

Children's property and inheritance rights and their livelihoods:

The context of HIV and AIDS in Southern and East Africa



Laurel L. Rose

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FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Livelihood Support Programme (LSP)

An inter-departmental programme for improving support for enhancing livelihoods of the rural poor.

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The context of HIV and AIDS in Southern and East Africa

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1. *Sustainable livelihood approaches in the context of access to different natural resources*
2. *Access to natural resources and making rights real*
3. *Livelihoods and access to natural resources in a rapidly changing world*

This paper addresses the legal and institutional aspects of children's property and inheritance rights in Southern and East Africa. It discusses the violations of such rights and how the spread of HIV/AIDS contributes to these violations. It identifies gaps in customary norms and international and national legislation as well as topics for inclusion in plans of action. It presents recommendations regarding preventative and corrective methods to protect children's property and inheritance rights, and recommendations for future research and development priorities.

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1. INTRODUCTION

This paper focuses on legal and institutional aspects of children's property and inheritance rights in Southern and East Africa. Chapter 2 discusses violations of children's property and inheritance rights and discusses how the spread of HIV/AIDS has contributed to the violations. Chapter 3 assesses several norms of customary law that aim to protect children's property and inheritance rights as well as the current practices of customary law that—in the context of the HIV/AIDS pandemic—serve to complicate and limit children's ability to maintain their rights. Chapter 4 reviews and assesses a selection of international laws and national laws from the countries in the region that influence children's property and inheritance rights, emphasizing succession and land laws. Several gaps in national legislation and policy that need to be addressed are identified.

The fifth chapter reviews several National Plans of Action (NPAs) for orphans and vulnerable children¹, identifying a number of topics which should be addressed in all NPAs in order that they are more comprehensive in their coverage of children's property and inheritance rights. Chapter 6 discusses the effectiveness of government structures in addressing children's property and inheritance rights, emphasizing the institution of the public trustee. Chapter 7 outlines and evaluates a number of stakeholder initiatives that address children's property and inheritance rights. Chapter 8 presents eight case studies of children whose property and inheritance rights were violated. Each case study includes a summary and an accompanying analysis of legal and policy issues.

Chapter 9 presents recommendations regarding both preventive and corrective methods to protect children's property and inheritance rights as well as recommendations regarding future research and development priorities. Chapter 10 offers a few concluding remarks.

¹ In a recent publication, the author provided the following explanation of terms: "In the African studies literature, writers commonly refer to 'vulnerable children' and 'orphans'. Vulnerable children are usually considered to be any children who lack family support, are poor, are in prison, or experience frequent changes in residence due to homelessness or refugee status. Orphans, who are a special category of vulnerable children, are considered to be any children who lack one or both parents. The literature refers to 'single' orphans who have lost one parent as opposed to 'double' orphans who have lost both parents. It also refers to 'paternal' orphans who have lost their father as opposed to 'maternal' orphans who have lost their mother. Moreover, the literature refers to several types of orphans according to the following factors: cause of orphaning, such as 'war' orphans and 'AIDS' orphans; support systems, such as 'foster-care' orphans; and place of residence, such as 'street' orphans" (Rose 2005: 912).

2. THE PROBLEM: CHILDREN'S PROPERTY AND INHERITANCE RIGHTS VIOLATIONS

According to a report by UNAIDS, there are about 108 million orphans in the world, of whom 13.4 million (12.4 per cent) are AIDS orphans. UNAIDS speculates that by 2010, there will be 107 million orphans in the world (almost no change from 2001), of whom a proportionately higher twenty-five million will be AIDS orphans. This report also states that in Africa alone, there are about thirty-four million orphans, of whom about eleven million are AIDS orphans (nearly 80 per cent of the world total). In some parts of Africa, one out of every three children is an orphan (Understand the Crisis 2001; see also UNAIDS Global Report 2006 and Unbelievable Stats 2002).

The spread of HIV/AIDS throughout Africa, having decimated the adult population, has transformed the continent's orphan problem from a short-term, sporadic phenomenon caused by war, famine, or disease into a long-term, chronic problem that will likely persist decades into the future. Moreover, the orphan problem has been exacerbated by the fact that extended family support systems in Africa, which once acted as social safety nets, absorbing and assuming care for orphans according to customary practice, have become weaker in recent years as a consequence of larger social, economic, and political developments that have occurred as countries became more urbanized and industrialized and more focused on nuclear families and individual economic advancement (Rose 2005: 912-3; Seeley et al 1993). The result of these interrelated developments is that many potential guardians of orphans not only reject guardianship roles, but they even compete for scarce land and property with the same orphans for whom they customarily might have assumed caregiving roles. Ultimately, the spread of HIV/AIDS, in a situation that lacks the old safeguards which once served to protect vulnerable family members and that also does not have modern support systems which are adequate to fill the caregiving gap, has compelled many orphans to fend for themselves (Christiansen nd; Hunter 2000: 681, 683; Rose 2005:912-3).

A number of recent studies of orphans in Southern and East Africa (e.g., Drimie 2002b; Izumi 2006c, 2006d; Nyambedha 2001; and Rose 2005), where HIV/AIDS has had a devastating impact, indicate that many orphans are not only compelled to support themselves, but they often have to defend their property and inheritance rights against usurpations by relatives, neighbors, and strangers. And despite the fact that violations of orphans' property and inheritance rights constitute an important economic as well as human rights issue, researchers have thus far not adequately addressed these violations. Indeed, most researchers have focused on orphans' living condition or on the strategies to support them (e.g., Hunter and Williamson 1997), mentioning orphans' property and inheritance rights anecdotally, without accompanying data and analysis (e.g., Subbarao and Coury 2004: 19, 28, 29, 61).

In view of how little attention children's property and inheritance rights have received, as well as how little is known about violations of these rights, it is no wonder that the governments of Southern and East Africa have not already fully protected such rights within legislation. Nonetheless, just as lawmakers have recently debated how to secure women's property and inheritance rights within legislation (see Q &A nd: 1-2; Rose 2004), they should debate what children's property and

inheritance rights should be and how these rights should be protected within legislation. Importantly, they should specify how children's property and inheritance rights should be monitored and how violations of these rights should be sanctioned.

It is herein argued that children's property and inheritance rights are violated when people deny them the possibility to benefit—either in the present or in the future—from the property of their parents or from the property that they have acquired through their own labors. Those people who deny children their property and inheritance rights commonly argue that customary law supports their own rights to inherit and/or use the property of the children's parents. They maintain that the rules of customary inheritance stipulate that the property of deceased adults should be distributed within the extended family, or they maintain that the rules of customary inheritance require that adult guardians of children decide how inherited property should be distributed or earned property should be used.

In any case, it is not always easy to ascertain when children's property and inheritance rights have been violated because the members of extended families usually have rights to the property of their deceased relatives, as stipulated by the laws of the different countries within the region, and because the guardians of orphans have the right to determine how the property that the orphans inherited from their parents should be used to provide for their needs, including for clothing, food, housing, and education. The problem, as this desk study will reveal through an analysis of various laws from select countries within the region as well as through illustrative case studies, is that many members of extended families confiscate the property of deceased relatives to which they are not entitled by either customary or statutory law and that many guardians/estate executors use for their own benefit the property of deceased relatives which should be used for the benefit of the orphaned children. The consequence of these property confiscations and abuses, which are essentially "violations" of orphans' human rights, is that thousands of orphans become destitute and vulnerable to mistreatment, including forced labor and prostitution.

Although the laws of several countries in Southern and East Africa contain provisions that aim to protect children's property and inheritance rights, the reality is that many children are not able to protest violations of their rights due to inadequacies of the laws (mostly the laws fail to specify fully children's rights or the means to enforce their rights), to unresponsive authorities, and to ineffective courts. In general, children are not in a good position to use either customary law or statutory law to their advantage because of barriers which they commonly encounter: information (they are not fully aware of their rights), time (they are unable to pursue their property claims before their deceased parents' property is permanently alienated), status (they are of lower status and power than their competitors—often their own guardians), youth (they are not permitted by law to pursue their property claims on their own), and cost (they are unable to meet the logistical and legal costs of pursuing their property claims) (refer to Rose 2005: 929-30 on Rwanda).

In a recent publication about orphans and land-grabbing in Rwanda (Rose 2005: 931), the author proposed that lawmakers should expand the concept of "guardianship" and that they should empower courts to grant "active legal capacity" to minors on the basis of their mental maturity, their expressed need to be independent, and their immediate interest in asserting land rights. In addition, the author argued that

lawmakers should reconsider the requirement that orphans must obtain “consent” in order to be legally emancipated from their guardians and that they should consider new methods for extending “protection” to orphans, such as by assigning advocates to orphans.

In this desk study, which is focused on the wider problem of property-grabbing in the wider context of Southern and East Africa, the author argues that the legislation and policy of the countries in the region should guarantee orphaned children, who have lost one or both parents and who are under the age of majority as determined by the laws of their country, the following property and inheritance rights: the right to own, acquire (through purchase, gift, or inheritance), and dispose of tangible and intangible property, including land, housing, money, livestock, and crops. The author also argues that any national property and inheritance laws and policies which insufficiently address children's property and inheritance rights or otherwise impose undue hardships upon children in their efforts to maintain these rights violate international human rights law, with its guaranteed rights to information, to the protection of the law, to legal inheritance rights, and to effective remedy.

In essence, the argument is made that orphaned children should be guaranteed the following rights: to legal protection of their property and inheritance rights; to participate in and be informed about all decisions and dispositions regarding their parents' property; and to receive legal aid and the assistance of an advocate in order that they might claim their property and inheritance rights or otherwise protest violations of these rights.

3. REGIONAL REVIEW OF CUSTOMS AND PRACTICES THAT ARE ADVANTAGEOUS OR DISADVANTAGEOUS TO CHILDREN'S PROPERTY AND INHERITANCE RIGHTS

In the countries of Southern and East Africa that were surveyed for this report, property rights continue to be governed mostly by customary law and practice, although research into community perceptions about property rights reveals that common practices are based less on specific customs (or statutory law) than on people's perceptions of what is right (Strickland 2004: 22). Indeed, a gap between *de jure* property and inheritance rights, as stipulated by law, and *de facto* rights, as realized in daily life, is produced when people deliberately ignore statutory law in favor of customary law or when they ignore both statutory law and customary law. People may reject statutory law because they do not know its provisions or because they are uncertain about how to apply its provisions in their defense; alternatively, they may reject either statutory or customary law (or both) because they believe that the provisions of either system of law are not favorable to the facts of their case or will inhibit the realization of justice in their case.

“Traditionalists”—those people who favor a continuation of customary property systems in these countries—argue that such systems are characterized by an adaptability that enables local authorities to reformulate and apply customary norms on an ongoing basis as circumstances necessitate. They also argue that such systems already provide for the rights of children. Nonetheless, traditionalists do not account for the fact that these systems arose in pre-colonial times when social and family structures were much different. In modern times, extended family systems have been gradually weakened by social and economic changes, such as urban migration and the growth of a market economy, and more recently by the spread of HIV and AIDS. Significantly, the increased importance placed on nuclear families, which are more focused on individual advancement, has led to diminished support for orphans and increased property-grabbing in both urban and rural settings: the evidence from individual case studies indicates that the relatives of many orphans grab their land and property—regardless of whether the orphans or the relatives are living on private tenure land in urban locations or customary tenure land in rural locations. Still, in urban locations, orphans are more likely to suffer from losing private tenure plots, houses, television sets and household goods, whereas in rural settings, they are more likely to suffer from losing arable fields, roofing material, and livestock (see discussion by Foster et al 1998 on peri-urban communities in Zimbabwe). In light of the weakening of extended family systems, traditionalists should acknowledge that customary property systems frequently do not protect children and that different interventions, including revised customary laws, new statutory laws, or a progressive merging of both types of laws within a comprehensive and unified system (along with better mechanisms for enforcing the laws), are needed to protect orphans in both urban and rural settings.

Several customary norms, which vary from country to country across the Southern and East Africa region, are considered by legal analysts to be *advantageous* to the protection of children's property and inheritance rights. One norm specifies that a trustee within the extended family—ordinarily a senior male relative of a deceased man—should take care of the needs of a deceased man's wife and children. The

trustee assumes control and administration of the deceased man's property and is expected to make sure that it is used for the benefit of the man's wife and children. A second norm specifies how a trustee should take care of a deceased man's wife: the man's widow should be permitted to remain in the marital home, to use her husband's property to provide for herself and her children, and to hold the matrimonial land and property in trust for her children (most often her sons). A third norm specifies how a trustee should take care of a deceased man's children within the context of their extended families: the man's orphans should be placed under the protection of their father's extended family within patrilineal systems of inheritance, whereas they should be placed under the protection of either their mother's or their father's extended family within matrilineal systems of inheritance (refer to Rose 2002 on Swaziland and Malawi).

At the same time, several related customary practices, which vary from country to country, are considered by legal analysts to be *disadvantageous* to the protection of children's property and inheritance rights. Many of these practices derive from customary norms but currently deviate from these norms.

