

**The protection of the rights of children affected by HIV/AIDS in South Africa and Botswana:  
A critical analysis of the legal and policy responses**

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**Declaration by Supervisors**

As the candidate’s supervisors we agree to the submission of this thesis.

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## DECLARATION

I -----declare that-

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Contents	
Declaration by Supervisors .....	i
DECLARATION .....	ii
ACKNOWLEDGEMENT .....	iii
Table of Cases .....	xi
Abbreviations .....	xii
Chapter 1 Introduction .....	1
1.0 Background to the study .....	1
1.1 Relevance of the study .....	5
1.2 Statement of the research problem .....	7
1.2.1 HIV/AIDS in the Southern Africa Development Community (SADC) region.....	8
1.2.2. Brief HIV/AIDS statistics in South Africa and Botswana .....	10
1.2.3. Impact of HIV/AIDS on children in South Africa and Botswana.....	11
1.3 Scope of the study .....	14
1.4. Research hypotheses .....	15
1.5 Research questions .....	16
1.6 Literature review .....	16
1.7 Limitations to the study.....	25
1.8 Research methodology .....	26
1.9. Outline of chapters .....	26
Chapter 2 Conceptualising the protection of the rights of children affected by HIV/AIDS in South Africa and Botswana.....	29
2.0 Introduction.....	29
2.1 Definition of concepts .....	29
2.1.1 “Child-centred approach” to examining the legal protection available to children .....	29
2.1.2 Rights-based approach to the protection of children affected by HIV/AIDS .....	31
2.1.3 The “best interest of the child” principle.....	32
2.2 Theories of children’s rights .....	34
2.3 Specific rights of children that are likely to be affected by HIV/AIDS.....	37
2.3.1 ESCR.....	38
This section attempts an outline of how HIV impacts on children infected by HIV/AIDS or those vulnerable to HIV infection and how their ESCR rights are likely to be infringed. These include: .	38
This section attempts an outline of how HIV impacts on children infected by HIV/AIDS or those vulnerable to HIV infection, and how their CPR rights are likely to be infringed. ....	40
2.4 The impact of HIV/AIDS on children’s rights.....	42

2.3.1	The loss of a parent or care-giver.....	43
2.3.1.1	Financial stress on children as a result of parents' ill-health.....	44
2.3.1.2	Poor access to nutrition.....	45
2.3.2	The right to be protected by a parent or guardian .....	46
2.3.2.1	Lack of assistance with decision-making .....	46
2.3.2.2	Child exploitation .....	47
2.3.2.3	Property grabbing and other inheritance issues .....	48
2.3.4	The right to be protected from stigma and discrimination .....	50
2.3.4.1	Stigmatisation of children infected by HIV/AIDS .....	50
2.3.5	The right to protect themselves against HIV infection.....	52
2.3.6	The right to access HIV care and treatment.....	53
2.4	Cross cutting legal complexities .....	55
2.4.1	HIV testing of children .....	55
2.4.2	Evolving capacity and accessing sexual and reproductive health services below the age of majority .....	57
2.4.3	The rights of children participating in HIV/AIDS related scientific research .....	58
2.6	The development of a child-centred and HIV/AIDS aware jurisprudence.....	61
2.7	Conclusion .....	64
Chapter 3 Comprehensive audit of international standards relevant to the protection of children affected by HIV/AIDS in South Africa and Botswana.....		65
3.0	Introduction.....	65
3.1	Status of international HIV/AIDS and standards in the legal systems of South Africa and Botswana.....	65
3.2	UN standards on the protection of children affected by HIV/AIDS.....	69
3.2.1	Binding, non HIV/AIDS-specific instruments .....	69
3.2.1.1	The international Covenant on Civil and Political Rights (1969) (ICCPR).....	69
3.2.1.2	Human Rights Resolution 2003/47; The Protection of Human rights in the Context of HIV/AIDS 72	
3.2.1.2	Human Rights Resolution 2005/84 on The Protection of Human Rights in the Context of HIV/ AIDS.....	72
3.2.1.4	International Covenant on Economic, Social and Cultural Rights (1976) (ICESCR).....	73
3.2.1.5	The Ottawa Charter for Health Promotion (1986).....	77
3.2.1.4	The CRC (1990) .....	78
3.2.2	HIV/AIDS-specific instruments .....	87

3.2.2.1	The World Health Assembly (WHA) Resolution 41.24 on the Avoidance of Discrimination in relation to HIV infected People and People with AIDS (1988).....	87
3.2.2.2	The International Guidelines on HIV/AIDS and Human Rights (1996) (the Guidelines) 87	
3.2.2.3	The Millennium Development Goals (2000) (MDGs) .....	89
3.2.2.4	UNCHR, Human Rights Resolution 2001/51: The Protection of Human Rights in the Context of HIV and AIDS (2001).....	90
3.2.2.5	The UN National Assembly (UNGASS) Declaration of Commitment on HIV/AIDS (2001) 91	
3.2.2.6	Political Declaration on HIV/AIDS (2006) Res/60/262.....	92
3.3	Conclusion .....	94
Chapter 4	African regional standards relating to the protection of children affected by HIV/AIDS in South Africa and Botswana.....	96
4.0	Introduction.....	96
4.1	Binding non-HIV/AIDS-specific instruments .....	97
4.1.1	The African Charter on Human and Peoples Rights (1981) (ACHPR) .....	97
4.1.2.	The African Charter on the Rights and Welfare of the Child (ACRWC).....	101
4.1.3	The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (The Protocol). .....	102
4.2	Non-binding HIV/AIDS-specific instruments .....	104
4.2.1	Tunis Declaration on AIDS and the Child in Africa (1994) .....	105
4.2.2	The Resolution on Regular Reporting of the Implementation Status of OAU Declarations on HIV/AIDS in Africa (1996).....	105
4.2.3	Grand Bay (Mauritius) Declaration and Plan of Action (1999).....	106
4.2.4	Lomé Declaration on HIV/AIDS in Africa (2000) .....	106
4.2.5	Abuja Declaration and Plan of Action on HIV/AIDS, tuberculosis and other related Infectious Diseases (2001) and the Abuja framework for action for the fight against HIV and AIDS, Tuberculosis and Other Related Infectious Diseases (ORID) .....	107
4.2.6	Maputo Declaration on HIV/AIDS, Tuberculosis Malaria and Other Related Diseases (2003)-	108
4.2.7	Solemn Declaration on Gender Equality in Africa (2004).....	108
4.2.8	The Gaborone Declaration on a Road Map towards Universal Access to Prevention, Treatment and Care (2005) .....	110

4.2.9	Continental Framework for Harmonisation of Approaches among Member states and Integration of Policies on Human Rights and People Infected and Affected by HIV/AIDS in Africa (2005) (The Continental Framework) .....	111
4.2.10	Brazzaville Commitment on Scaling Up Towards Universal Access to HIV/AIDS Prevention, Care and Support in Africa by 2010 (2006) .....	111
4.2.11	Abuja call for Accelerated Action towards Universal Access to HIV/AIDS, Tuberculosis and Malaria Services in Africa (2006).....	112
4.2.12	Africa's Common Position to the UN General Assembly Special Session on AIDS (2006)	113
4.3	SADC Instruments on HIV/AIDS.....	114
4.3.1	Binding non-HIV/AIDS-specific- .....	115
4.3.1.1	Treaty of SADC (1992) .....	115
4.3.1.2	SADC Protocol on Health (1999).....	116
4.3.2	Non-binding Instruments.....	117
4.3.2.1	The SADC Model Law (2008) .....	117
4.3.2.2	SADC Protocol on Gender and Development (2008) .....	121
4.3.2.3	Maseru Declaration on the Fight against HIV/AIDS in the SADC region (2003).....	122
4.3.2.4	HIV/AIDS Framework and Programme of Action 2003 – 2007.....	123
4.4	Conclusion .....	124
Chapter 5 Legislative and policy framework for responding to children affected by HIV/AIDS in South Africa 127		
5.0	Introduction.....	127
5.1.	Provisions regulating the rights of children affected by HIV/AIDS in South Africa .....	128
5.1.1	The Constitution of the Republic of South Africa 1996 .....	129
5.1.2	The Children's Act of 2005 (Act No. 38 of 2005)- .....	131
5.1.2.1	HIV/AIDS specific sections of the Children's Act.....	132
5.1.2.2	Non-HIV/AIDS-specific sections in the Children's Act which are relevant to the protection of children affected by HIV/AIDS.....	137
5.1.3	Other legislation and policies dealing with specific rights of children affected by with HIV/AIDS .....	147
5.1.3.1	The legal and policy framework protecting the right to treatment and health care-.....	148
5.1.3.2	The right to maintenance .....	150
5.1.3.3	The right to equality and freedom from HIV/AIDS-related discrimination.....	151
5.1.3.4	The right to care and access to social services for children affected by HIV/AIDS .....	154



5.1.3.5	Protecting vulnerable groups, including children, from crimes which expose them to the risk of HIV infection .....	158
5.1.3.6	Protecting the right to education .....	161
5.1.3.7	Protecting the rights of employees .....	164
5.1.3.8	Protecting the right to property or inheritance.....	164
5.4	Other instruments which deal with the protection of children affected by HIV/AIDS .....	165
5.5	Conclusion .....	167
Chapter 6	Legislative and policy framework for responding to children affected by HIV/AIDS in Botswana	168
6.0	Introduction .....	168
6.1	Provisions regulating the rights of children affected by HIV/AIDS in Botswana.....	169
6.1.1	The Constitution of Botswana 1966.....	170
6.1.2	Children’s Act of 2009 (Chapter 28:04).....	173
6.1.2.1	Non-HIV/AIDS-specific rights and principles relating to the protection of the rights of children affected by HIV/AIDS .....	175
6.1.3	Other legislation and polices dealing with specific rights of children affected by HIV/AIDS .....	184
6.1.3.1	Framework which protects the rights to treatment and health care .....	184
6.1.3.2.	Framework which protects the right to maintenance .....	190
6.1.3.3.	Framework which protects the right to equality and freedom from HIV/AIDS related discrimination.....	192
6.1.3.4.	Framework which protects the right to care and access to social services for children affected by HIV/AIDS .....	193
6.1.3.5	Framework which protects vulnerable groups including children from crimes which expose them to the risk of HIV infection.....	199
6.1.3.6	Framework which protects the right to education .....	204
6.1.3.7	Framework which protects the rights of employees .....	207
6.1.3.8	Framework which protects the right to property or inheritance .....	208
6.2	Conclusions.....	209
Chapter 7	The extent to which the legal responses in South Africa and Botswana meet the international legal and policy standards on the rights of children infected and affected by HIV/AIDS	
	211	
7.0	Introduction.....	211
7.1	Key features of a well-functioning framework on the protection of children affected by HIV/AIDS .....	212

7.1.1.	Analysis of the protective framework for children who are affected, but not infected, by HIV/AIDS .....	213
7.1.1.1	Meeting the social and economic needs of children .....	213
7.1.1.2	Meeting the needs of children to a parent or guardian .....	227
7.1.1.3	Meeting the needs of children to care .....	230
7.1.1.4	Meeting the needs of children to be able to protect themselves from HIV infection ....	237
7.1.2	Analysis of the protective framework for children who are infected with HIV .....	248
7.1.2.1	Outlawing unfair discrimination against children affected by HIV/AIDS .....	248
7.2	Conclusion .....	254
Chapter 8	Conclusion and Recommendations .....	256
8.1	Introduction .....	256
8.2	Concluding comments on the legal and policy frameworks protecting children affected by HIV/AIDS in Botswana and South Africa .....	256
8.2.1	How does HIV affect the rights of children affected by HIV/AIDS? .....	257
8.2.1.1	There are a number of issues, which impact the rights of children affected by HIV/AIDS and these in particular inhibit their rights to survival and development .....	257
8.2.2.	Can international standards serve as a template to shape the laws in South Africa and Botswana on the protection of the rights of children affected by HIV/AIDS? .....	258
8.2.2.1	Both countries are members of the international community and they have submitted to various international law standards .....	259
8.2.2.2	The legal and policy frameworks of both countries show that international standards are relevant to the protection of certain rights, which affect the children affected by HIV/AIDS .....	259
8.2.2	Are there adequate international law norms to address the rights of children affected by HIV/AIDS and the legal and policy frameworks in both countries in line with these international standards? .....	262
	In answering this question, this thesis finds that: .....	262
8.2.3.1	The CRC and its GCs are comprehensive documents which form an appropriate model for the design of legal and policy frameworks on the protection of children affected by HIV/AIDS	
	262	
8.2.3.2	Apart from the CRC and its optional protocols, many of the existing, binding international standards on the protection of the rights of children are not HIV/AIDS-specific but they nevertheless protect children affected by HIV/AIDS .....	263
8.2.3.3	There are some African regional and SADC sub-regional standards on the protection of the rights of children affected by HIV/AIDS. The SADC Model law, a non-binding document is the most comprehensive instrument describing the rights of those affected by HIV/AIDS .....	263

8.3.	There are both strengths and gaps in the frameworks of Botswana and South Africa resulting in inadequate protection of the rights of children affected by HIV/AIDS .....	265
8.3.1	The strengths of the South African legal and Policy frameworks.....	265
8.3.1.1	The weaknesses of the South African legal and policy frameworks .....	267
8.3.2	The strengths of Botswana’s legal and Policy frameworks include:.....	268
8.3.2.1	The weaknesses of Botswana’s legal and Policy frameworks include:.....	270
8.4	Recommendations .....	272
8.5	Conclusion .....	276
	Appendix.....	278

## **Table of Cases**

AD and Another v DW and Others (CCT48/07) [2007] ZACC 27.

Attorney General v Dow 1992 BLR 119 (CA) 3 July 1992, Court of Appeal.

Bhe and others V Khayelitsha Magistrate and Others, 2005 (1) BCLR (CC)

Botswana case of Botswana Building Society (BBS) vRapulana Jimson Civil Appeal No. 37 of 2003

Centre for Child Law and Others v Member of the Executive Council, Gauteng Provincial Government and Another, case no. 19559/06 (TPD)(1) SA 1 (SCA).

Government of the Republic of South Africa and Others v Grootboom and Others, 2000 11 BCLR 1169 (CC).

Kenneth Good v Attorney General 2005 2 BLR 337.

M v The State 2008 (3) SA 232 (CC) 261

Malope vMalopeMc 67/1986Minister of Education, Western Cape and others v. Governing Body,

Mikro Primary School 2006 Motlogelwa v Khan (2006) 2 BLR147 HC

Mc Call v Mc Call 1994 (3) SA 201 (C)

Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (7) BCLR 713 (CC)

Mmusi and Others v Ramantele and Another (MAHLB-000836-10) [2012] BWHC

Ndlovu v. Macheme MAHLB-000522-07) [2008] BWHC 293 (6 October 2008).

Ovaya vOvayaC 7/1976

Perreira v BuccleuchMontessoriI Pre-school and Primary (Pty) Ltd and Others (4377/02) [2003] ZAGPHC 1 (21 October 2003).

S v M (Centre for Child law as Amicus Curiae) 2008 (3) SA 232

S vMakwanyane 1995 (3) SA 391 C

Sarah Diau v Botswana Building Society case, Industrial Court 50/2003 (J 992) 19 December 2003

Soobramoney v Minister of Health KZN 1998 (1) SA 756 (CC)

SS v The Presiding Officer, Children's Court Krugersdorp and Others, 2012 SA (6) 45 (GSJ)

Teddy Bear Clinic for the Abused Children and Another v Minister of Justice and Constitutional Development and Another case (73300/10) [2013] ZAGPPHC 1 (4 January 2013)

Tsabalala- Misimang and Another vMakhanya and others(2008) 6 SA102 W, para 27

## Abbreviations

Acquired Immune deficiency syndrome	AIDS
African Charter on Human and Peoples Rights	ACHPR
African Charter on the Rights and Welfare of the Child	ACRWC
African Union	AU
Antiretroviral treatments	ARVs
Civil and political rights	CPR
Committee of Experts on the Applications and Recommendations	CEACR
Constitutional Court	CC
Convention on the Rights of the Child	CRC
Department for International Development	DFID
Department of Social Services	DSS
Economic Commission for Africa	ECA
Economic, social and cultural rights	ESCR
Human immunodeficiency Virus	HIV
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic Social and Cultural Rights	ICESCR
Joint United Nations Programme on HIV/AIDS	UNAIDS
Millennium Development Goals	MDG
Ministry of Local Government	MLG
Mother to child transmission	MTCT
National AIDS Convention of South Africa	NACOSA
National Health Act	NHA
National Poverty Reduction Strategy	NPS
Organisation of African Unity	OAU
Organisation for Economic Co-operation and Development	OECD
Orphans and vulnerable children	OVC
People Living with HIV/AIDS	PLWHA
Prevention of mother to child transmission	PMTCT
Revised National Policy on Education	RNPE
Sexually transmitted diseases	STD
South African Law Reform Commission	SALRC
Southern Africa Development Community	SADC
Treatment Action Campaign	TAC
Tuberculosis and Other Related Infectious Diseases	TB and ORID

United Nations	UN
United Nations Children's Emergency Funds	UNICEF
United Nations Commission on Human Rights	UNCHR
United Nations National Assembly	UNGASS
Universal Declaration on Human Rights	UDHR
Vulnerable Group Feeding Programme	VGFP
World Health Assembly	WHA
World Health Organisation	WHO

## Chapter 1 Introduction

### 1.0 Background to the study

Globally, the scale of the Human Immunodeficiency Virus /Acquired Immune Deficiency Syndrome (HIV/AIDS) epidemic is staggering. In 2011, 1.7 million people around the world died from AIDS;<sup>1</sup> 230 000 of them were under the age of 15 and there were 2.7 million new HIV infections among adults and children.<sup>2</sup> Despite these seemingly high numbers, infection rates have dropped considerably and in 14 countries AIDS-related deaths decreased by more than 50% between 2005 and 2011, largely due to increased access to antiretroviral treatments (ARVs).<sup>3</sup>

The reduction in the HIV/AIDS prevalence rates has meant that more than half a million fewer people died from AIDS-related illnesses in 2011 than six years earlier.<sup>4</sup> In 2011, 3.4 million children under 15 years of age were living with HIV<sup>5</sup> and 230 000 had died from AIDS related causes.<sup>6</sup> Again, there were more than 700 000 fewer new HIV infections globally in 2011 than in 2001; and Africa has cut AIDS-related deaths by one third in the past six years.<sup>7</sup> According to the UNAIDS report, new HIV infections in children also dropped by 43% from 2003 to 2011 and new HIV infections in children have declined by 24% in the past two years alone, which is equal to the decrease between 2003 and 2011.<sup>8</sup>

Sub-Saharan Africa accounted for 72% of all new HIV infections by the end of 2011<sup>9</sup> and the Southern African region remains at the epicentre of the HIV/AIDS epidemic, as the region with 48% of the world's new HIV infections, 55% of the world's new HIV infections among children and 48% of the world's AIDS related deaths.<sup>10</sup> Currently, more than two-thirds (69%) of all the people living with HIV (PLWHA), 23.5 million people live in sub-Saharan Africa, including 91%

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<sup>1</sup> UNAIDS 2012 *Global Report* available at [http://data.unaids.org/pub/report/2012/jc1700\\_epi\\_update\\_2012\\_en.pdf](http://data.unaids.org/pub/report/2012/jc1700_epi_update_2012_en.pdf) (Accessed on 18 January 2012).

