

Legally recognising child-headed households through a rights-based approach: The case of South Africa

by

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submitted in fulfilment of the requirement for the degree

Doctor of Laws (LLD)

in the Centre for Human Rights, Faculty of Law, University of Pretoria

under the supervision of Professor Frans Viljoen

December 2009



DECLARATION

I hereby declare that this thesis, which I submit for the degree Doctor of Laws (LLD) at the University of Pretoria, is my own work and has not previously submitted by me for a degree at another university. Both primary and secondary sources used have been duly acknowledged.

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Date

ACKNOWLEDGEMENTS

It has been a long journey and I could not have made it on my own. First of all, I thank Professor Frans Viljoen for supervising this thesis. I am ever grateful for his intellectual guidance and continuous moral support throughout the course of the journey. Thank you. I would also like to thank Professor Hansungule, Professor Sloth-Nielsen and friends and fellow LLD students at the Centre for Human Rights for their valuable comments on the thesis at various stages. I extend my sincere gratitude to Fr John, who did a wonderful language editing for me within a short period of time. Thank you.

Secondly, I wish to thank the Centre for Human Rights for giving me an opportunity to embark on this journey and all the professional assistance from the very beginning. I also wish to thank various individuals at the Centre for their professional assistance and moral support throughout the course of my journey with the Centre: Norman, Carole, Gill, John, Martin, Sarita, Emily, Isabeau and Lizette.

Thirdly, I thank Mark and Chris Harding at the Tshepo Ya Bana in Hammanskraal. The admirable and challenging work they are doing with children who are deprived of their family environment was a starting point of my thesis. I am grateful for their support and assistance throughout my research and most of all, I am grateful for their friendship and prayers. I also wish to thank my family; my husband who truly believed that I could finish this journey; my little baby angel, Hanl, whose mere presence brought laughter and joy to my life; and my parents who were ever encouraging.

Last but not least, I truly believe that without divine intervention, I would not have been able to juggle the challenges from the first-time motherhood and the writing of the thesis. I thank you.

SUMMARY

Focusing on the rights of children who are deprived of their family environment and remain in child-headed households in the context of the HIV epidemic in Africa cannot be more relevant at present as the continent faces a significant increase in the number of children who are left to fend for themselves due to the impact of the epidemic. The impact of the epidemic is so severe that it is likened to an armed conflict. In sub-Saharan Africa, an estimated 22.4 million people are living with HIV, and in 2008 alone, 2 million people died of AIDS-related illnesses. Such massive loss of human lives is itself a tragedy. However, the repercussions of the epidemic suffered by children may be less visible, yet are just as far-reaching, and in all likelihood longer lasting in their effects. Initially, it appeared that children were only marginally affected by the epidemic. Unfortunately, it is now clear that children are at the heart of the epidemic. In sub-Saharan Africa, an estimated 14 million children lost their parents to AIDS-related illnesses and an unimaginable number of children consequently find themselves in deepened poverty.

Traditionally, children who are deprived of their family environment in Africa have been cared for by extended families. However, the HIV epidemic has dramatically affected the demography of many African societies. As the epidemic continues to deplete resources of the affected families and communities, extended families and communities find it more and more difficult to provide adequate care to the increasing number of children who are deprived of parental care. As a result, more and more children are taking care of themselves in child-headed households.

The foremost responsibility of states with regards to children who are deprived of parental care is to support families and communities so that they are able to provide adequate care to children in need of care, thereby preventing children from being deprived of their family environment. While strengthening families and communities, as required by articles 20 of the Convention of the Rights of the Child and 25 of the African Charter on the Rights and Welfare of the Child, as well as other international guidelines such as the 2009 UN Guidelines for the Alternative Care of Children, states also have the responsibility to provide 'special protection and assistance' to children who are already deprived of their family environment and are living in child-headed households. The important question is how to interpret the right to alternative care, and special protection and assistance, with

respect to children in child-headed households. The study examines the international standards and norms regarding children who are deprived of their family environment including children in child-headed households and explores the ways those children are supported and protected in South Africa, against the background of related developments in a number of different African countries, including Namibia, Southern Sudan and Uganda. .

In 2002, the South African Law Reform Commission made the important recommendation that child-headed households should be legally recognised. The Children's Amendment Act (No 41 of 2007), which amended the comprehensive Children's Act (No 38 of 2005) gave effect to this recommendation by legally recognising child-headed households under prescribed conditions. It is a bold step to strengthen the protection and assistance given to children in child-headed households. However, child-headed households should not be legally recognised unless all the necessary protection and assistance measures are effectively put in place. In order to design and implement the measures of protection and assistance to children in child-headed households, a holistic children's rights-based approach should be a guiding light. A rights-based approach, which articulates justiciable rights, establishes a link between the entitlement of children as rights-holders and legal obligations of states as duty-bearers. States have the primary responsibility to provide appropriate protection and assistance to children who are deprived of their family environment. This is a legal obligation of states, not a charitable action. A rights-based approach is further important in that it ensures that both the process of mitigation strategies and the outcome of such efforts are firmly based on human rights standards.

The study argues that legal recognition should be given to child-headed household only after a careful evaluation based on the international standards with regard to children deprived of their family environment. It further argues that measures of 'special protection and assistance' should be devised and implemented using a rights-based approach respecting, among others, children's rights to non-discrimination, to participation and to have their best interests given a priority.

Key words: child-headed households, children deprived of their family environment, right to alternative care, and special protection and assistance, children's rights, rights-based approach, HIV and AIDS, parental care, extended family, community-based care, orphaned and vulnerable children, foster care, institutionalised care, adoption.

OPSOMMING

Teen die agtergrond van die beduidende toename in die aantal kinders wat vandag na hulleself moet omsien weens die MIV-epidemie in Afrika, is ‘n fokus op die regte van kinders in huishoudings waarvan kinders aan die hoof staan (*child-headed households*) meer relevant as ooit tevore. Die impak van die epidemie is so erg dat dit aan ‘n gewapende konflik gelykgestel kan word. In sub-Sahara Afrika leef ‘n geraamde 22 miljoen mense met MIV, en net in 2007, het 1.5 miljoen mense gesterf aan VIGS-verwante siektes. Lewensverlies op so ‘n massiewe skaal is op sigself ‘n tragedie. Die effek van die epidemie op kinders is miskien minder sigbaar, maar is net so verreikend en het waarskynlik meer diepgaande gevolge. Aanvanklik is aangeneem dat kinders nie ingrypend deur die epidemie geraak word nie. Ongelukkig is die realiteit nou klinkklaar dat kinders sentraal staan tot die epidemie. In die streek het ‘n geraamde 12 miljoen kinders hulle ouers aan VIGS-verwante siektes afgestaan, en gevolglik bevind ‘n onvoortselbare hoeveelheid kinders hulleself in ‘n situasie van diepgaande armoede.

Tradisioneel is kinders in Afrika wat van hulle familie-omgewing ontnem is, versorg deur die netwerk van die uitgebreide familie. Oor die laaste paar dekades het die MIV-epidemie die demografie van baie Afrikastate dramaties verander. Soos die epidemie voortgaan om die hulpbronne van families en gemeenskappe te verteer, vind uitgebreide famielies en gemeenskappe dit al moeiliker om voldoende sorg te voorsien aan die toenemende getal kinders sonder ouerlike sorg. Meer en meer kinders sorg gevolglik vir hulleself in huishoudings waarvan kinders die hoof is (*child-headed households*).

Die belangrikste verantwoordelikheid van state met betrekking tot kinders wat ontnem is van ouerlike sorg is om families en gemeenskappe te ondersteun sodat hulle behoorlike sorg kan voorsien aan sorgbehoewende kinders, on sodoende te verseker dat kinders nie ontnem word van ‘n familie-omgewing nie. Terwyl state families en gemeenskappe steun, soos artikel 20 van die ‘Convention of the Rights of the Child’ en article 25 van die ‘African Charter on the Rights and Welfare of the Child’ vereis, het hulle steeds die verpligting om ‘special protection and assistance’ te verskaf aan kinders wat reeds van hulle familie-omgewing ontnem is en in kinder-beheerde huishoudings (*child-headed households*) leef. Die belangrike vraag is hoe die reg op alternatiewe sorg (*alternative care*), en spesiale beskerming en bystand (*special protection and assistance*),

met betrekking tot kinders in kinder-beheerde huishoudings, geïnterpreteer moet word. Hierdie tesis ondersoek hierdie vraag met verwysing na Suid-Afrika, teen die agtergrond van ontwikkelings in ander Afrikalande soos Namibië, Suid-Soedan, en Uganda.

In 2002 het die Suid-Afrikaanse Regshervormingskommissie die belangrike aanbeveling gemaak dat kinder-beheerde huishoudings regserkenning behoort te geniet. Die ‘Children’s Amendment Act’ (41 of 2007), wat die omvattende ‘Children’s Act’ (38 van 2005) wysig, en in werking getree het in 2008, gee hieraan uiting deur child-headed households’ (onder sekere voorwaardes) amptelik te erken. Dit was ‘n waagmoedige stap om die beskerming en bystand aan kinders in kinder-beheerde huishoudings te verseker. Kinder-beheerde huishoudings behoort egter slegs regserkenning te geniet indien die vereiste maatreëls ter beskerming en bystand in plek is. Om die maatreëls ter beskerming en bystand vir kinders in kinder-beheerde huishoudings te ontwerp en te implementeer, behoort ‘n holistiese regs-gebaseerde benadering die rigsgaande te wees.

‘n Regsgebaseerde benadering, wat beregbare (*justiciable*) regte bevat, trek ‘n verband tussen die aansprake van kinders-as-draers-van-regte en die regsverpligtinge van state as draers-van-verpligtinge. State het die primêre verantwoordelikheid om gepaste beskerming en bystand te verleen aan kinders wat van hulle familie-omgewing ontnem is. Dit is ‘n regeeringsverpligting, en nie ‘n weldoeningsdaad nie. ‘n Regsgebaseerde benadering is verder belangrik omdat dit verseker dat beide die strategieë om die negatiewe impak op kinders tot die minimum te beperk en die uitkomst van sulke pogings gebaseer is op menseregtebeginsels.

Die studie voer aan dat regserkenning van kinder-beheerde huishoudings nie, as sodanig, kinders se reg tot alternatiewe sorg en tot spesiale beskerming en bystand skend nie. Sodanige erkenning moet egter alleen verleen word ná ‘n sorgvuldige evaluasie vanuit ‘n regsgebaseerde perspektief. Die studie kom verder tot die gevolgtrekking dat maatreëls ter spesiale beskerming en bystand (‘special protection and assistance’) geformuleer en geïmplementeer behoort te word volgens ‘n regsgebaseerde benadering waarvolgens kinders se reg teen diskriminasie, hul reg op deelname en die beginsel van die beste belang van die kind, voorrang geniet.

LIST OF ABBREVIATIONS

ACHPR	-	African Charter on Human and Peoples' Rights
ACPF	-	African Child Policy Forum
ACRWC	-	African Charter on Rights and Welfare of the Child
AIDS	-	Acquired Immune Deficiency Syndrome
ART	-	Anti-retroviral Treatment
ARV	-	Anti-retroviral
AU	-	African Union
CABA	-	Children Affected by HIV and AIDS
CC	-	Constitutional Court
CEDAW	-	Convention on Elimination of all Discrimination against Women
CESR	-	Committee on Economic, Social and Cultural Rights
CRC	-	Convention on the Rights of the Child
DRC	-	Democratic Republic of Congo
EU	-	European Union
FGM	-	Female Genital Mutilation
GA	-	General Assembly
HDR	-	Human Development Report
HIV	-	Human Immunodeficiency Virus
HRC	-	Human Rights Committee
HSRC	-	Human Science Research Council
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ILO	-	International Labour Organisation
IRC	-	International Research Centre
ISS	-	International Social Services
NGO	-	Non-governmental Organisation
OHCHR	-	Office of the High Commissioner for Human Rights
OVC	-	Orphans and Vulnerable Children
SALRC	-	South African Law Reform Commission
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNAIDS	-	The Joint United Nations Programme on HIV/AIDS



- UNDP - United Nations Development Programme
- UNGASS - United Nations General Assembly Special Session
- UNICEF - United Nations Children's Fund

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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**
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 - 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.

CHAPTER TWO

Who cares?

The changing role of African extended families

2. Who cares?

The changing role of African extended families

2.1 Introduction

2.2 Traditional role of African families: an anthropological perspective

2.2.1 Family as an informal social security provider

2.2.2 Foster care by relatives

2.3 Changes in the family structure

2.3.1 Labour migration

2.3.2 Urbanisation

2.3.3 The HIV epidemic

- (i) Overview of the impact**
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2.4 Conclusion

2.1 Introduction

In many societies, extended families perform various important functions. Often, the extended family network is the first line of defence in times of misfortune. It is a source of financial, emotional and physical security against various difficulties. The strong family network system or kinship network is not only common to African societies, but has also played a role in other societies in Asia, Latin America and Europe.¹ Although it is important not to overemphasise or romanticise the role played by the extended family network system,² there is no denying that, in Africa, the extended family network is one of the main coping mechanisms where there is a lack of an institutionalised social security system.³

Traditionally, in Africa, family provided the most reliable social security to its vulnerable members, such as the poor, children and elderly.⁴ The traditional care system was built in complex family systems which ensured the reciprocal care and assistance among generations.⁵ Partly due to the tradition of informal foster care by extended families, governments in Africa have been slow at intervening in care

¹ R Dirks, 'Social responses during severe food shortages and famine' (1980) 21/1 *Current anthropology* 25, Robert Dirks explains how kinship and friendship network played an extremely important role during the famine in Western Netherlands in 1944-1945; R M Safman, 'Assessing the impact of orphanhood on Thai children affected by AIDS and their caregivers' (2004) 16/1 *AIDS Care* 11-19, R M Safman examines the coping strategy of Thai families and observes that "intra-familial fostering arrangement may prove even more central in Thailand than they are in Africa." He bases his argument on the fact that in Thailand, child-headed households, which are seen as an important extended family coping strategy, are viewed less favourably.

² J Iliffe, *The African poor: a history*, Cambridge University Press (1987) 7.

³ J Iliffe, 1987 (as above) 7, Iliffe identified four means of survival in Asia and Europe; institutions established by the society as a whole, informal and individual charity, the poor initiated organisations and their own efforts. He further suggested, however, that the scarcity of such institutions resulted Africans' hostility towards institutional care for the poor.; see also A Adepoju & W Mbugua, 'The African family: an overview of changing forms' in A Adepoju (ed) *Family, population and development in Africa*, Zed Books (1997) 43; J Goody, 'Futures of the family in rural Africa' (1989) 15 *Population and Development Review: supplement - Rural Development and Population: Institutions and Policy* 119-144.

⁴ N A Apt, 'Ageing and the changing role of the family and the communities: an African perspective' (2002) 55 *International Social Security Review* 39.

⁵ N A Apt, 2002 (as above) 39.

practices of children who are orphaned, abandoned, or abused in a family setting.⁶ Such tradition minimised the necessity of government intervention.

However, as society changes, the role and structure of the extended families have also changed. Due to poverty, urbanisation, migration, the development of a cash economy, westernisation and labour movements, the kinship network system has been undergoing thorough restructuring and reorganisation.⁷ It is true that extended families are still the major provider of social safety nets in various African societies.⁸ Nevertheless, there has been an over-reliance on the kinship network system, and the HIV epidemic might serve as a last blow to already overstretched extended family resources.⁹ Without a speedy and adequate government intervention, traditional ‘orphan care’, which relied almost exclusively on extended families, will not be able to sustain itself.¹⁰

The chapter explores the changing role and capacity of the kinship network system in African societies and the consequent need for alternative methods of care for children who are deprived of their parental care. The chapter examines the factors leading to the change in traditional kinship relationship and provides a brief overview of the impact of the HIV epidemic on the workings of the traditional family network system. Despite the important role played by the extended family network in Africa, many anthropologists argue that, in Africa, there is no equivalent term to the Western notion of family.¹¹ The family is a much more inclusive notion in the African usage than in

⁶ *Children at the Centre: a guide to supporting community groups caring for vulnerable children*, Save the Children UK (2007) 1.

⁷ G Foster, ‘The capacity of the extended family safety net for orphans in Africa’ (2000) 5/1 *Psychology, Health and Medicine* 56.

⁸ See A Adepoju & W Mbugua, 1997 (n 3 above); A B C Ocholla-Ayayo, ‘African family between tradition and modernity’ in A Adepoju (ed) *Family, population and development in Africa*, Zed Books (1997).

⁹ See C Cross, ‘Sinking deeper down: HIV/AIDS as an economic shock to rural households’ in (2001) 32/1 *Society in Transition* 133-145; C Baylies, ‘The impact of AIDS on rural households in Africa: a shock like any other?’ (2002) 33/4 *Development and Change* 611.

¹⁰ S Tsegaye, *HIV/AIDS, orphans and child-headed households in sub-Saharan Africa*, African Child Policy Forum (2008) 16.

¹¹ D W Sabeau, ‘The history of the family in Africa and Europe: some comparative perspectives’ (1983) 24/2 *The Journal of African History* 164.

Euro-American usage.¹² Marks and Rathbone partly attribute the lack of studies on African family history to the problem of definition and argue that in pre-modern Africa, the term ‘family’ itself was problematic.¹³ To understand the African notion of family, one must ask three pertinent questions:¹⁴ How was ‘family’ understood in the African context? What were its functions? What is it changing into?

Following the introductory section, section 2.2 examines the traditional role of the extended family network in various traditional African societies based on anthropological studies on kinship relationships. Section 2.3 examines myriad factors that affect the functions of the traditional extended family network system in modern African societies such as urbanisation, labour migration and the HIV epidemic. Although the section is not expressly divided into pre- and post-AIDS African societies, giving separate consideration is important, as the epidemic has an unprecedented impact on every section of African societies. The section shows how the epidemic affected and changed the African social fabric and created the need for a stronger and different type of governmental intervention in matters relating to the care of children, among others. It is true that the extent of such resilience is different from society to society. For instance, in rural communities, the respect for an extended family network is better preserved compared to more urbanised communities.¹⁵ In many communities, the extended family network continues to be the major social security provider to a large extent. However, as illustrated in the section, the extended family network that once epitomised African family life is changing in the face of strings of modern challenges. Section 2.4 is the concluding section of the chapter.

¹² A B C Ocholla-Ayayo, 1997 (n 8 above) 60.

¹³ S Marks & R Rathbone, ‘The history of the family in Africa: introduction’ (1983) 24/2 *The Journal of African History* 149; Also see M Vaughan, ‘Which family?: problem in the reconstruction of the history of the family as an economic and cultural unit’ (1983) 24/2 *The Journal of African History* 276, Vaughan attributes the scarcity of direct historical sources for the history of family in most part of Africa and for most part of African history directly to the problem of ‘family’ as a unit of analysis. She argues that ‘family’ is a too ill-defined concept for the study of the family.

¹⁴ A Armstrong, ‘Law and the family in Southern Africa’ in A Adepoju (ed) *Family, population, and development in Africa*, Zed Books (1997) 187.

¹⁵ 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).

2.2 From the traditional to modern African family: an anthropological perspective

2.2.1 Family as an informal social security provider

John Roscoe proclaimed in his study of the Baganda:¹⁶

Real poverty did not exist. When a member of a clan wished to buy a wife, it was the duty of all the other members to help him to do so; when a person got into debt, the clan combined to assist him to pay it, or if a clansman was fined, the clan helped to pay the fine. There were no orphans, because all the father's brothers were fathers to a child; and the heir to a deceased person immediately adopted and became responsible for the children of the latter.

This utopian vision of the Bagandan society might not be applicable to all other African societies. Different cultures and tribes had their own particular weakness and cruelty; their own particular categories of unsupported and abandoned poor based on taboos and superstitions.¹⁷ In the same way that it would be misleading to talk about 'Africans' as a homogenous group, it is misleading to talk about the homogenous 'African family'¹⁸ or 'African family tradition' as an absolute point of reference. For example, despite the importance of kinship relations and extended family life in most part of Africa, it was common for Amhara to leave their parents upon their marriage and form a new household.¹⁹ The extended family had little significance and poor Amhara had little support from kinsmen.²⁰ Nonetheless, African families in general provided, and still continue to provide, an important social security to family members in difficulties and the extended family network system continues to perform

¹⁶ J Roscoe, *The Baganda, an account of their native customs and beliefs* (Frank Cass & Co., 1965) 12.

¹⁷ J Iliffe, 1987 (n 2 above) 7, 59 & 70; Each society has its own categories of people who had no support from extended families. It could be orphans in one society, childless elderly in another or barren women. Further it was noted that victims of epilepsy and especially leprosy sufferers were excluded from the society with unusual cruelty. O N Gakuru *et al.*, 'Children in debt: the experience of street children in Nairobi', J L P Lugalla & C G Kibassa (eds) *Poverty, AIDS, and street children in East Africa*, Edwin Mellen Press (2002) 27-28.

¹⁸ A Adepoju, 'Introduction' in A Adepoju (ed) *Family, population and development in Africa*, Zed Books (1997) 8.

¹⁹ J Iliffe, 1987 (n 2 above) 15 & 16.

²⁰ As above, 15 & 16. The author notes the uncommonly weak family solidarity as a main reason for little family support for the poor.

the role of safety net.²¹ The traditional households also played a role of distribution and redistribution of food and other goods among members to ensure that every member was taken care of and benefited from the product of communal labour.²²

The role of the extended family as a social security provider is more pronounced in countries with weak public social security mechanisms.²³ Although the semi-institutionalised charity or self-help organisations also existed in Africa, the institutionalised social security system was, and still is, weak if not non-existent in the majority of African states.²⁴ Therefore, traditional social security measures, which consist of mutual assistance within the family, clan and tribes, played a vital role in assisting needy members of the community.²⁵ The extended families continue to play an important role as an informal social security provider. A study by the World Bank found that in Tanzania, AIDS affected households were mainly supported by relatives and community groups such as savings clubs or burial societies and only roughly around 10 per cent of their needs were met by NGOs and other agencies.²⁶ In Kenya, 41 per cent of total HIV-related expenditure came directly from Kenyan citizens on an individual basis; in Rwanda, 93 per cent of HIV-related spending was out-of-pocket spending by private citizens;²⁷ in the Kisesa community of Northwest Tanzania, 93 per cent of children who are orphaned were supported by extended family members.²⁸ Furthermore, a study by Save the Children claims that ‘out-of-pocket spending by

²¹ J Iliffe, 1987 (n 2 above) 7.

²² O N Gakuru *et al.*, 2002 (n 17 above).

²³ Z Zimmer & J Dayton ‘Older adults in sub-Saharan Africa living with children and grandchildren’ (2005) 59/3 *Population Studies* 296.

²⁴ J Iliffe, 1987 (n 2 above) 7; also see D Ghai, ‘Social security priorities and patterns: a global perspective’, Education and outreach programme Discussion paper DP/141/2002, International Institute for Labour Studies, 13, available at: <http://www.ilo.org/public/english/bureau/inst/download/dp14102.pdf> [accessed: 7 July 2007].

²⁵ D Kayongo-Male & P Onyango, *The sociology of the African family*, Longman (1984) 81; J Iliffe, 1987 (n 2 above) 7; A B C Ocholla-Ayayo, 1997 (n 8 above) 71.

²⁶ G Mutangadura, D Mukurazita & H Jackson, ‘A review of household and community responses to the HIV epidemic in the rural areas of sub-Saharan Africa’, UNAIDS Best practice collection, Geneva, cited in G Foster, ‘Under the radar - Community safety nets for children affected by HIV/AIDS in poor households in sub-Saharan Africa’, UNRISD/ Training and Research Support Centre (January 2005); also cited in G Foster, ‘Children who live in communities affected by AIDS’ (2006) 367 *Lancet* 701.

²⁷ G Foster, 2005 (as above) 15.

²⁸ E O Nyambedha *et al.*, ‘Policy implications of the inadequate support systems for orphans in Western Kenya’ (2001) 58 *Health Policy* 93.

households ... is the largest single component of overall HIV and AIDS expenditure in African countries.²⁹ These examples clearly reflect the realities of many African states: a weak social security and health care system, and a compensatory role of extended family.

Formal social security can be broadly defined as governmental programmes or measures that aim to provide economic assistance to people who are financially vulnerable due to old age, disability or other dependency.³⁰ In the simplest terms, the main objective of most social security provisions is to ensure access to health care and basic income security.³¹ The institutionalised social security system is difficult to achieve in Africa, mainly due to the lack of resource and appropriate infrastructure. In many states, the majority of people are employed in the informal sector with low wages. In low-income developing countries, nearly 85 per cent of the work force is employed outside of the formal sector.³² For instance, in Malawi, an estimated 84 per cent of the population lives in rural areas and the majority of them are engaged in subsistence farming.³³ Moreover, over half of its population is living in extreme poverty.³⁴ In countries such as Malawi, where the majority of the population is extremely poor and lives off the land by subsistence farming, a conventional social security system, which relies on the contribution from the formal sector of economy, is difficult to sustain. Income-related taxes are difficult to impose when the majority

²⁹ G Foster, *Bottlenecks and drip-feeds: channelling resources to communities responding to orphans and vulnerable children in southern Africa*, Save the Children (2005) 1; G Foster, 2006 (n 26 above).

³⁰ See D Kayongo-Male & P Onyango, 1984 (n 25 above) 80.

³¹ *Social security: a new consensus*, ILO: Geneva (2001) 38; 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] Tostensen states, 'amelioration, prevention and development' as the main aim of the social assistance programmes. See Tostensen, 2004, 3.

³² WIEGO Programme Areas: social protection, cited in A H Dekker, 'The role of informal social security in an inter-generational society', paper submitted for International Social Security Association 4th International Research Conference on Social Security, *Social security in a long life society*, Antwerp, Belgium (5-7 May 2003).

³³ Statistics from United Nations International Strategy for the Disaster Reduction, available at: <http://www.unisdr.org/eng/country-inform/malawi-general.htm> [accessed: 17 December 2009].

³⁴ According to the UNDP HRD 2004, 76.1 % of the population lives below \$2 a day and 65.3 % lives below the national poverty line in Malawi.

of the population does not have a sufficient and regular income.³⁵ Therefore, governments often do not have a regular source of income to develop a reliable social security infrastructure.³⁶

Furthermore, public social security programmes often fail to reach the people who are in the most vulnerable position. In South Africa, there are three grants that are available for children: child support grant; care dependency grant and foster child grant.³⁷ South Africa has one of the most comprehensive social assistance programmes in Southern Africa.³⁸ In 2009, the Department of Social Development reported that as of April 2009, 8.8 million children were receiving child support grant.³⁹ As of 1 January 2010, the child support grant is expanded to cover children who were born on or after 1 October 1994.⁴⁰ In general, to access such grants, the applicants are required to provide documents such as the Identity Book (ID) of the applicant, the child's ID, or a birth certificate and proof of income.⁴¹ In addition to that, to apply for a foster child grant, the applicant is required to provide a court order allowing the applicant to foster from the Children's Court. For a care dependency grant, the applicant is required to submit a medical report of the child from a medical officer.⁴² Where the basic documents are lacking, other documents, such as a sworn statement on a form provided by the South African Social Service Agency and, where available, the proof that formal identification documents have been applied for at the Home Affairs.⁴³ Such documents could be supported by a sworn statement by a

³⁵ A Maes, 'Informal economic and social security in sub-Saharan Africa' (2003) 56/3-4 *International Social Security Review* 43; A Tostensen, 2004 (n 31 above) 7.

³⁶ A Maes, 2003 (as above) 43.

³⁷ Social Assistance Act No 13 of 2004.

³⁸ E Kaseke, 'The role of social security in South Africa' (2010) 53 *International Social Work* 160.

³⁹ S Pendlebury *et al.*, *South African Child Gauge 2008/2009*, Children's Institute, University of Cape Town (2009) 14.

⁴⁰ South Africa Government Gazette, No 32853 (31 December 2009).

⁴¹ 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) 27-28.

⁴² J Sloth-Nielsen, 2004 (as above) 27-28.

⁴³ *Reference Guide to Paralegals*, Black Sash (February 2010) 35. However, the grants will be discontinued if the applicants do not apply for the formal documents within three-month period or fail to return the proof of the application to the SASSA within the three-month time frame. In *Alliance for Children's Entitlement to Social Security v Minister for Social Development*, the

reputable person who knows the applicant, and other documents such as baptismal certificate, school reports or clinic cards.⁴⁴ However, obtaining such documents can be challenging as people are unaware of the format and information required to put in the statement or affidavit to assess the grants.⁴⁵

Also, in-kind programmes targeting children, such as school feeding programmes, although important, can hardly be universal, as they may not reach the most vulnerable children who are forced out of school.⁴⁶ The development of an informal social security system, whether kinship-based or community-based, is, therefore, an adaptive mechanism of poor people who are excluded from the formal social security system.⁴⁷ The existence of a strong kinship networks may not be unique in Africa, but in the absence of a formal institutionalised social security system, the kinship network system is proving to be vital in various African societies, both traditional and modern.⁴⁸ The importance of the extended family network system against the economic and social hardships is also illustrated in language. In several African languages, the word for ‘poor’ suggests a lack of kin and friends.⁴⁹ Although the existence of a weak family tie is unlikely to be the only cause of the extreme poverty,

High Court held that the lack of basic documents should not prevent children from assessing grants. See S Pendlebury *et al.*, 2009 (n 39 above) 14.

⁴⁴ Black Sash, 2010 (as above).

⁴⁵ For further information on the required documents, see <http://www.services.gov.za/ServicesForPeople/Socialbenefits/socialservices/childsupportgrant.aspx?Language=en-ZA> [accessed: 29 July 2009].

⁴⁶ M Grosh, ‘Weaving the social safety net’, Presentation at conference: *Protecting the vulnerable: the design and implementation of effective safety nets*, (December 2-13, 2002) The World Bank, Washington DC, slide 41; also cited in G Foster, 2005 (n 26 above).

⁴⁷ A H Dekker, 2003 (n 32 above) 8.

⁴⁸ J Aldous, ‘Urbanisation, the extended family, and kinship ties in West Africa’ (1962) 41/1 *Social Force* 11. Although it is observed that due to urbanisation and weakening of the kinship ties, the assistance obligation to relatives has lessened, still the extended family network system substitutes for a ‘non-existent public welfare programme.’ A Maes, 2003 (n 35 above) 45 & 55 The most reliable source of informal social security is the ‘household-based system’ which is based on the strong family ties in Africa.; A B C Ocholla-Ayayo, 1997 (n 8 above). Ocholla-Ayayo suggests that despite existence of limited government-supported social security schemes, people preferred to depend on the members of kinship group. Various interrelated factors that may explain it include the difficulty of accessing those formal social security measures and slow and unreliable service delivery.

⁴⁹ J Iliffe, 1987 (n 2 above) 7; J Vansina, *The Tio Kingdom of the middle Congo 1880-1892*, London (1973) 306. Vansina’s study on the Tio kingdom in Congo shows that poverty is understood as ‘not having many kinsmen, being alone and powerless.’

the identification of poverty with a lack of family support was common in the twentieth-century Africa.⁵⁰

The importance of the extended family network as a social security system is illustrated in the vast amount of anthropological work on African tribes. For instance, in the Kavirondo culture in west Kenya, the close clan organisation based on the genealogical relationship made sure that no individual became socially or economically destitute.⁵¹ The close kinship relationship is further illustrated by the usage of the kinship terminology, such as father, mother, brother and sister. The terms are used much widely; the term *baba wange* (my father) is used to address all the married men of the speaker's clan who belong to the generation of his natural father.⁵²

The extension of the kinship terminology beyond the immediate family does not necessarily mean that there was no distinction between the immediate family and other members in the lineage.⁵³ Nevertheless, it implies the close kinship relationship, especially during the crisis. As shown in Bantu culture, if one's father dies, one of the nearest kin stepped in automatically;⁵⁴ hence orphanhood, widowhood and other hardships, despite their personal nature, were dealt with collectively and were not faced alone.⁵⁵ Similar cultural practices can also be found in the Shona people in

⁵⁰ J Iliffe, 1987 (n 2 above) 53.

⁵¹ G Wagner, *The Bantu of Western Kenya: with special reference to the Vugusu and Logoli vol I*, Oxford University Press (1970) 73; It is also observed that the Xhosa showed a high level of reciprocity and mutual aid that worked as a self-regulated welfare system. See J Iliffe, 1987 (n 2 above) 70-72.

⁵² G Wagner, 1970 (as above) 72.

⁵³ M F C Bourdillon, *The Shona peoples: an ethnography of the contemporary Shona, with special reference to their religion*, Mambo Press (1976) 44.

⁵⁴ G Wagner, 1970 (n 51 above) 72; J C Caldwell & P Caldwell, while trying to explain why fertility rate is high in Africa, states that culturally differential treatment between children was seen as 'an offence against the lineage and against the children's grandparents'. Although such assertion is a generalisation, it illustrates strong family ties based on a sense of obligation. See Caldwell & Caldwell, 'Is the Asian family planning program model suited to Africa' (1988) 19/1 *Studies in Family Planning* 24

⁵⁵ J Goody, 1989 (n 3 above) 122; I Schapera 'The old Bantu culture' in I Schapera (ed) *Western civilization and the natives of South Africa: studies in culture contact*, London (1935) 15-16 Schapera also notes the similar findings in South Africa. Kinship members were obliged to assist each other in most of the major domestic tasks and economic activities; It was further noted that among the Xhosa, destitute children were rare as orphaned children were taken care of by the father's brother. See H Lichtenstein cited in J Iliffe, 1987 (n 2 above) 72; O N Gakuru *et al.*, (n 17 above) 26.

Zimbabwe.⁵⁶ The kinship terms were extended beyond immediate family and upon the death of a father, the next of kin assumed the legal and economic responsibilities.⁵⁷ Abebe and Aase's study of the Ethiopian extended family system distinguishes between two patterns of extended family structures; blood-related extended families and 'fictive kinships'.⁵⁸ Fictive kinships indicate people, who despite having no blood relations, have deliberately created social ties based on common ground, such as religion, gender or social status, to assist each other. Religious-based brotherhood or sisterhood are the examples of 'fictive' kinship networks. The example above demonstrates that the concept of extended family in some African societies may not be restricted only to blood ties.

2.2.2 Foster care by relatives

Another important characteristic of the African family life is the frequency of foster care arrangements.⁵⁹ For example, in Gonja, a kingdom in northern Ghana, foster care was frequent and often considered to have a positive influence on children's socialisation.⁶⁰ Although in some cases, foster parents asked for a specific child to foster, in the majority of the cases, children were from homes broken either by the death of parents or parents' divorce.⁶¹

⁵⁶ M F C Bourdillon, *Where are the ancestors? Changing culture in Zimbabwe*, Harare: University of Zimbabwe (1999) cited in C Nyamukapa & S Gregson, 'Extended family's and women's roles in safeguarding orphans' education in AIDS-affected rural Zimbabwe' (2005) 60 *Social Science & Medicine* 2158.

⁵⁷ M F C Bourdillon, 1976 (n 53 above) 43.

⁵⁸ T Abebe & A Aase, 'Children, AIDS and the politics of orphan care in Ethiopia: The extended family revisited' (2007) 64 *Social Science & Medicine* 2059.

⁵⁹ D Kayongo-Male & P Onyango, 1984 (n 25 above) 6 & 19. Although the tradition of fosterage is common in many African states, foster care in a formal and legal sense is not common in Africa. The same goes for adoption. Informal adoption by the extended family is a common tradition. Adoption in a formal sense is not a common practice in the most parts of Africa. See *Caring for children affected by HIV and AIDS*, UNICEF-Innocenti Research Centre (IRC) (November 2006) 18.

⁶⁰ P Mayer, *Socialisation: The approach from social anthropology*, Tavistock publications (1970) 52.

⁶¹ P Mayer, 1970 (as above) 58

The tradition of foster care arrangements was used to provide for children in crisis⁶² and also to reemphasise kin solidarity. Even today, fostering serves certain economic functions. Research done in Burkina Faso illustrates that child fostering is often used as a ‘risk coping mechanism’.⁶³ For instance, households that experience economic difficulties or suffer from particularly severe economic shocks are more likely to send children to be fostered. In turn, households that are perceived to be able to provide better educational or job opportunities are more likely to receive children. Fostering can be also due to the marital status of the parents. When a mother is young or unmarried, the child is more likely to be fostered by grandparents.⁶⁴ Children are also likely to be fostered when parents are divorced or a divorced person is remarried.⁶⁵ The extended families are more likely to take on a role of fostering rather than risk the child being mistreated by unrelated step-parents.⁶⁶

The tradition of fostering still persists in various parts of Africa.⁶⁷ In the late 1990s, Page showed, using the data from the World Fertility Survey and the Demographic and Health Survey, that 21 per cent of under 15 year-old children in Lesotho were not living with their parents; in Côte d’Ivoire, 21 to 22 per cent of children were fostered by relatives; 13 to 28 per cent in Ghana; 14 to 24 per cent in Cameroon; nine to 17 per cent in Kenya; and nine to 14 per cent in Nigeria.⁶⁸ While the reasons for fostering in those countries were not investigated, the data indicate several factors. First of all, the high incidence of fostering may mean that the strong extended family network still exists, and it is reinforced through fostering practices. For instance, in Lesotho it was a common practice for the eldest child to live with his or her maternal grandparents

⁶² A Shorter, *The East African Societies*, Routledge & Kegan Paul (1974) 76.

⁶³ R Akresh, ‘Risk, Network Quality and Family Structure: Child Fostering Decisions in Burkina Faso’ (January, 2005) IZA Discussion Paper No 1471: Yale University Economic Growth Centre Discussion Paper No 922, available at: <http://ssrn.com/abstract=643163> [accessed: 23 April 2007] 2 & 20.

⁶⁴ J C Caldwell, ‘The impact of the African HIV epidemic’ (1997) 7/2 *Health Transition Review* 178.

⁶⁵ J C Caldwell, 1997 (as above) 178.

⁶⁶ As above 178.

⁶⁷ See K Deininger *et al.*, ‘AIDS-induced orphans as systemic shock: magnitude, impact and programmatic interventions in Africa’ (2003) 31/7 *World Development* 1213.

⁶⁸ H Page, ‘Childrearing versus childbearing: co-residence of mother and child in sub-Saharan Africa’, in R J Lesthaeghe (ed) *Reproduction and social organisation in sub-Saharan Africa*, Berkeley: University of California Press (1998) 401, cited in J C Caldwell, 1997 (n 64 above) 178.

when he or she was young.⁶⁹ Young boys were often sent to help with agricultural chores and girls were sent to provide domestic help for other relatives who were old or whose children were too young.⁷⁰ Such arrangements spread the cost and benefit of child rearing among wider family units.⁷¹ On the one hand, it could mean that relatives are still willing and able to foster children to improve their educational and job opportunities. On the other hand, it may also indicate the growing number of children who are unable to remain with their natural parents because of economic difficulties or death of parents. Caldwell's study in 1997 showed that there were generally more rural-to-urban migrations of children than the other way around.⁷² However, recently, children's migration pattern shows a big increase in the urban-to-rural migration.⁷³

Rural-to-urban fostering is important in several ways. Rural-to-urban fostering mitigates income inequalities between rural and urban households.⁷⁴ A larger and poorer rural household can delegate some of the child rearing cost to a smaller and wealthier urban household.⁷⁵ Furthermore, such arrangement may present more educational and economic opportunities for children from rural areas, which, in turn, increases the social mobility of the children.⁷⁶ Interestingly, although a rural-to-urban migration of children is more common in many African societies, a recent research shows that an 'AIDS-related migration' is largely urban-to-rural.⁷⁷ The reasons could be that the HIV prevalence is higher in urban areas than rural areas. Also many

⁶⁹ N Ansell & L van Blerk, *HIV/AIDS and children's migration in Southern Africa*, Southern African Migration Project (2004) 10.

⁷⁰ N Ansell & L van Blerk, 2004 (as above) 10.

⁷¹ C S Stokes, 'Explaining the demographic transition: Institutional factors in fertility decline' (1995) 60/1 *Rural Sociology* 12.

⁷² J C Caldwell, 1997 (n 64 above) 179.

⁷³ R Monasch & J T Boerma, 'Orphanhood and childcare patterns in sub-Saharan Africa: an analysis of national surveys from 40 countries (2004) 18/2 *AIDS* 64.

⁷⁴ B Bigombe & G M Khadiagala, 'Major trends affecting families in sub-Saharan Africa' available at: <http://www.un.org/esa/socdev/family/Publications/mtbigombe.pdf>, [accessed: 8 May 2007] 9.

⁷⁵ B Bigombe & G M Khadiagala (as above) 9.

⁷⁶ As above 9.

⁷⁷ N Ansell & L van Blerk, 2004 (n 69 above) 2.

children in urban areas live in nuclear family units. Therefore, when their parents die of AIDS-related illnesses, children often move in with their relatives in rural areas.⁷⁸

However, it is not to say that the fostering arrangement always brings a positive outcome. In many cases, the decision to foster is motivated by the economic productivity of the child.⁷⁹ In a study on children affected by the HIV epidemic in Malawi, it has been pointed out that, in some cases, the reason for fostering a child was the desire ‘to use the child as an unpaid domestic servant’.⁸⁰ Many guardians cited the above reason, among others, for preferring to foster a girl child.⁸¹ Furthermore, fostering does not necessarily guarantee better opportunities for children. For instance, the comparison between non-fostered children and fostered children on primary school enrolment in Burkina Faso shows that fostered children showed a slightly lower enrolment rate.⁸² Ainsworth’s study in Côte d’Ivoire also shows that fostered children are less likely to be enrolled in school than biological children in the same households.⁸³ Also, fostered children show a higher rate of housework participation when compared to biological children.⁸⁴ Moreover, studies in West and East Africa show that children growing up with non-biological parents have more health and educational problems than non-fostered children.⁸⁵

Other related studies show that the treatment of fostered children also depends on whether the children were ‘pulled’ to another household, for instance, to be cared for by a childless couple, or ‘pushed’ to another household, for instance, due to a marital

⁷⁸ N Ansell & L van Blerk, 2004 (as above) 15.

⁷⁹ G Gibbison & C Paul ‘Foster care and the educational attainment of Jamaican children’ (2005) 24 *Population Research and Policy Review* 108.

⁸⁰ G Mann, *Family matters: the care and protection of children affected by HIV/AIDS in Malawi*, Commissioned by Save the Children USA (2002) 29.

⁸¹ G Mann, 2002 (as above) 29; In the study, it was also noted that some guardians preferred to foster a girl child in order to marry the child or to benefit from a man who would marry the child.

⁸² R Akresh, 2005 (n 63 above) 3.

⁸³ M Ainsworth, ‘Economic aspect of child fostering in Côte d’Ivoire’ (1996) 8 *Research in Population Economics* 25-62 cited in G Gibbison & C Paul, 2005 (n 79 above).

⁸⁴ G Gibbison & C Paul, 2005 (n 79 above).

⁸⁵ J P M Ntozi, ‘Effect of AIDS on children: the problem of orphans in Uganda’ (1997) 7 *Health Transition Review* 24.

breakdown.⁸⁶ Oleke *et al.* shows how fostering children who are orphaned differed from the ‘exchange of children’ in the Langi society in Uganda.⁸⁷ The study further shows that children who are orphaned were called ‘*atin kic*’ (meaning orphans in the Langi language) instead of their names indicating their inferior position in the family.⁸⁸ A study by Masmus *et al.* in Guinea-Bissau further illustrates how most people in their study ‘expect orphans to be stigmatised and neglected within their community’.⁸⁹ Such findings clearly illustrate the danger of romanticising the informal foster care of children who are orphaned by relatives. The possible culturally rooted discrimination against children who are orphaned should be taken into account when devising laws or policies on alternative care arrangements. Nonetheless, regardless of the treatment of the fostered children, the culture of fostering provided a certain social safety net for impoverished families and their offspring.

As several studies illustrate above, the burden of caring for orphans, widows, elderly and people with disabilities was shared between the members of extended family.⁹⁰ As observed in the Baganda culture, due to the close kinship relationship, there was no occasion for the adoption of orphans as children were thought to belong to the whole extended family network as when their father or mother died, they were always under the care of other relatives.⁹¹ Such traditional care arrangements inadvertently led to the governments’ reluctance to intervene, as orphaned and vulnerable children are *expected* to be cared for within the extended family network.⁹² Unfortunately, governments have been slow at realising the rapidly changing economic and social

⁸⁶ M Urassa *et al.*, ‘Orphanhood, child fostering and the HIV epidemic in rural Tanzania’ (1997) 7/2 *Health Transitional Review* 151; H R Aspaas, ‘AIDS and orphans in Uganda: geographical and gender interpretation of household resources (1999) 36/2 *Social Science Journal* 204.

⁸⁷ C Oleke *et al.*, “‘When the obvious brother is not there’”: Political and cultural contexts of the orphan challenge in northern Uganda’ (2005) 61 *Social Science & Medicine* 2631.

⁸⁸ C Oleke *et al.*, 2005 (as above) 2631

⁸⁹ T N Masmus *et al.*, ‘The social situation of motherless children in rural and urban areas of Guinea-Bissau’ (2004) 59 *Social Science & Medicine* 1237.

⁹⁰ M F C Bourdillon, 1976 (n 53 above) 43.

⁹¹ J Roscoe, 1965 (n 16 above); E.E. Evans-Pritchard, *Kinship and marriage among the Nuer*, Clarendon Press: Oxford (1995); Evans-Pritchard also observed that in Nuer, the similar cultural belief that children were considered to have belonged to wider kinship network prevailed. It was observed that a child was born into “a wider circle than the family, in a sense that all those who share the homestead with the father and adjacent homesteads take an interest” in the child’s well-being.

⁹² D Kayongo-Male & P Onyango, 1984 (n 25 above) 88.

circumstances that make it difficult, if not impossible, for the extended family to take on the burden of care.

2.3 Changes in the family structure

The extended family network system worked as an effective social security provider in traditional agricultural societies where the communities were comprised of extended family members working as largely self-sufficient economic units. However, the role of family as a unit of ‘production, consumption, reproduction and accumulation’ changed as the socio-economic environment in which they operate changed.⁹³ Living in large extended households was more common in traditional agricultural societies and gradually became less so as societies become more industrialised.⁹⁴ Rapid urbanisation, labour migration and development of a cash economy, which are closely linked to the westernisation of a traditional socio-economic structure, brought about the weakening of family ties, and the need to redefine the functions of the African family.⁹⁵ However, it is an oversimplification to view the process, and the extent, of the decline of extended kinship ties as a uniform phenomenon across Africa.⁹⁶ Depending on the level of industrialisation and urbanisation, the degree of erosion of the extended family network system differs from one society to another. Nevertheless, the commonality across the societies is that an African family network system is changing over time and its reliability as an informal social security provider is weakening.

As mentioned above, the causes of changes in the African family structure vary. These factors cannot be seen as an isolated phenomenon, as they are interrelated. For instance, growing industrialisation based on mineral resources attracts labour forces to

⁹³ B Bigombe & G M Khadiagala (n 74 above).

⁹⁴ Z Zimmer & J Dayton, 2005 (n 23 above) 296.

⁹⁵ See generally, A B C Ocholla-Ayayo, 1997 (n 8 above); C Oppong, ‘African family systems and socio-economic crisis’ in A Adepoju (ed) *Family, population and development in Africa*, Zed Books (London & New Jersey: 1997); G Foster *et al.*, ‘Factors leading to the establishment of child-headed households: The case of Zimbabwe (1997) 7 *Health Transitional Review* 156; N A Apt ‘Rapid urbanisation and living arrangements of older persons in Africa’, available at: http://www.un.org/esa/populations/publications/bulletin42_43/apt.pdf [accessed: 8 May 2007] 10.

⁹⁶ A B C Ocholla-Ayayo, 1997 (n 8 above) 71; D Kayongo-Male & P Onyango, 1984 (n 25 above) 34 & 35.

mines, which in turn speeds up the urbanisation. Urbanisation provides more diverse work opportunities for people, which further encourages labour migration from rural to newly urbanised areas. The consequence is that through the process, the African family structure has gradually transformed from ‘corporate kinship and extended families towards nuclear families.’⁹⁷ Modernisation through industrialisation and the westernised educational system penetrated many communities and individuals in Africa nudging them to embrace a lifestyle that is previously unknown to traditional African societies.⁹⁸ In addition to the changes brought about through urbanisation and industrialisation, the HIV epidemic caused major changes to the structure of traditional African family. The impact of the epidemic on the structure of families in severely affected African states is so profound that it grossly limits the ability of the extended family network to perform its traditional function as an informal social security provider. In the following section, the impacts of urbanisation, labour migration and the HIV epidemic on African society and family are explored.

2.3.1 Labour migration

Africa has a long history of migration in search of opportunities and financial advantages.⁹⁹ Even before the industrialisation, droughts and floods, which affected the agricultural production, forced millions of people to leave their habitual residence to look for a greener and richer land.¹⁰⁰ With the advance of industrialisation, millions of people were, and still are, lured to mines or collective plantations to supplement the income in rural households. The difference between the previous agricultural migration and the current labour migration practice is the movement of households. In the past, extended families or households may have moved together to find a new area to settle, while current labour migration consists of a smaller family unit or household breaking up from a larger group to form a new unit of production.¹⁰¹ In other words, the current labour migration movement is individualistic rather than collective.

⁹⁷ B Bigombe & G M Khadiagala (n 74 above) 2.

⁹⁸ A B C Ocholla-Ayayo, 1997 (n 8 above) 63.

⁹⁹ S E Findley, ‘Migrations and family interactions in Africa’ in A Adepoju (ed) *Family, population and development in Africa*, Zed Books (London & New Jersey, 1997) 109; N A Apt, (n 95 above) 3-4.

¹⁰⁰ S E Findley, 1997 (as above) 109.

¹⁰¹ See N A Apt (n 95 above) 3-4.

Furthermore, it includes not only rural-to-urban migration but also inter-state migration. Labour migration from poorer and agrarian states like Lesotho, Malawi, Swaziland and Zambia to more industrialised South African mines and factories is a good example.¹⁰² Although such inter-state labour migration is often temporary, the impact on the African family structure has been profound.¹⁰³ A reduced number of contacts with family members gradually weakened the ties among units of extended family.¹⁰⁴

However, labour migration does not only bring negative consequences. It is a response, and may be a solution, to limited employment and educational opportunities in rural areas or less industrialised countries. Labour migration has an important economic function as shown in the case of Lesotho where Basotho mine workers' remittances from South African mines constituted 67 per cent of Lesotho's GDP in the 1990s.¹⁰⁵ It should also be stressed that rural-urban labour movement itself does not necessarily lead to a break-down of rural-urban ties in all cases. Undeniably, the traditional care system that is characterised by inter-generational reciprocal care and support is much affected by the fact that younger generation moves away from its larger extended family unit. Nevertheless, regular urban-to-rural cash remittances and rural-to-urban commodity remittances help maintaining the family ties. The rural-to-urban fostering practice is also a form of remittance, which affirms rural-urban ties.¹⁰⁶

¹⁰² B Bigombe & G M Khadiagala (n 74 above) 12.

¹⁰³ N A Apt (n 95 above) 4.

¹⁰⁴ C Murray, *Families divided: The impact of migrant labour in Lesotho* (Cambridge University Press, 1981) 100-103, In page 101, Murray quoted Barker (1973) to express the negative impact of migration on the family ties; "It is at family level that the most pain is felt, and we cannot forget that the African cultural heritage enshrines a broader, more noble concept of family than that of the West. The extended family has proved a marvellous security for those for whom, otherwise, there was no security at all. The extended family is a net wide enough to gather the child who falls from the feeble control of neglectful parents, it receives the widow, tolerates the batty, gives status to grannies. Migratory labour destroys this ..."

¹⁰⁵ C Sander & S M Maimbo, 'Migrant labour remittances in Africa: reducing obstacles to development contributors', Africa Region Working Paper Series No 64 (November 2003), available at: <http://www.worldbank.org/afr/wps/wp64.pdf> [accessed: 9 May 2007] 15.

¹⁰⁶ B Bigombe & G M Khadiagala (n 74 above) 9.

The weakening of family ties can be attributed to the prolonged economic downturn since 1980s, which makes remittances a burden.¹⁰⁷ For instance, related studies show that during the years of economic decline, rural-to-urban fosterage rate declines, thereby generally undermining rural-urban ties.¹⁰⁸ Furthermore, a prolonged geographical separation among family members inevitably reduces the frequency of contact with relatives, gradually weakening a strong kinship bond.¹⁰⁹

2.3.2 Urbanisation

It is true that the majority of people in African states still live overwhelmingly in rural areas. However, the volume and constancy of the labour movement from rural to urban areas are unprecedented compared to any other continent.¹¹⁰ Such scale of labour migration contributes to the rapid urbanisation in Africa. The UN World Urbanisation Prospects 2005 Update shows an average 22 per cent urban growth rate in Africa between 1950 and 1980.¹¹¹ It is further projected that by 2015, 42.8 per cent of Africa would be urbanised.¹¹²

In the urban setting, it became increasingly difficult for an extended family unit to stay together due to the high cost of maintaining a large household with low wages.¹¹³ Furthermore, as an individually controllable cash income increases, the collective economy-based kinship solidarity gradually erodes away.¹¹⁴ Development of the notion of personal property renders the traditional economic unity of the extended family obsolete.¹¹⁵ In addition, formal education also contributes in lessening the role

¹⁰⁷ B Bigombe & G M Khadiagala (as above) 12-14; M Jerven, *Prospects for growth in Africa: Learning from patterns of long-term economic change*, London School of Economics (2010) available at: <http://www2.lse.ac.uk/IDEAS/publications/reports/pdf/SU004/jerven.pdf> [accessed: 12 July 2010]; C Sander & S M Maimbo, 2003 (n 105 above) 8.

¹⁰⁸ B Bigombe & G M Khadiagala (as above) 9-10.

¹⁰⁹ C Oppong, 1997 (n 95 above) 162; G Foster, 2005 (n 26 above)

¹¹⁰ N A Apt (n 95 above) 4.

¹¹¹ UN World Urbanisation Prospects: The 2005 revision population database, available at: <http://esa.un.org/unup/p2k0data.asp> [accessed: 9 May 2007].

¹¹² UN World Urbanisation Prospects (as above).

¹¹³ B Bigombe & G M Khadiagala (n 74 above); D Kayongo-Male & P Onyango, 1984 (n 25 above) 35.

¹¹⁴ C Oppong, 1997 (n 95 above) 162.

¹¹⁵ G Foster, 2005 (n 26 above) 69.

of elders in the family. Social values are taught through schools rather than through traditional mechanisms, further diminishing the educational role of an extended family.¹¹⁶ The pressure on the traditional kinship structure by the physical separation of family members is aggravated by economic downfalls, an individualistic market economy and an increasing value attached to westernised education.

Labour migration, rapid urbanisation and development of cash economy affected the fundamental 'principles of socialisation and solidarity among the members of kinship network'.¹¹⁷ Such development brought out changes not only in the form of a family network, but the way members of a family unit relate to each other. In Malawi, in urban areas, it was reported that networks with relatives outside the immediate household were weak.¹¹⁸ The weak extended family network has reinforced the importance of sibling relations and assistance from friends.¹¹⁹ While in rural areas, networks with relatives outside of the immediate household were still strong and relatives played a major role in contributing financial and emotional support to the children.¹²⁰ Interestingly, the study also highlighted the changing relationship among the family members. For instance, in urban areas, the relationship with a guardian's biological children and fostered children was often characterised as cruel and abusive.¹²¹ However, in rural areas, the relationship between the biological children of a guardian and fostered children was reported to be relatively close and strong.¹²²

Together with the labour migration, urbanisation, and the modernised economic and educational system, another related determinant that is affecting the traditional African family structure is the HIV epidemic.¹²³ The scale of the impact is such that

¹¹⁶ G Foster, 2005 (as above) 69.

¹¹⁷ A Adepoju & W Mbugua, 1997 (n 3 above) 71.

¹¹⁸ G Mann, 2002 (n 80 above) 53.

¹¹⁹ As above) 53.

¹²⁰ As above 53.

¹²¹ As above 53.

¹²² As above 53.

¹²³ *Economic social conditions in Southern Africa 2003: The challenges of private sector development in Southern Africa*, Economic Commission for Africa (2005) 20. On the issue of gender inequality, the report points out that over 50 % of infected people in Africa are women and girls. The report further argues for the need for fundamental shifts in the gender biased mind-set and cultural norms that exacerbate gender inequality and discrimination.

the epidemic is re-shaping demography of the severely affected African societies. The re-structuring and change in the traditional extended family system most severely affects the elderly and children. The increasing number of deaths among the young working generation has two broad implications on the situation of the elderly. First of all, it weakens the traditional inter-generational support, making the older generation financially vulnerable. Secondly, the older generation is often entrusted to take on a role of caring for grandchildren who have lost their parents, thus worsening the situation of the already destitute elderly.¹²⁴ In the next section, the impact of the epidemic on African families in relation to the care of children is discussed in detail.

2.3.3 The HIV epidemic

(i) Overview of the impact on the society

In all countries (in southern Africa) the epidemic is attacking the most productive sectors and prime-aged adults and also robbing economics of scarce skills, children of their parents, and exacerbating food insecurity. HIV/AIDS-induced poverty is intensifying and deepening while, at the same time, demands are increasing for public goods such as health and education.¹²⁵

The impact of the HIV epidemic in sub-Saharan African states is complicated and devastating. At the onset of the epidemic, it was seen as a health condition affecting certain categories of population, such as male homosexuals and intravenous drug users.¹²⁶ However, it became clear that the HIV epidemic in Africa is much more general in nature, hence more destructive. The HIV transmission in Africa is mainly through heterosexual intercourse, and the transmission through drug abuse, homosexual intercourse or blood transfusion is relatively small.¹²⁷ Precisely because of the heterosexual nature of the epidemic in Africa, it is affecting a wider range of the population including adults who are in their most reproductive and productive stage in their lives, children who are infected by the virus through mother-to-child

¹²⁴ G Bicego *et al.*, 'Dimensions of the emerging orphan crisis in sub-Saharan Africa' (2003) 56 *Social Science & Medicine* 1241.