The first practice involves the appointment of the trustee. Although a customary norm stipulates that a trustee should provide for the needs of a deceased man's wife and children, in practice many trustees are exploiting the property entrusted to them and at the same time ignoring their responsibilities to others (refer to Kenya 2001: 18 on Kenya; Rose 2005: 915 on Rwanda; Rwezaura 2001: 416-7 on Tanzania). Instead of using a "reasonable" share of the property to meet the needs of the orphaned children, many trustees, who are motivated by factors ranging from poverty to greed, are using the property to meet their personal needs or those of members within their nuclear families. Many trustees justify their actions by emphasizing their customary rights to the property rather than their customary duties to the orphaned children. And even when statutory laws do not support the customary rights claimed by trustees, they nonetheless insist that custom should prevail (i.e., their interpretation of custom).

One explanation for the subversion of trusteeship lies in the ambiguity of customary norms regulating trusteeship; this situation of uncertainty has enabled opportunists to dispossess orphans of their property (see e.g., Drimie on Kenya, 2002a: 15; Rose 2005: 913 on Rwanda). To complicate matters, many local authorities do not adequately monitor trustees due to the authorities' uncertainty about how to apply various laws, their disinterest, their competing interests, or their lack of financial resources to do so (Drimie 2002a: 22; Rose 2005: 928-9).

A second practice involves the care that a trustee provides for a deceased man's widow. Although a customary norm stipulates that a trustee may (or should) allow a widow and her children to remain in the marital home, to use the marital property to provide for herself and her children, and to hold the matrimonial land and property in trust for her children, in practice many trustees confiscate marital property, and sometimes they instruct widows and their children to vacate the marital home.

One explanation for the failure of some trustees to provide for some widows lies in the continued practice of customs that restrict and complicate widows' property and inheritance rights. One custom, the exchange of bridewealth, according to which valuables are transferred from the family of a man to the family of a woman upon

marriage (in order that any children resulting from the union will belong to the man's family), may persuade a trustee to believe that various members of the man's family who contributed to the bridewealth for his marriage possess rights after his death to his marital property. (If the man died of AIDS, his wife may be suspected of also having AIDS and may be sent away while the marital property is confiscated; see Kenya 2001: 9-10 and Izumi 2006a: 30 on Kenya.) A second custom, polygamous marriage, according to which a man marries different wives (often through a combination of civil and customary marriages), may complicate a trustee's task of determining each woman's (and thereby her children's) rights to the property of the deceased husband (see Rose 2005, 2006 on Rwanda). As will be explained in Chapter 4, the property rights of a child are commonly determined by the type of marriage his/her parents contracted and the chronological order of his/her mother's marriage relative to the other wives' marriages. A third (albeit disappearing) custom, wife inheritance (levirate marriage), according to which a widow is inherited by her deceased husband's brother or another male relative, may persuade a trustee that a widow, rather than being entitled to marital property, is herself marital "property" that should be granted to someone within the extended family.

A third practice involves the care that a trustee provides for a deceased man's children. The norm which provides for the care of orphaned children within their extended families is no longer in full force due to various factors, including the advance of AIDS, which have weakened the social safety net that once provided for vulnerable family members.

Similar to the situation of widows, one explanation for the failure of trustees to provide adequately for orphans lies in the continued (or altered) practice of customs that restrict or complicate orphans' property and inheritance rights. One custom, according to which inheritance is conferred patrilineally, compels a trustee to grant more significant property and inheritance rights to a deceased man's male heirs (sons or brothers) than to his widow and daughters. A second custom, according to which elders within the extended family or family council are granted decision-making powers about property distribution, may cause a trustee to overlook or downplay the interests of orphans who are not represented adequately. Although some aged or ailing people make oral statements or prepare written wills regarding the distribution of their property after their deaths, many do not because they view estate-planning as uncomfortable or uncustomary. And even when people do write wills, their relatives may refuse to recognize the wills (refer to Case 6 in Chapter 8). A third custom, according to which orphans are cared for in their homes or in the homes of paternal relatives, has been supplanted by the practice of raising children orphaned by AIDS in hospitals, orphanages, foster homes, or at the homes of maternal relatives: this new practice is due to the fear that the orphans may be HIV positive themselves (a fear that tends to stigmatize them), the belief that they may die before reaching majority, or the desire to redistribute their parental property within the paternal lineage. Importantly, the customary practice of linking orphans' property and inheritance rights to residency may persuade a trustee that an orphan who was raised outside his/her family house has less right to that house than the person who occupied it during his/her minority. A fourth custom, according to which extended family members, including trustees, have the right to use the land of orphans' parents until the orphans attain the age of majority, has been supplanted by the practice of landholders refusing to vacate

orphans' land when they reach adulthood. Basically, a trustee may not want to evict a landholder who has developed the land.

In general, it might be argued that trustees are not deviating significantly from custom when they deny inheritance rights to girls or children born out of wedlock. At the same time, it might be argued that trustees are deviating from custom (within patrilineal societies) when they confiscate all marital property and instruct widows and orphaned children to vacate the marital home and relocate to the home of the maternal extended family. (More research needs to be conducted to determine whether nowadays the paternal family tends to take over the marital property, while the maternal family tends to assume guardianship; see Izumi 2006d: 49.) Moreover, it might be argued that trustees are deviating from custom when they refuse to turn over property to orphans when they reach the age of majority (see Drimie 2002a: 11 and Drimie and Mullins 2002 on case studies obtained in Lesotho, Kenya, and South Africa).

Viewed together, the customary laws and the statutory laws within each country in the region tend to obfuscate property and inheritance rights because they often contain contradictory provisions. For example, in some countries, the provisions of customary law indicate that a deceased man's wife, children, and property should be inherited by one of his brothers, while the provisions of statutory law indicate that a deceased man's wife and children should inherit his property. Although the provisions of statutory law are supposed to prevail when the provisions of customary law and statutory law are contradictory, the reality is that statutory law will be poorly implemented and possibly completely ignored.

The main point is that the AIDS pandemic has changed the local contexts in which customary norms operate. As a result of changed local contexts, new norms and new practices are needed to satisfy new needs, including the needs of AIDS orphans who are heading households. Several suggestions for new norms and new practices will be made in the chapters that follow.

4. REVIEW OF THE LAWS AND POLICIES THAT INFLUENCE CHILDREN'S PROPERTY AND INHERITANCE RIGHTS IN THE COUNTRIES OF SOUTHERN AND EAST AFRICA

4.1 International laws

The United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child recognize children as rights-bearers and further define their rights, although they do not mention a right to inherit. Those African countries that have signed on to the convention have accepted their obligations to protect children who are deprived of family care (Article 20) and to protect children who experience violence, neglect, or exploitation on the part of a parent, guardian, or other caregiver (Article 19).

Some observers argue that lawmakers of these countries have not translated into practical legal solutions their obligations to protect children's rights, including the right to inherit property, according to the standards established by the Convention and the African Charter (e.g., *Lasting Wounds* 2003: 78 regarding Rwanda). Moreover, observers argue that these instruments are not well known and that uncertainties exist regarding their interpretation. Finally, observers argue that more effort needs to be made in informing people about these instruments within clear and simple messages.

The Protocol on the African Charter on Human and Peoples' Rights, on the Rights of Women in Africa, gives to men and women, including girls, the right to inherit in equal shares parental property (Article 21).

Several other instruments produced by international bodies make more specific commitments to orphans and vulnerable children affected by HIV and AIDS, including the United Nations Secretary General's Task Force on Women, Girls and HIV and AIDS. These commitments are expressed in the UNGASS "Declaration of Commitment (DoC) on HIV/AIDS" (2001) and the "World Fit for Children" (WFFC) declaration of the UN Special Session on Children (2002) ("Report on the Africa Leadership Consultation" 2002: 4; see also *Facing the Future Together* 2004).

Of special note, the U.N. Committee on the Rights of the Child states that distinctions made on the basis of having an AIDS-affected parent (e.g., denial of property rights) constitute an inappropriate ground for discrimination.

4.2 National laws

Although the governments of the countries in Southern and East Africa have tended to emphasize health and welfare issues of families affected by HIV/AIDS, increasingly they are recognizing the importance of addressing the legal rights of children living with HIV/AIDS (see e.g., Barrett et al 1998 and Grant and Strode 2003 regarding South Africa).

In particular, the governments should specify within the laws and policies orphans' property and inheritance rights, a special class of rights that has attained significance

due to the growing number of orphans who are compelled to be self-sufficient heads of households. Moreover, they should specify orphans' rights apart from the rights of their widowed mothers.

According to an assessment by Hunter (2000: 17), African countries "have revised a variety of laws and created new policies to protect children" ... and ... "[j]udicial systems have been more flexible toward women and children defending their inheritance and rights to property." She adds that several African countries, including Mozambique, Namibia, and Tanzania, have opened up land tenure systems and property ownership to women. According to this author's observation (Rose 2005), most African countries have only recently begun to consider the land and property inheritance rights of children.

Several types of laws and policies in Southern and East Africa, which are relevant to the property and inheritance rights of children, are examined and compared below. Due to the number of countries covered within this desk study, as well as to the considerable number of laws and policies that are currently in force or in the planning stages in these countries, only a select group of laws and policies are addressed. Moreover, only the most salient issues covered within these laws and policies are addressed.

4.3 Laws prohibiting violence against children

Several laws, which specifically prohibit violence against children, are a first step toward protecting children's property rights. *Rwanda's* "Law Relating to Rights and Protection of the Child against Violence" (2001) aims to give children a voice and to protect their welfare. Nonetheless, it does not adequately protect children's property rights because it emphasizes criminal rather than civil offences (such as property-grabbing) against children, does not specify the standards and methods for achieving children's representation, and does not create the legal remedies for enforcing and correcting violations of children's rights. *Kenya's* Children's Bill of 2001 also tends to focus more on issues relating to children in conflict with the law; but compared with previous laws in the country, it desirably expands consideration of the "protection and care" of children, making more explicit children's right to protection from child labor, armed conflict, harmful cultural practices, and sexual abuse and exploitation. *South Africa's* Domestic Violence Act (December 1999) similarly does not specifically protect children's property rights, although it does provide a sufficiently broad and open-ended definition of "abuse" such that economic abuse and property damage seem to be covered.

4.4 Marriage and succession (family) laws

Succession laws vary across the countries of Africa and are inevitably the subject of debate. Some countries, such as *Botswana*, do not have specific legislation dealing with inheritance, such that it is covered by common law. Some countries, such as *Lesotho*, do not recognize children born out of wedlock as legitimate heirs, and some countries, such as *Lesotho, Malawi, South Africa, and Zambia*, have legislation that provides children with a portion of the deceased's estate in the case of intestacy (a person dies without leaving a will) (Overcome 2006: 31).

Two succession laws—*Rwanda's and Zambia's*—were examined closely for this desk study and are discussed in detail. Several aspects of the succession laws of other countries—*Malawi, Uganda, Zimbabwe, and Kenya*—are discussed in lesser detail.

Rwanda's Civil Law on property, No. 2/99, the “Law on Matrimonial Regimes, Liberalities and Successions” of 2000 is one example of several laws that have been passed in the region with the aim, among others, of granting or enhancing women’s and girls’ property and inheritance rights.

The law extends the inheritance rights of both women and girls to property within their families of birth (Articles 43 and 50). Article 50, concerning successions, stipulates that “all legitimate children” of a deceased parent will, in accordance with the civil laws, inherit in equal parts without any discrimination between male and female children, but Article 70(9), concerning intestate successions, specifies inheritance “without any discrimination between legitimate and illegitimate children.” In terms of orphaned children’s property rights in general, the various articles of the law are often interpreted to mean that a boy or girl who is the sole surviving descendent of a patrilineal group can inherit the property rights of the group and that a boy or girl without parents can inherit the property rights of the parents (previously only boys could inherit such rights) (Rose 2005: 922-3).

The law provides several guidelines regarding the responsibilities of a guardian for minor children. Article 70(6) of the law specifies that a surviving spouse must care for the minor children of a deceased parent. Articles 51, 52, 75, and 81 deal specifically with the Council of Succession (i.e., the extended family council), specifying its membership (minor children are excluded in Article 81) and granting it discretionary powers to regulate the guardianship of minor children (the distribution and use of the inheritance). Essentially, the law provides that minor children’s interests must be represented through an adult guardian, and moreover, that the Council of Succession holds considerable powers to decide who this guardian will be and how he or she will exercise the guardianship role.

Regarding land inheritance, the law specifically mentions land in only two articles: Article 90, which specifies that land within an estate is subject to land regulations, and Article 91, which specifies that land within an estate comprising less than one hectare must not be subdivided among the heirs. Since many landholders in Rwanda possess less than one hectare, this article could be expected to limit the land inheritance rights of many children.

The law addresses several issues of importance for children’s rights: the rights of children born within three types of marital regimes (community of property, limited community of acquests, and separation of property); the ranking of children’s rights within the regime of separation of property (children’s rights are ranked ahead of other members of the extended family) (Article 66); and the penalty to be imposed in the event that a surviving spouse fails to fulfill his/her duties to raise the children of the deceased (Article 70(6)).

At the same time, the law does not adequately address several issues of importance for children’s rights: the standards for providing the adequate care of children that is required by Article 51; the acceptable limits to the discretionary powers of the

Council of Succession in dealing with children; the alternative means for protecting children's rights in the event that a Council of Succession and/or appointed guardian do not protect the interests of children under their supervision; the property rights (and the means to assert these rights) of children from non-legal unions; the property and inheritance rights of a widow and her children when a deceased man had owned multiple houses and land plots or when a widow remarries (Article 75); children's specific property and inheritance rights; and the rights of children to transact land, houses, and property that they inherit (Article 76).