<sup>2</sup> UNAIDS 2012 *Report on the Global AIDS Epidemic*, available at [http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120\\_UNAIDS\\_Global\\_Report\\_2012\\_with\\_annexes\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_with_annexes_en.pdf) (Accessed on 19 January 2013).

<sup>3</sup> See note 1.

<sup>4</sup> UNAIDS (note 2).

<sup>5</sup> C Luo *Innovation for elimination of new HIV infections in children by 2015 and keeping mothers alive* (2012) available at [http://www.unicef.org/supply/files/4-EMTCT\\_innovation.pdf](http://www.unicef.org/supply/files/4-EMTCT_innovation.pdf) (Accessed on 19 January 2013).

<sup>6</sup> Ibid.

<sup>7</sup> UNAIDS (note 2).

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> UNICEF *Children and AIDS- Overview* available at [http://www.unicef.org/esaro/5482\\_HIV\\_AIDS.html](http://www.unicef.org/esaro/5482_HIV_AIDS.html) (Accessed on 27 August 2013). This information is based on the data from UNAIDS *Getting to Zero: HIV in Eastern and Southern Africa* 2013.

of the world's HIV-positive children. Of the approximately 2.5 million new infections globally in 2011 alone, an estimated 1.8 million people were from sub-Saharan Africa, while 51% of all new HIV infections were in Africa.<sup>11</sup> South Africa and Botswana, like many other SADC countries, have been hard hit by the HIV/AIDS epidemic.

The impact of HIV/AIDS is most profoundly reflected in the lives of children, whose very survival and development are at stake. By 2011, over 17.3 million children had lost one or both parents due to AIDS in sub-Saharan Africa.<sup>12</sup> The HIV/AIDS epidemic therefore poses not only a public health problem; it also affects a number of the rights of children who ordinarily should have been protected by their parents or guardians. For example, many children are left as orphans and may have their rights to an appropriate standard of living, access to health care and education, food security, employment essential services compromised.<sup>13</sup> Despite the fact that HIV/AIDS appears to be a public health issue, it is generally agreed that HIV/AIDS also has human rights implications and a number of children's rights are directly affected by the epidemic.<sup>14</sup>

Before delving into discussion of the protection which laws and policies<sup>15</sup> offer to the rights of children affected by HIV/AIDS in South Africa and Botswana, two terms used in this thesis will be clarified. These are "rights" and "children's rights". The term "rights," according to the Oxford Dictionary of law,<sup>16</sup> is defined as title to "any other interest or privilege recognised and protected by law" or the "freedom to exercise any power conferred by law." The Concise Oxford Dictionary<sup>17</sup> defines a right as including "a thing one may legally or morally claim; the state of being entitled to a privilege or immunity or authority to act." This definition is useful because it recognises the fundamental distinction between legal and moral rights. A legal right will arise whenever the operation of a pre-existing legal rule gives an individual an entitlement enforceable by law. It is

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<sup>11</sup> USAIDS *Southern Africa Regional Programme Report* (2010) available at [http://www.usaid.gov/our\\_work/global\\_health/aids/Countries/africa/saregional.html](http://www.usaid.gov/our_work/global_health/aids/Countries/africa/saregional.html) (Accessed on 27 August 2010). Although these statistics are from 2010, very little has changed in respect of Africa being the epicentre of the HIV epidemic and of children bearing the harshest brunt of the epidemic.

<sup>12</sup> UNICEF *A call to Action- the missing faces of AIDS* available at [http://www.unicef.org/supply/files/4-EMTCT\\_innovation.pdf](http://www.unicef.org/supply/files/4-EMTCT_innovation.pdf) (Accessed in 28 December 2012).

<sup>13</sup> DO Morisky & WJ Jacobs (eds.) *Overcoming AIDS: Lessons Learned from Uganda* (2006) 252.

<sup>14</sup> World Medical Association 'Statement on HIV/AIDS and the Medical Profession' adopted by the WMA General Assembly, Pilanesberg, South Africa, October (2006), available at <http://www.wma.net/en/30publications/10policies/a25/index.html> (Accessed on 3 December 2010).

<sup>15</sup> This research focuses on both legal and policy responses. The analysis of policy responses has been included in this research because policies play a big role in guarding the response of governments in the HIV/AIDS epidemic. Policies shape the laws and they determine the manner in which the legal responses will be executed. In addition, some standards which are not included in the law are contained in the policies and some of these standards have been implemented in the country. Thus this thesis includes policies in its analysis so as to better understand the reason behind specific actions of the government, since analysing the laws alone might not provide the appropriate explanation for such actions.

<sup>16</sup> EA Martine *Oxford Dictionary of Law* 5 ed. (2002).

<sup>17</sup> R Allen (ed) *Concise Oxford Dictionary* 8 ed. (1990).



usually accompanied by a legal duty on another party to fulfil that entitlement or refrain from denying it.<sup>18</sup> Moral rights need not be enforceable by law, and hence their existence is much harder to demonstrate.<sup>19</sup> The United Nations (UN) describes human rights as the rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Everyone is equally entitled to human rights, without discrimination. These rights are all interrelated, interdependent and indivisible.<sup>20</sup>

“Children’s rights” have been defined as the human rights of children with particular attention to the rights of special protection and care afforded to the young, including their right to association with both biological parents, human identity, as well as the basic needs for food, universal state-paid education, health care and criminal laws appropriate for the age and development of the child.<sup>21</sup>

In many societies and cultures of the world, the protection of children is considered to be of the utmost importance and children are seen as a key component of the society.<sup>22</sup> The rights of children as members of the vulnerable group are important in all societies and the availability of children’s rights in the society goes a long way in determining what the outcome of the society will be, since the children are the future of any community. Thus it is correct to say that a society that protects the rights of its children invests in the future of the society. Children’s rights are fundamental to the existence and development of all children and should be protected without distinction or discrimination of any kind.<sup>23</sup> On this, the Convention on the Rights of the Child (CRC)<sup>24</sup> provides that:

State parties shall respect and ensure the rights set forth in the present Convention to each child within its jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

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<sup>18</sup> W Hohfeld *Fundamental Legal Conceptions* (1964) 271.

<sup>19</sup> J Malcolm *Do Corporations Have Rights?* (Summary of unpublished LLM dissertation, Murdoch University (1994), Chapter 2, available at <http://www.malcolm.id.au/honours/index.html#contents> (Accessed on 20 July 2010).

<sup>20</sup> UN OHCHR- *Your Human Rights*, available at <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx> (Accessed on 20 July 2010).

<sup>21</sup> A Singh *Right to Assembly and Association of Children: A Critical Analysis, on the basis of the case of Tilottam Poudel and Others v. HMG* (2008) 1. See also Amnesty International *Children’s rights*, available at <http://www.amnestyusa.org/our-work/issues/children-s-rights?id=1011016&n1=3&n2=78> (Accessed on 20 July 2009).

<sup>22</sup> Many societies and cultures recognise that children are vulnerable and helpless creatures who depend on adults for their protection and safety. Many of the adults have also taken up the duty to care for children and protect them. It should, however, be borne in mind that some adults violate the rights of children and hence there is the need for legal and other intervention to protect them.

<sup>23</sup> 3rd Preambular Paragraph of the CRC, available at <http://www2.ohchr.org/english/law/crc.htm> (Accessed on 3 November 2010).

<sup>24</sup> Article 2 of the CRC.

It is settled that the notion of the protection of children and the fulfilment of their rights are not new on the African continent. A number of child-based declarations and resolutions have been adopted by the organs of the African Union (AU),<sup>25</sup> which relate primarily to the development and health of children and children affected by armed conflict.<sup>26</sup>

Children's rights have made a measurable impact on the legal and policy environment in Africa.<sup>27</sup> They are guaranteed through the constitutions of many African countries, in line with international treaties such as the CRC, the African Charter on the Rights and Welfare of the Child (ACRWC) and other instruments that specifically relate to the protection of children, which both South Africa and Botswana are parties to.<sup>28</sup> Section 28 of the Constitution of the Republic of South Africa (1996)<sup>29</sup> guarantees the rights of children; however, the 1966 Constitution of Botswana does not contain any specific provision concerning the rights of children.

The CRC, recognising the fact that children face hardships, affirms in the eleventh preambular paragraph that, "in all countries of the world, there are children living in exceptionally difficult conditions, and that such children need special consideration." Although this provision does not explicitly imply the difficulties children face as a result of the HIV/AIDS epidemic, it can be interpreted to reflect the impact of HIV/AIDS on the social context in which they live. This is

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<sup>25</sup> The Organisation of African Unity (OAU) in 2001 legally became the African Union.

<sup>26</sup> ACRWC, available at <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/> (Accessed on 23 September 2012) and Security Council *Normative Framework for the Protection of Children Affected by Armed Conflict in Africa* (2007), available at [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross\\_cutting\\_report\\_cac\\_2012.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_cac_2012.pdf). (Accessed on 23 September 2012).

<sup>27</sup> J Sloth-Nielsen *Children's rights in Africa a legal Perspective* (2008) 53.

<sup>28</sup> Such treaties include the CRC, which came into force on 2 September 1990, the ACRWC, which came into force in 1999, the International Covenant on Civil and Political Rights (ICCPR), which entered into force 23 March 1976, the International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force 3 January 1976 and a host of others.

<sup>29</sup> Section 28 of the Bill of Rights providing for the rights of children states that:

'Every child has the right to -

to a name and a nationality from birth;

to family care or parental care, or to appropriate alternative care, when removed from the family environment;

to basic nutrition, shelter, basic health care services and social services;

to be protected from maltreatment, neglect, abuse or degradation;

to be protected from exploitative labour practices;

not to be required or permitted to perform work or provide services that-

are inappropriate for a person of that child's age; or

place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections

12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -

kept separately from detained persons over the age 18 years;

and treated in a manner, and kept in conditions, that take account of the child's age;

to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the

child, if substantial injustice would otherwise result; and not to be used directly in armed conflict, and to be protected in times of armed conflict. A child's best interests are of paramount importance in every matter concerning the child'.

In this section "child" means a person under the age of 18 years.

because children represent a vulnerable group and they bear the brunt of the epidemic.<sup>30</sup> Their rights tend to be inadvertently compromised by the factors that foster the epidemic. Such factors may be economic, social, health, institutional, security and a host of others. HIV/AIDS also affects many of the civil, political, economic, social and cultural rights (ESCR) of children. Examples of such rights include freedom from stigma and discrimination, right to privacy, family, education, health and housing.<sup>31</sup>

## 1.1 Relevance of the study

The HIV/AIDS epidemic has affected the economic, social, cultural, civil, political and environmental rights of all persons and can thus undeniably have a destructive effect on the future of children.

It is generally accepted that HIV/AIDS is responsible for leaving a vast number of children across Africa without one or both parents. In both countries in this study, a larger proportion of orphans have lost their parents to AIDS than to any other cause of death, meaning, were it not for the HIV/AIDS epidemic, these children would not have been orphaned. These children, who are orphaned as a result of their parent's infection, bear the greatest burden of the HIV/AIDS epidemic. Historically orphaning on a large scale has been a sporadic, short-term problem associated with war, natural disasters or disease. However, due to the high HIV/AIDS infection rate, orphanhood is now a chronic long-term problem.<sup>32</sup> In the pre-AIDS era in sub-Saharan Africa, an estimated 2 - 5% of children under 15 years of age were orphaned;<sup>33</sup> now 17.3 million children have been orphaned by HIV/AIDS, globally.<sup>34</sup> Within the orphan population degrees of vulnerability exist, with child-headed households and children living on the streets forming the two most vulnerable groups. Unless suitable arrangements are made to cater to the needs of children before their parents' deaths, the trauma, grief and guilt so common among these children is compounded by the uncertainty of their future or their relocation within the extended family, often at the expense of breaking up the support offered by the sibling group.<sup>35</sup>

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<sup>30</sup> UNICEF/UNAIDS/WHO, *Young People and HIV/AIDS: Opportunity in Crisis*, (2002), available at [http://data.unaids.org/topics/young-people/youngpeoplehiv aids\\_en.pdf](http://data.unaids.org/topics/young-people/youngpeoplehiv aids_en.pdf) (Accessed on 4 May 2012).

<sup>31</sup> OUNHCHR *International Guidelines on HIV/AIDS and Human Rights (2006) Consolidated Version*.

<sup>32</sup> Paper presented by G Foster *AIDS and Child Health* the Homecare Conference, Amsterdam, (1997), available at <http://www.procaare.org/archive/procaare/199705/msg00023.php> (Accessed on 28 December 2012).

<sup>33</sup> Ibid.

<sup>34</sup> UNAIDS, *2012 Report* (note 1).

<sup>35</sup> Ibid.

The risks of orphaned children have been well documented and can briefly be divided into those experienced by pre-school children and those of the school age. Pre-school children show greater physical consequences of their changing status than their older siblings and experience greater degrees of malnutrition, ill-health and higher mortality rates than their non-orphaned peers.<sup>36</sup> The older orphans may, to some degree, be exploited by their host families, stop attending school and may be required to work within or outside the house, to supplement household income.<sup>37</sup>

Several decades of experience of the HIV/AIDS epidemic have shown that an essential component of preventing transmission and reducing the impact of the epidemic is the promotion and protection of human rights.<sup>38</sup> The need for the application of human rights to the HIV/AIDS epidemic has long been established.<sup>39</sup> Wojick states that, in reviewing the relatively short history of responses to the HIV/AIDS pandemic, a common denomination of effective programmes is the respect for human rights and the dignity of persons.<sup>40</sup> This fact illustrates the connection between HIV/AIDS and the application of human rights principles.<sup>41</sup> It has also been established that “the recognition that protecting the rights of those with HIV was not inimical, but complementary, to disease containment”<sup>42</sup> Thus it is imperative that legal systems respond to the new and emerging social and economic issues raised by the pandemic, so that vulnerable children are given adequate protection legally in line with state obligations under international and national laws and to ensure that the best interest of the children is paramount in all legislation dealing with the protection of children affected by HIV/AIDS.<sup>43</sup>

South Africa has recently reformed its child-related laws through the promulgation of the Children’s Act No. 38 of 2005. Botswana also recently enacted a new Children’s Act of 2009

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<sup>36</sup> Among the poorer households, stunting ... among children under 5 is indeed substantially higher for orphans (51%) than (non-orphans). World Bank *Confronting AIDS World Bank Report* (1997), quoted in S Hunter *Rethinking Development Paradigms in the Context of Extremely High Mortality in Sub-Saharan Africa*, Draft Report prepared for UNICEF, (1998) 8.

<sup>37</sup> Poor levels of education and high levels of physical and sexual exploitation place these children at an increased risk of becoming HIV infected thereby completing a circle started by their parents’ infection. See UNAIDS, UNICEF and USAIDS *Children on the Brink A Joint Report of New Orphan Estimates and a Framework for Action* (2004) 6 and the UNICEF *Framework for the Protection, Care, and Support of Orphans and Vulnerable Children Living in a World with HIV and AIDS* (2004) 8.

<sup>38</sup> It is well established that human rights standards should guide HIV policy-makers in formulating the direction and content of HIV-related policy and should be an integral part of all aspects of the national and local response to HIV/AIDS. See UNAIDS/UN High Commissioner/Centre for Human Rights, *Guidelines on HIV/AIDS and Human Rights*, Second International Consultation on HIV/AIDS and Human Rights (1996) 4.

<sup>39</sup> ME Wojick ‘Global aspects of AIDS’ in D.W. Webber (eds.) *Aids and the Law* (1997) 454.

<sup>40</sup> *Ibid.*

<sup>41</sup> S Gumede ‘HIV/AIDS and human rights: The role of the African Commission on Human rights’ (2004) 4 *African Human Rights Law Journal* 185.

<sup>42</sup> E Cameron ‘Legal and Human rights responses to the HIV/AIDS epidemic’ (2006) 1 *Stellenbosch Law Review* 42.

<sup>43</sup> The best interest of the child principle is upheld in the CRC (article 3), ACRWC (article 4), the South African Constitution (article 28), Botswana Children’s Act (article 5) and the South African Children’s Act (article 7).

(Chapter 28:04).<sup>44</sup> This is therefore an opportune moment to critically review both countries' law and policies to determine the extent to which they have responded to the needs of children infected and affected by HIV; as well as to propose possible reforms, if needed. Both countries have adopted international conventions on the protection of children and a number of laws and policies have applied the principles in these documents to develop or interpret laws and policies on the protection of children affected by HIV/AIDS in the countries.

The guarantees given to children's rights in legal documents both locally and internationally will be of no value if the judicial system does not adequately cater for the protection of the rights of vulnerable children. There is an urgent need to examine the theories on the protection of children and apply them to this new context of children infected and affected by HIV/AIDS. It is argued that this type of analysis is necessary to enable an effective assessment of the legal and policy responses in both countries.

## 1.2 Statement of the research problem

Globally, many factors affect any given individual's risk of infection, chances for access to relevant resources and the protection of the person's rights. Such factors include national developments and infrastructure, national responses, local customs, family structures and interpersonal relationships.<sup>45</sup> This fact is also applicable to the case of children affected by HIV/AIDS, the protection of their rights and their access to relevant resources in Botswana and South Africa.

In Botswana and South Africa, children affected by HIV/AIDS face hardships as a result of being infected with HIV, while many more suffer due to the loss of their parents and family members from AIDS. Once orphaned, children are more likely to face poverty, poor health, living in child-headed households,<sup>46</sup> to hunger, poverty, and homelessness, a lack of access to education and the general lack of basic facilities.<sup>47</sup> In fact according to Piot and Greener *et al*, "AIDS is at the core of a "vicious circle", whereby the impact of AIDS increases poverty and social deprivation, while poverty and social deprivation increase vulnerability to HIV infection. In examining this view, it is

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<sup>44</sup> Department of Justice *Children's Act 2009*, available at [http://www.aclr.info/images/stories/uploader/Publication\\_files/Acts/Botswana\\_Children\\_Act\\_08\\_of\\_2009.pdf](http://www.aclr.info/images/stories/uploader/Publication_files/Acts/Botswana_Children_Act_08_of_2009.pdf) (Accessed on 19 July 2011).

<sup>45</sup> Ibid.

<sup>46</sup> A Bilson & P Cox, 'Caring about poverty' (2007) 13 *Journal of Children and Poverty* 1.