¹²⁵ Economic Commission for Africa, 2005 (n 123 above) 20.

¹²⁶ See A Larson, 'Social epidemiology of Africa's AIDS epidemic' (1990) 89/354 *African Affairs* 5.

¹²⁷ A Adepoju, 1997 (n 18 above) 16.

transmission during birth or lactation, children who have lost their parents to AIDS and millions of others who are bearing the brunt of the epidemic.

Owing to the multitude of indirectly and directly affected people, the epidemic is predicted to reshape African societies in much the same fashion as the plague outbreak did in medieval Europe.¹²⁸ The HIV epidemic has claimed approximately two million lives in 2007 alone in sub-Saharan Africa and in the same year, an estimated 2.7 million adults and children were newly infected with HIV.¹²⁹ The lack of access to ART is also a contributing factor to an increasing number of AIDS-related casualties.¹³⁰ In any society, a high death toll among the productive work force affects all dimensions of the society. The debilitating impact of the HIV epidemic is manifold and the consequences of the epidemic are hard to analyze separately. General consequences of the epidemic on heavily affected countries include the decreasing rates of GDP,¹³¹ increasing child mortality rates,¹³² reduced life expectancy, over-stretched already weak health and educational systems and the breakdown of family structure.¹³³ On account of such wide implications of the

¹²⁸ 'Forty million orphans' in *The Economist* (28 November 2002). The Black Death, which swept through Eurasia, killed one third of the population, marking a grave social change in Europe and Asia; J C Caldwell, 1997 (n 64 above) 169; J C Caldwell, 'The African HIV epidemic: reflections on a research program' (2002) 19/2 *Journal of Population Research* 173.

¹²⁹ Statistics from the UNAIDS, *Global AIDS epidemic update 2008* (2008) 30.

¹³⁰ By end of 2008, around 44 % of people in need of ART were receiving the treatment in sub-Saharan Africa. It is a big increase from 17 % in 2005. However, the rate differs across the continent. The number of people on ART varies; in Botswana and Uganda over 50 % of people were getting treatment whereas in Mozambique, only 28 % of people were receiving such treatment. See <http://www.avert.org/universal-access.htm> [accessed: 23 October 2009]; *Treat 3 by 2005 Progress on global access to HIV antiretroviral therapy: A report on "3 by 5" and beyond*, WHO & UNAIDS (March 2006) 19; UNGASS Report 2008, Mozambique.

¹³¹ R Hecht *et al.*, 'Putting it together: AIDS and the millennium development goals' (2006) 3/11 *PLoS Medicine* 1992-1998. It was predicted that in a typical African states with a 20 % or higher prevalence rate would have a 2.6 % lower GDP growth rate each year than would have been the case in the absence of AIDS.

¹³² In countries that are severely affected by the epidemic, the gains in under-five mortality rates have reversed. In Botswana, the child-mortality rate, which would have been 42 per 1000 live birth without AIDS, is 106 due to AIDS; in Swaziland, 143 as opposed to 73; Lesotho, 123 as opposed to 71; South Africa 74 as opposed to 43 and in Zimbabwe, 117 as opposed to 78. See UNAIDS *Report on the global AIDS epidemic update 2006* (2006) 92.

¹³³ Economic Commission for Africa, 2005 (n 123 above) 20. The epidemic destabilises numerous important institutions such as health, education and military as the HIV and AIDS affects skilled personnel. A study on the HIV prevalence in the education sector found that the prevalence rate among teachers reflects that of national rate, save in Ghana, where the prevalence rate in the education sector was 9.2 % while the national rate was 3 %. J Tamukong, *The impact of HIV/AIDS on teachers and other education personnel in West and Central Africa: A synthesis of the literature from 2000-2004*, Educational Research Network for West and Central Africa,

epidemic, several different levels of analysis can be employed: individual, families, community, and national.¹³⁴

An examination of the recent United Nations General Assembly Special Session (UNGASS) Progress Reports and United Nations Development Programme (UNDP) Human Development Reports (HDR) illustrates the long-term impact of the HIV epidemic.¹³⁵ In Botswana, it is projected that after 20 years, the national economy will be 30 per cent smaller than it would have been without the HIV epidemic.¹³⁶ In Swaziland, the HIV epidemic is thought to cause a reduction in economic growth between 0.6 per cent and 2.6 per cent.¹³⁷ Furthermore, a substantial human resource loss due to HIV-related absentees and AIDS-related death in many African states has been documented.¹³⁸

Increasing human casualties also affect public sectors hindering the effective public service delivery in already resource-challenged countries. The Mozambique National Human Development Report 2007 shows that the HIV prevalence is 17 per cent among qualified health care workers. Also the loss of teachers to the AIDS-related illnesses is increasing and by 2010, Mozambique would have lost 17 per cent of its key staff in the education sector to AIDS-related illnesses.¹³⁹ In South Africa, it was reported that 11.5 per cent of health care workers were living with HIV, including 14

Cameroon, (2004) 2; In the first 10 months of 1998, 1300 teachers died of AIDS-related illness in Zambia. Information, available at: <http://www.fao.org/FOCUS/E/aids/aids6-e.htm> [accessed: 11 June 2007].

¹³⁴ *Measuring impacts of HIV/AIDS on rural livelihoods and food security*, Food and Agricultural Organisation of the United Nations (2002) 8.

¹³⁵ 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 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*.

¹³⁶ Botswana UNGASS Progress Report 2008 (as above) 12.

¹³⁷ A Whiteside & A Whalley, *Reviewing 'Emergencies' for Swaziland: shifting the Paradigm in a New Era* (2007) 34.

¹³⁸ UNAIDS, 2008 (n 129 above) 177.

¹³⁹ Mozambique National Human Development Report 2007 (n 135 above) 27.

per cent of nurses.¹⁴⁰ Such high HIV prevalence among health care workers translates into weakened health care systems. The combination of the increasing loss of health care professionals and the dramatically increasing demands of health care services among general population due to the HIV epidemic means that public health care systems will not be able to provide adequate and quality health care to people in need of health care services.¹⁴¹ Exacerbating the problem are the prohibitive costs of private health care systems which prevent the majority of the population from accessing such health care.

The impact of the epidemic on different levels of a society is interlinked, interdependent and circular. Thus, to fully grasp the changes brought about to the African family structure and its child-care practices by the epidemic, it is imperative to analyse such an impact on the wider community, at the regional and national levels. For instance, macroeconomic impacts of the epidemic, such as decreasing levels of GDP and government revenue, affect the effectiveness and scale of social services provided for people in poverty.¹⁴² Essential social services may include health care provisions, free education and social assistance grants. The lack of, or ineffectiveness of, social services contributes to the increasing level of household poverty which in turn fuels the spread of HIV. Increase in the HIV prevalence again worsens the fall of government revenue. As Barnett and Whiteside acutely pointed out, governments' ability to provide for poverty alleviation and social services will be significantly reduced when the demand for such services is the greatest.¹⁴³ Although the importance of exploring the wider impacts of the epidemic is recognised, for the purpose of the section, the central focus of the analysis is limited to the impact of epidemic on the African family and individuals.

¹⁴⁰ UNAIDS, 2008 (n 129 above) 175.

¹⁴¹ The WHO Health Statistics 2008 shows that in many southern African states, there is a severe lack of health care professionals. For instance in Malawi and Mozambique, less than 1 physician is available per 10 000 people. The regional average is 2 physicians per 10 000 people. Information is available at www.who.org [accessed: 9 September 2008].

¹⁴² Tostensen also talks of the irony of the “very phenomena of HIV/AIDS” that undermines the development of an effective social security measures, but reinforces the necessity of reforms and improvement. A Tostensen, 2004 (n 31 above) 10.

¹⁴³ T Barnett & A Whiteside, ‘Poverty and HIV/AIDS: impact, coping and mitigation policy’ in G A Cornia (ed) *AIDS, public policy and child well-being*, UNICEF-IRC (June 2002).

(ii) Impact on families and family structure

The HIV epidemic in various African societies has a serious impact on the African family structure. The high mortality rate among the young reproductive working generation means, first of all, a substantial fall in income levels. Rural communities and households directly bear the brunt of the epidemic's impact on labour-intensive sectors, such as agriculture. According to Food and Agricultural Organisation of the United Nations (FAO) estimates, seven million agricultural workers have died from AIDS-related illnesses between 1985 and 2002, and by 2020, a further 16 million agricultural labourers could be lost in sub-Saharan countries.¹⁴⁴ It is also projected that in heavily affected countries, such as Namibia, Botswana, Zimbabwe, Mozambique and South Africa, over 20 per cent of the agricultural force could be lost by 2020.¹⁴⁵ Apart from the loss of productive labour of the afflicted members, other members' labour productivity is also reduced due to the time spent taking care of sick members. At a community level and national level, such loss inevitably contributes to a slowing down of the economy and heightened food insecurity. At an individual and family level, it directly reduces the average income level and dramatically affects the standard of living and health status of other dependents. The World Bank research shows that the impact of a prime-age adult death on poor households is dramatic on food expenditure and food consumption.¹⁴⁶ On average, in poor households, the food expenditure per adult member of the households dropped by 32 per cent.¹⁴⁷ Such a drop in the food expenditure and consumption directly affects health status of the members of the households.

Furthermore, in the absence of public health care services, the cost of medical care is borne individually by family members severely affecting the income levels of

¹⁴⁴ Food and Agricultural Organisation of the United Nations, 2002 (n 134 above) vii.

¹⁴⁵ For more information and statistics, see <http://www.fao.org/FOCUS/E/aids/aids6-e.htm> [accessed: 11 June 2007].

¹⁴⁶ M Ainsworth *et al.*, (eds) *Confronting AIDS: public priority in a global epidemic*, World Bank, European Commission & UNAIDS (1998) available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1997/10/01/000009265_3980219162747/Rendered/PDF/multi0page.pdf [accessed: 17 November 2009].

¹⁴⁷ 'AIDS and poverty: who needs help?' in M Ainsworth *et al.*, 1998 (as above) 206.

households.¹⁴⁸ A study conducted in Rakai district in Uganda found that when a death of an economically active adult was AIDS-related, the decline in household resource was more acute compared to non-AIDS related deaths.¹⁴⁹ Non-AIDS related deaths of adults had no or little impact on household resources. Although the finding should be accepted with caution and should not be generalised, it shows that AIDS-related deaths have a stronger impact on the household economy. It might be that while trying to meet the health care costs during a long period of illness, the household depletes its savings and other resources.¹⁵⁰ Other research on the income level of HIV-affected and non-affected households also showed a significant difference between the two sets of households. Oni *et al.* found that in the rural Limpopo province of South Africa, which has an estimated HIV prevalence of 21.5 per cent among antenatal attendees, an average annual income of HIV-affected households was 35 per cent lower than that of non-affected households.¹⁵¹ In the rural Kafue district of Zambia, the average annual income of households affected by chronic illnesses is 46 per cent lower than that of non-affected households.¹⁵²

What makes matters even worse is the secondary consequence of high mortality rates among the younger generation: an increasing number of children who are deprived of their parental care. Naturally, the increasing number of dependents on a reduced level of income increases the financial instability of affected households. For instance, in Botswana, HIV increases the share of household living in poverty by six per cent and every income earner in the group supports an additional eight dependents.¹⁵³ In

¹⁴⁸ *Missing mothers: meeting the needs of children affected by AIDS*, Save the Children: UK (2006) 11.

¹⁴⁹ R Menon *et al.*, 'The economic impact of adult mortality on households in Rakai district, Uganda', *Confronting AIDS: evidence from the developing world* (1997) Selected background papers for the World Bank Policy Research Report, M Ainsworth *et al.*, 1997 (n 146 above): 334.

¹⁵⁰ *Reversed roles and stressed souls: child-headed households in Ethiopia*, African Child Policy Forum (2008) 36. Children in child-headed households that are affected by AIDS-related illnesses often inherit debt as parents' illnesses deplete household assets.

¹⁵¹ Cited in V Naidu & G Harris, 'The impact of HIV/AIDS morbidity and mortality on households - a review of households studies' (2005) 73 *South African Journal of Economics* 536; Statistics available at <http://www.avert.org/safricastats.htm> [accessed: 30 May 2007]; Also see *Report on National HIV and Syphilis antenatal sero-prevalence survey in South Africa 2005*, Department of Health of South Africa (2006)10.

¹⁵² V Naidu & G Harris, 2005 (as above) 536.

¹⁵³ UNAIDS, 2008 (n 129 above) 170.

Zimbabwe, nearly 25 per cent of rural households are fostering children who are orphaned.¹⁵⁴ Howard *et al.* aptly observed that ‘the dual disaster of AIDS and economic decline is straining the country’s primary, preferred, most cost-effective, and previously well-defined and almost fail-safe system of orphan care - the extended family.’¹⁵⁵ Despite that the observation was made in relation to a situation in Zimbabwe, it is equally applicable in other states heavily affected by the epidemic.

Increasingly, a weakened traditional extended family support structure is evidenced by a swelling number of grandparent-headed households and child-headed households.¹⁵⁶ As noted in section 2.2, traditionally, children who are orphaned have been looked after by extended families, especially aunts and uncles.¹⁵⁷ However, due to the high mortality rate among younger generation, the burden of care is often carried out by grandparents or elder siblings who are often children themselves.¹⁵⁸

Nyamukapa and Gregson’s study in rural Zimbabwe indicates that 45.3 per cent of children who lost both parents lived with their grandparents and further 25 per cent of them lived in sibling-headed households.¹⁵⁹ In Ethiopia, 68 per cent of the cases where parents died with AIDS-related illness, children were left with their

¹⁵⁴ B H Howard *et al.*, ‘Barriers and incentives to orphan care in a time of AIDS and economic crisis: a cross-sectional survey of caregivers in rural Zimbabwe’ (2006) 6/27 *Bio-medical Central Public Health* 3.

¹⁵⁵ B H Howard *et al.*, 2006 (as above) 3.

¹⁵⁶ S B Kamerman & S G Gabel, ‘Social protection for children and their families: a global overview’, delivered at the ‘Social protection initiatives for children, women, and families: an analysis of recent experience’ UNICEF and the Graduate Program in International Affairs at the New School (30-31 October 2006), available at: www.unicef.org/policyanalysis/files/Social_Protection_for_Children_and_their_Families_-_A_Global_Overview.pdf [accessed: 11 January 2008] 18; also see J P M Ntozi & S Nakayiwa ‘AIDS in Uganda: how has the household coped with the epidemic?’ (1999) *The Confronting African HIV/AIDS epidemic*, 166, available at: http://htc.anu.edu.au/pdfs/ContinuingHIV/Ntozi_Naka.pdf [accessed: 8 December 2009].

¹⁵⁷ G Foster, ‘HIV and AIDS: orphans and sexual vulnerability’, in P Kilbourn & M McDermid (eds) *Sexually exploited children: working to protect and heal*, MARC Publications (1998) 218.

¹⁵⁸ G Foster, 1997 (n 95 above) 155-157; G Foster, 2000 (n 11 above) 59; Such trend is also observed in other heavily affected non-African societies. R M Safman observed that in Thailand, as in sub-Saharan Africa, the death of young adults leaves children in the care of elders without inter-generational support. R M Safman, 2004 (n 1 above) 17; Z Zimmer & J Dayton, 2005 (n 23 above) 306.

¹⁵⁹ C Nyamukapa & S Gregson, ‘Extended families and women’s roles in safeguarding orphans’ education in AIDS-affected rural Zimbabwe (2005) 60 *Social Science & Medicine* 2159.

grandparents.¹⁶⁰ In Zambia, an estimated 20 per cent of children are orphaned and over seven per cent of Zambian households are headed by child younger than 14 without an adult member.¹⁶¹ In Swaziland, where the adult HIV prevalence is nearly 40 per cent, so far 70 000 children, which is around eight per cent of the total population, have lost their parents to AIDS and an estimated 15 000 or more households are headed by children who are left to fend for themselves with little help.¹⁶² It is a huge increase from 10 664 households in 2002.¹⁶³ The worst is yet to come, as the number of children who have been orphaned is expected to reach 120 000, approximately 15 per cent of total population in Swaziland, by 2010. Also in South Africa, the overall number of children in ‘child-headed households’ increased from 118 000 in 2002 to 148 000 in 2007.¹⁶⁴ Although the statistics indicate that the proportion of the children living in child-headed households is still small, the existence of, and an increasing number of, child-headed households pose a serious and important challenge to all stakeholders including policy and law-makers and service-delivery agencies because of the particular vulnerabilities of these households.¹⁶⁵

The increase in such unconventional forms of households is also attributable to economic factors. Arnab and Serumaga-Zake argue that people are increasingly reluctant to bear the burden of caring for children who are not their own because of the financial insecurities they already face.¹⁶⁶ A study by Oleke *et al.* shows a sharp

¹⁶⁰ UNICEF-IRC, 2006 (n 59 above) 19.

¹⁶¹ UNAIDS, 2008 (n 129 above) 164; B Rau, ‘Combating child-labour and HIV/AIDS in sub-Saharan Africa: a synthesis report’, No 1, ILO (2003) 30.

¹⁶² Statistics are available at: www.unaids.org [accessed: 15 January 2009]; ‘Swaziland: young heroes website appeals for help for AIDS orphans’ *IRIN news* (14 February 2006) available at: <http://www.aegis.com/news/irin/2006/IR060234.html> [accessed: 20 February 2009].

¹⁶³ *Caring for children affected by HIV and AIDS*, UNICEF-Innocenti Research Centre (IRC) (November 2006) 25.

¹⁶⁴ Statistics are available at: <http://www.childrencount.ci.org.za/content.asp?PageID=68> [accessed: 20 October 2009]. The definition employed for the purpose of the statistics is children living in ‘a household in which all members are under 18.’ Therefore, it does not include children living with incapacitated adult thereby performing a *de facto* head of household.

¹⁶⁵ B Rau, 2003 (n 161 above) 30; it is noted, in the report, that children in child-headed households and grandparent-headed households suffer from health-related issues. See B Rau, 2003 (n 32 above) 7.

¹⁶⁶ R Arnab & P A E Serumaga-Zake, ‘Orphans and vulnerable children in Botswana: the impact of HIV/AIDS’ (2006) 1/3 *Vulnerable Children and Youth Studies* 222.

increase in the number of female-headed households in a strongly patrilineal Lango society in Northern Uganda.¹⁶⁷ It can be attributed to the decrease in wife-inheritance practice due to an increasing awareness of the mode of the transmission of HIV and the conversion to Christianity.¹⁶⁸ In addition, the authors argue that the decrease in the wife-inheritance can also be explained as being due to economic downfall.¹⁶⁹ Poverty and death of potential *laku* (widow inheritance) partners due to AIDS-related illnesses means that the wife-inheritance is often not an option for the widow and her dependent children, leaving them with limited or no social and economic support from their in-laws.¹⁷⁰

Other reasons that may lead to the establishment of child-headed households include the unwillingness or inability of relatives to care for the children, the preferences of children themselves or dying parents that children should remain on their own, and the death of single mothers especially if the children were not recognised as born of married parents.¹⁷¹ No matter what the reasons are, research points out that children in grandparent- (often grandmother) headed or child-headed households are most likely to suffer from material difficulties.¹⁷² A study on the impact of the HIV epidemic on children in the Rakai district in Uganda, showing that only 19 per cent of children continued with uninterrupted schooling, is a striking illustration.¹⁷³ The study further shows that only seven per cent of children in grandparent-headed households continued with their education.¹⁷⁴ Another study in Uganda shows that children in grandparent-headed households are particularly vulnerable to malnutrition and

¹⁶⁷ C Oleke *et al.*, 2005 (n 87 above) 2635, In patrilineal society like Lango, the customs like widow-inheritance (*laku*) made sure that the widows and orphaned children were taken care by deceased husband's family network.

¹⁶⁸ C Oleke *et al.*, 2005 (as above) 2635; the practice of wife-inheritance varies from community to community and culture to culture. However, in general, the practice involves a male relative of the dead husband, often a brother, takes over the widow was a wife. See, <http://www.hrw.org/campaigns/women/property/qna.htm#12> [accessed: 4 November 2010].

¹⁶⁹ C Oleke *et al.*, 2005 (as above) 2635.

¹⁷⁰ C Oleke *et al.*, 2005 (as above) 2636.

¹⁷¹ See generally G Foster, 2004 (n 15 above).

¹⁷² R Arnab & P A E Serumaga-Zake, 2006 (n 166 above) 223; G Foster, 'HIV and AIDS' (n 157 above) 219.

¹⁷³ R Basaza & D Kaija, 'The impact of HIV/AIDS on children: lights and shadows in the "successful case" of Uganda', in G A Cornia (ed) *AIDS, public policy and child well-being*, UNICEF-IRC (June 2002) 48.

¹⁷⁴ R Basaza & D Kaija, 2002 (as above) 48.

infectious diseases.¹⁷⁵ In addition to the economic vulnerability, children in grandparent-headed households may experience multiple losses of primary caregivers, which can have a serious impact on their psychological health.¹⁷⁶

The emergence and increasing number of child-headed households and street children¹⁷⁷ seem to illustrate the breakdown of a traditional form of child care or an over-saturated extended family capacity which can no longer absorb children who are orphaned. The change in the traditional form of child care is an indirect result of the changes in the traditional extended family network system. Urbanisation, labour migration and development of a more individualistic economic system weakened the traditional bond between different units of extended family. In addition to that, the dramatic increase in the number of children who are in need of alternative family care as the epidemic takes its toll means more and more children will become ‘social orphans’ - a concept that did not exist in many African societies. Although the HIV epidemic is not the only factor that negatively affects the realisation of children’s rights and well-being, it is the main factor that makes such a daunting task even more daunting.

(iii) Children in times of AIDS

As illustrated above, the high prevalence of HIV, AIDS-related illnesses and deaths in many sub-Saharan African states have created a long-term public health, social and economic crisis, which affect all levels of society: individuals, families, communities and states. Children are one of the most vulnerable groups. Safman argues that children are often more vulnerable to family crises than adults because they are not in

¹⁷⁵ T Barnett & P Blaikie, *AIDS in Africa: its present and future impact* (London: Belhaven, 1992) cited in R M C Evans, ‘Social networks, migration, and care in Tanzania’ (2005) 11/2 *Journal of Children and Poverty* 115.

¹⁷⁶ R M C Evans, 2005 (as above) 115.

¹⁷⁷ G Foster, 2004 (n 15 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: Côte 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.

a position to protect or disassociate themselves from the problems.¹⁷⁸ In the majority of African states, the situation of children's rights had been precarious even before the epidemic, and with the epidemic, even the progress made in the areas of education and health is being reversed.¹⁷⁹ The situation in Zambia illustrates a general trend in many African states. In Zambia, the proportion of stunted children has increased from 40 per cent in 1990 to 50 per cent in 2005, and the primary educational enrolment rate has decreased from 80 per cent in 1990 to 78 per cent in 2005.¹⁸⁰

Furthermore, because children's development is time-dependent, the social, educational and health consequences of such a crisis can be more serious and longer-lasting for children than for adults.¹⁸¹ For instance, one of the inevitable consequences of death of a primary income-earning adult in household or an increased number of dependents on a limited household income is reduced food expenditure and consumption. Reduced food expenditure and consumption is directly related to childhood malnutrition. Childhood malnutrition affects the healthy development of the child, both intellectual and physical. The effect is long-lasting and profound, especially when the child is young. Also deprivation of parental affection could also have a long-term emotional and psychological consequence on children.

The most obvious groups of children whose rights have been grossly infringed by the epidemic are children who are living with HIV, children whose parents are directly affected by the epidemic and children who are deprived of their parental and family environment. Often these three categories overlap. Considering the main mode of the HIV transmission in children under 15 is through mother-to-child transmission, children who are living with HIV are likely to have parents who are also living with HIV. The most recent UNAIDS AIDS epidemic update indicates that more than 14

¹⁷⁸ R M Safman, 2004 (n 1 above).

¹⁷⁹ R Hecht *et al.*, 'Putting it together: AIDS and the millennium development goals' (2006) 3/11 *PLoS Medicine* 1992; The rate of GDP growth in a typical African state with 20 per cent HIV prevalence would be 2.6 per cent lower each other than it would have been in the absence of AIDS. It was found in six affected countries, child nutrition rapidly deteriorated in the presence of high HIV prevalence. In Mozambique, the percentage of underweight children rose from five per cent to 20 per cent between the years 1997 and 2002.

¹⁸⁰ Zambia National Human Development Report 2007 (n 135 above) 20.

¹⁸¹ See L Sherr, *Young children and HIV/AIDS: mapping the field*, Working papers in early childhood development, Bernard van Leer Foundation (2005).

million children lost their parents to AIDS-related illnesses¹⁸² and the number of children who lost both of their parents to AIDS is also increasing sharply. Studies show that the prevalence of children who have lost both parents is disproportionately high in severely affected countries.¹⁸³ Bicego *et al.* found that in countries in East and Southern Africa, the regions most severely affected by the epidemic, 10 to 17 per cent of all orphaned children lost both parents, while in West and Central Africa, only four to eight per cent of children who are orphaned lost both parents.¹⁸⁴

Moreover, the time lag between the infection of HIV and the death from AIDS-related illnesses means the number of children who are orphaned will increase for some years even after the fall of HIV prevalence. In Thailand, for example, despite the reduced HIV prevalence since 1995, the number of children who are orphaned has risen eight fold.¹⁸⁵ Another similar example can be found in Uganda. Despite that the HIV prevalence declined from 14 per cent in the late 1980s to an estimated 5 per cent in 2001, the number of children who are orphaned by AIDS continued to increase until 2001.¹⁸⁶ Unfortunately, in the majority of countries the HIV epidemic has not reached its peak and it is argued that the AIDS-related mortality rate will not be stabilised till 2020.¹⁸⁷ It means that the number of children orphaned by AIDS-related illnesses will increase at least until 2030.¹⁸⁸

¹⁸² *AIDS epidemic update 2009*, UNAIDS (November, 2009), available at: http://data.unaids.org/pub/FactSheet/2009/20091124_FS_global_en.pdf [accessed: 12 July 2010].

¹⁸³ G Bicego *et al.*, 2003 (n 124 above) 1237; R Monasch & J T Boerma, 'Orphanhood and childcare patterns in sub-Saharan Africa: an analysis of national surveys from 40 countries' (2004) 18/2 *AIDS* 57; Monasch and Boerma showed that in Zambia, the percentage of children who lost both parents among all children who are orphaned rose from 8 % to 19 % between 1992 and 2001 and in Zimbabwe, the figure also rose from 8 % to 15 % between 1994 and 1999. See table 2 Orphans as a percentage of all children under 15 years of age, countries with trend date by different HIV prevalence levels.

¹⁸⁴ G Bicego *et al.*, 2003 (as above) 1237.

¹⁸⁵ G A Cornia, 'Overview of the impact and best practice responses in favour of children in a world affected by HIV/AIDS' G A Cornia (ed) *AIDS, public policy and child well-being*, UNICEF-IRC (June 2002) 11.

¹⁸⁶ G Andrews *et al.*, 'Epidemiology of health and vulnerability among children orphaned and made vulnerable by HIV/AIDS in sub-Saharan Africa (2006) 18/3 *AIDS Care* 271. In 2001, 14.6 per cent of all children in Uganda were orphaned children. The number gradually declined and in 2010, an estimated 2.5 million children are orphaned and among them 1.2 million are estimated to be orphaned by AIDS. Statistics available at: http://www.unicef.org/infobycountry/stats_popup4.html [accessed: 15 July 2010].

¹⁸⁷ C Levine & G Foster, *The white oat report: building international support for children affected by AIDS*, New York: the orphan project (2000) cited in K Subbarao & D Coury, *Reaching out to*

In addition to the swelling number of children losing their parents to AIDS-related illnesses, another tragic aspect of the HIV epidemic is the increasing number of children who are abandoned. A study in Thailand shows that children of mothers who are living with HIV are five times more likely to be abandoned than other children.¹⁸⁹ In the absence of strong social support, HIV-related poverty, stigmatisation, social isolation and inability to care for children who are living with HIV are factors inducing abandonment. Desmond and Gow also reported the increasing number of abandoned babies in South Africa as the epidemic takes its toll.¹⁹⁰

Another category of children who may not have been directly affected by the HIV epidemic but are equally vulnerable are children who have been orphaned by non-AIDS related causes and children whose households are taking care of children who are orphaned. Notwithstanding that they have parental care, their welfare is also grossly compromised as the number of dependents increases in their households. While they may not have been directly affected by the HIV epidemic, as the epidemic depletes the general resource capacity of communities, children may find themselves in an equally dire situation as the children who are orphaned by AIDS. Consequently, focusing on resources for children who are orphaned by AIDS at the expense of other vulnerable children or singling them out for social services is not desirable.¹⁹¹

However, an AIDS-related death in a household seems to lead to a deeper level of problems than a non-AIDS-related death. A study in Siaya district in Kenya showed that children who are orphaned by AIDS-related deaths were more likely to be withdrawn from school, more likely to fall ill over the observed period and more

Africa's orphans: a framework for public action, African Regional Study Series, World Bank (2004) 7.

¹⁸⁸ K Subbarao & D Coury, 2004 (as above) 7.

¹⁸⁹ G A Cornia, 2002 (n 185 above) 12.

¹⁹⁰ C Desmond & J Gow, 'The current and future impact of the HIV/HIV epidemic on south Africa's children', G A Cornia (ed) *AIDS, public policy and child well-being*, UNICEF-IRC (June, 2002) 19.; Also see 'Charities report sharp rise in number of abandoned South Africa babies' *Guardian.co.uk*, (14 June 2009), available at: <http://www.guardian.co.uk/world/2009/jun/14/babies-abandoned-south-africa> [accessed: 29 July 2009]. The alternative care related issues concerning abandoned babies are dealt with in chapter 4.

¹⁹¹ UNICEF-IRC, 2006 (n 59 above) 24.

likely to be discriminated than children who are orphaned by other causes.¹⁹² Furthermore, children whose parents suffer from AIDS-related illness experience a deeper level of poverty than other children.¹⁹³ The loss of income through illness as well as increased medical expenditure, often leave children who lost their parents to AIDS in debt.¹⁹⁴ A study conducted in Cape Town also reported similar findings. The study found that children who were orphaned by AIDS were less likely to be enrolled and more likely to experience food insecurities than children who were orphaned by other causes.¹⁹⁵ Furthermore, children who are orphaned by AIDS were less likely to access basic social services, including social grants compared with other children.¹⁹⁶

Apart from the financial difficulties, emotional and psychological burdens on children who are losing their parents to AIDS-related illnesses may have more serious and longer lasting effects. Prolonged illness incapacitates parents and children are often pushed to take on a role of *de facto* primary caregivers for their ill parents and younger siblings. As Barnett and Whiteside point out, the care of ill parents goes beyond doing house chores or looking after younger siblings.¹⁹⁷ As AIDS-related illnesses debilitate parents, children often have to provide culturally sensitive care, such as toileting or bathing of parents and often need to cope with parents' mood swings and declining mental capacity.¹⁹⁸ The psychological burden on children who are providing care cannot be exaggerated. Therefore, children who are orphaned by AIDS may need a different type and scale of intervention. Importantly, AIDS-related causes are increasingly becoming a major cause of orphanhood in many southern African states. In some of the severely affected countries, such as Zimbabwe,

¹⁹² B O Kóyugi & J Muita, 'The impact of a growing HIV/AIDS epidemic on the Kenyan children', G A Cornia (ed), *AIDS, public policy and child well-being*, UNICEF-IRC (June 2002) 9.

¹⁹³ *Enhanced protection for children affected by AIDS: a companion paper to Framework for the protection, care and support for orphaned and vulnerable children living in a world with HIV and AIDS*, UNICEF (2007) 13.

¹⁹⁴ African Child Policy Forum, 2008 (n 150 above) 36.

¹⁹⁵ L Cluver *et al.*, 'Poverty and psychological health among AIDS-orphaned children in Cape Town, South Africa' (2009) 21/6 *AIDS Care* 735.

¹⁹⁶ L Cluver *et al.*, 2009 (as above).

¹⁹⁷ T Barnett & A Whiteside, 2002 (n 143 above) sec 5.8.

¹⁹⁸ T Barnett & a Whiteside, 2002 (as above) sec 5.8.

Botswana, Swaziland and Lesotho, over 60 per cent of children who are orphaned lost their parents to AIDS-related illness.¹⁹⁹

A study by Beegle *et al.* found that orphanhood has a permanent impact on children in terms of their educational level and height in adulthood.²⁰⁰ According to the Rwanda National Plan of Action for Orphans and Other Vulnerable Children 2008-2011, among 10 to 14 year old children who are orphaned, only 74 per cent of children were attending school compared with 89 per cent of non-orphaned children in the same age group.²⁰¹ In Kenya, 88 per cent of children who lost both parents were in school compared with 92 per cent of children with both parents.²⁰² The result should be interpreted carefully due to the difficulties of controlling variables that may affect the results in longitudinal studies. Nevertheless, the study shows the importance of an active and early intervention in orphanhood as children's development is often negatively affected by the loss of parents, and such negative impact can be long-term.²⁰³

Extended families more often than not take in children who have lost their parents. However, as pointed out in the earlier section, as the capacity of extended families to absorb children who are orphaned is dwindling, an increasing number of children will become street children or live in child-headed households.²⁰⁴ The increasing number of children in child-headed households and street children is a great concern as those children are often in the most vulnerable situation. Children in child-headed

¹⁹⁹ Statistics are available at: <http://www.avert.org/aidsorphans.htm> [accessed: 25 June 2007].

²⁰⁰ K Beegle *et al.*, *Orphanhood and the long-run impact on children*, World Bank (September 2005). K Beegle *et al.* found that, in terms of the educational loss, the effect of orphanhood was greater among maternal orphans compared to paternal orphans.

²⁰¹ National Plan of Action for Orphans and Other Vulnerable Children 2008-2011, Government of Rwanda, 13.

²⁰² National Plan of Action for Orphans and Vulnerable Children (OVC) 2005/06-2009/2010, Republic of Kenya, 6.

²⁰³ K Beegle *et al.*, 2005 (n 200 above) 20-22.

²⁰⁴ The Nelson Mandela Study by HSRC found that 3 % of households were headed by children aged between 12 and 18. In urban areas where the HIV prevalence was highest, the figure increased to 4.8 %. Cited in R Mabala, 'From HIV prevention to HIV protection: addressing the vulnerability of girls and young women in an urban area' (2006) 18 *Environment and Urbanisation* 419; A Bhargava & B Bigombe, 'Public policies and the orphans of AIDS in Africa' (2003) 326 *British Medical Journal* 1388. The authors argue that although foster care by extended family members is important, without subsidies, many children will end up in orphanages.

households or in impoverished households face similar problems including food insecurity, difficulty in accessing education or health services, and inadequate housing conditions.²⁰⁵ However, those problems in child-headed households may be more severe and perpetual because children are often not equipped to work full-time as adults; they are often not in a position to negotiate fair wages; and children who are orphaned have a relatively lower level of education.²⁰⁶ Most importantly, such problems must be faced without adult supervision and assistance.²⁰⁷

Abebe and Aase suggest that child-headed households are not permanent features and adult co-residents eventually take on the responsibility of caring for the children when the biological parents die.²⁰⁸ However, such an assertion seems to be far removed from reality. There are numerous reports indicating the increasing number of child-headed households in the context of the HIV epidemic.²⁰⁹ Such reports also indicate that many child-headed households eventually dissolve as children become street children. The Ethiopia National Plan of Action on Orphans and Vulnerable Children states that the HIV pandemic has ‘tremendously increased the number of child-headed households and changed cultural patterns of child care and put an incredible strain on the social safety net’.²¹⁰ In Rwanda, there were 100 956 children living in child-headed households.²¹¹ The figure is much higher than children in formal alternative care. The same report stated that 28 341 children were in foster care and 3 475 were in institutions.²¹² Such figures suggest that a practical and long-term plan to support and protect children in child-headed households is necessary.

²⁰⁵ G Foster, 2004 (n 15 above) 72; S Tsegaye, 2008 (n 14 above) 6, 21 & 22; also see African Child Policy Forum, 2008 (n 150 above).

²⁰⁶ R Arnab & P A E Serumaga-Zake, 2006 (n 166 above) 223.

²⁰⁷ G Foster, 2004 (n 15 above) 72.

²⁰⁸ T Abebe & A Aase, 2007 (n 58 above) 2064.

²⁰⁹ R M C Evans, 2005 (n 175 above) 121; UNICEF-IRC, 2006 (n 59 above) 16; ‘In the shadow of death: HIV/AIDS and children’s rights in Kenya’ (June 2001) 13/4A *Human Rights Watch Report*; Also see M A Ayieko, *From single parent to child-headed households: the case of children orphaned by AIDS in Kisumu and Siaya districts in Kenya*, Study paper No 7, HIV and Development Programme, UNDP.

²¹⁰ Orphans and Vulnerable Children National Plan of Action 2004-2006, Federal Democratic Republic of Ethiopia, 1.

²¹¹ National Plan of Action of Rwanda (n 201 above) 14.

²¹² As above 13-14

So far the chapter highlighted the impact of the HIV epidemic in Africa on different levels of society. It is clear that the epidemic affects all levels and aspects of societies. The consequences of high mortality rates among adults in their most productive and reproductive age, decreased income levels combined with an increased dependency rate, and the subsequent diminished capacity of communities and extended families to absorb economic shocks is also clear. The next question may be whether and how African families are ‘coping’ and the understanding of the concept of ‘coping strategies’.

2.3.4 Coping by providing ‘good enough care’?

Some of the earlier research suggested that despite the hardships, extended families were resilient and ‘coping’.²¹³ The concept of ‘coping’ and ‘coping strategy’ should be examined carefully to distinguish between ‘surviving’ and ‘coping’. Ansell and Van Blerk listed an early marriage of a child and child migration as forms of ‘coping strategy’.²¹⁴ A marriage of a child could bring economic benefit to the girl’s paternal relatives where a payment of bride wealth is still observed. A marriage could also provide the child with shelter and other material needs.²¹⁵ Child migration, whether local or long-distance, is a way to seek shelter and care when a household is dissolved by various reasons. For children, whose parents have died, it might be the only way to survive. However, as Ansell and Van Blerk pointed out, a marriage, more often than not, signals the end of education for girls.²¹⁶ They also noted that child migration due to an AIDS-related cause could put young migrants at risk of being mistreated and abused by their foster carers.²¹⁷ Evans listed some of the coping strategies adopted by child-headed households to illustrate their resilience.²¹⁸ The list includes agricultural

²¹³ J C Caldwell, 1997 (n 64 above); M Urassa *et al.*, 1997 (n 86 above); G Foster, ‘Beyond education and food: psychosocial well-being of orphans in Africa’ (2000) 91 *Acta Paediatr*; see S Madhavan, ‘Fosterage patterns in the age of AIDS: continuity and change’ (2004) 58 *Social Science & Medicine* 1449.

²¹⁴ N Ansell & L van Blerk, 2004 (n 69 above) 2-3 & 23.

²¹⁵ As above 23-25.

²¹⁶ As above 25.

²¹⁷ As above 2-3; A study by Hosegood *et al.* in KwaZulu-Natal shows that children from households affected by AIDS are more likely to move. Cited in *Understanding the needs of orphans and other children affected by HIV and AIDS in Africa: state of the science*, US Agency for International Development, Working draft (April 2005) 26.

²¹⁸ R M C Evans, 2005 (n 175 above) 111-129.

labour after school hours, reducing the household's food consumption, and asking for money from neighbours and friends.²¹⁹ Human Rights Watch report on Kenya states that 'withdrawing children from school' is a common coping mechanism for families affected by the HIV epidemic.²²⁰

In such cases, it is hard to understand how a strategy that potentially limits rights of children can be seen as a 'coping strategy'. 'Coping strategy' or 'coping mechanisms' can only be valid when a community or household maintains its capacity to meet children's needs at some culturally acceptable level.²²¹ When such strategies or mechanisms clearly pose dangers to children's wellbeing and rights, they are not 'coping strategies' but mere 'survival strategies'. As Barnett and Whiteside pointed out, the term, 'coping', may be 'a way of escaping from the challenge of confronting how people's capabilities are stunted, their entitlements blocked and their abilities to function as full human beings with choices and self-definitions frustrated.'²²²

Increasingly, despite the earlier confidence that extended families would cope, it became evident that many households do not cope but merely survive. Children are increasingly mistreated by relatives, deprived of their inheritance, forced to discontinue their education to become children labourers.²²³ As the report on Kenya by Human Rights Watch eloquently argues, 'children should not have to steal, turn to prostitution, or engage in other forms of labour' to survive.²²⁴ Providing daily survival needs of children is the responsibility of parents or guardians. However, when children are deprived of parental care and family environment, it becomes the responsibility of the state to ensure such needs are met.²²⁵

Foster argues that in times of the current 'orphan crisis', the concept of 'good enough' standards is worthy of consideration in countries where the proportion of children

²¹⁹ As above 119.

²²⁰ Human Rights Watch, 2002 (n 209 above) 7.

²²¹ T Barnett & A Whiteside, 2002 (n 143 above) sec 5.15.

²²² T Barnett & A Whiteside, 2002 (n 143 above) sec 5.15.

²²³ Rajaraman (2001) cited in T Barnett & A Whiteside, 2002 (n 143 above) sec 5. 13.

²²⁴ Human Rights Watch, 2002 (n 209 above) 16.

²²⁵ As above 16.

who are orphaned is over ten per cent.²²⁶ ‘Good enough’ standards can be understood as standards that are ‘appropriate to the norms of the community in which the child lived’.²²⁷ In times of ‘orphan crisis’, as Foster terms it, it might be an important part of a ‘coping strategy’ to minimise the administrative hurdles and lower the minimum standards set for formal fostering to enable poor but willing community members to provide ‘good enough’ care for children.²²⁸

However, the concept of ‘good enough care’ is vague. Due to the vagueness of the concept, it is open to misapplication. Barnett and Whiteside criticise the concept as being an attempt to sensitise social workers to the idea that ‘while their client’s standards of care might appear inadequate by their own social and cultural standards, the clients’ was “good enough” as long as everyone was “coping”’.²²⁹ Studies suggest the danger of romanticising the tradition of fostering by relatives. Being looked after by family members does not guarantee that children are being ‘well-looked after’.²³⁰ When children are taken in by their relatives because of the family obligation rather than genuine affection, the children are in a greater danger of being mistreated or abused by their carers than otherwise. Ansell and Van Blerk showed that Malawian children considered discrimination and ill treatment by foster families as the worst problems they face.²³¹ Furthermore, as it is impossible for a poor family to foster a large number of siblings, children are often separated among different households.²³² Separation of siblings can have a negative effect on children who are already traumatised by the death of parents.²³³

The heroic efforts of communities and extended families to ‘cope’ with the current crisis should be acknowledged. However, over-reliance on extended families’

²²⁶ G Foster, 2004 (n 15 above) 87.

²²⁷ As above 87.

²²⁸ As above 87.

²²⁹ T Barnett & A Whiteside, 2002 (n 143 above) sec 5.15.

²³⁰ UNICEF-IRC, 2006 (n 59 above) 19.

²³¹ N Ansell & L van Blerk, 2004 (n 69 above) 36.

²³² UNICEF, 2007 (n 174 above) 15.

²³³ K Subbarao & D Coury, 2004 (n 187 above) 29; UNICEF, 2007 (n 193 above) 15; Also see paras 17 and 62 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, 2009.

capacity to ‘cope’ or romanticising a traditional model of care could subject children to the danger of exploitation and abuse. Accepting ‘good enough care’ delays the governmental intervention and the development of new initiatives to provide ‘good care’ to children who are deprived of their parental and family care.

2.4 Conclusion

It has been claimed that the concept of ‘social orphan’ did not exist in Africa.²³⁴ It has been also claimed that in African culture, as soon as children are in need, they would be cared for in the community.²³⁵ It is true that traditionally, children who have been deprived of their parental care have been cared for by the extended families and the need of formal intervention had been minimal.²³⁶ However, another side of the truth is that increasingly, many children have experienced hardships and inadequate care in communities. In some cases, the children suffer from inadequate standard of care within their extended family setting.

The chapter explored the changing circumstances, which render providing traditional form of care to children who are deprived of their family environment within extended family network, problematic. It highlighted the role of extended families in traditional African societies and how the caring role has changed over time with other changing social factors, and especially, in the face of increasing socio-economic pressure on the capacity of extended families to provide adequate care to children who are deprived of their parental care in the context of the HIV epidemic. The increasing number of children living in households containing only siblings in the areas where the HIV epidemic has taken its toll indicates that the capacity of extended families has reached ‘maximum capacity’.²³⁷ Nevertheless, it has been argued that extended families still absorb the majority of the children who are orphaned by AIDS or

²³⁴ D Skinner *et al.*, *Defining orphaned and vulnerable children*, Human Science Research Council of South Africa (2004) 9; G Foster, 2004 (n 15 above) 67.

²³⁵ D Skinner, *et al.*, 2004 (as above) 9.

²³⁶ T Abebe & A Aase, ‘Children, AIDS and the politics of orphan case in Ethiopia: The extended family revisited’ (2007) 64 *Social Science and Medicine* 2059.

²³⁷ N Dalen *et al.*, “‘They don’t care what happens to us.’ The situation of double orphans heading households in Rakai District, Uganda’ (2009) 9 *Bio-Medical Central Public Health* 322.

children who are single orphans continue to live with their surviving parents.²³⁸ It has also been argued that families and communities are amazingly resilient in times of crisis and develop various coping strategies to deal with the increasing care burden.²³⁹

However, a substantial increase in a number of maternal, paternal and double orphans living in households headed by grandparents shows the shift in the child care within the extended family network.²⁴⁰ Grandparent-headed households are considerably vulnerable economically and there is a danger of children will eventually assume the role of a *de facto* caregiver, due to the old age of their purported caregivers.²⁴¹ The deteriorating health of elder caregivers may lead to the dissolution of the household or the establishment of child-headed households, requiring a stronger government intervention in this regard.²⁴² Moreover, in many cases, the coping strategies, which include children having to contribute to the household livelihoods as ‘producers, carers, homemakers and decision-makers’, may be detrimental to the well-being and development of the children.²⁴³

Despite the international as well as the domestic legal and policy framework protecting the rights of the children who are deprived of their family environment, such children are often vulnerable to marginalisation and violation of their rights, including the deprivation of their inheritance.²⁴⁴ Children in child-headed households are particularly vulnerable to various kinds of maltreatments and abuses.²⁴⁵ Children in child-headed households, especially children in unaccompanied child-headed households are, at a higher risk of being subject to different types of abuses and

²³⁸ C Ardington & M Leibbrandt, ‘Orphanhood and schooling in South Africa: trends in the vulnerability of orphans between 1993 and 2005’ (2010) 58/3 *Economic Development and Cultural Change* 513.

²³⁹ T Abebe & A Aese, 2007 (n 234 above) 2060.

²⁴⁰ C Ardington & M Leibbrandt, 2010 (as above).

²⁴¹ G Foster *et al.*, 1997 (n 95 above) 160; G Foster, 2004 (n 15 above) 70-71.

²⁴² G Foster, *et al.*, 1997 (as above); G Foster, 2004 (as above).

²⁴³ T Abebe & M Skovdal, ‘Livelihoods, care and the familial relations of orphans in eastern Africa’ (2010) 22/5 *AIDS Care* 573.

²⁴⁴ D Skinner, *et al.*, 2004 (n 233 above) 10.

²⁴⁵ See African Child Policy Forum, 2008 (n 150 above); S Tsegaye, 2008 (n 14 above); N Dalen *et al.*, 2009 (n 237 above).

maltreatment by their relatives, neighbours and employers.²⁴⁶ The increasing trends to recognise child-headed households as an option of care calls for the establishment and implementation of a stronger legal and policy framework to protect the rights of children who are deprived of their family environment, and in particular, the rights of children living in child-headed households.

In the following chapter, the international legal and policy framework protecting the rights of children who are deprived of their family environment is explored. The analysis of the right to alternative care, and special protection and assistance protected under the CRC and the ACRWC in particular, form the major part of the discussion. The chapter also explores the existing forms of alternative care placements and the emergence of child-headed households as a recognised form of care.

²⁴⁶ African Child Policy Forum, 2008 (n 150 above).

CHAPTER THREE

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

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

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3.6 Conclusion

3.1 Introduction

Children who are deprived of their family environment are entitled to alternative care, and special protection and assistance. As has been explored in detail in chapter two, many African states have traditionally relied heavily on informal forms of child care practice. Formal alternative care provisions have consequently often been considered as largely irrelevant to meet African social needs.¹ Such beliefs and attitudes may have contributed to the lack of enforcement and implementation of the right to alternative care, and special protection and assistance enshrined in the CRC and the ACRWC, especially in the context of the HIV epidemic in southern Africa.² The failure of the CRC Committee and the African Committee of Experts on the Rights and Welfare of the Child to adopt any explicit general comment or explanation regarding the interpretation and implementation of the right to alternative care, and special protection and assistance, may also have contributed to the lack of understanding of state obligations under the relevant articles. Nevertheless, the exponential increase of children who are deprived of their family environment in various parts of Africa, and, especially, the recent movement to recognise various new forms of alternative care of children, including child-headed households, necessitate that greater importance be given to properly understanding and implementing the right to alternative care, and special protection and assistance of children who are deprived of their family environment.

In addition to articles 20 of the CRC and 25 of the ACRWC, and other related provisions of these two treaties, there are other international instruments aimed at assisting states to fulfil their obligations towards children in need of alternative care. 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 (1986 UN Declaration on Foster Care and Adoption), the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption (1993 Hague Convention on Inter-Country Adoption), the

¹ H H Semkiwa, *et.al.*, *HIV/AIDS and child labour in the United Republic of Tanzania: a rapid assessment*, No 3, International Labour Organisation (2003) 7; J Kaliyati *et al.*, *HIV/AIDS and child labour in Zimbabwe*, No 2, International Labour Organisation (2002) 16.

² H H Semkiwa *et al.*, 2003 (as above) 7.

2005 Council of Europe Recommendation on the Rights of Children Living in Residential Institutions (the 2005 Council of Europe Recommendation) and 2009 UN Guidelines for the Alternative Care of Children (the 2009 UN Guidelines for the Alternative Care) are a few pertinent examples. These instruments are important as they provide detailed standards and principles in relation to children in alternative care thus filling the gap left by international legal provisions.

This chapter explores the question of state responsibilities towards children who are deprived of their family environment by examining the contents of international treaties and guidelines. It explores the advantages and disadvantages of conventional alternative care options in detail and examines the recent development of legally recognising child-headed households as a care option. The chapter is divided into six sections. Following this introductory section, section 3.2 introduces international instruments regarding the alternative care placements of children who are deprived of their family environment, including the CRC, the ACRWC, the 1986 Declaration on Foster Care and Adoption, the 1993 Hague Convention on Inter-Country Adoption, the 2003 General Comment and relevant recommendations made as part of a General Day of Discussion by the CRC Committee, the 2005 Council of Europe Recommendations on the rights of children living in residential institutions and the 2009 UN Guidelines for the Alternative Care of Children. It should be noted that the purpose of the section is to introduce major international instruments relating to the rights of children, especially in alternative care placements, rather than to provide a detailed analysis of the contents. The Council of Europe Recommendations is a regional instrument and only applicable to the 47 member states of that intergovernmental body. However, it is an important example for other regions illustrating the importance of protecting the rights of children in institutionalised care. Section 3.3 explores relevant articles of the CRC and the ACRWC protecting children who are deprived of their family environment in more detail and discusses the principles of a rights-based approach in relation to alternative care placements. In order to analyse state obligations and the scope of the articles, provisions and standard of earlier identified international guidelines and recommendations are used extensively. Section 3.4 introduces different alternative care options, including kinship care, foster care and adoption. Section 3.5 focuses on child-headed households as an emerging form of care. The section also explores how child-headed

households are defined and recognised in legal and policy frameworks in different African states, in particular, examples of Southern Sudan, Namibia and Uganda have been highlighted. Section 3.6 is the concluding section of the chapter.

3.2 International protection of children who are deprived of their family environment

3.2.1 Treaty law

(i) 1989 Convention on the Rights of the Child

The CRC is the major global instrument on children's rights. It has been ratified by all countries, except Somalia and the US. The idea to create a convention on children's rights was first introduced in 1978 by Poland.³ Many states were originally against the idea of creating a separate binding instrument devoted to children.⁴ The main argument was that a separate instrument was redundant as major international human rights instruments, such as the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were also applicable to children.⁵ Besides the general wording of 'rights of everyone', which includes children, children are specifically mentioned in all three instruments. In the UDHR, article 25(2) provides special care and assistance to childhood.⁶ In the ICCPR, article 23(4) protects children at times of marital dissolution and article 24 is devoted to children's right to non-discrimination, and to a name and nationality. In the ICESCR, article 10(3) protects children from economic and social exploitation and article 12(2)(a) requires state parties to devise provisions to reduce infant mortality rate and to achieve healthy development of children.

³ N Cantwell, 'Chapter one', S Detrick (ed), *The United Nations Convention on the Rights of the Child: a guide to the travaux preparatoires*, Martinus Nijhoff (1992) 20.

⁴ N Cantwell, 1992 (as above) 20.

⁵ M D Seitles, 'Effect of the Convention on the Rights of the Child upon street children in Latin America: a study of Brazil, Colombia and Guatemala' (1997) 16 *In the Public Interest* 171; P Miljeteig-Olssen, 'Advocacy of children's rights - The Convention as more than a legal document' (1990) 12 *Human Rights Quarterly* 148.

⁶ W H Bennett, 'A critique of the emerging Convention on the Rights of the Child' (1987) 20/1 *Cornell International Law Journal* 17; Bennett also mentions article 26 on education to specifically applicable to children, but the article is general rather than child-specific. Also article 26(3) deals with parental right to choose the type of education for their children, not children's right to participate in choosing the kind of education he or she wishes to receive.

Despite the objections, an open-ended working group of the UN Commission on Human Rights was formed to draft a convention based on the model convention proposed by Polish delegate.⁷ The lack of enthusiasm at the beginning of the drafting period was evidenced by the low number of states attending the drafting session.⁸ Even during the drafting period, the concerns regarding the creation of a separate universal convention on children continued to be raised. It was only from 1983 that the interest in the drafting of the CRC began to grow among states. The growing interest was reflected in the growing number of states participating in the drafting sessions.⁹ However, unfortunately, due to logistical reasons, only a few countries from the developing world could consistently participate in drafting sessions.¹⁰ It was only towards the end of the drafting session that many developing states, particularly states with Islamic law, started to actively participate.¹¹ After a long and arduous drafting process, the Convention was finally adopted on 20 November 1989.

The normative value of the CRC is that it is a legally binding instrument that is exclusively devoted to children. Although the ICCPR and ICESCR are applicable to all human beings including children, as Miljeteig-Olssen points out, such fact is generally ‘taken for granted in the minds of authorities, policy-makers’ as well as the public.¹² The Convention is the culmination of struggles and efforts towards the recognition of children as rights-holders and the adoption of a rights-based approach to matters relating to child development, welfare and protection. As subsequent developments in the field of children’s rights, such as the development of Optional Protocols I and II and other regional initiatives, show, the CRC provided the ‘momentum’ for the continued advancement of a children’s rights regime.

⁷ N Cantwell, 1992 (n 3 above) 21.

⁸ N Cantwell, 1992 (n 3 above) 23, In the early period of drafting no more than 30 states participated. See N Cantwell, 1992 (n 3 above) 21.

⁹ C P Cohen, ‘The role of the United States in the drafting of the Convention on the Rights of the Child’ (2006) 20 *Emory International Law Review* 187.

¹⁰ L J LeBlanc, *The Convention on the rights of the child* (University of Nebraska Press, 1995) 33 & 34.

¹¹ L J LeBlanc, 1995 (as above) 35.

¹² P Miljeteig-Olssen, 1990 (n 5 above) 149.

Among 41 substantive articles, articles 20 and 21 of the CRC are of particular importance for the purpose of the thesis. Article 20 of the CRC provides children who are deprived of their family environment with a right to alternative care, and special protection and assistance. The article specifies the children who are entitled to alternative care, and special protection and assistance; it lists possible forms of alternative care; and it sets out the basic principles to be observed during the process of placing children in alternative care. While article 20 provides for alternative care in general, article 21 of the CRC specifically provides for inter-country adoption. Both articles are discussed in detail in the later sections of this chapter.

(ii) 1990 African Charter on the Rights and Welfare of the Child

The ACRWC, which was adopted in 1990, is the most comprehensive regional instrument on children's rights. The ACRWC was created as a response to the CRC to represent an 'African' concept of children's rights.¹³ Although the wording of both instruments is similar in many respects, the ACRWC is designed to reflect 'virtues of the African cultural heritage, historical background and the values of the African civilisation'.¹⁴

Of the 31 substantive articles of the ACRWC, articles 24 and 25 are of particular importance for the purpose of the thesis. Article 24 deals with inter-country adoption and article 25 provides for the right to alternative care, and special protection and assistance to children who are deprived of their family environment or are parentless. The articles are discussed in detail in the later sections.

¹³ D M Chirwa, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157; D Olowu, 'Protecting children's rights in Africa: a critique of the African Charter on Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127.

¹⁴ Preamble of the ACRWC, See A Lloyd, 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: *Raising the gauntlet*' (2002) 10 *International Journal of Children's Rights* 180.