Zambia's "Intestate Succession Act" of 1989 was introduced as a means to end property-grabbing when a deceased spouse had not left a written will. The act contains provisions for the division of inheritance: widows are to be given 20 percent, parents 20 percent, other dependents 10 percent, and children 50 percent (the amounts for widows and children will vary according to the existence of other dependents and parents) (Part II). The act also states that a "surviving spouse or child or both [are] entitled to [the] house," that "the surviving spouse shall have a life interest in that house which shall determine upon the spouse's remarriage," and that "where the estate includes more than one house the surviving spouse or child or both shall determine which of the houses shall devolve upon them and the remainder shall form part of the estate" (Part II(8)). The act also specifies the penalty that will be imposed on any person who denies any person his/her right to the property to which he/she is entitled under the act (Part II(14)). The act, which was amended by Act No. 13 of 1994, provides inheritance rights for multiple wives; it also specifically defines a "child" as a child born "in or out of marriage," thereby including children of non-legal unions within the provisions for inheritance.

The act addresses several issues of importance for children's rights: the percentages of property to be distributed to heirs (children receive fifty percent to be distributed in proportions commensurate with a child's age or educational needs) (Part II(5)(1)(b)); the right to property of a child born "out of marriage" (Part I(3)); the equal rights of children resulting from a polygamous union (Part II(10)); the right of minor children to be adequately cared for (Part II(5)(b) and (6)(a)); the responsibility of a parent or guardian to hold a minor's property until he/she ceases to be a minor (Part II(5)(2)); the right of orphans without a surviving parent to receive the share that a surviving spouse would have received (Part II(6)(a)); and the penalty that will be imposed on an administrator or guardian who "wrongfully deprives a minor of property or a share in property to which the minor is entitled ..." (Part IV (35)(1)). Therefore, unlike Rwanda's succession law, Zambia's succession act acknowledges the problem of property-grabbing, as concerns orphans, and specifies penalties for such action.

At the same time, the act does not adequately cover several important issues: the rules for inheriting land held under customary tenure and family property (it excludes land held under customary tenure and family property in Part I (2)(a) and (c)); the standards for meeting minor children's "needs" (Part II(5)(b) and (6)(a)) and for providing "proper care and management of any property belonging ... to a minor" (Part IV (33)); the means and mechanisms for monitoring care of minor children and for enforcing the penalty for dereliction of duty to them, as specified in Part IV (35)(1); the means and mechanisms for a minor child to challenge the property grabbing that is prohibited in Part IV (35)(1) and gain access to court, as guaranteed in Part IV (2((b)); and children's land inheritance rights.

Interestingly, in *Zambia*, as pointed out in a report by Save the Children (Overcome ... 2006: 31), discriminatory practices related to property dispossession are allowed to continue, despite the provisions of the succession act because *Zambia's* Constitution, in section 23(4)(c) and (d), provides that traditional practices related to the "... devolution of property on death and other matters of personal law will be allowed to continue."

In *Zimbabwe*, the Administration of Estates Amendment of 1997, which repealed provisions of the prior Administration of Estates Act, gives women in customary marriages, whether registered or not, the right to inherit property from their husbands. In effect, when a man dies, his surviving spouse is automatically entitled to ownership of the matrimonial home, and the property is divided among the children and the surviving spouse. The positive effect of the act's protections for children from non-registered unions is counterbalanced, however, by a Supreme Court decision in 1999 (*Magaya vs Magaya*) which found that a woman could not inherit her father's property because customary law dictates that family property may only be inherited by a male. *Zimbabwe's* act serves as an interesting contrast to *Rwanda's* Matrimonial Regimes, Liberalities and Successions Law of 2000, which, as noted above, extended the inheritance rights of both women and girls to property within their families of birth (Articles 43 and 50) and further stipulated that inheritance rights in the marital home should be determined by the type of marriage contracted (community of property, limited community of acquests, and separation of property) (Rose 2005).

In *Malawi*, according to Semu (2002: 82-3), some political wrangling occurred in association with the Wills and Inheritance Bill (1964), which proposed in clause 11—contrary to tradition—that if a man died intestate, four-fifths of his earthly goods should go to his wife and children. The bill failed to pass, and instead, in 1967, Parliament passed the Wills and Inheritance Act, which proposed three forms of sharing the property of a deceased man, depending on how a marriage had been contracted: a surviving wife and children in customary patrilineal marriages would receive half the property; a surviving wife and children in customary matrilineal marriages would receive two-fifths, and the rest would go to the man's traditional heirs; and a wife married under the marriage act would receive the first MK10,000 worth of property, and the rest would be divided between her and the children. The 1967 bill is still operational in Malawi, despite calls to create a uniform inheritance system, to change the proportions distributed such that the immediate family (surviving spouse and children) receive at least 75 percent of the deceased's estate, and to make the act more gender sensitive. In 1999, an amendment to the act declared any property-grabbing by a deceased spouse's relatives to be a criminal act, subject to prosecution.

The act protects children's inheritance rights in two important ways: all children of a deceased are entitled to inherit from the estate of their parents, whether they were born in or out of wedlock, and a child who is left out of a parent's will can make application to the courts to receive a portion of the deceased parent's estate. In spite of the protections that the act guarantees to children, a recent report by Save the Children (Overcome ... 2006: 31-2) argues that traditional practices of inheritance still prevail in rural areas in Malawi, such that girls and children born out of wedlock are subjected to discrimination regarding their inheritance rights.

In *Uganda*, the Succession Act of 1906 was adopted from English law. The argument has been made that Ugandan succession law should be developed and applied in accord with the country's constitution, thereby providing for ownership of the marital home by either spouse and for the right of occupancy by children. To achieve this standard implied in the constitution, it is further argued that men should specify in their wills that their marital homes will be occupied by their wives and children. Unfortunately, the reality is that most men do not prepare wills, and in the absence of wills, the distribution of property is assigned to the Administrator General who usually grants widows and children the right of occupancy, although he may terminate their right of occupancy, in accordance with the act, when widows remarry (Byamukama 2006).

Also in *Uganda*, a domestic relations bill was recently under debate in Parliament. The bill aimed to protect all family members without bias and to eliminate the injustices that women and children suffer at the hands of in-laws and other relatives during disputes over property inheritance (Strickland 2004: 48).

In *Kenya*, the Law of Succession Act of 1982 details procedures for the inheritance of property by children with or without a surviving parent. In Section 26, it extends to dependent children or someone acting on their behalf the right to apply to the court for redress in cases where "reasonable provision" has not been made for the children. Unfortunately, as with the succession laws of other countries, the standard for "reasonable provision" is not specified. The act also states that trusteeship for the property of a surviving child should be undertaken until the child reaches the age of eighteen.

Despite the apparent protections afforded by the region's various succession laws, some legal analysts have argued that these protections are frequently disregarded and that property is grabbed, primarily because the laws contain provisions that are resented as contrary to custom. To complicate matters, many children are not aware of the laws and their rights, or even when they do know about the laws and their rights, they are unwilling or unable to pursue their rights.

Of further note, several Constitutions of the region were examined for this desk study to discover if children's property and inheritance rights are addressed. In fact, most of the Constitutions make little or no mention of children. One Constitution that does mention children, the Constitution of the Kingdom of *Swaziland*, states in Chapter IV, Article 28, that "motherhood and childhood are entitled to special care and assistance by society and the State" and in Article 30(b) that "a child is entitled to reasonable provision out of the estate of its parents" and in Article 30(d) that "children receive special protection against exposure to physical and moral hazards within and outside the family." *Swaziland's* Constitution commendably alludes to children's inheritance rights, but the standards to be applied for "reasonable provision" and "special protection" are unclear.

4.5 Land laws

Just as the succession and inheritance laws of the countries in Southern and East Africa devote little, if any, attention to land rights, the countries' land laws devote

little attention to inheritance rights. Indeed, when designing succession laws, the countries' lawmakers tend to argue that land inheritance rights should be discussed in the context of land laws, but when designing land laws, they tend to argue that land inheritance rights should be discussed in the context of succession laws (i.e., family laws). The result of this tendency to defer responsibility for covering land inheritance rights is that the rights of special population groups (primarily widows and orphans) are not adequately dealt with in any laws.

The region's succession laws deal primarily with intestate successions, specifying that customary law applies; therefore, within the framework of customary land law, land inheritance rights are supposed to be processed informally by families or local authorities rather than formally by state officials.

In *Zimbabwe*, the Constitution, in Section 23 (3) (b) protects the discriminatory practice of allocating land to men and not to women due to the primacy afforded customary law, which is based on patriarchal and patrilineal customs of ownership and succession.

Interestingly, even in countries where land titles are granted under statutory law, custom plays a role. To illustrate, in *Zambia*, the Land Act of 1995 was specifically designed to be gender-neutral in that it allowed women to apply for land titles. However, in practice, women's applications for land were frequently rejected as contrary to custom; this course of action was permissible because the Act also provided that the customary laws of an area were paramount. To counteract the local practice of denying women's applications for land, Zambia's Ministry of Lands made a policy announcement in 1999 that ten per cent of all advertised land plots should be allocated to women. (More research is needed to determine the impact of the new policy on women's and children's land rights.)

Although a number of the land laws in the region mention women's land rights, they ordinarily do not say much about children's land rights. Moreover, when the land laws do mention children's land rights, they mostly do so in the context of women's land rights. It might be argued that the land laws cover more fully women's as opposed to children's land rights because women—as compared to children—are in a better position to advocate for their rights. Curiously, various land tenure specialists have argued that the land laws should say more about women's land rights (e.g., Rose 2004 on *Rwanda*), but few land tenure specialists have commented that the land laws say little about children's land rights (see Rose 2005 on *Rwanda*).

Rwanda's land law, the Organic Law Establishing the Land Tenure System in Rwanda (2005) specifies in Article 4 that “[m]en and women shall have equal rights on landed property” and in Article 8 that “the land commission shall include men and women.” Interestingly, women's land rights were not mentioned in early drafts of the land law; however, women's groups, which had attained local and national positions of power after the 1994 war, successfully pressed for specification of their rights in the final version of the law. *Ugandan* women similarly pushed for an amendment to *Uganda's* “Land Act, 1998” in order to secure their land rights. *Mozambique's* land law states that women may “...hold the right of land use and benefit” (p. 5), may “...request an individual title upon partition of the particular land parcel from the area of the community” (p. 7), and may provide “testimonial proof” (p. 7). *Tanzania's*

“Land Act, 1998” specifies a “fair balance of men and women in the [National Land Advisory] Council” (p. 12) and guarantees assistance to women with mortgages (p. 66).

In a recent paper prepared for the High Level Commission on Legal Empowerment of the Poor (2006: 6), Toulmin argues that new land legislation needs to strengthen women's formal rights to land and that supporting measures need to ensure that women are represented on land committees and in setting up legal clinics. As is typical, she specifically argues for the legal protection of women, essentially subsuming the legal interests of children under those of widows. Moreover, in recent articles concerning specific countries, such as Semu's (2002: 82-3) on *Malawi's* land legislation, women's land interests are the focus of attention and children's land interests are alluded to in the context of their widowed mothers.

A closer examination of several land laws, with a view toward children's land interests and rights, reveals that the following land laws of the region scarcely mention children's, orphans', or youths' land rights: *Rwanda's* “Organic Law No. 08/2005 of 14/07/2005 Determining the Use and Management of Land in Rwanda”; *South Africa's* “Communal Land Rights Bill” of 2003; *Zambia's* “The Lands Act 1995”; *Tanzania's* “The Land (Amendment) Act, 2004”; and *Mozambique's* “Land Law No. 19/97 of 1 October 1997”. *Rwanda's* law specifies in Article 36 that “members of the family ... are spouses legally married, children who have attained majority age, minors represented by their guardians and the incompetent children represented by their tutors” (p. 10). *Tanzania's* act briefly mentions the issues of land disposition of at-risk groups, including children (p. 24), although no details are provided. *South Africa's* bill grants land rights to “youth” (p. 22) and also specifies that one member of “...a land administration committee must represent the interests of vulnerable community members including women, children and the youth, the elderly and the disabled” (p. 20) and furthermore that one member of a Land Rights Board “...must represent the interests of child-headed households” (p. 23). Unfortunately, *South Africa's* law does not indicate whether a minor can directly participate in the committee's or board's proceedings and represent his/her own interests.

Some land tenure specialists argue that modern-day circumstances—including the breakdown of the extended family, the growth of individual interests in the context of a market economy, the growing land shortages, and the spread of HIV/AIDS—necessitate that the land inheritance rights of vulnerable population groups, including orphans who head households, should be protected within legislation and policies that specify standards and that guarantee transparent proceedings by unbiased authorities (e.g., Rose 2005). In addition, they argue that the land rights of vulnerable population groups should be monitored and their claims, when deemed legitimate, enforced.

4.6 Impact of national laws on the property and inheritance rights of children

Overall, some laws of the region *positively* affect the property and inheritance rights of children:

- succession laws that guarantee children's, including girls', property and inheritance rights;

- succession laws that specify the proportion of a deceased parent's estate that children should receive;
- succession laws that specify penalties for violations of children's property and inheritance rights.