<sup>47</sup> P Piot, R Greener *et. al* 'Squaring the Circle: AIDS, poverty, and human development' (2007) 4 *Public Library of Science Medical Journal*, 314.

important to distinguish between what might be called the “downstream” effects of AIDS on poverty, and the “upstream” effects of poverty upon the risk of acquiring HIV”.<sup>48</sup>

In South Africa, the responsibilities of state agencies is underlined by the Constitution, which places specific obligations on government to secure every child’s right to family, parental care, or to appropriate alternative care when the child is removed from the family, or no longer has a family environment and the right to basic nutrition, shelter, health care services, social development and education.<sup>49</sup> In Botswana, the Constitution does not contain provisions on the protection of the rights of children.

South Africa has responded to the impact of HIV/AIDS on children through specific provisions in the Children’s Act. This Act repeals the Child Care Act of 1983 (hereafter referred to as “the 1983 Act”). Whilst the 1983 Act did not respond in any way to the merging epidemic, many of its provisions were able to be applied to issues such as HIV testing.<sup>50</sup> HIV related issues were a key concern for the drafters of the 2005 Act.<sup>51</sup> The new Children’s Act now guarantees a number of rights for children affected by HIV/AIDS. Nevertheless, limited work has been done reviewing the extent to which these laws have been able to address all the legal complexities posed by the epidemic.

In Botswana, there is also a new Children’s Act, which is the main law that regulates the protection of children’s rights. It covers many of the issues which were left out of the 1981 Children’s Act. It covers issues like child protection and the protection of infants, establishment of homes and schools and institutions for the reception of children.<sup>52</sup> Although these sections are adaptable to the protection of children affected by HIV/AIDS, the current Act is silent on HIV/AIDS and does not refer to children affected by HIV in any of its provisions. It is not clear to what extent the available provisions are able to address the problems faced by children affected by the epidemic.

### **1.2.1 HIV/AIDS in the Southern Africa Development Community (SADC) region**

In order to put into proper perspective the reasons why the rights of children need to be protected in both countries, it is important to highlight the seriousness of the HIV/AIDS epidemic in the SADC

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<sup>48</sup> Ibid.

<sup>49</sup> E Gouws & Q Abdool Karim, *HIV infection in South Africa: the evolving epidemic* Chapter 2 in S Abdool Karim & Q Abdool Karim, (eds.) *HIV/AIDS in South Africa* (2010) 48.

<sup>50</sup> Section 39 of the former Child Care Act dealt with consent to medical treatment by parents or guardians on behalf of children younger than 14 years old and this clause was applied to HIV testing.

<sup>51</sup> South African Law Reform Commission Project 110, *Review of the Child Care Act Report* (2002) 148.

<sup>52</sup> T Maundeni & MS Nnyepi (eds.) *Thariya Bana: Reflections on Children in Botswana* (2011) 20.

region, specifically in South Africa and Botswana, to discuss in both countries specifically the extent of the epidemic's impact on children.

HIV/AIDS is the leading cause of death among adults aged 15-59 in sub-Saharan Africa.<sup>53</sup> Of greater concern is the fact that the HIV/AIDS epidemic has already orphaned millions of children. This makes Africa home to 80% of all the children in the developing world who have already lost a parent to the disease. Moreover, it was estimated that by 2010, an estimated 15.7 million children, 30% of the 53 million anticipated orphans from all causes in sub-Saharan Africa, will have lost at least one parent to AIDS.<sup>54</sup>

The SADC region has been hardest hit by the HIV/AIDS epidemic.<sup>55</sup> The epidemic in this region has negatively impacted on the previous developmental milestones, which the region had aspired to in previous years. There has been a sharp decrease in life expectancy,<sup>56</sup> a rise in the number of orphans and vulnerable children (OVC)<sup>57</sup> and most of all a high number of inadvertent violations of human rights of vulnerable groups.<sup>58</sup> Countries have lost an unquantifiable amount of human

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<sup>53</sup> UNICEF 2009 Report available at, [http://www.unicef.org/sowc09/docs/SOWC09\\_Table\\_4.pdf](http://www.unicef.org/sowc09/docs/SOWC09_Table_4.pdf) (Accessed on 23 September 2010).

<sup>54</sup> UNICEF *Africa's Orphaned and Vulnerable Generations: Children Affected by AIDS* (2006) 4.

<sup>55</sup> A chart of the HIV/AIDS prevalence rates in the 9 hardest hit countries in the world can be found in the appendix 1.

<sup>56</sup> The life expectancy of South Africa declined from 61 years in 1990 to 52 years in according to the CIA 2010 estimates; it is expected to reduce to 49.2. Although life expectancy in Botswana is expected to increase from 54 in 2008 to 60.93, according to the 2010 CIA report, life expectancy had reduced sharply in previous years to as low as 35 years in 2004. This was the lowest figure in the world (based on World Bank figures for 208 countries and territories). See CIA *World Fact book* available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2102rank.html> (Accessed on 26 August 2010). See also UNICEF *South Africa Report* available at [http://www.unicef.org/infobycountry/southafrica\\_statistics.html](http://www.unicef.org/infobycountry/southafrica_statistics.html) and UNICEF *Botswana Report* available at [http://www.unicef.org/infobycountry/botswana\\_statistics.html](http://www.unicef.org/infobycountry/botswana_statistics.html) See also PPI Online *Life Expectancy in Botswana has fallen* available at [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=108&subsecID=900003&contentID=254030](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecID=900003&contentID=254030) (Accessed on 26 August 2010).

<sup>57</sup> There are about 1.4 million orphans in South Africa while in Botswana, there are about 95 000 orphans. See UNICEF *Global Report (2007)* available at [http://www.unicef.org/infobycountry/botswana\\_statistics.html](http://www.unicef.org/infobycountry/botswana_statistics.html) (Accessed on 3 December 2010). In addition, HIV/AIDS has increased the death rate hence the number of AIDS orphans in the society. In 2006, 41% of HIV/AIDS deaths were attributed to 25-49 year olds, up from 29 % in 1997, see Statistics *South Africa 2008 Estimates* available at <http://www.statssa.gov.za/Publications/statsdownload.asp?PPN=P0309.3&SCH=4254> (Accessed on 24 September 2010). In Botswana on the other hand, about 8 732 deaths occurred according to the Botswana HIV and AIDS Estimates and Projections: 2009 thus making the number of orphans due to AIDS aged 0 - 17 about 61840. See UNAIDS *2011 World AIDS day Report* available at [http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/jc2216\\_worldaidsday\\_report\\_2011\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/jc2216_worldaidsday_report_2011_en.pdf)(Accessed on 24 September 2010).

<sup>58</sup> The HIV/AIDS epidemic has brought about a rise in some violations of the rights of PLWHA and other vulnerable groups. The most vulnerable group of children in this context are those infected and affected by HIV/AIDS, orphaned children and children affected by poverty as a result of the impact of the epidemic in their communities. The rights affected also include the right to privacy, right to family, freedom from discrimination, right to education and a host of others.

capital, as well as economic resources, to the epidemic.<sup>59</sup> This has negatively affected national development goals and living conditions.<sup>60</sup>

### 1.2.2. Brief HIV/AIDS statistics in South Africa and Botswana

South Africa has the highest number of people infected with HIV/AIDS, globally.<sup>61</sup> According to the 2011 UNAIDS World AIDS Day Report, there were approximately 5.6 million people living with HIV/AIDS (PLWHA) in the country at the end of 2012.<sup>62</sup> Furthermore, there were 281 404 South Africans who died of AIDS in 2010; this amounted to 43% of all deaths in the country.<sup>63</sup> The national HIV/AIDS prevalence is estimated to be 17.8% among those aged 15-49 with some age groups being particularly affected.<sup>64</sup>

Estimates show that 460 000 children in South Africa under the age of 15 years were living with the virus by the end of 2011.<sup>65</sup> This figure amounts to about 3% of the total population. Currently, between 40 to 59% of all people in need of ARV therapy is receiving it.<sup>66</sup> In 2010, 183 000 children were in need of ARV therapy<sup>67</sup> and in 2009 of the children living with HIV and AIDS who were eligible for ARV treatment, 81% received it.<sup>68</sup> There were about 1.99 million AIDS orphans and 40 000 new infections among children in 2009.<sup>69</sup> AIDS remains one of the largest causes of deaths in children in South Africa accounting for 35% of the mortality of children younger than five years.<sup>70</sup>

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<sup>59</sup> Department of Health *WHO guide to identifying the economic consequences of disease and injury* available at [http://www.who.int/choice/publications/d\\_economic\\_impact\\_guide.pdf](http://www.who.int/choice/publications/d_economic_impact_guide.pdf) (Accessed on 28 December 2012).

<sup>60</sup> According to the UNICEF Report on South Africa, South Africa's GDP per capita average annual growth rate (%) from 1990 to 2008 was as low as 1.2%. See UNICEF *Report- South Africa* available at [http://www.unicef.org/infobycountry/southafrica\\_statistics.html](http://www.unicef.org/infobycountry/southafrica_statistics.html) (Accessed on 3 December 2010), while Botswana's GDP per capita average annual growth rate from 1990 to 2008 was 4%. See UNICEF *Botswana Statistics* available at [http://www.unicef.org/infobycountry/botswana\\_statistics.html](http://www.unicef.org/infobycountry/botswana_statistics.html) (Accessed on 3 December 2010).

<sup>61</sup> Statistics South Africa *Mid-Year 2010 Estimates* available at <http://www.statssa.gov.za/publications/P0302/P03022010.pdf> (Accessed on 31 January 2010).

<sup>62</sup> UNAIDS (note 1).

<sup>63</sup> Ibid.

<sup>64</sup> It is noted that some age groups face the brunt of the HIV/AIDS epidemic more than the others. Thus between the 15-49 age group which is the reproductive age, certain groups are more affected. This is borne out of the fact that the more sexually active an age group is, the higher the HIV/AIDS prevalence rate within that age group.

<sup>65</sup> UNAIDS (note 1).

<sup>66</sup> UNAIDS (note 57).

<sup>67</sup> Department of Health *Health Information Epidemiology Evaluation and Research Report* (2009) 2.

<sup>68</sup> UNAIDS *Country Progress Report on the Declaration of Commitment on HIV/AIDS- South Africa* (2010) 10.

<sup>69</sup> UNICEF *Children and AIDS: Fifth Stocktaking 2010 Report* available at [http://www.unicef.org/publications/index\\_57005.html](http://www.unicef.org/publications/index_57005.html) (Accessed on 31 January 2013).

<sup>70</sup> AVENT *South Africa HIV/AIDS statistics* available at <http://www.avert.org/aids-statistics.htm> (Accessed on 28 September 2009).



According to the 2010 UNAIDS report,<sup>71</sup> there are between 1.5 million and 3 million children with one or both parents deceased in South Africa.<sup>72</sup> Similarly, according to the 2010 UNAIDS report on the Global AIDS Epidemic, Botswana has an estimated adult HIV prevalence among 15-49 year olds of 24.8%, the second highest in the world, after Swaziland. In 2009, there were 300 000 PLWHA (out of less than 2 million people who constitute the population of the country).<sup>73</sup> The country has an estimated 19 125 children living with HIV/AIDS<sup>74</sup> and about 61 840 children have lost at least one parent to the epidemic.<sup>75</sup> According to 2009 estimates, about 8732 people died from AIDS in Botswana.<sup>76</sup>

By December 2011, more than 80% of the people in need of ARVs were receiving ARVs in Botswana<sup>77</sup>, making it the first African country to aim to provide universal access to ARVs. This has greatly helped to control the number of people dying from HIV/AIDS in the country.<sup>78</sup> In addition, HIV infections among children reduced by 20-39%. Infection rates dropped from 700 new infections among children in 2009, to 500 in 2011.<sup>79</sup>

### 1.2.3. Impact of HIV/AIDS on children in South Africa and Botswana

HIV/AIDS has been ranked as one of the three greatest threats to childhood today.<sup>80</sup> Children and young people are at the frontline of the epidemic's advance and are bearing the brunt of its impact.<sup>81</sup> The effects of HIV/AIDS on the family and society at large, are severe. The number of HIV/AIDS related death in both countries has been directly linked to the rise in the number of HIV/AIDS

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<sup>71</sup> UNAIDS *South Africa 2010 Country Progress Report*, available at [http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/southafrica\\_2010\\_country\\_progress\\_report\\_en.pdf](http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/southafrica_2010_country_progress_report_en.pdf) (Accessed on 29 August 2011).

<sup>72</sup> A table showing the number of orphans in South Africa from 1991 to 2010 can be found in appendix 2 available at *Save the Children South Africa – Orphans*, available at [http://www.unicef.org/southafrica/SAF\\_resources\\_safethechildren.pdf](http://www.unicef.org/southafrica/SAF_resources_safethechildren.pdf) (Accessed on 1 April 2012). See also R Dorrington, D Bradshaw & D Budlender *HIV/AIDS profile in the provinces of South Africa: Indicators for 2002* Cited in Save the Children (UK) *Children Affected by HIV/AIDS in South Africa A Rapid Appraisal of Priorities, Policies and Practices - A Rapid Appraisal of Priorities, Policies and Practices* (2003) 10, available at [http://www.unicef.org/southafrica/SAF\\_resources\\_safethechildren.pdf](http://www.unicef.org/southafrica/SAF_resources_safethechildren.pdf) (Accessed on 01 April 2012).

<sup>73</sup> AVENT *HIV/AIDS in Botswana*, available at <http://www.avert.org/aids-botswana.htm> (Accessed on 31 January 2011).

<sup>74</sup> NACA *HIV/AIDS in Botswana, Estimated Trends and Implications* (2008) cited in UNAIDS *Botswana 2010 UNGASS Report* (note 71).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> WHO *Towards Universal Access, Scaling up Priority HIV/AIDS Interventions in the Health Sector Progress Report 2010*, available at [http://whqlibdoc.who.int/publications/2010/9789241500395\\_eng.pdf](http://whqlibdoc.who.int/publications/2010/9789241500395_eng.pdf) (Accessed on 31 January 2011).

<sup>78</sup> S Bertozzi, NS Padian & J Wegbreit *HIV/AIDS Prevention and Treatment* cited in JDT, Breman JG, AR Measham, *et al Disease Control Priorities in Developing Countries* (2006) Chapter 18.

<sup>79</sup> Botswana HIV/AIDS statistics cited in WHO, UNICEF and UNAIDS *Global update on HIV treatment 2013: Results, Impact and Opportunities* (2013) 29.

<sup>80</sup> C Bellamy *The State of the World's Children Childhood under Threat* (2005) 1.

<sup>81</sup> LZ Gilborn 'The effects of HIV infection and AIDS on children in Africa' (2002) 176 *West Journal of Medicine* 12.

orphans. The epidemic also negatively impacted the human resources, thus having a negative effect on the gross national product of both countries.<sup>82</sup>

HIV/AIDS related deaths in both countries occur primarily within the ages of 15 to 49 years. Many parents and care-givers fall within this age group as the majority of new infections occur among young people in their reproductive years.<sup>83</sup> The high HIV/AIDS prevalence rate among this age group positively correlates with the increase in the HIV/AIDS related death rate and consequently the number of OVCs and children infected and affected by HIV/AIDS.<sup>84</sup>

The impact of HIV/AIDS on children is without doubt alarming. Children as a vulnerable group are severely affected by one of the worst epidemics to ever hit humankind. They face many hardships when their rights are violated; resulting in a vicious circle that tends to increase the impact of the epidemic on the society. When children infected by HIV/AIDS are stigmatised at school because of their HIV status, other rights are also affected.<sup>85</sup> For instance, the child may stay away from school or decides not to visit the clinic for fear of people finding out that he or she is HIV positive. This perpetuates the stigma surrounding the epidemic and impacts on the child's rights to education and health care.

Many children infected and affected by HIV/AIDS are left vulnerable and in many cases, abandoned to face life on their own. Children whose parents are living with HIV often experience many negative changes in their own lives. The parents may start to neglect their children, including emotional abandonment, long before they are orphaned. Eventually, they suffer the death of their parent(s) and the emotional trauma that results from this loss of a care-giver. They may then have to adjust to a new situation, with little or no support, and consistently become victims of exploitation and abuse.<sup>86</sup>

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<sup>82</sup>UNAIDS and WHO *Sub-Saharan Africa AIDS epidemic Update Regional Summary* (2008) 20.

<sup>83</sup> Save the Children UK *Children Affected By HIV/AIDS: Rights And Responses in the Developing World Working Paper 23* (2001) 10.

<sup>84</sup> It is estimated that more than 16 million children under 18 have been orphaned by AIDS. AIDS is responsible for leaving vast numbers of children across Africa without one or both parents. The percentages of orphans in different countries largely depend on the local HIV prevalence rates. Thus it can be positively deduced that HIV/AIDS related deaths are responsible for the increase in the global number of orphans. AVENT *AIDS Orphans*, available at <http://www.avert.org/aids-orphans.htm> (Accessed on 1 February 2011).

<sup>85</sup> L Richter *The Impact of HIV/AIDS on the Development of Children* cited in R Pharaoh (ed) *A Generation at risk? HIV/AIDS, vulnerable children and security in South Africa* (2004) 109.

<sup>86</sup> J Stein *Sorrow makes Children of us all: A literature review of the psycho-social impact of HIV/AIDS on Children* (2003) 5.

Research<sup>87</sup> has shown that some of the effects of HIV/AIDS on children include poverty,<sup>88</sup> frequent relocation or migration,<sup>89</sup> changes in caregivers and family composition,<sup>90</sup> child-headed households,<sup>91</sup> new and extra household responsibilities and work for children<sup>92</sup> and the fact that some children have to drop out of school to face the challenges posed by the HIV/AIDS epidemic.<sup>93</sup> Children may also face issues relating to the loss of their family home and assets,<sup>94</sup> health and nutrition,<sup>95</sup> psychosocial impact,<sup>96</sup> vulnerability to infection<sup>97</sup> and long-term psychological effects of emotional deprivation.<sup>98</sup>

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<sup>87</sup> J Anarfi 'Vulnerability to sexually transmitted disease: Street children in Accra' (1997) 7 *Health Transition Review* 281.

<sup>88</sup> Undeniably, more people live with HIV in poor countries than in rich ones. More than 60% of PLWHA inhabit the world's poorest region: sub-Saharan Africa. P Piot (note 47) 1371.

<sup>89</sup> Some forms of migration include 'going-home-to-die', rural widows moving to town to seek work or the help of relatives, and potential caregivers and dependants moving between kin households to achieve the most optimum care arrangements for all concerned. Adolescents are particularly affected by migration, as girls are sent to help out in other households, or as children are encouraged to try and fend for themselves by working—including street work. See J Anarfi (note 87) 290.

<sup>90</sup> As a result of death and migration, family members, including dependent children, often move in and out of households. Caregivers change and siblings may be split up. Separation from siblings has not only been found to be a predictor of emotional distress in children and adolescents, but children become more vulnerable when they are cared for by very aged relatives due to the conditions of mutual dependency that often exist between adult and child. See J Anarfi (ibid).