(iii) 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption

The 1993 Hague Convention on Inter-Country Adoption was created in recognition that the dramatic increase in inter-country adoptions caused complex human and legal problems, and because there was insufficient domestic and international law regulating inter-country adoption.¹⁵ The Convention is designed to meet four broad areas of concern: 1) the need to establish legally binding standards regarding inter-country adoption; 2) the need to develop a system of supervision to ensure such principles are respected; 3) the need for the establishment of a channel of communication between the sending country and the receiving country; and 4) the need for cooperation between sending and receiving countries.¹⁶ The aim of the 1993 Convention reinforces four fundamental principles in relation to inter-country adoption: 1) respect for the best interests of the child; 2) ensuring the adoptability of the child; 3) principles of subsidiarity; and 4) the requirement to obtain informed consent from all stake-holders, including the child concerned, if applicable.

The scope of the Convention is limited to adoptions that create a permanent parent-child relationship.¹⁷ Therefore, it is not applicable for transnational foster care, which may be found in emergency situations or transnational *kafalah*. One of the important features of the Convention is that it is also applicable to all cases where competent government authorities (central authorities) have agreed to proceed with adoption before the child turned 18 years old.¹⁸ Therefore, the Convention continues to provide protection to young persons who attained the age of 18 years while waiting for the adoption process to be finalised. In order to ensure that inter-country adoption takes place in accordance with the best interests of the child, the Convention endeavours to prohibit any financial consideration to be involved in any stages of inter-country adoption. Article 4(d)(4) specifically states that payment or compensation of any kind should not be used in inter-country adoption and article 32 emphasises that no

¹⁵ G Parra-Aranguren, *Explanatory report on the Convention on the protection of children in respect of inter-country adoption*, HCCH Publications (1994) available at: <http://hcch.evision.nl/upload/expl33e.pdf>, para 6 [accessed: 24 April 2010].

¹⁶ As above, para 7.

¹⁷ Art 2(2) of the 1993 Hague Convention on Inter-Country Adoption.

¹⁸ Art 3 of the 1993 Hague Convention on the Inter-Country Adoption.

financial gain should be made to any parties involved in inter-country adoption. Article 29 goes as far as prohibiting the meeting of prospective adoptive parents and natural parents of the child before it is determined that the child is ‘adoptable’, unless competent authorities determine otherwise.¹⁹

The Convention also deals with the complicated scenario of a ‘failed adoption’. Article 21 foresees a situation where an adoption is to be finalised in a receiving country after the transfer of a child to the receiving country but the competent authorities determined that the continued placement of the child with the prospective adoptive parents was not in the best interest of the child. Under the Convention, contracting state parties are required to provide temporary care with a view to eventual adoption to a different adoptive parent(s), or if it is not possible, long-term care. The central authority of the sending countries should be informed of all the new development and an adoption to different parents cannot take place until the central authority of the sending countries is fully informed of the new prospective parents. Article 21(2) stipulates that, having regard to the age and degree of maturity of the child, the consent of the child should be obtained in relation to any measures to be taken. The return of the child should take place only as a last resort, if it is in the interests of the child.²⁰

Although the article provides a broad framework of action in the case of ‘failed adoption’, it is not clear on two issues. First of all, the term, ‘long-term care’ is not clearly defined. It is possible that ‘long-term care’ may indicate care in the family environment where possible, but the article is silent on the types of long-term care to be provided. Secondly, as mentioned before, the return of the child should be used as a last resort under the article. The explanatory report on the Convention states that the return of the child should take place only when ‘all measures to find alternative care in receiving countries having been exhausted and any prolonged stay of the child in that state is no longer for his or her welfare and interests’.²¹ The Convention is not

¹⁹ Art 29 of the 1993 Hague Convention on Inter-Country Adoption, unless the adoption is taking place within the family and unless the contact is compliance with the conditions established by the competent authority of the State of origin.

²⁰ Art 21(1)(c) of the 1993 Hague Convention on Inter-Country Adoption.

²¹ G Parra-Aranguren, 1994 (n 15 above) para 371.

clear whether ‘all measures to find alternative care’ may include the institutionalisation of such children. Children would have been awarded stronger protection in such a difficult situation if the wording of the Convention had specified the meaning of ‘long-term care’ and had required that the procedure to place children in alternative care should be assessed a case-by-case basis giving the paramount importance to the best interests of the children. Furthermore, the Convention is silent on other important issues such as the nationality of the child in a ‘failed adoption’ case. Since the child is not formally adopted in the receiving country, he or she does not have the nationality of the receiving county. If the child were to be placed in long-term alternative care in the receiving county, depending the age of the child, it may be advisable that there is an established procedure to naturalise the child when he or she is old and mature enough to give informed consent regarding the issue.

Despite remaining gaps in the 1993 Convention, it is an important instrument regulating the complex procedure of inter-country adoption with an aim to protect children’s rights before and during the process of inter-country adoption. The 1993 Convention is particularly relevant for Africa as an increasing number of children are being deprived of their parental care and family environment in the context of the HIV epidemic and inter-country adoption is increasingly regarded as one of the ways to provide permanent care to children.²² The CRC Committee, recognising its importance on safeguarding children’s rights in the inter-country adoption process, on numerous occasions urged states, including African states, to ratify the 1993 Hague Convention.²³

²² See B D Mezmur, ‘Inter-country adoption as a measure of last resort in Africa: Advancing rights of a child rather than a right to a child’ (2009) 6/10 *Sur-International Journal on Human Rights* 83.

²³ Concluding observation of the CRC: Equatorial Guinea (CRC/C/15/Add.245: 3 Nov 2004) para 43; Concluding observation of the CRC: Gabon (CRC/C/15/Add.171: 3 April 2007) para 38(e); Concluding observation of the CRC: The Gambia (CRC/C/15/Add.165: The Gambia) para 39; Ghana (n 18 above) para 43; Concluding observation of the CRC: Senegal (CRC/C/SEN/CO/2: 20 Oct 2006) para 35(b); Concluding observation of the CRC: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006) para 43; Togo (n 18 above) para 43; Concluding observation of CRC: Tanzania (CRC: CRC/C/TZA/CO2) para 38; Concluding observation of the CRC: Rwanda (CRC/15/Add. 234) para 43; Concluding observation of CRC: Nigeria (CRC/C/15/Add.257: 13 April 2005) para 43(e); Concluding observations of CRC: Malawi (CRC/C/15/Add.174: 2 April 2002) para 40(e); Concluding observation of the CRC: Benin (CRC/C/BEN/CO/2: 20 Oct 2006) para 45(c); Concluding observation of CRC: Botswana (CRC/C/15/Add.242: 3 Nov 2004) para 43(b); Concluding observation of CRC: Central African Republic (CRC/C/15/Add.138: 18 Oct 2000) para 51; Concluding observation of the CRC: Cameroon (CRC/C/15/Add.164: 6 Nov 2001) para 39(c); Concluding observation of CRC: Cape Verde (CRC/C/15/Add.168: 7 Nov 2001) para 42;

3.2.2 Soft law

Apart from the CRC and the ACRWC, there are international declarations, guidelines and General Comments to help states to understand their obligations under the treaty provisions. There are three important soft laws for the purpose of the thesis: (i) 1986 UN Declaration on the Social and Legal Principles relating to the Protection and Welfare of the Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; (ii) 2003 CRC General Comment on HIV/AIDS and the rights of the child; and (iii) 2009 UN Guidelines for the Alternative Care of Children. In the following section, each of the instruments are discussed and examined to give fuller analysis to the relevant articles of the CRC and the ACRWC.

(i) 1986 UN Declaration on Foster Care and Adoption

The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally (the Declaration on Foster Care and Adoption) was adopted in 1986 by the UN General Assembly to provide a set of principles to be respected in foster and adoption placement. The Declaration, which is based on existing international human rights instruments, firmly asserts that children need to grow up in the care and under the responsibility of their own parents and in ‘an atmosphere of affection, of moral and material security’.²⁴ In line with article 9 of the CRC, which affirms that children should not be separated from their parents unless such separation is in the best interest of the child, the Declaration restates that the parental care should be given priority.²⁵ It is only when parental care is unavailable or inappropriate, that foster care, adoption

The Republic of the Congo (CRC/C/COG/CO/1: 20 Oct 2006) para 4; Concluding observation of CRC: Ethiopia (CRC/C/ETH/CO) para 49(c); CRC Concluding observation: Ethiopia (CRC/C/15/Add.144) para 43; Concluding observation of CRC: Zambia (CRC/C/15/Add.206: 2 July 2003) para 43; Concluding observation of the CRC: Burkina Faso (CRC/C/15/Add.193: 9 Oct 2002) para 35; Concluding observations of CRC: Djibouti (CRC/C/15/Add.131: 28 June 2000) para 38; Concluding observation of CRC: Madagascar (CRC/C/15/Add.218: 27 Oct 2003) para 44; Concluding observation of CRC: Sierra Leone (CRC/C/15/Add.116: 24 Feb 2000) para 53. Currently, only 10 countries in Africa have ratified the Convention. Those countries include Burkina Faso, Burundi, Cape Verde, Guinea, Kenya, Madagascar, Mali, Mauritius, Seychelles, South Africa and Togo as of July 2010.

²⁴ Preamble of the 1986 UN Declaration on Foster Care and Adoption.

²⁵ Art 3 of the 1986 UN Declaration on Foster Care and Adoption.

or, if necessary, care in institutions should be considered.²⁶ However, despite the importance of prioritising parental care, the Declaration does not contain provisions requiring states to provide appropriate support and assistance to the parents of children who, without such assistance and support, may not be able to provide adequate care.

Importantly, article 5 of the 1986 UN Declaration on Foster Care and Adoption states that the best interest of the children should be *the* paramount consideration in *all* matters relating to the placement of a child outside of their family environment.²⁷ In the CRC, although the best interest of the child is one of the pillars of the Convention, the obligation to give ‘*the* paramount consideration’ to the best interests of the child is only mentioned in relation to article 21 on inter-country adoption.

Another important feature of the 1986 UN Declaration is article 16, which stipulates that the relationship between the child to be adopted and the prospective adoptive parents should be observed by child welfare agencies or services prior to the adoption. Although the wording of the article does not indicate domestic or inter-country adoption, the absence of the differentiation could be interpreted to encompass both domestic and inter-country adoption. Article 16 should be read together with article 14 of the Declaration, which provides that in considering possible adoption placements, persons responsible for them should select *the most appropriate environment* for the child.²⁸ Observing interactions between the child to be adopted and the prospective adoptive parents may be an important element in determining the most appropriate environment. Furthermore, it may be particularly useful if the child is old enough to express his or her views and wishes with regard to the prospective adoption. It may be noted that there is no similar observation requirement for foster care placements. Subjecting only adoption to such requirement can be explained by the permanency of adoption. Unlike foster care, which is subject to a regular monitoring and evaluation on which basis the placement can be revoked, adoption is permanent and is not subject to a regularly monitoring and evaluation. Naturally, due

²⁶ Art 4 of the 1986 UN Declaration on Foster Care and Adoption.

²⁷ Art 5 of the 1986 UN Declaration on Foster Care and Adoption. The emphasis is mine.

²⁸ Art 14 of the 1986 UN Declaration on Foster Care and Adoption. The emphasis is mine.

to the permanent nature of adoption, more rigorous checks and evaluations of adoptive parents may be required prior to adoption. However, considering that children in foster care may also be vulnerable to abuse and maltreatment by their foster parents, or that children may not be fit in their foster care environment for various reasons, the opportunity for the children to meet and interact with their potential foster parents may help reducing instances of breakdown of foster placements.

(ii) 2003 General Comment and relevant recommendations from the 2005 General Day of Discussion

The issue of children who are deprived of their family environment has been mentioned by the CRC Committee on several occasions since 1998. However, it was only in the 2005 General Day of Discussion that the CRC Committee led a substantial discussion on the children who are deprived of their family environment. In this section, the recommendations and comments by the CRC Committee on children in need of alternative care are discussed chronologically.

In 1998, the CRC Committee held a General Discussion Day on the theme of the rights of children in the context of HIV and AIDS. The focus of the discussion was centred on five themes: 1) identifying and understanding the impact of the HIV epidemic on children; 2) promoting the rights of children, especially non-discrimination and participation in the context of the epidemic; 3) identifying best practices in prevention of HIV and care of children affected and infected by HIV; 4) promotion of child-oriented policies, strategies and programmes; 5) promotion of the national strategic plans and policies on children based on international guidelines on human rights and HIV/AIDS.²⁹ The CRC Committee emphasised the importance of adopting a holistic rights-based approach to HIV and AIDS related policy and programmes and stressed the importance of making better use of the existing legal framework on children's rights.³⁰ Although not binding, the 1998 General Discussion was important for promoting children's rights in the context of HIV and AIDS as

²⁹ CRC Committee, General Day of Discussion on Children Living in a World with HIV/AIDS, CRC/C/80 (1998) para 213.

³⁰ CRC Committee, 1998 (as above) paras 227-228.

many influential bodies, including UNICEF, UNAIDS and UNDP, were gathered together to discuss children's issues in the context of the HIV epidemic from a children's rights perspective. Nevertheless, the discussion gave little attention to children who are orphaned by AIDS, except to recommend that strategies to address the 'growing number of orphans that the epidemic was causing must target all orphans in the community.'³¹

Following from the 1998 discussion, in 2003, the CRC Committee developed a general comment on children's rights in the context of the HIV epidemic. The Committee advocated that a holistic child rights-based approach be employed in all HIV and AIDS responses and strategies including the distribution of information on HIV-prevention, HIV counselling and testing, mother-to-child-transmission, and HIV/AIDS research programmes.³² Importantly, the Committee also took the opportunity to raise concern over the increasing number of children who are orphaned by AIDS. With regard to children who are orphaned by AIDS, the CRC Committee emphasised six issues: 1) The Committee further recommended that children orphaned by AIDS and children from affected families, including child-headed households, be given special attention and emphasised the importance of providing legal, economic and social protection to affected children;³³ 2) the Committee emphasised the importance of birth registration for children affected by HIV/AIDS;³⁴ 3) the Committee urged states to ensure the inheritance and property rights of children who are orphaned are protected;³⁵ 4) the Committee recognised the important role played by extended families and communities in providing care to children who are orphaned by AIDS and urged states to provide the necessary assistance to extended families taking care of such children;³⁶ 5) it emphasised that children should grow up in a family environment and recommended that states provide, as far as possible,

³¹ CRC Committee, 1998 (as above) para 227.

³² CRC Committee, General Comment No 3 (2003) HIV/AIDS and the rights of the child, CRC/GC/2003/3, para 5.

³³ CRC Committee, 2003 (as above) para 31.

³⁴ CRC Committee, 2003 (as above) para 29.

³⁵ CRC Committee, 2003 (as above) para 32.

³⁶ CRC Committee, 2003 (as above) para 33.

family-type alternative care;³⁷ and 6) the Committee stated that institutionalised care should be used as a measure of last resort and measures of protection against all forms of abuse and exploitation should be put in place.³⁸

Although it was not the first time that the CRC Committee raised the issue of child-headed households,³⁹ the specific mentioning of child-headed households in a general comment was significant as it acknowledged the existence of and precarious situations of child-headed households. Nevertheless, the Committee merely *encouraged* states to provide support, ‘financial and otherwise, when necessary’ to child-headed households. It is unfortunate that the CRC Committee did not issue a stronger statement requiring states to reduce or prevent the occurrence of child-headed households or requiring states to commit maximum assistance to such households if the formation of such household is unavoidable.

In 2005, the CRC Committee devoted its Day of General Discussion to ‘children without parental care’. During the discussion, there were several concerns raised, including the increasing number of children who are separated from their parents and who are placed in institutions, and the lack of data on children in informal care or children who are without care, such as street children.⁴⁰ The Committee emphasised the importance of preventing children from being separated from their parents by

³⁷ CRC Committee, 2003 (as above) para 34.

³⁸ CRC Committee, 2003 (as above) para 35.

³⁹ The CRC Committee noted the increasing number of child-headed households on numerous occasions: CRC Concluding Observation: South Africa (CRC/15/Add.122: 22 Feb 2000); Concluding observations of CRC: Burundi (CRC/C/15/Add.133: 16 Oct 2000); Concluding observations of the CRC: DRC (CRC/C/15/Add.153: 9 July 2001); Concluding observations of the CRC: Lesotho (CRC/15/Add.147: 21 Feb 2001); Concluding observations of the CRC: Lesotho (CRC/15/Add.147: 21 Feb 2001); Concluding observation of CRC: Zambia (CRC/C/15/Add.206: 2 July 2003); Concluding observation of CRC: Uganda (CRC/C/UGA/CO/2: 23 Nov 2005); Concluding observation of CRC: Ethiopia (CRC/C/ETH/CO/3); CRC CO: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006); Concluding observations of CRC: Kenya (CRC/C/KEN/CO/2: 2007); Concluding observation of CRC: Eritrea (CRC/C/ERI/CO/3: 2008); Concluding observations of CRC: Malawi (CRC/C/MWI/CO/2: 2009); Concluding observations of CRC: Mauritania (CRC/C/MRT/CO/2: 2009); and Concluding observations of CRC: Mozambique (CRC/C/MOZ/CO/2: 2009). The CRC Committee urged the states to reduce and prevent the occurrence of child-headed households (South Africa) and recommended all necessary measures to assist such households (Lesotho, Zambia, Kenya, Uganda, Ethiopia, Swaziland, Mauritania and Eritrea).

⁴⁰ CRC Committee, Day of General Discussion: children without parental care, 12-30 September 2005, CRC/C/153 paras 654 & 681.

providing appropriate support and assistance to parents.⁴¹ In case the separation is unavoidable, family-type alternative care should be given a priority.⁴² The Committee's recommendation to develop an international standard on protection and care of children without parental care led to the development of the 2009 UN Guidelines for the Alternative Care of Children, which is discussed below.⁴³ Although it is important that the Committee has devoted its day of general discussion to the issue of children who are in need of alternative care, it is regrettable that children who are affected by the HIV epidemic have received only scant mention in the discussion. While children who are affected and infected by HIV are described as 'especially vulnerable children',⁴⁴ the issue of the increasing number of children who are deprived of their family environment in the context of the HIV epidemic, including children in child-headed households, was not discussed in detail. Nevertheless, the Committee recognised the importance of children growing up in their own community and recommended that the most vulnerable families in the community should be supported, so that alternative measures to institutionalised care could be found within the community.⁴⁵

(iii) 2005 Council of Europe Recommendation on the Rights of Children Living in Residential Care

The Council of Europe Recommendation on the Rights of Children Living in Residential Care was adopted by the Committee of Ministers on 16 March 2005 to further protect the rights of children in residential care. While the 2005 Recommendation recognises the family as a natural environment for children to grow up, the Council of Europe Recommendations foresees that in some cases, residential care of children might be necessary. The Recommendation provides for the basic principles of providing out-of-home care to children and the standards of care in institutions as well as the rights of children in residential care.

⁴¹ CRC Committee, 2005 (as above) para 649.

⁴² CRC Committee, 2005 (as above) para 665.

⁴³ CRC Committee, 2005 (as above) para 649.

⁴⁴ CRC Committee, 2005 (as above) para 670.

⁴⁵ CRC Committee, 2005 (as above) para 674.

An important feature of the Recommendation is that it is very comprehensive. It provides basic principles and guidelines regarding the determination to place children in residential care, standards of care in residential care, including the rights of children in residential care, and aftercare provisions. It clearly sets out that the primary objectives of residential care are the protection of the best interests of the child and to enable the child to integrate or re-integrate as soon as possible into society. In order to achieve the successful integration of the child into society, the Recommendation provides for appropriate aftercare support to children leaving institutions. It also provides that an individual care plan should be designed to prepare children for living outside the institution in the future. These are very important elements as the ultimate goal of any alternative care including residential care is to prepare children for a smooth transition from childhood to independent adulthood.

The Recommendation further recognises the important role played by private bodies, such as NGOs or faith-based organisations, in providing residential care. Nonetheless, it holds states responsible for the standard of care provided by private bodies. In order to ensure the requisite standard of care, the Recommendation requires that all residential care facilities be accredited and registered with the competent public authorities and stipulates the establishment of an efficient system of monitoring and external control of residential institutions. It further provides that children have the right to submit complaints to an identifiable, impartial and independent body. Enabling children in residential care to lodge complaints is essential as there is a high risk of abuses and maltreatment of these children going unnoticed.⁴⁶ However, the Recommendation does not specify how such body will operate, including the procedure through which children can make complaints, especially for younger children, or how the complaints will be examined and dealt with once the allegations are found to be correct. Although the basic principles of the Recommendation clarify that residential care should only be used as a last resort for the shortest possible period, it does not specifically address the development needs of children under five and how such young children can be cared for in a residential setting.

⁴⁶ See, C Csaky, *Keeping children out of harmful institutions*, Save the Children UK (2009).

The Council of Europe Recommendation is a regional instrument and only applicable to member states of the Council of Europe. However, it serves as an important example to other regions, especially in Africa, where the CRC Committee often observed the frequent resort to institutionalised care.⁴⁷ Although all the rights enshrined in the CRC are equally applicable to children in residential care, the specific needs and vulnerability of such children justify the reiteration of certain rights more specific to their situation.

(iv) 2009 UN Guidelines for the Alternative Care of Children

In 2004, UNICEF and International Social Service (ISS),⁴⁸ in its working paper on children without parental care, called for the development of international guidelines on the alternative care for children without parental care.⁴⁹ In the paper, ISS and UNICEF raised concerns over, among other aspects, the inappropriate use of

⁴⁷ Concluding Observation of the CRC: Equatorial Guinea (CRC/C/15/Add.245: 3 Nov 2004) para 38, although the Committee welcomes the existence of institutions to accommodate increasing number of children who are orphaned but it emphasises that institutionalised care should be a temporary measure of last resort; Concluding observation of the CRC: Eritrea (CRC/C/15/Add.204: 2 July 2003) para 35; Concluding Observation of the CRC: Lesotho (CRC/C/15/Add.147: 21 Feb 2001) para 37; Concluding Observation of the CRC: Gabon (CRC/C/15/Add.171: 3 April 2007) para 37; Concluding observations of the CRC: The Gambia (CRC/C/15/Add.165: The Gambia) para 36; Concluding observation of the CRC: Guinea Bissau (CRC/C/15/Add.177: 13 June 2002) para 32(a) & 32(b); Concluding observation of the CRC: Senegal (CRC/C/SEN/CO/2: 20 Oct 2006) para 32; Concluding observation of the CRC: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006) para 40; Concluding Observation of the CRC: South Africa (CRC/C/15/Add.122: 22 Feb 2002) para 25; CRC Concluding observation: Rwanda (CRC/C/15/Add. 234) para 40; Concluding observation of CRC: Nigeria (CRC/C/15/Add.257: 13 April 2005) para 42; Concluding observation of CRC: Mali (CRC/C/MLI/CO/2: 3 May 2007) para 41; Concluding Observation of the CRC: Malawi (CRC/C/15/Add.174: 2 April 2002) para 39; Concluding observation of CRC: Angola (CRC/C/15/Add.246: 3 Nov 2004) para 34; Concluding observation of CRC: Benin (CRC/C/BEN/CO/2: 20 Oct 2006) para 42; Concluding Observation of the CRC: Central African Republic (CRC/C/15/Add.138: 18 October 2000) para 48; Concluding observation of CRC: Cameroon (CRC/C/15/Add.164: 6 Nov 2001) para 38; Concluding observation of CRC: Liberia (CRC/C/15/Add.236: 1 July 2004) para 40(a) & (b); Concluding observation of CRC: Mozambique (CRC/C/15/Add.172: 3 April 2002) para 44(a) & (b); Concluding Observation of the CRC: Niger (CRC/C/15/Add. 159: 13 June 2002) para 40; Concluding Observation of the CRC: Sudan (CRC/C/15/Add.190: 9 October 2002) para 41; Concluding observation of CRC: Uganda (CRC/C/UGA/CO/2: 23 Nov 2005) para 41; Concluding observations of CRC: Djibouti (CRC/C/15/Add.131: 28 June 2000) para 35.

⁴⁸ International Social Service (ISS) is an international organisation operating in 140 countries in the world providing legal advices and services to governments and organisations working with children in alternative care placements. See <http://www.iss-ssi.org/2009/index.php?id=1> [accessed: 3 June 2010].

⁴⁹ ISS & UNICEF, 'Improving protection for children without parental care: a call for international standard' (August 2004).

alternative care, the lack of protection of children in informal care, the lack of support to child-headed households and inadequate planning for the future of children in alternative care, and called for the development of comprehensive guidelines on standard of care for children in alternative care placements.⁵⁰ In response to the call, during the Day of General Discussion on children without parental care, the CRC Committee recommended that guidelines be developed to improve the implementation of article 20 of the CRC.⁵¹ The initial draft was developed by an NGO working group, which was then submitted to the CRC Committee for further revision and comments.⁵² In the following consultation stage, governmental bodies were encouraged to participate.⁵³ In August 2006, an inter-governmental meeting, a ‘Group of Friends’ led by the government of Brazil, was held in Brasilia to further develop the draft.⁵⁴ The broad-based consultation continued between 2007 and 2009, including a consultation meeting in Cairo hosted by the League of Arab States, a high panel discussion at the Human Rights Council and a series of intergovernmental consultations in early 2009.⁵⁵ The Guidelines were approved by the UN General Assembly on 20 November 2009.⁵⁶

The UN Guidelines for the Alternative Care of Children aim to assist and encourage governments to better implement their responsibilities and obligations under the broader framework of the CRC in relation to providing alternative care to children. It aims to clarify ‘less clear areas’ of the CRC framework, as identified by Cantwell: (1) the relationship between ‘parental care’ and ‘alternative care’; (2) the obligations regarding ‘informal’ or ‘kinship’ care; (3) the application of the best interests of the child; (4) the goals of ‘alternative care’; and (5) the concepts of ‘suitability’ and

⁵⁰ ISS & UNICEF, 2004 (as above).

⁵¹ International Social Service factsheet on Guidelines for the Alternative Care of Children, available at: <http://www.iss-ssi.org/2009/assets/files/guidelines/Factsheet%20Guidelines%20Nov%202009.pdf> [accessed: 23 April 2010].

⁵² As above.

⁵³ As above.

⁵⁴ As above.

⁵⁵ As above.

⁵⁶ As above.

‘necessity’ in relation to alternative care placement.⁵⁷ It also deals with several contentious issues, such as the role of state in informal care; recognition of child-headed households; providing care to children of mothers in prison; the hierarchy of care options; residential care for under-3’s and de-institutionalisation.⁵⁸ Nevertheless, as Cantwell pointed out, there are issues that still needed to be clarified including the definition of ‘family’ and the question of the form in which to recognise child-headed households.⁵⁹

General principles of the Guidelines

The UN Guidelines are clear that alternative care should be used only when it is absolutely necessary and only in suitable forms to meet the individual needs of children.⁶⁰ One of the general principles of the Guidelines is to provide appropriate support measures to families to minimise resort to alternative care.⁶¹ Paragraph 5 of the Guidelines clarifies that only when ‘the child’s own family is unable, even with appropriate support, to provide adequate care for the child’, does the state assume the responsibility over that child. The role of the state with regards to children who cannot be cared for in their own family environment include: 1) ensuring appropriate alternative care; 2) ensuring supervision of the safety, well-being and development of any child placement in alternative care, and 3) regularly reviewing the appropriateness of the care arrangement provided.⁶² The Guidelines emphasise the importance of applying principles of children’s rights in all course of actions for children deprived of parental care, or at risk of being so deprived, and require all decisions regarding alternative placement to be made on a case-by-case basis.⁶³

⁵⁷ N Cantwell, Note on presentation at the Better Care Network (22 May 2008); N Cantwell, note on presentation at the Quality4Children European Congress, Austria (1-2 June 2005).

⁵⁸ 2009 UN Guidelines for the Alternative Care of Children; also pointed out by N Cantwell, 2005 (as above).

⁵⁹ As above).

⁶⁰ As above.

⁶¹ Para 8 of the UN Guidelines for the Alternative Care of Children.

⁶² Para 5 of the UN Guidelines for the Alternative Care of Children.

⁶³ Para 6 of the UN Guidelines for the Alternative Care of Children.

Understanding 'alternative care'

One of the important features of the Guidelines is that it provides a broad definition of alternative care. Paragraph 28(b) of the Guidelines acknowledges that alternative care could be informal or formal care. *Informal care* is defined as 'any private arrangement provided in a family environment, whereby the child is looked after on an on-going or indefinite basis by relatives or friends or by others in their individual capacity' without the involvement of administrative or judicial authority or a duly accredited body.⁶⁴ It does not include care in private facilities. *Formal care* is defined as all care provided in a family environment, which has been ordered by an administrative or judicial authority, and all care provided in a residential environment including care in private facilities. Residential care provided in an unregistered children's home is included in formal care. In other words, 'informal care' can only be provided in a family environment and, therefore, it may be termed as 'informal family care'.

The Guidelines categorise five different forms of alternative care: 1) kinship care, defined as 'family-based care within the child's extended family or with close friends of the family known to the child' whether informal or formal;⁶⁵ 2) foster care, defined as 'situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care';⁶⁶ 3) other forms of family-based or family-like care placements;⁶⁷ 4) residential care;⁶⁸ and 5) supervised independent living arrangements for children.⁶⁹

It may be noted that 'supervised independent living arrangements for children' does not necessarily include a 'child-headed' or 'sibling-headed household'.⁷⁰ Paragraph

⁶⁴ Para 28(b) of the UN Guidelines for the Alternative Care of Children.

⁶⁵ Para 28(c)(i) of the UN Guidelines for the Alternative Care of Children.

⁶⁶ Para 28(c)(ii) of the UN Guidelines for the Alternative Care of Children.

⁶⁷ Para 28(c)(iii) of the UN Guidelines for the Alternative Care of Children.

⁶⁸ Para 28(c)(iv) of the UN Guidelines for the Alternative Care of Children.

⁶⁹ Para 28(c)(v) of the UN Guidelines for the Alternative Care of Children.

⁷⁰ In a correspondence with Ms M Dambach, Children's rights specialist, International Social Service, she stated that child-headed households did not fall under the independent living

36 of the Guidelines, under Part IV (entitled ‘Preventing the need for alternative care’) states that ‘support and services should be available to siblings who have lost their parents or caregivers and choose to remain together in their household, to the extent that the eldest sibling is both willing and deemed capable of acting as the household head.’ The fact that the requirement to support sibling-headed household is included under the prevention of the need for alternative care suggests that ‘sibling-headed households’ are primarily viewed as a form of family rather than as a form of alternative care.

Considering that ‘kinship’ is primarily defined as a ‘blood relation’,⁷¹ the inclusion of ‘the care by close friends of the family previously known to the child’ as ‘kinship care’ seems to be rather broad. The main concern of adopting a broad definition is that ‘kinship care’, whether it is informal or formal, is favoured over other forms of care on the assumption that children are better taken care of by their extended family members. However, informal care by unrelated friends of the family may put children at risk of being maltreated and abused in their care for several reasons. Firstly, informal care is harder to regulate and monitor than formal care. Secondly, other family members may be more willing to intervene in the cases of maltreatment or abuse of the child when the caregiver is also a member of the family. Finally, close friends of the deceased parents of the children may or may not be known to other members of the extended family, especially when the family had moved away from their community. Therefore, there should be adequate protection measures to protect children in all forms of informal kinship care, especially informal kinship care provided by unrelated individuals. The issue is further discussed in the following.

Protection of children in informal care

The Guidelines recognise the importance of informal care as a form of alternative care placement and require states to recognise the *de facto* responsibility of informal carers

arrangement for children but were considered as a form of kinship care. (27 April 2010). This point will be discussed further in section 3.4 and 3.5 below.

⁷¹ S Roalkvam, ‘The children left to stand alone’ (2005) 4/3 *African Journal of AIDS Research* 214.

for the child.⁷² Under paragraph 78, states are obliged to devise special and appropriate measures to protect children in informal care, especially children in informal care provided by non-relatives, or by relatives previously unknown to the children or living far from the children's habitual place of residence. The Guidelines further require states to encourage and enable informal caregivers to formalise the care arrangement after 'a suitable lapse of time, to the extent that the arrangement has proved to be in the best interests of the child and is expected to continue in the foreseeable future'.⁷³ The wording seems to suggest that if the particular informal care arrangement is not in the best interests of the child, the child should be provided with a different form of care arrangement. Furthermore, if the informal arrangement is for a short term, it is not required to formalise the care arrangement.

Although it is important that the Guidelines formally recognise the role played by informal caregivers and the need to provide stronger protection to children in informal care, it may be desirable that the Guidelines provided a stronger emphasis on the formalisation of informal care arrangements. The Committee on numerous occasions expressed its concern over the prevalence of informal care and the difficulty of monitoring and regulating such care arrangement.⁷⁴ The Guidelines only require states to 'encourage' informal care arrangements to be formalised. Arguably, the Guidelines would have provided better protection for children in informal care, if it were legally required that informal care arrangement be formalised after a certain lapse of time.

⁷² Paras 55 & 77 of the UN Guidelines for the Alternative Care of Children.

⁷³ Para 55 of the UN Guidelines for the Alternative Care of Children.

⁷⁴ Concluding Observation of the CRC: Comoros (CRC/C/15/Add.141: 2000) para 30; Concluding Observation of the CRC: The Gambia (CRC/C/15/Add.165: 2001) paras 38-39; Concluding Observation of the CRC: Algeria (CRC/C/15/Add.269: 2005) para 45; Concluding Observation of the CRC: Burundi (CRC/C/15/Add.133: 2000) para 26; Concluding Observation of the CRC: South Africa (CRC/C/15/Add.122:2001) para 43; Concluding Observation of the CRC: Tanzania (CRC/C/15/Add.156: 2002) para 32; Concluding Observation of the CRC: Guinea-Bissau (CRC/C/15/Add.177: 2004) para 43; Concluding Observation of the CRC: Rwanda (CRC/C/15/Add.234: 2004) para 43; Concluding Observation of the CRC: Niger (CRC/C/15/Add.173: 2002) para 43; and Concluding Observation of the DRC (CRC/C/15/Add.153: 2001) para 45.

Provisions on aftercare

Another striking feature of the 2009 UN Guidelines is the inclusion of provisions on aftercare. Paragraph 130 clarifies the ultimate aim of alternative care as the preparation of children to assume self-reliance and their full integration into the community. The Guidelines emphasise the importance of planning for the aftercare as early as possible to ensure an appropriate continuum of appropriate support for youth leaving alternative care. The Guidelines stipulate that ongoing education and vocational training opportunities and access to social, legal and health services should be provided to young adults leaving care or during aftercare. However, the possible duration of the aftercare period and the criteria to determine discontinuation of aftercare are not specified in the Guidelines.

The UN Guidelines for the Alternative Care of Children are an ambitious attempt to facilitate the implementation of state obligations under the CRC towards children who are deprived of their family environment. They do not only fill gaps in the CRC framework but, based on the framework, venture into issue areas that have not been previously considered, most notably by providing a continuum of care to young persons leaving alternative care placement, who are no longer protected under the CRC due to the age limit. The 2009 UN Guidelines are both a useful tool to determine state obligations under the CRC in relation to children in alternative care and a checklist against which a domestic legal and policy regarding children in alternative care can be assessed. However, in the area of child-headed households, the Guidelines would have taken a stronger position in defining, recognising and supporting such households. Although the Guidelines require states to provide support and assistance of child-headed households, they neither provide details of what criteria should be used to determine if children can form and remain in child-headed households, nor clearly define child-headed households. In the following section, the scope and contents of the articles of the CRC and the ACRWC on children who are deprived of their family environment are analysed against the background of the above cited instruments.

3.3 Articles 20 of the CRC and 25 of the ACRWC: Analysis

Articles 20(1) of the CRC and 25(1) of the ACRWC clearly establish that children who are deprived of their family environment and parental care are entitled to special protection and assistance.⁷⁵ The further sub-articles, articles 20(2) of the CRC and 25(2)(a) of the ACRWC, specifically provide for the state obligation to provide alternative care to such children and articles 20(3) of the CRC and 25(3)(a) of the ACRWC provide a non-exhaustive list of examples of alternative care.

In the following sections, the two articles will be analysed in detail and the differences of wordings in the two articles will be highlighted. Although the focus of the analysis is articles 20 of the CRC and 25 of the ACRWC, other closely related articles, such as the provisions dealing with inter-country adoption and periodic monitoring of the children in placement will be included in the discussion. The principles and guidelines

⁷⁵ Art 20 of the CRC reads:

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

Art 25 of the ACRWC reads:

1. Any child who is permanently or temporarily deprived of his family environment for any reasons shall be entitled to special protection and assistance;
2. State parties to the present Charter:
 - (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;
 - (b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.
3. When considering alternative family care of children and the best interest of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

developed in international instruments mentioned in section 3.2 further inform much of the discussion.

3.3.1 Understanding ‘family’ and ‘family environment’

The concepts of ‘family’ and ‘family environment’ are central to understanding the scope of the right to alternative care, and special protection and assistance. However, the lack of a ‘treaty definition of family’⁷⁶ may cause problems when there is a need to interpret the concept of ‘family’. Article 20(1) of the CRC provides that ‘a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.’⁷⁷ In order to determine what the term ‘family environment’ constitutes, the concept of ‘family’ should be clearly understood. Furthermore, under article 25 of the ACRWC, states are required to provide ‘alternative family care’ when children are deprived of their natural family environment.⁷⁸ What is considered as ‘family environment’ may not be legally recognised as such. For instance, should homosexual couples be allowed to foster or adopt children as they can provide a ‘family environment’? In South Africa, where a marriage between homosexual persons is legally recognised, the answer would be positive.⁷⁹ However, many other African states where homosexual acts are criminalised,⁸⁰ it may be unthinkable that such couple can be considered as suitable foster parents or prospective adoptive parents who are able to provide ‘family-type’ care. For instance, in Ghana and Southern Sudan, adoption of foster care by same sex couple is explicitly prohibited.⁸¹

⁷⁶ G Van Bueren, *The International law of the rights of the child*, Martinus Nijhoff (1995) 68.

⁷⁷ Art 20 of the CRC.

⁷⁸ Art 25 of the ACRWC. (The emphasis on the text is mine.)

⁷⁹ *Minister of Home Affairs and Another v Fourie and Another*, CCT 60/04, 2006 (3) BCLR 355 (CC); *Lesbian and Gay Equality Project and others v Minister of Home Affairs and others*, CCT/10/05, 2006 (3) BCLR 355 (CC). Civil Union Act No 17 of 2006.

⁸⁰ All but 12 countries in Africa criminalise same sex relationship and only South Africa legally recognises same sex marriage in Africa. For more information, see http://en.wikipedia.org/wiki/LGBT_rights_by_country_or_territory [accessed: 1 June 2010].

⁸¹ Adoption by same-sex couples is prohibited in Ghana. For more information, see <http://adoption.state.gov/country/ghana.html> [accessed: 1 June 2010]; Sec 73(3)(c) and sec 83(3)(c) of the Child Act No 10 of 2008, Southern Sudan.

Understanding the concept of ‘family’ and ‘family environment’ is also crucial to addressing the question related to children in child-headed households. The need to interpret the concept requires the establishment of criteria to determine the existence of ‘family.’ A set criterion may prevent states from loosely interpreting their treaty obligations by providing sub-standard ‘family’ care or by giving the legal status of ‘family’ to child-headed households, which are not prepared to function as a ‘family’, thereby, excluding those children from benefiting under the right to special protection and assistance. In the following sections, the concepts of ‘family’ and ‘family environment’ are discussed in different dimensions, such as structural and subjective dimensions of a ‘family’ and ‘family environment’.

(i) Culturally diverse understanding of family

The concept of ‘family’ varies from one society to another. The family is a fundamental unit of a society, but determining what constitutes a ‘family’ is one of the most complicated socio-anthropological as well as legal questions. As Holy points out, many anthropological writings use the term ‘family’ without offering a clear definition.⁸² The concept is fundamental, yet culturally diverse; readers are left to understand that it is based on their own cultural experience.⁸³ The term ‘family’, as Allan and Crow suggest, is used ‘routinely, normally without any need for reflection or self-awareness.’⁸⁴ Although the term itself may not offer much controversy, the ambiguous everyday usage of the sociological term could pose a problem when trying to analyse issues related to family.⁸⁵

(ii) Structural understanding of a ‘family’

In 1949, Murdock came up with one of the most cited and best-known definitions of family.⁸⁶ In his study, Murdock defines ‘family’ as a ‘social group characterised by

⁸² L Holy, *The Anthropological perspective on kinship*, Pluto Press (1998) 52.

⁸³ L Holy, 1998 (as above) 52.

⁸⁴ G Allan & G Crow, *Families, households and society*, Palgrave (2001) 1; also see G P Murdock, *Social structure*, The Macmillan company (1949) 1.

⁸⁵ G Allan & G Crow, 2001 (as above) 1.

⁸⁶ A F Steyn, *Family structures in the RSA*, Co-operative research programme on marriage and family life, HSRC (1994) 5.

common residence, economic cooperation and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults.⁸⁷ Needless to say, since 1949, Murdock's concept of family has changed dramatically both in anthropology and law. Even the slightly broader definition of 'family' as 'a small kinship-structured group with the key function of nurturing socialisation'⁸⁸ begs the question as how to understand the term 'kinship.' Given that 'kinship' is largely understood as 'blood relations',⁸⁹ the definition leaves out families that may not necessarily be based on blood ties, such as conjugal families.

Despite the fact that the concept of family lacks not only an anthropological definition, but also a clear legal definition,⁹⁰ various human rights instruments uphold the family as 'the natural and fundamental group' and grant protection by the society and states.⁹¹ However, the difficulty, if not impossibility, of adopting a universal definition of the term, has often been noted. The Human Rights Committee (HRC) observes, without offering a definition, that the term 'family' should be given 'a broad interpretation to include all those comprising the family as understood in the society of the state party concerned.'⁹² This sentiment is also reflected in *Hopu and Bessert v France*, where the Committee observed:⁹³

⁸⁷ G P Murdock, 1949 (n 84 above) 1.

⁸⁸ I L Reiss offered the definition in an attempt to include all possible family structures. Cited in A F Steyn, 1994 (n 86 above) 5.

⁸⁹ See <http://oxforddictionaries.com/definition/kinship> [accessed: 30 June 2010]; <http://dictionary.cambridge.org/topics/family-relations-in-general/definition-of-kinship> [accessed: 30 June 2010].

⁹⁰ Family is defined as: 1) A group of persons connected by blood, by affinity, or by law, especially within two or three generations; 2) A group consisting of parents and their children; 3. A group of persons who live together and have a shared commitment to a domestic relationship. See B A Garner (ed), *Black's Law Dictionary*. However, these definitions are too general and broad to be applied without further interpretation.

⁹¹ Art 23 (1) of the ICCPR; Art 17(1) of the American Convention on Human Rights; Art 16 of the UDHR; Art 18(1) of the African Charter states that the family 'shall be the natural unit and basis of society.'

⁹² HRC, General Comment No 16: Article 17 Right to privacy (1988) para 5.

⁹³ *Hopu and Bessert v France* (1997) Communication no. 549/1993 CCPR/C/60/D/549/1993/Rev.1 para 10.3; Also see M Spulveda, T van Banning, G D Gudmundsdottir & C Chamoun, *Universal and regional human rights protection, Cases and commentaries*, University of Peace (2004) 340-341.

[T]he objectives of the Covenant requires that the term ‘family’ be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural tradition should be taken into account when defining the term ‘family’ in a specific situation.

The impossibility of drafting a standard definition of family is also noted in General Comment No 19 on article 23 of the ICCPR:⁹⁴

[T]he concept of the family may differ in some respects from State to State, and even from region to region within a State ... it is therefore not possible to give the concept a standard definition.

Although the Committee leaves the interpretation of ‘family’ to member states, it nevertheless requires states to report on ‘how the concept and scope of the family is construed or defined in their own society and legal system.’⁹⁵

The examination of various state reports and domestic legislation supports the diverse understanding of ‘family’ among member states. In many African states, the definition of family is based on a marital relationship. For instance, the law in Malawi presupposes that all families are based on marriage. However, in reality, female-headed households constitute 26 per cent of all ‘families’ in that country.⁹⁶ Also in Benin, under the Personal and Family Code, only monogamous marriage is recognised.⁹⁷ However, despite the legislative prohibition, polygamous marriages take place under customary law.⁹⁸ Such legally unprotected marriage could mean that women and children in customary polygamous marriages fall outside of state protection.⁹⁹

⁹⁴ HRC, General Comment No 19: Article 23 The family (1990) para 2.

⁹⁵ HRC, General Comment No 19 (as above), The Committee requires the states parties, where necessary, to indicate diverse concepts and forms of the family existing within a state and the degree of protection guaranteed to each.

⁹⁶ Consideration of reports submitted by state parties under article 16 of the Convention on the elimination of all forms of discrimination against women (CEDAW): Malawi, CEDAW/C/MWI/12-5 para 16.13.

⁹⁷ Concluding observations of the Human Rights Committee: Benin, CCPR:CO:82:BEN (01 December 2004) para 10.

⁹⁸ HRC, Concluding observations: Benin (as above) para 10.

⁹⁹ HRC, Concluding observations: Benin (as above).

Another example of legal interpretation of ‘family’ as a marriage-based group can be found in Uganda. The Initial State Report by Uganda in 2003, for example, defines a ‘family’ as a man and his wife, or wives, and children.¹⁰⁰ There are five different recognised marriage practices in Uganda: customary marriage, marriage under Islamic law, marriage in a Christian church, marriage before a chief administrative officer, and marriage under the Hindu faith.¹⁰¹ Although family protection services are provided to all types of families, the law is limited as it does not recognise cohabitation of partners as a family, or other types of families that do not fit in the formula of husband, his wife, or wives, and children. Zimbabwe offers also a definition of ‘family’ based on marriage: registered customary marriage, civil marriage, and unregistered customary law union.¹⁰²

The inclusion of an unregistered customary law union offers broader protection, but such marriage is recognised only in limited cases, for instance, in respect of the maintenance of a child and for inheritance purposes.¹⁰³ The family is understood in a slightly broader way in Kenya, where a family falls under three categories: extended, nuclear, and single parent families.¹⁰⁴ However, as in Uganda, unmarried cohabiting couples are not protected under the law.¹⁰⁵ It is clear that such a narrow understanding of ‘family’ in a legal setting fails to protect the interests of people who fall outside of the formal marriage-based family arrangements. It is regrettable as there is an increasing number of ‘families’ that fall outside of the scope of the classic understanding of ‘family’.¹⁰⁶

As illustrated above, drawing a standard definition of ‘family’ is an arduous task. In addition to the complexity of the term, it may have negative repercussions, as it may

¹⁰⁰ Initial Report of State Parties submitted by state parties under article 40 of the Covenant on civil and political rights: Uganda, CCPR/C/UGA/2003/1 (2003) para 483.

¹⁰¹ CCPR Initial Report: Uganda (as above) para 490.

¹⁰² Initial report of States parties due in 1992: Zimbabwe CCPR/C/74/Add.3 (29 September 1997) para 211.

¹⁰³ CCPR Initial report: Zimbabwe (as above).

¹⁰⁴ Second periodic report to the Human Rights Committee: Kenya, CCPR/C/KEN/2004/2 (27 September 2004) para 178.

¹⁰⁵ CCPR Second periodic report: Kenya (as above) para 183.

¹⁰⁶ CEDAW Concluding observation: Malawi (n 96 above).

limit the kinds of families that could be legally protected. In states where ‘family’ is understood as only based on marriage, other forms of family, such as female-headed, child-headed or grandparent-headed families may be left outside of legal protection granted to ‘family’. Therefore, the CRC Committee recommended that the concept of ‘family’ should be broadened to include different types of families such as the extended family, nuclear family, re-constructed family, joint family, single-parent family, common-law family and adoptive family.¹⁰⁷ The CRC Committee further recommended that more attention be given to the concept of ‘extended family’, especially the role of grandparents in providing care to children, which is ‘rarely acknowledged in domestic laws’.¹⁰⁸

(iii) Subjective elements of a family

Interpreting article 16 of the UDHR, Lagoutte and Anason include both biological and sociological aspects of a ‘family’ in its definition.¹⁰⁹ Biological relationships, such as common ancestry, and social or legal unions, including marriage or adoption, are the major factors that determine a ‘family’.¹¹⁰ This trend of conceptualising ‘family’ is reflected in a sociological understanding of ‘family’ as ‘an intimate domestic group made up of people related to one another by bonds of blood, sexual mating, or legal ties.’¹¹¹ Mere biological or legal ties are not enough to constitute a ‘family’. The ‘intimacy’ is an important element in ‘family’. The element of intimacy represents the functions of ‘family’. Biological and legal ties may explain the structure of family, but the emotional elements of family concern the ‘contents’ of family. Elmer outlines three significant aspects of family: ‘reproduction, nurture of children and mutual sympathetic understanding and helpfulness.’¹¹² Due to changes in the understanding of ‘family’ and ‘family life’, ‘reproduction’ or ‘nurture of children’ may not be the

¹⁰⁷ CRC Committee, 2005 (n 40 above) para 644.

¹⁰⁸ CRC Committee, 2005 (as above) para 646.

¹⁰⁹ S Lagoutte & A T Anason, ‘Article 16’ in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights: A common standard of achievement*, Martinus Nijhoff (1999) 338; Art 16 of the UDHR deals with the right to marry and found a family. Art 16(3) reads, ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’

¹¹⁰ S Lagoutte *et al.*, 1999 (as above) 339.

¹¹¹ G Marshall, *The Oxford Dictionary of Sociology*, Oxford University Press (1998) 222.

¹¹² M C Elmer, *The Sociology of the family*, Ginn & Company (1945) 3.

universal aspects of family. The important point here is that the emotional ties, which Elmer describes as ‘mutual sympathetic understanding and helpfulness,’ is an essential element in ‘family’ and ‘family environment’.¹¹³ The emotional elements based on the function of family provide ‘full mental and emotional life which will enable the child to become adjusted to his social surroundings and responsibilities’.¹¹⁴ The emphasis on emotional elements can also be found in various legal decisions.

In *Wim Hendriks, Sr v The Netherlands*, the HRC interpreted the term ‘family’ as not solely dependent on the existence of marriage, but rather emphasised the importance of the bond between parents and child.¹¹⁵ In order to fill the gap in the standard definition of ‘family’ and effectively incorporate different forms of the families, other criteria should also be considered. As the sociological definition requires, the other important element of family is intimacy, the determination of which is more complicated than other objective criteria.¹¹⁶

The subjective elements, such as ‘life together’¹¹⁷ or ‘effectiveness of the relationships’,¹¹⁸ are difficult to determine, but there are certain objective standards of verification. Nowak extends the understanding of the concept of ‘life together’ to include ‘economic ties or other forms of an intensive, regular relationship.’¹¹⁹ The importance of an effective family life is also stressed in the Committee’s decision in *A.S v Canada*.¹²⁰ The author of the communication argued that the refusal by the Canadian authorities to permit her adoptive daughter to immigrate to Canada violated, *inter alia*, article 23 of the ICCPR, which ensures the protection of the family by the state.¹²¹ The state party argued that in order to prove the breach of article 23 by the

¹¹³ M C Elmer, 1945 (as above) 7.

¹¹⁴ M C Elmer, 1945 (as above) 7.

¹¹⁵ *Wim Hendriks, Sr. v. The Netherlands*, Communication No. 201/1985, U.N. Doc. CCPR/C/33/D/201/1985 (1988) para 10.3.

¹¹⁶ M Spúlveda *et al.*, 2004 (n 93 above) 340.

¹¹⁷ M Nowak, *U.N. Covenant on Civil and Political Right: CCPR Commentary*, N.P. Engel Publisher (1993) 405.

¹¹⁸ S Lagoutte & A T Anason, 1999 (n 109 above) 339.

¹¹⁹ M Nowak, 1993 (n 117 above) 405.

¹²⁰ *A.S v Canada*, Communication No 68/1980: (Canada 31/03/81. CCPR/C/12/D/68/1980) Decision of the Human Rights Committee under the Optional protocol to the ICCPR.

¹²¹ *A.S v Canada* (as above).

state, the applicant must prove that ‘an effective family life between the members of the family’ existed.¹²² The Committee agreed with the state party and found no breach of article 23 by Canada as the applicant and the daughter had not lived together as a family and, therefore, the criterion of ‘effective life together’ had not been met.¹²³ A similar decision was reached in *Balaguer Santacana v Spain*, where the Committee emphasised that although the ‘family’ should be interpreted broadly, an emotional and inter-dependent relationship was necessary to constitute a ‘family’.¹²⁴

The emphasis on the inter-personal relationship can also be found in the decisions of the European Court of Human Rights. The Court interpreted the ‘family life’ in article 8 of the European Convention of Human Rights to mean ‘not confined solely to marriage-based relationships and may encompass other *de facto* family ties where the parties are living together outside of the marriage.’¹²⁵ Such an interpretation of ‘family life’ is evident in *X, Y and Z v The United Kingdom*, where the Court recalled that the notion of family life goes beyond marriage and that one should consider the degree of ‘commitment’ that can be demonstrated by means other than marriage.¹²⁶

An emphasis on subjective elements, such as emotional ties or the ‘life together’ criterion, has a particular importance when states are implementing the right to alternative care, and special protection and assistance. By emphasizing the emotive criterion of ‘family’ and ‘family environment’, states are prevented from simply putting children into the care of unscreened blood relatives. The study by the Centre for Health and Well-being at Princeton University found that orphaned children are significantly more disadvantaged than non-orphaned children in the same household in respect of school enrolment.¹²⁷ It was found that ‘the degree of relatedness between

¹²² As above, para 5.1

¹²³ As above, para 8.2.

¹²⁴ *Balaguer Santacana v Spain*, Communication No 417/1990, UN DOC CCPR/C/51/D/417/1990 (1994) para 10.2.

¹²⁵ Cited in S Lagoutte, ‘Surrounding and extending family life: the notion of family life in the case-law of the European Court of Human Rights’ (2003) 21/3 *Mennesker & Rettigheter* 295.

¹²⁶ *X, Y and Z v The United Kingdom*, Case no 75/1995/568/667 (1997) para 36; also see *Keegan v Ireland*, Application no 16969/90 (1994) The Court held that the family ties exist beyond the marriage relationship.

¹²⁷ A Case *et al.*, *Orphans in Africa: Parental death, poverty and school enrolment (revised version)*, Princeton: Centre for Health and Wellbeing, Princeton University (2004) 1-2.

orphans and their adult caregivers’ plays a more important role in explaining this disadvantage than the socio-economic conditions of the household in which the children live.¹²⁸ This situation shows the importance of the subjective elements of ‘family’, which have a serious impact on the quality of care that children receive.

In the following section, based on the discussion on the interpretation of ‘family’ and ‘family environment’, the personal and objective scope of the articles, such as subjects of the right to alternative care, and special protection and assistance and underlying principles of alternative care, are analysed.

3.3.2 Children covered by the articles

In the drafting stage of the CRC, the term, ‘parental care’ and ‘natural family environment’ seem to have been used interchangeably. For instance, the basic working text of article 11(a) as adopted by the 1980 Working Group stated that the right to alternative care, and special protection and assistance, should be provided to ‘children who are deprived of parental care’.¹²⁹ Article 11(b) obliges the state to provide an ‘educational environment’ to children who are deprived of their ‘natural family environment’ rather than ‘alternative care’ and article 11(c) only lists adoption and foster care. Unless sub-sections to article 11, (a) and (b) are intended to cover different sets of children, the usage of the terms ‘parentless’ and ‘deprived of their natural family environment’ under the same article suggests that those two terms were used as being synonymous.

During the working group session, the delegates contended that the phrase ‘deprived of parental care’ was limited and did not reflect the broader concept of kinship relations present in many different cultures.¹³⁰ After considering several suggestions,

¹²⁸ A Case *et al.*, 2004 (as above) 5.

¹²⁹ Article 11 of the Draft CRC reads:

- a. A child deprived of parental care shall be entitled to the protection and assistance provided by the state.
- b. The States Parties to the present Convention shall be obliged to provide appropriate educational environment to a child who is deprived of his natural family environment or, on account of his wellbeing, cannot be brought up in such environment.
- c. The States Parties to the present Convention shall undertake measures so as to facilitate adoption of children and create favourable conditions for establishing foster families.

¹³⁰ S Detrick, 1992 (n 3 above) 300; for a detailed discussion on the process, see 298-301.

including ‘natural family environment’ and ‘biological family’, the term ‘family environment’ was adopted.¹³¹

The text adopted by the 1982 working group differentiates between the terms, ‘parentless’ and ‘deprived of their family environment’.¹³² The working text of article 10(1) provided that children who are deprived of their family environment would be entitled to special protection and assistance. In the text, the deprivation of the family environment could be either permanent or temporary. The final text of article 10(2) provides alternative family care to children who are ‘parentless’, ‘temporarily or permanently deprived of their family environment’ or ‘who in his best interests cannot be brought up or be allowed to remain in that environment’.¹³³ Although the intention of the working group was to interpret the term ‘family environment’ to mean something more than ‘parental care’, the wording of the article seems to suggest that the relationship between family environment and parental care was not clearly defined at that stage. The current wording of the article was developed by the 1989 working group. The term ‘parentless’ was dropped and the term ‘children who are deprived of their family environment either permanently or temporarily’ was adopted.¹³⁴

¹³¹ S Detrick, 1992 (as above).

¹³² *Article 20 Children deprived of a family environment for: Legislative History of the Convention on the Rights of the Child (1978-1989)*, UN-SEC-HR/1996/SER.1/Article 20, para 59.

¹³³ The emphasis is mine. Article 10 of the Draft CRC reads:

1. A child permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance provided by the States.

2. The States Parties to the present Convention shall ensure that a child who is parentless, or who is temporarily deprived of his family environment, or who in his best interests cannot be brought up or be allowed to remain in that environment shall be provided with alternative family care which could include, *inter alia*, adoption, foster placement, or placement in suitable institutions for the care of children. When considering alternative family care for the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious or linguistic background.

Adopted by the Working Group at its ninth session (1987). Sec E/CN.4/1987/25, para 27, cited in S Detrick, 1992 (as above) 304.