Overall, some laws of the region *negatively* affect the property and inheritance rights of children:

- succession laws that severely restrict the property and inheritance rights of children by denying them the right to participate in family proceedings regarding the distribution of their parents' estate and thereafter a direct right to the property that they inherit (i.e., to be signatories to or custodians of property);
- succession laws that do not guarantee property and inheritance rights to children of non-legal or customary marriages;
- succession laws that do not sufficiently regulate guardianship of minors, specify what constitutes "proper" care, or specify alternative forms of guardianship in the event that a guardian does not protect an orphan's property and inheritance or act in his/her best interest.

Regarding land laws more specifically ...

- land laws that promote modern landholding systems and land use techniques, which children do not have the resources or knowledge to take advantage of, without providing the means for children to take advantage of new opportunities;
- land laws that provide new standards for land rights, without accounting for children's rights.

In effect, a number of gaps in national legislation and policy need to be addressed in order that children's property and inheritance rights are protected more fully. The gaps, which are commonly related to a lack of financial resources or political will, are caused by the following:

- failure to update national laws in accordance with international instruments, such as the Convention on the Rights of the Child or the African Charter on the Rights and Welfare of the Child of 1990;
- failure to develop national succession laws that specify children's property and inheritance rights;
- failure to develop institutional and policy frameworks for monitoring, implementing, and enforcing provisions of the laws as concern children's property and inheritance rights;
- failure to guarantee women's property and inheritance rights, which, in turn, complicates their efforts to bequeath property to their children;
- failure to specify children's property and inheritance rights apart from the rights of the children's parents, particularly mothers (children's property and inheritance rights are commonly subsumed under women's property and inheritance rights);
- failure to protect the property and inheritance rights of some categories of children, such as children born out of wedlock or girls;

- failure to create systems to maintain legal documents, such as certificates of birth, death, and marriage, and to create registries of land ownership and use rights, thus complicating children's efforts to prove their property rights;
- failure to specify the methods for children to establish their property and inheritance rights, thus resulting in bureaucratic hurdles and "run-arounds" for them (refer to examples provided in Kenya 2001: 19);
- failure to specify alternate methods (such as witnesses' oral testimony) for children to prove their property and inheritance rights in the absence of written documents and registries;
- failure to grant orphans the right to represent their property and inheritance interests and to participate in proceedings concerned with their property and inheritance rights;
- failure to provide financial and legal assistance to orphans who must defend their property and inheritance rights;
- failure to monitor institutions, such as public trustees who are responsible for protecting orphans' property and inheritance rights, thus leading to abuses or neglect (refer to examples provided in Kenya 2001: 20);
- failure to promote succession and estate planning (i.e., preparation of wills) that might protect orphans' property and inheritance rights.

Regarding land rights more specifically ...

- failure to specify children's (particularly minor orphans') land rights;
- failure to differentiate orphans' land rights under different land tenure categories, including customary land, leasehold land, and private tenure land. Orphans who experience problems with customary land holdings will require assistance from the local authorities and possibly a local mentor, whereas orphans who experience problems with private tenure land may require legal counsel and the assistance of a state-assigned advocate or trustee;
- failure to specify special legal standards to better protect orphans' land rights. The land laws of many countries contain provisions which impose an undue burden on orphans. For example, provisions regarding compulsory consolidation of fragmented landholdings, confiscation of unexploited land, compensation for confiscated land, and reclamation of lost land rights, work against orphans who lack the resources and legal knowhow to assert their land rights and to demand fair land transactions (refer to Rose 2005: Drimie 2002a: 10). In the best interest of orphans, the laws might extend leniency to orphans regarding time frames for land confiscations, and they might provide legal assistance to orphans who are pursuing grievances about land confiscations, unpaid compensations, and lost land rights;
- failure to specify the criteria according to which orphans are permitted to pursue land claims. The criteria should specify the nature of land transactions that orphans can perform independently, the circumstances under which orphans can make land claims, the procedures that orphans should follow in making land claims, the approaches that officials should take in handling orphans' land claims, and the special interventions that officials should resort to in protecting orphans' land interests, such as assigning special advocates to them.

5. REVIEW OF THE NATIONAL PLANS OF ACTION (NPAS) REGARDING CHILDREN'S PROPERTY AND INHERITANCE RIGHTS

A number of countries in Southern and East Africa, including Zimbabwe, Namibia, Swaziland, Lesotho, and Malawi, have produced or are in the process of producing, National Plans of Action (NPAs) regarding orphans affected by HIV/AIDS.

One comprehensive NPA is that of Zimbabwe (National Plan of Action ... 2004). Importantly, Zimbabwe's NPA accepts the legal commitments to children that are spelled out in international agreements (e.g., the Convention on the Rights of the Child) and regional agreements (e.g., the African Charter on the Rights and Welfare of the Child). In addition, the NPA acknowledges Zimbabwean legislation that is relevant to children's interests (Children's Protection and Adoption Act; Guardianship of Minors Act, Maintenance Act, Child Abduction Act) as well as national policy that is relevant to children's interests (Zimbabwe National Orphan Care Policy).

In terms of legal interventions, Zimbabwe's NPA emphasizes: "...education and advocacy on the implementation of existing legislation and policies in the best interests of the child" and "strengthening the rights-based approach to programming, where the family, community, local authorities, civil society, and the state are viewed as duty bearers, and must commit to upholding children's rights" (p. 6). The NPA clearly states that a first aim is to intensify the implementation of national legislation and policies that are pertinent to children, in particular the Children's Protection and Adoption Act and the Zimbabwe National Orphan Care Policy of 1999. It also indicates that a second aim is to review legislation and policy in light of the current situation, filling in gaps and contradictions in the best interests of children (p. 10). Finally, it indicates that a third aim is to change laws only when deemed necessary to fill in gaps (p. 18). Importantly, Zimbabwe's NPA includes a legal/protection category in the budget (p. 59).

Zimbabwe's NPA covers considerable ground: it recognizes the need for government agencies and NGOs (stakeholders) to better coordinate and link their efforts on behalf of orphans and to enhance orphans' participation (p. 16); it delegates responsibility for tasks (p. 20) and further provides detailed lists of various officials' roles and responsibilities (Annexes 2 and 3, pp. 30-5); it outlines monitoring and evaluation strategies (Annex 4, pp. 36-56); and it provides a budget (Annex 5, pp. 57-60). Of note, stakeholders were directly involved in drafting Zimbabwe's NPA at a conference (p. 16), and they promoted the participation of orphans (p. 17).

At the same time, Zimbabwe's NPA does not cover several important areas, particularly as concerns orphans' legal rights and protection. First, it never specifically mentions orphans' property rights, and it only mentions orphans' inheritance rights in the context of birth certificates (the lack of which complicates orphans' right of inheritance as guaranteed in the Constitution) (pp. 5 and 15). Second, it confirms the UNGASS Declaration of Commitment on HIV/AIDS Goal 65, which is to "... protect orphans and vulnerable children from ... loss of inheritance" (p. 12) and further outlines Zimbabwe's policies and legislation which protect children's rights of inheritance (p. 14), but it does not specify the nature of children's property and inheritance rights and exactly how these rights are to be

protected. Third, it acknowledges that Zimbabwe's legislation and policies have gaps, as far as protecting orphans' rights are concerned, but it does not specify what these gaps are and how they should be addressed. In effect, Zimbabwe's NPA is much more focused on the specifics of the social and economic protection of orphans as opposed to the legal protection of orphans.

A second comprehensive NPA is that of Namibia (Yates 2004; refer also to "Policy Workshop ..." 2004). Namibia's NPA discusses the issue of policy development and legal reform, indicating that child-headed households have no physical or legal protection and that "relatives refuse to recognize the children's inheritance rights and take their house and land from them" (pp. 16 and 54). The NPA also indicates that people are not sufficiently knowledgeable about children's rights and that the materials which might inform people about these rights are not adequately disseminated (pp. 18 and 45).

Namibia's NPA points out that the main legislation governing child status and protection is the outdated, pre-Independence Children's Act of 1960, inherited from the Republic of South Africa. Two pieces of draft legislation—a Child Care and Protection Act and a Children's Status Act—are currently under consideration to replace the outdated legislation. According to the NPA, the new laws will emphasize the best interests of the child in terms of preventive measures—an important departure from the existing Children's Act (p. 34). The NPA includes a sample questionnaire (assessment of country effort), a legislative review, a timetable of activities, and a list of parties responsible for legislation (pp. 51 and 63).

Namibia's NPA indicates that "[c]ertain legislation is still needed with regard to inheritance in order to protect the property of orphans" (p. 11). Section H: Status of Orphans and Other Children Made Vulnerable by HIV/AIDS" (p. 32) includes a category on succession planning (% of children for whom a standby caregiver has been identified in event of premature death) and on property dispossession (% of widows that have experienced property dispossession) (refer also to p. 35 regarding customary inheritance laws and the dispossession of widows); at the time of the report, no figures could be supplied for these categories. Unfortunately, the table did not include a category on property dispossession of orphans. Moreover, although the NPA indicates that the adoption of new legislation on "child protection and the status of children is awaited" (p. 35), no mention is made about property dispossession of orphans. Essentially, the NPA makes clear that orphans' inheritance rights should be protected (preventive measures), but it does not specify whether and how acts of property grabbing against orphans (i.e., violations of their property rights) should be sanctioned (corrective measures).

A third comprehensive NPA is that of Swaziland (Government of the Kingdom of Swaziland 2002). Swaziland's NPA indicates that one of the problems of vulnerable children is that they "are deprived of access to property" (p. 10; see also p. 72) and that "the laws prohibit and/or make it extremely difficult for widows and unmarried women from inheriting land, livestock and other items and ultimately denying both the mother and children property that is rightfully theirs" (p. 13).

Swaziland's NPA includes an entire section on the "legal component," stating that an area where challenges remain is that of developing the "legal framework in giving

protection to property rights etc of children” (p. 16). In this regard, the NPA proposes that a project within the government’s Poverty Reduction Programme should include an output that would involve, in part, creating a register of property of deceased persons and also implementing a law that would protect children’s inherited property (pp. 22, 25, and 55). Moreover, it indicates that OVCs should be assisted with mediation and legal advice on inheritance, maintenance, abuse, and children’s rights (p. 55). Finally, it suggests that several practical problems involved in protecting children’s property and inheritance rights should be addressed: the problem that property in Swaziland is not registered, that estate distribution takes a long time, thus allowing various people to pose as executors and loot property, and that children are not allowed a say in the choice of their guardian, thus opening the door for property violations by guardians (p. 72). In view of these problems, Swaziland’s NPA proposes that a legal officer be employed to “handle special cases as a safeguard against property grabbing and looting of property in families, communities ...” (p. 75) and that the NPA establishes eligibility criteria for an organization to receive funding under the Legal Assistance Component (p. 76).

Swaziland’s NPA goes farthest of all the NPAs that were reviewed in terms of explaining the specific cultural background to property and inheritance rights (Swazi law and custom), the current property and inheritance problems of the country’s OVCs, and the proposed administrative/organizational framework for addressing these problems. However, similar to the other NPAs, it contains significant omissions regarding the legislative framework: it does not specify exactly what orphans’ property and inheritance rights are or should be; how these rights should be protected in formal law; and how violations of these rights should be sanctioned within the proposed legal framework.

A fourth NPA is that of Lesotho (Government of Lesotho 2006). Lesotho’s NPA mentions that one of the social costs of AIDS is “inheritance problems” (p. 3) and that UNGASS has set a goal of protecting from “loss of inheritance” (p. 5). The NPA also indicates that there is or may be a need for the formulation of relevant legislation; and in this regard, it includes tables regarding the timing, costing, and dissemination of CPW legislation (pp. 5, 14, and 15). In general, the NPA covers many activities as well as the costing for these activities, but it barely mentions orphans’ property and inheritance rights, except when presenting the costing for activity 6.12 “Capacity development of the Office of Masters of the High Court (in order to decentralize services critical to protecting property and inheritance rights of OVC)” (p. 39).

A fifth NPA is that of Malawi (Malawi nd). Malawi’s NPA, which is presented in summary form (13 pages), indicates that one of its six key strategic objectives is to “protect OVC from ... property dispossession” (Strategic Objective 2, p. 3). Otherwise, the NPA mentions one specific activity in the section on “Succession Planning,” involving training 84 trainers in succession planning in 28 districts and incorporating succession planning activities into District Plans by April 2006 and again in 2007-2008 (p. 7). In addition, in Objective 3.2, “Strengthen the legal protective framework for OVC,” the NPA indicates that the legislative framework needs to ensure that OVCs’ inheritance rights are respected and that OVCs are protected from property grabbing (p. 11). Unfortunately, the NPA does not provide details regarding the rights of orphans within existing legislation or regarding the Government of Malawi’s position regarding the rights of orphans as specified within

international agreements; nor does the NPA specify how legislative reforms and policy changes would aim to better protect orphans' property and inheritance rights and to sanction violations of these rights.