<sup>91</sup> These are most likely to form when there is a teenage girl who can provide care for younger children, when there are relatives nearby to provide supervision, and siblings either wish to stay together or are requested to do so by a dying parent.

<sup>92</sup> Several studies have shown that responsibilities and work, both within and outside of the household, increase dramatically when parents or caregivers become ill or die. In such circumstances, instances of work and responsibility being given to children as young as five have been observed. See UNICEF *Child workers in the shadow of AIDS: Listening to the children* (2000) 18.

<sup>93</sup> In households affected by HIV/AIDS, the school attendance of children drops off because their labour is required for subsistence activities and, in the face of reduced income and increased expenditure, the money earmarked for school expenses is used for basic necessities, medication and health services. Even where children are not withdrawn from school, education often begins to compete with the many other duties that affected children have to assume. See J Anarfi (note 87).

<sup>94</sup> As effects on households deepen and parents die, children may suffer the loss of their home and livelihood through the sale of livestock and land for survival, as well as through asset stripping by relatives. Loss of skills also occurs because fewer healthy adults are present in the household and/or are involved in livelihood activities. See J Anarfi (ibid).

<sup>95</sup> Children affected by HIV/AIDS may receive poorer care and supervision at home, may suffer from malnutrition and may not have access to available health services, although no studies have yet demonstrated increased morbidity and mortality among broadly affected children compared to unaffected control groups.

<sup>96</sup> HIV affected and orphaned children are often traumatised and suffer a variety of psychological reactions to parental illness and death. In addition, they endure exhaustion and stress from work and worry, as well as insecurity and stigmatisation as it is either assumed that they too are infected with HIV or that their family has been disgraced by the virus. See J Anarfi (ibid).

<sup>97</sup> Children affected by HIV/AIDS are themselves often highly vulnerable to HIV infection. Their risk for infection arises from the early onset of sexual activity, commercial sex and sexual abuse, all of which may be precipitated by economic need, peer pressure, lack of supervision, exploitation and rape. Some studies of street children, for example, show that vulnerable children do little to protect themselves from HIV infection because the pressures for basic survival—such as finding food—far outweigh the future orientation required to avoid infection. See J Anarfi (ibid).

<sup>98</sup> Children who grow up without the love and care of adults devoted to their wellbeing are at higher risk of developing psychological problems. See J Wild 'The psychological adjustment of children orphaned by AIDS' (2002) 13 *Southern African Journal of Child and Adolescent Mental Health* 3.

The problems facing the rights of children affected by HIV/AIDS are a cause for concern for the parents, families and the communities, since they have the duty and obligation to protect the rights of children.<sup>99</sup> However, when these fail, the State bears the duty to promote, protect and respect the rights of all vulnerable groups, including children.<sup>100</sup> In South Africa this obligation flows from section 28 of the Constitution<sup>101</sup>. In Botswana, the parental duty to care for the child is set out in section 27 of the Children's Act, which acknowledges the primary responsibility of parents and families to care for and protect children and the secondary obligation on the State to support and assist them in carrying out that responsibility.

### 1.3 Scope of the study

The various forms of hardship children face in the HIV/AIDS epidemic have been highlighted in the previous section. Owing to the large number of children facing these hardships, it has become imperative to explore the legal<sup>102</sup> strategies in place, to ensure that the rights of children are adequately protected beyond the letter of the law. This is also necessitated by the fact that in the absence of adequate legal protection, children's rights will be violated and the vulnerability of the future generation may be heightened.

Children in this study are divided into 2 groups<sup>103</sup>; those infected with HIV/AIDS and those affected by the virus. Children affected by HIV/AIDS include orphans who have lost one or both parents to the epidemic and those made vulnerable by the epidemic. Not all children are equally affected. Barrett, Strode and McKerrow (1999)<sup>104</sup> maintain that the relationship between children and the virus determines the extent of the impact and, as a result children affected by HIV/AIDS can be placed within three distinct groups:

- i. HIV infected children;
- ii. Children living with an HIV infected family or household member; and
- iii. Children of uninfected households within an infected community.

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<sup>99</sup> The duty to protect the child first rests on the parents. It is only when the parents cannot assume this duty that the extended families or the communities (if the family fails) take up the duty.

<sup>100</sup> Section 28(1) (b) also imposes the duty on the parents and family of the child to care for the child before spelling out the duty imposed on the State in section 28 (1) (c).

<sup>101</sup> See also Section 15 of the South African Maintenance Act No. 99 of 1998.

<sup>102</sup> There are various strategies in place to protect the rights of children in the HIV/AIDS epidemic. Some of these are social, economic, cultural etc. However, the scope of this study covers only the legal strategies in place to protect the rights of children affected by HIV/AIDS.

<sup>103</sup> For the purpose of this thesis, the phrase "children affected by HIV/AIDS" refers to those infected and those affected by HIV/AIDS.

<sup>104</sup> C Barrett, A Strode & N McKerrow *Consultative Paper on Children Living with HIV/AIDS Commissioned by the South African Law Commission* (1999) 8 -9.

This study seeks to examine how the HIV/AIDS epidemic affects the rights of children affected by HIV/AIDS and how the law should respond. This is based on an analysis of the following factors which affect children in the HIV/AIDS epidemic-

- i. Access to treatment, care and support;
- ii. Access to guardianship for children living in child-headed households, unstable family structures, and new forms of families for children who are moved from one household to another;
- iii. Right to Maintenance;
- iv. Access to sexual and reproductive rights; and
- v. Protection from HIV/AIDS related stigma and discrimination.

The study analyses international standards established by the UN and the Southern African Development Community (SADC) on the protection of the rights of children to establish the standards for the legal protection of children affected by HIV/AIDS. It also measures the response of both countries against international best practice, as set out in the CRC. In the light of these standards it critically analyses the legal protection available to children in both South Africa and Botswana, with a focus on the current legal frameworks. It also proposes law reforms by indicating the areas which are in need of further legal development and legal reform. The comparative analysis of the laws in both countries aims at highlighting the different approaches employed by them in protecting children. The comparative analysis also informs the proposals for law and policy reform.

This study has elected to compare South African law with the law in Botswana for a number of reasons, which include the following:

- i. the similarities in the nature of the HIV epidemic in both countries;
- ii. the comparable regional and international obligations undertaken by both countries; and
- iii. the fact that children affected and infected by HIV/AIDS in both countries live in a similar social context.

#### **1.4. Research hypotheses**

This study proceeds on the premise that the law provides protection to the rights of all citizens and that the notion of children's rights exists because children have very specific needs, different from those of adults. Thus the laws and policies targeting the rights of children affected by HIV/AIDS in both countries need to specifically address the rights of children. International standards on HIV/AIDS and human rights are the most suitable and comprehensive norms on the protection of

children affected by HIV/AIDS. National legal and policy frameworks should emulate them in order to ensure adequate and appropriate protection of the rights of children affected by HIV/AIDS.

In South Africa, specific legal instruments have been put in place to deal with HIV/AIDS separately from other illnesses and there are special provisions in the frameworks on many of the issues which relate to the protection of children affected by HIV/AIDS. This thesis argues that, although giant strides have been taken to develop comprehensive legislation and unequivocal safeguarding of children's rights, there is still room to expand the protection given to the rights of children living with HIV/AIDS within the available legal framework, to bring it in line with international standards.

In Botswana on the other hand, the development of the legal framework for the protection of children still does not capture the fundamental nature of the problems which children face in the HIV/AIDS epidemic. Existing general legal principles must thus be applied to children infected and affected by HIV/AIDS. This thesis reasons that these instruments do not provide adequate protection for children affected by HIV/AIDS and that there is a dire need to bring the legal framework in line with the international standards which the country is a party to.

## **1.5 Research questions**

This thesis deals with a number of research questions, including:

- i. How does HIV affect the rights of children affected by HIV/AIDS?
- ii. Can international standards serve as a template to shape the legal response to HIV in South Africa and Botswana?
- iii. Are the legal and policy frameworks in both countries in line with these international standards?

## **1.6 Literature review**

Extensive literature exists on the impact of HIV/AIDS on children from a number of different perspectives, including how the epidemic affects children's rights and how states can and have responded to the epidemic. Key themes which run through the materials include:

### **1.6.1. The HIV epidemic has impacted on the lives of thousands of children in sub-Saharan Africa**

UN publications<sup>105</sup> on the impact of the HIV/AIDS epidemic in South Africa and Botswana<sup>106</sup> give an in-depth account of the situation of African children affected by HIV/AIDS as they struggle with the difficulties which they experience in the HIV/AIDS epidemic.<sup>107</sup> Other literature on the epidemic in the SADC region links HIV/AIDS to poverty and insinuates that the impact of HIV/AIDS on children can instigate them to become a threat to the security of the SADC region.<sup>108</sup>

Simply put, extensive literature exists on different aspects of the HIV/AIDS epidemic and how it impacts on society and on children in the region generally and on South Africa<sup>109</sup> and Botswana<sup>110</sup> specifically. Much work has also been done on HIV/AIDS as a human rights issue and a body of literature clearly show how the international human rights norms can be used to respond to HIV at a national level.<sup>111</sup>

Academics and international organisations have articulately described the physical, emotional and financial impact of HIV on the child, their care-givers and family.<sup>112</sup> Chesney and Folkman examine the psycho-social impact of HIV/AIDS from a sociological point of view.<sup>113</sup> Some authors also address the emotional effect of stigmatisation of HIV/AIDS and its psychological impacts on people when they are infected or affected with HIV/AIDS.<sup>114</sup> There is also literature on the impact HIV has on childhood and development; the different kinds of childhood experiences and the multiplicity of issues which constitute childhood experiences in the context of HIV/AIDS.<sup>115</sup> Much of the work has focused on the general population and not specifically children; however, the psycho-social impact of HIV/AIDS based discrimination on children is well-documented.

Chesney and Folkman employ a medical approach to establish the connection between HIV infection and the psychological impact of the stress of the disease.<sup>116</sup> Their article discusses this in

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<sup>105</sup> UNICEF *Child workers in the shadow of AIDS: Listening to the Children* (2000).

<sup>106</sup> S Hunter (note 36).

<sup>107</sup> UNICEF/UNAIDS/WHO, *Young People and HIV/AIDS: Opportunity in Crisis*, (2002), available at [http://data.unaids.org/topics/young-people/youngpeoplehivaids\\_en.pdf](http://data.unaids.org/topics/young-people/youngpeoplehivaids_en.pdf) (Accessed on 04 May 2012).

<sup>108</sup> R Pharoah (ed), *A Generation at Risk? HIV, Vulnerable Children and Security in Southern Africa* (2004) 109.

<sup>109</sup> J Sloth-Neilsen & Z Du Toit *Trials and Tribulations: Developments in International, African and South African Child and Family law* (2008) 87.

<sup>110</sup> CM Fombad (ed), *Essays on the Law of Botswana* (2007) 229–245.

<sup>111</sup> J Sloth-Neilsen & Z Du Toit (note 109).

<sup>112</sup> SB Watstein & K Chandler *The AIDS Dictionary Facts on File*, (1998) see also UNICEF *Child workers in the shadow of AIDS: Listening to the children* (2000).

<sup>113</sup> MA Chesney & S Folkman 'Psychological impact of HIV disease and implications for intervention' (1994) 17 *Psychiatric Clinics of North America Journal* 163-182.

<sup>114</sup> SB Watstein & K Chandler (note 112).

<sup>115</sup> L Richter (note 85).

<sup>116</sup> MA Chesney & S Folkman (note 102).

relation to its effect on the management of PLWHA and establishes how stress can affect their general well-being. Looking at the psycho-social impact of HIV/AIDS from a sociological point of view, others authors<sup>117</sup> address the emotional impact of HIV/AIDS and its psychological impacts on people when they are infected or affected by HIV/AIDS. This is based on the general population and not specifically on children but the issues raised in the article are applicable to children as well. Other studies on children and HIV/AIDS look at the issue of childhood and development; the different kinds of childhood experiences and the different issues which constitute childhood experiences in the context of HIV/AIDS.<sup>118</sup>

In addition to the discussion on the psycho-social impact of HIV/AIDS on children, research has shown that HIV/AIDS is one of the main causes of poverty among families in sub-Saharan Africa.<sup>119</sup> Some scholars insinuate that the impact of HIV/AIDS on children can influence them to becoming a threat to the security of a country<sup>120</sup> and have suggested ways to use the law to mitigate the impact of the epidemic on children.<sup>121</sup> Other studies<sup>122</sup> on children and HIV/AIDS look at the issue of childhood; the different kinds of childhood experiences and the different issues which constitute childhood experiences.

A number of scholars agree that government should engage in the social protection of individuals, families and communities, their risk and vulnerability.<sup>123</sup> Providing social protection for families affected by HIV/AIDS will help to mitigate its impacts and to support people and help them. It will also help “to secure basic livelihoods because of, for example, age, illness, disabilities, discrimination, or their position within the social and economic structure of their society”. If designed to do so, social protection can enable people to move structurally out of poverty by building assets and by altering social relations.<sup>124</sup>

### **1.6.2 The impact of HIV on the rights of children**

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<sup>117</sup> SB Watstein & K Chandler (note 101).

<sup>118</sup> L Richter (note 85).

<sup>119</sup> P Piot (note 47).

<sup>120</sup> R Pharoah (ed) (note 108).

<sup>121</sup> JD Bessler ‘In the spirit of ubuntu: Enforcing the rights of orphans and vulnerable children affected by HIV/AIDS in South Africa’ (2008) 31 *Hastings International and Comparative Law Review* 50-51.

<sup>122</sup> L Richter (note 85).

<sup>123</sup> M Adato & L Bassett *What is the Potential of Cash Transfers to Strengthen Families affected by HIV and AIDS? A Review of the Evidence on Impacts and Key Policy Debates* (2007-2008).

<sup>124</sup> Ibid.



Several authors have focused on the rights of children<sup>125</sup> which are affected by the HIV/AIDS epidemic.<sup>126</sup> Many articles have also addressed specific,<sup>127</sup> as well as general children's rights and set out how they are affected by the epidemic.<sup>128</sup> One author, Anarfi, gives a very broad insight into the plight of vulnerable children and the risk of HIV/AIDS infection which they face on a daily basis.<sup>129</sup> This article establishes the need for the legal protection of children from HIV infection.

Salaam's work on the impact of HIV/AIDS on certain socio-economic rights, such as access to food, education, love and nurturing, which children receive in their new homes are also crucial to this thesis.<sup>130</sup> The rights discussed include the right to access health<sup>131</sup> care services, privacy, equality and maintenance and support.<sup>132</sup> Gilborn discusses how HIV/AIDS related orphanhood increases poverty in households where orphans are cared for and the focus is on direct impact on an orphan who is hungry and is malnourished.<sup>133</sup>

Scholars have also looked at different aspects of the right to access HIV/AIDS related health care.<sup>134</sup> A number of writers have written on how HIV/AIDS must be treated as a broad developmental problem, rather than as a narrow public health concern.<sup>135</sup> Other studies have documented the rights of children who facilitate access to medical treatment.<sup>136</sup> For example, Hagger focuses specifically on general access to health care; he argues that these rights are crucial for the child's wellbeing thereby establishing the need for protecting the child's right to health as a recognisable human right.<sup>137</sup> There is also considerable literature on the need to strengthen national health systems guided by the values of "Health for All," with a view to ensuring that everyone is able to access health care without discrimination and in line with human rights principles.<sup>138</sup> Jong-

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<sup>125</sup> A Skelton 'The development of fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2008) 9 *African Human Rights Law Journal* 484.

<sup>126</sup> L Louw *HIV/AIDS and human rights in* (2004) 2. See also J Sloth-Nielsen & BD Mezmur *HIV/AIDS and Children's Rights in Law and Policy in Africa: Confronting Hydra Head On* in also J Sloth-Nielsen (ed.) *Children's Rights in Africa: A Legal Perspective* (2013) 279.

<sup>127</sup> B Abramson *A Commentary on the UNCRC, Article 2: The Right of Non-Discrimination* (2008).

<sup>128</sup> R Basaza & D Kaija 'The impact of HIV/AIDS on children: Lights and shadows in the "successful case" of Uganda' in GA Cornia *AIDS, Public Policy and Child Well-Being* (2002).

<sup>129</sup> EA Preble 'Impact of HIV/AIDS on African children' (1990) 31 *Journal of Social Science and Medicine* 671 – 680.

<sup>130</sup> T Salaam *AIDS Orphans and Vulnerable Children (OVC): Problems, Responses Issues for Congress* (2004), available at [http://pdf.usaid.gov/pdf\\_docs/Pcaab222.pdf](http://pdf.usaid.gov/pdf_docs/Pcaab222.pdf) (Accessed on 23 August 2010).

<sup>131</sup> N Cantwell & A Holzscheiter *A Commentary on the UNCRC article 20: Children Deprived of Their Family Environment* (2008).

<sup>132</sup> T Salaam (note 130).

<sup>133</sup> LZ Gilborn (note 81) 12–14.

<sup>134</sup> B Gerbert, BT Maguire, T Bleecker *et al* 'Primary Care Physicians and AIDS Attitudinal and Structural Barriers to Care' (1991) 266 *Journal of the American Medical Association* 1.

<sup>135</sup> C Grainger, D Webb & L Elliott *Children Affected by HIV/AIDS: Rights and responses in the developing world* (2001).

<sup>136</sup> J Anarfi, (note 87), 281–306.

<sup>137</sup> L Hagger *The Child as Vulnerable Patient: Protection and Environment* (2009) 14.

<sup>138</sup> L Jong-wook 'Global health improvement and WHO: shaping the future' (2003) 362 *The Lancet* 2083.

Wook's writes of a world torn by inequalities and the importance of governments acting resolutely to correct the injustices encountered in accessing healthcare systems. He submits that this will improve the collective future of humankind. He argues that many of the determinants of unequal health outcomes, such as poverty, armed conflict and levels of education in women, lie outside the control of the health sector, but must nevertheless be addressed.<sup>139</sup>

Much has also been written on a child's right to participate in health matters concerning them.<sup>140</sup> Hagger discusses the concept of evolving capacity of the child and how this affects the child's ability to participate in decisions affecting his or her health.<sup>141</sup> Theories on the child's right to participate in matters concerning them have also been critically discussed and some studies<sup>142</sup> reject the existing theories on the right of children to participate in matters concerning them. For example, it has been argued<sup>143</sup> that the focus of previous theories regarding children's right to participation<sup>144</sup> are too narrow and that they do not take into account all the activities which are regarded as participation. Instead they focus on issues "around who gets to participate and why, what the purposes of the participation are and under what conditions it is possible".

A key issue which has received ample attention in relation to child participation is when children should be informed of their HIV status.<sup>145</sup> On this issue, available literature has perceived disclosure in different two ways. "The first envisions disclosure as a one-time event, when information about the diagnosis of HIV or AIDS is provided to the child".<sup>146</sup> The second "sees disclosure as a process". One perspective of the process is from caregivers/parents providing information and the steps they undertake.<sup>147</sup> A second perspective is from the child receiving the information.<sup>148</sup>

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<sup>139</sup> Ibid.