¹³⁴ The changes in the draft version of article 20 of the CRC were made by the 1989 Working Group include ‘a child who is parentless’ was dropped; *kafalah* was added on the list of possible forms of alternative care and ‘if necessary’ was also added in front of ‘placement in suitable institutions for the care of children’. Also the expression ‘alternative family care’ was changed to ‘alternative care’. S Detrick, 1992 (as above) 304.

Cantwell and Holzscheiter correctly point out that the term ‘family environment’ is broader than ‘parental care’.¹³⁵ The role of extended family members or communities other than parents in child rearing has been recognised throughout the CRC. For instance, article 5 recognises responsibilities, rights and duties of extended family member or community ‘as provided by local custom’ in relation to care of a child. Article 18(1) acknowledges the primary responsibility of ‘parents or legal guardians’ in the upbringing of the child and article 18(2) obliges states to render appropriate assistance to parents or others who are responsible for the child in their performance to child rearing responsibilities. Article 27 also requires states to provide appropriate support to ‘parents and others responsible for the child’ to realise the right to an ‘adequate standard of living’. Such inclusive wording indicates that the CRC acknowledges ‘the wide variety of kinship and community arrangements within which children are brought up around the world.’¹³⁶

Considering the intention of the drafters to avoid restricting the concept of ‘family’ to ‘parents’, Cantwell and Holzscheiter argue that states do not have an obligation under article 20 to ensure alternative care for a child who is not in the care of his or her parents but is being looked after by a member of extended family ‘whether spontaneously or at the behest of the parents.’¹³⁷ However, it should be noted that the ‘family environment’ referred to in article 20(2) of the CRC is ‘his or her family environment’, which is different from ‘a family environment’.¹³⁸ The distinction is extremely important as it highlights the contents or emotional or subjective elements of ‘family environment’ and not only the structural element of the family.

In chapter two, it was highlighted that children who are deprived of their family environment have primarily been cared for informally by extended family members. Although a broader understanding of ‘family’ and ‘family environment’ is necessary to accommodate different cultural connotations attached to the term ‘family’, it is

¹³⁵ N Cantwell & A Holzscheiter, *A commentary on the United Nations Convention on the Rights of the Child article 20: children deprived of their family environment*, Martinus Nijhoff (2008) para 59-60.

¹³⁶ R Hodgkin & P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2007) 86.

¹³⁷ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 70.

¹³⁸ As above, para 58. In article 25(1) of the ACRWC, it is ‘his family environment’.

important to acknowledge the potential vulnerability of children in informal foster care provided by a ‘wider circle of family’ with whom the child may not have a strong emotional attachment. Therefore, rather than automatically excluding children who are cared for by their extended families from benefiting from the right to special protection and assistance, the term ‘family environment’ should be interpreted on a case-by-case basis to determine whether the ‘family environment’ fully constitutes ‘his or her family environment’ and not just ‘any’ family environment.¹³⁹

The wording of article 25 of the ACRWC is similar to that of article 20 of the CRC, but there are a few notable differences, which makes the scope of article 25 of the ACRWC broader than that of article 20 of the CRC. The ACRWC differentiates between a ‘child who is parentless’ and a child ‘who is deprived of his or her family environment’. The inclusion of ‘children who are parentless’ in article 25 of the ACRWC also indicates that not all children who are parentless are considered to be deprived of their family environment under the ACRWC. As the *travaux préparatoires* on the ACRWC is unavailable, it is hard to discern the reasons for differentiating between the two categories of children. ‘Children who are parentless’ may have been an unintentional insertion by the drafters of the ACRWC. However, due to the inclusion, article 25 of the ACRWC is applicable to children who are parentless. They do not have to be deprived of ‘their family environment’, which may be interpreted as *a possibility* of being cared for by the members of their extended family. In many African societies, children are at an unprecedented scale and speed becoming parentless due to AIDS-related illnesses.¹⁴⁰ Extended families are becoming increasingly unable and unwilling to care for children who are orphaned as the HIV epidemic depletes resources of communities and that of affected families.¹⁴¹ The growing number of street children and unsupported child-headed households shows that securing informal family care by relatives is increasingly problematic.¹⁴²

¹³⁹ The concepts such as ‘family’ and ‘family environment’ are discussed in the following section.

¹⁴⁰ H H Semkiwa *et al.*, *HIV/AIDS and child labour in the United Republic of Tanzania : a rapid assessment*, Report No 3, International Labour Organisation (2003) 7.

¹⁴¹ K Subbarao & D Coury, *Reaching out to Africa’s orphans: a framework for public action*, African Regional Human Development Series, World Bank (2004) 7; S Beckmann & P Rai, *HIV/AIDS, work and development in the United Republic of Tanzania*, ILO (2004) 10.

¹⁴² K Subbarao & D Coury, 2004 (as above) 7.

Nevertheless, states have been slow to recognise, and respond to, the challenges children and over-saturated extended families are facing.¹⁴³ As mentioned before, it may be partly due to the belief in traditional care arrangements, which did not require government intervention.¹⁴⁴ Under the traditional arrangements, children who were parentless, more often than not, had family members to look after them and the need for state intervention in the matter of informal fostering and adoption had been minimal. Differentiating between children who are parentless and children who are deprived of their family environment automatically qualifies all children who have lost their parents, regardless of the existence of traceable relatives, to be eligible for special protection and assistance.

Furthermore, including children who are ‘parentless’ means that even though such children are being cared for by their extended family, the right to special protection and assistance is still applicable to those children by virtue of being deprived of their *parental care*. It gives a stronger protection to children who are deprived of their parental care in comparison to the CRC. The protection of children who are deprived of ‘parental care’ regardless of the informal care provided by extended family members is extremely important. As pointed out earlier, in some cases, children in informal care placements face discrimination, maltreatment and abuses at the hands of caregivers. Children’s vulnerability to abuses and maltreatment may increase due to the mere fact that they lack ‘parental care’.

3.3.3 The relationship between ‘special protection and assistance’ and ‘alternative care’

One of the ambiguous aspects of the right to alternative care, and special protection and assistance, is the relationship between the concepts ‘special protection and assistance’ and ‘alternative care’. In this regard, article 20(1) of the CRC and article 25(1) of the ACRWC are almost identical. Both articles establish the responsibility of states to provide special protection and assistance to children who are, either temporarily or permanently, deprived of their family environment. Article 25(2)(a) of

¹⁴³ *Children at the centre: A guide to supporting community groups caring for vulnerable children*, Save the Children-UK (2007) 1.

¹⁴⁴ H H Semkiwa *et al.*, 2003 (n 140 above) 7.

the ACRWC and article 20(2) of the CRC further state, again in similar fashion, that states have the responsibility to provide alternative care to such children. However, from the wording of the provisions, it is not clear how the term ‘special protection and assistance’ should be interpreted, or what the relationship is between the terms ‘special protection and assistance’ and ‘alternative care’. For example, two questions may be posed: Is alternative care *one form* of special protection and assistance or is it *a mechanism* through which special protection and assistance should be provided? Are those terms synonymous? Neither the *travaux préparatoires* nor commentaries on article 20 of the CRC offer clear guidance on the issue. Detrick pointed out that the steps to be taken by state parties for the implementation of the right to special protection and assistance are not specific in article 20, apart from obligations relating to providing appropriate alternative care.¹⁴⁵

One way of understanding the relationship between the two concepts is to examine the CRC reporting guidelines to see if state parties have separate obligations under articles 20(1) and 20(2) of the CRC. The Committee developed guidelines to assist state parties when writing periodic reports, which state parties are required to submit to the Committee under article 44 of the CRC.¹⁴⁶ Under the section on ‘family environment and alternative care’,¹⁴⁷ state parties are required to provide information on nine related issue areas: parental guidance (article 5), parental responsibilities (article 18), separation from parents (article 9), family reunification (article 10), recovery of maintenance for the child (article 27), children deprived of their family environment (article 20), adoption (article 21), periodic review of placement (article 25), and abuse and neglect including physical and psychological recovery and social reintegration (articles 19 and 39).¹⁴⁸ In the section on ‘children deprived of their family environment’ state parties are required to provide information on five broad areas: 1) measures implemented to provide special protection and assistance; 2) measures implemented to provide alternative care to children who are deprived of

¹⁴⁵ S Detrick, *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff (1999) 335.

¹⁴⁶ Under art 44(1) of the CRC, state parties are required to submit reports on the implementation of the Convention within 2 years of the entry into force and thereafter every five years.

¹⁴⁷ General guidelines for periodic reports: 20/11/96. CRC/C/58 (Basic reference document) adopted by the Committee at its 343rd meeting (thirteenth session) on 11 Oct 1996, Sec 5.

¹⁴⁸ CRC General guidelines (as above) para 27.

their family environment; 3) measures to ensure that institutionalisation is used only if it is necessary; 4) monitoring of the situation of children placed in alternative care; and 5) respect for the guiding principles of the Convention when placing children in alternative care.¹⁴⁹

The reporting guidelines differentiate between the measures to be adopted to ensure ‘special protection and assistance’ and the measures to be adopted to ensure ‘alternative care’. Two separate requirements seem to suggest that ‘special protection and assistance’ is not synonymous with ‘alternative care’. Furthermore, the CRC Committee recommended that ‘States Parties make every effort to implement fully the provisions of article 20(3) of the Convention’ *and* that ‘special protection’ be provided to children deprived of a family environment to include providing placements in suitable families, including child-headed families, foster families and adoptive families, and providing appropriate support and supervision to such families.¹⁵⁰ From these recommendations by the CRC Committee, it is clear that state obligation to provide ‘special protection’ is distinct from the state obligation to provide care in the form of foster care, adoption and *kafalah* and, as a last resort, institutionalised care under article 20(3) of the CRC. Therefore, ‘special protection and assistance’ should be interpreted more broadly and separately from ‘alternative care’.

¹⁴⁹ CRC General guidelines (n 147 above) para 80 requires state parties to submit information on measures adopted to ensure

special protection and assistance to the child who is temporarily or permanently deprived of his or her family environment or in whose best interests cannot be allowed to remain in that environment;

alternative care for such a child, specifying the available forms of such care (*inter alia* foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of the child);

that the placement of such a child in suitable institutions will only be used if really necessary;

Monitoring of the situation of children placed in alternative care;

respect for the general principles of the Convention, namely non-discrimination, the best interests of the child, respect for the views of the child and the right to life, survival and development to the maximum extent.

¹⁵⁰ CRC Day of General Discussion: State violence against children, excerpted from CRC/C/97 (22 September, 2000) para 21; Also noted in ‘Article 20 children deprived of their family environment’, R Hodgkin & P Newell, 2002 (n 136 above) 282 (The emphasis is mine).

Understanding the obligation to provide ‘special protection and assistance’ differently from the obligation to provide ‘alternative care’ broadens the scope of these provisions. Children who are deprived of their family environment are not only entitled to alternative care but also special protection and assistance. The next questions would be: How should the right to ‘special protection and assistance’ be understood and interpreted? What are the state obligations under the right to special protection and assistance? To understand the obligations under the right to special protection and assistance, it is useful to start with the purpose of the right.

3.3.4 Purpose and scope of ‘special protection and assistance’

The concepts of ‘special’ protection’, ‘special assistance’, or ‘special care’ have been used in various human rights texts. For instance, article 25 of the UDHR grants ‘special care and assistance’ to motherhood and childhood. Article 10 of the ICESCR provides mothers with special protection ‘during a reasonable period before and after childbirth’. Also, a number of African states protect children’s right to special protection and assistance in their constitutions. For instance, the Constitution of Cape Verde provides for the right to special protection to ill children, children who are orphaned or deprived of balanced family environment.¹⁵¹ The Constitution of São Tomé and Príncipe gives young workers ‘special protection in order to render effective their economic social and cultural rights.’¹⁵² In the CRC and the ACRWC, the wording of ‘special protection’ has been used, apart from in relation to children who are deprived of their family environment, in article 23(1) of the CRC, which recognises the right of children living with disabilities to special care and article 13(1) of the ACRWC, which provides ‘special measure of protection’ to children living with disabilities.

It seems clear that the right to ‘special protection’ is granted to children who are considered to be in a relatively more vulnerable situation compared to other children

¹⁵¹ Art 73(2) of the Constitution of Cape Verde, available at: http://www.chr.up.ac.za/hr_docs/docs_country.html [accessed: 17 October 2009].

¹⁵² Art 73(2) of the Constitution of Cape Verde & art 52 of the Constitution of São Tomé and Príncipe. The Constitutions of Burundi, Swaziland and Rwanda also mention special measures of protection. Constitutions are available at: http://www.chr.up.ac.za/hr_docs/docs_country.html [accessed: 17 October 2009].

in general, such as young workers, children who are ill or children who are orphaned and have no adult caregiver. Their particular vulnerability requires ‘special protection and assistance’ in addition to their general need for protection. In a broad sense, the purpose of the right to special protection and assistance is to realise a full range of rights of children who are in particularly vulnerable situations by providing extraordinary measures and levels of protection and assistance.

An examination of the general comments on the above international provisions supports the above interpretation of the term, ‘special protection’. In the General Comment by the HRC on article 24 concerning children’s right to protection, the Committee stated that although article 24 of the ICCPR does not use the word, ‘special’, state parties are obliged to provide information on the measures taken to ensure that children enjoy their right to ‘special protection’.¹⁵³ The HRC categorically states that all civil rights enunciated in the Covenant are applicable to children. However, under article 24, state parties have an obligation to provide ‘greater protection to children than adults’ on the basis that children are relatively more vulnerable than adults due to their status as minors.¹⁵⁴

A similar usage of the concept of ‘special protection and assistance’ can be found in article 23 of the CRC, dealing with children living with disabilities. Quoting article 23(1), the CRC Committee stated that the leading principle for the implementation of the Convention with respect to children with disabilities is the ‘enjoyment of a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.’¹⁵⁵ All the measures taken by states should aim towards realising this leading principle.¹⁵⁶ States should implement special measures of care to enable children with disabilities to enjoy conventional rights without discrimination. The Committee interpreted the state obligation to provide special protection under article 23(2) broadly, as including not only children with disabilities

¹⁵³ HRC, General Comment No 17: Article 24 Rights of the child (07/04/89) para 2.

¹⁵⁴ HRC, General Comment No 17 (as above) para 2.

¹⁵⁵ CRC, General Comment No 9: The rights of the children with disabilities (2006) para 11.

¹⁵⁶ CRC, General Comment No 9 (as above) para 11.

but also the parents or others who are caring for the children in the scope of state responsibility.¹⁵⁷

In other words, states do not only have an obligation to implement international treaty rights in general, but they also have an obligation to take ‘special measures’ to ensure that children with disabilities enjoy a full range of rights without discrimination. To borrow Pare’s words

The rights of vulnerable groups to special protection and non-discrimination ensure that they enjoy certain equality with the rest of a country’s population.¹⁵⁸

The analysis of the General Comments seems to suggest that there are three layers to state responsibility in the realisation of human rights.

The first layer is a general responsibility of states to implement measures to protect human rights for all. The UDHR, ICCPR and ICESCR are instruments that provide and protect the human rights of all.

The second layer addresses the general vulnerability of certain groups of the population, such as women, children, migrant workers and refugees. The creation of international human rights instruments that are specific to certain group, such as the CRC, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) or the Convention on the Rights of Persons with Disabilities, is a measure to provide further protection to the groups that are considered generally more vulnerable than others.

Taking children as an example, children’s status as minors makes them comparatively more vulnerable than adults. In order to address their general vulnerability, separate

¹⁵⁷ CRC General Comment No 9 (as above) para 13 reads:

In order to meet the requirements of article 23 it is necessary that States parties develop and effectively implement a comprehensive policy by means of a plan of action which not only aims at the full enjoyment of the rights enshrined in the Convention without discrimination but which also ensures that a child with disability and her or his parents and/or others caring for the child do receive the special care and assistance they are entitled to under the Convention.

¹⁵⁸ M Pare, ‘Why have street children disappeared? - The role of international human rights law in protecting vulnerable groups’ (2003) 11 *International Journal of Children’s Rights* 10.

instruments are developed, which require state to implement measures that are specifically designed to realise children's rights. Such measure may be different from the measures provided in the first instance because children's status as minors requires a different level and type of protection. This point can be illustrated by the right to work. Article 6 of the ICESCR protects the right to work for everyone and article 7 provides for favourable working conditions. State responsibilities under these rights are general. Article 32 of the CRC, while it permits children to work, sets out stronger measures of protection including age limitations and appropriate regulations of working hours and conditions. It further urges states to establish penalties and other sanctions to enforce the article.

The third and final layer of the responsibility aims to protect the particularly 'vulnerable or marginalised groups' within generally vulnerable groups. Children living with disabilities present a good example. Children living with disabilities may face general vulnerability attached to being minor as well as a particular vulnerability attached to their disabilities. States have an obligation to enable such groups to enjoy a full range of rights despite their special vulnerabilities. For instance, article 28 of the CRC protects the right to education of every child. In addition to article 28, article 23, which protects the rights to children living with disabilities, recognises the special needs of children living with disabilities and urges states to provide and implement measures designed to ensure that children with disabilities have 'effective access to and receive education'.¹⁵⁹

The purpose of providing alternative care goes beyond simply providing each child with a place to stay. It is important to note that 'alternative care' is provided to children who are deprived of their family care as 'substitute care'. It does not mean a secondary or lesser level of care. The 'care' provided to children, although 'alternative', means that persons other than the 'family' should perform as far as possible the same function as the care provided by children's natural families. In other words, alternative care should enable children to fully realise their rights and potential, and prepare them for a smooth transition to adulthood. In the same way, 'special protection and assistance' should provide support and protection through

¹⁵⁹ Art 23(3) of the CRC.

extraordinary measures to ensure that children in particularly vulnerable situations may fully realise their rights and potential. For instance, a regular monitoring and evaluation of alternative care placements is one of the ‘special’ protection measures to ensure children are adequately cared for in out-of-home care placements. The measures of special protection and assistance cannot be applied singularly. The level of protection and assistance needed for children who are in kinship care, foster care, institutionalised care or child-headed household is different. Measures of special protection and assistance should be tailored individually to meet the needs of each child in different types of alternative care.

3.3.5 Alternative ‘family care’ or ‘alternative care’?

In relation to the type of alternative care, while the CRC obliges states to provide ‘alternative care’ to children deprived of their family environment, the ACRWC goes further and obliges states to provide ‘alternative *family* care.’¹⁶⁰ The expression ‘alternative family care’ is repeated in article 25(3) of the ACRWC. Although the linguistic difference between the two provisions is small, its practical implication could be significant. The requirement to provide ‘alternative family care’ could be interpreted in two ways.

Firstly, it could mean that all forms of alternative care provided under the ACRWC should resemble ‘family environment’. If the interpretation is accepted, the choices of formal alternative care, which states can provide under the ACRWC, would be limited to foster care and adoption. Pointing out the replacement of the term ‘solution’ in article 20(3) of the CRC with ‘alternative family care’ in article 25(3) of the ACRWC, Cantwell and Holzscheiter argued that under the ACRWC, a child deprived of their family environment should be placed in alternative *family* care rather than in some form of institutionalised care.¹⁶¹ However, considering that institutionalised care is listed as one of the forms of alternative care in article 25(2), such strict interpretation is not contextual.

¹⁶⁰ The emphasis is mine.

¹⁶¹ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 23.

Secondly, ‘alternative family care’ could simply be interpreted as requiring state parties to seek as far as possible alternative care that resembles ‘family care’ before placing a child in institutional care. Although this is a feasible interpretation, the ACRWC does not explicitly limit institutionalised care as being an option of last resort. Ironically, despite its emphasis on the ‘alternative family care’, article 25 includes a ‘placement in the suitable institution’ as a possible form of ‘alternative family care’ without qualifying it as a last resort. Furthermore, unlike the CRC, which recommends the placement in a suitable institution only ‘if [it is] necessary’, article 25 of the ACRWC does not stipulate such condition. Nevertheless, the absence of such a stipulation could be an unintentional oversight rather than an intentional omission.

Considering the possible interpretations of ‘alternative family care’, the obligation to provide ‘alternative family care’ under the ACRWC seems to require states to provide alternative care that resembles family care as far as possible with a view to gradually eradicate a non-family type of alternative care, such as institutionalised care.

3.3.6 A rights-based approach and fundamental principles

A rights-based approach to children who are deprived of their family environment has three broad implications. Firstly, it means children who are deprived of their family environment have the right to alternative care, and special protection and assistance. States have legal obligations to provide appropriate and adequate measures to enable children to enjoy the full range of rights even if they lack parental and family care. Providing support and protection to those children is not a charitable action but a legal obligation.

Secondly, the rights-based approach helps to define the standards and types of state obligation, thereby preventing simply placing children in placements of care or enforcing uniform measures of protection and assistance that do not fulfil the purpose of the right to alternative care, and special protection and assistance. States should implement effective measures to monitor and regulate alternative care placements or other measures of special care and protection to ensure that children’s rights are fully respected and fulfilled. It also requires detailed examination of children’s needs on an

individual basis and finding a solution that reflects their best interests. The UN Guidelines for the Alternative Care of Children strongly emphasise that any actions taken regarding children who are deprived of their family environment should be tailored to meet the individual needs of children.¹⁶²

Finally, applying a rights-based approach means respecting children's rights during all stages of providing alternative care, and special protection and assistance. From making a decision whether children are in need of alternative care, and special protection and assistance, during assessment and determination on what type of intervention is necessary, and to the final implementation stage, children's rights should be the fundamental basis. Also importantly, rights of children are in alternative care and receiving special protection and assistance should be fully respected.

In section 3.3.4, it was observed that the purpose of the right to special protection and assistance to children who are deprived of their family environment goes beyond providing alternative accommodation. It is to ensure that through the special protection and assistance, all other rights that are due to the children are fulfilled. To do so, it is imperative that the alternative care placement process is firmly based on the principles of the rights-based approach. In the following section, six pertinent principles of a rights-based approach are identified and explored. Those six principles are: 1) the respect for children's right to grow up with their parents; 2) best interests of the child; 3) equality and non-discrimination; 4) survival and development; 5) child participation and empowerment; and 6) monitoring and evaluation.

(i) *Respect for children's right to grow up with their parents*

One of the cardinal principles in relation to placing children in out-of-home care is that alternative care should be used only when it is absolutely necessary.¹⁶³ The recognition and emphasis placed on the family as the natural environment for the upbringing and development of children has been highlighted in various instruments,

¹⁶² Para 56 of the UN Guidelines for the Alternative Care of Children.

¹⁶³ See basic principles of the UN Guidelines for the Alternative Care; also see, basic principles of the Council of Europe Recommendations on the rights of children living in residential institutions.

including the CRC, the ACRWC, and the UN Guidelines for the Alternative Care.¹⁶⁴ In the preamble of the CRC and the ACRWC, it is recognised that ‘full and harmonious development of his or her personality, the child should grow up in a family environment, in an atmosphere of happiness, love and understanding’.¹⁶⁵ Both instruments give parents or others who are legally responsible for the child, the primary responsibility of ‘upbringing and development of the child.’¹⁶⁶ The primary responsibility of the states is to assist the parents and family to adequately care for their children. The responsibility to assist and protect the family is required not only under the CRC and ACRWC, but article 10 of the ICESCR also requires that states to provide ‘the widest possible protect and assistance’ to family especially ‘while it is responsible for care and education of dependent children.’¹⁶⁷ The CRC Committee pointed out that impoverished children over-represent children in alternative care in both developing and developed world, and required states to provide appropriate financial assistance, so that poverty alone should not be a reason for separating children from their parents.¹⁶⁸

Children’s rights to be with their parents can only be compromised when the separation is in the best interests of the child, for instance a case where children are abused and maltreated by their parents despite appropriate state support to the parents. The general principle that children may only be removed from their family environment when that is in their best interests is also implicitly expressed in articles 20 of the CRC and the 25 of the ACRWC. Alternative care is applicable to children, who are deprived of their family environment, or who in their *best interests* cannot be allowed to remain in that environment. It is clear that the removal of the child is solely based on the consideration of their best interests. The fact that the sanctity of the family can only be eroded by the best interests of the child suggests the centrality provided to the elusive concept of the ‘best interests of the child’, to which I now turn.

¹⁶⁴ For instance, preamble of the CRC recognises the family as a fundamental unit of society and a natural environment in which children should grow up and urges states to provide support to enable families to fulfil their responsibilities in the community.

¹⁶⁵ The wording of the ACRWC and CRC is similar.

¹⁶⁶ Art 18(1) of the CRC & Art 20(1) of the ACRWC.

¹⁶⁷ Art 10(1) of the ICESCR.

¹⁶⁸ CRC Committee, 2005 (n 40 above) para 658.

(ii) *Best interests of the child*

The concept of the best interests of the child is one of the most elusive, yet fundamental principles of children's rights.¹⁶⁹ The principle of the best interests of the child has been reflected in international human rights instruments since the 1959 Declaration of the Rights of the Child.¹⁷⁰ Principle 2 of the 1959 Declaration establishes that the best interests of the child should be 'the paramount consideration'. Later, the principle, albeit in a diluted form, was expressed in article 3(1) of the CRC and 4(1) of the ACRWC.¹⁷¹ Children's right to have their best interests considered as a primary consideration is an underlying value of the CRC and ACRWC. It is also an umbrella right, providing a basis on which all other rights enshrined in the CRC and ACRWC should be interpreted and implemented.

Some scholars argue that the ACRWC imposes a higher burden to member states as it requires that the best interests of the child be *the* primary consideration rather than *a* primary consideration.¹⁷² Furthermore, under article 4(1) of the ACRWC, the obligation to make the best interests of the child the primary consideration goes to 'any person or authority', which is broader than the CRC.¹⁷³ Nevertheless, both articles cover not only state-initiated actions but all actions concerning children.¹⁷⁴ Therefore, the articles are applicable not only to state provided-services, facilities and institutions, but also to all those responsible for the care and protection of children. The significance of the wide application is that, in many African states, a majority of

¹⁶⁹ D Archard & M Skivenes, 'Balancing a child's best interest and a child's view' (2009) 17 *International Journal of Children's Rights* 1.

¹⁷⁰ P Alston, 'The best interest principle: Reconciliation of culture and human rights' (1994) 8 *International Journal of Law and the Family* 3.

¹⁷¹ S Parker points out that the formulation of 'a primary consideration' in article 3 of the CRC is considerably weaker than 'the paramount consideration' in principle 2 of the Declaration. See S Parker, 'The best interests of the child: Principles and problems' 8 (1994) *International Journal of Law and the Family* 28.

¹⁷² See Sec 3.2.2(iii) for detailed discussion on the issue.

¹⁷³ M Freeman, *A commentary on the United Nations Convention on the Rights of the Child, Article 3: the best interests of the child*, Martinus Nijhoff Publishers, London (2007) 21.

¹⁷⁴ R Hodgkin & P Newwell, 2002 (n 136 above) 42.

facilities and institutions providing services to children are not state initiated but are initiated by NGOs or individuals.¹⁷⁵

How does the principle of the best interests of the child influence decisions in matters regarding children in need of alternative care? In order to answer the question, the right's formulation in relevant articles needs to be examined.

In article 20 of the CRC, the best interests of the child is mentioned only once in article 20(1). Under article 20(1), the best interests of the child should be considered when determining whether a child should be removed from his or her family environment. Cantwell and Holzscheiter pointed out that, unlike article 20 of the CRC, the best interest of the child is given more prominence in article 25 of the ACRWC. Article 25 of the ACRWC makes it an explicit requirement to consider the best interests of the child when considering alternative family care for the child as well as taking a decision to remove a child from his or her family environment.¹⁷⁶ Article 20(3) of the CRC does not contain the requirement to consider the best interests of the child while considering 'solutions'. It only requires states to consider the 'desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.' However, article 25(3) of the ACRWC includes 'the best interests of the child' to be considered when alternative family care is sought. It could be interpreted to mean that if it is in the best interests of the child, 'the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background' could be overruled. For instance, in cases where it is deemed to be in the best interests of the child to be provided with a permanent family care, an option of inter-country adoption may be considered more suitable than other non-permanent or non-family type national solutions under the ACRWC.

Freeman explains that the best interests of the child could be divided into two categories: current interests and future-oriented interests.¹⁷⁷ The current interests are

¹⁷⁵ "Malawi: Illegal orphanages mushroom", *IRIN News*, available at: <http://www.irinnews.org/report.aspx?reportid=61374> [accessed: 01 March 2009], "Mozambique: Orphans getting caught in HIV cycle", *IRIN News*, available at: <http://www.irinnews.org/report.aspx?ReportId=82033> [accessed: 10 March 2009].

¹⁷⁶ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 23.

¹⁷⁷ M Freeman, 2007 (n 172 above) 3.

often formulated in relation to experiential considerations, while future-oriented interests focus on ‘developmental considerations.’¹⁷⁸ When determining whether a child should be removed from his or her family environment, both the current interests of the child, for instance, the need for emotional security of being within their own family environment, and the future-oriented interests, such as the opportunities for development, should be taken into account. However, the mere fact that either set of interests is compromised should not be an automatic reason for the removal of a child from his or her own family environment. As discussed above, another fundamental principle with regard to placing children in alternative care is that the child’s right to parental care should be fully respected. If such compromise in either set of interests of the child can be corrected through appropriate state support and assistance to the parents, legal guardians or others who are caring for the child, the maximum efforts should be made to improving the quality of existing family care.

For example, poverty may be one of the major factors that could hinder the full realisation of the best interests of the child. Parents living in poverty may be unable to provide adequate emotional and social support to children due to the socio-economic challenges they face. Their economic difficulties may hinder children from accessing social services, such as health care or education, which inevitably have detrimental effects on their future interests. As the CRC Committee pointed out, parents living in poverty are discouraged from approaching authorities for help, because they fear that their children might be taken away and,¹⁷⁹ as mentioned in the previous section, children in poverty are overrepresented among the children who are separated from their parents both in the developing and developed world.¹⁸⁰ However, poverty and other material deprivation alone should not be the reason for separating children from their parents.¹⁸¹ The Committee recommended that upholding article 27 of the CRC pertaining to an adequate standard of living, states parties should ensure that poverty as such should not be used as a justification to place children in out-of-home care.¹⁸²

¹⁷⁸ M Freeman, 2007 (as above) 3.

¹⁷⁹ CRC Committee, 2005 (n 40 above) para 658.

¹⁸⁰ CRC Committee, 2005 (as above) para 658.

¹⁸¹ Paragraph 14 of the UN Guidelines for the Alternative Care of Children.

¹⁸² CRC Committee, 2005 (n 40 above) para 659.

The determining the best interests of the child is often ‘indeterminate and speculative’ and requires ‘highly individualised choice between alternatives.’¹⁸³ The determination of the best interests of the child during the alternative care placement should be done on a case by case basis. The determination of the best interests of the child should also include identifying the obstacles to achieve the best interests of the child and the ways to correct such obstacles whether it is to provide support and assistance to the parents or care givers of the children or removing the children from their family environment.

(iii) *Equality and non-discrimination*

The right to non-discrimination in relation to the right to alternative care, and special protection and assistance, is two-fold. Firstly, children should not be discriminated against during the process of placement. Decisions to place children in a particular alternative care placement should be based on the best interests of the child without any political, religious and ideological pressure or prejudice.¹⁸⁴ Secondly, the right to non-discrimination of children in alternative placement should be fully respected and realised. For instance, Cantwell and Holzscheiter noted that children in institutionalised care placement often face discrimination and stigmatisation due to the negative connotation attached to such care. Children in any alternative care placements should not be denied access to appropriate education, health care or opportunities to practice their own culture and religion. Van Bueren argued that the principle of non-discrimination does not mean equal treatment to everyone.¹⁸⁵ She argues that states are under an obligation to provide special protection and assistance to vulnerable groups to ensure ‘equality’.¹⁸⁶

¹⁸³ N Thomas & C O’Kane, ‘When children’s wishes and feelings clash with their best interests’ (1998) 6 *International Journal of Children’s Rights* 138.

¹⁸⁴ B Gudbrandsson, ‘Rights of children at risk and in care’, Conference paper delivered at the Conference of European Ministers Responsible for Family Affairs, ‘Changes in Parenting: Children Today, Parents Tomorrow’, XXVIIIth Session (16-17 May 2006), Lisbon, Portugal, 22.

¹⁸⁵ G Van Bueren, ‘Of floors and ceilings: Minimum core obligations and children’ in D Brand & S Russell (eds) *Exploring the core contents of socio-economic rights: South African and international perspectives*, Protea Book House, Pretoria (2002) 188.

¹⁸⁶ G Van Bueren, 2002 (as above) 188.

(iv) *Survival and development*

Article 6 of the CRC and article 5 of the ACRWC protect children's right to life, survival and development. The concept of survival and development to the maximum extent possible is an ultimate goal of the CRC and ACRWC. All the articles in children's rights instruments are directly or indirectly geared towards realising the right to life, survival and development.

The right to survival is a fundamental right, which can be also found in other human rights instruments. Article 3 of the UDHR proclaims that 'everyone has the right to life, liberty and security of the person' and article 6 of the ICCPR protects the right to life of every human being and prohibits arbitrary deprivation of the right. According to Pais, states should take positive as well as negative measures to promote and protect children's right to life. Positive measures include 'diminishing infant and child mortality, combating diseases and rehabilitating health, providing adequate nutritious foods and clean drinking water.'¹⁸⁷ Furthermore, states should refrain from doing any actions that may intentionally deprive life, such as pronouncing the 'death penalty, extra-legal, arbitrary or summary executions or any situation of enforced disappearance.'¹⁸⁸

The important aspect of the right to survival and development is that it goes beyond 'surviving.' Children have the right to 'development' as well as to 'survive'. Under the right to life, survival and development, states are under obligations to ensure that children grow up 'in a healthy and protective manner, free from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities.'¹⁸⁹ The concept of 'development' in the article can be linked to article 29(1) of the CRC, which provides for the aims of education.¹⁹⁰ Under article 29(1) of the CRC, the aims of education are: 1) to develop

¹⁸⁷ M S Pais, 'Convention on the Rights of the Child' in *Manual on human rights reporting: Under six major international human rights instruments*, OHCHR, Geneva (1997) 425.

¹⁸⁸ M S Pais, 1997 (as above) 425.

¹⁸⁹ M Nowak, *A commentary on the United Nations Convention on the Rights and the Child, Article 6: The right to life, survival and development*, Martinus Nijhoff Publishers (2005) 2.

¹⁹⁰ In the case of the ACRWC, article 11(2) provides for the aims of education.

the child's personality, talents and mental and physical abilities to their fullest potential; 2) to develop respect for human rights and fundamental freedoms; 3) to develop the child's own cultural identity, language and values; 4) to prepare the child for responsible life in a free society; and 5) to develop respect for the natural environment.

As Nowak noted, due to the fundamental nature of the right, the interpretation of article 6 'takes into account all the other human rights enshrined in the Convention.'¹⁹¹ However, the rights that have particular relevance to the development of children can be summarised as the right to health (article 24), education (article 28), an adequate standard of living (article 27) and rest, leisure and play (article 31).¹⁹²

The contents of the right to survival and development are particularly important in implementation of the right to alternative care, and special protection and assistance. One of the fundamental aims of providing alternative care, and special protection and assistance to children who are deprived of their family environment is to realise their right to survival and development outside of their own family environment. It is also a check list to determine the appropriate standard of alternative care and special protection and assistance. Nowak summed up the nature of state responsibility with regards to the right to life, survival and development by arguing that states have the general duty to create an environment conducive to realise the right to life, survival and development.¹⁹³ Apart from this general obligation, states have specific obligation to fulfil the right, firstly by '*respecting and facilitating* the responsibility of parents' by providing appropriate assistance.¹⁹⁴ As the degree of children's vulnerability increases, for instance, when children are deprived of their family environment, states obligation to *fulfil* becomes more important and states assume an active and direct responsibility to fulfil the right to life, survival and development.¹⁹⁵

¹⁹¹ M Nowak, 2005 (as above) 2.

¹⁹² M Nowak, 2005 (as above) 2.

¹⁹³ M Nowak, 2005 (as above) 38.

¹⁹⁴ M Nowak, 2005 (as above) 38 (The emphasis is mine).

¹⁹⁵ M Nowak, 2005 (as above) 38.

(v) *Child participation and empowerment*

Children's right to be heard is protected under article 12 of the CRC and article 4(2) of the ACRWC. The right to be heard and participation is one of the key rights of the children's rights instruments and one of the much emphasized principles in relation to alternative care placement. Children's right to participate in alternative care arrangements should be respected in all stages, including the determination of appropriate alternative care placement as well as in alternative care placements. For instance, article 4(d) of the 1993 Hague Convention on Inter-country Adoption specifically requires that children's opinions should be fully respected during the adoption process and that children's consent, where necessary, should be sought. The Council of Europe Recommendation on the rights of children in institutionalised care stipulates that children should be able to participate in decision-making processes concerning them and the living conditions in the institution.

State obligations under the right to be heard and participation go beyond providing opportunities for children to express their views. These obligations involve creating an environment where children can meaningfully participate in decision-making process. To do so, children should be provided with information and unbiased guidance on possible options and the foreseeable consequences arising therefrom.¹⁹⁶ Paragraph 6 of the 2009 UN Guidelines for the Alternative Care requires that children's view should be respected fully and duly taken into account in accordance with their evolving capacities. Furthermore, in order to enable children to make an informed decision, full information should be available for them in their preferred language.¹⁹⁷ It does not mean that children's views should be automatically endorsed, but rather that children's views should be given a due consideration and genuinely be able 'to influence the decisions to be taken'.¹⁹⁸ However, the CRC Committee was concerned that children's right to be heard and participate continues to be hampered by socio-political as well as economical barriers.¹⁹⁹ It was particularly concerned over

¹⁹⁶ M S Pais, 1997 (n 187 above) 427.

¹⁹⁷ Para 6 of the UN Guidelines for the Alternative Care of Children.

¹⁹⁸ M S Pais, 1997 (n 187 above) 428.

¹⁹⁹ CRC Committee, General Comment No. 12 The right of the child to be heard, (CRC/C/GC/12) 20 July 2009, para 4.

the right to be heard and participate of children belong to marginalized and vulnerable groups.²⁰⁰ The CRC guidelines on periodic reporting ask states to provide measures implemented to ensure that children's views are respected in accordance with article 12 of the CRC.²⁰¹

(vi) *Periodic monitoring and evaluation*

Although neither article 20 of the CRC nor the 25 of the ACRWC specifies what 'special protection and assistance' entail, the obligation to provide 'special protection and assistance' is closely linked to article 25 of the CRC. Under the article, children in care placements designated by states, in other words, formal alternative placements have the right to have their placement periodically reviewed and evaluated.²⁰²

Article 25 of the CRC complements article 19, which provides protection to children from all forms of abuse or neglect in the care of parents, legal guardians or others who are caring for the child.²⁰³ Article 25 has paramount importance to children as children are often vulnerable to exploitation in alternative care placement.²⁰⁴ The CRC Committee noted the increasing use of institutionalised care for children who are deprived of their family environment in Africa.²⁰⁵ Unfortunately, as the CRC

²⁰⁰ CRC Committee, General Comment No. 12 (as above) para 4.

²⁰¹ CRC Period Reporting Guidelines, CRC/C/58/Rev.1, para 28.

²⁰² Art 25 of the CRC reads: States parties recognize the right of a child who has been placed by the competent authorities for the purpose of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

²⁰³ Art 19 of the CRC reads:

19(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

19(2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

²⁰⁴ N Cantwell & A Holzscheiter, 2008 (n 135 above) 6.

²⁰⁵ Concluding Observation of the CRC: Comoros (CRC/C/15/Add.141: 2000) para 30; Concluding Observation of the CRC: The Gambia (CRC/C/15/Add.165: 2001) paras 38-39; Concluding Observation of the CRC: Algeria (CRC/C/15/Add.269: 2005) para 45; Concluding Observation

Committee pointed out on numerous occasions, in many African states, effective measures to monitor the standard of care and well-being of the child in alternative care placement were seriously lacking.²⁰⁶

Although the ACRWC does not provide for the periodic review of alternative care placement, article 16(2) of the ACRWC provides for the establishment of ‘special monitoring units’ as one of the protective measures.²⁰⁷ Reading it together with article 16(1), which include ‘school authority and any other person who has the care of the child’ in the category of persons or entities to be subjected under article 16, it is possible to assume that alternative care placements could be subjected to special monitoring units.

The importance of implementing effective monitoring and evaluation measures is also noted in the UN Guidelines for the Alternative Care of Children. The Guidelines specify that an independent monitoring body should organise both scheduled and unannounced visits to all forms of formal alternative care.²⁰⁸ Unfortunately, the responsibility of states to inspect and monitor the situations of children who are deprived of their family environment does not extend to informal kinship care. As discussed in section 3.2, the Guidelines require states to devise special and appropriate measures to protection of children in informal care, but they do not

of the CRC: Burundi (CRC/C/15/Add.133: 2000) para 26; Concluding Observation of the CRC: South Africa (CRC/C/15/Add.122:2001) para 43; Concluding Observation of the CRC: Tanzania (CRC/C/15/Add.156: 2002) para 32; Concluding Observation of the CRC: Guinea-Bissau (CRC/C/15/Add.177: 2004) para 43; Concluding Observation of the CRC: Rwanda (CRC/C/15/Add.234: 2004) para 43; Concluding Observation of the CRC: Niger (CRC/C/15/Add.173: 2002) para 43; and Concluding Observation of the DRC (CRC/C/15/Add.153: 2001) para 45.

²⁰⁶ As above.

²⁰⁷ Art 16 of the ACRWC reads:

16(1) State parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

16(2) Protective measures under this article shall include effective procedures for the establishment of special monitoring unites to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment , and follow-up of instances of child abuse and neglect.

²⁰⁸ Para 128 of the UN Guidelines for the Alternative Care of Children.

specify what measures should be taken. The reason behind excluding informal care from periodic monitoring and evaluation may be based on practicality. Informal care placement may not be notified to states and, therefore, periodic and organised inspection and monitoring may be difficult to enforce. Whatever the reason is, it is regrettable that inspection and monitoring requirements are not specifically required for informal care placements in the Guidelines, especially when the term ‘informal care’ is defined as broadly as to include care by non-relatives in their individual capacity.²⁰⁹

3.4 Forms of alternative care

Articles 20 of the CRC and 25 of the ACRWC provide for a non-exhaustive list of possible forms of alternative care. Article 20(3) of the CRC lists foster placement, *kafalah* of Islamic law, adoption and placement in suitable institutions as possible forms of alternative care. Furthermore, the list is not exhaustive as the term ‘*inter alia*’ allows the inclusion of other forms of alternative care as long as they reflect ‘the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background’.²¹⁰ Article 25(2)(a) of the ACRWC also lists foster placement and placement in suitable institutions as possible forms of alternative family care. The list is also not exhaustive as the term ‘among others’ similarly allows other non-listed forms of care. In the following section, eight forms of alternative care are discussed, namely 1) kinship care; 2) foster care; 3) cluster foster care; 4) *kafalah*; 5) residential or institutionalised care; 6) adoption; 7) inter-country adoption; and 8) independent living arrangement for children including child-headed household. The aim of the section is to explore the possible alternative care options for children who are deprived of their family environment as well as to examine whether recognising child-headed households rather than placing them in alternative care was indeed necessary. The suitability of each form of alternative care should be carefully examined on an individual basis.

²⁰⁹ Para 28(b)(i) of the UN Guidelines for the Alternative Care of Children.

²¹⁰ Art 20(3) of the CRC.

3.4.1 Kinship care

The concept of kinship care as defined in the UN Guidelines for the Alternative Care of Children has been introduced briefly in section 3.2. The concept of kinship care is not new. Informal kinship care, which can also be termed informal foster care has been the main mode of alternative care for children who are deprived of their parental care in traditional African societies as discussed in chapter two. Important elements of the definition of kinship care provided by the UN Guidelines for the Alternative Care of Children are: 1) Kinship care can be informal or formal; and 2) Kinship care is care provided by extended family members or close friends of the family known to the child.

The first point raises questions as to how formal kinship care is different from informal kinship care, and whether formal kinship care can be classified as foster care. The definition of formal care sheds light on the issue. Formal care is a type of care where a competent ‘administrative or judicial authority or duly accredited body’ has placed a child in certain form of alternative care, including residential care.²¹¹ Therefore, if a competent ‘administrative or judicial authority or duly accredited body’ has placed a child in kinship care, it is formal kinship care. Informal kinship care would be where family members of the child or close friends of the family have decided the placement of the child under their care without involving public authorities. In that sense, formal kinship care is similar to foster care that public authority plays an important role in placing children in the care. However, the major difference is that kinship care, whether it is formal or informal, is necessarily provided by an individual who is previously known to the child.

Kinship care, a form of care provided by family members or close friends of the family, has certain advantages over other forms of alternative care. For instance, the prior acquaintance between children and the caregiver may provide emotional security to children. Also, the risk of children being abused or maltreated may be lowered as the caregiver is well-known to other members of the family making monitoring and intervention at the family level relatively easy. Furthermore, kinship care may be in

²¹¹ Para 28(b)(ii) of the UN Guidelines for the Alternative Care of Children.

the best option of care in terms of providing the child with his or her own cultural and linguistic environment.²¹²

Nevertheless, there are inherent dangers of kinship care due to the familiarity among the caregiver, children and the parents or other family members of the children. In cases where kinship care is sought due to the parental neglect or the parents' inability to care for the child, based on the relationship between the kinship caregiver and the parents, unauthorised contact may be allowed between the child and the parents or conversely, authorised contact may be refused.²¹³ The children's views and wishes may also be ignored or given less weight in an informal decision making process; or there might be financial disincentive to return children to biological parents when the financial assistance attach to kinship care is much higher than those available to biological parents.²¹⁴

One of the possible dangers of informal kinship care is related to the difficulty of legally monitoring and regulating such foster care. Abuses and maltreatment of children in informal care placements could go unnoticed relatively easily. As explored in chapter two, children in informal kinship care may be subject to abuse and maltreatment within the households, especially when there is a lack of monitoring mechanisms. The UNICEF report, *Enhanced protection for children affected by AIDS*, points out that although generally informal care arrangements are safe and appropriate, they could put children at risk of inadequate care, abuse or exploitation.²¹⁵ The risk increases where caregivers are relatives other than grandparents, siblings or are unrelated.²¹⁶ Furthermore, if kinship care is provided based on family obligation rather than genuine affection for the children, the risk of children being abused or maltreated inevitably increases.²¹⁷ Especially in cases where kinship care is provided due to parental death, other relatives may be reluctant to intervene even when the

²¹² Para 10 of the UN Guidelines for the Alternative Care of Children.

²¹³ N Cantwell, 2005 (n 57 above).

²¹⁴ N Cantwell, 2005 (n 57 above).

²¹⁵ *Enhanced protection for children affected by AIDS: A companion paper to the Framework for the Protection, Care and Support of Orphans and Vulnerable Children Living in a World with HIV and AIDS*, UNICEF (2007) 29.

²¹⁶ UNICEF, 2007 (as above) 29.

²¹⁷ *Caring for children affected by HIV and AIDS*, UNICEF-Innocenti (2006) 19.

children are maltreated or abused under the kinship care. Furthermore, it also revealed that in informal kinship care settings, siblings are often separated into different households because poor relatives cannot accommodate a large number of siblings.²¹⁸ Compared to foster care, which is highly regulated by state from the selection of suitable foster carers to monitoring of foster placement, there is less governmental involvement in kinship care.²¹⁹

Although in many cases, children in kinship care, whether informal or formal, are safely and adequately cared for, considering the possible dangers of informal care, 'there is no less need to vet applicants, to examine the overall circumstances and the likely consequences' of the proposed kinship care.²²⁰ As asserted in the *Caring for children affected by HIV and AIDS*, 'being looked after by family members is not sufficient to guarantee child's welfare, protection and ability to cope.'²²¹ Moving in with relatives may mean separating siblings and removing children from the familiar family home.²²² Furthermore, it should not be automatically assumed that kinship care would be available to children as long as extended families are supported. As studies show, in some cases, children are left in the void of care by extended families due to the complicated lineage issues.²²³ It was pointed out that children who are born out of 'unmarried' couples, often due to unpaid *lobola*, are often unsupported by paternal relatives after the death of their parents.²²⁴ They often lose support from their maternal relatives when they have moved away from the communities where their mothers had been born and are unable to return to their maternal communities due to the inability of the paternal relatives to pay back *lobola*.²²⁵

The importance of kinship care in providing adequate alternative care to children who are deprived of their family environment should not be overlooked. However, kinship

²¹⁸ UNICEF, 2007 (n 215 above) 15.

²¹⁹ N Cantwell, 2005 (n 57 above).

²²⁰ N Cantwell, 2005 (n 57 above).

²²¹ UNICEF-Innocenti, 2006 (n 217 above) 19.

²²² UNICEF-Innocenti, 2006 (as above) 19.

²²³ S Roalkvam, 2005 (n 71 above) 216-217; L Jones, 'Children in poor urban settlements in Swaziland in an era of HIV/AIDS' (2005) 4/3 *African Journal of AIDS Research* 167.

²²⁴ S Roalkvam, 2005 (as above); L Jones, 2005 (as above).

²²⁵ S Roalkvan, 2005 (as above).

care should not be considered as automatically the best care option. Any decision regarding alternative care placement should be taken on a case-by-case basis while according the best interests of the child paramount importance.²²⁶ The article 10 of the 1986 Declaration on Foster Care and Adoption also requires that foster placement of children be registered by law.²²⁷ States should gradually eliminate informal care by registering all informal kinship carers to be able to periodically monitor and evaluate the standards of care.

3.4.2 Foster care

Foster care is defined as ‘situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been selected, qualified, approved and supervised for providing such care.’²²⁸ As the definition suggests foster care can only be formal, because the involvement of a ‘competent authority’ in foster placement is one of the elements of foster care. Also, by definition, foster care differs from kinship care as foster care is care provided by individuals who are not family members of the child. Although the definition provided by the UN Guidelines for the Alternative Care of Children does not contain a time factor, conventionally, foster care is used as a temporary measure to provide care for children while an appropriate long term solution is being devised.²²⁹ However, in many African states, foster care is nowadays increasingly used as a long-term measure to provide care for children who are orphaned by AIDS-related illnesses.²³⁰

Foster parents, unlike adoptive parents, do not have full parental rights and responsibilities over the fostered children. Foster parents have the responsibility to provide daily care and maintenance of the fostered child, but their powers are limited in a number of areas. For instance, foster parents cannot consent to operation or

²²⁶ Para 56 of the UN Guidelines for the Alternative Care of Children.

²²⁷ Art 10 of the 1986 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.

²²⁸ Para 28(c)(ii) of the UN Guidelines for the Alternative Care of Children.

²²⁹ *Child Care and Protection*, Malawi Law Commission Discussion Paper (June 2004) 19.

²³⁰ Malawi Law Commission, 2004 (as above).

medical treatment of the child when such operation or treatment may have serious implications for the health of the child; they further cannot consent to the marriage of the child; and they are not authorised to deal with any property belonging to the child.²³¹

When placing a child in foster care, ‘desirability of continuity in a child’s upbringing and the ethnic, religious, cultural and linguistic background’ of the child should be taken into consideration.²³² This condition suggests that foster care by a member of the child’s community is more desirable than foster care by persons far removed from the community in which the child has been brought up. In order to ensure the ethnic, religious, cultural and linguistic background of the child is respected, paragraph 118 of the UN Guidelines for the Alternative Care of Children requires that accredited foster carers be identified in each locality who can provide children with care and protection while maintaining the family ties.

One of the main advantages of foster care is that children are cared for in a family environment with care providers who act as ‘substitute’ parents. The close environment would allow care providers to identify the needs of children and better respond to them. However, foster care does not guarantee permanency of care. Naturally, similar to other options, foster placement can be terminated if the placement is deemed not in the best interests of the child. Furthermore, the foster care placement can be terminated by a request of the foster parents and such terminations may lead to frequent changes of foster care placements, which negatively affect psychological well-being and development of children.²³³ Children may also face ‘foster care drift’ where children go through multiple number of foster care placement without securing a permanent care.²³⁴ Studies conducted on foster care placement show that the age and experience of foster parents, and age and previous experience of

²³¹ <http://www.capegateway.gov.za/eng/directories/services/11575/17450#02> [accessed : 3 May 2010].

²³² Art 20(3) of the CRC and art 25(3) of the ACRWC.

²³³ M Sallanas *et al.*, ‘Breakdown of teenage placements in Swedish foster and residential care’ (2004) 9/2 *Child and family social work* 141; also see J Strijker & T J Zandberg, ‘Breakdown in foster care’ (2005) 9/1&2 *International Journal of Child and Family Welfare* 76.

²³⁴ G Cushing & S B Greenblatt, ‘Vulnerability to foster care drift after the termination of parental rights’ (2009) 19/6 *Research on Social Work Practice* 694.

foster children influence the success rate of the foster care.²³⁵ Furthermore, for a large number of siblings in need of alternative care, foster care may not be appropriate as siblings may need to be separated. The negative impact of the separation of siblings on emotional and psychological well-being of the children has been highlighted in chapter one.²³⁶ Despite the importance of foster care as a temporary measure of care and protection for children who are deprived of their family environment, the negative consequence of a series of short-term foster care placement on the emotional development of children and the possibility of separation of siblings should be fully considered before placing a child in foster care.

3.4.3 Cluster foster care

The UN Guidelines for the Alternative Care of Children do not specifically mention cluster foster care, but it could fall under ‘other forms of family-based or family-like care placements’.²³⁷ Distinguishing cluster foster care and group care may be necessary. A ‘small group home’ is defined as ‘older children living with a core worker as a permanent substitute parent in a substitute family.’²³⁸ However, ‘cluster foster care’ in South Africa can be understood as a placement of care where more than six children are cared for through a cluster foster care scheme provided by a non-profit organisation registered by the Provincial Head of Social Development.²³⁹ While in a conventional foster care placement, maximum of six children can be placed in one household, unless children are related, but under the cluster foster care scheme, more than six children can be cared for by a multiple number of active members of the organisation providing the scheme.²⁴⁰

²³⁵ M Sallanas *et al.*, 2004 (n 233 above) 144.

²³⁶ See sec 1.3.

²³⁷ Para 28(c)(ii) of the UN Guidelines for the Alternative Care of Children.

²³⁸ D M Swales *et al.*, *Applying the Standards: improving quality child care provision in East and Central Africa*, Save the Children- UK (2006) 4.

²³⁹ Sec 183 of the Children’s Act. The South African model of cluster foster care is discussed in detail in chapter 4.

²⁴⁰ *Children’s Act explained: Booklet 2 prevention, intervention and care*, Department of Social Development of the Republic of South Africa and UNICEF (2010) 25.

The functions of establishing group homes may vary from providing specialised care to children with special needs, including behavioural problems and disabilities in a non-institutionalised setting,²⁴¹ to providing care to a large number of children who are deprived of their family environment.²⁴² One of the main advantages of the cluster foster care or group homes is that it allows a group of children, who may not be appropriately cared for in conventional foster care placements, to be cared for in an alternative family-like environment rather than in an institutionalised setting. Group homes or cluster foster care may be a useful option in a context where a large number of children are losing both of their parents due to illnesses or conflicts as siblings can remain together in a group home with a designated care-provider(s). However, the problem of having to relocate children to a different household remains. A study in Uganda revealed that in many cases, children preferred to stay in their homes due to reasons such as fear of being rejected or abused by their relatives and the promise made to their parents to remain at home.²⁴³ Also, in a group home or cluster foster care setting, the primary care-providers may change over time, which could hamper children's ability to form a secure relationship with their care-providers. Furthermore, the number of children to be cared for in group homes or cluster foster care and the role of care giver should be carefully defined as to avoid group homes or cluster foster care placements resembling residential care.

3.4.4 *Kafalah*

Kafalah is an Islamic practice through which a family takes in a child on a permanent basis who is deprived of his or her family environment. However, unlike adoption, the child is not entitled to use the family name of the *kafalah* placement or inherit from the family.²⁴⁴ *Kafalah* is included in the list of possible forms of alternative care in the CRC. Despite its potential to provide permanent family-based care to children in

²⁴¹ P W Salsich, 'Group homes, shelters and congregate housing: deinstitutionalisation policies and the Nimby syndrome' (1986) 21 *Real Property, Probate and Trust Journal* 418.

²⁴² P H Wolff & G Fesseha, 'The orphanages of Eritrea: are orphanages part of the problem or part of the solution?' (1998) 155/10 *American Journal of Psychiatry* 1313.

²⁴³ N Dalen *et al.*, 'They don't care what happens to us.' The situation of double orphans heading households in Rakai District, Uganda' (2009) *Bio-Medical Central Public Health* 325.

²⁴⁴ G van Bueren, 1995 (n 76 above) xxi; for a detailed discussion on *kafalah*, see U M Assim, *The best interests of children deprived of a family environment: a focus on Islamic Kafalah as an alternative care option*, LLM dissertation, University of Pretoria (2009).

need of alternative care, *kafalah* is not specifically mentioned in the ACRWC. Recently, the UN Guidelines for the Alternative Care of Children placed much emphasis on *kafalah*. Paragraph 2(a) of the Guidelines includes *kafalah* as a permanent solution on par with adoption. Paragraph 112 also recommends that residential care should be used only in temporary measure to secure alternative family care such as *kafalah*. It is a welcome development as *kafalah* is an important child care practice in Africa due to a large number of countries in Africa that apply *Shari'a* law.²⁴⁵ However, the concerns over the rights of children in *kafalah* system should be fully addressed. The CRC Committee, while noting the importance of *kafalah* in providing alternative care to children deprived of their family environment, strongly recommended that the system of *kafalah* should never compromise the rights of the child, including non-discrimination and their effective implementation.²⁴⁶ Furthermore, the majority of countries that are most affected by the HIV epidemic are in southern Africa where Islamic laws are not applicable. Therefore, in such countries, *kafalah* practice has only a limited value as an alternative care option.