Several United Nations agencies have addressed, in general, the topic of National Plans of Action (NPAs). In a report prepared for the United Nations Department of Economic and Social Affairs workshop held in Windhoek, Namibia in 2004, entitled "Policy Workshop on HIV/AIDS and Family Well-being," this U.N. agency offers several recommendations for developing NPAs that will strengthen the social and economic welfare of families. Although this report includes a brief discussion about orphans, the recommendations section is general and does not mention orphans' property and inheritance rights.

The African Union produced a "Plan of Action on the Family in Africa," which suggests in part 5.3, "Promoting Environmental Sustainability," and section e, "Land Ownership," that land tenure laws be reviewed in order that women have equal access to land (pp. 20-21). Unfortunately, this Plan of Action does not mention children's rights to land access. Moreover, in part 5.4, "Rights, Duties and Responsibilities" (of the family), the plan emphasizes women and only alludes to girls.

Also of note, several international development agencies, such as USAID, have produced "action plans" regarding AIDS orphans in Africa (AIDS Orphans 2000).

In sum, the governments of Southern and East Africa have produced NPAs that cover various topics: some NPAs are thorough in some areas, while other NPAs are more thorough in other areas. While each government obviously should produce an NPA that reflects each country's particular needs and goals within the relevant social, political, and economic context, it is nonetheless herein suggested that each government should aim to be more comprehensive in its coverage of topics.

Toward the goal of achieving a more comprehensive coverage of topics, it is herein proposed that the governments of Southern and East Africa should aim to cover the following topics related to orphans' property and inheritance rights in their respective NPAs:

- the country's response to international agreements regarding orphans' property and inheritance rights (i.e., the specific implementation of international obligation through the adoption of domestic legislation that protects children's rights);
- a summary and analysis of the property and inheritance problems experienced by the country's orphans;
- a summary of the country's customary practice regarding property and inheritance, particularly as concerns orphans;
- a summary of the country's legislation relevant to orphans' property and inheritance rights, including gaps in the legislation and suggestions about how to address these gaps;
- strategies regarding how existing legislation and policy might be implemented and how legislative reforms and policy might be developed to better protect orphans' property and inheritance rights;

- strategies for enforcing orphans' property and inheritance rights and for sanctioning violations of these rights;
- proposals regarding the organizational and administrative processes (e.g., land registries) that would handle orphans' property and inheritance problems;
- proposals regarding the legal institutions (e.g., courts with sections specialized in children's property rights), legal processes (e.g., mediation), legal assistance (e.g., an Ombudsman, official advocates, or paralegals), and legal aid (possibly provided through community service) that would be available to orphans for processing their complaints about property and inheritance rights violations;
- proposals regarding more effective linkage between and communication among the various stakeholders entrusted with looking after orphans' property and inheritance rights;
- proposals regarding the delegation of responsibility for various activities concerned with protecting orphans' property and inheritance rights (distributed among various stakeholders, including government officials, local leaders, community residents, NGOs, and orphans);
- proposals regarding research activities that would investigate property and inheritance practices, particularly as concerns orphans;
- proposals regarding training activities that would inform orphans about their property and inheritance rights, that would explain these rights to government officials and local leaders, and that would sensitize the public regarding these rights;
- cost projections regarding the reform or development of legislation and policies, the dissemination of information associated with new laws and policies (e.g., sensitization of the public and training of the public, government officials, and local leaders), and the stepped-up enforcement of existing or new legislation and policies (such cost projections should include a review of all possible sources of funding);
- planned monitoring and evaluation activities associated with the implementation of new legislation, policies, and programs.

6. INSTITUTIONAL CAPACITIES: EFFECTIVENESS OF GOVERNMENT STRUCTURES, CAPACITIES, SKILLS, AND FINANCIAL RESOURCES IN ADDRESSING CHILDREN'S PROPERTY RIGHTS

In many countries in Southern and East Africa, government planners are debating the appropriate and most effective methods for dealing with the AIDS pandemic and more particularly, how to address the care and protection of children orphaned by AIDS. They want to determine the responsibilities that should be undertaken by government institutions and the responsibilities that should be delegated to NGOs. In addition, they want to determine how collaborative efforts should be undertaken by government institutions with one another or with NGOs. Finally, they want to determine what sorts of referral mechanisms should be developed to assure that children's needs are addressed by the most appropriate institution—either governmental or non-governmental.

In some countries, disagreement exists regarding the institutions that should assume responsibility for children (including oversight for children's property rights). (Currently, no country in the region has delegated responsibility for monitoring and enforcing children's property rights to a single, "umbrella" institution.) In addition, disagreement exists regarding how much responsibility for orphans should be undertaken by government institutions and how much responsibility should be delegated to NGOs. To illustrate, in Kenya, as reported by Human Rights Watch (Kenya 2001: 20), legal analysts have recognized that some well-intentioned guardians of orphans are not able to use effectively the legal mechanisms and procedures in place to protect the orphans' interests with respect to property and inheritance. Several of these analysts have suggested that the Kenyan government should amend the law to make it easier for NGO workers and other non-relatives to be children's legal representatives for the purposes of property disputes. They note that most guardians cannot afford the high fees for lawyers to defend the property rights of the children under their care and that no government-supported legal aid program exists for adults, much less for children. But their proposed solution that the government should give NGOs standing to act as guardians in legal processes—in order to establish a larger pool of people to provide legal assistance—is not without controversy. Other analysts argue that the Kenyan state must assume its responsibility for representing children's interests, by developing children's legislation and by urging the Attorney General's office—the state counsels—to take on more.

The institution of the public trustee has been both praised and criticized as a means for protecting the property and inheritance rights of children. Regarding the orphan crisis in Rwanda, the author (Rose 2005: 933) suggested that government trustees might act as independent advocates of children, further arguing that the trustees would offer specialized professional training and experience and, unlike community members, would not have a personal interest in the children's land or property (see also Himonga 2001). As a contrast, regarding the orphan crisis in Kenya, Human Rights Watch (Kenya 2001: 20) cited the statements of several orphans' guardians and legal analysts who criticized the institution of the trustee, commenting that the trustee could, in theory, be an effective mechanism in children's property cases but that, in practice, trustees are poorly paid, with the consequence that they have little incentive to deal with orphans' problems and some incentive to take money and do

little or nothing. Basically, the consensus among analysts seems to be that the institution of the public trustee could be effective in protecting children's property and inheritance rights if the trustees were better paid, were better organized, and were monitored.

A possible solution to disagreements regarding the appropriate role of the government trustee and the appropriate role of NGOs might be for the trustee to work in association with NGOs. That way, the trustee would act with the power of the state and would offer specialized legal expertise, while each NGO would act with on-the-ground knowledge of children's problems. Importantly, the trustee and NGOs should work closely with local authorities in identifying vulnerable children, including orphans, and in developing mechanisms to support them and to protect their legal rights (refer to chapter 6 below). Ultimately, the trustee and NGOs should monitor the activities of one another.

7. STAKEHOLDER INITIATIVES IN ADDRESSING CHILDREN'S PROPERTY RIGHTS

At an international and regional level, UNICEF has taken a lead in developing and assessing programmatic responses to the problems of AIDS orphans (Africa's Orphaned Generations 2003; Framework for the Protection 2004; and Hunter 1999). In particular, UNICEF has worked to find ways in which NGOs, CBOs, and the private sector can assist in community-based orphan assistance programs (Hunter 1998).

A number of community initiatives that have been developed by grassroots organizations are attempting to support or to further children's property rights. The following initiatives represent positive examples worthy of emulation:

Innovative Orphan-intervention Programs that aim to protect children's property and inheritance rights in Africa:

Home-based care and community caregivers:

In *Zimbabwe*, the Uzumba Orphan Trust, supported by the United Methodist Church, enables 1,500 AIDS orphans to remain in their homes because forty-five community caregivers regularly visit and attend to them. A major component of the Trust involves 'orphans' fields'—farmland plots that are worked by community volunteers. The produce from the plots is sold, and the proceeds are poured into the Trust to provide housing materials and school fees for the member orphans (Butler, 2000).

Also in *Zimbabwe*, the Mhakwe community-based orphan care program (CBO) in Chimanimani, started out as an initiative of religious leaders affiliated to the United Baptist Church but was further developed as a CBO by church women. The CBO has volunteer mothers and fathers who look after child-headed households in the community, and it provides community action committees with information about the orphan families. In addition to assisting orphans in living within and maintaining their parental homes, the CBO maintains a community garden that benefits the orphans. The money obtained from the sale of garden produce is used to purchase food and school uniforms and to pay for school fees for the orphans (Izumi 2006d: 61-2).

Also in *Zimbabwe*, the Farm Orphan Support Trust (FOST) was established in 1997 to assist children living in farm communities who are affected by HIV/AIDS. The organization tries to raise community awareness regarding children's property and inheritance rights, to advocate on behalf of orphans, to provide home-based care to orphans, and to support children within "kids clubs, where older children assist one another and younger children (Izumi 2006a: 108; Parry 1998).

In *Kenya*, GROOTS has trained 120 home-based volunteers—many of whom are themselves HIV-positive—to care for HIV/AIDS patients at their homes in Mathare slum in Nairobi. The volunteers are in the process of setting up an agro-processing project that will benefit the children of the caregivers who die (Izumi 2006a: 8).

Community leaders:

In *Swaziland*, the government has urged chiefs to allow orphans to remain on land that would customarily be redistributed upon their parents' death. The government has also encouraged chiefs to turn over to emergency stores for orphans' use the produce from traditional 'chiefs' fields' that are communally farmed by members of a chiefdom. Moreover, some chiefs are on their own setting aside additional land areas to feed orphans (Zavis, 2003; FM & G 2002).

In *Tanzania*, local leaders, as a part of a self-help initiative in Kagera, revised their by-laws to prevent snatching of women's property without due process (Hunter 2000: 11-2). (Similar legal initiatives by local leaders in other parts of Africa should be undertaken to prevent the grabbing of orphans' property.)

Community Development Trust

In *Swaziland*, the organization, Swazis Positive Living (SWAPOL), which is formed by people living with HIV/AIDS (PLWHA), invests energies in vegetable gardens, cash-crop farming, and sewing of school uniforms. Orphans and vulnerable children are secondary beneficiaries of such projects in that one quarter of the project profits is invested in a community trust fund for the orphans (Izumi 2006a: 56).

In *Zimbabwe*, the Ntengwe for Community Development plans to train 20 women and 20 girls living with HIV or AIDS on women's legal rights, with an emphasis on will-writing and developing advocacy skills. Ntengwe will support these women and girls to implement a series of activities to increase awareness of women's legal rights among community members, including lawyers and judges, traditional leaders, police, church leaders, and women and girls. The organization also plans to produce a documentary film about legal rights ("Reducing Women's and Girls' Vulnerability ..." 2006).

Mentors/advocates

In *Rwanda*, Care International has implemented a Nkundabana mentoring/advocacy program, in which Care staff train community volunteers to assist child-headed households in meeting their own material requirements and in dealing with ongoing problems, such as land or property problems. The project has occasionally had the added benefit of raising community awareness of orphans' land rights and enabled the "Nkundabana," who are usually not related to the orphans, to advocate for their land rights from a neutral, disinterested perspective (Rose 2005: 934).

Children's villages

In *Rwanda*, where extended families were decimated during the war and genocide, new types of families, such as groups of unrelated orphans living together, have spontaneously sprung up in the postwar period. NGOs have also assisted orphans in setting up children's villages. The Village of Hope, which was established by the Rwandan Women's Network (RWN), provides widows and children with shelter. The

organization plans to acquire plots for collective farming and to advocate for women's (and possibly orphans') land and property rights (Izumi 2006a: 9; Rose 2005: 934).

School programmes

In *Zambia*, CINDI Kitwe, a community-based organization, has a network of 720 community volunteers who live in the area. It works for the well being of orphans and vulnerable children and in meeting their changing needs in an integrated traditional family and community environment. Initially, CINDI Kitwe focused on home-based care provision, but in recent years, as the number of orphans has exploded, its areas of focus have expanded to include education, health, HIV/AIDS, community support, and training. It acknowledges the growing problem of property-grabbing and aims to start school clubs on the matter of children's rights and to add a component on children's property and inheritance rights within the local school curriculum.

Police programmes

In *Zambia*, the Police Service Reform Programme of 1994 led to the founding of the Victim Support Unit (VSU). The unit was legalized through the Police Amendment Act No. 14 of 1999. One of the objectives of the VSU is to restore confiscated property to women and children. Although many victims of property-grabbing are either unaware of their legal rights or are afraid to pursue their legal rights, an increasingly larger number of orphans are reporting their property-grabbing cases, with the result that the number of convictions for property-grabbing is going up year-by-year. Still, the number of cases that orphans report is only the "tip of the iceberg" (Izumi 2006a: 96-7).

Death and estate planning

In most countries in the region, those people with HIV/AIDS who prepare wills usually do so on their own initiative. Occasionally, people with HIV/AIDS are encouraged to write wills, as in *Zimbabwe*, where a local community-based organization, Seke Rural Home-based Care (SRHBC), assists people with will-writing (Izumi 2006d: 37). Two SRHBC officers are trained in will-writing, and those people whom the officers assisted with will-writing are encouraged to talk publicly about their wills.