<sup>140</sup> L Gerison *The Evolving Capacities of the Child* (2005) 3.

<sup>141</sup> L Hagger (note 137) 210.

<sup>142</sup> S Moses 'Children and participation in South Africa: An Overview' (2008) 16 *International Journal of Children's Rights* 327-342.

<sup>143</sup> Ibid.

<sup>144</sup> W Wadlington 'Medical Decision making for and by children: tensions between parent, state, and child' 1994 *University of Illinois Law Review* 311-336.

<sup>145</sup> C Thorne, ML Newell, CS Peckham, *et al* 'Disclosure of diagnosis and planning for the future in HIV-affected families in Europe' 2000 (1) *Child Care Health and Development Journal* 29-40.

<sup>146</sup> E Flanagan-Klygis, L.F. Ross, J. Lantos, *et al* 'Disclosing the diagnosis of HIV in paediatrics' (2001) 2 *Journal on Clinical Ethics* 150 in L Vaz, SM Eugenia, T Tshikandu, *et al*, 'Telling children they have HIV: Lessons learned from findings of a qualitative study in sub-saharan Africa' (2010) 24 *AIDS Patient Care STDS Journal* 247-256.

<sup>147</sup> W Pequegnat, 'Consortium on family & HIV/AIDS research issues with children infected and affected with HIV and their families' (2002) 7 *Clinical Child Psychology Psychiatry* 15.

<sup>148</sup> LS Wiener, HB Battles, N Heilman, CK Sigelman *et al*, 'Factors associated with disclosure of diagnosis to children with HIV/AIDS' (1996) 7 *Journal of Paediatric AIDS HIV Infection* 310- 324.

The importance of privacy and confidentiality in relation to accessing health care has also received much attention from scholars.<sup>149</sup> Authors have described the importance of confidentiality in cases of HIV testing with children<sup>150</sup> and its role as a principle underpinning quality health care.<sup>151</sup> The link between the confidentiality of patient information in relation to HIV/AIDS and minimising discrimination has also been well documented.<sup>152</sup> There is discussion on how the disclosure of the HIV status of a parent or a care-giver affects the child.<sup>153</sup> Most of the literature available, however, deals with the protection of confidentiality<sup>154</sup> and consequences for the breach of the confidentiality<sup>155</sup> of PLWHA and not children specifically.<sup>156</sup>

Existing literature has shown that stigma persists among HIV orphans and that there is a relationship “between HIV/AIDS orphanhood and psychological distress”<sup>157</sup> and that the interventions aiming to reduce stigma may help promote the mental health of HIV/AIDS-orphaned youth.<sup>158</sup> On freedom from HIV/AIDS based discrimination, existing literature indicates that the consequences go beyond the individuals infected with HIV. It extends to the society at large and it disrupts the functioning of communities and complicates the prevention and treatment of HIV.<sup>159</sup> There is some literature on the protection of the rights of children to equality with regards to PLWHA<sup>160</sup> and the psycho-social impact of stigma and discrimination on children.<sup>161</sup> Chesney and Folkman<sup>162</sup> use a medical approach to establish the connection between HIV infection, the stigma attached to it and the psychological impact of it.

Existing literature on how HIV/AIDS impacts on children’s rights to care and maintenance is directly linked to the socio-economic impact of HIV/AIDS on children and their families. Research

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<sup>149</sup> G Corey, M Schneider Corey *et al Issues and Ethics in the Helping Professions* 8 ed. (2011) 161.

<sup>150</sup> Ibid.

<sup>151</sup> Botswana Network on Ethics, Law, and HIV/AIDS, *Healthcare staff knowledge and attitudes toward confidentiality of HIV test results in Botswana* (2006).

<sup>152</sup> RE Jürgens & M Palles, *HIV Testing and Confidentiality: A Discussion Paper* (1997) 1.

<sup>153</sup> DA Murphy, KJ Roberts & D Hoffman, ‘Stigma and ostracism associated with HIV/AIDS: children carrying the secret of their mothers’ HIV+ serostatus’ (2002) 11 *Journal of Child and Family* 191-193.

<sup>154</sup> RC Turkington ‘Confidentiality policy for HIV- related information: an analytical framework for sorting out hard and easy cases symposium: at the limits of the law’ (1989) 34 *Villanova Law Review* 871- 873.

<sup>155</sup> N Angotti, A Bula, L Gaydosh, *et al* ‘Increasing the acceptability of HIV counselling and testing with three C’s: Convenience, confidentiality and credibility’ (2009) 68 *Social Science and Medicine Journal* 2263- 2265.

<sup>156</sup> M Greeff, R Phetlhu, LN Makoe *et al* ‘Disclosure of HIV status: Experiences and perceptions of persons living with HIV/AIDS and nurses involved in their care in Africa’ (2008) 18 *Qualitative Health Research Journal* 311.

<sup>157</sup> ME Boyes & LD Cluver, ‘Relationships between HIV/AIDS-orphanhood, stigma, and symptoms of anxiety and depression in South African youth: A longitudinal investigation using a path analysis framework’ (2013) *Clinical Psychological Science Journal* 2-3.

<sup>158</sup> Ibid.

<sup>159</sup> D Skinner & S Mfecane ‘Stigma, discrimination and its implications for people living with HIV/AIDS in South Africa’ (2005) 1 *Journal of Social Aspects of HIV/AIDS Research Alliance* 157- 160.

<sup>160</sup> G Alfredsson & A Eide (eds) *Universal Declaration of Human Rights, a standard of achievement* (1999) 20.

<sup>161</sup> ME Boyes & LD Cluver (note 1157).

<sup>162</sup> MA Chesney & S Folkman (note 113).

shows that HIV/AIDS is one of the main causes of poverty among families in sub-Saharan Africa.<sup>163</sup> Some scholars have suggested ways to use the law to mitigate the socio-economic impact of the epidemic on children.<sup>164</sup> A number of scholars suggest that if governments engage in the social protection of individuals, families, and communities, the risk and vulnerability of children affected by HIV can be reduced.<sup>165</sup>

A number of arguments are made on the evolving jurisprudence concerning socio-economic rights through an analysis of the Treatment Action Campaign (TAC) and the Grootboom's cases.<sup>166</sup> It was argued that providing social assistance to families affected by HIV/AIDS because it can help to mitigate the impact of the epidemic, facilitate "basic livelihoods because of, for example, age, illness, disabilities, discrimination, or their position within the social and economic structure of their society"<sup>167</sup> These studies seem to indicate that, if designed to do so, social assistance can enable people to move structurally out of poverty by building assets and altering social relations.<sup>168</sup>

There is very little literature on other key rights such as, the best interest of the child which has received a less attention by children's rights scholars in relation to other issues. There is agreement that this principle is a "universal standard which serves as a guiding principle in decisions to be made about children." However, there is still room to explore how the principle can be used as a yardstick to evaluate states' responses to the rights of children affected by HIV/AIDS.

There are 3 key HIV specific legal issues which emerge from the literature. These are the need for orphaned children to be placed under the guardianship of another adult, the problems caused by 'property grabbing' and the rights of children living in child-headed households. The guardianship of children affected by HIV/AIDS has received considerable amount of attention from scholars.<sup>169</sup> It has been submitted that all children require a guardian including those affected by the HIV/AIDS epidemic.<sup>170</sup> Key issues raised in the literature include the parental role of the guardian, ensuring there are resources to support the child, agreeing on the duties of the guardian, facilitating child participation, collecting social-services for the child, acting as the primary care-giver to the child

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<sup>163</sup> P Piot (note 67).

<sup>164</sup> JD Bessler (note 121) 51.

<sup>165</sup> N Walker, B Schwartländer & J Bryce 'Meeting international goals in child survival and HIV/AIDS' (2002) 360, *The Lancet*, 284.

<sup>166</sup> S Uebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 2 *Law, Democracy & Development Journal* 159 – 191.

<sup>167</sup> C Hardy & M Richter 'Disability grants or antiretroviral? A quandary for people with HIV/AIDS in South Africa' (2006) 5 *African Journal of AIDS Research* 85–96.

<sup>168</sup> M Adato & L Bassett (note 123).

<sup>169</sup> LC Simbayi, *Psychological issues affecting OVC in South Africa* (2006) 20.

<sup>170</sup> SE Sachs & JD Sachs 'Africa's children orphaned by AIDS' (2004) 364 *The Lancet*, 1404.

and consenting to the child's marriage.<sup>171</sup> There is some literature on the problems with transferring guardianship in South Africa.<sup>172</sup> In Botswana there is very limited literature on this point.

There has been a considerable amount of literature on the right to inheritance in South Africa and Botswana.<sup>173</sup> Much of the discussion is on property grabbing by relatives and how it leaves AIDS orphans homeless.<sup>174</sup> Gender related discriminatory inheritance practices which are enshrined in the traditional laws of different societies are also discussed. For example, Humonga argues that property grabbing is a result of a combination of factors linked to customary rules developed in the pre-colonial and pre-capitalist African societies.<sup>175</sup> Some scholars have also made it clear that property grabbing is a repugnant practice<sup>176</sup> which is contrary to the principles of natural justice, equity, and good conscience.<sup>177</sup>

There are varying academic opinions on child-headed households with writers disagreeing on whether these households should be recognised in law or not.<sup>178</sup> While some scholars believe that the legal recognition of child-headed households is necessary for the protection of orphaned children, others are of the opinion that the legal recognition of these households will lead to "further neglect and degradation" in the protection of children's rights.<sup>179</sup>

### 1.6.3 Legal responses to the rights of children with HIV

Focusing on legal responses to the epidemic, Fombad proposed 3 models to HIV/AIDS legislation in Botswana and lists these as the "proscriptive model", the "protective model" and the "instrumental model of the law."<sup>180</sup>

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<sup>171</sup> G Wille & F Du Bois *et al* (eds) *Wille's Principles of South African Law* (2007)

<sup>172</sup> *Ibid.*

<sup>173</sup> CM Fombad (note 100); L Richter *The Impact of HIV/AIDS on the Development of Children* in (note 64) and J Anarfi, (note 87).

<sup>174</sup> K Izumi *Invisible Poverty - Property Grabbing from Women and Children and AIDS* Paper delivered at the International Conference on African Agriculture and the WDR Organised by NAI, NORAD, SIDA and IFAD, Oslo (2008) available at

[http://www.nai.uu.se/events/archives/conferences/african\\_agriculture/izumi.pdf](http://www.nai.uu.se/events/archives/conferences/african_agriculture/izumi.pdf) (Accessed on 17 February 2011).

<sup>175</sup> C Humonga 'Law and Gender in Southern Africa- A Human Rights and Family Law' in YW Bradshaw & SN Ndegwa *The uncertain promise of Southern Africa* (2000) 289.

<sup>176</sup> K Mwenda, N Mumbae & J Mvula-Mwenda 'Property-Grabbing Under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience Yet a Troubling Reality' (2005) 37 *George Washington University International Law Review* 949.

<sup>177</sup> AIDS Legal Network South Africa Customary law available at [http://www.redribbon.co.za/legal-system.php?systemID=LS\\_Customary-Law&show=mymenu2&showsub=mysubmenu2](http://www.redribbon.co.za/legal-system.php?systemID=LS_Customary-Law&show=mymenu2&showsub=mysubmenu2) (Accessed on 17 February 2011).

<sup>178</sup> South African Law Reform Commission *Report of review of the Child Care Act* (Discussion Paper December 2002) 169.

<sup>179</sup> *Ibid* at 170.

<sup>180</sup> CM Fombad 'A critical assessment of the legal responses to the HIV/AIDS Pandemic in Botswana' in CM Fombad, R. Mupedziswa *et al* *HIV/AIDS, Vulnerable Groups, Human Rights and Development in Botswana* OSSREA (2009) 57.

Several articles have elaborated on the manner in which national and international frameworks have responded to the protection of the rights of children affected by HIV/AIDS. Many articles addressed specific,<sup>181</sup> as well as more general, children's rights which are affected by HIV/AIDS.<sup>182</sup>

The literature shows<sup>183</sup> that there are various legal approaches which can be used to respond to the legal and human rights of children affected by the epidemic in South Africa<sup>184</sup> and Botswana.<sup>185</sup> Authors have used various approaches to describe these rights and responsibilities. Many have used the CRC and its two Optional Protocols as a framework and there has been much written on how these substantive, organisational and procedural provisions are applicable to the rights of children affected by HIV/AIDS.<sup>186</sup> Linking South African legislation on children's rights with international jurisprudence, writers have emphasised that South African courts have promoted the constitutional rights and international law obligations.<sup>187</sup> Some authors have shown how the CRC, and its background principles and strategies, can be made the foundation for the protection of children's rights.<sup>188</sup> Other writers also elucidate the application of international law to the domestic protection of the rights of children.<sup>189</sup>

Some scholars have used international law as a basis for analysing national and regional<sup>190</sup> responses to the protection of the rights of children.<sup>191</sup> A number of authors have looked at how the courts have interpreted international human rights instruments.<sup>192</sup> For instance, Fombad's focus on the Botswana legal system<sup>193</sup> and the specific impact of HIV/AIDS on children in Botswana<sup>194</sup> gives crucial insights into the way the rights of children are protected, from the point of view of the

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<sup>181</sup> B Abramson *A Commentary on the United Nations Convention on the Rights of the Child, article 2: the right of non-discrimination* (2008) 22.

<sup>182</sup> R Basaza & D Kaija, 'The impact of HIV/AIDS on children: Lights and shadows in the "successful case" of Uganda' in GA Cornia *AIDS, public policy and child well-being* (2002).

<sup>183</sup> G Alfredsson & A Eide (eds) *Universal Declaration of Human Rights, a standard of achievement* (1999).

<sup>184</sup> F Frohlich *The impact of AIDS on the community* in S Abdool Karim & Q Abdool Karim (note 2) 351.

<sup>185</sup> M Colvin *Impact of AIDS- the health care burden* in S Abdool Karim & Q Abdool Karim (note 2) 336.

<sup>186</sup> N Cantwell & A Holzscheltinger (note 131).

<sup>187</sup> RL Ngidi 'The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 197.

<sup>188</sup> E Verhellen *Convention on the Rights of the Child; Background motivation, strategies, main themes* (1994).

<sup>189</sup> A Strode & B Grant *A critical review of the extent to which the HIV/AIDS and Human Rights International Guidelines have been implemented in the Southern African Development Community* (2007) 28 *Obiter* 70-83.

<sup>190</sup> S Hunter (note 36).

<sup>191</sup> A Skelton (note 114).

<sup>192</sup> J Dugard 'Role of International Law in Interpreting the Bill of Rights' (1994) 10 *South African Journal on Human Rights* 58.

<sup>193</sup> CM Fombad 'A critical assessment of the legal responses to the HIV/AIDS Pandemic in Botswana' in CM Fombad, R Mupedziswa *et al HIV/AIDS, Vulnerable Groups, Human Rights and Development in Botswana* OSSREA (2009) 57.

<sup>194</sup> M MacFarlan, S Sgherri *The Macroeconomic Impact of HIV/AIDS in Botswana* International Monetary Fund (IMF) Working Paper (2001).

State and the approach taken in applying international law to domestic law and, ultimately, to the protection of children affected by HIV/AIDS. In a comparative analysis of how the South African Constitution addresses the rights of children in relation to international law, Nielsen and du Toit<sup>195</sup> show that the direct application of children's rights principles in deciding matters which affect children has taken place.<sup>196</sup> The literature indicates that the extent of the protection of children's rights varies across jurisdictions, despite many states' having articulated the need for the protection of the rights of children.<sup>197</sup>

#### **1.6.4. Conclusion**

Despite the extent of work that has been done on HIV/AIDS and children's rights, the existing literature shows that less information exists on the legal and policy responses in Botswana. Little has been written about how both countries measure up when their legal responses and how these responses are benchmarked against international norms. There is also very little written on the comparisons between South Africa and Botswana's legal responses. This thesis intends to cover the lacunae which exist in the literature on HIV/AIDS within the purview of this thesis.

#### **1.7 Limitations to the study**

In the course of this research, there were a number of substantive and procedural limitations which affect the outcome of this thesis.

Firstly, the substantive limitation is in respect of the fact that this thesis discussed the socio-economic issues affecting children affected by HIV/AIDS in the same way as one would discuss children affected by poverty. This is because it was not so easy to differentiate between children affected by HIV/AIDS and those affected by poverty. Thus in discussing the socio-economic impact of HIV/AIDS on children, this thesis deals with children affected by HIV/AIDS in the same way as children affected by poverty.

Secondly, the phrase "children affected by HIV/AIDS" in this thesis was used to refer to all children infected and affected by HIV/AIDS. Although this was mentioned in section 1.5 of Chapter 1, sometimes the thesis had to differentiate between those infected and those affected for better analysis.

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<sup>195</sup> J Sloth-Nielsen & Z Du Toit (note 98).

<sup>196</sup> J D Bessler (note 111) 50-51.

<sup>197</sup> M Freeman & P Veerman *The Ideologies of Children's Rights* (1992) 125.

On the procedural aspect of the thesis, it is important to point out that this thesis was limited to a desktop review of the legal and policy frameworks existing in both countries. Additional resources were sought from other sources, such as reports, to overcome the limitations to the desk review since it was not easy accessing the latest information to keep abreast of the changes in the legal and policy frameworks of both countries especially Botswana. Effort was nonetheless made to ensure that the current laws and policies were analysed in this thesis.

Not all the laws and policies on the protection of the rights of children affected by HIV/AIDS in both countries were analysed in this thesis. However, the analysis was limited to the most important legislation and policies. This was due to the vast number of laws and policies in both countries and the limited scope of the thesis. Thus only the ones which are crucial to the outcome of this thesis were included.

## **1.8 Research methodology**

This study is a desk review of available literature. It relies on:

- i. Library sources - review of available literature:
  - a. review of State reports to the UN.
  - b. review of NGO reports on the protection of children in South Africa and Botswana.
- ii. Analyses of relevant statutes. These include:
  - a. all relevant UN standards on the protection of children in South Africa and Botswana.
  - b. African regional standards and sub-regional standards on the protection of children in South Africa and Botswana.
  - c. all applicable domestic legislation on the protection of children in South Africa and Botswana.
- iii. Analyses of relevant case law
- iv. Internet sources

## **1.9 Outline of chapters**

Chapter 1 of this thesis is the introduction to the study. It contains an overview of the HIV/AIDS epidemic giving brief statistics of HIV/AIDS, its impact in the countries explored and the impact on the children. It states the objectives of the study as well as the relevance of the study in relation to the legal protection available to children in both countries. The chapter also contains the research



questions and the hypothesis for this study. Finally, it highlights the methodology which the research employs.