3.4.5 Residential or institutionalised care

Institutionalised care or residential care refers to the placement of children in institutions, including but not limited to orphanages or correctional facilities for children in conflict with the law. Institutionalised care has often been viewed negatively. Research on children in institutionalised care finds that, among other conclusions, children raised in institutions during the early development period show significantly impaired physical, cognitive, linguistic, socio-emotional and brain development compared to children who grew up in their own communities.²⁴⁷ The reluctance to place children in institutionalised care is clear from the wording of the relevant treaty provisions. As Cantwell and Holzscheiter pointed out, institutionalised care is the only alternative care placements qualified by the term, 'if necessary', in

²⁴⁵ B Mezmur, 2009 (n 22 above) 87.

²⁴⁶ CRC Concluding observation: Algeria (n 74 above) para 46.

²⁴⁷ B Gudbrandsson, 2006 (n 182 above) 9; 'Children without parental care or at risk of losing it', SOS-KDI recommendation-background paper, available at: http://www.europarl.europa.eu/hearings/20070417/libe/sos_children_en.pdf [accessed: 2 Nov 2008] 5; C Csaky, *Keeping children out of harmful institutions: Why we should be investing in family-based care*, Save the Children UK (2009); K Browne, *The risk of harm to young children in institutional care*, Save the Children UK (2009).

article 20(3) of the CRC.²⁴⁸ Both the CRC and ACRWC regard institutionalised care as the last resort when other alternative care placement is unavailable or inappropriate. Alarming, the CRC Committee on several occasions in its concluding observations noted the over-reliance on institutionalise care for children who are deprived of their family environment in many African states especially in the context of the HIV epidemic.²⁴⁹

Although it is generally accepted that institutionalised care has a negative impact on children, such findings cannot be easily generalised. In countries with a high level of poverty and high number of children in need of alternative care, unregulated foster care or other care arrangements may not necessarily be better than regulated and monitored institutionalised care. A study conducted in Malawi, in which a number of children in different orphanages and under foster care by relatives were interviewed, reported that children in orphanages were receiving better care in terms of education, health care and psycho-social support.²⁵⁰ Interviews with both sets of children revealed that often children who are cared for by their relatives felt that their caregivers favoured their own biological children.²⁵¹ Another often cited criticism of institutionalised care is that the cost of keeping children in institutions is much higher than placing a child in foster care or community-based care. However, as the study in Malawi revealed, children in institutionalised care received much better material and health care than children in impoverished foster homes.²⁵² The question should not be ‘how much does it cost to keep a child in an institutionalised care or foster care?’ but ‘how much does it cost to keep a child in foster care at the same standard as

²⁴⁸ N Cantwell & A Holzscheiter, 2008 (n 135 above) 54.

²⁴⁹ CRC Concluding observation: Ethiopia (CRC/C/15/Add.144) para 50; CRC Concluding observation: Tanzania (CRC/C/15/Add. 156) para 53; CRC Concluding observation: Guinea-Bissau (CRC/C/15/Add. 177) para 33; CRC Concluding observation: Morocco (CRC/C/15/Add.211) para 36; CRC Concluding observation: Rwanda (CRC/C/15/Add. 234) para 40.

²⁵⁰ See B Zimmerman, Orphan living situation in Malawi: a comparisons of orphanages and foster homes (May, 2005) available at: http://www.stanford.edu/dept/publicpolicy/programs/Honors_Theses/Theses_2005/Zimmerman.pdf [accessed: 1 Nov 2008].

²⁵¹ B Zimmerman, 2005 (as above).

²⁵² As above 45.

institutionalised care?’²⁵³ The contrasting findings demonstrate the difficulty of generalising the negative effects of institutionalised care.

Article 20(3) of the CRC and article 25(2)(a) of the ACRWC provide for a suitability test with regard to institutions. Suitability can be assessed in two ways: a general evaluation of the quality of facilities, or an evaluation of appropriateness of facilities for meeting the specific needs of the children.²⁵⁴ There are several important regional and global guidelines on institutionalised care. Evaluating whether a certain facility meets the specific needs of an individual child should be determined on a case-by-case basis. In that case, article 3(1) of the CRC on the best interests of the child should be the primary consideration. Neither the CRC nor the ACRWC provide detailed guidelines on standards and quality of institutions. Article 3(3) of the CRC simply requires that ‘the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.’²⁵⁵ However, as Cantwell and Holzscheiter note, although the CRC or ACRWC does not specify any basic requirements of a facility, such as the size or location, a suitability test will involve determining ‘how well residential facilities protect and promote the whole range of civil and economic, social and cultural rights to be enjoyed by children.’²⁵⁶

Nonetheless, there are several important documents that list specific requirements of residential facilities. The UN Guidelines for the Alternative Care of Children require that facilities providing residential care resemble as much as possible a family or small group situation.²⁵⁷ The Guidelines further state that the residential care should be used as a temporary measure while actively seeking the child’s family reintegration or, if that is not possible, care in an alternative family setting.²⁵⁸ The Council of Europe 2005 Recommendation also stipulates that children have the right to be placed

²⁵³ As above 45.

²⁵⁴ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 56.

²⁵⁵ Art 3(3) of the CRC.

²⁵⁶ N Cantwell & Holzscheiter, 2008 (n 135 above) para 57.

²⁵⁷ Para 124 of the UN Guidelines for the Alternative Care of Children.

²⁵⁸ Para 124 of the UN Guidelines for the Alternative Care of Children.

in residential care only if it best meets the needs of children ‘that have been established as imperative on the basis of a multidisciplinary assessment.’²⁵⁹ The basic principles regarding residential placement includes, among others, the principle of non-discrimination, periodic monitoring of placements, respect for children’s views and prioritisation of the best interests of the child.²⁶⁰ The 2005 Recommendation further requires ‘all the residential institutions to be accredited and registered with the competent public authorities on the basis of regulations and national minimum standards of care.’²⁶¹

A temporary residential care or institutionalised care may prove to be a necessary evil in the context where there is no other suitable family-based alternative care placement. However, as emphasised above, states should endeavour to make residential facilities resemble small children’s homes or small group homes. Ultimately, the state should reduce the use of residential care by strengthening family-based alternative care placements.

3.4.6 Adoption

Adoption is a ‘welfare and protection measure that enables an orphaned or definitively abandoned child to benefit from a permanent family.’²⁶² As Van Loon points out, adoption is ‘the institutionalised social practice through which a person, belonging by birth to one family or kinship group, acquires new family or kinship ties that are socially defined as equivalent to biological ties and which supersede the old ones, either wholly or in part.’²⁶³ The ‘acquisition of new family or kinship ties, which supersedes the old ties’ is the main element that distinguishes adoption from foster care. It is also one of the reasons why the determination of adoptability of a child is

²⁵⁹ Appendix to Recommendation Rec(2005)5 of the Committee of Ministers to member states of rights of children in institutionalised care (16 March 2005).

²⁶⁰ Guidelines and quality standards, Recommendation (2005) (as above).

²⁶¹ As above.

²⁶² *Inter-country adoption*, UNICEF-Innocenti Digest No 4, UNICEF-International Child Development Centre, Florence, Italy (1998) 2.

²⁶³ Van Loon’s definition is cited in S Detrick, 1999 (n 145 above) 343.

vital if an adoption were to take place.²⁶⁴ Therefore, the primary aim of adoption ‘is to provide a child who cannot be cared for by his or her own parents with a permanent family.’²⁶⁵

Despite the obvious advantages of adoption as a way to provide permanent care in a family environment to children in need of care, adoption had been a controversial issue. During the drafting stage of article 20 of the CRC, some countries, including Australia and the US, wanted to give adoption a more prominent role in providing alternative care to children who are deprived of their family environment and sought that states should facilitate adoption of children even by providing ‘appropriate financial assistance to the adopting family.’²⁶⁶ However, many countries expressed their concern over making adoption the only option in case a child cannot be cared for by his or her biological family.²⁶⁷ The compromise was the recognition of adoption as one form of alternative care.

In addition to being listed as one of the alternative forms of care in articles 20 of the CRC and 25 of the ACRWC, adoption is separately dealt with in articles 21 of the CRC and 24 of the ACRWC. Both articles give the paramount importance to the best interests of the child in adoption arrangements,²⁶⁸ and provide for the minimal requirements for adoption procedure, especially with regards to the determination of the adoptability of the child.²⁶⁹ It is important to note that, unlike article 20-related issues under the CRC, where the ‘best interests of the child’ is not mentioned, in matters related to adoption, ‘the best interests of the child’ is given paramount importance indicating that no other interests should take precedent over the interests of the child.²⁷⁰ Although the CRC and the ACRWC do not provide detailed rights of

²⁶⁴ Art 21(a) of the CRC stipulates that only the competent authority should determine based on all the available information, the adoptability of a child. Art 24(a) of the ACRWC is also similarly worded.

²⁶⁵ Art 13 of the 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children.

²⁶⁶ Article 20 Children deprived of a family environment for- Legislative history of the Convention on the Rights of the Child (1978-1989) (n 132 above) para 52.

²⁶⁷ As above, para 53.

²⁶⁸ Art 21 of the CRC and Art 24 of the ACRWC.

²⁶⁹ Art 21(a) of the CRC and Art 24(a) of the ACRWC.

²⁷⁰ R Hodgkin & P Newell, 2002 (n 136 above) 296.

children who are adopted, the CRC Committee on numerous occasions recommended that states develop mechanisms to monitor adopted children²⁷¹ and to ensure that the right of the adopted children to know their origin and access information on their background.²⁷² Although child participation is not explicitly mentioned in the articles, given that the children's right to participation is one of the fundamental pillars of children's rights, the right of children to participate in their own adoption arrangement should be fully guaranteed according to the maturity and age of the children.

The purpose of the section is not to analyse the problems and challenges present in adoption arrangement but rather to introduce adoption as a form through which alternative care can be provided to children who are deprived of their family environment. Therefore, a detailed discussion on adoption and children's rights implications is beyond the scope of the section. Adoption may be a preferable option for very young children who are deprived of their parental care. Adoption would secure permanency of care in family environment over other care options, such as kinship care, foster care and residential care. Especially, local adoption may increase the possibility of the children maintaining ties with their cultural and social identity. However, it should be noted that adoption may not be an appropriate option for children who wish to remain with their siblings. Also, it should be pointed out that despite the advantages of adoption, there are serious risks of children being adopted for wrongful purposes or children being abused in their adoptive families. In order to minimise such dangers, it is imperative to establish a clear legal and policy framework, which reflects the best interests of the child, to regulate all the stages of the adoption arrangement.

3.4.7 Inter-country adoption

Inter-country adoption is dealt in the same articles as domestic adoption, in articles 21 of the CRC and 24 of the ACRWC. Before going into the details of these provisions, there is a need to clarify terminology such as 'inter-country adoption' and

²⁷¹ For instance, see CRC/C/15/ADD.225 (CRC, 2000, Armenia) para 38; CRC/C/15/ADD.122 (CRC, 2000, South Africa) para 26; CRC/C/15/ADD.127 (CRC, 2000, Kyrgyzstan) para 38; CRC/C/15/ADD.138 (CRC, 2000, Centre African Republic).

²⁷² For instance, see, CRC Concluding Observation: Slovenia (2004) CRC/C/15/ADD.230, para 35.

‘international adoption’. The distinction between ‘inter-country adoption’ and ‘international adoption’ is made by UNICEF and by scholars, such as Van Bueren, ‘to avoid the impression given that there is a uniform type of adoption and that substantive rules exist which are different from national adoption.’²⁷³ The main element of the inter-country adoption is the change in the child’s habitual country of residence, irrespective of the nationality of the adopting parents.²⁷⁴ In international adoption, the main element is the change of the nationality of the adopted child. International adoption occurs when adoptive parents adopt a child of a nationality that is different from theirs and irrespective of whether or not they reside and continue to reside in the child’s country of habitual residence.²⁷⁵

Inter-country adoption is a phenomenon of the last half century.²⁷⁶ Inter-country adoption, like domestic adoption, provides an opportunity to children who are deprived of their family environment to be cared for in a permanent family environment. Considering millions of children going through multiple foster care placements or living in institutionalised care, inter-country adoption seems to provide an excellent opportunity to both children in need of care and individuals who are willing and able to provide such care.²⁷⁷ However, inter-country adoption seems to have been met with certain reluctance. The 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Child stipulates that inter-country adoption ‘may be considered’ if the child cannot be placed in a foster family, a domestic adoptive family or ‘cannot, in any suitable manner be cared for in the child’s country of origin’.²⁷⁸ Article 21(b) of the CRC and article 25(b) of the ACRWC echo

²⁷³ G Van Bueren, 1995 (n 76 above) 96.

²⁷⁴ UNICEF-Innocenti Digest 4, 1998 (n 262 above) 2.

²⁷⁵ As above, 2.

²⁷⁶ E Bartholet, ‘International Adoption’ in L Askeland (ed) *Children and youth in adoption, orphanages and foster care*, Greenwood Publishing Group (2005) 108; S R Wallace, ‘Inter-country adoption: The most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others?’ (2003) 20 *Arizona Journal of International and Comparative Law* 692.

²⁷⁷ See S R Wallace, 2003 (as above); S Dillon, ‘Making legal regime for inter-country adoption reflecting human rights principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Inter-Country Adoption’ (2003) 21 *Boston University International Law Journal* 179.

²⁷⁸ Art 17 of the 1986 UN Declaration on Foster Care and Adoption.

the 1986 Declaration. During the CRC working group discussion on the provision concerning inter-country adoption, the representative of Venezuela expressed the view that inter-country adoption should be treated ‘as an extreme and exceptional measure and not as an alternative means of child care’.²⁷⁹ Her sentiment was joined by other delegates from the Federal Republic of Germany who suggested replacing the words, ‘an alternative means’ to ‘an exceptional means’.²⁸⁰ Such discussion seems to show how inter-country adoption was considered less favourably than domestic solutions. Cantwell argued that the insertion of the term ‘suitable manner’ means that if domestic care options are ‘unsuitable’, regardless of the existence of such options, inter-country adoption should be allowed.²⁸¹ However, the insertion of ‘any suitable manner’ seems to suggest that even institutionalised care, as long as it is deemed ‘suitable’, should be given priority over inter-country adoption.

Article 24 of the ACRWC is even more hesitant to endorse inter-country adoptions. Under the article, inter-country adoption ‘may, as a last resort, be considered’ when a child cannot be fostered, domestically adopted or be cared for in any suitable manner in the country of origin. Although the wording is similar, in the ACRWC, inter-country adoption may be considered as ‘a last resort’ while under the CRC, it may be considered as ‘an alternative means’. Furthermore, considering that the subsequent article (article 25 of the ACRWC) does not qualify institutionalised care as a last resort, it is ironic that such condition should be attached to inter-country adoption. As discussed above, article 25 of the ACRWC stipulates that children should be provided with ‘alternative *family* care’.²⁸² Nonetheless, one of the ways to provide permanent family care seems to have been met with a strong reservation. While article 20 of the CRC specifically mentions adoption, without differentiating whether it is domestic or inter-country, prior to the institutionalised care and demands that children be placed in institutionalised care as the last resort and only if it is necessary, article 25 does not specifically mention adoption giving the impression that the ACRWC gives inter-country adoption even lower priority than institutionalised care.

²⁷⁹ S Detrick, 1992 (n 3 above) 314.

²⁸⁰ S Detrick, 1992 (as above) 314.

²⁸¹ N Cantwell, ‘The challenges of out-of-home care’ in *Early Childhood Matters*, Bernard van Leer Foundation (December 2005) 11.

²⁸² The emphasis is mine.

The strong reluctance towards inter-country adoption is often illustrated in the domestic laws in various states in Africa. For instance, under section 3(5) of the Adoption of Children Act, inter-country adoption is currently prohibited in Malawi.²⁸³ The Law Commission in Malawi recommended that inter-country adoption to a state party to the Hague Convention should be allowed, if to do so is in the best interests of the child.²⁸⁴ Nevertheless, a required 3-year foster care period while residing in Malawi effectively hinders inter-country adoption.²⁸⁵ The Child Act No 10 of 2008 of Southern Sudan also imposes on restrictions of a three-year residency period in Southern Sudan and a prior fostering period of one-year on foreigners who wish to adopt a Southern Sudanese child.²⁸⁶ Also, in Zambia, section 4(5) of the Adoption Act²⁸⁷ prohibits inter-country adoption, although, technically, international adoption is recognised.²⁸⁸

Wallace listed three negative views that may prevent the full endorsement of inter-country adoption by countries; 1) the perception of inter-country adoption as a new form of imperialism; 2) the perception that allowing too many inter-country adoptions may send out the message that the country is not able to take care of its own children; and 3) a widely held perception that inter-country adoption leads to dangerous and evil practices, such as child-trafficking, kidnapping and financial exploitation.²⁸⁹

²⁸³ Sec 3(5) of the Adoption of Children Act Cap 26/01 states that ‘...adoption shall not be made in favour of any applicant who is not a resident in Malawi.’

²⁸⁴ *Review of Children and Young Persons Act Cap 26:03*, Special Law Commission, Malawi (2003).

²⁸⁵ Sec 3A(2) of the ‘Child care, protection and justice Bill’ requires that the applicants or one of the applicants, if not a relative of the child, has, while in Malawi, fostered the child for a continuance period of three years’, cited in Special Law Commission, Malawi 2003 (as above).

²⁸⁶ Sec 90 of the Child Act No 10 of 2008, Southern Sudan.

²⁸⁷ Adoption Act Chapter 54 of the Law of Zambia.

²⁸⁸ Sec 4(5)(a) of the Adoption Act prohibits adoption of adoption order unless the applicant and the infant reside in Zambia. Furthermore, Sec 4(5)(b) requires the infant to have been cared for the applicant for at least three consecutive months immediately preceding the date of the order. Although Sec 4(5)(a) does not prevent foreigners who reside in Zambia from adopting (international adoption), it could be interested to prohibit inter-country adoption which involves a change of residential country and prospective parent(s) often does not reside in Zambia. Also the three-month requirement in Sec 4(5)(b) makes it difficult for foreigner(s) who do not reside in Zambia from adopting.

²⁸⁹ S R Wallace, 2003 (n 275 above) 690-691; also see C Kleem, ‘Airplane trips and organ banks: random events and Hague Convention on Inter-country Adoption’ (2000) 28 *Georgia Journal of International and Comparative Law* 325.

Despite the general reluctance to accept inter-country adoption as a viable, and possibly the best option in certain cases, there has been a growing acceptance to inter-country adoption. The 1993 Hague Convention is a good example. The 1993 Hague Convention is the first international convention that enthusiastically endorses inter-country adoption.²⁹⁰ In its preamble, the Hague Convention recognises the importance of children to grow up in ‘a family environment’ and goes as far as to say that ‘inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her country of origin.’ It should be noted that the Hague Convention is clear that children should not be removed from their own family environment unless their best interests dictate otherwise. Under the Hague Convention, inter-country adoption is a third-best option after children’s natural family environment and domestic adoption by a suitable family.²⁹¹ Therefore, inter-country adoption is given priority over institutionalised care in the country or origin.²⁹² Also, recent court cases on inter-country adoption in South Africa and Malawi suggest that the negative perception on inter-country adoption and the blanket preference to ‘any’ domestic alternative care options may be changing in favour of giving a more individual and balanced assessment to the necessity of inter-country adoption in certain cases.²⁹³

Given the important role of inter-country adoption in providing children who cannot be cared for, in a suitable manner, in their own countries, the more important issue is how to make inter-country safe for the children. The ACRWC stipulates that inter-country adoption²⁹⁴ should take place between countries that have either ‘ratified or adhered’ to the CRC or the ACRWC. The condition is an attempt to provide the maximum protection for the children during and after inter-country adoption. The first step states may take to safeguard the interests of the children in inter-country adoption

²⁹⁰ S R Wallace, 2003 (as above) 692; B Mezmur, (n 22 above) 93.

²⁹¹ S R Wallace, 2003 (as above) 701- 702; C Kleem, 2000 (n 289 above) 333.

²⁹² S R Wallace, 2003 (as above) and C Kleem, 2000 (as above).

²⁹³ See 1) In the matter of Adoption of Children Act CAP 26:01 and in the matter of David Banda (a male infant), 2) Adoption case of No 2 of 2006, Malawi [2008] MWHC 3; In the matter of Adoption of Children Act CAP. 26:01 and in the matter of Chifundo James (a female infant) of C/O Mr. Peter Baneti. Adoption case No 1 of 2009 [2009] MWHC 3. MSC A Adoption Appeal n° 28 of 2009, Malawi; *AD and Other v DW and others*, CCT 48/7, 2008 (3) SA 183 (CC).

²⁹⁴ See Van Bueren, 1995 (n 76 above) 96 & UNICEF-Innocenti Digest, 1998 (n 262 above) 2 for the definition of inter-country adoption.

arrangements is to ratify the 1993 Hague Convention as frequently recommended by the CRC Committee and to revise their adoption laws to reflect the standard and principles of the Convention. As discussed in section 3.2, the Hague Convention is the most comprehensive instrument on inter-country adoption and it aims to harmonise laws and regulations on inter-country adoption in all countries.

3.4.8 Supervised independent living arrangement for children

‘Supervised independent living arrangement for children’ as alternative care is a relatively new concept, and is not mentioned in the CRC or the ACRWC.²⁹⁵ The UN Guidelines for the Alternative Care of Children list the ‘supervised independent living arrangement for children’ as one of the forms of alternative care without giving examples of such living arrangement. Nevertheless, a few examples of supervised independent living arrangements for children may be found in *Applying the standard*, a publication by the Save the Children. Those examples include; 1) ‘supported accommodation’ defined as ‘small groups of older children living in separate and independent households but supported by visiting staff on a regular basis’, 2) ‘peer households’ defined as ‘a small group of young people choose to live together and are supported in doing so, learning necessary life skills and being offered initial support and guidance towards independence’; 3) ‘sheltered housing’ defined as ‘young people or children live independently with a permanent adult worker living independently on site but available as a mentor for guidance and support’; and 4) ‘supported child-headed households’ defined as ‘siblings living as a family, in their own home, with social workers providing ongoing guidance and support’.²⁹⁶

²⁹⁵ ‘Supervised independent living programme’, which is similar to ‘peer households’ has been first introduced as a transitional care for children and young adults generally aged from 18 to 20 years leaving foster care or other structured care placement. The aim of the programme is to support and teach life skills to youth in transition to enable them to build their lives outside of alternative care placements. See, M E Collines, ‘Transition to adulthood from vulnerable youth: a review for research and implications for policy (2001) 21 *Social Service Review* 271.

²⁹⁶ D M Swales *et al.*, *Applying the standards: improving quality childcare provision in East and Central Africa*, Save the Children (2006) 4. There is no clear answer as to whether child-headed households are included in the independent living arrangement for children. The position of the International Social Service, an organisation who pioneered the drafting of the 2009 UN Guidelines for the Alternative Care of Children, is that a child-headed household (sibling-headed household) is not included in the independent living arrangement for children, but rather included under ‘kinship care’. Therefore, depending on whether the decision to form child-headed households is made informally by relatives or whether the decision is taken through an official authority, child-headed households will be considered, either informal kinship care or

As mentioned in the beginning, ‘supervised independent living arrangement for children’ as a mode of alternative care is a relatively new development. However, ‘supervised independent programme’ as a transitional care programme for young adults who are leaving foster care or institutionalised care has been developed, especially in the United States, since the 1980s.²⁹⁷ Among the four different types of supervised independent living arrangements, ‘supported accommodation’ and ‘peer households’ may fit most closely as a transitional care to older children leaving alternative care placements.

Although all four care arrangements are similarly defined, the level of support provided to each care arrangement differs. Also, the composition of each ‘group’ or ‘household’ is different in terms of age (whether they are ‘children’ or ‘young persons’) or biological relatedness among the members of the households or groups. According to the definition, it seems that it is only a ‘child-headed household’, which, by definition, consists of children who are related by blood. The concept of supervised living arrangements is not defined in the UN Guidelines for the Alternative Care of Children, but the wording of paragraph 160 of the Guidelines suggests that such living arrangements are for children who are deprived of their family environment but cannot be cared for in a permanent family-based care, such as adoption or *kafalah*. For such children, other ‘long-term’ solutions, such as ‘foster care, or appropriate residential care, including group homes and supervised living arrangements’ should be envisaged.²⁹⁸

In the next section, a ‘child-headed household’ as an emerging form of alternative care is discussed in detail. The reasons for singling out child-headed households are twofold. Firstly, there is no agreement on whether child-headed households should be included in supervised independent living arrangement for children. Secondly, while other forms of supervised independent living arrangements have not been introduced

formal kinship care.²⁹⁶ However, including child-headed households in kinship care does not seem logical as kinship care, as mentioned before, is defined as a care provided by a member of extended family or a close friend of the family. A child-headed household is a household headed by a child with a support from an adult supervisor; therefore does not fit under kinship care but rather under independent living arrangement for children.

²⁹⁷ For more information, see <http://www.cwla.org/advocacy/indlivtest991013.htm> [accessed: 2 J June 2010].

²⁹⁸ Sec 160 of the UN Guidelines for the Alternative Care of Children.

or implemented as alternative care placements, child-headed households have been gradually recognised in many African states especially in their national strategic plans of orphans and vulnerable children, including those of Namibia, Rwanda, Swaziland, South Africa and Uganda.²⁹⁹ As will be discussed more fully later, South Africa has gone as far as legislating on this issue, thus legally recognising child-headed households.

3.5 Child-headed households: An emerging form of care?

Child-headed households have become a very unfortunate phenomenon in societies that are profoundly affected by the HIV epidemic or conflicts.³⁰⁰ The proportion of children in child-headed households is still small.³⁰¹ However, the important point is that the number is increasing.³⁰²

The best way to protect children in child-headed households would be to reduce the occurrence of child-headed households in the first place. The obvious way to prevent the occurrence of child-headed households is to prevent children from losing their parents to AIDS by making appropriate ART and other treatment for AIDS-related illnesses available to people living with HIV. However, once children have been deprived of their parental care and are at risk of forming child-headed households, providing support extended families to promote kinship care is an important way to reduce the occurrence of child-headed households.

²⁹⁹ National Plan of Action on Orphans and Vulnerable Children 2006-2010, Rwanda, National Plan of Action for Orphans and Vulnerable Children 2006-2010, Swaziland; National Strategic Programme Plan of Interventions for Orphans and Other Vulnerable Children, 2005-2010, Uganda; First National Conference on Orphans and Other Vulnerable Children 2001, Namibia; South Africa has legally recognised child-headed households in their Children's Act.

³⁰⁰ See Second Periodic Report under article 44 of the United National Convention on the Rights of the Child: Rwanda (2004) CRC/C/70Add.22, para 319; also see BBC Report on children in conflict, available at: <http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/headed.shtml> [accessed: 17 October 2009].

³⁰¹ Information available at: <http://www.childrencount.ci.org.za/content.asp?PageID=68> [accessed: 17 October 2009]; The difficulty of ascertaining the accurate figure of child-headed household has been pointed out in UNICEF-Innocenti, 2006 (n 215 above) 16. .

³⁰² See chapters 2 and 4 for a detailed discussion; UNICEF-Innocenti, 2006 (n 216 above) 16.

The CRC Committee recommended that states provide all necessary measures of support to prevent children from being separated from their family of origin.³⁰³ Cantwell and Holzscheiter argue that the responsibilities of states under article 20 of the CRC go beyond providing alternative care when children are deprived of their family environment.³⁰⁴ The responsibilities of states include preventing children from being deprived of their family environment by providing appropriate assistance to the family.³⁰⁵ For instance, article 18(2) of the CRC requires states to provide appropriate assistance to parents and other legal guardians to perform their child-rearing responsibilities. While article 27(2) recognises that the primary responsibility to maintain children remains with parents and others who are legally responsible for the children, article 27(3) requires states to assist parents and other legal guardians to realise children's right to an adequate standard of living. The ACRWC also have similar articles requiring states to render appropriate assistance to parents and others who are responsible for the child.³⁰⁶ The UN Guideline on the Alternative Care of Children also emphasise the importance of assisting families in need in order to prevent children being deprived of their own family environment.³⁰⁷ However, it should be noted that in impoverished communities, material gains could provide an incentive to unscrupulous members of extended families or community members to foster children. Therefore, the strategy to encourage extended family members or community members to foster or adopt children should be implemented together with effective monitoring and regulatory mechanisms to prevent maltreatment or abuse of fostered children.

However, there can be cases where despite all the efforts to prevent children from being deprived of their family environment, children are still unable to secure family environment after their parental deaths or incapacity. In such cases, if it is in their best interests and children wish to remain by themselves, children should be allowed to form and remain in child-headed households with appropriate support and assistance

³⁰³ CRC Committee, 2005 (n 40 above) para 649.

³⁰⁴ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 10.

³⁰⁵ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 10; Para 3 & 31 of the UN Guidelines for the Alternative Care of Children; CRC Committee, 2005 (n 40 above) para 649.

³⁰⁶ Art 20(2) of the ACRWC.

³⁰⁷ Para 31 of the UN Guidelines for the Alternative Care of Children.

from the government. In the following sections, the question of legally recognising child-headed households is discussed in general.

3.5.1 Recognising child-headed households

Legally recognising child-headed households aims to enable children to take care of themselves without a live-in adult caregiver. The idea of legally recognising child-headed households may be at odds with principles of children's rights, especially with a conventional idea that children should be taken care of by an adult caregiver, either in their own family environment or in an alternative care placement, such as foster care or institutionalised care.³⁰⁸

Although it might be ideal that children who are deprived of their family environment should be provided with appropriate alternative care placements, the reality may not allow such approach. A practical problem is the ability of states to provide adequate alternative care to all children who are deprived of their parental care in the context of the HIV epidemic or conflicts. Another problem is that such uniform approach may not be in the best interests of the children in child-headed households. Firstly, some children may wish to stay together in their family house to honour their parents' wish or to avoid losing their family properties.³⁰⁹ In many cases, removing children from their familiar surroundings after the death of their parents adds to their emotional trauma.³¹⁰ Secondly, the UN Guidelines for the Alternative Care of Children stipulates that siblings 'should not in principle separated by placements in alternative care'.³¹¹ A study conducted in Pietermaritzburg showed that all children in child-headed households interviewed indicated that their siblings were the source of emotional support.³¹² Although the findings of the study should be generalised with caution, such result points out separating siblings could negatively affect children's emotional

³⁰⁸ UNICEF-Innocenti, 2006 (n 216 above) 16.

³⁰⁹ K Subbarao & D Coury, 2004 (n 141 above) 27.

³¹⁰ K Subbarao & D Coury, 2004 (n 141 above); L Richter & S Rama, *Building resilience: a rights-based approach to children and HIV/AIDS in Africa*, Save the Children Sweden (2006) 13 & 31.

³¹¹ Para 17 of the UN Guidelines for the Alternative Care of Children.

³¹² D Donald & G Clacherty, 'Developmental vulnerabilities and strengths of children living in child-headed households: a comparison with children in adult-headed households in equivalent impoverished communities' (2005) 4/1 *AIDS Care* 27.

well-being. Kinship care and foster care are important alternative family-based care options, but a large sibling groups may need to be separated into different households.

Finally, the heterogeneous nature of child-headed households poses a problem when enforcing a conventional method of providing alternative care. As discussed in chapter one, child-headed households can be sub-divided into, to borrow the expression used by the African Child Policy Forum, ‘unaccompanied child-headed household’ and ‘accompanied child-headed household’.³¹³ Unaccompanied child-headed household refer to a household, which is consisted of only children due to the death of parents or guardians, or abandonment. When children are found to be in unaccompanied child-headed households, it may be possible to provide appropriate conventional alternative care placements, such as foster care or small residential care, considering the views and the best interests of the children. However, unlike ‘unaccompanied child-headed households’, accompanied child-headed households refer to households in which children are providing primary care to terminally ill parents or old grandparents. In such cases, the uniform measure of placing children in alternative care placement is impractical as children in accompanied child-headed households may want to stay with their ill parents or guardians. Furthermore, separating children from terminally ill parents or guardian is ethically questionable.

There are also certain advantages of legally recognising child-headed households. By legally recognising their status, states are able to develop a legal framework to enforce protection and assistance measures. It also highlights challenges faced by children in child-headed households and opens up discussions on how best to support them. For instance, in South Africa, the move to legally recognise them generated discussions on the definition of child-headed households, a legal age limit by which a child can be allowed to head a household, conditions in which a household can be recognised as a child-headed household, and appropriate measures of support and protection that respect the rights of all children in child-headed households, especially that of children heading a household.³¹⁴ Recognising their status and developing an

³¹³ ‘Unaccompanied child-headed household’ is a child-only household. ‘Accompanied child-headed household’ refers to a household where a child is a *de facto* head of a household despite an adult is living in the household due to incapacity of the adult resident.

³¹⁴ See chapter 4 for a detailed discussion on the case of South Africa.

appropriate legal framework may be a step towards a rights-based approach. In the following section, the recognition and support provided to children in child-headed households in different African states will be discussed. The purpose of the section is to have an overview of the way child-headed households are addressed in legal and policy framework in different countries.

3.5.2 Recognising and supporting child-headed households in different African states

There is an increasing trend to include recognition and support to child-headed households in the legal and policy framework in African states. Most notably, Namibia has an extensive draft Child Care and Protection Bill, which includes provisions on alternative care placements, including child-headed households. The first proposed draft Amendment Bill for the Children Act in Uganda also contains a provision on child-headed household. Furthermore, Southern Sudan's Child Act provides material support and protection to children in child-headed households.

(i) Southern Sudan

The Child Act No 10 of 2008 of Southern Sudan specifically requires all levels of the government to register children in particular material needs, including child-headed households.³¹⁵ The purpose of the registration is to 'protection those children from abuse and enable them to grow with dignity and develop their potential and self-reliance.'³¹⁶ Furthermore, section 126 of the Act, which defines children in 'special needs and protection', includes certain categories of children that could potentially include children in child-headed households. For instance, children who are 'uncared for because of illness, old age or death of parents or guardians'³¹⁷ and children 'whose parents are terminally or severely ill'³¹⁸ are the examples. In case, where children are found to be in need of special care and protection, the state is required to

³¹⁵ Sec 117 of the Child Act No 10 of 2008 of Southern Sudan.

³¹⁶ Sec 117 of the Child Act of Southern Sudan.

³¹⁷ Sec 126(j) of the Child Act of Southern Sudan.

³¹⁸ Sec 126(p) of the Child Act of Southern Sudan.

provide temporary assistance and accommodation to such children, including food, education, medical care and other basic social service.³¹⁹

Although it is commendable that child-headed households are specifically addressed in the Act, the absence of the definition of the term, ‘child-headed household’, and unclear measures to protect and support children in child-headed household raise concern. For instance, section 70 of the Act states that the State should provide ‘alternative family care’ to children who are *parentless*, including kinship care, foster care or adoption.³²⁰ Section 70(2) stipulates that siblings should not be separated in foster care or adoption. However, it is not clear if a child-headed household is considered as an alternative family care. If child-headed household is not considered as an alternative family care, allowing children to remain in child-headed households may be contradictory to section 70. Furthermore, the Act does not specify in which condition children should be allowed to form and remain in child-headed households. Despite section 6 of the Act upholds the state obligation to give the best interests of the child the paramount importance in matters concerning child, specifically stating the requirements to be met, such as the age, maturity and wishes of the children in the households, would certainly increase the protection provided to children in child-headed households.

(ii) *Namibia*

The Namibian Child Care and Protection Bill is a comprehensive document, which contain detailed provisions on the care of children who are deprived of their family environment. There are two most notable features of the Namibian Bill, which are directly relevant to the thesis: 1) the inclusion of kinship care as a form of alternative care; and 2) provisions on child-headed households.

³¹⁹ Sec 116(4) of the Child Act of Southern Sudan.

³²⁰ The emphasis is mine. The emphasis is used to highlight the fact that the government’s obligation to provide alternative care family extends to children who are parentless rather than children who are deprived of their family environment, which could be interpreted more broadly than ‘parental care’.

The Namibian Bill defines ‘kinship care’ as ‘care of a child by a member of the child’s family or extended family’.³²¹ The definition of ‘family member’ is defined to include not only people who are related to the child through blood or legal ties, but also any other person with whom the child had developed a psychological and emotional attachment, which resembles ‘a family relationship.’³²² The understanding of the kinship care in the Bill is similar to that of the UN Guidelines for the Alternative Care of Children, which define ‘kinship care’ as ‘family-based care within the child’s extended family or with close friends of the family known to the child.’³²³ Nevertheless, the definition of ‘kinship’ in the Namibian Bill seems to give more emphasis on the ‘relationship between the kinship care giver and the child’ by including the element of emotional attachment between the child and the care giver. Although the Guidelines also include that the individual should be a close friend to the family and the child should know the individual, the ‘prior knowledge’ may not necessarily mean ‘emotional attachment’.

The distinction between ‘foster care’ and ‘kinship care’ in the Namibian Bill is the same as the distinction made in the UN Guidelines. Foster care is defined as ‘the care of a person who is not the parent, guardian, family members of extended family member of the child’, which is granted through an order of a children’s court.³²⁴ Kinship care, unlike foster care, does not necessarily go through a children’s court. However, in order for the kinship care giver to access any applicable grant or maintenance payment in terms of which the child is a beneficiary, the care agreement should be registered with the clerk of the children’s court.³²⁵ While the majority of kinship care agreement is expected to be informal without a court intervention, the Bill specifically requires the kinship agreements are concluded after due consideration to the view of the child, and also to comply with the best interest of the child.³²⁶ The inclusion of the provision regarding the best interests of the child is important as

³²¹ Chp 1 Definitions, objectives of action and application, Child Care and Protection Bill, Revised final draft: May 2010, Namibia. Also, see Sec 114(1) of the Child Care and Protection Bill.

³²² Child Care and Protection Bill (as above).

³²³ Para 29(c)(i) of the UN Guidelines for the Alternative Care of the Child.

³²⁴ Sec 150 of the Child Care and Protection Bill (as above).

³²⁵ Sec 114(2) of the Child Care and Protection Bill (as above).

³²⁶ Secs 114(3)(c) & 114(5) of the Child Care and Protection Bill (as above).

during the informal kinship care arrangement, the best interests of the child or the participation of the child could be ignored or given minimal consideration.³²⁷

The provisions on child-headed households in the Namibian Child Care and Protection Bill are similar to the relevant provisions contained in the Children's Act in South Africa, which is discussed in detail in chapter four. Section 206 of the Child Care and Protection Bill sets out the circumstances in which a household may be recognised as a child-headed household. Despite the similarities, section 206 of the Child Care and Protection Bill does not specify the age limit of a child who may head the household.³²⁸ Although an inflexible age limit is also undesirable, in the absence of the age limit of a child heading household, there is a danger that even a child who is too young to be a head of household may be entrusted with the responsibility. It may also be contrary to the requirement of the UN Guidelines for the Alternative Care, which urge states to provide special attention to ensure that the head of a child-headed household enjoy all rights inherent to his or her child status including access to education and leisure.³²⁹ Furthermore, in the absence of basic guideline on the age limit of the child head of a household, the harmonisation of the laws regarding the school-leaving age, minimum age for employment and age by which a child can apply for grants on behalf of his or her siblings is pertinent.

In order to prevent a child who is too young to be given the responsibility of a head of a household, the best interests of the child, which is included as one of the conditions based on which the determination to recognise a household as a child-headed household, should be given the utmost importance. Nevertheless, it would be desirable if the provision sets out the minimum age at which a child is allowed to head the household while providing exceptional cases where a child below the minimum age can head a household. The exceptional cases could include the following: 1) the child is mature enough understand the responsibilities as a head of the household and the consequences of assuming the role; 2) terminally ill parents or adult guardians of the child stay with the child in the household; 3) it is in the best interests of the child;

³²⁷ N Cantwell, 2005 (n 57 above).

³²⁸ Sec 206 of the Child Care and Protection Bill (n 321 above).

³²⁹ Para 37 of the UN Guidelines for the Alternative Care of Children.

and 4) the child expressly wishes to remain with his or her terminally ill parents or guardians while performing the role of the head of the household.

As in South Africa, children in child-headed households are under the general supervision of an adult designated by: (a) a children's court; or (b) an organ of state or a non-governmental organisation determined by the Minister. The Bill provides a strong protection to children in child-headed households from the abuse and misuse of the power by the supervising adult by including specific penalties in case of misappropriation of grant or assistance directed to the children in child-headed households.³³⁰ Furthermore, the section also provides that a child heading the household or other children in the household given the maturity and stage of development, may report the supervising adult if they are dissatisfied with the performance of their supervisor.³³¹ However, the section does not specifically mention the course of actions to be taken if the allegations against the supervisor have been proved true and the similar allegations are repeatedly made.

Finally, another important feature of the Bill is the provision on economic assistance to vulnerable children, including children in child-headed households. There are four main grants in relation to children; 1) state maintenance grant,³³² 2) residential child care facility grant,³³³ 3) foster parent grant³³⁴ and 4) child disability grant.³³⁵ Residential child facility care grant is unique in that the grant is available to children in residential child care facilities. The grants are payable to the residential care facilities to provide financial assistance to residential care facilities in caring for the children. The assumption is that the grant will ensure that children received a standardised level of care in residential care facilities. However, despite the provision penalising misuse of grants directed to children by adult recipients, it is not clear how the spending of the grant will be monitored and regulated in the residential care settings. It would also have been highly desirable if the portion of the grant were to be reserved for the children on a monthly basis as part of the aftercare programme.

³³⁰ Sec 206(9) of the Child Care and Protection Bill (n 321 above).

³³¹ Sec 206(8) of the Child Care and Protection Bill (as above).

³³² Sec 218 of the Child Care and Protection Bill (as above).

³³³ Sec 219 of the Child Care and Protection Bill (as above).

³³⁴ Sec 220 of the Child Care and Protection Bill (as above).

³³⁵ Sect 221 of the Child Care and Protection Bill (as above).

Children in child-headed households may apply for state maintenance grant. The grant is available for any child who is or under the age of 18 years. Also, importantly, children who receive a state maintenance grant or placed in foster care or in residential care are automatically entitled to various social services, including basic education in state schools, subsidised school uniforms and scholarly-related items and basic health care.³³⁶ Furthermore, such children are entitled to exemption from payment for the application for any official document.³³⁷ Such comprehensive provisions reflect the UN Guidelines for the Alternative Care of Children, which require states to provide support and services, particularly in relation to children's health, housing, education and inheritance rights.³³⁸

(iii) *Uganda*

The first proposed draft Amendment Bill for the Children Act specifies that a Family and Children Court may grant an order for the supervision of a child-headed household. Under section 36 on child-headed household, two categories of people can apply for such order; (1) a relative of the children, or (2) any person who is willing to undertake the role of supervising the children.³³⁹ The Court shall, in granting the supervisory order, appoint a child as a head of the household and prescribe the roles and duties of the supervising adult.³⁴⁰ Although it is commendable that child-headed households are specifically included in the Bill, the provision is limited in several ways. First of all, it does not define the term, 'child-headed households'. There is a danger that the term may be interpreted narrowly only to include 'child-only' households. Such limited understanding of the term could leave out households where children assumed *de facto* head of households despite the surviving parents or guardians. Secondly, the section does not specify under which circumstance the Court may appoint a child to head the household. It does not contain minimum thresholds,

³³⁶ Secs 224(a), 224(b) & 224 (c) of the Child Care and Protection Bill (as above).

³³⁷ Sec 224(d) of the Child Care and Protection Bill (as above).

³³⁸ Para 37 of the UN Guidelines for the Alternative Care of Children.

³³⁹ Sec 36(1) of the proposed draft Amendment Bill to the Children Act, Uganda (11 December 2009) The copy of the Bill is with the author.

³⁴⁰ Sec 36(2) of the proposed draft Amendment Bill (as above).

for instance, the age of the child to head the household, the maturity or capability of the child or different needs of the children in the households. Finally, the section does not mention whether and how the Court would assess the suitability of a person who is applying for the order for the supervision. Although the Court has the power to prescribe the roles and duties of the supervising adult, it is not clear whether and how the monitoring of the supervisor would be carried out.

(iv) Child-headed households recognised and supported in the policy frameworks

Child-headed households are also addressed in various national strategic frameworks on orphans and other vulnerable children including the National Plan of Action for Orphans and Vulnerable Children in Kenya,³⁴¹ the Malawi National Policy on Orphans and Other Vulnerable Children,³⁴² the Namibian National Plan of Action for Orphans and Vulnerable Children,³⁴³ the National Guideline and Standards of Practice on Orphans and Vulnerable Children in Nigeria,³⁴⁴ the National Action Plan for OVC in Swaziland,³⁴⁵ the National Strategic Programme Plan of Interventions for Orphans and Other Vulnerable Children in Uganda,³⁴⁶ the National Plan of Action for Orphans and Other Vulnerable Children in Zimbabwe.³⁴⁷

However, the level of support provided or responses developed in those documents differs from one country to another. For instance, a child-headed household is defined in the National Plans of Action for Orphans and Vulnerable Children in Nigeria, Namibia and Uganda. In all three countries, a ‘child-headed household’ is defined as a household headed by a child below 18 years of age. In Nigeria, the definition

³⁴¹ National Plan of Action for Orphans and Vulnerable Children, 2007-2010, Ministry of Gender, Children and Social Development, Kenya.

³⁴² National Policy on Orphans and Vulnerable Children 2003, Ministry of Gender and Community Services, Malawi.

³⁴³ National Guideline and Standards of Practice on Orphans and Vulnerable Children 2007, Federal Ministry of Women Affairs and Social Development, Nigeria.

³⁴⁴ National Plan of Action for Orphans and Vulnerable Children, 2006-2010, Ministry of Gender Equality and Welfare, Namibia.

³⁴⁵ National Action Plan for OVC, 2006-2010, Swaziland.

³⁴⁶ National Strategic Programme Plan of Interventions for Orphans and Other Vulnerable Children, 2006-2010, Ministry of Gender, Labour and Social Development, Uganda.

³⁴⁷ National Plan of Action for Orphans and Other Vulnerable Children, 2004, Zimbabwe.

includes a household headed by a child due to illnesses and disability of the parents.³⁴⁸ In Uganda, the definition includes ‘children who are parents’.³⁴⁹ The National Plans of Action for Orphans and Vulnerable Children in Kenya, Nigeria, Uganda and Zimbabwe provide a relatively comprehensive protection for child-headed households, such as mentorship support and financial support. National Plan of Action for Orphans and Vulnerable Children in Kenya provides for the establishment of mechanism to monitor child-headed households and to provide training programmes on issues such as parenting, financial management, safe sex and legal affairs.³⁵⁰ In Nigeria, child-headed households are prioritised in all support programmes, such as health care, food security, community-based care programmes and education. In Zimbabwe, child-headed households are entitled to food packages, improved sanitation facilities and access to health care. In Namibia and Swaziland, the type of support is limited to the protection of inheritance right and provision of food packages.

Although the inclusion of child-headed households in the policy framework is important, the limited support measures provided to children in child-headed households and the lack of clear definition of child-headed households remain a concern. Furthermore, the national survey conducted by UNAIDS shows that despite the existence of the specific plans and strategies to support and protection orphans and other vulnerable children, including children in child-headed households, only a limited proportion of children have been covered. For instance, in Kenya, Uganda, Zambia and Zimbabwe, less than 25 per cent of orphaned and vulnerable children are benefiting from the existing support and protection measures.³⁵¹ In Malawi and Mozambique, the figure is a little higher at 30 per cent.³⁵² It is strongly recommended that states develop a clear definition of child-headed households and include comprehensive protection and support measures in their legislative framework. The example of South Africa, which will be discussed in chapter four, could provide a

³⁴⁸ Nigeria 2006-2010 (n 343 above) 51.

³⁴⁹ Uganda, 2006-2010 (n 346 above) sec 3.4.

³⁵⁰ Kenya, 2007-2010 (n 341 above)16.

³⁵¹ 2010 UNAIDS National Policy Composite Index for those countries can be found at: http://www.unaids.org/en/KnowledgeCentre/HIVData/CountryProgress/2010_NCPI_reports.asp [accessed: 20 July 2010].

³⁵² As above.

guidance to other countries, which endeavour to develop a similar legal framework recognising and protecting child-headed households.

In the following section, some pertinent issues that may be raised by legally recognising child-headed households are addressed.

3.5.3 A child-headed family or a placement of alternative care?

As discussed in section 3.5.1, the implementation of effective strategies to reduce the number of child-headed households is, needless to say, important. Nevertheless, measures to legally recognise child-headed households do not necessarily contradict the efforts to prevent the occurrence of child-headed households. Legal recognition protects children who have no option but to form and remain in child-headed households, either temporarily or permanently. The importance of providing support and assistance to children in child-headed households has been advocated by various organisations³⁵³ and legally recognising the rights of, and obligations of states towards, child-headed households is an important way to recognising the children's status as rights-holders. However, as Cantwell and Holzscheiter note, the implications of legally recognising child-headed households in relation to the right to alternative care, and special protection and assistance, have not been explored fully.³⁵⁴ Some of the unexplored questions are whether to recognise child-headed households as a form of family, and whether state responsibilities should thus be geared towards 'family preservation', or whether child-headed households should be recognised as a form of alternative care.³⁵⁵

One of the strongest arguments for the family preservation approach is that child-headed households meet the criteria of 'family' and 'family environment'. As mentioned in the previous section, there are generally two criteria in determination of a 'family': the biological or legal ties among the members, and the emotional elements, such as an element of a 'life together'. Child-headed households often meet

³⁵³ UNICEF, 2007 (n 215 above) 29; S Tsegaye, *HIV/AIDS, orphans and child-headed households in sub Saharan Africa*, African Child Policy Forum (2008) 6.

³⁵⁴ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 86-88.

³⁵⁵ N Cantwell & A Holzscheiter, 2008 (n 135 above). Another question posed by Cantwell and Holzscheiter was the definition of child-headed households.

both criteria as child-headed households often consist of siblings and have a strong family bond.

However, it has to be emphasised that although child-headed households may meet the criteria of ‘family’, those criteria are based on an assumption that a parent(s) or adult relative live (‘exist’) in the concerned household. In all cases, where HRC or European Human Rights Court were asked to determine the ‘existence of family’, the cases concerned estranged parents, child custody, or the examination of violation of the right to family in article 24 of the ICCPR or in article 8 of European Convention on Human Rights in cases of immigration and deportation. As such, the presence of a ‘parent’ or at least an ‘adult caregiver’ in a ‘family’ has been taken for granted. Child-headed households, especially unaccompanied child-headed households, lack an adult caregiver within the households.

Besides the structural understanding of ‘family’, and most importantly, the question is whether recognising child-headed households as a type of family would be in the best interests of the children. By recognising a child-headed household as a type of family, the state assumes responsibilities to provide what is necessary to sustain it as a family unit. Nevertheless, once the child-headed household is recognised as a ‘family’, it would disqualify children in child-headed households from benefiting from article 20 of the CRC, and other relevant articles on children who are *deprived* of their family environment.³⁵⁶ Once recognised as a ‘family environment’, such households of siblings could be excluded from receiving special protection and assistance because, in essence, the children have not been deprived of their ‘family environment’.³⁵⁷ A preservation approach would provide a weaker protection and assistance to children in child-headed households than a protection approach, which recognise the special status of children in child-headed households. Furthermore, recognising child-headed households as ‘family’ could normalise such households, which in turn, may overshadow their vulnerable status that warrants special protection and assistance.

³⁵⁶ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 88; However, under article 25 of the ACRWC, the matter is different as the article distinguishes children who are parentless from children who are deprived of their family environment.

³⁵⁷ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 32.

As Cantwell and Holzscheiter point out, child-headed households could be recognised as ‘alternative care that maintains family and other ties’.³⁵⁸ The CRC General Comment No 3, which mentions child-headed household, is rather ambiguous in this instance. This General Comment simply urged states to give ‘special attention’ to children who are affected by AIDS, including child-headed households.³⁵⁹ It recognised the necessity to give ‘legal, economic and social protection to affected children’ and ‘encouraged’ states to provide ‘support, financial and otherwise’ to child-headed households, but it is not clear whether such legal protection indicates legally recognising child-headed households.³⁶⁰ While recognising that the best way to protect and care for children who are orphaned is to keep siblings together in the care of relatives or family members, the CRC Committee recommends that if the kinship care option is not available, states should, as far as possible, support family-type alternative care, such as foster care.³⁶¹

The relevant sections in the 2009 UN Guidelines for the Alternative Care of Children are also ambiguous. The Guidelines require states to provide support and service to siblings who lost their parents or caregivers and choose to remain in their household and to protect such households from all forms of abuse and exploitation.³⁶² However, the Guidelines do not seem to explicitly recognise or categorise child-headed households into any particular categories.³⁶³ Although the Guidelines do not clearly define or provide a list of possible forms of ‘supervised independent living arrangement for children’, if child-headed households would be so classified, it seems most feasible that child-headed households should have been explicitly included in the supervised independent living arrangement for children.

³⁵⁸ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 86.

³⁵⁹ CRC Committee, 2003 (n 32 above) para 31.

³⁶⁰ CRC Committee, 2003 (as above) paras 31 & 34.

³⁶¹ CRC Committee, 2003 (as above) para 34.

³⁶² Para 37 of the UN Guidelines for the Alternative Care of Children.

³⁶³ See n 296 above for the discussion on the understanding of kinship care.

The third way would be to legally recognise the special status of such households and to provide appropriate support mechanisms.³⁶⁴ South Africa has opted for this approach. Child-headed households are, under certain conditions, recognised as a protective measure, and are given a secure and determined legal status. The significance of classifying child-headed households as a protective measure rather than as an alternative care measure is the idea that children should not be *deliberately placed* in child-headed households but if children were to be *found* in child-headed households, and to remain so is in their best interests, a legal status should be given to such household and the children should be fully supported to function as an independent unit of care. The UN Guidelines for the Alternative Care of Children seems to support the third way, albeit implicitly. Paragraph 37 of the Guidelines stipulate that states have a responsibility to ensure that through appointment of a legal guardian, a recognized responsible adult or, where appropriate, a public body legally mandated to act as guardian' to provide 'mandatory support' to children from all forms of exploitation and abuse'.³⁶⁵

Another question that may arise is whether the recognition of a child-headed household, thereby allowing children to remain in such household, should be the last resort when all the other alternative care options have been considered and deemed inappropriate. The wording of the UN Guidelines for the Alternative Care of Children seems to suggest that sibling or child-headed households may be a preferred option to other alternative care placements if siblings need to be separated or at least there is no obligation on the part of the states to try alternative care placements for such children. As mentioned briefly, the Guidelines emphasises the importance of keeping siblings together and urges that as long as the eldest sibling is willing and capable of carrying out the responsibilities as a head of the household, states should provide support and service to such household.³⁶⁶ Then, the next logical question would be how to support child-headed households to function as an independent unit of care while protecting

³⁶⁴ N Cantwell & A Holzscheiter, 2008 (n 135 above) para 86; However, the Act, which is finalised after the publication of the book indicates that South Africa has deliberately avoid classifying child-headed households as a form of placement of option.

³⁶⁵ Para 37 of the UN Guidelines for the Alternative Care of Children.

³⁶⁶ Para 37 of the UN Guidelines for the Alternative Care of the Children.

the rights of all children in child-headed households, including children heading the households. This is the subject matter of the next section.

3.5.4 Protection of children in child-headed households: a rights-based approach

As Sloth-Nielsen points out, there are inherent dangers in legally recognising child-headed households.³⁶⁷ Firstly, recognising child-headed households could undermine the principle that the protection of children's rights should be extended to all children below the age of 18.³⁶⁸ Legally sanctioning a child to assume adult responsibilities could lead to 'dilution of the minimum age for entry into adulthood', which in turn could compromise the fundamental principle that all people under 18 are, by definition, children and, therefore, should be protected as such.³⁶⁹ Secondly, there is a danger of states negating their responsibilities towards children who are deprived of their family environment by formally recognising child-headed households as autonomous family units, capable of regulating their own affairs.³⁷⁰

Nevertheless, the existence of child-headed households is a reality in many African states. The non-recognition of the existence of child-headed households could pose an equally great danger. The over-reliance on the willingness and capacity of extended families to provide adequate care to children who are deprived of their family environment could also lead to neglecting such children. Therefore, the recognition of child-headed households may provide an avenue for the governments to develop concrete measures to support and protect children in such households.³⁷¹ In order to minimise the dangers of recognising child-headed households, the measure recognising and supporting such households should be provided from a rights-based approach.

³⁶⁷ J Sloth-Nielsen, 'Of newborns and nubile: some critical challenges to children's rights in Africa in the era of HIV/Aids' (2005) 13 *The International Journal of Children's Rights* 77.

³⁶⁸ As above 78.

³⁶⁹ As above 78.

³⁷⁰ As above 78.

³⁷¹ As above 79.

The benefit of adopting a human rights-based approach is clear in this case when compared to other approaches such as the needs-based or cost-effective approaches. Although all these approaches are essentially working towards relieving suffering of recipients, their ultimate objectives are different. For instance, a needs-based approach aims simply to meet the needs of the people. It is useful in short-term emergencies where the needs of the affected people are clear.³⁷² To achieve the objective of a needs-based approach, the theoretical consideration or examination of the root causes of the problem is not required. For instance, organisations providing humanitarian assistance to people in situations of armed conflict or natural disasters may naturally prioritise the speedy delivery of service to meet the needs of the people.³⁷³

However, a rights-based approach aims to address the root causes of the violation of those rights as well as the needs of the people. One case scenario is following: a study by Human Science Research Council indicated that children in child-headed households find it difficult to continue with their education.³⁷⁴ A similar study conducted in Botswana showed that 40 per cent of children heading a household have not been to school.³⁷⁵ Applying a needs-based approach may provide school fees or other assistance to enable children to attend the school without analysing the causes of the violation of the right to education of those children. On the other hand, applying a rights-based approach would require locating the right to education in domestic and international legal frameworks. It also requires an analysis of the root-causes of the non-fulfilment of the right to education. When the causes are identified, the government can be held responsible for not providing adequate services or assistance to enable those children to enjoy their right to education.