In *Malawi*, the organization, Women's Voice, is fostering mass awareness of women's property and inheritance rights, while also mobilizing rural communities to address rights violations through advocacy, counseling, and case referral. Through its "Will Writing Campaigns," Women's Voice sought to sensitize women and men (including traditional authorities) on women's rights. The organization has advocated for fair and equitable dispensation of property at the community level, including reform of discriminatory customary inheritance practices. Moreover, it has been teaching community members how to write a valid will and to observe a will's provisions. Finally, it has trained fourteen (or more) paralegals on matters related to inheritance and succession and has conducted over 550 training events that reached more than 13,000 people. Interestingly, the organization's activities have led to gradual changes in local customary norms (Strickland 2004: 49). Although Women's

Voice focuses on women's property and inheritance rights, presumably the women's children benefit during their lives as well as after their deaths.

Despite the potential security afforded by will-writing, it should also be noted that evidence has surfaced in some countries that wills are contested and that many people hesitate to write wills because of a lack of faith in the legal system (Izumi 2006d: 38 on *Zimbabwe*). Evidence has also indicated that some men prepare wills in order to disenfranchise their wives and children. To illustrate, in *Uganda*, the husband of a woman, Edivina, wrote a will which directed that his property should go to his sisters and his mistress with whom he had a daughter and that his land in the village should be given to Edivina's daughters. Edivina's husband did not pass on his land in Kampala to their sons as he feared that they would then pass on the land to Edivina (Izumi 2006a: 78).

In an effort to provide options for people who are reluctant to write formal wills, some organizations are encouraging parents with HIV/AIDS to prepare memory books, a less formal and more comprehensive approach to preparing last testaments. Ideally, a memory book informs children about family history and establishes a framework for their future. In *Uganda*, memory books have proven to be a simple way for parents to document for the benefit of their relatives and their children many aspects of their lives, including the facts about their property. In essence, the existence of a memory book helps to protect children from property-grabbing because it presents their parents' expectations about the distribution of their property, thereby avoiding the situation in which relatives, who expect to be beneficiaries, are presented with a will for the first time after the deaths of the children's parents (Izumi 2006a: 87).

Legal aid

In *South Africa*, the Women's Legal Centre (WLC) performs several functions. First, it conducts constitutional litigation on women's rights to remove all legal barriers that prevent women's rights from being achieved. Second, it advocates for law reforms that might achieve women's rights. Third, it provides legal advice to women regarding their rights (Izumi 2006a: 48). Presumably women's children benefit from the advice that their mothers receive.

In *Kenya*, FIDA provides legal aid, monitors women's rights, advocates for and educates women, and assists women with referrals.

In *Zambia*, the Justice for Widows and Orphans' Project (JWOP) was formed in 2001 for the purpose of improving the legal status of widows and orphans. The JWOP works directly with widows and orphans who have been victimized by discriminatory laws and practices relating to land rights and inheritance, bringing together six or seven organizations within a network. Among its activities, it advocates for legal reform, trains widows in inheritance laws, provides paralegal advice, takes matters to court, and documents case studies (Izumi 2006a: 92).

Also in *Zambia*, the Law and Development Association (LADA) has initiated a Paralegal Kids Programme that trains select children about various aspects of children's rights. These children further train other children at schools and within communities.

Property rights advocacy in the context of HIV/AIDS

In *Kenya*, the AIDS NGOs Consortium (KANCO) uses a grant to help its members promote property and inheritance rights for women and girls in their programs (“Reducing Women’s and Girls’ Vulnerability ...” 2006). Also in *Kenya*, GROOTS uses a grant to work in three communities to reduce women’s and girls’ vulnerability to HIV and AIDS by safeguarding their property and inheritance rights. The group facilitates group discussions with community leaders, attempts to strengthen “watchdog groups” that might monitor enforcement of women’s and girls’ property and inheritance rights, and trains paralegals in order to improve women’s access to legal services (“Reducing Women’s and Girls’ Vulnerability ...” 2006). Importantly, the group facilitates peer-learning among chiefs about women’s and children’s property rights by enabling well-informed chiefs to train and sensitize other chiefs (see also entry above under *Home-based Care*).

In *Rwanda*, the Rwanda Women’s Network (RWN) is similarly helping to educate administrators and local authorities about women’s land succession and inheritance rights and will-writing, including producing trainer guidelines for use in will-writing clinics. The network also plans to target grassroots initiatives on women’s property and inheritance rights, particularly in the context of HIV and AIDS (“Reducing Women’s and Girls’ Vulnerability ...” 2006) (see also entry above under *Children’s Villages*).

In *Malawi*, Women’s Voices is educating village headmen and others about women’s and girls’ property and inheritance rights (see also entry above under *Death and Estate Planning*).

In *Zambia*, the Strengthening Women’s Property Rights Program is going a step farther than many advocacy programs and is convening legal tribunals to review management and judgment of relevant cases (see “Reducing Women’s and Girls’ Vulnerability ...” 2006: 3-4).

8. CASE STUDIES

The following case studies involving violations of children's property and inheritance rights are taken from the FAO reports, "Report of the Regional Workshop on HIV and AIDS and Children's Property Rights and Livelihoods in Southern and East Africa" (Izumi 2006c: 11-20) and "Report of the National Conference: Women's Property Rights and Livelihoods in the Context of HIV and AIDS" (Izumi 2006b: 16-7). Each case study includes a case description, which summarizes the important points, and a case analysis, which first discusses the legal gaps or obstacles that allowed the property-grabbing and then suggests legal or policy changes (relevant to each national context) that might result in a more just and orphan-protective outcome.

8.1 Case 1: Kenya

Summary: Grace, who is twenty-six years old, was orphaned in 1999 when her father died of AIDS and again in 2004 when her mother died of AIDS. Following her mother's burial, she and her siblings went back to school. After school, they returned to their house, only to discover that their grandfather had locked the door with a padlock. He informed them that they would have to give him the land title deed before he would unlock the door. Fortunately, Grace's sister had hidden the deed, and she refused to relinquish it to him, fearing that he would alter or destroy it. The children's grandfather responded by confiscating the family's cows, and two of their uncles took over the family's farms, harvesting and selling the coffee crop.

Lacking a source of income, the children had no choice but to live with neighbors and friends. Grace sought but did not receive assistance from the Provincial Administration. She also went to NGOs for assistance, and they advised her about "processes." Only after her grandfather beat and hurt her sister, did she take her complaint to court. By early 2006 when she discussed her case at an FAO workshop, she was scheduled to go to court a second time. She was worried that the court process might take years; she did not have sufficient resources to keep going to court.

According to Grace, a representative of the group, Women Living with AIDS, took her to the District Commissioner who wrote a letter to her uncles and grandfather informing them that she and her siblings should be allowed access to their family home; the District Commissioner also instructed her uncles and grandfather to report to his office. Grace said that a community watchdog group associated with GROOTS Kenya accompanied her to her chief and helped her to get a letter that authorized her to pursue the inheritance of her deceased parents' property (Izumi 2006c: 11-4²).

Analysis: This case demonstrates that close relatives of orphans may not only refuse to assume guardianship for the orphans but may even harm the orphans' interests by confiscating their property. Although Kenya's Law of Succession Act of 1982 provides that "reasonable provision" should be made for children (Section 26) and that trusteeship for the property of a surviving child should be taken until the child reaches the age of eighteen (refer to p. 9), the reality is that many guardians, such as

² Grace discussed her case in more depth at an FAO workshop held in Nakuru, Kenya, 21-26 October, 2006 (attended by the author).

the grandfather and uncles of Grace and her siblings, do not make “reasonable provision” and actually deny children access to their family house and property.

This case points to two problems commonly experienced by orphans in Southern and East Africa who try to protest the confiscation of family property: 1) the long and costly complaint process, and 2) the lack of documents to verify land or property rights. Regarding the long and costly complaint process, orphans often require legal aid and the assistance of a legal advocate to present their complaint to officials or at court. Regarding the lack of documents, orphans usually require various documents, including their birth certificates, a marriage certificate for their parents, and/or a land occupancy document, to back up their complaint. In this case, Grace and her siblings possessed a land title deed, but they still were not able to use it effectively to regain their property rights.

As this case demonstrates, NGOs or government representatives should assist children's parents in preparing, collecting, and/or storing documents along with a last will and testament. Moreover, it also demonstrates that after parents' deaths, orphaned children should be assisted in using documents to maintain their property rights.

8.2 Case 2: Kenya

Summary: Grace (the orphan in Case 1) related the case of Linda, aged twenty-three, who lived with her grandmother. Linda's uncle demanded access to her deceased parents' National Social Security Fund (NSSF), and he emptied their bank account. He also confiscated the original copies of important documents, giving Linda only photocopies. Linda has no idea how to protest her uncle's property-grabbing (Izumi 2006c: 12).

Analysis: Similar to Case 1, this case demonstrates the importance of safeguarding documents, such as relating to bank accounts, at a location where they can be accessed by orphans but not confiscated by relatives. This case also demonstrates the necessity of putting the assets of orphans' parents within a trust fund that can only be accessed with the orphans' knowledge and consent. Although efforts need to be taken to protect the moveable property of orphans (e.g., houses, furniture, household utensils, livestock), such as by taking inventories before their parents die, efforts also need to be taken to protect the non-moveable property (e.g., bank accounts or pensions), such as by putting money in a trust fund, by allowing the orphans' guardian to access the money only with the consent of their advocate, or by requiring that orphans must consent to and sign for the release of money.

Finally, this case indicates that national legislatures should designate the percentage of parental assets that should be reserved for the support of orphaned children—as the lawmakers of several countries, including Zambia and Malawi, have done—and that such laws should be enforced. Of interest, Linda was twenty-three years old—beyond the age of majority—and yet she was not able to defend against her uncle's property-grabbing.

8.3 Case 3: Rwanda

Summary: Mary is a twenty-four year old orphan who was born in a family with eleven members. Her parents and eight brothers died during the 1994 Rwandan genocide when she was 12. She was the only survivor in her family.

Mary is currently living in Kigali where she heads a household of her cousins who also lost their parents during the genocide. Her task is burdened by poverty and the physical and psychological challenges of her HIV status, her severe war-time injuries from a spear and machetes, and her experience with sexual violence.

In 1996, two years after the deaths of her parents, her paternal uncle returned from Congo where he had been in exile. Subsequently, he took over her family land. She reported the matter to the local authorities who helped her regain the land in 1997. Unfortunately, when new authorities were later installed, her uncle again took over the land. She could not pursue the case because she was unable to keep raising money for traveling to Cyangugu, the provincial center.

Mary indicates that she needs but lacks professional and moral support to assist her with documentation. She says that she wants training on (legal and administrative) “structures and mechanisms” so that she knows “where to go for certain issues” and how to process these issues. She also argues that relatives of orphans should be informed about the laws that protect children’s property and inheritance rights. Finally, she suggests that children should be “encouraged to request their parents to give them property before they die as well as sensitize them to leave written wills that are gender sensitive.”³ The Rwanda Women’s Network (RWN) has assisted Mary and her family members psychologically and with free medical care (Izumi 2006c: 15).

Analysis: This case represents the typical “double bind” experience of many orphans: their relatives or other people confiscate their land and property, and they subsequently have no assets to protest the confiscation.

This case also demonstrates the tenuousness of decisions reached by some local authorities. In Rwanda, in particular, where the local authorities were continuously replaced during and after the war, community residents have not always been able to rely on them to verify and support their land claims. (Many Rwandans, including orphans, complained to the author (Rose 2004 and 2005) that one of their primary problems in maintaining land control was that the decision reached by one local authority was later not acknowledged by a subsequent local authority. As one orphan explained, “I won back my land, but when a new leader was installed, he said he didn’t know about my situation and he refused to support my land claim.”) Clearly, an enforcement mechanism needs to be put in place in order to avoid the situation in which decisions in land and property disputes are contingent upon the personality and will of each authority. In all cases, decisions should be written down, supporting documents should be stored in safe locations, and the authorities should be instructed to enforce the decisions.

³ In the event that a child’s parents die first, a will might provide that the property would revert to the child’s parents rather than be transferred to other relatives.

This case also demonstrates the force of custom. As Mary commented, “Relatives take property because they are greedy and take advantage of children.” In essence, greedy relatives believe that custom entitles them to the property, and they know, in any case, that they will not likely be obstructed when they take over the property of the orphans’ parents (first, orphans have limited status and power and, second, the laws and policies to protect orphans are not known or are not enforced). In Rwanda, many people either do not know about the new succession law, the “Law on Matrimonial Regimes, Liberalities, and Successions” of 2000 (refer to p. 7), or they refuse to adhere to its provisions, preferring instead to apply customary law.⁴

Mary offers an important suggestion: children should be encouraged to ask their parents to leave them property and write their wills before they die. Her suggestion is one step away from the idea that children need to be trained in schools about property rights and will-writing and then further encouraged to pass on the relevant lessons to their parents. Importantly, children’s parents need to be informed in numerous ways by various parties (e.g., NGO representatives or local teachers) about the importance of making advance plans for protecting their children’s property interests through will-writing and estate planning. (Presumably many of the children’s sick parents will not be visited by representatives of NGOs, or when they are, the visitors’ focus will be primarily on health care or livelihood issues. Therefore, schools, as well as home-based caregivers, should serve as a conduit for passing on legal information.) (Refer to *School Programs* in chapter 7.)