Chapter 2 takes a broad look at the issues that are relevant to the theme of this thesis and addresses the theoretical background to the study. The first section deals with the key concepts and it discusses the ideologies that are applicable to the protection of the rights of children generally and those affected by HIV/AIDS specifically. It examines issues such as why children's rights need protection and sheds light on the theories applicable to the protection of the rights of children. The human rights approach to the protection of children is also examined and the various human rights principles that are applicable to children. The second part focuses on the specific rights of children that are affected in the HIV/AIDS epidemic. It deals with the role of the state in protecting these rights. Finally, the chapter explores the role of the courts in interpreting children's rights and discusses relevant case law.

Chapter 3 deals with the international standards on the protection of children affected by HIV/AIDS. It attempts a comprehensive discussion of relevant UN standards applicable to the rights of children affected by HIV/AIDS. The chapter outlines the relevance of the standards to the protection of the rights of children and discusses how the instruments deal with the rights of children affected by HIV/AIDS.

Chapter 4 is a comprehensive audit of the AU and SADC regional standards available on the protection of the rights of children affected by HIV/AIDS in both countries. The standards discussed in this chapter are not necessarily binding but they are HIV/AIDS-specific. The chapter also attempts to show the impact of these instruments on the domestic legal systems of Botswana and South Africa.

Chapters 5 and 6 deal with an analysis of the national legal and policy frameworks on the protection of the rights of children affected by HIV/AIDS in both countries. The chapters cover all legislation and policies that can be evoked to protect the rights of children affected by HIV/AIDS and not only the HIV/AIDS-specific ones. The chapters also discuss the relevance to the protection of children affected by HIV/AIDS as well as their limitations.

Chapter 7 delineates the extent of the conformity of the legal and policy frameworks in both countries with international standards. It brings to light the strengths and weaknesses of both legal frameworks as well as the shortfall of the laws in both countries. This leads to the conclusion and

proposals for reforms presented in Chapter 8, which suggests ways by which the legal frameworks available in both countries can be reviewed to bring them into conformity with international norms and standards on the protection of the rights of children generally and those affected by HIV/AIDS specifically.

## **Chapter 2    Conceptualising the protection of the rights of children affected by HIV/AIDS in South Africa and Botswana**

### **2.0 Introduction**

This chapter is multi-dimensional. It conceptualises the legal protection of children affected by HIV/AIDS within the context of the child-centred approach to children's rights. It analyses the underlying concepts which form the basis for the protection of children's rights. It briefly discusses the human rights approach to the protection of children affected by HIV/AIDS.

This chapter does not give in-depth details of legislation, policies and decided cases, as this is dealt with in the following chapters. It points out the areas where the legal and policy frameworks of both countries are expected to provide for the adequate protection of the rights of children affected by HIV/AIDS. Some of the concepts which form the basis for discussion in this thesis and which have been addressed in this thesis will be presented.

### **2.1    Definition of concepts**

It is important to point out that some concepts are important in forming the theoretical model for discussing the conceptualisation of the legal protection of the rights of children affected by HIV/AIDS.

#### **2.1.1    “Child-centred approach” to examining the legal protection available to children**

This thesis employs a child-centred approach to examine the legal protection available to children affected by HIV/AIDS in Botswana and South Africa. In the context of this research, a child-centred approach is one which focuses on children and is based on the underlying philosophy that children must occupy a focal position in any legal framework designed to protect them. Thus the framework must protect, promote and respect their rights. Using this approach, this study places the child in the middle of all interventions concerning them. This approach sees each child as a unique and equally valuable human being, with the right not only to life and survival, but to development to their fullest potential.<sup>1</sup> A child-centred approach appreciates that children understand their own situation; that they have essential experience to offer and that they deserve to have their best

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<sup>1</sup> This approach is in line with all international and national standards on the rights of the child.

interests met through adequate allocation of resources and implementation of all their rights. A child-centred approach requires implementation of international standards at all levels.<sup>2</sup>

Applying the child-centred approach to evaluating the legal protection available to children involves focusing on the impact the legal interventions have on children to determine whether or not there has been an adequate focus on the protection of children's rights and whether or not this has yielded the desired effect. Therefore, it is of paramount importance for laws and policies to remain child-centred if they are to protect the rights of children.<sup>3</sup>

Various questions have been developed and used in this thesis and these are used to evaluate whether an approach is child-centred:

- 2.1.1.1 to what extent have children been included as recipients of the rights?
- 2.1.1.2 to what extent are children's rights promoted by the legislation?
- 2.1.1.3 to what extent has the participation of children been facilitated in developing the legislation?
- 2.1.1.4 is the legislation in the best interests of the children?
- 2.1.1.5 does the legislation safeguard their lives and survival and actively contribute to the development of children?
- 2.1.1.6 is the legislation reaching or taking into consideration the needs of all children, without discrimination against particular groups?
- 2.1.1.7 are there adequate resources available to implement the legislation?

Hence employing a child-centred approach to investigate the laws and policies on the protection of children affected by HIV/AIDS will help to determine how dedicated the laws and policies are to the rights of children and to what extent the available framework has been able to uphold the rights of children affected by HIV/AIDS. This will help in couching recommendations and making proposals for reforms on the laws and policies that will ensure children are the focal points of such legislation and policies.

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<sup>2</sup> K Ford, J Sankey & J Crisp 'Development of children's assent documents using a child-centered approach' (2007) 11 *Journal of Child Health Care* 19-28.

<sup>3</sup> This study believes that this will ensure that all the standards set of the protection of the rights of children are realised.

### 2.1.2 Rights-based approach to the protection of children affected by HIV/AIDS

A rights-based approach is a conceptual framework for the process of protecting human rights, based on international human rights standards and operationally directed towards promoting and protecting human rights. It seeks to “analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress”.<sup>4</sup>

Under a human rights-based approach, “the legislation, plans, policies and processes are anchored in a system of rights and corresponding obligations established by international law”.<sup>5</sup>In a rights-based approach, human rights determine the relationship between individuals and groups with valid claims (rights holders) and state and non-state actors with correlative obligations (duty-bearers). “It identifies rights-holders and their entitlements and corresponding duty-bearers and their obligations. It works towards strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations”.<sup>6</sup>

Applying this approach to the protection of children affected by HIV/AIDS requires a process of protecting children affected by HIV/AIDS based on international human rights standards directed at promoting and protecting the rights of these children. This involves the determination of the relationship between the children as rights holders and all actors with correlative obligations (duty-bearers). These include the parents and care-givers, schools and the state when these fail to protect the children.

This thesis will analyse the legal and policy frameworks in South Africa and Botswana to establish if they are child based. In doing this, it will look at the purpose of the laws and policies to establish if they are designed to protect the rights of children and to ensure that duty holders meet their responsibilities.

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<sup>4</sup> OHCHR *Frequently asked Questions On A Human Rights-Based Approach To Development Cooperation* (2006) available at [www.ohchr.org/Documents/Publications/FAQen.pdf](http://www.ohchr.org/Documents/Publications/FAQen.pdf) (Accessed on 23 July 2010).

<sup>5</sup> Ibid.

<sup>6</sup> UNICEF *The Human Rights Based Approach - statement of Common Understanding State of the World's Children* (2004) 1.

### 2.1.3 The “best interest of the child” principle<sup>7</sup>

The standard of “the best interest of the child” was introduced for the first time in the non-binding Declaration on the Rights of the Child of 1959 (1959 Declaration).<sup>8</sup> Regarding the content and scope of the “best interest” standard, neither the Declaration nor the CRC contained any special stipulation.<sup>9</sup> Principle 2 of the 1959 Declaration reads as follows:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

This can be compared with article 3 (1) of the CRC which provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The 1959 Declaration makes the best interest of the child a “paramount consideration” in the enactment of laws that are intended to give special protection that will enable the physical, mental, moral, spiritual and social development of a child. This is contrary to the CRC which applies the principle to “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”.<sup>10</sup> While the 1959 Declaration limits the application of the best interest of the child to the enactment of laws which affect the child, the CRC extends the principle to all actions concerning the child be it administrative or legislative.

The CRC, which is “a universally agreed set of non-negotiable standards and obligations” and “basic [human rights standards that] set minimum entitlements and freedoms that should be respected by governments,<sup>11</sup> makes the best interest of the child principle one its 4 cardinal principles. It is a universal standard which serves as a guiding principle in decisions to be made

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<sup>7</sup> The best interest principle is a very crucial principle which is the foundation for the analysis of the strengths and weaknesses of the frameworks of both countries are built regarding the rights of children affected by HIV/AIDS. This principle is further elaborated in other chapters. The discussion in the other chapters deals with the application of the principle under national legislation and courts, while this chapter deals with the fundamental issues relating to the principle.

<sup>8</sup> Declaration on the rights of the Child of 1959 available at <http://www.cirp.org/library/ethics/UN-declaration/> (Accessed on 07 February 2011).

<sup>9</sup> M Freeman & P Veerman *The Ideologies of Children’s Rights* (1992) 125.

<sup>10</sup> Article 3(1) of the CRC.

<sup>11</sup> S Chen *The Fundamental Question when Applying the Welfare Principle: “Who will be the Better Parent or Guardian”?* Selected Works Published by Singapore Management University (2011) 3.

about children. International and regional instruments support the best interest of the child standard and this is evident in a number of judgments from courts in African countries.<sup>12</sup>

According to Zermatten,<sup>13</sup> the “best interest of the child” is a fundamental legal principle of interpretation developed to limit the extent of adult authority over children (parents, professionals, teachers, medical doctors, judges, etc.). The principle is based upon the recognition that an adult is only in a position to undertake decisions on behalf of a child because of the child’s lack of experience and judgement. Thus, simply put, the best interest of the child principle can be interpreted as taking the child’s emotional, spiritual, physical and, psychological welfare and all other factors that affect the child’s wellbeing and interests into consideration before a decision affecting his/her life is made.<sup>14</sup>

According to Currie & De Waal, the concept of the best interest of the child is not without difficulty. It has become controversial because it has failed in the past to provide a reliable or determinate standard. In addition, there is the danger of social engineering through what the helping professional or social services consider to be in the best interests of the child.<sup>15</sup> On the other hand Skelton<sup>16</sup> sees the principle as being a useful standard. She shows how it has been applied in various regional and domestic instruments dealing with the rights of the child.

Both the CRC and the ACRWC employ very similar approaches while applying this principle. The CRC refers to best interests as being ‘a primary consideration’ in matters concerning the child while the ACRWC uses a subtly different wording namely ‘the primary consideration.’<sup>17</sup> The difference amounts to only one small word, but it creates a significant difference in how to give weight to the principle. Whilst ‘a primary consideration’ leaves best interests competing equally with other considerations on the same footing, ‘the primary consideration’ suggests that children’s best interests must be given a heavier weighting where there are competing rights or considerations.<sup>18</sup>

The South African Constitution, in section 28(2), refers to a child’s best interests as being ‘of paramount importance’ in every matter concerning the child. The Constitutional Court, whilst giving careful and deliberate consideration to children’s best interests, has made it clear that the

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<sup>12</sup> Some of the cases are discussed later on in this thesis. See chapters 4, 5 and 6.

<sup>13</sup> J Zermatten ‘The Best Interests of the Child Principle: Literal Analysis and Function’ (2010) 18 *The International Journal of Children's Rights* 484.

<sup>14</sup> This definition summarises all the arguments which have previously been put forward on the definition of the best interest principle.

<sup>15</sup> I Currie & J de Waal *The Bill of Rights Handbook* (2007) 681.

<sup>16</sup> A Skelton ‘The development of fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments’ (2008) 9 *African Human Rights Law Journal* 484.482.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

paramountcy of a child's best interest is a right that all children have where their interests are concerned.<sup>19</sup>

In Botswana, the best interest of the child principle is not constitutionally enshrined. However, this concept is well understood and appreciated within the courts' jurisdiction as a guiding principle for all actions regarding children and is progressively being embraced in many decisions involving the rights of the child. The courts have interpreted it to mean that in all cases involving children, the welfare of the child should be the paramount consideration irrespective of what law is applied. In fact, "in its original jurisdiction, the High Court<sup>20</sup> has, on numerous occasions, pronounced itself the upper guardian of all children in Botswana and enjoins all courts to take into consideration what is best for the welfare of the child".<sup>21</sup>

In spite of this, however, both the South African Children's Act No 15 of 2005<sup>22</sup> (South African Children's Act) and Botswana new Children's Act of 2009<sup>23</sup> (Botswana Children's Act) recognise the best interest of the child principle and recommend its application when making decisions concerning the child. The principle is mentioned in various policies such as the Botswana's National Development Plan 8.

## 2.2 Theories of children's rights

There are a number of theories on the protection of the rights of children. These amongst others, give rationales for why rights (including children's rights) need to be protected.

Conceptually, rights are derived from the theory of natural law. The natural rights theory believes that human rights are universal rights held to belong to individuals by virtue of their being human, encompassing civil, political, economic, social and cultural rights and freedoms, and based on the notion of personal human dignity and worth.<sup>24</sup> This theory<sup>25</sup> recognises the universality of human rights inherent in all human beings, as stated in article 1 of the UDHR.

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<sup>19</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [22].

<sup>20</sup> *Moremi v MesothoMisca*, 13/96 Unreported (Botswana; 1996)

<sup>21</sup> J Sloth -Nielsen & Z Du Toit (note 98).

<sup>22</sup> Section 7 of South African Children's Act.

<sup>23</sup> Section 5 of Botswana Children's Act.

<sup>24</sup> MA Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 2.

<sup>25</sup> This theory was developed in the UDHR which recognises that all human beings are born free and equal in dignity and rights.



If it is agreed that children are human beings<sup>26</sup> with inherent dignity, then the inalienable rights of all members of the human family belong to them as well. Therefore the obligation to protect the rights of human persons stated in the UDHR applies to all persons, including children.

This theory, which treats children's rights as universal rights inherent in all human beings, has been applied by various writers and they have reasoned that there are two aspects to the protection of children's rights.<sup>27</sup> The first is extending the rights of all human beings to children<sup>28</sup> while the second involves developing "special safeguards" for children, the provisions of which extend beyond the protection provided by the general human rights clauses.<sup>29</sup>

The legal or statutory rights theory sees rights as claims which exist under the rules of legal systems.<sup>30</sup> "They are bestowed by a particular government to the people and are relative to specific cultures and governments. They are enumerated or codified into legal statutes by a legislative body. These rights may differ from country to country, depending upon the constitution and culture that they adopt. Nevertheless, at the same time, legal rights impose an obligation on other people not to exceed the prescribed limits of law."<sup>31</sup>

They raise a number of different philosophical issues, such as:<sup>32</sup>

- i. whether legal rights are conceptually related to other types of rights, principally moral rights?
- ii. what the analysis of the concept of a legal right is?
- iii. what kinds of entities can be legal right-holders?
- iv. whether there any kinds of rights which are exclusive to, or at least have much greater importance in, legal systems, as opposed to morality?
- v. what rights legal systems ought to create or recognise?

Focusing on the notion that rights are a moral fiction based on some outdated metaphysical view and humanity's place in it, Freeman and Veerman<sup>33</sup> attempt to make theoretical sense of the

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<sup>26</sup> Article 1 of the CRC defined children as every human being below the age of eighteen years unless under the law applicable to the child majority is attained earlier.

<sup>27</sup> A Bainham *Children: the Modern Law* (2005) 731, and AE Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa, With Specific Reference to Guardianship, Care and Contact* Ph.D. Thesis, University of Pretoria (2007) 122.

<sup>28</sup> J C Mubangizi *The Protection of Human Rights In South Africa: A Legal And Practical Guide* (2004) 2-3.

<sup>29</sup> A Bainham *Children: the Modern Law* (2005) 731.

<sup>30</sup> R Dworkin *Taking Rights Seriously* (1977) 37.

<sup>31</sup> TSN Sastry *Introduction to Human Rights and Duties* (2011) 14

<sup>32</sup> K Campbell 'On the General Nature of Property Rights' (1992) 3 *King's College Law Journal* 79.

<sup>33</sup> M Freeman & P Veerman (note 197).

international standards on the rights of children and to test the interface between morals and rights<sup>34</sup> to determine if people could exist on morals alone, without rights. They suggest an experiment by Feingberg<sup>35</sup> to look at a world in which there are no rights. In this scenario, it was deduced that “no matter how benevolent and possibly even devoted to duty everyone in it is, such a world would be greatly “morally improvised” because no one would feel deserving of decent treatment. Rather, inhabitants of this world would feel humble gratitude for the smallest kindness”.<sup>36</sup>

Imagining this hypothetical world, one can infer that people would lack the dignity and insurance that comes from considering themselves the moral equal of everyone else in the community. Thus the harm to individual self-esteem and character development would be incalculable.<sup>37</sup> The thought of such a world with moral rights (or even more generic “claim rights”) seem sufficient to convince anyone that the notion of rights and the related concepts are a significant and valuable addition to the moral life. In fact, given the resultant harm to the character development of individuals, one wonders what kind of a moral life would even be possible.<sup>38</sup>

If we consider the function of right-talk in moral discourse, it is commonly held that rights serve the purpose of establishing either a justified claim<sup>39</sup> or a valid claim,<sup>40</sup> which protects the interest of the right holder or another. These interests are not just the desire to seek pleasure and avoid pain, but these interests are comprised of the concerns, plans, projects, state of mind and being, without which our lives would lose much, if not all, of their meaning. In other words, these interests, however we state them, are what make human life more fully human.<sup>41</sup>

This theory is subject to a number of objections by those who argue that there are a number of societal conflicts and objections, not all of which are related to the issue of rights and cases of conflicting interests will always arise. There is thus a possibility that everyone’s interests will not always be sufficient to establish the necessity for, and values of, a rights model.<sup>42</sup>

It can be reasoned that “the unavailability of rights might make the world a quieter and less contentious place to live; and children could conceivably continue indefinitely in their societally

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<sup>34</sup> Although this theory focuses on rights generally, it is applicable to children’s rights because children’s rights are to children what human rights are to everyone. Thus a right is a right be it human rights or children’s rights.

<sup>35</sup> J Feingberg *Social Philosophy* (1973) 58.

<sup>36</sup> J Feingberg (ibid).

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> A I Melden *Rights and Persons* (1977) 5.

<sup>40</sup> J Feingberg (note 35) 65 – 67.

<sup>41</sup> Ibid at 9.

<sup>42</sup> Ibid at 10.