It could be argued that as long as children are given assistance to attend schools which approach has been applied is not important. However, if the cause of the non-attendance is linked to stigmatisation and discrimination against children in child-

³⁷² S Goonesekere, *A rights-based approach to realizing gender equality*, available at: <http://www.un.org/womenwatch/daw/news/rights.htm> [accessed: 15 Sept 2006] para 67.

³⁷³ S Goonesekere (as above) para 67.

³⁷⁴ A Davids & D Skinner (eds), *Situational analysis of the socio-economic conditions of OVC in four districts in South Africa*, Human Science Research Council (2005) 71.

³⁷⁵ G N Tshoko *et al.*, *A census of orphans and vulnerable children in two villages in Botswana*, Human Science Research Council (2006) 27.

headed households, simply providing school fees and uniforms through a needs-based approach may not be enough. A rights-based approach could facilitate a dialogue to address deeper causes of the violation and find a solution that is more permanent and has far reaching consequences. For example, in South Africa, under the South African Schools Act,³⁷⁶ children should not be prevented from attending school if they are under 15 and have not completed grade 9.³⁷⁷ A needs-based approach may not heed the fact that under the law, children have the right to education regardless of their inability to pay school fees. A rights-based approach emphasise the fact that children have the right to education and the government has a responsibility to put in place appropriate measures to ensure that children's right to education is fulfilled.

Furthermore, in needs-based approaches, beneficiaries of programmes are passive recipients rather than active participants. The participation and inclusion of recipients in programming and implementation of projects are not necessarily important. Nevertheless, the emphasis on participation and inclusion elements is important in addressing structural problems in a society. Unequal power distribution in any given society creates marginalised groups of the population. The marginalisation of socially vulnerable groups renders them invisible. The invisibility hinders active participation of such groups in decision-making processes which affect them. The lack of representation and participation, in turn, exacerbates their indivisibility and marginalisation forming a vicious circle. A rights-based approach ensures participation and inclusion of all the stake holders in planning and implementation of projects and programmes and thereby breaking the vicious circle of marginalisation and lack of participation. A rights-based approach is particularly important when planning and implementing projects, programmes and social services for children. Children are often socially and politically marginalised. Despite their right to be heard, children's participation often remains an aspiration.

Utilitarian-driven approaches, such as 'low-cost high impact' or 'cost-effective' approaches, might focus on a less severe type of violations that affects a larger

³⁷⁶ South African Schools Act No 84 of 1996.

³⁷⁷ Sec 5(3)(a) of the South African Schools Act.

number of people.³⁷⁸ A rights-based approach, which is based on the concept of maximum benefits to the most marginalized population, is more likely to give a priority to a severe or gross type of rights violation even if that affects only a small number of people.³⁷⁹ Although the number of children in child-headed households is small in proportion compare to other children in poverty, due to their special vulnerability, states are under the obligation to provide special protection and assistance. Providing special protection and assistance to children in child-headed households does not mean, and should not mean, other vulnerable children are sidelined. Nevertheless it means that children in the most vulnerable situation should be given the adequate protection, if necessary a stronger protection, so there would be an equal chance of their rights being realised. The rights-based approach justifies providing a stronger protection for children in the most vulnerable situation. Furthermore, like a needs-based approach, utilitarian approaches do not necessary base their claims on human rights. Therefore, it shares the same weakness as a needs-based approach. As Goonesekere put it, the most important feature of the rights-based approach is that is ‘allows legitimate claims to be articulated with a moral authority which other approaches lack.’³⁸⁰

To design effective support and protection measures based on the principles of a rights-based approach, it is important to understand the particular difficulties and vulnerabilities of being in child-headed households. By correctly identifying and understanding the challenges faced by children in child-headed households, states can devise appropriate support and protection measures, which specifically target particularly vulnerable areas. Germann, quoting from the UNICEF workshop report on regional conference on children without parental care in Windhoek, identifies five areas of special vulnerabilities of child-headed households: 1) development of older children is negatively affected by the parenting responsibilities; 2) older children’s education is often interrupted due to the financial difficulties and lack of time; 3) child-headed households lack protection; 4) children are deprived of parental guidance and inter-generational skills; and 5) children face difficulties of meeting

³⁷⁸ C Nyamu-Musembi & A Cornwall ‘What is the rights-based approach all about? Perspectives from international development agencies’, IDS Working Paper 234 (November 2004) 3.

³⁷⁹ C Nyamu-Musembi & A Cornwall, 2004 (as above) 3.

³⁸⁰ S Goonesekere (n 372 above) para 4.

daily needs.³⁸¹ Subbarao and Coury note the particular vulnerabilities of children who are orphaned by AIDS as: 1) loss of income; 2) loss of educational opportunities; 3) malnutrition and adequate health care; 4) property grabbing; 5) abuse, exploitation and discrimination; and 6) psychological trauma.³⁸²

A study on children in child-headed households in Ethiopia by the African Child Policy Forum provided a detailed analyse on vulnerabilities of children in child-headed households. It pointed out the differences in needs and vulnerabilities between children in unaccompanied and accompanied child-headed households. The common vulnerabilities and needs are identified as: 1) financial difficulties; 2) the tremendous emotional trauma; 3) the danger of exploitation and discrimination; 4) the loss of educational opportunities, especially for children heading the households; 5) the inability to seek adequate health care and limited accessibility to health care services; 6) the heightened vulnerability to sexual abuses and property grabbing; and 7) a lack of play time.³⁸³ The report noted that children heading accompanied child-headed households may experience added care burdens as they are required to meet physical and emotional needs of incapacitated adults as well as younger siblings.³⁸⁴

The most important areas of concern can be noted in relevant international documents. The CRC Committee specifically mentioned the legal, economic, and social protection to enable children to access 'education, inheritance, shelter and health and social services'.³⁸⁵ The 2009 UN Guidelines emphasise the importance of providing mandatory protection to children in child-headed households from all forms of abuse and maltreatment, with particular attention to children's health, housing, education and inheritance right.³⁸⁶

³⁸¹ S E Germann, *An exploratory study of quality of life and coping strategies of orphans in living in child-headed households in the high HIV/AIDS prevalent city of Bulawayo, Zimbabwe*, Doctorate thesis, University of South Africa (June 2005) 95.

³⁸² K Subbarao & D Coury, 2004 (n 141 above) 22.

³⁸³ *Reversed roles and stressed souls: child-headed households in Ethiopia*, African Child Policy Forum (2008) 14-16.

³⁸⁴ African Child Policy Forum, 2008 (as above) 16.

³⁸⁵ CRC Committee, 2003 (n 32 above) para 31.

³⁸⁶ Para 37 of the UN Guidelines for the Alternative Care of Children.

Considering the above vulnerabilities of child-headed households, the measures of special protection and assistance should focus on five broad issues: 1) the establishment of legal and social protection for all children in child-headed households against exploitation, abuses and discrimination; 2) the realisation of the right to an adequate standard of living; 3) protection of educational rights and health rights; 3) ensuring cultural connection remains with the communities in which they live; 4) providing psycho-social support and counselling; and 5) ensuring child-headed households benefit from adequate home-based care programmes to reduce the burden of care. The principles of a rights based approach should inform how the support measures should be designed and implemented to sufficiently address the vulnerabilities of all children in child-headed households.

3.6 Conclusion

Many African states that are affected by the HIV epidemic are facing the immense challenge of providing care to children who are deprived of their family environment. One of the difficult dilemmas in those countries is the increasing number of children in child-headed households. Without doubt, supporting the existing extended family network to reduce the occurrences of child-headed households is essential. Also important is the strengthening of the formal alternative care structure to provide appropriate alternative care to children in child-headed households, such as kinship care, foster care or cluster foster care. However, in certain cases, there is no suitable option for the children but to remain in child-headed households. Children may not have suitable relatives who are willing take them. A large sibling group may need to be separated in kinship or foster care. A cluster foster care or small residential care may not be suitable for children who do not wish to leave their house where they have strong emotional ties. Therefore, the questions are how to determine whether children can remain in a child-headed household and how to support and protect children in child-headed households.

Determining whether a certain child-headed household can provide adequate welfare and protection to the children with warmth and affection should be examined on a case-by-case basis. Several factors, such as the maturity and willingness of the child heading the household, and the existence of external material and emotional support

will largely determine whether a certain child-headed household can function as an independent unit of society. In many cases, child-headed households will, with adequate support, be able to provide adequate care to children in the households. However, leaving aside whether they can or not, whether it is *desirable* to legally accept child-headed households may be questioned. One may argue that legally accepting child-headed households may normalise what is a most unfortunate consequence of the HIV epidemic. It may also be argued that by legally recognising child-headed households, states may evade their responsibility towards children deprived of family environment under articles 20 of the CRC and 25 of the ACRWC.³⁸⁷

In principle, placing children who are deprived of parental care and a family environment in conventional alternative care might seem to be in line with the principles of children's rights, but the matter is rather more complicated. First of all, it is reported that many children in child-headed households wish to stay in their family estate.³⁸⁸ There can be several reasons, for instance, to protect their inheritance right and the desire to remain together. Secondly, separating from their siblings children who have gone through the traumatic experience of losing parents may add considerable psychological burdens on those children.³⁸⁹ Thirdly, considering the lack of adequate alternative care measures and facilities in many countries in Africa, placing all children in alternative care would not only be impractical, but also undesirable. Considering the above points, at least in some cases, children may be better cared for in child-headed households.

However, not all households that have been spontaneously headed by a child after the death of parents should be legitimatised. There should be stringent criteria according to which the decision on whether children should be allowed to stay as a child-headed household should be made by a competent body. On the one hand, if the decision is made that children, for their best interests, should not be allowed to stay in the child-

³⁸⁷ J Sloth-Nielsen, 2005 (n 367 above) 78.

³⁸⁸ See chapters 1 & 4 for further discussion. Also see L C Simbayi *et al.*, *Psychosocial issues affecting orphaned and vulnerable children in two South African communities*, Human Science Research Council & Nelson Mandela Foundation (2006) chapter 2; S Tsegaye, 2008 (n 353 above) 17.

³⁸⁹ As above.

headed household, states have an obligation under the right to alternative care, and special care and protection to provide those children with appropriate alternative family care. On the other hand, if children, in their best interests, should be allowed to stay in a child-headed household, those children are entitled to special measures of protection and assistance from states.

The concept of special protection and assistance has been explored in section 3.4. The purpose of providing special protection and assistance is to ensure that children in child-headed households are not discriminated against from realising their potential and rights only due to the fact that they live in child-headed households. The support and protection measures should ensure not only the access to services but also the effective enjoyment of such services. For example, in relation to education, state responsibilities to provide education to children in child-headed households go further than giving them access to education. It also entails providing the necessary support, material and otherwise, to enable children in child-headed households to receive appropriate and quality education. Only when clear legal and policy frameworks to support children in child-headed households to fully realise their rights are established, should children be allowed to form and remain in child-headed households.

In the following chapter, the South African legal and policy frameworks legally recognising child-headed households are analysed against the background and principles provided in this chapter.

CHAPTER FOUR

The case of South Africa

4. The case of South Africa

4.1 Introduction

4.2 Status of South African children in the HIV epidemic

4.3 Children's rights in South Africa

4.3.1 Constitutional rights

4.3.2 The Children's Act as amended by the Children's Amendment Act

4.4 Recognising child-headed households

4.4.1 Section 137 of the Children's Act

(i) Defining the term 'child-headed household'

(ii) Operation of supervision

4.4.2 Legally recognising child-headed households from a rights-based approach

(i) Best interests of the child

(ii) Child participation

(iii) Non-discrimination

(iv) Survival and development

Right to property

Right to education

Right to basic nutrition, shelter, basic health care services and social services

Right to be protected from exploitation and child labour

Right to play and leisure

(v) Monitoring and evaluation

(vi) Accountability and rule of law

4.5 Conclusion: Development and challenges

4.1 Introduction

South Africa is one of the countries most severely affected by the HIV epidemic in Africa. Since the first AIDS case was diagnosed in 1982, the HIV prevalence has increased rapidly during the 1990s, from less than one per cent in 1990 to 22.8 per cent in 1998.¹ Although the HIV prevalence has decreased over the years,² this rapid increase of the HIV prevalence in South Africa is characteristic of the HIV epidemic in many Southern African states. Zwi and Cabral, as early as 1991, proposed the term ‘high-risk situation’ to describe a social and individual situation which puts individuals at risk of HIV transmission.³ According to Zwi and Cabral, a high-risk situation can be characterised as one where there is ‘diminished concern about health, increased risk-taking, reduced social concern about casual sexual relationships’.⁴ Citing Wilson, Zwi and Cabral listed specific situations that may be categorised as high-risk situations, such as ‘impoverishment, rapid urbanisation, anonymity of city life, migrant labour, poor wages and dependency of women’.⁵ Considering the high level of unemployment and poverty, and rapid social change in South Africa, the HIV and AIDS pandemic, as Marks points out, might have been ‘a pandemic waiting to happen’.⁶

Fortunately, the prevalence has decreased a little and the most recent UNAIDS data puts the HIV prevalence at 16.2 per cent among the general population aged between 15 and 49.⁷ The national HIV prevalence trend among antenatal attendees is naturally much higher. The HIV prevalence from the antenatal clinics shows that it reached 30.2 per cent in 2005, decreased slightly to 29.1 per cent in 2006 and in 2009, the figure climbed a little to 29.3 per cent.⁸ Despite the slight decrease in the prevalence,

¹ S Marks, ‘Epidemic waiting to happen? The spread of HIV/AIDS in South Africa in Social and Historical Perspective’ (2002) 61/1 *African Studies* 16.

² The current HIV prevalence rate is discussed in the following paragraph.

³ Zwi & Cabral, ‘Identifying high-risk situations to prevent AIDS’ (1991) 303 *British Medical Journal* 1527.

⁴ Zwi & Cabral, 1991 (as above) 1527.

⁵ As above 1527.

⁶ S Marks, 2002 (n 1 above) 17.

⁷ UNAIDS AIDS Epidemic Update 2009, 19.

⁸ *Country Report under the United National General Assembly Special Session (UNGASS) Commitment*, South Africa (2010) 10.

it is estimated that 5.7 million people were living with HIV in 2008, which makes it the largest epidemic in the world.⁹ Considering the factors, such as the primary mode of HIV transmission in Africa, including South Africa, the scale of the epidemic and the number of the total population, it is not surprising that South Africa is also a country that has the largest number of children who are orphaned by AIDS.¹⁰ The Mid-year Population Estimates 2009 by Statistics South Africa estimated that 1.9 million children in South Africa have been orphaned by AIDS-related illnesses.¹¹ As explored in chapter two, the diminishing capacity and the changing role of extended family network caused an increasing number of children being incorporated into households headed by a grandparent or a sibling in South Africa.¹² Also alarmingly, through the loss of an elderly caregiver to age-related illnesses or a surviving parent, often, to AIDS-related illnesses, many children in such households eventually are left to form child-headed households.¹³

The present chapter focuses on the situation of child-headed households in South Africa and the issue of legally recognising child-headed households. The chapter is divided into five sections. Following the introduction, section 4.2 briefly describes the impact of HIV on children in South Africa. Section 4.3 provides an overview of the status of children's rights in South Africa. Section 4.4 analyses section 137 of the Children's Act as amended by the Children's Amendment Act,¹⁴ which legally recognises child-headed households. Although the focus of the section is on the way South Africa has legally recognised child-headed household, provisions of the

⁹ UNAIDS, 2009 (n 7 above) 27.

¹⁰ Information available at: <http://www.mg.co.za/article/2007-01-18-south-africa-has-most-aids-orphans> [accessed: 18 August 2009].

¹¹ *Mid-year Population Estimates 2009*, Statistics South Africa, Pretoria, South Africa (2009) 8. The report also indicates that nearly half of all deaths occurred in 2009 was due to AIDS-related illnesses.

¹² See B A Anderson & H E Phillips, *Trends in percentage of children who are orphaned in South Africa 1995-2005*, Pretoria, Statistics South Africa (2006) 2 & 16. The report from the South African Statistics Office shows that overwhelming majority of children age between 0 and 4 and whose mother has passed away are being taken care of by their grandparents or great-grandparents.

¹³ L Richter *et al.*, *Family and community interventions for children affected by AIDS*, Human Science Research Council (2004) 16; P Armstrong *et al.*, *Poverty in South Africa: a profile based on recent household surveys*, Stellenbosch Economic Working paper 04/08, 15. The study shows a high poverty level among households headed by over 55 years.

¹⁴ Children's Act No 38 of 2005 as amended by the Children's Amendment Act No 41 of 2007.

Children's Act that provide for different types of alternative care to children deprived of their family environment are also examined. Section 4.4.2 assesses the measures of protection provided to children in child-headed households from a rights-based approach. The section contains information obtained from informal interviews with children in youth-headed households, a director of children's shelter and social workers in Temba, Hammanskraal.¹⁵ Section 4.5 provides a conclusion to the chapter by addressing the challenges of legally recognising child-headed households without violating their rights as children.

4.2 Status of South African children in the HIV epidemic

It is estimated that the overall HIV prevalence among children is 2.1 per cent.¹⁶ An alarming factor is the high HIV prevalence among older girls. The HIV prevalence among girls aged between 15 and 19 is estimated at 9.4 per cent.¹⁷ The prevalence among young pregnant girls is much higher. The 2008 South Africa Country Report under the United National General Assembly Special Session indicates that 12.9 per cent of young pregnant girls aged between 15 and 19 are living with HIV.¹⁸ The data indicates that children are not only indirectly affected by the HIV epidemic, but they form a considerable proportion of people living with HIV.

¹⁵ The informal interviews were conducted with Ms Olivia Ratema & Ms Susan Molokomme from Moretele Sunrise Hospice, Ms Catherine Sepato, a director of Tswaraganang orphanage (OVC Programme) in Temba, Hammanskraal and children from four youth-headed households in Temba, Hammanskraal. The interview with social workers was conducted in English and the interviews with children were conducted in Sesotho through interpretation by Ms Sepato (25 June 2009). For more information on the interviews, see Sec 1.6 methodology.

¹⁶ Information available at: <http://www.childrencount.ci.org.za/content.asp?TopLinkID=12&PageID=50> [accessed: 9 February 2009]. However, a much higher prevalence among the children in age groups 2 to 4 and 5 to 9 has been observed. The prevalence among children aged between 2 and 4 is estimated at 4.9 % for boys and 5.3 % for girls. In the 5 to 9 age group, the prevalence is estimated at 4.2 % for boys and 4.8 % for girls. In these age groups, the mother-to-child transmission at birth or during lactation is the most common cause of the HIV prevalence. Nevertheless, 1.5 % of the annual increase among children aged between 5 and 9 indicates that other factors, such as sexual abuse against children, may contribute to the HIV transmission among young children. See O Shisana & S Mehtar, *HIV risk exposal among young children: a study of 2-9 years olds served by public health facilities in the Free State*, Human Science Research Council (2005) 76; R Jewkes, 'Child sexual abuse and HIV infection' in L Richter *et al.*, (eds) *Sexual abuse of young children in Southern-Africa*, Human Science Research Council (2004) 130-142.

¹⁷ Information available at: <http://www.avert.org/safricastats.htm> [accessed: 9 February 2009].

¹⁸ *The National HIV and Syphilis Prevalence Survey 2007*, South African National Department of Health (2008) 19.

The 2007 General Household Survey shows that a growing number of children are orphaned by AIDS in South Africa.¹⁹ The definition of ‘orphan’ in the Survey includes children who have lost at least one parent to all causes.²⁰ The Survey indicated that there were an estimated 3.7 million children who are orphaned in South Africa.²¹ That is 18 per cent of all children in South Africa. Among the 3.7 million orphaned children, the number of children who are orphaned by AIDS is estimated at 1.91 million.²² The number of children who have lost both their parents is still relatively small. However, as pointed out in chapter one, the main mode of HIV transmission in Africa, including South Africa, is through unprotected heterosexual intercourse. Therefore, if one parent is infected with HIV, there is a high probability that the other parent is also infected with the virus, greatly increasing the possibility of the children losing both of their parents in a relatively short period of time.²³ Furthermore, as evidenced in other countries with high HIV prevalence, the time lag between the actual transmission of HIV and AIDS-related death, the number of children orphaned by AIDS will continue to grow even after the prevalence rate has stabilised or declined.²⁴

As pointed out in chapter two, one of the consequences of the increasing number of children who have lost both their parents to AIDS-related illnesses, and the decreasing capacity of the communities and extended families to absorb the orphaned children is the growing number of children living in child-headed households.²⁵ Although accurate data on child-headed households do not exist, the 2007 General Household Survey also indicated that 148 000 children were living in 79 000 child-only

¹⁹ Information available at: <http://www.childrencount.ci.org.za/content.asp?PageID=71> [accessed: 18 August 2009].

²⁰ As above.

²¹ As above.

²² Statistics South Africa, 2009 (n 11 above) 18.

²³ As above, the number of children who lost both of their parents increased from 350 000 in 2002 to 701 000 in 2007 in South Africa; G Andrews *et al.*, ‘Epidemiology of health and vulnerability among children orphaned and made vulnerable by HIV/AIDS in sub-Saharan Africa’ (2006) 18/3 *AIDS Care* 271.

²⁴ G Andrews *et al.*, 2006 (as above) 271.

²⁵ K Subbarao & D Coury, *Reaching out to Africa’s orphans: a framework for public action*, African Human Development Series, World Bank (2004) 29-30; S Tsegaye, *HIV/AIDS, orphans and child-headed households in sub-Saharan Africa*, African Child Policy Forum (2008) 17-19.

households.²⁶ It is reported that 49 per cent of all children living in child-only households are over 15 years and 70 per cent of them are over 12 years.²⁷ The proportion of the children in child-only households is still small. The 2007 survey shows that only 0.8 per cent of children are living in child-only households.²⁸ Nevertheless, despite the small proportion of children living in child-only households, the important fact is that the number of children living in such households is increasing.²⁹ For instance, in 2002 General Household Survey, the number of children living in child-only households was estimated at 118 000. In 2007, the number has increased to 148 000.³⁰ It is also important to note that the figure is for children living in child-only households rather than child-headed households. A ‘child-only household’ is defined as a household containing only children under 18, while a ‘child-headed household’ includes a household in which a child has assumed the role of primary caregiver regardless of the presence of an adult.³¹ As discussed in section 1.5, since the term, ‘child-headed household’ includes both accompanied and unaccompanied child-headed households, the actual number of children living in child-headed households can be much higher.

In the 2007 General Household Survey, it is transpired that the majority of child-only households (79 per cent) were concentrated in three provinces of South Africa: Limpopo, the Eastern Cape and KwaZulu-Natal.³² There are several reasons behind the concentration of the number of child-headed households in Limpopo, the Eastern Cape and KwaZulu-Natal. First of all, the HIV prevalence is high in all three provinces. The HIV prevalence among ante-natal clinic attendees is estimated at 20.7

²⁶ Information available at: <http://www.childrencount.ci.org.za/content.asp?TopLinkID=6&PageID=68> [accessed: 13 August 2009].

²⁷ As above.

²⁸ As above.

²⁹ O Shisana *et al.*, *Nelson Mandela/HSRC Study on HIV/AIDS*, Nelson Mandela Foundation & Human Science Research Council (2002) 68.

³⁰ Information available at: <http://www.childrencount.ci.org.za/content.asp?TopLinkID=6&PageID=19> [accessed: 13 August 2009].

³¹ The definition of ‘child-only household’ is available at <http://www.childrencount.ci.org.za/content.asp?TopLinkID=6&PageID=68> [accessed: 13 August 2009]; The definition of ‘child-headed household’, see Sec 137(1)(a), (b) & (c) of the Children’s Act as amended by the Children’s Amendment Act.

³² Information available at: Children’s Institute (n 30 above).

per cent in Limpopo; 27.6 per cent in the Eastern Cape and 38.7 per cent in KwaZulu-Natal.³³ Secondly, the unemployment rate is also high in all three provinces. The unemployment rate stands at 25.9 per cent in the Eastern Cape and KwaZulu-Natal; and 32.5 per cent in Limpopo. The level of poverty is strongly linked to the unemployment rate. Armstrong *et al.*'s study on poverty in South Africa shows that the level of poverty is highest in the three provinces.³⁴ According to the study, 64.4 per cent of people are living in poverty in Limpopo; 58.5 per cent in KwaZulu-Natal; and 57.5 per cent in the Eastern Cape.³⁵ In terms of child poverty, the result is the same. A study by Streak *et al.* shows that the largest proportion of child poverty can be found in the Eastern Cape, KwaZulu-Natal and Limpopo.³⁶ In the Eastern Cape and Limpopo, 78 per cent of children were living in poverty and in KwaZulu-Natal, the figure was 75 per cent.³⁷

Finally, the General Household Survey indicates that service delivery in the above three provinces is relatively low. For instance, in the Eastern Cape, only 72.8 per cent of the population have access to tap or piped water.³⁸ The limited access to education in the above provinces is also observed. In Limpopo, over 18 per cent of the adult population surveyed did not have any education while in KwaZulu-Natal and Limpopo, the proportion of the adult population with no education is estimated to be around 11 per cent.³⁹ The above analysis suggests that the number of child-headed households is most likely to increase in provinces where there is a combination of a high HIV prevalence, a high level of poverty and limited access to basic services.

³³ South Africa UNGASS Report 2010 (n 8 above), 12.

³⁴ P Armstrong *et al.*, 2008 (n 13 above) 10.

³⁵ As above 10.

³⁶ J Streak *et al.*, 'Measuring child poverty in South Africa' (2008) 6/4 Human Science Research Council Review (November, 2008) available at: http://www.hsrc.ac.za/HSRC_Review_Article132.phtml [accessed: 11 August 2009].

³⁷ As above.

³⁸ *General Household Survey 2008*, Department of Statistics, South Africa (2008) 38.

³⁹ *General Household Survey 2008* (as above) 61.

4.3 Children's rights in South Africa

4.3.1 Constitutional rights

Children's rights in South Africa occupy an important place in the domestic legal system. Not only is South Africa a party to the CRC and ACRWC,⁴⁰ the Constitution of South Africa⁴¹ provides extensive protection of children's rights. Children in South Africa are entitled to all the rights contained in the Bill of Rights, except the right to vote.⁴² In addition to the 25 general human rights provisions in the Bill of Rights, which are applicable to children, section 28 is specifically devoted to children's rights. The inclusion of section 28 on children's rights signifies the importance of protecting children's rights, not only the rights expressly protected in section 28 but all rights in the Constitution that are applicable to children.⁴³

Section 28 protects a wide range of rights encompassing both civil and political, and socio-economic rights. It is often pointed out that, unlike other socio-economic rights protected in the Constitution, the realisation of section 28 is not subject to the availability of resources.⁴⁴ Both sections 26 and 27, which provide, respectively, for access to adequate housing, and health care, food water and social security, contains to an internal limitation clause, 'available resources', and are termed, as 'qualified socio-economic rights'.⁴⁵ However, section 28 does not contain such conditionality.⁴⁶ The absence of the internal limitation clause has been interpreted by scholars to mean that children's basic minimum needs take precedence over the similar needs of others,

⁴⁰ South Africa has ratified the CRC on 16 June 1995, and the ACRWC on 10 October 1997.

⁴¹ Constitution of South Africa Act No 108 of 1996.

⁴² Sec 19 of the Constitution.

⁴³ *Bhe and Others v Khayelitsha Magistrate and Others*, 2005 (1) BCLR 1 (CC) para 52.

⁴⁴ J Sloth-Nielsen, 'The child's right to social services, the right to social security and primary prevention of child abuse: some conclusions in the aftermath of *Grootboom*' (2001) 17 *South African Journal on Human Rights* 220; L Stewart, 'Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others' (2008) 24 *South African Journal on Human Rights* 473.

⁴⁵ S Liebenberg, 'The interpretation of socio-economic rights' in S Woolman *et al.* (eds) *Constitutional Law of South Africa*, Juta (2008) 33-5.

⁴⁶ S Liebenberg, 2008 (as above).

especially in relation to health care services, nutrition, shelter and social services.⁴⁷ The following excerpt from the *Memorandum on Children* by the Panel of Constitutional Experts clearly illustrates the reasoning behind prioritising the needs of children:

The international instruments dealing with children's rights do not limit the rights of children by requiring reasonable and progressive steps. This is so because of the view that it is inappropriate for children's rights to be so qualified on account of two underlying reasons. The vulnerability, lack of maturity and comparative innocence of children render them deserving of more effective protection. Also children cannot be expected to participate actively in human rights discourse, in defining its scope, or articulating its social dimensions and implications, as adults can be expected to do. The difference in formulation means that the state would undertake to make a greater effort in order to secure the rights of children. The sub-clause will not permit children to make unreasonable demands on the state.⁴⁸

Due to time-bound developmental needs of children and their general inability to pursue their own needs effectively, children need 'special protection' by states. As discussed briefly in section 3.3.4, 'the special care and assistance' granted to childhood in Universal Declaration of Human Rights⁴⁹ or the 'special protection' conferred to children under article 24 of the International Covenant on Civil and Political Rights⁵⁰ also show the importance of timely and active state intervention to prioritise the realisation of children's rights despite the limited resources.

With regard to socio-economic rights of the children, it is also argued that, while sections 26 and 27 provides the right of access to housing,⁵¹ health care,⁵² sufficient

⁴⁷ A Skelton & P Proudlock, 'Interpretation, object, application and implementation of the Children's Rights' in C J Davel & A M Skelton (eds) *Commentary on the Children's Act*, Juta (2007) 10; S Liebenberg, 2008 (n 45 above) 33-50; A Friedman & A Pantazis, 'Children's rights' in S Woolman *et al* (eds) *Constitutional Law of South Africa*, Juta (2008) 47-6.

⁴⁸ Panel of Constitutional Experts, *Memorandum on Children*, (5 February 1996) 2, cited in C J Davel & A M Skelton, 2007 (as above) 10.

⁴⁹ Art 25 of the Universal Declaration of Human Rights.

⁵⁰ HRC, General Comment No 17: Article 24 Rights of the child (07/04/89) para 2

⁵¹ Sec 26 of the Constitution.

⁵² Sec 27(1)(a) of the Constitution.

food and water⁵³ and social security,⁵⁴ section 28(1)(c) provides a direct entitlement to ‘basic nutrition, shelter, basic health care services and social services’.⁵⁵ The wording of the Constitution led to the argument that, unlike sections 26 and 27, section 28 (1)(c) provides ‘basic’ services, which imposes ‘a direct and immediate duty’ on the state to provide for the ‘minimum core’ obligation on states.⁵⁶ For instance, under section 28(1)(c), children have the right to ‘basic nutrition’ rather than ‘sufficient food and water’. However, the interpretation and application of socio-economic rights by the Constitutional Court has been far from clear.⁵⁷ I now turn to that Court’s interpretation of section 28.

The nature of the state obligation towards the realisation of children’s socio-economic rights under section 28(1)(c) is discussed in the *Grootboom* case⁵⁸ and *TAC* case.⁵⁹ In both cases, the Court rejected the minimum core argument.⁶⁰ In the *Grootboom* case, the Constitutional Court overturned the judgment of the Cape High Court⁶¹ with regard to the interpretation of the children’s right to shelter under section 28(1)(c) and

⁵³ Sec 27(1)(b) of the Constitution.

⁵⁴ Sec 27(1)(c) of the Constitution.

⁵⁵ L Stewart, 2008 (n 44 above) 473; Sec 28(c) of the Constitution. (Emphases are mine.).

⁵⁶ M Pieterse, ‘Reconstructing the private/public dichotomy? The enforcement of children’s constitutional social rights and care entitlement’ (2003) 1 *Journal of South African Law* 5; L Stewart, 2008 (n 44 above) 473; S Rosa & M Dutschke, ‘Child rights at the core: The use of international law in South African cases of children’s socio-economic rights’ (2006) 22 *South African Journal on Human Rights* 250; D M Chirwa, *Child poverty and children’s rights of access to food and basic nutrition in South Africa*, Socio-Economic Rights Project, Community Law Centre, University of Western Cape (2009) 20.

⁵⁷ L Stewart, 2008 (n 44 above).

⁵⁸ *The Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

⁵⁹ *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC).

⁶⁰ D M Chirwa 2009 (n 54 above) 19; M Wesson, ‘*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court’ (2004) 20 *South African Journal on Human Rights* 287-289 & 300; S Rosa & M Dutschke, 2006 (n 54 above) 254; L Stewart, 2008 (n 44 above) 481.

⁶¹ *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C); The main issue in this case is the nature of the rights of children to shelter under section 28(1)(c) of the Constitution. It was argued by the appellants that section 28(1)(c) created an unqualified right to shelter for children. Moreover, since it is in the best interests of the children to remain with their parents, section 28(1)(c) should be extended to the parents. The Court found that the term ‘shelter’ indicated ‘temporary shelter’, which falls short of ‘adequate housing’ under section 26. The Cape High Court agreed with the appellants and found that, unlike the right of access to housing under section 26, the children’s right to shelter is not subject to progressive realisation. Furthermore, the Court held that, in order for children to enjoy their right to shelter, the right should be extended to include the parents.

denied the argument that ‘shelter’ is a rudimentary form of ‘housing’.⁶² It also rejected the argument that the state had a direct and immediate responsibility to provide basic housing to every child.⁶³ The Constitutional Court argued that section 28(1)(c) and 28(1)(b) should be read together.⁶⁴ Section 28(1)(b) protects children’s right to parental care and family care. It is only when such care is lacking, the state has an obligation to provide an alternative care.⁶⁵ Therefore, it is the parents and families of children who have the primary responsibility to realise children’s care, including in particular their socio-economic rights.⁶⁶ As discussed in chapter three, the CRC and the ACRWC also place primary responsibility to care and provide for children on the parent(s) and other legal guardian(s). The state’s direct obligation to provide for section 28(1)(c) is only applicable when children are deprived of parental or family care.⁶⁷ Nonetheless, the state also has an obligation to put in place a legal and policy framework to assist parents to care adequately for their children,⁶⁸ such as a social welfare mechanism would be one such measure.⁶⁹

If the *Grootboom* judgment determined the scope of the children who have a direct claim against the state with regard to their socio-economic rights rather narrowly, the *TAC* case, in which the limited availability of Nevirapine at public health facilities was challenged, has broadened the scope to give not only children who are deprived of their family and parental care but also children whose parents are unable to adequately provide for their children a direct claim against the state under section 28(1)(c).⁷⁰ The reading of the Transvaal High Court judgments in the subsequent cases regarding children who lacked parental care indicates that the state has an

⁶² The *Grootboom* case (n 58 above) para 73; see S Liebenberg, 2008 (n 45 above).33-24.

⁶³ D M Chirwa, 2009 (n 56 above) 19-22; L Stewart, 2008 (n 44 above) 481; S Rosa & M Dutschke, 2006 (n 56 above) 246-250; S Liebenberg, 2008 (n 45 above) 33-50.

⁶⁴ The *Grootboom* case, (n 58 above) para 76.

⁶⁵ As above, para 76.

⁶⁶ As above, para 76.

⁶⁷ As above, para 77.

⁶⁸ As above, para 78.

⁶⁹ As above, para 78.

⁷⁰ The *TAC* case (n 59 above) para 77. For a discussion on the issue, see K Creamer, *The impact of South Africa’s evolving jurisprudence on children’s socio-economic rights on budget analysis*, Occasional Paper, IDASA (December 2002) 6-9; S Rosa & M Dutschke, 2006 (n 56 above) 250; S Liebenberg, 2008 (n 45 above); A Friedman & A Pantazis, 2002 (n 47 above) 47-16.

immediate and active duty to protect and provide the rights enshrined in section 28 to children who lack parental and family care including unaccompanied foreign children.⁷¹ As Stewart pointed out, the direct and immediate state responsibility to protect and realise section 28(1)(c) is only applicable for children who are deprived of their parental and family care, and children living in extreme poverty.⁷²

The Constitutional Court's understanding of the limited direct state obligation under section 28(1)(c) and the Court's rejection of the 'minimum core' argument has been criticised.⁷³ The Constitutional Court held that the Court was not in a position to determine the minimal core content of sections 26 and 27 due to factors such as the Court's institutional incapacity and the lack of information to determine the contents of the minimum core,⁷⁴ the danger of breaching the separation of powers,⁷⁵ and the impossibility of delivering the minimum core obligation to everyone immediately.⁷⁶

Instead, the Court adopted the 'reasonableness' approach to determine if the measures adopted to realise certain socio-economic rights are reasonably capable of delivering basic human needs.⁷⁷ Liebenberg summarised the threshold for the reasonableness test developed in *Grootboom* and *TAC*.⁷⁸ The reasonableness test should consider whether the measures in question are comprehensive, coherent and coordinated; whether appropriate financial and human resources to implement the measures have been allocated; whether the approach taken is balanced and flexible enough to cater for short, medium and long-term needs; whether there has been reasonable planning

⁷¹ *Centre for Child Law v MEC for Education*, unreported case no. 19559/06(T) 8-9, The case concerned the children in Luckhoff High School, a state industrial school for children in need of care; Also see, *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) para 17.

⁷² L Stewart, 2008 (n 44 above) 478; S Liebenberg, 2008 (n 45 above) 33-51.

⁷³ L Stewart, 2008 (n 44 above) 478; S Rosa & M Dutschke, 2006 (n 54 above) 250; S Liebenberg, 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in S Woolman & M Bishop (eds) *Constitutional Conversations*, Pretoria University Law Publications (2008) 309; S Liebenberg, 2008 (n 45 above) 33-27.

⁷⁴ The *Grootboom* case (n 58 above) para 32; *TAC* case (n 59 above) para 37; L Stewart, 2008 (n 44 above) 481.

⁷⁵ *TAC* case (n 59 above) para 96; L Stewart 2008 (n 44 above) 481, M Wesson, 'Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 300-301.

⁷⁶ *TAC* case (n 59 above) para 35; M Wesson, 2004 (as above) 302.

⁷⁷ S Liebenberg, 2008 (n 73) 305.

⁷⁸ S Liebenberg, 2008 (as above) 307.

and implementation; and finally, whether the measures are developed and implemented in a transparent manner.⁷⁹

In addition to the above criteria, the measures to realise socio-economic rights should cater for the most vulnerable section of the society ‘whose needs are most urgent and whose ability to enjoy all rights, therefore, is most in peril.’⁸⁰ Justice Yacoob further stated that to pass the reasonableness test, the measures implementing socio-economic rights should be beyond achieving statistical advancement.⁸¹ Although statistically successful, if the measures fail to respond to the needs of the most desperate, they should not pass the reasonable test.⁸² Liebenberg argued that through the component of the reasonableness tests, the Court has implicitly accepted the notion of minimum core. Yet, the distinction between the minimum core and the reasonableness test is that reasonableness test does not confer a right upon any individual to claim concrete goods and services from the state.⁸³ Similarly, Rosa and Dutschke, while stating that the ‘at the end of the day the reasonableness test achieves a similar effect to the underlying the sentiments behind the minimum core’, lamented that the establishing the minimum core could be the key to understanding the relation between the socio-economic rights of children in section 28(1)(c) and the other socio-economic rights in sections 26 and 27.⁸⁴ It has been argued that children’s special vulnerability requires the prioritisation of children’s needs in resource allocation.⁸⁵ Establishing section 28(1)(c) as the minimum core to other socio-economic rights, including section 26 and 27 would establishing a direct and immediate claim of section 28(1)(c) for all children regardless whether children have parental or family care or are deprived of such care.

⁷⁹ S Liebenberg, 2008 (as above) 307.

⁸⁰ The *Grootboom* case (n 58 above) para 44; S Liebenberg, 2008 (as above) 307.

⁸¹ As above, para 44.

⁸² As above, para 44.

⁸³ S Liebenberg, 2008 (n 45 above) 33-30.

⁸⁴ S Rosa & M Dutschke, 2006 (n 56 above) 254 & 256.

⁸⁵ F Viljoen, ‘Children’s rights: A response from a South African perspective’ in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspective*, Protea Book House, Pretoria (2002) 203; L Stewart, 2008 (n 44 above) 480.

Another relevant right for the purpose of the thesis is section 28(1)(b) on children's right to family care, or parental care, or to appropriate alternative care when removed from the family environment. The separate listing of 'family care' and 'parental care' mirrors the wording of article 25 of the ACRWC, which differentiates between children who are parentless, on the one hand, and children who are deprived of their family environment, on the other hand. The distinction between the parental and family spheres should be understood as recognising the important role played by extended families in child care.

Section 28(1) is not an exhaustive list⁸⁶ and section 28(2) provides a further layer of protection by requiring the best interests of the child to be given paramount importance in all matters relating to the child.⁸⁷ Justice Goldstone stated that the plain language of the section indicates that the constitutional obligation to give the paramount importance to the best interest of the child is not limited to section 28(1) and section 28(2) creates a right that is independent from section 28(1) of the Constitution.⁸⁸ Unfortunately, section 28 does not include a provision on child participation.

4.3.2 Children's Act as amended by the Children's Amendment Act

Whether legislation directly and explicitly refers to children or not, it is hard to imagine any piece of legislation that does not impact on children's lives in one way or another. However, the purpose of the section is not to provide a detailed analysis of all the laws that have implications for children's lives, but to highlight the most relevant laws.

The most recent and important Act, for the purpose of the study, is the Children's Act No 38 of 2005 as amended by the Children's Amendment Act No 41 of 2007.⁸⁹ In

⁸⁶ *Minister of Welfare and Population Development v Fitzpatrick and others*, 2000 (3) SA 422 (CC) para 17.

⁸⁷ A Skelton & P Proudlock, 2007 (n 47 above) 7.

⁸⁸ *Fitzpatrick* (n 85 above) para 17. More discussion on the best interest of the child is included in sec 4.4.2.

⁸⁹ The relevant sections from the General Regulations Regarding Children, 2010 (the Children's Act 2005) are also discussed.

1997, the Minister of Social Welfare requested the South African Law Reform Commission (SALRC)⁹⁰ to review the Child Care Act to make recommendations in a view to reform the existing legislation.⁹¹ However, the SALRC interpreted its mandate broadly and over the six years, from 1997 to 2002, drafted a comprehensive children's bill based on broad consultation.⁹² Initially, the Children's Act and Children's Amendment Act were meant to form a single Act to repeal the old Child Care Act and to codify some areas of existing family law.⁹³ The SALRC also envisaged provisions on several new areas relating to children, such as parental rights and responsibilities, children in especially difficult circumstances, international adoption, the age of majority, prevention and early intervention, child trafficking, the rights of children as consumers, and social security for children to be encapsulated into a single act.⁹⁴

The splitting of the Bill was due to the procedural issues rather than the contents of the Bill. Under the Constitution, provisions regulating issues over which the national government has exclusive legislative competence are dealt with following the procedures established under section 75. In the case of provisions over which both national and provincial government have legislative competence, section 76 is applied. The original Bill contained both section 75 and section 76 provisions. Parliament requested the Bill to be split into the section 75 Bill and section 76 Bill.⁹⁵ The Section 75 Bill eventually became the Children's Act⁹⁶ and the Section 76 Bill the Children's Amendment Act.

⁹⁰ Prior to 2003, the South African Law Reform Commission was called South African Law Commission. In the study, the current name is used to prevent possible confusion.

⁹¹ *Project 110 Report of review of the Child Care Act*, South African Law Reform Commission (December 2002) 1.

⁹² As above, 3; also see A Skelton & P Proudlock, 2007 (n 47 above) 1-12.

⁹³ SALRC, 2002 (n 90 above) 10.

⁹⁴ As above 10.

⁹⁵ A Skelton & P Proudlock, 2007 (n 47 above) 1-14.

⁹⁶ The Children's Act consists of 15 chapters; chapter 1 Interpretation, objects, application and implementation of the Act; chapter 2 General principles; chapter 3 parental responsibilities and rights; chapter 4 children's courts; chapter 7 Protection of children; chapter 9 Child in need of care and protection; chapter 10 Contribution order; chapter 15 Adoption; chapter 16 Inter-country adoption; chapter 17 Child abduction; chapter 18 Trafficking in children; chapter 19 Surrogate motherhood; chapter 20 Enforcement of Act; chapter 21 Administration of Act; and chapter 22 Miscellaneous matters. The provisions in chapter 7 are divided into provisions under the national competence and provisions under the national and provincial competence. Part 2 of

One of the most innovative features of the Act is its expanded section on diverse form of alternative care placements and the recognition of child-headed household. In 1999 Consultative Paper on Children living with HIV/AIDS addressed the need to consider broader options of alternative care in the context of the HIV epidemic in South Africa.⁹⁷ In the paper, it was pointed out that available forms of care under the Child Care Act were limited and could not meet the dramatically increasing demands of alternative care placements and proposed the options, which represent a variation on the existing models of care in South Africa, including ‘cluster foster care’, ‘independent living by orphans’ and ‘independent living with external supervision and support’.⁹⁸

The study does not delve into the details of the all sections of the Children’s Act. However, the most relevant section for the purpose of the study is section 137 on child-headed households, which will be examined in section 4.4. Also, other selected provisions of chapters on alternative care, such as chapters 9, 11, 12 and 13, are summarised below. Although not considered as forms of alternative care in the Children’s Act, adoption and inter-country adoption are considered as forms of alternative care as understood under the CRC and ACRWC. Therefore, selected provisions from chapters 15 on adoption and 16 on inter-country adoption of the Children’s Act are also examined.

chapter 7 on national child protection measures and part 3 on protective measures relating to health of children fall under the national competence, hence was included in the Children’s Amendment Act. However, part 1 of chapter 7 on Child protection system and part 4 on other protective measures (save section 142 Regulations) falls under the national and provincial competences and, therefore, included in the Children’s Act. Other chapters also included in the Children’s Act are chapter 5 Partial care; chapter 6 Early childhood development; chapter 8 Prevention and early intervention; chapter 11 Alternative care; chapter 12 Foster care; chapter 13 Child and youth care centre; and chapter 14 Drop-in centres.

⁹⁷ C Barret, *et al.*, ‘Consultative paper on children living with HIV/AIDS’ (January 1999) 22. The Paper was commissioned by the South African Law Reform Commission but was never been published. It has been used only as research material for Issue Paper 13: The review of the Child Care Act, which preceded Discussion Paper 103: Review of the Child Care Act. The Paper does not reflect the view of the Commission.

⁹⁸ C Barret, *et al.*, 1999 (as above) 26.

(i) *Definition of children in need of care*

As mentioned earlier, under section 28(1)(b) of the South African Constitution, children have the right to alternative care if their parental and family care is inadequate.⁹⁹ As confirmed in the *Grootboom* case, the right to alternative care only arises where existing parental and family care is seriously deficient or non-existent.¹⁰⁰

Section 150(1) of the Children's Act provides nine grounds on which children can be found in need of care and protection. The nine grounds may be grouped into three categories; 1) children who are abandoned or orphaned and are without any visible support;¹⁰¹ 2) children at risk of maltreatment, abuses and neglect;¹⁰² and 3) children whose parents or care givers lack the ability to provide appropriate support and care.¹⁰³ Although the list is similar to that of section 14(4) of the now repealed Child Care Act, the notable difference is the general focus of the grounds.¹⁰⁴ Section 150 is more child-centred in the sense that the grounds focus on the needs of children rather

⁹⁹ C Matthias & N Zaal, 'Children in need of care & Maintenance order', C J Davel & A Skelton, 2007 (n 47 above) 9-3.

¹⁰⁰ *Grootboom* case (n 58 above) para 76; also C Matthias & N Zaal, 2007 (as above) 9-3.

¹⁰¹ Sec 150(1)(a) the child has been abandoned or orphaned and is without visible means of support.

¹⁰² Sec 150(1)(c) the child lives or works on the streets or begs for a living; Sec 150(1)(e) the child has been exploited or lives in circumstances that expose the child to exploitation; 150(1)(f) the child lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being; Sec 150(1)(g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; and Sec 150(1)(h) the child is in a state of physical or mental neglect.

¹⁰³ Sec 150(1)(b) the child displays behaviour which cannot be controlled by the parent or care-giver; Sec 150(1)(d) the child is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency, and Sec 150(i) the child is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

¹⁰⁴ C Matthias & N Zaal, 2007 (n 96 above) 9-9; The grounds listed in Sec 14(4) of the Child Care Act are following: a. the child has no parent or guardian; a(A) the child has a parent or guardian who cannot be traced; a(B) the child (i) is abandoned or without visible means of support, (ii) displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is in, (iii) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation, (iv) lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child, (v) is in a state of physical or mental neglect, (vi) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is, or (vi) is being maintained in contravention of section 10.

than the deficiencies of parents.¹⁰⁵ In the discussion paper on children in need of protection, the SALRC pointed out the importance of a broad-based approach to tackle to pertinent issues, poverty and barriers to accessing basic social services.¹⁰⁶ As the categorisation shows, the majority of the grounds for protection and care focus on the circumstances of the children. By focusing on the situation of the children that render them in need of care and protection rather than the deficiencies of caregivers, a wider range of children can be reached under section 150. Furthermore, it is important to note that in the new Act, the term ‘children in need of care and protection’ replaced the previous term ‘children in need of care’.¹⁰⁷ Matthias and Zaal argued that the change in the terminology showed the intention to require the state to provide for the children’s safety needs in addition to nurturing needs.¹⁰⁸ The inclusion of the term ‘protection’ may also reflect the Commission’s view that a broader structural intervention is necessary to address the causes of children’s marginalisation.¹⁰⁹

It is important to note that under section 150(2), children in child-headed households or children who are victims of child labour may be found to be in need of care and protection, but being in child-headed households or being a victim of child labour itself is not an automatic ground for finding a child in need of care and protection. If children in such circumstances are not found to be in need of care and protection as foreseen in section 150(3), the social worker, where necessary without court order, should provide appropriate support and services without removing the child from the existing placement of care. It may stressed that, although a children’s court has the power to made an order placing a child in child-headed household under section 46(1)(b) of the Children’s Act, such order is different from an alternative care order, which is defined as foster care, residential care and temporary safe care under section 46(1)(a) of the Act. As mentioned before, an alternative care order is only to be issued when a child is found to be in need of care and protection. The possible court

¹⁰⁵ C Matthias & N Zaal, 2007 (n 98 above) 9-9.

¹⁰⁶ *Project 110 Review of the Child Care Act*, Discussion paper, South African Law Commission (2001) 526.

¹⁰⁷ C Matthias & N Zaal, 2007 (n 98 above) 9-3.

¹⁰⁸ As above 9-3.

¹⁰⁹ SALRC, 2001 (n 105 above) 526.

interventions when children are found to be in need of care and protection under section 150 are discussed in the following section.

(ii) Possible court orders when the child is found to be in need of care and protection

Section 156(1) gives a children's court the power to make any placement order as long as the order is in the best interests of the child. Sections 156(1)(e) and 156(1)(f) are particularly relevant for the thesis. Under section 156(1)(e), if the child has no care giver, or has parents or other care givers but they are unsuitable to care for the child, the court may order the child to be placed in suitable foster care, cluster foster care, temporary safe care, pending an application or, and the finalisation of, adoption, or a child, shared care and youth care centre that provides residential programmes. As Matthias and Zaal point out, the wording of section 156(1) gives a children's court the liberty to create an order to meet the specific needs of a child concerned.¹¹⁰ Nevertheless, when the court makes a decision to remove a child from the child's parents or primary caregiver under section 156, it must consider section 157, which stipulates the importance of providing stability in the child's life. The basic guiding principles are the prioritisation of the family preservation by providing appropriate support and assistance to the parents or other care givers of the child and, in case children should be removed even after the government intervention, the priority should be given to the family-type of alternative care.

Under section 157, the court is required to consider a report submitted by a designated social worker compiled in terms of section 152(2) of the Act. The report by the social worker should include: 1) an overall assessment of the needs of the child;¹¹¹ 2) information on previous interventions and family preservation services that have been taken;¹¹² and 3) a permanency plan for the child.¹¹³ A different priority is given to each alternative care option reflecting the importance of establishing stability of care in the child's life. For instance, the most desired option is the foster care placement

¹¹⁰ C Matthias & N Zaal, 2007 (n 98 above) 9-22.

¹¹¹ Sec 157(1)(a)(i).

¹¹² Sec 157(1)(a)(ii).

¹¹³ Sec 157(1)(a)(iii).

with relatives or non-relatives who live geographically close to parents, or other care giver of the child to encourage visiting by the parents or care giver. If that is not possible, in the following order, four other options may be considered: 1) the possibility of adoption by relatives; 2) the possibility of guardianship with relatives; 3) the possibility of adoption by non-relatives; or 4) the possibility of foster care by relatives or non-relatives or cluster foster care may be considered.¹¹⁴ Important to note is that the possibility of adoption by non-relatives is given priority to the foster care placement with relatives who do not live geographically close to the parents or other care giver of the child. It may be due to the fact that ‘adoption’ provides more permanent care than ‘foster care’ placement. Although the section does not specify domestic or inter-country adoption by non-relatives, the preference is given to adoptive parents with a ‘similar ethnic, cultural and religious background’.¹¹⁵ The prioritisation of the permanency of the care placement in the South African law reflects the general international standards in the UN Guidelines for the Alternative Care of Children. Paragraph 60 of the Guidelines stipulates that considering the negative impact of frequent change in care setting to the child’s development, an appropriate permanent solution should be arranged without due delay.

In addition to the consideration given to the report submitted by the designated social worker, under section 157(1)(b), the court is further required to consider options, which could best establish the stability in the child’s life, giving priority to the possibility of keeping the child within its family environment by providing appropriate support and supervision to the parents or other care giver of the child.

Each of the alternative care options provided in the Children’s Act is now discussed.

Foster care

Foster care, which is regulated under chapter 12 of the Children’s Act, may be the preferred mode of care for children who cannot remain with their biological families and who are not available for adoption, especially if a foster placement can be found

¹¹⁴ Sec 55(2) of the General regulations regarding Children 2010, Children’s Act 38 of 2005 (1 April 2010).

¹¹⁵ Sec 55(2)(d) of the General regulations (as above).

geographically close to the parents or other care giver of the child.¹¹⁶ The prioritisation of the foster placement close to the parents or other caregiver of the child promotes the permanency planning, including family unification. Enabling children to maintain their contact with their own community and the family network facilitates the future integration of children back into their community. Furthermore, the ethnic, cultural and other background of the child should be considered when placing the child into foster care and the preference should be given to foster parent(s) from the similar background as the child. Section 184(2) further stipulates that a child may be placed in foster care with foster parents from a different background only if there is an existing bond between the child and the prospectus foster parents or if a suitable person from a similar background with the child is not available. Prioritising foster families from the similar cultural background and locality is in line with the 2009 UN Guidelines for the Alternative Care of Children.¹¹⁷ In order to maintain family-type care, no more than six children may be placed under a same foster care placement, unless those children are siblings or blood-related, or it is in their best interests.¹¹⁸

Apart from the conventional foster care, the Children's Act introduced two new forms of foster care: cluster foster care and shared care, which are discussed below. The introduction of these new forms of foster care is an attempt to meet the dramatically increased number of children in need of alternative care due to the HIV epidemic. As early as 1999, the need to consider different forms of foster care had been pointed out.¹¹⁹ The SALRC, in its discussion paper, also pointed out that, in order to provide a conventional form of foster care, four out of five families need to take in a child unrelated to them.¹²⁰ The problem of lack of human and financial resources to monitor foster care to ensure well-being of children in formal and informal foster care has been raised and the development of cluster foster care was proposed as one of the ways address the short coming of conventional foster care.

¹¹⁶ SALRC, 2001 (n 105 above) 17-1.

¹¹⁷ Para 119 of the UN Guidelines for the Alternative Care of Children.

¹¹⁸ Secs 185(1)(a) & 185(1)(b) of the Children's Act.

¹¹⁹ C Barret, *et al.*, 1999 (n 96 above) 28.

¹²⁰ SALRC, 2001 (n 105 above) 17-1.

Cluster foster care

Cluster foster care is defined as ‘reception of children in foster care in accordance with a cluster foster care scheme registered by the provincial head of social development’.¹²¹ More than six children, only, may be placed in a cluster foster care scheme. The cluster foster care scheme may be managed by NGOs and should be registered with the provincial head of social development for that purpose.¹²² Unlike conventional foster care, where children are placed with individual foster parents, in cluster foster care, children would be cared for by a group of individuals or an organisation. There has been a concern over the operation of a cluster foster care scheme. Most notably, the Children’s Institute pointed out the ambiguous definition of cluster foster care and raised the concern that some organisations were using the foster care legislation to operate residential care without having to operate within the stricter regulations of residential care.¹²³ The Children’s Institute called for amending the provision to ensure that children are placed directly with foster parents and not into the care of an organisation.¹²⁴ Similar concern was raised by the National Association of Child Care Workers, which argued that without a clear definition of cluster foster care, there was a danger of cluster foster care being operated as ‘mini-children’s home’.¹²⁵ However, the suggested amendments are not reflected in the Act.

Although the regulations require the organisation operating a cluster foster care scheme to submit an annual report to the Provincial Head of Social Department indicating the number of children assigned per active member of the organisation providing foster care and the number of active members of the organisation who provide foster care to children, it does not specify how many children could be

¹²¹ Sec 3(e) of the Children’s Act.

¹²² Sec 3(e) of the Children’s Act.

¹²³ S Moses & H Meintjes, ‘Submission from the Children’s Institute, University of Cape Town on residential care in the Children’s Amendment Bill [B19B of 2006]’, Children’s Institute, University of Cape Town (2007) 9.

¹²⁴ Children’s Institute suggested that ‘cluster foster care scheme’ to be defined as ‘a support network’ for foster parents and ‘foster parent’ as ‘person who has foster care of a child by order of the Children’s Court’ by removing the phrase ‘includes an active member of an organisation operation cluster foster care scheme and has been assigned responsibility for the foster care of a child’. S Moses & H Meintjes, 2007 (as above) 9.