8.4 Case 4: Swaziland

Summary: Thandeka, a fourteen-year-old girl, was orphaned in 2003 when her mother, an unmarried woman who was living at her parental home with her children, died of AIDS. Thandeka’s mother was an active member of the organization, Swazi Positive Living (SWAPOL). After her mother’s death, Thandeka’s maternal uncles chased her and her sisters from their home and told them to go to their father’s home. But the children did not know where he stayed. Eventually, the children were “adopted” by one of the community members (Izumi 2006c: 16).

Analysis: This case reveals the particular property and inheritance problems of orphans born to unmarried mothers in societies that adhere to customary practices of patrilineal succession. In such societies, unmarried women may be given land and a house at their birth homestead. But their land rights are fragile: the rights depend upon the availability of land/houses and the good-will and generosity of the male homestead members (their father, uncles, brothers). These women’s land rights also depend on the presence of a son among their children who can claim land inheritance rights.⁵

⁴ The author interviewed a number of Kigali residents about the provisions of the new succession law and received variable responses. Most residents knew about the existence of the law but not necessarily its exact provisions. Interestingly, a number of women and some children said that they had initiated property confiscation complaints—even without knowing the exact provisions of the law.

⁵ Although Thandeka did not specify this last point, the author knows from her own land dispute case studies in Swaziland during the 1980s (Rose 1992, 2002) that unmarried mothers and their daughters maintain their land/property rights through the sons. Even if Thandeka and her sisters had known where their father lived, they would likely have encountered problems obtaining land and housing because their father had not married their mother, they had never lived at their father’s place, and they had no brother.

Another interesting aspect of this case is that Thandeka and her siblings were adopted by a community member rather than by their own relatives. This case serves as a testament to the fact that community members often intervene to care for orphans as well as to the associated argument that such community members should be assisted with their efforts.

8.5 Case 5: Zambia

Summary: Namoonga is a fourteen-year-old girl who was the first-born child in a wealthy family. Her parents divorced in 2000 because her father had a girlfriend. After the divorce, her mother moved out of their shared house and died shortly thereafter. Her father suffered from a stroke which paralyzed him. Namoonga's father married his girlfriend, and Namoonga stayed with her father and her stepmother, the latter who was cruel to her, imposing heavy household chores on her such that her performance at school was affected. Her father did not intervene on her behalf.

Following her mother's death, Namoonga's father took her to live in the village of his younger brother. This man, her uncle, did not and still does not support her financially, and her father also does not send her any money. To make matters worse, her aunt is cruel to her, and the villagers are not friendly to her. Namoonga's deceased mother had once had a good job and had acquired some assets. After she died, her relatives grabbed everything from household goods to money in a bank. Currently, Namoonga's father is trying to sell his only house in order to acquire money for his medications. She asked him not to sell the house because she needs support.

Namoonga praises supportive NGOs, such as the Paralegal Kid's Project, that have taught her and other orphans about children's rights and property-grabbing (Izumi 2006c: 16-7).

Analysis: This case demonstrates that orphans with one parent, mostly maternal orphans, are often abandoned and vulnerable to the same extent that double orphans are. Basically, Namoonga's sick father is not supporting her, and she is forced to look after herself.

As indicated in Case 2, lawmakers or policymakers need to protect against orphans' relatives gaining access to and misusing the money (bank accounts and pensions) of the orphans' deceased parent(s). Such accounts should be put in trust for the orphans until they reach the age of majority and should only be released with the consent of the orphans' advocate (preferably not a relative) and the orphans themselves. This case reveals the necessity of assigning legal advocates who will protect orphans' interests, including property interests, both *before and after* their parents' deaths. In effect, policymakers should find ways to protect against a parent selling off the family's assets in order to pay for medical treatment or other expenses—a course of action that usually impoverishes the surviving orphans. As is the situation of many orphans, Namoonga's father wanted to sell the family house in order to pay for his medications.

This case also reveals the importance of encouraging sick parents who have assets, such as Namoonga's mother, to write a will in order to ensure that their assets are put

in trust for their children. Possibly Namooonga's mother did not write a will because her husband was still living and because she believed that she, as a woman, was not expected to write a will. Nonetheless, she should have written a will in order to ensure that at least those assets which she had personally acquired would be used for the benefit of her children.

As was argued in Case 3, orphans should be taught about will-writing at school, or they should be enabled to attend legal workshops so that they can encourage their parents to write a will. Although Namooonga benefited from the advocacy of the Paralegal Kid's Project, it would seem that this organization's intervention came only after her mother's property had been grabbed and only after she had suffered at the hands of her step-mother and other relatives. Because Namooonga was quite young at the time of her mother's death, a social worker or a representative from an NGO should have intervened earlier to assist with will-writing and to protect against property-grabbing.

8.6 Case 6: Zambia

Summary: Mwaya is a seventeen-year-old boy who is the last born of eight children. His father died in 1992, and his mother died in 1993 when he was four-years-old. His parents, who considered themselves to be middle-class, left a will. However, this will was their second will, which Mwaya's father had prepared after his mother (Mwaya's paternal grandmother) had heard about the first will: she forced him to write a second will that made her the primary beneficiary.

Before Mwaya's parents died, various relatives, including his grandmother and an uncle, grabbed property, including a t.v., a VCR, two cars, and about twenty goats. Moreover, after his parents died, Mwaya's paternal aunts and uncles took all the property that was not specifically designated for the orphans. Mwaya and his siblings were left in an impoverished condition. After his parents' deaths, Mwaya was assisted by an older brother and an older sister until they died; thereafter, he and his remaining siblings were split up into different groups. Mwaya was taken in by his mother's sister and was eventually assisted by the organization CINDI with education and food.

In Mwaya's view, orphans should be educated in order that they can find employment and lead independent lives. He also believes that orphans should be educated regarding their property rights in order that they can defend these rights against the claims of relatives, including those who were also dependent on the financial resources of the orphans' parents (Izumi 2006c: 17-9).

Analysis: This case reveals the complexity of financial dependencies within large extended families. Mwaya's father was reasonably well-off and was able to support a number of his relatives. As in many African families, these relatives had possibly assisted Mwaya's father, such as with his education, and he may have felt reciprocally obligated to support them. In other words, the relatives may have felt that they were entitled to Mwaya's father's support, despite the fact that he had many dependent children. In effect, the facts of this case point to a common problem in Southern and East Africa: children's parents may be torn between their duties to their extended family members and to their children.

Zambia's succession law, the "Intestate Succession Act" of 1989," provides that 50% of a deceased's estate should be left for the care of surviving orphans. In Mwaya's case, however, his father left a will. Although Mwaya does not specify exactly what his father left for him and his siblings, he does indicate that his father made his grandmother the primary beneficiary and even distributed property to his relatives before he died. The argument may be raised, as in Case 5 above, that ailing parents should not be permitted to distribute the bulk of their estate, whether for the purpose of purchasing medicine, as in Case 5, or for satisfying the demands of relatives, as in this case. In effect, official efforts should be undertaken before the deaths of children's parents to protect the children against losing their inheritance rights: such efforts might involve monitoring the will-writing process and property dispersals (e.g., through maintaining an inventory of property).

In this case, Mwaya's relatives' property-grabbing may have been reduced had Mwaya's older siblings been educated about property rights such that they were equipped to protect the sibling group's property rights. Moreover, the property rights of the younger siblings, such as Mwaya, should have been monitored by an external advocate in order that such rights could not be eventually usurped by the older siblings. (Mwaya was very young at the time of his parents' deaths.)

8.7 Case 7: Uganda

Summary: Martha, an eighteen-year-old orphan, lost her father to AIDS when she was eight and her mother to AIDS when she was eleven. Of the seven surviving children, Martha and another are HIV positive. At the time of her mother's death, Martha did not know that her mother had died of AIDS and that she herself was HIV positive.

Martha's aunts and uncles began grabbing the family's property while her mother was ill, and her mother was unable to prevent their actions because she was sick and had seven children to care for. When Martha's mother died, the family was living in a rented house and had no income. Soon after her mother's death, Martha and her siblings were sent to live with various relatives and the remainder of the family's property was distributed. These relatives did not consult with or inform the children about the distribution of the property, and Martha says that she did not feel free to ask about the property because she believed her questions would be resented by her guardians.

After Martha was eventually tested for HIV and proved to be positive, she experienced discrimination in her foster household. According to her, she was more concerned about her health than about pursuing her property and inheritance rights. Currently, Martha is supported by the Mildmay Centre where she gets her ARVs, treatment, and tuition fees.

Martha argues that governments should consult with orphans about how to design and monitor their programs in order that more effective utilization of funds might result. She also argues that governments should support children's groups and supply ARVs to children. In her view, the guardians of HIV-positive orphans have already declared a death sentence on them and are therefore unwilling to use family resources to support them (Izumi: 2006c: 19-20).

Analysis: This case demonstrates the importance of including orphans in family council meetings where the distribution of their deceased parents' property is discussed, of allowing them to contribute to the discussions and decisions about the distribution of the property, and of informing them about the final distribution of the property. In this case, Martha and her siblings were not consulted, and they did not know what happened to their parents' property.

This case also demonstrates the importance of engaging an outside advocate who can speak for children's interests. As Martha pointed out, she hesitated to raise any questions about her parents' property for fear of alienating her foster parents and thereby losing her shelter as well as her chance to go to school and be fed. Martha thinks that NGOs, which are involved within communities, are in a good position to be pro-active in stopping property-grabbing. In other words, NGOs, as external and objective entities, are in a good position to assist children (possibly before their parents die) and to take measures to stop property-grabbing before it happens. Unfortunately, when NGOs intervene only after property has been grabbed, the financial costs incurred in challenging the property-grabbing tend to be high and the damage to family relationships are considerable. As discussed above, Martha's parents' property should have been put in trust for the children.

8.8 Case 8: Zambia

Summary: Emmah is a thirteen-year-old orphan whose mother died in 2002 and whose father died in 2005. After her father's death, she was sent to stay with her mother's sister. Although Emmah's mother had secured her aunt's consent to care for her, Emmah's aunt treated her unkindly by denying her food and by making her work hard before school. Emmah spoke to her teacher about her aunt's treatment of her, and her teacher spoke with her aunt about Emmah's complaint. Emmah's aunt was angry that she had complained, and she treated Emmah even more poorly. Emmah then sought assistance (food and shelter) from her mother's friend, a neighbor of her aunt. Again, her aunt became angry, with the consequence that her mother's friend sent her back to her aunt. Currently, Emmah is living with her father's sister who is also unkind to her.

Emmah did not discuss property-grabbing when relating her situation, but she did indicate that she received no or little property from her parents and is impoverished (Izumi 2006b: 16).

Analysis: This case points to the importance of formalizing mentorship and supporting community mentors, such as Emmah's neighbor, who try to assist impoverished and mistreated orphans. In addition, it demonstrates the importance of intervening to assist orphans who reach out for help, such as from a teacher. Emmah's teacher attempted to assist her but her intervention only worsened her situation. Perhaps various strategies need to be developed and employed by governments to provide professional family counseling to orphans and their guardians.

9. RECOMMENDATIONS

9.1 Methods to protect children's property and inheritance rights

A number of *preventive measures* can be undertaken to protect children's property and inheritance rights:

Design legal interventions

- Conduct a legal review of areas that impact on vulnerable children, including property and inheritance rights, and use this review to identify gaps in legislation and further to reform legislation.
- Develop and enact new laws that more completely recognize and protect orphans' rights—apart from adults' rights and within an orphans' rights framework. Widows and children's property rights are typically lumped together in discussions, as in UNICEF's report on "Africa's Orphaned Generations" (2004: 20); these respective sets of rights should be differentiated. The new laws should specify children's property and inheritance rights and the methods for protecting these rights.
- Create new legal standards to prevent violations of children's property rights. One such standard would allow orphans of non-legal unions to inherit their deceased parent's (usually the father's) property.
- Create new legal approaches to prevent violations of children's property rights (e.g., enact a law to regulate the operation of financial institutions, create the Office of the Trustee, and modify probate hearings to allow the admission of memory books into evidence).
- Instruct courts (or special guardianship courts) on recognized professional criteria for dealing with minor orphans' property claims.
- Monitor compliance to the laws that protect children's property and inheritance rights.

Design policy interventions

- Develop national policy initiatives that protect orphans' property and inheritance rights. For example, governments should promote succession planning and encourage families to write their wills in order to counter property-grabbing.
- Enable external parties to monitor orphans' guardians in order to ensure that the guardians are not violating orphans' property rights.

Engage in succession and estate-planning with children's parents

- Encourage and assist parents in preparing, assembling, and/or safely storing documents (e.g., birth and marriage certificates, land title deed, land occupancy agreement, and/or a will) which the children will likely need to verify their legal rights after their parents' deaths. Orphans may not be able to prove their rights if their parents do not prepare or inform them about such documents. The parents may choose to transfer such documents to older orphans or to give such documents

to a trusted person for safekeeping. Advance efforts by parents may avoid property confiscations by relatives who argue that the orphans cannot prove their property and inheritance rights because they lack documents (either the documents were never prepared or the documents were confiscated by the relatives because the orphans' parents did not take precautions to safeguard them) (see e.g. Cases 1, 2, 5, and 7 in chapter 8).