(and often legally) prescribed time-honoured role of being seen and not heard.”<sup>43</sup> It will, however, not make the world a less conflict-free place and certainly not a qualitatively better one.<sup>44</sup> This is because rights are indispensable. They help to settle these conflicts or disputes after they have arisen and they do so in a fair, non-arbitrary and consistent way. There is no denying that rights including children’s rights, are important because they allow persons to be treated as dignified subjects of respect rather than having to rely on the whim of others to act benevolently.<sup>45</sup>

### **2.3 Specific rights of children that are likely to be affected by HIV/AIDS**

For several years, national and international responses on the HIV/AIDS epidemic have been on prevention and care, rather than on counteracting its impact on communities. Consequently, orphaned children, caregivers, households, communities, and civil society organisations have had to bear the brunt of the epidemic's impact.<sup>46</sup> It is therefore very important to delineate the rights which ought to be the focus of national responses in the epidemic. In this regard, this section briefly sets out most of the rights of children depending on their relationship which should be the focus of protection in national HIV/AIDS responses.<sup>47</sup>

ESCR are a group of rights which are derived from the ICESCR.<sup>48</sup> “These rights have taken on a position of significance in light of the systemic poverty imposed by the HIV/AIDS epidemic and other social and economic factors.”<sup>49</sup> ESCR are very important for the security, welfare and comfort of all children. These are crucial to meet basic human needs of children, and to guarantee that they have the highest attainable standard of living.<sup>50</sup>

HIV/AIDS however has the tendency to negatively impact one or more of these rights. This can happen when the child is infected with HIV/AIDS, when there is HIV/AIDS in the family or when the child is vulnerable to HIV infection. The inability to enjoy all the human rights which children

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> L Hagger *The Child as Vulnerable Patient: Protection and Environment* (2009) 14.

<sup>46</sup> Population and Development Review ‘On the Socioeconomic Impact of HIV/AIDS’ (2001) 3 *Population and Development Review* 619.

<sup>47</sup> This section takes into account the fact that some specific rights are crucial for some children depending on their relationship with HIV/AIDS.

<sup>48</sup> S Liebenberg ‘South Africa's evolving jurisprudence on socio-economic rights : an effective tool in challenging poverty’ 2002 (6) *Journal of Law, Democracy & Development* 156 – 191.

<sup>49</sup> L Gilbert & L Walker ‘Treading the path of least resistance: HIV/AIDS and social inequalities—a South African case study’ *Journal of Social Science & Medicine* 2002 (54) 1093 – 1110.

<sup>50</sup> Amnesty International *Economic Social and Cultural Rights* (2013) available at <http://www.amnestyusa.org/demand-dignity/economic-social-cultural-rights/page.do?id=1011006> (Accessed on 13 September 2010).

require for their wellbeing plunges the children into hardship further deepening the impact of the epidemic on the child.

Civil and political rights (CPR) exist to ensure the security and worth of the life of a person. This category of human rights guarantee that the dignity and value of all persons are protected and that no one is unduly dealt with. In the case of a person living with HIV/AIDS these rights ensure that the respect of the person is maintained and that the person is not unfairly treated because of the HIV/AIDS condition.<sup>51</sup>

### 2.3.1 ESCR

This section attempts an outline of how HIV impacts on children infected by HIV/AIDS or those vulnerable to HIV infection and how their ESCR rights are likely to be infringed. These include:

- i. Right to adequate nutrition: the right to adequate nutrition implies that the child, alone and in community with others must have physical and economic access at all times to adequate food using a resource base appropriate for its procurement in ways consistent with human dignity. The right to adequate food is a distinct part of the right to an adequate standard of living.<sup>52</sup> This right is crucial for all children because they normally require adequate nutrition, especially when the child is infected by HIV. This right is however likely to be infringed if the parents of the child do not have enough money to care for the child or if the child is an orphan living in a child-headed household.
- ii. Right to health care: the right to health care implies that all children have access to all the services that will secure the enjoyment of the highest attainable standard of physical and mental health and wellbeing of the child. The child's right to health care is one of the first rights to be infringed when a child is orphaned and the child does not have proper care-givers. For children living in child-headed households or with care-givers who are not familiar with the child's health needs, this can be a big problem. In the case of a child infected by HIV/AIDS, the right to health care is crucial and accessing this right might be the difference between life, and death.
- iii. Right to housing: the right to housing implies that all children are able to live in a secure home and community in peace and dignity. This right can be affected if the child's family is not able to secure a home because they have been left impoverished by HIV/AIDS in the family. If the

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<sup>51</sup> Civil and Political Rights are the categories of rights listed under the International Covenant on Civil and Political Rights. These rights protect people from unwarranted action by government and private individuals.

<sup>52</sup> University of Minnesota *Circle of Rights ESCR Activism training manual The right to adequate food Module 12* available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module12.htm> (Accessed on 15 October 2010).

parents are too ill and cannot work, their right to housing is likely to be affected. In the case of an AIDS orphan, the right to housing can be affected when the orphan has nowhere to live after the death of the parents.

- iv. Right to education: the right to education implies that the child will be given access to education through any of the available and convenient mediums of learning in the country. Access to education has to be on the basis of equality and non-discrimination and the freedom to choose the kind (public/private institutions) and content (religious and moral) of education. This is crucial for all children as a child's right to education can be infringed when the child is unable to go to school because of the child's ill-health or that of the parents or family members when they are sick from AIDS and so cannot take the child to school or prepare them for school.
- v. Right to adequate standard of living: this right implies that the child will be able to attain the standard of living that will promote the health and general welfare of the child. This is important for all children, irrespective of their relationship with the epidemic. This is one of the first rights that are impacted by HIV/AIDS epidemic because HIV/AIDS often affects the ability of the parents to reach their full economic or production capacity. If the parents are not able to work due to ill health, they will not be able to earn enough money to cater for their needs and thus the standard of living of the family will fall.
- vi. Right to social security: the right to social security schemes are of particular importance for children and parents who are sick with AIDS. This right is especially very important for the survival of families and children affected by HIV/AIDS from low socio-economic backgrounds. Parents need to be able to access social security to help the children. The availability of social security will assist the child to live a comfortable life. This right is however, likely to be breached if the government does not provide any social security or assistance scheme or when the parent is sick or too weak to access the social security.
- vii. Right to a clean environment: the right to a clean environment implies that the child will live in an environment that promotes the health and general wellbeing of the child. This is very important for children especially those infected by HIV/AIDS. This right can be linked to the right to health, in the sense that if the environment is clean; the health of the child will be safe-guarded to a large extent. The right to a clean environment can be infringed if the parents of the child are too sick to take care of the environment.
- viii. Right to gender equality: for children affected by HIV/AIDS, their gender-related rights are likely to be infringed when they are made to perform roles which are culturally stereotypical of certain genders. For instance, in some societies, the girl child is raised to be subordinate and submissive to the needs of the males; to believe that they are to perform certain duties while the male children perform certain duties. The gender stereotypes refer to the beliefs which are linked to the gender

roles which children play in their different societies. The right to gender equality can be breached in cases where children experience differential treatments based on the gender-related stereotypes.

### **2.3.2 CPR**

This section attempts an outline of how HIV impacts on children infected by HIV/AIDS or those vulnerable to HIV infection, and how their CPR rights are likely to be infringed.

- i. **Right to dignity:** the right to dignity implies that the child will be accorded all the respect and treatment due to the child by virtue of the worth of the person as a human being. This is a very important human right that is often linked to human existence and the daily acknowledgement of a person's humanity. If dignity is taken away, a person is likely to feel worthless as a human being. The infringement of the right to dignity has been linked to the death of a number of people. The dignity of a child affected by HIV/AIDS is likely to be infringed if the child is stigmatised because of HIV/AIDS. Discrimination or prevention from accessing facilities because of the HIV status of the child can lead to a violation of the child's dignity.
- ii. **Freedom from discrimination and stigmatisation:** the right to be free from discrimination and stigmatisation implies that the child will be protected from all actions that unfairly differentiate the child from others based on the HIV/AIDS status of the child, or that of a family member. This right is very important to all children affected by HIV/AIDS. This is because HIV/AIDS often leads to severe stigmatisation and discrimination and these have been proven to escalate the rate of the HIV/AIDS infection and its effect on people.
- iii. **Right to privacy:** The right to privacy ensures that the child is protected from external factors unduly interfering with the child without permission. This right is important for a child affected by HIV/AIDS, especially when accessing health care facilities. This right is usually infringed in cases of children affected by HIV/AIDS when the status of the child or that of his or her family member is probed or made public for no reasons beneficial to the child. In other situations, the child might have persons interfering with his or her privacy, especially those concerning the health of the child, or that of the family of the child or even the situation of the child at home.
- iv. **Right to expression and to give opinion:** the right to expression and to give opinion ensures that the child is involved in all processes that will lead to the making of decisions concerning the child. This right is often infringed in the case of children if they are not allowed to express their opinion on the treatment plan which the medical practitioner is making, or on other issues

concerning the health of the child. The right is to be protected when other decisions will be made regarding the welfare of the child. This includes issues such as adoption, fostering, education and all other similar issues concerning the child. Respecting this right will ensure that the best interest of the child is taken into consideration and that the child is not forced to accept decisions which suit the parents or the adults and not necessarily the child.

- v. Access to information: the right to access information implies that the child is allowed access to information on issues relating to the child; to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. This kind of information might relate to the health of the child or to the health of the family of the child. This right can be infringed in the case of a child affected by HIV/AIDS if the child is not given adequate counselling on the status of the health of the child or the treatment which the child is placed on. This is important, as it gives the child the power to make informed decisions and to consent to their treatment. This makes the child a part of the treatment or the decision-making process.
- vi. Right to family care or parental care: the family is the fundamental and natural unit of society and all children have the right to be under the care and protection of a family and loving parents. The family or parents can be the foster or biological. This right is crucial for all children and the right might be hampered by HIV/AIDS when the child loses both parents to AIDS and the child does not get alternative care and support. In this case, the orphan might have to go and live with foster parents, in an institution for orphans or they might have to live alone in child-headed households. There is likely to be a disruption of the family structure and this can curtail the enjoyment of this right.
- vii. Right to appropriate care (if they are removed from their parents): the right to appropriate care if they are removed from their parents implies that the child, if taken away from the parents or family, should be placed in a home where the care of the child will be guaranteed to be in line with the standard that is appropriate for the wellbeing of the child. This right can be violated in the case of children who lose their families on account of HIV/AIDS; it is possible that the children will not enjoy the same standard of care they enjoyed while they were under the care of their parents.
- viii. Right to be protected from abuse or violence: the right to be protected from abuse and bad treatment implies that the child should be allowed to live a life that is free from abuse and

violence. This right is crucial for all children and can be easily violated if a child affected by HIV/AIDS is separated from their parents. This can be because of the death of the parents or because the parents are unable to protect them from abuse, due to their own ill-health.

- ix. Right to be protected from child labour: The right to be protected from child labour implies that the child should be not be subjected to any activity that is exploitative or activities that will hinder the childhood, education and normal growth of the child. Orphans or other children living in a child-headed household or households, where the parents are incapacitated because of an AIDS related illness, are sometimes subjected to activities which will ensure that they contribute some financial support to the family. This can be by their parents or while they are under foster care. This can occur because of the death of the parents or care-giver, or when the parents are too sick to work and cater for the family. Children in child-headed households experience this, as child labour is a means of ensuring that they are able to care for their younger siblings.

## 2.4 The impact of HIV/AIDS on children's rights<sup>53</sup>

*AIDS is a disease unlike any other. It is a social issue, a human rights issue, an economic issue. It targets young adults just as they should be contributing to economic development, intellectual growth, and bringing up young children. It is taking a disproportionate toll on women. It has made millions of children orphans. It does to society what HIV does to the human body – reduces resilience and weakens capacity, hampers development and threatens stability..*<sup>54</sup>

Directly and indirectly, HIV/AIDS affects the rights which are crucial for the survival and development of children.<sup>55</sup> The direct impacts of HIV/AIDS include the adversity children face as a result of the epidemic, either as infected or affected children. These include abuse, denial of care, forced child labour and loss of inheritance.<sup>56</sup>“The indirect impacts of HIV/AIDS include the potentially stigmatising situations and hardship they face when engaging in social interaction, accessing health care and educational opportunities because they expect or internalise stigma.”<sup>57</sup>

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<sup>53</sup> The factors discussed in this section as impacting the rights of children have been ordered in line with the conceptual framework which is used later on in the analysis section of this thesis.

<sup>54</sup> B Ki-Moon, *UN Secretary-General Speech at the World AIDS Day* (2007) available at [http://human-rights.unglobalcompact.org/doc/UNGC\\_HIVAids.pdf](http://human-rights.unglobalcompact.org/doc/UNGC_HIVAids.pdf) (Accessed on 28 June 2010).

<sup>55</sup> A Strode & K Grant *Children and HIV: Using an evidence-based approach to identifying legal strategies that protect and promote the right of children infected and affected by HIV/AIDS* Working Paper prepared for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, 7-9 July (2011).

<sup>56</sup> A Strode & K Grant *The role of stigma and discrimination in increasing the vulnerability of children and youth infected with and affected by HIV* in H Deacon & I Stephney *HIV, Stigma and Children: A literature Review* HRSC (2007) 2.

<sup>57</sup> Ibid.



Simply put, the HIV/AIDS epidemic poses many complexities for the protection of the rights of children. The epidemic may not only affect the health of the children but it may cause them to lose their parents or guardians thereby prematurely ending their childhood. HIV/AIDS affects the rights of children in the following ways:

### 2.3.1 The loss of a parent or care-giver

*"We should remember that the process of losing parents to AIDS for the children often includes the pain and the shame of the stigma and the fear that the disease carries in most of our societies."<sup>58</sup>*

The loss of parents and families is one of the main consequences of HIV/AIDS on children. The socio-economic rights of children are usually affected in households where the parents die or are very sick with AIDS. In many of these households, the children lack adequate food and this affects the nutritional well-being of the children. Routine immunisations and other preventive care can be overlooked by sick parents or new guardians, thereby leaving AIDS-affected children prone to illness.<sup>59</sup>

The majority of children orphaned or made vulnerable by HIV/AIDS live with a surviving parent, or within their extended family (often a grandparent).<sup>60</sup> For children orphaned by AIDS, who live in homes or that have been taken into foster care, access to education and other basic resources can be very difficult. These children tend to constitute additional expenses for the households, thereby affecting the socio-economic status of the homes where they live. For these children, there is often a decline in the quantity and quality of food, education, love and nurturing which they receive in their new homes. They might even be stigmatised.<sup>61</sup>

In many of these households, poverty deepens with each orphan taken in. Thus, overwhelmed guardians may choose to feed their own children first, leaving orphans hungry and malnourished.<sup>62</sup> This is particularly common in households in communities with high HIV/AIDS rates. The children may be forced to leave school, engage in child labour, prostitution and other exploitative means of survival. They suffer from depression and anger, or engage in risky behaviour like survival sex,

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<sup>58</sup> Statement by B Ljunqvist -UNICEF representative, *HIV/AIDS Orphans Survey Findings Conference*, New York (2003).

<sup>59</sup> L Z Gilborn 'The effects of HIV infection and AIDS on children in Africa' (2002) 176 *West Journal of Medicine* 12.

<sup>60</sup> GM Shelling *AIDS Policies and Programs* (2006) 49. An estimated 5% of children affected by HIV/AIDS worldwide have no support and are living on the street or in residential institutions.

<sup>61</sup> T Salaam *AIDS OVC: Problems, Responses, and Issues for Congress* (2004) available at [http://pdf.usaid.gov/pdf\\_docs/Pcaab222.pdf](http://pdf.usaid.gov/pdf_docs/Pcaab222.pdf) (Accessed on 23 August 2010).

<sup>62</sup> L Z Gilborn (60).

making them vulnerable to contracting HIV.<sup>63</sup> Impoverished children living in households with one or more ill parent are affected, as more money is spent on health care, which frequently leads to the depletion of savings and other resources reserved for education, food and other purposes.<sup>64</sup>

The law of guardianship under the South African Children's Act stipulates that every person under the age of 18 years should have a legal guardian.<sup>65</sup> Ordinarily, both parents of a child born in or out of wedlock are the natural guardians of a child. If the parents are dead or unavailable to care for the child another person may be appointed as the child's guardian. This could include a person appointed in terms of a will, an adoptive parent or a person appointed as guardian by the High Court. Sometimes a child without a parent or guardian is placed in the custody of a person or institution (such as a foster parent, or a children's home) without a guardian being appointed. In this case, the High Court itself can act as the guardian of the child.<sup>66</sup> The loss of a care-giver can lead to a number of other issues, such as:

### **2.3.1.1 Financial stress on children as a result of parents' ill-health**

It is trite that serious adult illness puts households under enormous financial stress; even before the death of the parents, they incur medical expenses and are less able to farm or work for wages. Consequently, children face diminishing resources for food, school, health care and clothes.<sup>67</sup> At this point, relatives might get involved financially with caring for the sick parent and the children. After the death of the parent, the children often have to battle with relatives to keep or gain access to their inheritance, because the relatives often claim that they use the deceased's property for the funeral or to defray the medical costs incurred by the dead parent.

When the bereaved survivors struggle to pay for funeral expenses, the widows and orphans stand to lose their land, homes and possessions in cases where their rights to property and inheritance are neglected.<sup>68</sup>

Traditional law in many societies fuels this kind of behaviour, especially where the children are females. This is because these laws stipulate that female children cannot inherit property. Property

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<sup>63</sup> J Anarfi 'Vulnerability to sexually transmitted disease: Street children in Accra' (1997) 7 *Health Transition Review* 281.

<sup>64</sup> Ibid.

<sup>65</sup> See section 17 of the Children's Act.

<sup>66</sup> K Grant *et al Building Stakeholder Skills to Manage Legal Complexities in Child and Adolescent Research - A Directory of the Legal Rights of Minor Research Participants Including Children & Adolescents* (2007).

<sup>67</sup> LZ Gilborn (note 60)14.

<sup>68</sup> Ibid.

grabbing has a number of negative consequences, particularly for girls.<sup>69</sup> Property grabbing is very rare in South Africa, but it still occurs in cases, where traditionally, orphaned children are cared for by the extended family.<sup>70</sup> It has, however, been found that sometimes people are no longer willing, or indeed are no longer able, to do this and the level of care the orphans receive is sometimes unacceptable. Sometimes the family members use the orphans to benefit from the government orphan packages.<sup>71</sup>

Both countries have national legislation and policies<sup>72</sup> which are based on the CRC and these provide protection for OVCs from actions which might be detrimental to their wellbeing. These have been able to provide support for OVCs to a large extent in both countries and a variety of different community organisations now provide support for orphans, especially when they face socio-economic problems.

### **2.3.1.2 Poor access to nutrition**

Children require adequate and essential nutrition for their daily growth and wellbeing. For a child affected by HIV/AIDS, protection of the right to nutrition is very important. If a child affected by HIV /AIDS does not have access to nutrition, the rate of the child's growth will be impeded and the child will lose the ability to live an active life and to ward off infections.

Poor access to nutrition can be common among children from the low socio-economic rung of society or among children whose parents are too sick with AIDS to provide their needs. Reduced household income, combined with increased expenses (for example for treatment, transport, funerals), may push families into poverty, which has negative outcomes for children in terms of nutrition.<sup>73</sup>

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<sup>69</sup> AN Tshikongo *To Investigate Factors Preventing The Care-Givers from Accessing the Social Grants and Other Benefits Entitled to the (OVC) Under Their Care*

(Unpublished Masters dissertation, Stellenbosch University (2013) 27.