¹²⁵ National Association of Child Care Workers, ‘Reviewed submission on the draft Children’s Amendment Bill’, National Association of Child Care Workers (August 2007) 4.

managed in one cluster foster care scheme.¹²⁶ Section 69(4)(a) stipulates that an organisation providing a cluster foster care scheme or schemes should employ a social worker per 50 children served by the cluster foster care scheme or cluster foster care schemes. This wording seems to suggest that more than 50 children may be served in one cluster foster care scheme.

The general duration for any court order related to alternative care, including foster care and cluster foster care, is two years or for a shorter period and the court may renew the order of the foster care placement every two years.¹²⁷ However, after a child has been in foster care more than two years, the court may, considering the need to create the stability in the child's life, extend the order until the child turns 18 if the conditions set out in section 186(2) are met. In case of foster care with non-relatives, after a careful assessment under section 186(1), the court may also order that no further social work supervision or social worker report is required. However, despite subsections 1 and 2, the social worker must visit at least once in two years to monitor and evaluate the placement.¹²⁸ Section 186, which allows the court to make a long-term foster care order or freeing the social workers from the obligatory monitoring and supervision, is useful to lessen unnecessary burden on the limited human and material resources of organisations providing social work. Section 186 reflects the concern and recommendation of the SALRC. The SALRC pointed out that children were often looked after in safe long-term care by relatives which, in practice, did not require on-going supervision and monitoring.¹²⁹ The Commission further recommended that in order to reduce the social work load, the court should have the discretion to determine whether a placement with relatives should be of a permanent nature, and also whether supervision and monitoring by the state is necessary.¹³⁰

¹²⁶ Secs 69(2)(c) & 69(2)(d) of the General regulations (n 113 above).

¹²⁷ Sec 159(1)(a) of the Children's Act.

¹²⁸ Sec 186(3) of the Children's Act.

¹²⁹ SALRC, Discussion Paper 103 on the Review of Child Care Act (2001) 4; Similar concerns of overburdening of social workers due to the increasing number of long-term care by relatives for children who are orphaned by AIDS was raised by H Meintjes *et al.*, in *Children in 'need of care' or cash? Questioning social service provisions of orphans in the context of the South African AIDS pandemic, A joint-working paper of the Children's Institute and the Centre for Actuarial Research, University of Cape Town* (2003) 29 & 54.

¹³⁰ SALRC, 2002 (n 90 above) 216.

Although such measures could reduce human and material burden of social workers, the discontinuation of on-going supervision and monitoring could put children at risk. Paragraph 79 of the UN Guidelines for the Alternative Care of Children stipulate that states should devise special and appropriate measures to protect children in informal care and paragraph 128 of the Guidelines further require that care placements to be inspected frequently through both scheduled and unscheduled visits.¹³¹ Considering above international standards, rather than discontinuing on-going supervision and monitoring, training community members to visit and monitor the condition of care on a regular basis might be a better solution. The format of the assessment report could be simplified for the community trainees to easily complete. Social workers may only intervene or conduct a thorough assessment of the placement only when there are concerns raised by the community trainees regarding the placements.

Shared care

Shared care is another new concept introduced in the Children's Act.¹³² Shared care is a practice 'where different care-givers or centres alternate in taking responsibility for the care of the child at different times or periods'.¹³³ The aim of the shared care is to supplement the inadequate care by primary caregivers. For instance, the court may order shared care by requiring a child to be cared for by a community organisation during school days, while allowing the child to remain with their parents (or other primary caregivers) during school holidays.¹³⁴ Shared care is the least intrusive measure, which enhances the quality of care to children without completely removing them from their families.¹³⁵ However, no regulations relating to the operation and implementation of share care have been developed.

¹³¹ Paras 79 and 128 of the UN Guidelines for the Alternative Care.

¹³² Secs 46(1)(e) and 156(1)(e)(iv) of the Children's Act.

¹³³ Sec 156(1)(e)(iv) of the Children's Act.

¹³⁴ C Matthias & N Zaal, 2007 (n 98 above) 9-26.

¹³⁵ As above, 9-27.

Residential care

Under section 158(1), a court may order the placement of a child in child and youth care centres only when no other appropriate options are available. Such stipulation reflects the principle that residential care should only be used as a last resort. However, the section does not specifically state that the placement order in residential care should be used only for the period as short as necessary.

A reading of section 191 suggests that the residential care serves three broad purposes: 1) to provide alternative care to children who are in need of care and protection due to inadequate parental and family care; 2) to provide developmental and secure care to children awaiting trial or sentencing; and 3) to provide developmental and secure care to children with behavioural or psychological difficulties. In addition to the residential programmes, a child and youth care centre may offer various developmental and therapeutic programmes, such as programmes for children with drug dependency, children living with disabilities and children with psychiatric difficulties.¹³⁶ Therefore, under section 158(2), when place a child in a child and youth care centre, the court should identify a suitable residential programme for the child concerned. Section 158(3), in turn, requires the provincial head of social development to consider the particular developmental and therapeutic needs of children, permanency plan for the child and the distance between the residential centre and the child's community and family. Section 158(4) stipulates that the provincial head of social development, where feasible, must select a residential care placement which is located as close as possible to the children's family or community. The efforts to facilitate the integration of children who stayed in the residential care into the community are also made through the developmental programmes provided to children. While in the residential care, children are entitled to various developmental programmes, which would help them to adjust to a life outside of the residential care. Such programmes include life skills, after-care, income generating activities and independent living for children disengaging from residential care.¹³⁷

¹³⁶ Sec 191(3) of the Children's Act.

¹³⁷ Sec 194 of the Children's Act & Sec 74 of the General Regulations (n 115 above).

The rights of children in such residential care are also protected under section 73 of the Consolidated Regulations for the Children’s Act. Importantly, section 74 of the Regulations provides for an age appropriate and accessible complaints procedure. However, the Regulations do not specify the possible actions should be taken against staff members against whom repeated complaints are made.

One of the important features of the Children’s Act with regards to alternative care placements is that it provides the possibility of extending an alternative care order beyond the age of 18. Under section 176(1), an alternative care order may be extended until the child reaches 21 years of the age, if the current alternative care provider is willing and able to continue to provide care and if the continued stay is necessary for the child to finish his or education or training programme.¹³⁸ It is a way to further prepare the child for the life outside of alternative care, but the limited ground for the extension of the alternative care order may fall short of the standards of the UN Guidelines for the Alternative Care of Children, which stipulate that appropriate after-care programmes and assistance, which include counselling and mentorship scheme where possible, to be provided to all children who are leaving care.¹³⁹

*Adoption*¹⁴⁰

When making a placement order, section 157(2) requires courts to consider the best way to secure the stability of the child’s life. Adoption, in certain circumstances, could be the best way to secure the stability of the child’s life. For a very young orphaned or abandoned child, who cannot be reunited with the parents or family, adoption may be the best way to provide permanent care in a family. Section 157(3), which requires that ‘a very young child who has been orphaned or abandoned by its parents must be made available for adoption’ unless this is not in the best interests of the child, seems to reflect the importance given to adoption as a permanent care option for very young children. The provision reflects the standard set in the UN

¹³⁸ Sec 176(1) of the Children’s Act.

¹³⁹ Paras 131 to 136 of the UN Guidelines for the Alternative Care of Children.

¹⁴⁰ Adoption and inter-country adoption are not considered as alternative care placements in terms of under Sec 167(1) of the Children’s Act, which classifies alternative care as: 1) foster care; 2) residential care; and 3) temporary safe care.

Guidelines for the Alternative Care of Children, which stipulates that children under the age of 3 years should be provided in family-based settings.¹⁴¹

There are several grounds based on which a child may be found adoptable. Section 230(1) of the Children's Act provides that any child may be adopted if three conditions are met: 1) the child is adoptable under section 230(3); 2) the adoption is in the best interests of the child; and 3) the provisions of the relevant sections on adoption are fully complied with. Section 230(3) provides for five categories of children who are considered as adoptable. Under section 230(3)(a), a child is adoptable if the child is an orphan and has not guardian or caregiver who is willing to adopt the child. Reading it together with section 230(3)(e), which states that a child in need of a permanent alternative placement is an adoptable child, the fact that the existence of the relatives or other caregivers of the child who are able and willing to provide a permanent alternative care, for instance, long-term foster care, does not affect the fact that the child is adoptable. In that case, the best interests of the child should be the determinant factor whether the child should be adopted or placed in a long-term foster care by relatives.

Sections 230(3)(b) and 230(3)(c) provide that if the whereabouts of the child's parents or guardian cannot be established or and the child has been abandoned, the child is adoptable. Section 56(1) of the Consolidated Regulations stipulates that to determine whether a child is abandoned, the social workers should post on advertisement about the child in at least one local newspaper circulating in the area where the child has been found. The social worker should prove that no one has claimed the responsibility for the child for three months after the publication of the advertisement¹⁴² and also provide an affidavit explaining the measures taken to trace the child's parents, guardian or care-giver of the child.¹⁴³

Other category of children are adoptable are children in need of care and protection and have no prospectus of reuniting with their families. Under section 230(3)(d) of the

¹⁴¹ Para 22 of the UN Guidelines for the Alternative Care of Children.

¹⁴² Sec 56(2)(ii) of the General regulations (as above).

¹⁴³ Sec 56(2)(d) of the General regulations (as above).

Children's Act, children who have been deliberately abused and neglected by their parents or guardians or whose parents or guardians has allowed the children to be abused and neglected are also adoptable. Section 236(1), which provides for the grounds where the consent of parents or guardians of the child to the adoption of the child is not necessary, contains many of the same grounds provided in section 230(c). Related sections may be section 28 providing for the termination of parental responsibilities and rights and section 135, which provides for the Director-General, a provincial head of social development or a designated child protection organisation to submit application, without consent of a parent or care giver, to terminate or suspend parental responsibilities for young children who has been in alternative care for a considerable length of time with no prospectus for reuniting with their family. Section 135 is linked the age and development of the child and the younger the child is the shorter period is required before such application to terminate parental rights and responsibilities can be made. As Mosikatsana and Loffell pointed out, the insertion of section 135 greatly strengthen the protection of the children's right to family care due to the refusal of the parents or care giver to consent to the adoption of the children, by enabling children who previously might have been considered unadoptable to be adopted.¹⁴⁴

Adoption provides permanent family care to children who are deprived of their family environment. From this perspective, adoption should be promoted and facilitated where appropriate. However, it should be noted that in many cases, adoption is not a suitable option. In South Africa, adoption by non-related persons is uncommon and limited to absorb the increasing number of orphaned children due to current HIV epidemic.¹⁴⁵ Furthermore, adoption of a large sibling group by one family is highly unlikely. Therefore, siblings are likely to be separated. The limitations of foster care, residential care and foster care in providing quality care to a diverse group of children who are orphaned in South Africa necessitate the need to devise a new form of child care practice, including the recognition of child-headed households.

¹⁴⁴ T Mosikatsana & J Loffell, 'Adoption' in C J Davel & A M Skelton (eds) *Commentary on the Children's Act*, Juta Publishers (2007).

¹⁴⁵ *Child adoption: Trends and policies*, United Nations Department of Economic and Social Affairs, Population Division (2009) 69. The report indicated that in 2001, total 2218 adoption took place and among them, 1906 were domestic adoption. More recent data on adoption in South Africa was not available in the report and other data base.

*Inter-country adoption*¹⁴⁶

The landmark case in the area of inter-country adoption is *Minister of Welfare and Population Development v Fitzpatrick*, in which the Constitutional Court decided that the prohibition of adoption by non-South African was invalid.¹⁴⁷ South Africa is a party to the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption and the Children's Act incorporates the 1993 Hague Convention in chapter 16. Section 254 clearly states that one of the main purposes of the chapter is to domesticate the Hague Convention on inter-country adoption. It is an important development as inter-country adoption plays an increasingly important role in providing a permanent care to children who cannot be suitably cared for domestically. Section 256 gives effect to the Hague Convention by providing that the provisions of the Convention are law in South Africa.

A child may be available for inter-country adoption if the name of the child has been on the Register of Adoptive Children and the Prospective Adoptive Parents for at least 60 days and no 'fit and proper' adoptive parents have come forward in South Africa.¹⁴⁸ This is to give effect to the subsidiarity principle that the possibility of suitable domestic adoption should be given priority over inter-country adoption. However, the principle of subsidiarity is not applicable blindly as the wording of the section also suggests that the prospective adoptive parents should be 'fit and proper'.

In *AD and another v DW and others*, the Constitutional Court held that while the principle of subsidiarity should be given due consideration, 'a contextualised case by case enquiry' to determine the best interests of the child in each inter-country adoption should be conducted.¹⁴⁹ The court further stressed that the courts should guard the best interest of the child rather than rigidly adhering to technical matters.¹⁵⁰ The importance of the best interests of the child in inter-country adoption cases is also

¹⁴⁶ Inter-country adoption in general has been discussed in detail in Chapter 3. Therefore, the discussion in this section focuses only on the relevant provisions in the Children's Act.

¹⁴⁷ The *Fitzpatrick* (n 85 above).

¹⁴⁸ Sec 261(1)(g) of the Children's Act.

¹⁴⁹ *AD and another v DW and others*, CCT 48/07, 2008 (3) SA 183 (CC) para 50.

¹⁵⁰ As above, para 55.

reflected in section 261(5)(a) of the Children's Act, which stipulates that inter-country adoption should only take place if it is in the best interests of the child. Also importantly, to give effect to article 4(d) of the 1993 Hague Convention, which requires that views and opinions of the child is given due consideration, section 112 of the Consolidated Regulations requires that the report by the Central Authority under the terms of sections 261(3) and 262(3) of the Children's Act should include the views of the child concerning the adoption where the child is capable of forming his or her own view.¹⁵¹ If the child is over 10 years of age, the consent of the child should be attached to the report.¹⁵²

So far, the possible care orders the court may make in case a child is found to be in need of care and protection have been discussed. In the earlier section, it was briefly mentioned that under section 150(2), a child in a child-headed household may be children in need of care and protection contemplated under section 150(1) and a designated social worker should conduct an investigation to determine whether a child is in need of care and protection. When the child is found to be in need of care and protection, the matter should be referred to a local children's court for care and protection order as contemplated under section 156 of the Children's Act. However, if the child is not found to be in need of care and protection, the social worker should provide necessary support services and programmes without the intervention of the court. In the later section, provisions related to child-headed households are discussed in detail.

4.4 Recognising child-headed households

In 2002, in the Review of the Child Care Act, the SALRC pointed out that child-headed households would become 'a familiar phenomenon' due to the increasing number of adult caregivers dying of AIDS-related illnesses.¹⁵³ Therefore, the

¹⁵¹ Sec 112(2)(g) of the General regulations (n 113 above).

¹⁵² Sec 112(2)(h) of the General regulations (as above).

¹⁵³ SALRC, 2002 (n 90 above) 199.

Commission recommended that child-headed households be given a legal recognition ‘as a placement of option for an orphaned child in need of care’.¹⁵⁴

The recommendation by the SALRC generated heated debate on the related issues including the age of which a child should be allowed to head a household, the role of supervisors to child-headed households and the monitoring of the functioning of child-headed households.¹⁵⁵ The Children’s Bill Working Group has been formed in 2003 to facilitate discussions around the provisions in the Children’s Amendment Bill.¹⁵⁶ In 2006, the Children’s Bill Working Group help a workshop and the members of the working group raised the concerns over the rigid definition of child-headed household, which may not cater for households in transition, such as households headed by over youth aged between 18 and 21, and ensuring the proper identification and recognition process to ensure that all child-headed households benefit from the support measures.¹⁵⁷ Finally, the Children’s Act recognised child-headed households as one of the ‘protective measures’.¹⁵⁸

4.4.1 Section 137 of the Children’s Act

As mentioned briefly in the introduction, the 1999 Consultation paper on the children living with HIV/AIDS, recommended that ‘independent living with external supervision and support’ as a potential means to provide care to children who are orphaned.¹⁵⁹ The paper further pointed out the need to clarify whether and what form a child-headed household should be recognised and the legal aspects, which needed to be considered, including the age of the child heading a household and guardian and custodian issues.¹⁶⁰ Section 137 of the Children’s Act, introduced by way of an amendment via the Children’s Amendment Act and its related regulations address

¹⁵⁴ As above 199.

¹⁵⁵ SALRC, 2002 (n 90 above) 170-172.

¹⁵⁶ Workshop Report, Children’s Bill Working Group Workshop in Draft Children’s Amendment Bill (28-29 March, 2006), Children’s Institute (June 2006) 1.

¹⁵⁷ Children’s Institute, 2006 (as above) 39.

¹⁵⁸ The child-headed household is recognised under ‘other protective measures’. See Sec 137, Part 4 Other Protective Measures, Chapter 7 Protection of Children of the Children’s Act.

¹⁵⁹ C Barret *et al.*, 1999 (n 96 above) 31.

¹⁶⁰ As above, 31.

concerns pointed out in the 1999 Consultation paper. Section 137 of the Children's Act and relevant regulations are discussed in the following sections.

(i) *Defining the term 'child-headed household'*

In order for a household to be recognised as a child-headed household, all four criteria mentioned in section 137(1) should be met. The first criterion is that there should not be a *de facto* head of household who is an adult. It is important to note that the recognition is not only dependent on whether there is an adult living together in the household, but whether the adult is providing effective care to the children.¹⁶¹ For instance, under section 137(1)(1), a household in which an adult caregiver is terminally ill may be recognised as a child-headed household if the other criteria are met. Inclusion of such households is important as it recognises that in many cases, especially in the case of AIDS-related illnesses, children assume a role of *de facto* head of the household providing care to their parents and younger siblings even before their parents pass away. This inclusion also accommodates the concerns raised by Desmond and Richter that the conventional understanding of 'child-headed households' as 'adultless households' failed to include many households where children are *de facto* heads of households because their adult caregivers are unable to provide care.¹⁶² However, the criteria could be broadened to include incapacity due to old age to cover children living with their grandparents who are too old to provide effective care. As Desmond and Richter point out, in some grandparent-headed households, children are heading households when their grandparents become unable to care for them due to old age.¹⁶³

The second criterion is that there is no adult family member available to provide the care to the children in the household. However, it is not clear how the term 'availability' of an adult family member should be interpreted and the relationship between the 'suitability' of the 'available' adult member. Section 137(4) prevents a

¹⁶¹ Definitions of unaccompanied and accompanied child-headed households have been discussed in Sec 1.5 of the study.

¹⁶² C Desmond *et al.*, 'Child-headed households: dissecting our understanding of who is at risk' (2003) Special edition, *ChildrenFirst* 55.

¹⁶³ C Desmond *et al.*, 2003 (as above).

person ‘unsuitable’ to work with children from being assigned as a supervisor. Therefore, it can be assumed that the suitability of an adult member of the family will be examined before he or she is granted the rights and responsibilities of the guardian of the children using the same criteria, which is provided under section 120 of the Children’s Act.¹⁶⁴ Nevertheless, the determination of ‘suitability’ should also consider subjective elements. As Sloth-Nielsen has clearly pointed out, the problem may arise if a family member is available to provide care but children refuse him or her.¹⁶⁵ In that situation, the available family member is clearly not suitable to care for the children.

The third criterion is that of an age restriction. Under section 137(1)(a) only a person over 16 may assume the role of head of household. The rationale behind setting the age limit to 16 is to enable the child heading the household to apply for appropriate social grants to sustain the household. In order to access the social grants, the appellant needs a South African identity document, which can be obtained at 16 years of age. In addition, according to section 3(1) of the South African Schools Act children are required to attend school till they reach age of 15 or ninth grade, whichever comes first. Also the Basic Conditions of Employment Act prohibits employment of anyone under 15 years¹⁶⁶ or under a minimum school leaving age.¹⁶⁷ Therefore, a child heading a household can be legally employed.¹⁶⁸ In case where the conditions listed in section 137(1)(a) and 137(1)(b) are met but the oldest child is younger than 16, the household cannot be recognised as a child-headed household. In that case, the children in that household will be considered as children in need of care

¹⁶⁴ Sec 120(1) specifies that a person may found unsuitable to work with children by a) children’s court; b) any other court in criminal or civil proceedings; and 3) any forum established or recognised by law in any disciplinary proceedings concerning the conduct of the person relating to a child. In terms of criminal matters, a person who is convicted of murder, attempted murder, rape indecent assault or assault with the intent to do grievous bodily harm with regard to a child is a person unsuitable to work with children under Sec 120(4). Furthermore, Sec 120(6) stipulates that in terms of Sec 120(1)(b), whether the person is found guilty or innocent in the criminal trial does not affect the determination of the unsuitability of the person to work with children.

¹⁶⁵ J Sloth-Nielsen, ‘Protection of children’ in C J Davel & A M Skelton (eds), 2007 (n 47 above) 7-47.

¹⁶⁶ Basic Conditions of Employment Act No 75 of 1997, Sec 43(1)(a).

¹⁶⁷ As above sec 43(1)(b).

¹⁶⁸ The issue of the employment of children is discussed in Sec 4.4.2.

and protection and court-mandated interventions, including a placement in appropriate alternative care, will be sought under section 156.

The ‘best interests of the child’ is the fourth criterion. Even if the other three criteria are met, if it is not in the best interests of the children to remain as a child-headed household, the household will not be recognised as such. For instance, as pointed out by Couzens and Zaal, the fact that a child older than 16 has ‘assumed’ the responsibility as a head of a household, does not mean that the child is ‘capable’ of providing adequate care to the members of the household.¹⁶⁹ If an assessment reflects that the child is unable to provide adequate care to the members of the households, applying the best interests of the child criterion, the household cannot be recognised as a child-headed household.

As mentioned in section 4.2, South Africa is not only bound under the CRC and ACRWC to give the best interests of the child a paramount importance in matters related to the child. Also under its Constitution, the best interests of the child are of ‘paramount importance in every matter concerning the child’.¹⁷⁰ The inclusion of the best interests of the child criterion illustrates the determination of the South African Government to adhere to its international and constitutional obligation towards children. However, it is not clear what criteria will be used to determine the best interests of the child and whose best interests will be given priority when the best interests of young children and the child-head of the household come into conflict. As Sloth-Nielsen points out, the right to childhood, especially that of the child heading the household, could be threatened if children have to assume the responsibilities of a primary caregiver.¹⁷¹

Three main concerns can be raised with regards to section 137(1).

Firstly, as mentioned above, section 137(1) does not contain a criterion requiring children’s participation in determination of a child-headed household. Child

¹⁶⁹ M Couzens & F N Zaal, ‘Legal recognition for child-headed households: an evaluation of emerging South African Framework’ (2009) 17 *International Journal of Children’s Rights* 310.

¹⁷⁰ Sec 28(2) of the Constitution.

¹⁷¹ 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* 77.

participation in all decisions concerning the children and the respect for children's view is one of the fundamental principles of the CRC and ACRWC.¹⁷² Unfortunately, the section does not contain a specific provision requiring the participation of children in the determination of child-headed households. Therefore, it is not clear whether and to what extent the opinions of the children will be sought and respected when determining if a household can be recognised as a child-headed household. It can be argued that child participation in matters related to the children is protected in several different provisions in the Children's Act. Most importantly, section 10 of the Children's Act, which incorporates article 12 of the CRC and article 4(2) of the ACRWC into South African domestic law, provides as follows:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

It is feasible to argue that section 10 should suffice to protect the wishes and opinions of the children in this regard. It can also be argued that from the wording of section 137(1)(c) - a child over 16 *has assumed* the role of care-giver - one can surmise that the child has voluntarily taken over the role of caregiver and, therefore, the issues of wishes and opinions of the children do not need to be addressed separately. Nonetheless, considering the gravity of the matter, it should be clear without doubt that a child who has 'assumed' the role of caregiver understands all the long and short-term implications of his or her decision, and has voluntarily opted to remain in a child-headed household. The insertion of the respect for the view and opinions of the children concerned as one of the criteria will ensure that children's views and informed consents are actively sought.

The second concern is the age limit of which a child can head a household. During the initial discussion stage, the SALRC recommended against setting an age limit at which a child can head a household but the maturity of the child should be a determining factor.¹⁷³ In the later stage, the prevalent argument was that the age limit

¹⁷² For further discussion on the children's rights-based approaches, see Sec 3.3.6.

¹⁷³ SALRC, 2002 (n 90 above) 172.

should be set to 15 years of age.¹⁷⁴ Nevertheless, the Act specifies the age at which a child can head a household at 16.

It is true that children under a certain age should not be allowed to ‘head’ a household. As pointed out in section 3.5.2, not having any age limit as is the current case in Namibian Bill might also pose a problem. However, the inflexible age limit can be equally undesirable. For instance, set age limit may be difficult to apply in a case of an accompanied child-headed household where a child younger than 16 has assumed a role of a *de facto* head of the household due to the illness of his or her parents but is living together with a *de jure* head of the household.¹⁷⁵ In that case, not recognising the household as a child-headed household could lead to two situations. The first situation is that despite the extreme vulnerability of the child and other members of the household, the children will not be qualified to receive the same kind of support and protection as children in recognised child-headed households. For example, terminally-ill parents may have difficulty accessing relevant grants, such as child support grants or disability grants due to their physical weakness. Furthermore, children under 15 who are *de facto* primary caregivers, but the households are not recognised as such, those children will not be able to apply for the grants themselves for their siblings. Also, while children in child-headed households are assisted by their supervisors to access relevant grants, children in unrecognised child-headed household are not entitled to such assistance. The second situation is that of placing the children in an alternative care placement. As the household cannot be recognised as a child-headed household and it is clear that the children are not receiving adequate care from their terminally-ill parents, they will qualify as children in need of care and protection, and therefore, could be placed in conventional alternative care.

¹⁷⁴ Children’s Amendment Bill: Summary of key recommendations by the Children’s Bill Working Group, Children’s Institute (2007) 6; Z Vice, Submission to National Assembly, Child Welfare South Africa (August 2007) 8-9; W Mukoma & L Jamieson, Submission to National Assembly, Children’s Institute (August 2007) 1. However, Children in Distress (CINDI) insisted setting no age limit for the child-headed household. It argued that the recognition should be given depending on the maturity and capability of the child rather. See Submission on the Children’s Amendment Bill from the Child Advocacy Project from the CINDI Network (August 2007) 1.

¹⁷⁵ The term ‘accompanied’ child-headed household is taken from *Reversed roles and stressed souls: child-headed households in Ethiopia*, African Child Policy Forum (2008). For a detailed explanation of the term, see Sec 1.5 Definitions.

Neither of these situations seems to reflect the best interests of the children. Children may want to remain with their ill parents but also are in need of the same type of support and protection provided to other ‘recognised’ child-headed households. In such cases, a hard and fast age criterion may not be best for the children. In a case like that described above, the household should be recognised as a child-headed household if the other three criteria are met. Nevertheless, the level of supervision may be strengthened to meet the different needs of the children. For instance, linking the household with a home-based care organisation to support the child in providing physical care to their parents would be an example. Furthermore, whenever feasible, the parents should be involved as far as possible in making decisions regarding households. A study of child-headed households in Ethiopia showed that in many cases, incapacitated adults in child-headed households play a vital role in counselling and advising children on various issues.¹⁷⁶ Their role and contribution to the working of the households should be fully respected and encouraged.

The third concern relates to the fact that a child-headed household is a household headed by a child under 18 years. The support measures, including the assignment of a supervisor, are provided because a household is headed by an under-18. The Act does not provide for when an oldest child who heads the household has turned 18 and the household is no longer classified as a ‘child’-headed household. The discontinuation of the support to a household is no longer defined as a ‘child-headed household’ may fall short of the international standard, which requires states to provide appropriate aftercare to children leaving care placements. Paragraph 135 of the UN Guidelines for the Alternative Care of Children stipulates that ongoing educational and vocational training opportunities should be provided to young people leaving care. Although child-headed household may not be classified as an alternative care placement, the situation of children in child-headed households may be similar to that of children in alternative care setting. It may be argued that children in child-headed households have more opportunity to exercise their independence than children in alternative care, such as foster care or residential care as the role of supervisor is less intensive than the role of foster parents or caregivers in residential care. However, in many situations, the problems faced by a ‘child’-headed household

¹⁷⁶ African Policy Forum, 2008 (as above) 85.

will not disappear simply because it is no longer classified as a ‘child’-headed household when the child heading the households turns 18. In some cases, youths over 18 years old may still be in school and may wish to pursue further education.¹⁷⁷ Therefore, the termination of support measures should be gradual to enable the smooth transition of a young head of a household from ‘childhood’ to ‘adulthood’.

(ii) Operation of supervision

Section 137(2) stipulates that, once a household is recognised as a child-headed household, the household should function under the general supervision of an adult supervisor. The supervising adult should be designated by a children’s court,¹⁷⁸ or an organ of state or an NGO determined by the provincial head of social development.¹⁷⁹ The appointment of supervisor reflects the paragraph 19 of the UN Guidelines for the Alternative Care of Children, which stipulate that children should be supported and protected by a legal guardian or other recognised responsible adult or competent public body at all times.¹⁸⁰ Paragraph 37 of the Guidelines also require state to ensure that children are protected from all forms of exploitation and abuse through appropriate measures including the appointment of a legal guardian, a recognised responsible adult, or a public body legally mandated to act as guardian.¹⁸¹

From the onset of the discussion to legally recognise child-headed households, the SALRC has endeavoured to ensure the autonomy of child-headed households.¹⁸² Part III of the National Norms and Standards on Child Protection stipulates that ‘the

¹⁷⁷ From the informal interviews with children in youth-headed households, it transpired that many of the youth heading households who are over 18 were still in school (grade 10 and 12). The interviews were conducted in Sesotho through Ms Catherine Sepato, a director of Tswaraganang orphanage (OVC Programme) in Temba, Hammanskraal. (25 June 2009). For details of the households visited, see Sec 1.6 of the study; Also see J Kuhanen *et al.*, ‘Junior-headed households as a possible strategy for coping with the growing orphan crisis in Northern Namibia’ (2008) 7/1 *African Journal of AIDS Research* 123; The similar issue has been pointed out before during the Children’s Bill Working Group workshop in 2006 where the need to support households in transition phase, households headed by youth between 18-21, is recognised. See Sec 4.4.

¹⁷⁸ Sec 137(2)(a)

¹⁷⁹ Sec 137(2)(b)

¹⁸⁰ Para 19 of the UN Guidelines for the Alternative Care of Children.

¹⁸¹ Para 37 of the UN Guidelines for the Alternative Care of Children.

¹⁸² SALRC, 2002 (n 90 above) 169.

independent functioning of a child-headed household must be promoted as far as possible'.¹⁸³ The aim of the supervision is to enhance 'the capacity of the children living in the child-headed household to function as a family'.¹⁸⁴ The maintenance of the independent functioning of the household aims to protect the children's right to family life.¹⁸⁵

While section 137(3)(a) gives a general description of the duties of a supervisor, section 50 of the Consolidated Regulations Pertaining to the Children's Act gives a more detailed list of duties, which include providing psychological, social and emotional support to the children,¹⁸⁶ ensuring the all members of the household who are by law required to attend educational institutes do so,¹⁸⁷ assisting with children with homework¹⁸⁸ and educating children about basic health and hygiene including sexually transmitted infections where appropriate.¹⁸⁹ The supporting role of the supervisor is oriented to 'enhancing the capacity of the children living in the child-headed household to function as a family.'¹⁹⁰ Therefore, the supervisor is required to perform the role that is much similar to a foster parent but with much more limited decision-making power. Section 137(6) specifically prohibits a supervisor from taking any decisions concerning a household without consulting a child-head of the household and other children in the household given the maturity and age of the children. Section 137(7) further stipulates that the child heading the household may take all day-to-day decisions concerning the household and the members of the household.

It is not clear to what extent the views and opinions of the children in child-headed households expressed during the consultation will be taken into account when the decision is made. Section 137(6) merely requires a supervisor to consult children in a

¹⁸³ Part I. National Norms and Standards for Child Protection, Annexure B, General regulations (n 111 above).

¹⁸⁴ Part I, Sec 11(a)(iii) (as above).

¹⁸⁵ As above, Part I, Sec 11(a)(ii) specifically lists the protection of the right to family life.

¹⁸⁶ Sec 50(a) of the General regulations (n 113 above)

¹⁸⁷ Sec 50(b) of the General regulations (as above).

¹⁸⁸ Sec 50(c) of the General regulations (as above).

¹⁸⁹ Sec 50(d) of the General regulations (as above).

¹⁹⁰ Sec 11(a)(iv), Part I National Norms and Standards for Child Protection.

child-headed household when making decisions concerning the household, but does not specify to what extent the decisions should reflect the opinions of the children, especially if their wishes are in conflict with that of the supervisor. Since the child heading the household may take only the ‘day-to-day’ decisions relating to the household and the children in the household, the supervisor may have the power to take decisions other than day-to-day decisions as long as children have been consulted. It may have been useful if the regulations concerning the duties of the supervising adult in relation to child-headed households or section 137 clearly specify that children’s views and opinions should be given due weight in all decision making process.

Under section 137(8), a child heading a household and, given the maturity, age and stage of development, any members of the household, could make a complaint regarding the performance of a supervisor. Nonetheless, it is not clear what actions the NGO or a state organ which designated the supervisor is required to take after the complaints are made. The regulations do not specify the procedure regarding an investigation and the disciplinary measures to be taken if the complaints were found to be valid. It can be assumed that if the complaints are valid, the supervisor would be directed to ensure that he or she adheres to the regulations. If the situation does not improve, it is only logical that the supervisor is removed and a new supervisor should be assigned to the household. However, it is not clear if the supervisor, against whom the complaints are made and found valid, would be allowed to work with other households.

Limiting the role of a supervisor also helps to minimise the potential abuse of power by a supervisor. It is particularly important as, under section 137(5)(a), a supervisor could collect and administer any grants available to the household. In order to prevent any financial fraud, section 137(5)(b) requires that a supervisor to be accountable to the organisation that designated him or her to supervise the household under section 137(2). Regulation 51 should be read together with section 137(5)(b). A supervisor or anyone who collects and administers money should develop a monthly expenditure plan, which must be signed by a child heading the household. The signed monthly expenditure plan with original documents, receipts, invoices and other relevant documents should be submitted to the NGO or the organ of state, which designated

the supervisor to the household. Under regulation 51(2), the NGO or the organ of state, which designated the supervisor, can initiate an investigation if there is any suspicion of misappropriation or maladministration of money. In cases of such financial fraud, appropriate steps should be taken, including the institution of criminal charges against the supervisor and the replacement of the supervisor.

4.4.2 Legally recognising child-headed households: Adopting a rights-based approach

In the following section, the analysis focuses on the adequacy of the protection provided to children in child-headed households in the South African legal framework. The provisions, which protect the rights of children in child-headed households, are analysed from a rights-based approach. In addition to analysing relevant legal and regulatory provisions, the section also contains information extracted from informal interviews with social workers in Hammanskraal, a director of the Tswaraganang Orphanage in Temba, Hammanskraal and children living in youth-headed households in Temba.¹⁹¹ The informal interview with relevant professionals and children provides valuable information on the reality on the ground. It also serves as an important tool to assess the effectiveness of legal provisions.

As well as section 137(2), which prescribes the supervision for child-headed households, Part III of the National Norms and Standards on Child Protection provides a detailed guideline on the support and protection of children in child-headed households. The provisions in Part III and other protective measures are compartmentalised into five main thematic areas: the best interests of the child; children's participation; non-discrimination; survival and development of the child; and monitoring and evaluation.

¹⁹¹ The term, 'youth headed-household' is used to describe those households visited because the head of the households are over 18 years. All the households visited stayed as a child-headed household for several years until the eldest sibling turned 18 years.

(i) *Best interests of the child*

In South African jurisprudence, ‘the best interest of the child’ has occupied an important position. Section 28(2) of the Constitution requires that the best interests of the child to be given the paramount importance in all matters affecting the child. Therefore, the courts are obliged to consider the effects their decisions will have on the rights and interests of the child.¹⁹² There is rich jurisprudence exploring the best interests of the child in South Africa.¹⁹³ Importantly, the need to consider individual circumstances of the children when determining the best interests of the child has been emphasised in several judgments.¹⁹⁴

The concept of ‘best interests of the child’ has also been frequently mentioned throughout the Children’s Act. For instance, as mentioned briefly in section 4.4.1, the principle of the best interests of the child is one of the criteria based on which a household would be assessed to qualify as a child-headed household in South Africa.¹⁹⁵ The best interests of the child is determining factor in adoption matters.¹⁹⁶ Moreover, section 9 of the Children’s Act clearly states that ‘all matters concerning the care, protection and well-being of a child, the standard that the child’s best interests is of paramount importance, and must be applied’. However, determining the best interests of the child is a complex issue. Section 7 of the Children’s Act provides a comprehensive list of points to be considered whenever the best interests of the child should be applied in the Children’s Act. Yet, the issue of whose interests may be prioritised remains. The criteria listed in section 7 have more relevance in assessing the needs and interests of younger children than the needs and interests of the older child whose long-term interests and needs could be affected by the responsibilities as a head of a household. For instance, many criteria, such as the capacity of the caregiver to provide for the needs of the child, including emotional and intellectual

¹⁹² *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development for Others*, CCT 36/08, 2009 (7) BCLR 367 (CC) para 74.

¹⁹³ For instance, *The Director of Public Prosecutions* (as above); *The Fitzpatrick* case (n 83 above); *AD and Another* (n 146 above); *M v S* 2007 (12) BLCR 1312 (CC).

¹⁹⁴ *The Fitzpatrick* (n 83 above) para 18; *The AD and Another* (n 148 above) para 12; A Friedman & A Pantazis, 2002 (n 47 above) 47-35.

¹⁹⁵ Sec 137(1)(d) of the Children’s Act.

¹⁹⁶ Sec 230(1)(a) and 261(5)(a) of the Children’s Act.

needs,¹⁹⁷ the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from their family members or care-giver,¹⁹⁸ the need for the child to remain in the care of his or her family and the need for the child to maintain a connection with his or her family, extended family, culture or tradition¹⁹⁹ might reflect the emotional needs of younger children than older children who interests might be more geared towards the opportunity to continue with education and to develop intellectually and professionally.

The principle of the best interests of the child is an elusive concept. As discussed in section 3.3.6, the interests can be categorised as immediate interests and future-oriented interests.²⁰⁰ It is difficult to argue which set of interests should be given a priority. There might even be a case where a balance needs to be found between immediate interests of younger children, such as emotional security, and future-oriented interests of elder children, such as educational opportunities. It should be noted that the best interests criteria can be used to determine the ambit of another right or the rights of others.²⁰¹ The best interests of one child may be validly limited by the competing interest of another child. As Fridman and Pantazis pointed out, the Constitution states that the best interests of the child are of 'paramount importance', not that they are 'paramount'.²⁰² The measures to support children in child-headed households should be designed to meet both sets of interests of children. The rights and interests of children heading households should not be unreasonably compromised due to their responsibilities as a primary caregiver to their younger siblings, and perhaps, to their ailing parents. The court should assess the best interests of the child on a case-by-case basis giving equal weight to the interests of all children in a household.²⁰³

¹⁹⁷ Sec 7(1)(c) of the Children's Act.

¹⁹⁸ Sec 7(1)(d) of the Children's Act.

¹⁹⁹ Sec 7(1)(f) of the Children's Act.

²⁰⁰ M Freeman, *A commentary on the United Nations Convention on the Rights of the Child, article 3: the best interests of the child*, Martinus Nijhoff (2007) 3.

²⁰¹ A Friedman & A Pantazis, 2002 (n 47 above) 47-34.

²⁰² A Friedman & A Pantazis, 2002 (n 47 above) 47-35.

²⁰³ Para 6 of the UN Guidelines for the Alternative Care of Children also stipulate that the best interests of the child to be considered an individual case by case basis.

(ii) Child participation

The principle of child participation is not only one of the fundamental principles of the CRC but one of the most important rights of children. As discussed in section 3.3.6, the right to participate in decision making processes that affect their lives enables children to actively assert their rights. The right to participate, to be heard and to have their opinions given due weight is one of the most important rights for children in child-headed households. As mentioned in section 4.4.1(ii), the intention of legally recognising child-headed households is to protect and assist such households to function independently as a family. The purpose of limiting the role of a supervisor and legally protecting the right of a child heading a household to make day to day decisions is based on the notion that the autonomy of child-headed households should be preserved. In order for a child-headed household to function independently, children's right to participate in the running of the household and make decisions affecting them is vital.

The National Norms and Standards on child-headed households endeavour to ensure and encourage all children in the child-headed household to participate in running of the household and benefit equally from the available resources. Section 11(g) of the National Norms and Standards on child protection specifically requires that all children living in the households should participate in matters affecting the functioning of the household. It also requires a social worker to consult child-headed households in any investigation under sections 150(2) and 150(3) of the Act.²⁰⁴ Section 11(b)(v) of the National Norms and Standards requires that the 'culture, spirit, dignity, individuality, language and development of each child' living in the household should be respected and promoted and section 11(b)(vi) ensures that available resources should be used equitably to promote wellbeing of all children in the household. These provisions may be more important when the child-headed household includes members who are not siblings or blood-related.

²⁰⁴ Sec 150(2) and (3) of the Children's Act concerned investigation to determine if a child is in need of care and protection.

Other important sections in the Children’s Act, which aim to enhance children’s decision-making power and autonomy, are sections 129, 130 and 134. Section 129 allows a child who is 12 years of age or older²⁰⁵ or under 12 years of age and is of sufficient maturity²⁰⁶ to give consent to medical treatment and surgical operation. Section 130 allows a child who is 12 of age or older or under 12 years of age²⁰⁷ and is of sufficient maturity to understand the implication of HIV testing²⁰⁸ to give consent to be tested. Section 134 allows children to obtain contraceptives under prescribed conditions, such as age and maturity of the child.²⁰⁹ Although these sections are applicable to all children whether they are in child-headed households or not, these are particularly important provisions for children in child-headed households. As discussed in chapter 2 and section 4.2, the emergence of child-headed households cannot be understood out of the context of HIV. In section 4.2, there is a high concentration of child-headed households in provinces which have the highest HIV prevalence in South Africa. Children in child-headed households are often directly affected by HIV or live in communities, which have high HIV prevalence. Legally enabling children to give consent to an HIV test, medical treatment or to provide access to contraceptives could potentially allow children in child-headed households to make life-altering decisions regarding their health and long-term future.

(iii) *Non-discrimination*

The general aspects of the right to non-discrimination have been explored in section 3.3.6. South Africa does not only have an obligation to realise the right of non-discrimination under international human rights instruments, but it also has a constitutional obligation to respect, promote and fulfil the right of non-discrimination of all children.

Section 9 of the Constitution protects the right to equality and non-discrimination. It is noteworthy that section 9(3) includes ‘age’ as one of the grounds on which a person

²⁰⁵ Sec 129(2)(a) and 129(2)(b) of the Children’s Act.

²⁰⁶ Sec 129(2)(b) & 129(3)(b) of the Children’s Act.

²⁰⁷ Sec 130(2)(a)(i) of the Children’s Act.

²⁰⁸ Sec 130(2)(a)(ii) of the Children’s Act.

²⁰⁹ Sec 134(1)(b), 134(2)(a), 134(2)(b) & 134(2)(c) of the Children’s Act.

should not be discriminated against. The principle of non-discrimination is emphasised throughout the Children's Act. Section 6(2)(d) of the Children's Act protects a child from unfair discrimination based on any ground. Apart from the general non-discrimination clause, section 137(9) prohibits excluding child-headed households from accessing any grants, social assistance and programmes on the ground that the household is headed by a child.

The right of non-discrimination is extremely important for all children, and in particular, for children in child-headed households. The importance of implementing the measures to protection children from discrimination is also stipulated in paragraph 10 of the UN Guidelines for the Alternative Care of Children. Paragraph 10 specifically requires states to make special efforts to tackle discrimination on the basis of any status of the child or parents, including HIV and AIDS or other serious illnesses. The right of non-discrimination is, as Abramson describes, an 'umbrella right', which protects the realisation of all the other rights.²¹⁰ As such, the right of non-discrimination works in conjunction with other rights.²¹¹ State obligation under the right of non-discrimination is two-fold. Taking children in child-headed households as an example, states are prohibited from making any discriminatory laws and policies, either directly or indirectly, preventing children in child-headed households from enjoying their rights. For instance, any laws or policies, which prohibit those children from accessing social services, including health and educational services, are contrary to the right to non-discrimination. Also, states are prohibited from making any laws or policies, albeit 'facially-neutral', that negatively affect children in child-headed households.²¹² Abramson used the literacy test imposed in certain part of the United States of America to deprive African-Americans from their right to vote and political participation.²¹³ With regards to children in child-headed households, a law or policy requiring an adult legal guardian to be presented before a child can be admitted to a school or receive health care would be 'facially-

²¹⁰ B Abramson, *A commentary on the United Nations Convention on the Rights of the Child, article 2: right on non-discrimination*, Martinus Nijhoff (2008) para 14.

²¹¹ B Abramson, 2008 (as above) para 67.

²¹² The expression, 'facially-neutral' has been taken from B Abramson, 2008 (as above) para 99.

²¹³ B Abramson, 2008 (n 207 above) para 100.

neutral' but discriminatory as such requirement could greatly hinder children in child-headed households to access education and health services. .

To implement fully the right to non-discrimination is complicated. Particularly, where a child-headed household is affected by HIV, for instance a member or members of a child-headed household are living with HIV, the complexity of fully implementing the right to non-discrimination increases. A study by Deacon and Stephney illustrated that children who are orphaned by AIDS-related illnesses experience stigma and discrimination based on one's actual or perceived HIV status.²¹⁴ The link between stigma and discrimination is hard to define. Stigma has been often linked to discrimination since the main problem of stigmatisation is that it could lead to unfair discrimination.²¹⁵ However, the link is subtle and hard to address because not all stigmatising beliefs lead to actual discrimination.²¹⁶ Although stigma may not necessarily lead to actual discrimination, the stigma attached to HIV and AIDS has negative effects on all who are affected, including children.²¹⁷ Stigmatised children may withdraw from social encounters exacerbating their social marginalisation.²¹⁸

Actual discrimination is easier to address than stigmatisation through laws or policies that prohibit discrimination. However, stigmatisation based on false beliefs or ignorance cannot be addressed adequately through laws or policies unless education or campaigns to address the root causes of the stigma are implemented concurrently. It is commendable that the right of non-discrimination is firmly established in the legal framework to protect children in child-headed households. However, it should be noted that to achieve the aim of non-discrimination and enable children to benefit from basic social services, the measures should also address subtle stigmatisation of child-headed households and HIV. Therefore, active public campaigns and education of relevant professionals, such as health care providers, teachers and grant officers to tackle stigma attached to child-headed households would be an another important

²¹⁴ H Deacon & I Stephney, *HIV/AIDS, stigma, children: a literature review*, Human Science Research Council (2007).

²¹⁵ H Deacon & I Stephney, 2007 (as above) 5.

²¹⁶ As above 5.

²¹⁷ As above 6.

²¹⁸ As above 6.

means to achieve the right to non-discrimination of children living in child-headed households.

(iv) *Right to survival and development*

As mentioned in chapter 3, the right to survival and development is a complex concept. Together with the right of non-discrimination, the right to survival and development can be seen as an umbrella right which encompasses various rights, including but not limited to the right to education or the right to an adequate standard of living. The purpose of the section is not to delve into the concept of the right to survival and development since the concept has been discussed in the previous chapter. In the following section, several rights that have implications for the realisation of the right to survival and development are discussed. The rights discussed include: the right to property; the right to education; and the right to basic nutrition, shelter, basic health care services and social services; and the right to be protected from exploitation and child labour; and the right to play and leisure.²¹⁹

Right to property

‘Property grabbing’ against children in child-headed households has been reported in various documents.²²⁰ In a study by Munthali and Ali, it is for example reported that the right to property is one of the most violated rights of children in Malawi.²²¹ In a report on orphans and vulnerable children in Botswana, it is also reported that the property grabbing against children is one of the major problems.²²² In the report, the need to put in place measures to protect the property rights of children and to

²¹⁹ The right to survival and development encompasses a wide range of rights. To mention all the rights in detail would be out of the scope of the study. The three rights above are selected because those rights are deemed essential and also the CRC Committee has repeatedly emphasised the importance of those rights in its General Comment No 3 on HIV/AIDS and the rights of the child. See the CRC General Comment No 3 HIV/AIDS and the Rights of the Child, CRC/GC/2003/3, paras 31 & 32.

²²⁰ See A Munthali & S Ali, *Adaptive strategies and coping mechanisms: the effect of HIV/AIDS on the informal social security system*, National Economic Council, Malawi (June, 2000) xviii; G N Tsheko *et al.*, *A census of orphans and vulnerable children in two villages in Botswana*, Human Science Research Council (2006) 16 & 17; L Richter *et al.*, *Family and community interventions for children affected by AIDS*, Human Science Research Council (2004).

²²¹ A Munthali & S Ali, 2000 (as above).

²²² G N Tsheko *et al.*, 2006 (n 217 above) 16 & 17.

encourage parents to make wills so that the property can be legally protected is mentioned.²²³

Although a report on orphans and vulnerable children in two communities in South Africa indicates that property grabbing is not very common, the analysis of the report suggests that, depending on the area, the level of protection of property rights of children differs.²²⁴ For instance, the report points out that in Kanana, a densely-populated township in a mining area in North-West province, 18 per cent of child-headed households lost their property, while in Kopanong municipality, a sparsely-populated farming area in southern Free State, only five per cent of child-headed households reported to have lost their property.²²⁵ However, obtaining accurate figures on the issue is difficult and there is a danger that the figures are underestimated due to the under-reporting.

Section 11(d) of the National Norms and Standards on child-headed households protects children's right to property by providing that children living in child-headed households should be able to assume full responsibility for any property belonging to the household. Furthermore, children in child-headed households should be assisted to maintain and preserve, or dispose of or preserve the property as they wish. However, it is not clear who has the duty to assist the children in their endeavour to preserve and maintain their property. It can be assumed that it is a duty of the supervising adult, but the duty to assist in such cases is not clearly listed in section 50 of the Consolidated regulations. The insertion of the protection of children's property rights in the National Norms and Standards is highly commendable. Nonetheless, it would have rendered stronger protection if the children's property rights were safeguarded under section 137 of the Children's Act.

²²³ As above 66.

²²⁴ S Jooste *et al.*, *A Census of orphans and vulnerable children in two South African communities*, Human Science Research Council (2006) 30 & 19.

²²⁵ As above 30 & 19. However, the validity of the information can be questionable as the information was not obtained from children in child-headed households. See S Jooste *et al.*, 2006 (as above) 30.

Right to education

As mentioned in section 4.2, children in South Africa have a constitutional right to education. The importance of the right to education is that the right to education is an enabling right. Education empowers the children to make their life choices based on their interests and wishes. The importance of education in the present and future of children cannot be exaggerated. For instance, the link between poverty and the lack of education is undeniable. In a study by Armstrong *et al*, it has been reported that, while 41.7 per cent of the whole population of South Africa were living in poverty, the rate of poverty was 66.3 per cent among people who had no schooling.²²⁶ Such data shows, children who are educated will have more opportunity to escape poverty and make an adequate living for themselves and for their future families. Unfortunately, as highlighted in the earlier part of the section, the difficulty of children in child-headed households to continue with their education is cited in various reports.²²⁷

Under section 11(c)(4) of the National Norms and Standards, children in child-headed households who are at a school-going age should attend school regularly and are entitled to any necessary assistance to enable them to access education. Furthermore, section 51 of the Consolidated regulations requires that the supervisor to ensure that any child who is legally required to attend school receive education. Under section 5(3)(a) of the South African Schools Act, the inability to pay for the school fees should not be a ground for non-admission. However, Davids and Skinner reported that, although children who have been orphaned are entitled to an exemption from paying school fees, many principles insist on orphaned children to pay for the fees.²²⁸ Furthermore, other school requirements, such as uniforms and the lack of stationery, cause children to leave school.²²⁹

²²⁶ P Armstrong *et al.*, 2008 (n 13 above) 19.

²²⁷ A Davids & D Skinner, (eds), *Situational analysis of the socio-economic conditions of OVC in four districts in South Africa*, Human Science Research Council (2005) 71; G N Tshoko *et al.*, 2006 (n 215 above). 27.

²²⁸ A Davids & D Skinner, 2005 (as above) 71.

²²⁹ Plessis and Conley reported that despite section 5 of the South African Schools Act, some children are abused to pay the school fees. In some cases, the school demands a special customized tracksuit, which children cannot afford. See P Plessis & L Conley, 'Children and poverty in South Africa: The right to social security' (2007) 2/4 *Educational Research and Review* 55.

Sections 3(5)(a) and 3(5)(b) of the South African Schools Act stipulate that if a learner, who is subject to compulsory attendance under section 3(1) of the Act, has failed to enrol in or attend school, a head of department *may* investigate the circumstances of the learner and take appropriate measures to remedy the situation.²³⁰ The South African Schools Act Amendment Bill²³¹ attempts to replace section 3(5)(1) of the South African Schools Act and stipulates that ‘if a learner who is subject to compulsory attendance in terms of subsection (1) is not enrolled or failed to attend a school, a head of department *must*’ investigate the situation and take appropriate measures to enable the learner to continue with the education.²³² The change of the wording of section 3(5)(1) is a positive development as it provides stronger protection to children who are in danger of dropping out of school.

Another interesting point from the study by Armstrong *et al.* is that the rate of poverty between people who completed matriculation and who had not differed greatly. While 23.2 per cent of people who had matriculation were living in poverty, the rate of poverty among people with no matriculation was 44.9 per cent.²³³ Especially, the poverty rate dropped to 4.6 per cent among people who had matriculation and an additional certificate or diploma.²³⁴ What this data shows is that although children are allowed to leave school after completing grade 9 or at age of 15, whichever comes first, children should be encouraged and supported to carry on further education if they wish and academically able to do so. It is particular important that children in child-headed households are supported and encouraged to stay in education despite they are legally able to leave schools.

It should be borne in mind that, often, the assistance required for the children in child-headed households to remain in education goes beyond the financial. Children, especially older children in the household, may be required to provide intensive care

²³⁰ The emphasis is mine.

²³¹ South African Schools Act Amendment Bill, a private members’ bill, submitted under section 73(2) of the Constitution, available at: http://www.da.org.za/docs/569/gettingbasicsright_PMB.pdf [accessed: 8 January 2010].

²³² Sec 3(5)(1) of South African Schools Act Amendment Bill.

²³³ As above 19.

²³⁴ As above 19.

to their ailing parents or relatives. The household may contain very young children who need to be under constant supervision. The measures of the assistance under section 3(5)(1) should go beyond the exemption of fees. The measures should be devised after a thorough assessment of the situation of the households to meet the particular needs of each household. Fortunately, chapter 5 of the Children's Act provides for partial care, which is defined as 'care of more than six children on behalf of their parents or care-givers during specific hours of the day or night, or for a temporary period, by agreement between the parents or care-givers and the provider of the service'.²³⁵ If properly implemented, partial care facilities, such as crèches, education centres and after-school centres, can lessen the burden of care on the child heading the household.

*Right to basic nutrition, shelter, basic health care services and social services*²³⁶

The right to basic nutrition, shelter, basic healthcare services and social services is protected under section 28(1)(c) of the South African Constitution. As discussed in section 4.2, in the *Grootboom* case, the Constitutional Court held that section 28(1)(c) does not create a separate right for children. Nevertheless, in case of children who are deprived of their parental and family care, or whose parents or other care-givers are unable to provide adequate care to the children, the State assumes a direct responsibility to realise section 28(1)(c) for the children or assist parents or adult caregivers to enable them to realise section 28(1)(c) for their children.²³⁷ In case of children in child-headed households, the state should assume a direct and immediate responsibility to provide for the children as they are deprived of their parental care.²³⁸

Section 137(5)(a) mandates a child heading a household or a designated supervisor of such household to collect and administer any grants that are available to the household

²³⁵ Sec 76 of the Children's Act.

²³⁶ All rights are inter-linked and inter-dependent. Yet, the right to basic nutrition, shelter, basic health care services and social services is particularly linked to the right to be protected from child-labour, which is discussed in the following section. Although the two rights are discussed separately, the inter-dependency of these rights has been emphasised throughout the section.

²³⁷ P Proudlock, 'Children's socio-economic rights: do they have a right to special protection?' (2002) 3/2 *ESR Review* 6-7.

²³⁸ L Stewart, 2008 (n 44 above) 478. Stewart argued that children without parents and children in extreme poverty may have a direct and immediate claim to socio-economic rights.

under the Social Assistance Act.²³⁹ Under the Social Assistance Act, there are three main grants: the child support grant, the foster child grant and the child dependency grant.

The child support grant, which is means tested, is currently available to a primary care-giver of a child who is born after 31 December 1993.²⁴⁰ The definition of primary caregiver is defined as ‘a person older than 16 years, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child’.²⁴¹ Therefore, the primary care-giver does not need to be parents of the child. The factual assessment of determination of a ‘primary caregiver’ is based on the premise that the ‘grant should follow the child’.²⁴² By the definition, a child heading a household and providing care to younger children in the household is entitled to apply for a grant for the children. Currently, the amount of a child support grant is R250 per month.²⁴³

The foster child grant is available to a foster parent who is providing care to a child aged between 0 to 18 years who is in need of care and protection.²⁴⁴ To access the foster child grant, the applicant needs to be appointed as a foster parent by a children’s court. The foster child grant is renewed on the expiry of the court order, which is currently every two years. The Social Assistance Act or the Children’s Act does not specify the age at which one can apply to be a foster parent. However, considering that the lower age limit for adoption is 18 years, it can be assumed that a person over 18 years of age would be eligible to apply to be a foster parent. The amount for a foster child grant is R720 per month.²⁴⁵

²³⁹ Social Assistance Act No 14 of 2004.

²⁴⁰ Information available at: <http://www.services.gov.za/ServicesForPeople/Socialbenefits/childsupportgrant.aspx?Language=en-ZA> [accessed: 22 June 2010].

²⁴¹ Chapter 1 of the Social Assistance Act.