- Encourage and assist parents in writing wills and in engaging in estate planning. The wills should clearly leave the parental property for the use and benefit of the children. The property for minor children should be put in a trust, and the property for children who have reached the age of majority should be transferred to them. Importantly, provisions should be made to provide for all the children individually—both those that have attained majority and those that are still minors. (In Rwanda, the author discovered many cases in which minor orphans had been denied their property and inheritance rights by their older siblings who had taken over the parental property on behalf of the entire sibling group, only to use the property exclusively for their own benefit.)
- Encourage and assist parents in selecting the future guardian of their children.
- Encourage and assist parents in writing memory books. In Uganda, memory books have proven to be an effective form of succession and estate-planning (Subbarao and Coury 2004: 61).

Rethink guardianship

- Secure children's property and inheritance rights by assisting traditional caregivers (i.e., families) in new ways. The caregivers might be assisted through community awareness programs that encourage community action and responsibility (e.g., community childcare committees as discussed by Guest for South Africa, 2001: 57-70). Moreover, the caregivers should be supported psychologically and economically (e.g., through home visits, skill training programs, and business grant programs) in order to ensure that they have sufficient means to assist orphans and reduced incentives to deny them their rights.
- Assist NGOs in supporting orphans who choose to care for themselves. In addition, respect orphans' initiatives and ideas about how they might care for themselves.
- Develop new types of caregivers such as independent advocates who are assigned to orphans—particularly minor orphans who are pursuing property claims.
- Support caregivers in the community (e.g., with school fees or food supplements) who take in unrelated children (e.g., Case 4 in Swaziland).

Develop a child-centered framework

- Include children in research endeavors.
- Target benefits to children not families (Hunter 2000: 23). (This approach may be controversial.)
- Develop legislation that targets children and their rights. Uganda's Children's Statute is a comprehensive and revolutionary framework. Hunter (2000: 26)

argued that the reviews needed to be extended to account for the impact of HIV/AIDS on children and families. In addition, she commented that only two countries in Eastern and Southern Africa (Malawi and Zimbabwe) had a specific national orphan policy (not formally adopted by Parliament). Since then various countries in the region have developed National Plans of Action (NPAs).

- Ask children for their input regarding legislation or policy that would influence their property and inheritance interests. For example, ask children to contribute to discussions at the national and community levels about proposed laws or policies that would effect their land interests—such as those dealing with expropriation, registration, or titling.
- Recognize children’s right to own and manage their deceased parents’ property.
- Train both children and their caregivers on the laws and policies that influence children’s property and inheritance rights.
- Grant self-sufficient orphans the right to represent their specific property interests at various institutions, such as family council meetings, meetings with local authorities, and court. As the orphan Grace from Kenya (Case 1), explained, “It is time the society stopped treating orphans as mere children. It is time they got recognized, because of their plight, as children-made-adults-by-death, who have a right to manage their property. As it is, most of us have experienced more than adults who do not have to visit Provincial Administrations, courts, paralegals, and NGO offices seeking intervention” (Izumi 2006c: 14). Grace went on to argue that society no longer cares for widows and orphans, instead leaving them to fend for themselves. She concluded that society needs to recognize that times have changed such that orphans’ property rights must be recognized and orphans must be given the mandate to manage their deceased parents’ property. (Grace’s argument resembles the author’s argument (Rose 2005) that self-supporting orphans should be granted “active legal capacity.”)

Advocate for children

- Assign independent advocates to orphaned and vulnerable children in order to enhance their benefits and protect their interests. Essentially, the advocates must not have a personal interest in the children’s property claims—unlike traditional guardians or community members; and the advocates should serve both to prevent and to correct violations of children’s rights. Such advocates might be private individuals, private or public institutions (i.e., NGO representatives or government trustees), or trained professionals. The advantages of official trustees or trained professionals would be that they would have an ongoing (rather than an ad hoc) mandate to protect orphans’ interests, they would offer cumulative professional training and experience, and they would not be community members and thus would presumably be less biased regarding community affairs. Most advocates should be in a position to provide orphans with information, help them obtain required documentation, accompany them to administrative and legal hearings, or assist them with organizing and lobbying efforts. Hunter (2000: 17) mentions that Uganda provides voluntary child advocates to help children redress exploitation, while Uganda, Malawi, Zambia and Zimbabwe support village committees to assist children. Guest (2001: 57-70) discusses community childcare committees in South Africa.

- Form Children's Advisory Committees at the appropriate administrative levels to assist in the care and protection of orphans (see Kenya 2001: 25).
- Support NGOs in their efforts to educate children and their families about orphans' property and inheritance rights and in their efforts to assist orphans in pursuing these rights.

Educate and train people

- Educate children regarding the meaning and implementation of laws and policies. Many of the countries in Southern and East Africa have recently passed (or will soon pass) new laws. For example, as concerns new land laws, many such laws have implications for children's land interests because they promote modern landholding systems and land use techniques that children may not have the resources or knowledge to take advantage of.
- Train judges, magistrates, police, and relevant local and national officials on laws relating to children's property and inheritance rights and their obligation to respect these rights.
- Raise awareness and train the public on inheritance matters, focusing on the requirements under the law and the protections offered by the law.

A number of ***corrective measures*** can be undertaken to address violations of children's property and inheritance rights:

Implement legal interventions

- Enforce and punish violations of existing laws that protect children's property and inheritance rights.
- Create new legal standards to correct violations of children's property rights. Such standards would better accommodate minor children's interests and better enable them to defend their property and inheritance rights. For example, orphans who are challenged to prove their parents' land rights should be allowed to rely on oral testimony in the event that the children do not possess written documentation.
- Implement legal policies that prevent delaying tactics by members of a deceased man's extended family who want to prevent his surviving spouse as well as his children from settling his estate.
- Provide financial assistance to indigent orphans who need help in defending their property claims. For example, organizations might waive fees for legal advice or provide paralegals to orphans.
- Encourage courts to undertake test case litigation regarding children's property rights.

Implement policy interventions

- Create national standards that protect and enhance orphans' ability to defend their property rights. For example, governments should encourage (perhaps require) family councils and land commissions to include orphans in discussions about the distribution of their family land and property.

- Encourage local leaders to become involved in cases in which children have been dispossessed of their land (or are threatened with dispossession of their land). The local leaders should intervene to ensure that the children are treated equitably and receive a fair share of the property. In difficult cases involving children's property and inheritance rights, the local leaders should also be encouraged to refer the children to NGOs and legal bodies, as appropriate.

9.2 Future research and development priorities

Conduct Research

- Design and implement quantitative surveys to determine the extent and nature of violations against children's property and inheritance rights and use the information obtained from the surveys to develop orphan-friendly policy that advocates for orphans' rights.
- Examine, compare, and evaluate the strengths and weaknesses of innovative caregiving programs that address orphans' care and housing needs. Policymakers in Africa will likely continue to support traditional caregiving methods, such as placing orphans in foster families (see Rwezaura, 2001: 431-4), but innovative programs (e.g., mentorship programs) might be implemented on a pilot basis in an effort to better secure children's property and inheritance interests.
- Examine the operation of customary institutions and the courts in order to determine how children's property rights are being handled.

Undertake development activities

Promote legal reform

- Work toward eliminating discriminatory laws and customs that undermine children's property rights.
- Establish national legal aid systems with the capacity to handle children's property and inheritance claims.
- Find the means and the will to investigate, prosecute, and punish violations of children's property rights.

Promote land reform

- Introduce a simple and low-cost system of registering the land of AIDS patients and assist them with registering their land so that after their deaths, their children will have an easier time of proving their land rights and will be less at risk of land-grabbing.
- Assist orphans with land administration activities so as to ensure that their land rights are protected.
- Encourage land administrators to allocate land to the most vulnerable groups, including orphans.

Educate and train

- Develop educational toolkits that include a component on children's property and inheritance rights, with the goal of sensitizing lawmakers and guiding parliamentary discussions about relevant legislation. At the same time, educate local leaders, residents, and orphans about the land and property rights of orphans and other vulnerable groups.
- Develop and implement public awareness campaigns to inform people about children's property rights. Such campaigns might involve performing plays, songs, and poems.

Support local authorities

- Encourage and enable local authorities to acknowledge and address eviction and property confiscations involving orphans.

Support NGOs

- Encourage NGOs to collaborate and share information. Numerous NGOs in each country are working with orphans; these NGOs should develop referral mechanisms so that each NGO is better equipped to provide the services that each particular orphan requires. Moreover, NGOs in the region should meet and share information and experiences about best and worst practices in each country so that good practices are promoted and bad experiences avoided. Finally, an information management system should be developed at local, national, and international levels so that information about orphans' property and inheritance problems is available.
- Enable NGOs to protect orphans' property and inheritance rights, sometimes acting as guardians.

Explore community care options

- Encourage community care of orphans in order that their property and inheritance rights may be maintained and protected.
- Design and implement innovative caregiving programs for orphans, such as home-based care, that enable them to maintain their property and inheritance rights. In addition, begin home-based care when a child's parents are sick so that he/she can be assisted in dealing with the disease and in planning for after a parent's death (e.g., will and memory-book writing and property administration).

Explore guardianship options

- Implement innovative forms of guardianship, including community mentors, State-appointed trustees, and an Ombudsperson, in order to address orphans' complaints. Consider appointing village committees or village overseers to monitor property distribution after the death of AIDS patients with minor children.

10. CONCLUSIONS

The HIV/AIDS pandemic in Africa has transformed the “orphan” phenomenon: it has created many more orphans than in the past; it has created younger orphans who have lost younger parents; it has impoverished some orphans’ parents before their deaths, thus threatening the orphaned children’s livelihoods and future prospects; it has impoverished members of extended families, thus reducing their incentives to maintain and defend orphans’ property and inheritance rights; and it has decimated extended families, thus eliminating potential guardians who might support orphans.

This desk study has argued that the orphans of Southern and East Africa should be assisted in various ways: they should be informed of their property and inheritance rights; they should be given the practical “tools” for asserting these rights; and they should be assisted with pursuing these rights. Toward these ends, lawmakers and policymakers should ensure that orphans’ property and inheritance rights are protected both in legislation and enforced in practice. Although legal and policy guarantees for orphans will not eliminate their property problems, such guarantees will level the “playing field,” thereby reducing the incidence of property usurpations, or alternatively, give orphans a better chance of fighting property usurpations when they do occur. Importantly, orphans who succeed in maintaining their property and inheritance rights will likely face more secure futures.

In sum, this desk study emphasizes, first, that the governments of Southern and East African countries must recognize that the current national laws and administrative structures cannot, in their existing form and ideology, provide the institutional responses required by the new social conditions inflicted upon communities by the spread of HIV/AIDS, and second, that the governments of these countries must take urgent action to reform national laws and to strengthen administrative structures.

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Further information about the LSP

The Livelihood Support Programme (LSP) works through the following sub-programmes:

Improving people's access to natural resources

Access of the poor to natural assets is essential for sustainable poverty reduction. The livelihoods of rural people with limited or no access to natural resources are vulnerable because they have difficulty in obtaining food, accumulating assets, and recuperating after shocks or misfortunes.

Participation, Policy and Local Governance

Local people, especially the poor, often have weak or indirect influence on policies that affect their livelihoods. Policies developed at the central level are often not responsive to local needs and may not enable access of the rural poor to needed assets and services.

Livelihoods diversification and enterprise development

Diversification can assist households to insulate themselves from environmental and economic shocks, trends and seasonality – in effect, to be less vulnerable. Livelihoods diversification is complex, and strategies can include enterprise development.

Natural resource conflict management

Resource conflicts are often about access to and control over natural assets that are fundamental to the livelihoods of many poor people. Therefore, the shocks caused by these conflicts can increase the vulnerability of the poor.

Institutional learning

The institutional learning sub-programme has been set up to ensure that lessons learned from cross-departmental, cross-sectoral team work, and the application of sustainable livelihoods approaches, are identified, analysed and evaluated for feedback into the programme.

Capacity building

The capacity building sub-programme functions as a service-provider to the overall programme, by building a training programme that responds to the emerging needs and priorities identified through the work of the other sub-programmes.

People-centred approaches in different cultural contexts

A critical review and comparison of different recent development approaches used in different development contexts is being conducted, drawing on experience at the strategic and field levels in different sectors and regions.

Mainstreaming sustainable livelihoods approaches in the field

FAO designs resource management projects worth more than US\$1.5 billion per year. Since smallholder agriculture continues to be the main livelihood source for most of the world's poor, if some of these projects could be improved, the potential impact could be substantial.

Sustainable Livelihoods Referral and Response Facility

A Referral and Response Facility has been established to respond to the increasing number of requests from within FAO for assistance on integrating sustainable livelihood and people-centred approaches into both new and existing programmes and activities.

For further information on the Livelihood Support Programme,
contact the programme coordinator:
Email: LSP@fao.org

LSP WORKING PAPERS to December 2006

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- Warren P., (December 2002) **Livelihoods Diversification and Enterprise Development: An initial exploration of Concepts and Issues.** FAO, LSP WP 4, Livelihoods Diversification and Enterprise Development Sub-Programme.
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- Evrard O., (Janvier 2004) **La mise en oeuvre de la réforme foncière au Laos : Impacts sociaux et effets sur les conditions de vie en milieu rural** (with summary in English). FAO, LSP WP 8, Access to Natural Resources Sub-Programme.
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Email: LSP@fao.org

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