²⁴² J D Triegaardt, ‘The child support grant in South Africa: a social policy for poverty alleviation?’ (2005) 14/4 *International Journal of Social Welfare* 251; However, the primary care-giver cannot apply for the grant for more than six children who are not his or her biological or legally adopted children.

²⁴³ SASSA (n 237 above).

²⁴⁴ Sec 8 of the Social Assistance Act.

²⁴⁵ SASSA (n 237 above).

The care dependency grant is available to a parent, primary caregiver, or a foster parent who is caring for a child aged between 0 to 18 years ‘who requires or receives permanent care or support services due to his or her physical and mental disability’.²⁴⁶ Although the grant is means tested, a foster parent is exempt from the test.²⁴⁷ The amount for a care dependency grant is R1 080 per month.²⁴⁸

Children heading a household will be eligible to apply for child support grants for their siblings provided that other requirements are met. If a child under the care of a child heading a household requires permanent care and support services due to the physical or mental disabilities as envisioned in section 7 of the Social Assistance Act, the child-head of the household should be eligible to apply for the care dependency grant. It should be noted that child support grants cannot be converted to foster child grants without a court order. Therefore, if a child-heading a household turns 18, he or she could apply to be a foster parent to younger siblings and once approved, can apply for foster child grant.

Section 137(9) ensures that a child-headed household will not be excluded from ‘any grant, subsidy, aid, relief or other assistance or programmes provided by an organ of state in the national, provincial or local sphere of government solely by reason of the fact that the household is headed by a child’. This is an important inclusion as a number of reports indicate that despite the Social Assistance Act, which enables a primary caregiver over 16 years old to apply for child support grants, in some cases, a child caregiver has difficulty assessing the grants.²⁴⁹

Rosa pointed out that despite the laws allowing children over 16 to access grants, children living in child-headed households face difficulties in securing financial support, in the form of the child support grant, from the government for two reasons: 1) the administrative identification requirements placed on the applicant to prove that he or she is a ‘primary caregiver’ to other children; and 2) the lack of political will to

²⁴⁶ Sec 7 of the Social Assistance Act.

²⁴⁷ SASSA (n 237 above).

²⁴⁸ As above.

²⁴⁹ 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) 4.

give grants directly to the children.²⁵⁰ For a primary caregiver who is not a parent of the child to apply for a child support grant, a letter or affidavit from either of the parents confirming that the applicant is a primary caregiver of the child or, if the parents are dead or missing, a death certificate of the parents or proof that the father or mother is missing, such as a missing person's report from the police and sworn statements from the applicant and another family member are required.²⁵¹ The applicants who do not have such documents could still apply for the grant if they can submit following documents: 1) an affidavit commissioned by a justice of the peace; 2) a sworn statement by a reputable person who knows the applicant and the child; 3) proof that application for a birth certificate or ID document has been lodged with the Department of Home Affairs; 4) where appropriate, a temporary ID issued by the Department of Home Affairs; 5) a baptismal certificate; 6) a Road to Health Clinic card; and 7) a school report.²⁵² However, various reports noted the difficulty of obtaining appropriate documents from government departments and 'uncooperative relatives'.²⁵³

Another difficulty of accessing child support grant is the difficulty of obtaining basic documents such as birth certificate of the children. It may be particularly difficult for children living in remote areas where due to the distance and lack of public transportation accessing relevant government offices is difficult. However, in 2008, the Alliance for Children's Entitlement successfully challenged the documentation requirement in the High Court and it was held that alternative forms of identification should be accepted where birth certificate or identity documents are lacking.²⁵⁴

²⁵⁰ S Rosa, 2004 (as above) 4.

²⁵¹ Information available at: <http://www.paralegaladvice.org.za/docs/chap09/03.html> [accessed: 16 August 2009].

²⁵² The information available at: <http://www.services.gov.za/ServicesForPeople/Socialbenefits/socialservices/childsupportgrant.aspx?Language=en-ZA> [accessed: 29 July 2009].

²⁵³ A Delany *et al.*, *Review of the Child Support Grant: Uses, Implementation and Obstacles*, Community Agency for Social Enquiry (June 2008) 56; D Skinner & A Davids (eds), *Multiple vulnerabilities: qualitative data for the study of orphans and vulnerable children in South Africa*, Human Science Research Council (2006) 29 & 71; also see A Davids & D Skinner, 2005 (n 224 above).

²⁵⁴ See G Mirugi-Mukundi, *Realising the social security rights for children of South Africa, with particular reference to the child support grant*, Community Law Centre (2009).

Also see
<http://access.org.za/home/images/stories/3%20projects%20and%20campaigns/4%20challenging>

Through the personal informal interviews with children in youth-headed households, it has transpired that the children in the interviewed households faced difficulties accessing grants.²⁵⁵ All the households interviewed had not been able to access grants, although all the necessary documents had been submitted.

In Household A, three youths aged, 14, 18 and 20 were looking after each other after their parents' death in 2006. The eldest has been trying to access a foster child grant since 2006, but has not been successful. The reason for applying for a foster child grant rather than a child support grant, which is much faster to access, was the higher amount of the foster child grant compared to the child support grant.

In household B, three siblings have been living in child-headed households after their parents passed away in 2002. The eldest youth was 14 years old. He has been looking after his two younger sisters (then 11 and 12 years old respectively). However, he has not been successful in accessing grants for his siblings.

In Household C, a 22 year-old youth was looking after his two younger sisters, 5 and 12 years respectively. He has been looking after his sisters since 2004. He was not receiving any grants for his sisters.

In Household D, a 24-year old youth was looking after 11 children. She has been looking after the children since her grandmother passed away in 2006. Her late grandmother had been receiving foster child grants for the children, but it was not clear if she had been receiving the grants for all the children. After the death of her grandmother, the grants ceased. She has been trying to access foster child grants for the children since 2006, but she has not been informed of the progress of her application. However, she was receiving child support grants for her two young children.

[%20barriers%20to%20service%20delivery/1%20Enabling%20documents%20campaign/6%20litigation%20-%20court%20papers/Paper-Chase-Court-Order.pdf](#) [accessed: 22 June 2010].

²⁵⁵ Informal interviews were held with children in five youth-headed households. The interviews were conducted in Sesotho through Ms Catherine Sepato, a director of Tswaraganang orphanage (OVC Programme) in Temba, Hammanskraal. (25 June 2009) For more details on the interview and households visited, see Sec 1.6 Methodology.

From the discussions, it has transpired that accessing a foster child grant was a big challenge. Many considered the lack of social workers as one of the reasons for the delay. Social workers in Moretele Sunrise Hospice reported the heavy workload as one of the biggest challenges. The two of the social workers interviewed were in charge of 405 families.²⁵⁶

In addition to the difficulty of accessing grants, the small amount of the child-support grant is also problematic. According to a report published by National Statistics South Africa in 2007, in 2006 prices, an individual would need R431 per month to purchase essential food and non-food items.²⁵⁷ Considering 6.9 per cent inflation on consumer prices, in 2009 prices, R526 would be required to purchase essential food and non-food items.²⁵⁸ The current amount for the child support grant covers only about 50 per cent of the cost of purchasing essential food and non-food items.

It can be argued that the child support grant was not intended to *eliminate* poverty, but to *alleviate* poverty.²⁵⁹ However, for children in child-headed households, a child support grant may be the only source of income. One can also argue that, considering the rate of unemployment in South Africa, for many households, whether it is headed by a child or not, a child support grant or old age pension is the main source of income. Nevertheless, the difference between the household headed by an unemployed adult and a child-headed household is the very fact that a child-headed household is headed by a child whose rights as a child should be respected as much as possible. Adults heading households are expected to work full-time when jobs become available. However, as discussed above, for a long-term benefit of children, children should be encouraged and supported to remain in education regardless of the law allowing them to leave school at age 15. Adequate grants and an increased access

²⁵⁶ However, the social workers interviewed stated that if all the necessary documents were submitted, the procedure to receive a foster child grant should take three months.

²⁵⁷ *A National Poverty Line for South Africa*, Statistics South Africa, National Treasury (21 February 2007) 8.

²⁵⁸ The rate of inflation on consumer prices is available at: [http://www.indexmundi.com/south_africa/inflation_rate_\(consumer_prices\).html](http://www.indexmundi.com/south_africa/inflation_rate_(consumer_prices).html) [accessed: 18 August 2009].

²⁵⁹ H Meintjes *et al.*, 2003 (n 128 above) 4.

to free education may be the two most important measures, which could protect children from exploitation and child labour.

Right to be protected from exploitation and child labour

As mentioned in the earlier section, children over 15 years of age can be legally employed. However, children between the age of 15 and 18 have the right to be protected from having to perform work or services that are detrimental to their wellbeing and development.²⁶⁰ It should be clearly noted that not all work performed by children between age 15 and 18 is defined as child labour. Child labour is a labour practices that is exploitative and harmful to developmental and safety needs of children. Articles 32 of the CRC and 15 of the ACRWC do not define ‘child labour’. Nevertheless, both articles prohibit ‘economic exploitation’ of children and ‘any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.’²⁶¹ They further require states to develop a legal framework to determine minimum wage for admission to every employment, and provide for appropriate regulation for hours and conditions of work.²⁶²

In South Africa, there are well-developed legal and policy frameworks protecting children from engaging in child labour. Section 28(1)(e) of the South African Constitution protects children from exploitive labour practices and section 28(1)(f)(i) prohibits children from being employed to perform work or services that are inappropriate for the age²⁶³ and at places at risk the child's wellbeing, education, physical or mental health, or spiritual, moral or social development.²⁶⁴

Although section 28(1)(f) of the Constitution does not specify which type of work may constitute inappropriate for children, article 3 of the International Labour

²⁶⁰ Art 32 of the CRC; Art 15 of the ACRWC; Sec 43(2) of the Basic Conditions of Employment Act.

²⁶¹ Art 32(1) of the CRC & Art 15(1) of the ACRWC.

²⁶² Art 32(2)(a) & 32(2)(b) of the CRC; Art 15(2)(a) & 15(2)(b).

²⁶³ Sec 28(1)(f)(i).

²⁶⁴ Sec 28(1)(f)(ii).

Organisation Convention on the Worst Form of Child Labour 1999, which South Africa is also a party,²⁶⁵ provides detailed examples of the line of work for which children should not be employed. Under article 3, the worst form of child labour includes; 1) slavery or practices similar to slavery; 2) any work or activity related to sexual exploitation of children, such as child prostitution or pornography; 3) any illegal activities such as drug trafficking; and 4) work that is likely to harm the health, safety or morals of children.²⁶⁶ Section 141 of the Children's Act further protects children against the similarly worded type of exploitative and harmful labour practices. Section 11(e)(i) of the National Norms and Standards states that children in child-headed households should not be exposed to harmful or hazardous labour practices. However, despite the legal and policy frameworks to protect children from harmful and hazardous child labour, a study of the International Labour Organisation on child labour in South Africa pointed out that South Africa had one of the highest numbers of children engaged in child labour in Africa.²⁶⁷

Furthermore, the study, which was conducted in KwaZulu-Natal, showed the undeniable link between poverty and child labour.²⁶⁸ The main reason for children engaged in various work and services was the need to supplement the family income due to unemployment or illness of their parents.²⁶⁹ In some cases, children were heading the households and reported having to cater for their younger siblings without external support.²⁷⁰ Undoubtedly, prostitution, domestic labour and farm labour are some of the examples of the worst form of child labour.²⁷¹ Alarming, nearly 50 per cent of the girl children interviewed were engaged in either prostitution or working as

²⁶⁵ South Africa ratified the 1999 ILO Convention in 2000 and it came into force in June 2001.

²⁶⁶ Art 3 of the Convention concerning Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour, C182 ILO (1999). South Africa has ratified the Convention on 7 June 2000.

²⁶⁷ A Mturi & N Nzimande, *HIV/AIDS and Child Labour in South Africa: a rapid assessment the case of KwaZulu-Natal*, Study No 4, ILO (2003) 4.

²⁶⁸ A Mturi & N Nzimande, 2003 (as above) 15; A Friedman & A Pantazis, 2002 (n 47 above) 47-21.

²⁶⁹ As above 15.

²⁷⁰ As above 16.

²⁷¹ As above 39.

domestic labourers.²⁷² For boys, the majority of them were engaged in miscellaneous works, street vendors, car attendants and trolley attendants.²⁷³

Children, regardless of their age, should be protected from such hazardous forms of child labour. Commendably, South Africa has developed the Regulations on hazardous work done by children under the basic Conditions of Employment Act.²⁷⁴ The Regulations prohibit children under 15 or who is receiving compulsory schooling from working while setting out protective measures for children over 15 or who are not receiving compulsory schooling. The Regulation also provides the list of economic activities that constitute worst form of child labour.

The ILO Worst Form of Child Labour Recommendation recommends that programmes to eliminate child labour under the Convention on the Worst Form of Child Labour should aim, among other things, to give special attention to children with special vulnerabilities and needs.²⁷⁵ Children in child-headed households are ‘children with special vulnerabilities’ and needs. The Government of South Africa should urgently strengthen labour laws to protect working children. Furthermore, special attention should be given to economic needs of children in child-headed households to prevent them from being forced into hazardous forms of child labour.

Considering the strong link between poverty and child labour, the adequacy of grants and other supports to children in child-headed households should be urgently addressed.²⁷⁶ As Sloth-Nielsen pointed out, ‘given the especially vulnerable position of children in child-headed households, the state has a primary responsibility to provide immediate and direct assistance to such children to ensure their continued survival and development’.²⁷⁷ The important point is that such assistance should be

²⁷² As above 24.

²⁷³ As above 24.

²⁷⁴ Regulations on the health and safety of children at work and on hazardous work by children, Department of Labour, South Africa (July 2010).

²⁷⁵ Sec 2(c)iv of the Worst Form of Child Labour Recommendations, R190 International Labour Organisation, 1999.

²⁷⁶ A Friedman & A Pantazis, 2002 (n 47 above) 47-22.

²⁷⁷ J Sloth-Nielsen, ‘Too little, too late: provisioning for children in child-headed households’ (2002) 3/1 *ESR Review* 31.

adequate to ensure not only ‘survival’, but also ‘development’ of the children. Considering the level of vulnerability children in child-headed households face, it seems reasonable to argue that the government has a responsibility to prioritise the most vulnerable group in society to ensure that the right to basic nutrition, shelter, basic health care and social services is realised.²⁷⁸

Right to leisure, play and culture

Children’s right to leisure, play and culture is protected under article 31 of the CRC and article 12 of the ACRWC. Play and leisure are fundamental aspects of childhood. However, the importance of the right is often underestimated.²⁷⁹ The importance of the right to leisure and play, particularly for children in child-headed households, becomes clear when it is considered in relation to other relevant rights, such as article 32, which in limited conditions, allows children under 18 to work.²⁸⁰ Reading two articles together, the right to leisure and play protects children in child-headed households, particularly the child heading household, from long hours of work, either paid or unpaid.

As Sloth-Nielsen pointed out, one of the dangers of legally recognising child-headed households is that it could legally sanction the loss of childhood, especially for children heading households.²⁸¹ Section 11(b)(iv) of the National Norms and Standards clearly states that ‘children living in child-headed households must be able to benefit from the right to rest, leisure and play.’ For children to be able to benefit from the right to rest, leisure and play, adequate social support, which guarantees an adequate standard of living is necessary. It would be unreasonable to expect children to rest and play when their dire financial circumstances force them to work overtime, or a heavy load of household or child-care responsibilities does not leave children any

²⁷⁸ See S Liebenberg, ‘Taking stock: the jurisprudence of children’s socio-economic rights and its implications for government policy’ (2004) 5/4 *ESR Review* 6.

²⁷⁹ R Hodgkin & P Newell, *Implementation handbook of the Convention on the Rights of the Child*, UNICEF (2002) 465; P David, *A commentary on the United Nations Convention on the Rights of the Child, article 31: the right to leisure, play and culture*, Martinus Nijhoff (2006) para 46.

²⁸⁰ M S Pais, ‘Convention on the Rights of the Child’, *Manual on human rights reporting under six major international human rights instruments*, OHCHR (Geneva), UNITAR & UNSCP (1999) 469.

²⁸¹ J Sloth-Nielsen, 2005 (n 170 above) 77-78.

free time. The right to leisure and play is a fundamental part of the right to survival and development of children. The harmonious development of children cannot be possible without the right to leisure and play. However, the realisation of the right to leisure and play is dependent on the implementation of adequate measures to realise the right to survival and development, such as economic and social support and protection of children.

(v) Monitoring and evaluation

It has been noted in the previous chapter that under sections 150(2) and 150(3), children in child-headed households or children who are victims of child labour may be found to be in need of care and protection. Section 150(2) stipulates that a child in a child-headed household may be a child in need and protection and should be referred to a social worker for an investigation. If a child is found to be a child in need of care and protection, a ‘court-mandated intervention’ will be required.²⁸² If the child is found *not* to be in need of care and protection, the social worker should provide appropriate measures to assist the child where necessary. Such measures may include ‘counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behavioural modification, problem solving and referral to another suitably qualified person or organisation.’²⁸³ In the case of child-headed households, a supervisor will be assigned as contemplated in section 137(2) of the Act.

The question may arise as to the criteria to determine whether a child in a certain child-headed household is a child in need of care and protection. In her commentary on section 157, Sloth-Nielsen commented that section 11(b) of the National Norms and Standards for child-headed households are the indicators according to which an assessment can be made.²⁸⁴ The contents of section 11(b) of the National Norms and Standards are the following:²⁸⁵

²⁸² The orders a children’s court can make are listed in Secs 46 and 156 of the Children’s Act.

²⁸³ Sec 150(3) of the Children’s Act.

²⁸⁴ J Sloth-Nielsen, 2007 (n 164 above) 7-48; Sec 11(b) of the National Norms and Standards (n 182 above).

²⁸⁵ Sec 11(b) of the National Norms and Standards (n 182 above).

(b) A safe and nurturing environment for children

1. Children must experience safety, security and feel cared for while living in a child-headed household, and have their basic needs met.
2. Adequate nutrition, water and means for preparing food must be available to meet the basic needs of the children in a child-headed household.
3. Adequate care of the health of children living in child-headed households must be undertaken.
4. Children living in child-headed households must be able to benefit from the right to rest, leisure and play.
5. A child-headed household must respect and nurture the culture, spirit, dignity, individuality, language and development of each child living in that household and children must be encouraged to develop positive social values.
6. The resources available to the household must be used equitably to promote the well-being of all children living in the child-headed household.
7. Children living in child-headed households must have access to psychosocial support.

A close examination of the contents of section 11(b) suggests that, in reality, it seems highly unlikely that child-headed households will meet the standards of the indicators without intervention from the government or NGOs. Therefore, the investigation by a social worker should consider, first of all, whether a child-headed household is meeting the indicators and, if not, whether the child-headed household *can* meet the indicators through support measures other than non-court-mandated interventions, for example, through the supervisory orders under section 150(3) of the Children's Act. In most cases, the answer to the first question will be negative. However, if the answer to the second question is positive, such children in child-headed households should be supported as prescribed in section 150(3). In cases where the answer to the second question is also negative, the child may be in need of care and protection and should be referred to a children's court where a court-mandated intervention under section 156 of the Children's Act should be devised.

After the initial assessment and if it is determined that children should remain in child-headed households, the situation of child-headed households should be monitored regularly. Under 11(h)(ii) of the National Norms and Standards on child-headed households, children living in child-head households are 'entitled to be visited

on a regular basis, and not less than once every two weeks, for the purposes of monitoring and supervision'. To ensure that the supervision and assistance is available when it is needed, section 50(o) of the General regulations stipulates that the designated supervisor should be available to provide required services to a child even after working hours.²⁸⁶

Effective monitoring and evaluation mechanisms have tremendous importance to children in any care placement, including child-headed households. Implementing effective mechanisms to monitor and evaluate well-being of children in care placements is one of the most effective ways to ensure children in care placements are receiving adequate care. States are accountable for the well-being of children in care placement and children have the right to periodic monitoring and evaluation under article 25 of the CRC. As discussed in chapter three, a holistic rights-based approach to providing care to children who are deprived of their family environment goes beyond simply providing a physical place to stay. The application of a rights-based approach ensures that children are receiving adequate care, as defined in chapter one, in their care placements.

(vi) *Accountability and rule of law*

The principle of accountability is what distinguishes a rights-based approach from other approaches. As discussed in chapter three, a rights-based approach is based on the premise that states have the obligation to respect, promote, protect and fulfil the rights enshrined in the domestic legal framework as well as in relevant international legal frameworks. As illustrated through the discussions with children in child and youth-headed households, the existence of legal provisions does not necessarily mean an effective implementation of such provisions. The principle of accountability means that, through a rights-based approach, a government can be held accountable for the failure to effectively deliver the social welfare provisions, which are protected under the law.

²⁸⁶ In her commentary to sec 137, Professor Sloth-Nielsen indicated that the visit should be conducted at least once in every two weeks. J Sloth-Nielsen, 2007 (n 164 above) 7-49.

South Africa has a rich jurisprudence on the effective realisation of socio-economic rights, including the *Gootboom* case and the *TAC* case, which are discussed in the earlier section of the chapter. Other important cases are *Kate v The MEC for the Department of Welfare Eastern Cape*²⁸⁷ and *Vumazonke and others v The MEC for Social Development and Welfare for Eastern Cape Province*.²⁸⁸ These cases are two of the many similar cases concerning the maladministration and inefficiency in administration of social assistance. Justice Plasket, in the *Vumazonke* case, lamented about the vast number of cases dealing with similar problems and the lack of efforts to improve the service delivery and warned that the administration should ‘operate within the limits of Constitution and the law’.²⁸⁹ Justice Plasket’s comment expressed the very essence of a rights-based approach. Application of a rights-based approach means when the administration does not effectively deliver its legal obligation to uphold constitutional rights, it can be held accountable for its maladministration and inefficiency.

Nevertheless, it should be reminded that, as Bonthuys point out, ‘the most disadvantaged people’ who are unaware of their rights and entitlement, or who are discouraged from accessing social services because of the transportation fees or illiteracy may not be helped through the courts.²⁹⁰ The majority of children who are in the most vulnerable situation would not be able to access courts without external assistance, such as NGOs.²⁹¹ To borrow Justice Cameron’s expression, children are one of the groups that are ‘most lacking in protective and assertive armour’.²⁹² In order to truly hold the administration accountable for the most vulnerable people whose needs are most desperate, active monitoring and evaluation of the effective implementation of social services is vital.

²⁸⁷ *Nontembiso Norah Kate v The MEC for the Department of Welfare, Eastern Cape*, ECJ 2004/028 [2005] 1 All SA 745 (SE).

²⁸⁸ *Vumazonke and others v The MEC for Social Development and Welfare for Eastern Cape*, ECJ 050/2004, [2004] ZAEHC 40 (25 November 2004).

²⁸⁹ As above, para 11.

²⁹⁰ E Bonthuys, ‘Realising South African children’s basic socio-economic claims against parents and the State: what courts can achieve’ (2008) *International Journal of Law, Policy and the Family* 353.

²⁹¹ E Bonthuys, 2008 (as above).

²⁹² *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and others v Ngxuzza and others*, 493/2000, [2001] ZASCA 85, para 12.

4.5 Conclusion: Development and challenges

The question of whether to legally recognise child-headed households has generated much debate in South Africa as well as other Southern African countries heavily affected by the HIV epidemic. There were views that children should not be given parental responsibilities over younger siblings.²⁹³ Also, there were views that child-headed households would become a familiar phenomenon and a legal recognition would provide them with better protection.²⁹⁴ At the same time, it should be acknowledged that the existence of child-headed households is a reality in many African states, including South Africa. By legally recognising child-headed households, the government may be able to develop a legal and policy framework to protect the children in child-headed households. Also, giving them legal recognition and entitlements, which can be legally enforced against states, could empower children in child-headed households. However, as Sloth-Nielsen pointed out, there is a great danger that by recognising child-headed households and assuming that they can function independently in society could lead to masking ‘further neglect and degradation’.²⁹⁵

South Africa has taken a bold step towards acknowledging the existence of child-headed households, and their needs for appropriate care, and special protection and assistance. Also, South Africa has developed a comprehensive legal and policy framework providing for the rights of children in child-headed households. Although such a step is admirable, the implementation of those protection measures remains problematic due to the structural problems, such as shortage of trained human resources and limited access to public services in rural areas. Furthermore, the measures of protection and assistance should fully recognise the particular vulnerability of children in child-headed households. Special assistance should be provided to children heading households in order for them to realise their rights as children as well as the head of a household. The measures of special protection and assistance should be assessed not only by the existence of such measures, but also by the adequacy and effectiveness of the measures. For instance, as pointed out in the

²⁹³ SALRC, 2002 (n 90 above) 170.

²⁹⁴ As above 169 & 170.

²⁹⁵ J Sloth-Nielsen, 2005 (n 170 above) 78.

previous section, despite the law and policy that children in child-headed households should be able to access the applicable social grant which is, in most cases, a child support grant, the limited amount of the available grant does not fully provide for an adequate standard of living for these children. The limited amount of available grants, in many cases, force children to be engaged in harmful and hazardous labour practices, which would be detrimental to their educational development, effectively depriving them of the right to education and the right to leisure and rest.

Also, in order for the measures of special protection and assistance to be effective, the context in which child-headed households appear and exist cannot be ignored. It is true that AIDS-related illnesses are not the only cause of orphanhood. Nevertheless, General Household Survey 2007 showed that a number of children who have lost both of their parents increased from 400 000 in 2002 to 700 000 in 2007.²⁹⁶ Furthermore, nearly 50 per cent of children who are orphaned were living in KwaZulu-Natal and the Eastern Cape.²⁹⁷ It has been pointed out, in section 4.2, that the majority of child-only households were concentrated in Limpopo, the Eastern Cape and KwaZulu-Natal. Considering that these three provinces also have the highest HIV prevalence in South Africa, it can be assumed that the major cause of children losing both of their parents and remaining in child-headed households is related to the HIV epidemic.²⁹⁸ Both legal and policy measures to protect and assist children in child-headed households should be devised reflecting the context in which children in child-headed households find themselves: the context of HIV epidemic. In such context, children in child-headed households may be stigmatised due to their actual and perceived HIV status and their parents' HIV status.²⁹⁹ Such stigmatisation may lead to isolation of the children and render them more vulnerable to abuses and maltreatment by others. Therefore, active campaigns to educate and sensitise communities on the rights of children, especially the rights of children in child-headed households is one of the essential measures to ensure that their rights are respected and protected in reality.

²⁹⁶ More information can be found at: <http://www.childrencount.ci.org.za/content.asp?PageID=71> [accessed: 19 August 2009].

²⁹⁷ As above.

²⁹⁸ As above.

²⁹⁹ See generally, B Rau, *Combating child labour and HIV/AIDS in sub-Saharan Africa: A review of good policies, programmes and projects in South Africa, United Republic of Tanzania and Zambia to identify good practices*, ILO (2002) 23-24; S Tsegaye, 2008 (n 25 above).

CHAPTER FIVE

Conclusion and Recommendations

5. Conclusion and Recommendations

5.1 Introduction

5.2 Children's rights and well-being: Whose responsibility?

5.2.1 Family as a primary duty-bearer

5.2.2 When children are deprived of their family environment

5.3 Protecting the rights of children in child-headed households

5.4 Recommendations

5.1 Introduction

The concept of ‘childhood’ may be described most commonly with expressions, such as ‘innocent’, ‘happy’, ‘protected’, ‘care’, ‘schools’, ‘play’ and ‘parents’. Unfortunately, there are children whose childhood does not reflect the general images of childhood. Children living in child-headed households may be an example. In theory, the mere fact of being deprived of a family environment should not necessarily lead to a compromised childhood or deprivation of adequate care. Children’s rights instruments, such as the CRC and the ACRWC, aim to protect the idyllic image of childhood and to ensure that all children irrespective of their social and economic background have a fair chance in life.

Nonetheless, in reality, many children who are deprived of their family environment are also deprived of adequate care and experience a compromised childhood. As the CRC Committee pointed out on several occasions, in many African states, facilities to provide alternative care are limited in number and inadequate in their standards.¹ Furthermore, in many cases, the mechanisms to monitor and evaluate such facilities are not in place, making children vulnerable to maltreatment and violations of their rights in alternative care placements.²

¹ Concluding observations of the CRC: DRC (CRC/C/15/Add.153: 9 July 2001) para 36; Concluding observations of the CRC: Equatorial Guinea (CRC/C/15/Add.245: 3 Nov 2004) para 36; Concluding observations of the CRC: Gabon (CRC/C/15/Add.171: 3 April 2007) para 33; Concluding observations of the CRC: Lesotho (CRC/15/add.147: 21 Feb 2001) para 35; Concluding observation of the CRC: South Africa (CRC/15/Add.122: 22 Feb 2000) para 22; Concluding observation of the CRC: Rwanda (CRC/15/Add. 234) para 38 & 40; Concluding observations of CRC: Malawi (CRC/C/15/Add.174: 2 April 2002) para 35; Concluding observation of CRC: Botswana (CRC/C/15/Add.242: 3 Nov 2004) para 38; Concluding observations of CRC: Burundi (CRC/C/15/Add.133: 16 Oct 2000) para 46; Concluding observation of CRC: Central African Republic (CRC/C/15/Add.138: 18 Oct 2000) para 46; Concluding observation of CRC: Cape Verde (CRC/C/15/Add.168: 7 Nov 2001) para 37; Concluding observation of CRC: Mozambique (CRC/C/15/Add.172: 3 April 2002) para 40(a); Concluding observation of CRC: Niger (CRC/C/15/Add.179: 13 June 2002) para 36; Concluding observation of CRC: Sudan (CRC/C/15/Add.190: 9 Oct 2002) para 41; Concluding observation of CRC: Madagascar (CRC/C/15/Add.218: 27 Oct 2003) para 40.

² Equatorial Guinea (as above) para 38, although the Committee welcomes the existence of institutions to accommodate increasing number of children who are orphaned but it emphasises that institutionalised care should be a temporary measure of last resort; Concluding observation of the CRC: Eritrea (CRC/C/15/Add.204: 2 July 2003) para 35; Lesotho (as above) para 37; Gabon (as above) para 37; Concluding observations of the CRC: The Gambia (CRC/C/15/Add.165: The Gambia) para 36; Concluding observation of the CRC: Guinea Bissau (CRC/C/15/Add.177: 13 June 2002) para 32(a) & 32(b); Concluding observation of the CRC: Senegal (CRC/C/SEN/CO/2: 20 Oct 2006) para 32; Concluding observation of the CRC: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006) para 40; South Africa (as above) para 25; Concluding observation on Rwanda (as above) para 40; Concluding observation of CRC:

The situation of children living in child-headed households is particularly precarious due to the fact that the absence of an adult caregiver adds to their general vulnerability as children deprived of their parental care.³ In order to address the particular vulnerabilities of children living in child-headed households, the CRC Committee recommended that states give special attention to children who are made vulnerable to HIV, including children in child-headed households and highlighted the importance of providing legal, policy and social protection to those children.⁴ UNICEF has further recommended child-headed households be legally recognised and urged states to develop a legal and policy framework to protect and assist such households.⁵

In South Africa, the need to consider reforming the alternative care system in the context of the HIV epidemic has been highlighted in the Consultative Paper on Children living with HIV/AIDS prepared for the South African Law Reform

Nigeria (CRC/C/15/Add.257: 13 April 2005) para 42; Concluding observation of CRC: Mali (CRC/C/MLI/CO/2: 3 May 2007) para 41; Malawi (as above) para 39; Concluding observation of CRC: Angola (CRC/C/15/Add.246: 3 Nov 2004) para 34; Concluding observation of CRC: Benin (CRC/C/BEN/CO/2: 20 Oct 2006) para 42; Central African Republic (as above) para 48; Concluding observation of CRC: Cameroon (CRC/C/15/Add.164: 6 Nov 2001) para 38; Concluding observation of CRC: Liberia (CRC/C/15/Add.236: 1 July 2004) para 40(a) & (b); Mozambique (as above) para 44(a) & (b); Niger (as above) para 40; Sudan (as above) para 41; Concluding observation of CRC: Uganda (CRC/C/UGA/CO/2: 23 Nov 2005) para 41; Concluding observations of CRC: Djibouti (CRC/C/15/Add.131: 28 June 2000) para 35.

³ The CRC Committee expressed its concern over the increasing number of child-headed households on numerous occasions: CRC Concluding Observation: South Africa (CRC/15/Add.122: 22 Feb 2000); Concluding observations of CRC: Burundi (CRC/C/15/Add.133: 16 Oct 2000); Concluding observations of the CRC: DRC (CRC/C/15/Add.153: 9 July 2001); Concluding observation of the CRC: Lesotho (CRC/15/Add.147: 21 Feb 2001); Concluding observation of the CRC: Lesotho (CRC/15/Add.147: 21 Feb 2001); Concluding observation of CRC: Zambia (CRC/C/15/Add.206: 2 July 2003); Concluding observation of CRC: Uganda (CRC/C/UGA/CO/2: 23 Nov 2005); Concluding observation of CRC: Ethiopia (CRC/C/ETH/CO/3); CRC CO: Swaziland (CRC/C/SWZ/CO/1: 16 Oct 2006); Concluding observation of CRC: Kenya (CRC/C/KEN/CO/2: 2007); Concluding observation of CRC: Eritrea (CRC/C/ERI/CO/3: 2008); Concluding observation of CRC: Malawi (CRC/C/MWI/CO/2: 2009); Concluding observation of CRC: Mauritania (CRC/C/MRT/CO/2: 2009); and Concluding observation of CRC: Mozambique (CRC/C/MOZ/CO/2: 2009). The CRC Committee urged the states to reduce and prevent the occurrence of child-headed households (South Africa) and recommended all necessary measures to assist such households (Lesotho, Zambia, Kenya, Uganda, Ethiopia, Swaziland, Mauritania and Eritrea).

⁴ CRC Committee, General Comment No 3 HIV/AIDS and the rights of the child (2003), para 31.

⁵ *Enhanced protection for children affected by AIDS: A companion paper to the protection, care and support of orphans and vulnerable children living in a world with HIV and AIDS*, UNICEF & UNAIDS (2007) 28; Committee on the Rights of the Child, General Comment No 3: HIV/AIDS and the rights of the child, CRC/GC/2003/3 (17 March 2003) paras 31-35.

Commission (SALRC) by Barret *et al.* in 1999.⁶ The paper highlighted the increasing number of children in need of alternative care and the limitations of the existing alternative care system. It also included alternative care options, such as independent living by children with supervision and cluster foster care.⁷ In 2002, the SALRC acknowledged that child-headed households would become a ‘familiar phenomenon’ and called for legal recognition of child-headed households.⁸ The Children’s Act⁹ as amended by the Children’s Amendment Act¹⁰ provided detailed provisions on care of children who are deprived of their family environment. The Act contains provisions that are relevant for child-headed households, such as section 137 of the Children’s Act, which regulates conditions in which a household can be recognised as a child-headed household, and articulates measures of protection and support for such households.¹¹

In chapter one, four main research questions were posed: 1) Is the extended African family capable of providing care to children who are deprived of their parental care?; 2) What is the state obligation under articles 20 of the CRC and 25 of the ACRWC as well as international guidelines and declarations?; 3) What is the position of international treaty law, guidelines and declaration on child-headed households?; 4) how does South African law recognise child-headed household?

To address these questions, the thesis explored the impact of the HIV epidemic on African families and communities, which weakens the capacities of the families and communities to provide adequate care to the growing number of children who are deprived of their parental care. Furthermore, the thesis examined the situation of children living in child-headed households in the context of the HIV epidemic in Africa. As noted in chapter three, there is a growing trend of recognising and including child-headed households in the legislative framework. For instance, the

⁶ C Barret *et al.*, ‘Consultative Paper on Children living with HIV/AIDS’, SALRC (January 1999).

⁷ C Barret *et al.*, 1999 (as above) 26.

⁸ See *Project 110, Review of the Child Care Act*, South African Law Reform Commission (December 2002).

⁹ Children’s Act (No 38 of 2005).

¹⁰ Children’s Amendment Act (No 41 of 2007).

¹¹ Sec 137 of the Children’s Act as amended by the Children’s Amendment Act.

thesis highlighted the examples of Southern Sudan, Uganda and Namibia and the relevant provisions are discussed in the light of the standard developed in the UN Guidelines for the Alternative Care of Children in the chapter. Child-headed households are also specifically mentioned in various national frameworks on orphans and vulnerable children. Chapter four provided a detailed analysis of the South African legal framework recognising child-headed households. The thesis addressed children's rights implications of legally recognising child-headed households in a view to contribute to the development of legal and policy framework in other African states following the South African suit. In what follows in this chapter, the main issues, which are discussed throughout the thesis, are revisited. Section 5.2 recaptures the most fundamental aspects of a rights-based approach – who is responsible for the realisation of children's rights? By doing so, the section revisits the scope and purpose of the right to alternative care, and special protection and assistance. Section 5.3 provides a conclusion to the thesis. Based on the outcomes of the previous chapters, general and specific recommendations are made to states who are considering following the South African path of legally recognising child-headed households.

5.2 Children's rights and well-being: Whose responsibility?

5.2.1 Family as a primary duty-bearer

The fundamental importance of 'family' in children's lives has been noted on numerous occasions.¹² The CRC recognises the family 'as the fundamental group of society'.¹³ It affirms that the family is 'the natural environment for the growth and well-being of all its members and particularly children'.¹⁴ The CRC further states that for the 'full and harmonious development', a child should grow up in a happy, loving and understanding family environment.¹⁵ The ACRWC also echoes the similar sentiment.¹⁶ For instance, article 7 of the CRC protects children's right to be cared for by their parents. Article 20 of the ACRWC also provides a detailed right of children

¹² See Sec 3.2 for a detailed discussion on the concept of 'family' and 'family environment'.

¹³ Preamble of the Convention on the Rights of the Child.

¹⁴ Preamble of the CRC.

¹⁵ Preamble of the CRC.

¹⁶ Preamble of the ACRWC, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

to be cared for by their parents and the right to reside with their parents whenever possible. Also, it is the family with whom the primary responsibility to realise children's rights rests. The CRC and the ACRWC place the primary responsibility to protect and realise the rights of children on the parents or legal guardians of children.¹⁷ When the parents or legal guardians of children are unable to adequately care for their children, the CRC and the ACRWC require states to render appropriate support to the parents and others who are responsible for the children. The strong emphasis on the protection of family and 'keeping children in their family environment' is based on the idea that children's rights are best respected and realised in their own family environment.¹⁸ The recent UN Guidelines for the Alternative Care of Children also emphasise the role of the family as the fundamental group of society and place a strong emphasis on the preventing the need for alternative care by promoting parental care through appropriate support measures.¹⁹

The importance of a family environment to children does not imply that all children who are in their own family environments are adequately cared for or their rights are fully respected and realised. Unfortunately, there are cases where parents or others who are legally responsible for children are unable to provide adequate care. There are even cases where the most severe forms of child abuse take place within the family environment. There are also instances where children who lost their parental care through the death of their parents and are unable to be cared for by other family members. When children are deprived of their family environment, states assume the primary responsibility to protect and realise those children's rights through appropriate measures of protection and assistance. Under articles 20 of the CRC and 25 of the ACRWC, children who are deprived of their parental care and their family environment have the right to alternative care, and special protection and assistance from states.

¹⁷ Art 19 of the CRC and Art 20 of the ACRWC.

¹⁸ The preambles of the CRC and the ACRWC emphasise the importance of the family for the harmonious development of children.

¹⁹ Paras 3 & 32 of the UN Guidelines for the Alternative Care of Children, A/RES/64/142 (24 February, 2010).

Traditionally, in many parts of Africa, children who are deprived of their parental care have been absorbed into an extended family network.²⁰ As explored in chapter two, the reliable and mutual informal social safety provided by strong extended family ties rendered the notion of formal alternative care provided by states irrelevant in Africa.²¹ Unfortunately, the right to alternative care, and special protection and assistance is increasingly important in the continent as more and more children are being deprived of their parental care and family environment. Chapter two further explored the social changes such as rapid urbanisation, industrialisation and labour migration that led to gradual weakening of extended family ties. Most importantly, due to the impact of the HIV epidemic in Africa that continues to deplete human and material resources of families and communities, the traditional family network is increasingly unable to provide adequate care to children who are deprived of parental care. Considering the growing number of children who are deprived of their parental care and family environment in many parts of Africa, the right to alternative care, and special protection and assistance should be given the much needed attention it deserves.

5.2.2 When children are deprived of their family environment

The purpose of the right to alternative care, and special protection and assistance is to ensure that children who are deprived of their family environment are adequately cared for through means that are alternative to their own parental care and family care. Despite the importance of the right, as discussed in chapter four, the examination of the concluding observations by the CRC Committee on state reports suggests that in many parts of the continent, the right to alternative care, and special protection and assistance has not been effectively implemented. The CRC Committee pointed out the general lack of facilities that provide alternative care; the inadequate quality of existing facilities; and the absence of effective monitoring mechanisms of those facilities. Most alarmingly, it also pointed out that in many countries, there is a lack of reliable data on children who are deprived of their family environment.

²⁰ See chapter 2 for further discussion on the traditional family network in Africa.

²¹ H H Semkiwa, et.al, *HIV/AIDS and child labour in the United Republic of Tanzania : a rapid assessment*, No 3, International Labour Organisation (2003) 7; J Kaliyati *et al.*, *HIV/AIDS and child labour in Zimbabwe*, No 2, International Labour Organisation (2002) 16.

There are many reasons for such dire failure to implement the right to alternative care, and special protection and assistance. Limited financial and qualified human resources could be one of them. The lack of political will to prioritise children who are deprived of their family environment may be another reason. The social convention that ‘social orphans do not exist in Africa’ may have also contributed to the lack of political will to fully implement the right to alternative care, and special protection and assistance.²² No matter what the reasons are, the reality is undeniable that the number of children deprived of their parental care and family environment is increasing in many African states, especially where HIV has most dramatically left its mark.

The responsibility of states towards children in respect of the provision of care has three dimensions: prevention, active monitoring and protection. First of all, states should prevent children from being deprived of their family environment. Under article 18(2) of the CRC and article 20(2) of the ACRWC, states should provide appropriate assistance to parents and others who are legally responsible for the child so that they are able to perform their child rearing responsibilities. The UN Guidelines for the Alternative Care of Children also require states to direct their efforts primarily towards enabling children to remain in their own family environment.²³ Secondly, states have the responsibility to ‘take all appropriate legislative, administrative, social and educational measures’ to protect children from all forms of maltreatment and abuse in and out of their family environment.²⁴ After the identification of children at risk of abuses and maltreatment in their family environment and it is deemed that the children should not remain in their own family environment, states have an obligation to provide them with special protection and assistance.²⁵ The right to alternative care, and special protection and assistance is applicable to all children who are deprived of their family environment for whatever the reasons. Therefore, thirdly, the needs of the children should be assessed individually in order to tailor the measures of protection and assistance provided to these needs.

²² See D Skinner *et al.*, *Defining orphaned and vulnerable children*, Human Science Research Council of South Africa (2004).

²³ Para 3 of the UN Guidelines for the Alternative Care of Children.

²⁴ Art 19(2) of the CRC; Art 16(2) of the ACRWC.

²⁵ Art 20 of the CRC; Article 25 of the ACRWC.

Although the needs of children are different and the measures of special protection and assistance should be designed to meet the specific needs of children, it is often assumed that the special protection and assistance are provided only through alternative care placements, such as foster care or institutionalised care. The dilemma arises when children are deprived of their parental care but the application of conventional alternative care placement does not necessarily reflect their best interests.

As explored in chapter two, the number of children who are deprived of their parental care is increasing rapidly in the midst of the HIV epidemic in southern Africa. Unfortunately, the traditional way of absorbing such children is not working as effectively as it once did due to a combination of various factors, such as the number of children in need of alternative care, an increasing level of poverty and a decreasing number of people who are able to provide a level of adequate care. As a result, many children who are deprived of their parental care are left to form child-headed households.

In the following section, a number of important points to be considered when legally recognise child-headed households are noted and recommendations on the legally recognising child-headed households are made.

5.3 Protecting the rights of children in child-headed households

The issue of child-headed households has gained interests and importance both internationally and domestically in many parts of Africa. The CRC Committee mentioned the vulnerable situation of child-headed households in 2003 in its General Comment and the UN Guidelines for the Alternative Care of Children specifically require states to provide all necessary measures to protect and support children in child-headed households.²⁶ Domestically, child-headed households are increasingly incorporated into the domestic legal and policy frameworks in Africa, and in this thesis, Namibia, South Africa, Southern Sudan and Uganda have been highlighted.

²⁶ Para 37 of the UN Guidelines for the Alternative Care of Children.

Especially, in South Africa, the issue of the increasing number of child-headed household has been discussed since 1999 in a consultative paper addressing the HIV epidemic and the rights of the children.²⁷ Following the consultative paper, while recognising the increasing number of children in child-headed households, the SALRC further recommended that child-headed households be legally recognised in order to provide stronger support and protection.²⁸ Mindful of the challenges of legally recognising child-headed households, the SALRC maintained the importance of legally recognising child-headed households as ‘the formal placement options for children in need of care and protection are inadequate to cater for the massive number of children orphaned by AIDS’.²⁹ It further argued that child-headed households had an advantage of keeping siblings together.³⁰ Finally, the Children’s Act as amended by the Children’s Amendment Act legally recognised child-headed households as a form of protective measure.

Although providing legal and policy protection to child-headed households has been supported by the CRC Committee, UNICEF and in the UN Guidelines for the Alternative Care of Children,³¹ as Cantwell and Holzscheiter pointed out, the implications of legally recognising child-headed households for children’s rights, especially in relation to the right to alternative care, and special protection and assistance, remain uncertain.³² While recognising that there are certain cases where the best interests of the child is protected better in child-headed households, it further argued that in order to provide strong protection and assistance, recognising child-headed households as ‘family environment’ was not advisable. If child-headed households are recognised as ‘family environment’, children in such households may not be entitled to the protections and assistance under article 20 of the CRC.³³ The

²⁷ C Barret *et al.*, (n 6 above).

²⁸ SALRC, 2002 (n 8 above) 169.

²⁹ As above 172.

³⁰ As above 172.

³¹ UNICEF & UNAIDS, 2007 (n 5 above).

³² N Canwell & A Holzscheiter, *A commentary on the United Nations Convention on the Rights of the Child: article 20 children deprived of their family environment*, Martinus Nijhoff (2008) para 87.

thesis recommended that child-headed households should be recognised as special units of society that are entitled to special protection and assistance.

The thesis further examined the case of South Africa from a rights-based perspective. It argued that legally recognising child-headed households is a bold step towards applying a rights-based approach to supporting and protecting children in child-headed households. Such recognition sends the important message that child-headed households exist and that children in child-headed households are legally entitled to appropriate support and protection from states.

However, it is a step that should not be taken hastily or symbolically. As Sloth-Nielsen warned, legally recognising child-headed households should not be a way for states to negate their responsibilities to protect and provide for the children in such households.³⁴ There should be adequate and effective measures put in place to support and protect such households so that they may properly function independently. Legally recognising child-headed households is not an end in itself but a means to an end, which is to enable children in child-headed households to fulfil their potentials and rights as children while they eventually prepare themselves for a fulfilling and well-adjusted adulthood. Furthermore, to prevent the very existence of child-headed households, legally recognising child-headed households should not overshadow the importance of strengthening extended families and communities.

5.4 Recommendations

A few recommendations are directed to states who are considering following South Africa in legally recognising child-headed households.

The general recommendations regarding children deprived of their family environment are the following:

³³ Cantwell and Holzscheiter mentioned similar arguments concerning children who are looked after informally by relatives. States do not have an obligation to find alternative care for such children as they are not deprived of their family environment. N Cantwell & A Holzscheiter, 2008 (as above) paras 70 & 88.

³⁴ J Sloth-Nielsen, 'Of newborns and nubile: Some critical challenges to children's rights in Africa in the era of HIV/Aids' (2005) 13 *The International Journal of Children's Rights* 80.

First of all, the process of placing children who are deprived of their family environment to alternative care placement should be guided by a rights-based approach. The starting point of a rights-based approach is to recognise that children who are deprived of their family environment have the right to special protection and assistance. It is a legal duty of states to protect and realise the rights of children in child-headed households through various measures of protection and assistance. The designing and implementation of the measures of protection and assistance should be based on the fundamental principles of a rights-based approach: the right to non-discrimination; the right to participation and inclusion; respect for the best interests of the child; the right to survival and development of the child; and respect for the rule of law. In the case of children in child-headed household, it should be borne in mind that the rights of all children in the household should be respected. Importantly, the eldest child's rights as a child should be as fully respected and realised as his or her rights as a head of a household.

Secondly, as emphasised above and also in previous chapters, the responsibility of states towards children who are deprived of their family environment goes beyond providing alternative care, and special protection and assistance. Foremost, states have a responsibility to assist people who are responsible for children to be able to effectively perform their child rearing responsibilities. Article 18(2) of the CRC and article 20(2) of the ACRWC oblige states to render all appropriate support and assistance, including material support, to parents and others who are responsible for the well-being and development of children. In other words, states have the responsibility to prevent children from being deprived of their family environment.

Finally, states should strengthen monitoring and regulatory mechanisms to ensure the quality of care in both informal and formal care placements. Under article 19(1) of the CRC, states have a legal obligation to protect children from all forms of maltreatments and abuses while in the care of 'parent(s), legal guardian(s) or any other person who has the care of the child.'³⁵ In case of abuses or maltreatment of a child is identified, article 19(2) requires states to take an appropriate follow-up step

³⁵ Art 16(1) of the ACRWC is similarly worded but art 16(2) does not specifically mention 'judicial involvement'.

including ‘judicial involvement’. It is an extremely important provision as it acknowledges the existence of ‘deliberate violence to children by parents and other caregivers.’³⁶ It is particularly important in Africa in the context of the HIV epidemic. As the CRC Committee observed, a wide-spread practice of unregulated and monitored informal foster care or informal adoption in many parts of Africa could put children at risk of abuses and maltreatment while they are in ‘their family environment.’³⁷

A number of specific recommendations with regards to recognition and protection of children in child-headed households are also made:

First, the term, ‘child-headed household’ should be defined broadly to include not only unaccompanied child-headed households but also accompanied child-headed households.³⁸ As mentioned in chapter four, the South African definition of ‘child-headed household’ also includes a household containing terminally ill parents or legal guardians. It is commendable because the inclusive definition reflects the reality that many children are assuming the role of a primary caregiver even before the death of their parents. Nonetheless, it is recommended that the definition should also include the instances where a child has assumed a role of *de facto* head of household due to factors other than the illness of parents or legal guardians. Importantly, it should be reminded that not all ‘child-headed households’ are homogenous and their needs may be very different. For instance, an accompanied child-headed household, where a child is looking after a terminally ill parent as well as younger siblings, may require a different type of support and intervention compared to children in unaccompanied child-headed households.

Secondly, the age limit of a child heading a household should be a guideline but not a hard and fast rule. In South Africa, a child over 16 can legally assume a role of a head of household. It is beyond argument that children under a certain age should not be expected to carry out the responsibility of a head of a household. However, an

³⁶ R Hodgkin & P Newell, *Implementation handbook for the Convention on the Rights of the Child*, UNICEF (2002) 257.

³⁷ See Sec 3.2 for the detailed discussion.

³⁸ The terms are taken from *Reversed Roles and Stressed Souls: child-headed households in Ethiopia*, African Policy Forum (2008), See Sec 1.5 for definitions of the terms.

inflexible age limit might be unrealistic to apply when a child-headed household is an accompanied child-headed household. There may be cases where children younger than 16 to have assume the responsibilities as a primary caregiver to their terminally ill parents or ailing grandparents. The age limit may exclude such households whose needs are similar to other ‘recognised’ child-headed households. When all the other criteria are met, such as the absence of an available and suitable adult family member, and, most importantly, the best interests of the children and the wishes of the children, the household should be recognised as a child-headed household and provided with the level and type of protection and assistance needed. One of the ways would be to link such a household with an organisation providing home-based care in order to relieve the child from physical care of the ill parents or guardians.

Thirdly, there should be overall legislative reform to accommodate the reality that a minor may head a household. The two main purposes of such legislative review is: (a) to respect the rights and responsibilities of children heading households as a head of a household, and therefore, assisting and enabling them to perform their responsibilities as a primary caregiver to younger siblings; and (b) it is also to protect their rights as children, and therefore, to accommodate their needs and rights as children while they perform their responsibilities as a head of a household. For instance, the legislative reform should include revising the labour law to provide a stronger protection to children who are allowed to work legally including, but not limited to, provisions on the fair wage and reasonable working hours. The labour laws should also protect the children’s right to education and need to be flexible enough to accommodate the educational needs and schedule of the working children.

Other good examples of laws that respect the evolving capacity of the children are sections 129 and 130 of the Children’s Act. Sections 129 and 130 of the Children’s Act enable a child over 12 years old who has enough maturity and mental capacity to understand the implications of the decision to give consent to medical treatment and surgical operations, and consent to HIV testing respectively. Although the provisions may not have been included with a view to accommodate the needs of children in child-headed household, it nevertheless enables children who are heading a household and having responsibilities as a primary caregiver to their younger siblings to make important decisions affecting their lives. The legislative review should aim to achieve

full respect for children's evolving capacity and autonomy. Nevertheless, children should not be given the responsibility to make decisions on issues which they do not fully understand without sufficient and appropriate assistance. It is important to note that 'allowing' children over 12 years old to make important decisions regarding health and medical treatment does not mean leaving them to their own devices to make such vital decisions. In other words, only a child is over 12 years old who is of sufficient maturity and has the mental capacity to understand all the implications of his or her decision may consent to their medical treatment.³⁹ In case where the child lacks the sufficient maturity or the mental capacity to fully comprehend the implications of his or her decision, the person who is responsible for the child to provide appropriate assistance to make decisions.⁴⁰

Fourthly, legally recognising child-headed households is not a uniform solution to a complicated challenge. The decision whether to legally recognise a certain household as a child-headed household and allow children to remain by themselves should be made after a thorough investigation and consultation with all interested persons, including the children themselves. There are several criteria on which a household can be recognised as a child-headed household, but the most important criteria are the best interests of the children and the preference of the children. When the wishes of the children come into conflict with what is considered to be the best interests of the children, the solution should accommodate both sides as much as possible. For instance, there might be a case where children prefer to remain as a child-headed household while it is considered that the best interests of the children would be a placement in foster care. In such cases, it is important to understand the rationale behind the wishes of the children, which could include the wishes to remain together or the fear of mistreatment in foster homes, and the reasons favouring a placement in foster homes, such as immaturity of the eldest child or the difficulty of combining educational needs of children and care responsibilities. The solution does not need necessarily be either the one or the other. The solution could be keeping children together in cluster foster care or intensifying the role of a supervisor. The decisions on

³⁹ Sec 129(2)(a)(b) and Sec 129(3)(a)(b) of the Children's Act. Under Sec 130, the consent to HIV testing can be given by a child over 12 years of age. Sec 130 does not contain qualifications such as maturity.

⁴⁰ Sec 129(4) of the Children's Act.

care arrangements or appropriate support and protection measures should be based on individual assessments.

Finally, legally recognising child-headed households is not a costless panacea without complications. Children in child-headed households are entitled to special protection and assistance from states. Special protection and assistance includes measures to realise the right to adequate standard of living. Article 27 of the CRC protects children's right to an adequate standard of living. Although the wordings of articles 27(2) and 27(3) of the CRC suggest that the right to an adequate standard of living is not directly conferred on children but on their parents or guardians. States are responsible to assist the parents or whoever has the responsibility for the child to provide an adequate standard of living.

However, reading it together with article 26 of the CRC, which ensures a child's right to directly benefit from social security and considering the consequence of legally recognising child-headed households, the right to an adequate standard of living should be directly applicable to children who are responsible for younger siblings. The purpose of article 27 of the CRC is to ensure an 'adequate' standard of living for the full development of the children. Simply providing access to social grants or other services might not be enough to meet the level of state obligation unless through such social services, children can enjoy an adequate standard of living. As Hodgkin and Newell pointed out, article 27 qualifies the extent of state obligations by 'in accordance with national conditions and within their means'.⁴¹ Nevertheless, reading it together with article 4, which requires states to use their available resources to a 'maximum extent possible' to realise children's socio-economic rights, the qualifications on article 27 cannot be used as an excuse for failure to meet the core minimum of the right and also the failure to improve continuously the living conditions of children.⁴²

⁴¹ R Hodgkin & P Newell, 2002 (n 21 above) 393.

⁴² As above 393.

Legally recognising child-headed household does not mean an end to the challenges of care. It might even be the opening of a Pandora's Box,⁴³ raising more questions than providing answers. However, considering the current situations in many parts of Africa, the opening of the Box might be a necessary risk to take. The question is how well one should be prepared for the adventure. As the myth goes, the last thing remaining in the Box was hope. Legally recognising child-headed households, despite all the difficulties and questions, which arise at the initial stage, may pave the way to providing better protection and assistance to children in child-headed households.

This thesis favoured giving legal recognition to child-headed households if and only if the legal recognition is firmly grounded on a rights-based approach. The fundamental element of a rights-based approach is the recognition of children's status as rights-holders. Children in child-headed households have the right to special protection and assistance, which should enable them to enjoy their rights as children as well as members of an independent household. States have a legal obligation under international human rights instruments and domestic laws to provide 'special protection and assistance' to children in child-headed households. The measures of special protection and assistance should be adequate to enable children to realise fully their potentials and rights. Deprivation of their family environment should not lead to the deprivation of either their childhood or their harmonious physical, mental and spiritual development. Legally recognising child-headed households is not an end but a means to an end – stronger legal protection for children in child-headed households through a legal recognition of their status and rights.

⁴³ The expression was taken from P M Eba, 'Pandora's Box: The criminalisation of HIV transmission or exposure in SADC countries' in F Viljoen & S Precious (eds) *Human rights under threat: Four perspectives on HIV, AIDS and the law in southern Africa*, PULP (2007) 13.

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