<sup>70</sup> F Snedeker *AIDS Orphans* (2008) <http://www.futurechoices.net/articles/HIVAIDS/AIDSorphans-thefacts.html> (Accessed on 23 August 2010).

<sup>71</sup> Ibid.

<sup>72</sup> Botswana's Children's Act of 2009 provides, among other things, guidelines for the provision of care and support for orphans and other vulnerable children. It has a National Orphan Care Programme established by the Ministry of Local Government in 1999, to provide food baskets, support with educational necessities, psychological counselling and to facilitate the waiving of school fees for orphans.

South Africa's Children's Act of 2005 provides for the protection of all children including orphans. The Act has the Policy Framework for Orphans and other Children made Vulnerable by HIV & AIDS, National Action Plan for Orphans and other Children made vulnerable by HIV/AIDS and a National Action Plan (2009-2012) as some of its programmes for OVCs.

<sup>73</sup> AVENT *Children and HIV/AIDS* (2012) <http://www.avert.org/children.htm> (Accessed on 17 February 2011).

As HIV/AIDS grows more severe, families face decreasing labour power. Adults become ill or die, or have to provide increasing care for ill relatives or orphans. Such factors reduce their capacity to work on the land or to earn a wage.<sup>74</sup> The nutritional needs of a child living with HIV/AIDS can be hard to meet. Even when the parents can provide basic food for the child, a child infected with HIV/AIDS has more nutritional needs and, if the parents cannot meet these needs, the child's health will suffer.<sup>75</sup>

### **2.3.2 The right to be protected by a parent or guardian**

There is no gainsaying the fact that HIV/AIDS affects the right of the child to be protected by a parent or guardian. This right is not necessarily affected when a child's parents die alone, but the capacity of a parent or guardian to protect the child might be affected while they are still alive but not able to take care of the child when they are incapacitated by AIDS or any other HIV related sickness.

The inability of a parent or guardian to protect the child can lead to a number of other issues such as:

#### **2.3.2.1 Lack of assistance with decision-making**

A number of factors affect the capacity of children to make crucial decisions which affect their lives. Some of these factors depend on the age and level of maturity of the child, while others depend on the life experiences and a number of other circumstances in which the child finds him or herself. This fact indicates that the age of the child is not the only factor which must be considered when a child's capacity to participate in making decisions on matters that affect the child is determined. On this, the Committee on the rights of the child stipulates that:

*Article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice, which would restrict the child's right to be heard in all matters affecting her or him.*

Despite the child's right to be heard and the right to participate in decision-making, children of all ages still require adult supervision and assistance when making decisions which affect their lives. This is in line with article 5 of the CRC which requires parents, guardians and any other persons legally responsible for the child, to provide guidance and direction to the child in a manner

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<sup>74</sup> UNICEF *HIV's High Nutritional Toll* (2008) available at [http://www.unicef.org/nutrition/index\\_24808.html](http://www.unicef.org/nutrition/index_24808.html) (Accessed on 17 February 2011).

<sup>75</sup> Ibid.

consistent with the evolving capacities of the child. Likewise, article 9 (2) of the ACRWC requires parents and guardians to provide guidance and direction to the child while having regard to the evolving capacities and best interests of the child.<sup>76</sup>

The child's right to be allowed to be heard and participate in matters concerning the child is a human right; however, the parents or guardians have to ensure that they guide the child to the most appropriate decisions regarding their lives. In the case of children who have lost their parents to HIV/AIDS, or whose parents are too sick to guide them in the decision-making process, these children face very difficult situations. Children living in child-headed households or children who have to assume decision making powers on behalf of their sick parents face a very tough dilemma in making decisions which affect their lives and those of the other members of their household.<sup>77</sup> In some cases, it was reported that other people (not necessarily family members) have made detrimental decisions on what to do with the children and the participation of AIDS orphans in the decisions to care for them was marginal.<sup>78</sup>

### **2.3.2.2 Child exploitation**

Child exploitation is a broad term which includes forced or dangerous labour, child trafficking and child prostitution. The term is used to refer to situations where children are abused – physically, verbally, or sexually – or when they are submitted to unsatisfactory conditions as part of their forced or voluntary employment.<sup>79</sup>

The exploitation of children affected by HIV/AIDS is more common among orphans who live in child-headed households, or with foster parents who might take advantage of them. Many of the children who suffer from exploitation do so because they have no other choice. Some who still live with their parents may be exploited because they have to engage in child labour to supplement their family income.<sup>80</sup> Others may be trafficked or forced into slave labour, either in their own country or somewhere internationally, and may be living a life of struggle, suffering and invisibility within the community.<sup>81</sup>

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<sup>76</sup> L Gerison *The Evolving Capacities of the Child* (2005) 3.

<sup>77</sup> JPM Ntozi 'Effect of AIDS on children: the problem of orphans in Uganda' (1997) 7 *Health Transition Review* 23-40.

<sup>78</sup> Ibid.

<sup>79</sup> CM Burns, J Morley, R Bradshaw, *et al* The emotional impact on and coping strategies employed by police teams investigating Internet child exploitation (2008)14 *Traumatology* 20-31

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

### 2.3.2.3 Property grabbing and other inheritance issues

Property grabbing is a practice where relatives claim the property of orphans after the demise of their parents.<sup>82</sup> Humonga<sup>83</sup> believes that property grabbing is a result of a combination of factors that have changed the contexts within which the customary rules developed in the traditional pre-colonial and pre-capitalist African societies. These factors include the weakening of traditional social security or support systems in modern conditions, as well as problems of poverty and the ensuing struggle for scarce resources among family members.<sup>84</sup>

In other cases children may lose ownership or may be unable to gain access to their deceased parents' estate due to the loss of property documents or lack of proper documentation of the property which the parents leave behind. The lack of proper registration of the children at birth can hinder or stall the process of claiming ownership of the parents' estate after the demise of the parents.<sup>85</sup> There are various methods of property grabbing which include<sup>86</sup> taking moveable property when the parent is sick; taking moveable property after the death of parent; obtaining burial order and a death certificate of the parent and gaining access to moveable and immovable property (e.g. pension and bank accounts); or assuming guardianship of orphans and disposing of moveable and/or immovable property.

This can be particularly hard on children in child-headed households, because the children are left with little or nothing to depend on for their sustenance and welfare. In some cases, the children's inheritance is squandered by members of the family, without regard to the wellbeing of the children, while in other cases the members of the family act greedily, disallowing the children access to their parent's property. Property grabbing has been held to be repugnant to natural justice, equity and good conscience, in many traditional African Societies.<sup>87</sup> In South Africa, property grabbing is very

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<sup>82</sup> GM Shelling (note 53) 57.

<sup>83</sup> C Humonga 'Law and Gender in Southern Africa- A Human Rights and Family Law' in YW Bradshaw & SN Ndegwa *The uncertain promise of Southern Africa* (2000) 289.

<sup>84</sup> Ibid.

<sup>85</sup> I De Bruin Cardoso & R Sarumi *Strategic Analysis on Civil Registration in the Context of HIV/AIDS: Experiences from Uganda and Zambia* (2008).

<sup>86</sup> K Izumi *Invisible Poverty - Property Grabbing from Women and Children and AIDS* Paper delivered at International Conference on African Agriculture and the WDR Organised by NAI, NORAD, SIDA & IFAD, Oslo (2008) available at

[http://www.nai.uu.se/events/archives/conferences/african\\_agriculture/izumi.pdf](http://www.nai.uu.se/events/archives/conferences/african_agriculture/izumi.pdf) (Accessed on 17 February 2011).

<sup>87</sup> K Mwenda, N.Mumbae & J Mvula-Mwenda 'Property-Grabbing Under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience yet a Troubling Reality' (2005) 37 *George Washington University International Law Review* 949.

rare. This is because the South African Constitution and the customary laws in most traditional South African societies have abolished the practice.<sup>88</sup>

In South Africa, the general rules of customary law sometimes allow for inequality among people to continue, especially for women and girls, who remain economically and socially inferior to men.<sup>89</sup> Customary rules or customary marriage may deprive widows of any inheritance and the property of the deceased reverts to his extended family. Widows and daughters can, however, inherit property bequeathed through a will, with the exception of immovable property or livestock. Such property is managed by the son of the deceased or by another man in the family.<sup>90</sup> Thus the oldest son inherits the control of the family property, and makes the decisions about the property. The wife does not inherit the family property, although she may use it.<sup>91</sup>

The law omits female children from property inheritance since they are not regarded as equal to males in inheritance. The result of this is that in a family where the father is survived by only female children, the children will have a different time accessing their father's property if he dies intestate. This is contrary to the provisions of the South African Constitution which protects property rights<sup>92</sup> and prohibits discrimination based on gender,<sup>93</sup> as set out in section 39 (c).

In Botswana on the other hand, property (land) grabbing from those who should rightfully inherit the property, especially widows and orphans, is still common. Few people make wills and since women and children have a weak position in traditional society, other family members, such as uncles and in-laws, take the land of the deceased person and refuse to give widows and orphans their rightful inheritance.<sup>94</sup>

There are often problems relating to the property rights of children born from co-habitation relationships. Although the 2001 Census found that over 86% of couples living together in Botswana were not married, various laws still discriminate between those born in and out of

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<sup>88</sup> AIDS Legal Network South Africa *Customary law* available at [http://www.redribbon.co.za/legal-system.php?systemID=LS\\_Customary-Law&show=mymenu2&showsub=mysubmenu2](http://www.redribbon.co.za/legal-system.php?systemID=LS_Customary-Law&show=mymenu2&showsub=mysubmenu2) (Accessed on 17 February 2011).

<sup>89</sup> *Ibid.*

<sup>90</sup> See the case of *Mthembu v Letsela and Another* 1997 (2) SA 937 (T). See OECD *Gender Equality and Social Institutions in South Africa* (2012) available at <http://genderindex.org/country/south-africa> (Accessed on 17 February 2011).

<sup>91</sup> AIDS Legal Network South Africa (note 81). *This position is similar to the customary law position in Botswana*. See the case of *Mmusi and Others v Ramantele and Another* (MAHLB-000836-10) [2012] BWHC 1 (12 October 2012)

<sup>92</sup> See section 25 of the 1996 Constitution of South Africa.

<sup>93</sup> See section 9 and 25 of the 1996 Constitution of South Africa.

<sup>94</sup> The Botswana Centre for Human Rights *Land Rights* (2007) available at [http://www.ditshwanelo.org.bw/land\\_rights.html](http://www.ditshwanelo.org.bw/land_rights.html) (Accessed on 17 February 2011).

wedlock.<sup>95</sup> Under Customary Law, children born out of wedlock belong to their mother's family and the father has no duty of support, other than compensation to the woman's father for damaging the family's reputation.<sup>96</sup> The father has no rights, such as visitation. This situation reduces the likelihood that he would provide property.<sup>97</sup>

### 2.3.4 The right to be protected from stigma and discrimination

Children who are infected and affected by HIV/ AIDS face a number of issues:

#### 2.3.4.1 Stigmatisation of children infected by HIV/AIDS

Stigma remains the single most important barrier to public action. It is a main reason why too many people are afraid to see a doctor to determine whether they have the disease, or to seek treatment, if so. It helps make AIDS the silent killer, because people fear the social disgrace of speaking about it, or taking easily available precautions. Stigma is a chief reason why the AIDS epidemic continues to devastate societies around the world.<sup>98</sup>

“AIDS-related stigma and discrimination refers to prejudice, negative attitudes, abuse and maltreatment directed at PLWHA. They can result in being shunned by family, peers and the wider community; poor treatment in healthcare and education settings; an erosion of rights; psychological damage; and can negatively affect the success of testing and treatment.”<sup>99</sup>

At the start of the HIV/AIDS epidemic, a series of powerful metaphors were ignorantly mobilised to reinforce and legitimate stigmatisation.<sup>100</sup> The fear surrounding the emerging epidemic in the 1980s is still fresh in many people's minds. These stereotypes make some people scared of those infected, due to fear of contagion.<sup>101</sup> Since many people know very little about HIV/AIDS, when they are in proximity with a person living with HIV/AIDS, they believe that they are at risk of HIV and other opportunistic infections.<sup>102</sup> This explains why children affected by HIV/AIDS tend to face a lot of discrimination and stigmatisation among their friends and school mates.

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<sup>95</sup> Ibid.

<sup>96</sup> MP Seng 'In a Conflict between Equal Rights for Women and Customary Law, the Botswana Court of Appeal Chooses Equality' (1992-1993) 24 *University of Toledo Law Review* 565

<sup>97</sup> The Botswana Centre for Human Rights Land Rights (note 284).

<sup>98</sup> Ban Ki Moon 'The stigma factor', *The Washington Times* (6th August 2008).

<sup>99</sup> AVENT *HIV/AIDS Stigma and Discrimination* (2012) available at <http://www.avert.org/hiv-aids-stigma.htm> (Accessed on 17 February 2011).

<sup>100</sup> UNAIDS *HIV and AIDS-related stigmatisation, discrimination and denial: forms, contexts and determinants Research studies from Uganda and India* (2000) available at [http://data.unaids.org/Publications/IRC-pub01/jc316-uganda-india\\_en.pdf](http://data.unaids.org/Publications/IRC-pub01/jc316-uganda-india_en.pdf) (Accessed on 17 February 2011).

<sup>101</sup> T De Bruyn 'HIV and AIDS-related stigmatisation, discrimination and denial: forms, contexts and determinants UNAIDS Research studies from Uganda and India in GC Satpathy, *Encyclopaedia of AIDS, Vol. 2* (2003) 239.

<sup>102</sup> Ibid.



Children naturally have very little understanding of the infection and they are thus fearful of contracting the infection from another child that is infected with HIV, or whose parent or guardian is infected.<sup>103</sup> The fact that children living with HIV/ AIDS are often sick or appear sickly makes them easily identifiable by their mates and they are stigmatised. Stigmatisation of children affected by HIV/AIDS may lead to poor self-esteem in the children and a lack of confidence.<sup>104</sup>

Stigmatisation causes psychological harm in children and is a form of violence. When children are stigmatised they are set aside and prevented from having normal interpersonal relationships with others. Often they are made to feel that there is something wrong with them and that they are worth nothing. While children are usually stigmatised by those with economic and mental power over them (including guardians, teachers and relatives), other times they are stigmatised by fellow children who have been influenced by those with power.<sup>105</sup>

The attitude of children to other children infected with HIV can be linked to the attitude of adults or their parents to PLWHA. This attitude is based on the deep-rooted belief of people that HIV/AIDS infection is a repercussion of certain life style choices people have made at some point in their lives. In many cases children learn their reaction to PLWHA from the way their parents treat PLWHA. The present study therefore submits that the stigmatisation of children living with HIV/AIDS can be linked to the attitude of the parents themselves.

The issue of stigmatisation and discrimination against PLWHA was addressed in the case of *Hoffmann v South African Airways*<sup>106</sup> where the court stated that:

At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim

According to academics,<sup>107</sup> the factors which contribute to HIV/AIDS-related stigma include the fact that HIV/AIDS is a life-threatening disease; people are afraid of contracting HIV; the disease's

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<sup>103</sup> The stigma for children relates not only to whether they are HIV positive but to the status of their parent/care-giver.

<sup>104</sup> C Campbell, CA Foulis C Maimane *et al.* 'I Have an Evil Child at My House: Stigma and HIV/AIDS Management in a South African Community' (2005) 95 *American Journal of Public Health* 808- 815.

<sup>105</sup> World Vision International *UN Study on Violence Against Children Violence against Children Affected by HIV/AIDS – A case Study of Uganda* (2005) available at [http://www.wvi.org/wvi/wviweb.nsf/272A45E3414F256C882573DB006D5814/\\$file/children\\_violence-uganda\\_study.pdf](http://www.wvi.org/wvi/wviweb.nsf/272A45E3414F256C882573DB006D5814/$file/children_violence-uganda_study.pdf) (Accessed on 17 February 2011).

<sup>106</sup> *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000) Paragraph 27.

association with behaviours (such as sex between men and injecting drug use) that are already stigmatised in many societies; PLWHA are often thought of as being responsible for having contracted the disease, religious or moral beliefs that lead some people to conclude that having HIV/AIDS is the result of a moral fault (such as promiscuity or “deviant” sex) that deserves punishment; inaccurate information about how HIV is transmitted, creating irrational behaviour and misperceptions of personal risk;<sup>108</sup> and HIV/AIDS is a relatively new disease.<sup>109</sup>

Children whose parents are sick with AIDS experience distress and social isolation before and after the death of their parent(s). They might be subjected to the same shame, fear, and rejection experienced by PLWHA.<sup>110</sup>

Because of the stigma and often-irrational fear surrounding people with HIV, children are susceptible to intense emotional stress even before they are orphaned. Children might suffer the trauma of watching a parent suffer and then die. When their parents are sick with HIV, children often suffer from neglect. After a parent’s death, orphans are sometimes stigmatised for being associated with HIV/AIDS. Because of lingering stigmas surrounding the disease, children are sometimes denied access to schools or health care, while losing the support of friends. Such children are often more at risk of being abused, exploited or discriminated against.<sup>111</sup>

Often children who have lost their parents to AIDS are assumed to be HIV positive themselves, adding to the likelihood that they will face discrimination and damage to their future prospects.<sup>112</sup>

### **2.3.5 The right to protect themselves against HIV infection**

With the number of children who are currently infected with HIV across the globe, it is clear that children living through the period of the HIV/AIDS pandemic have to worry about many issues which children did not have to worry about 40 years ago.

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<sup>107</sup> T De Bruyn (note 94).

<sup>108</sup> AVENT (note 92).

<sup>109</sup> C Evian *Primary HIV/AIDS Care: A Practical Guide for Primary Care Personnel in a Clinical and Supporting Setting – Primary HIV/AIDS Care* 4 ed. (2006) IX.

<sup>110</sup> L Wild ‘The Psychosocial Adjustment of Children Orphaned By AIDS’ (2001) 13 *South African Journal of Child and Adolescent Mental Health* 3-5.

<sup>111</sup> IRIN Orphans and HIV available at <http://www.irinnews.org/pdf/pn/Plusnews-Media-Fact-file-Orphans-and-HIV.pdf> (Accessed on 23 August 2010).

<sup>112</sup> L Gilbert & L Walker (note 52).

HIV/AIDS is a serious disease<sup>113</sup> which everyone both young and old has to take steps to protect themselves from. For children, a lot of factors expose them to HIV infection. Some of these factors include unprotected sexual intercourse with an infected person, blood transmission with HIV infected blood, sharing of sharp instruments such as razor blade, shaving stick, violent acts which predispose children to HIV, use of injected illegal drugs and mother to child transmission (MTCT).

Children who have been orphaned or who face various impoverishing conditions are more vulnerable to HIV/AIDS. These children sometimes have very few choices and they face increased risk through their exposure to sexual exploitation and all forms of abuse which predispose them to HIV infection. Many of the children “are forced into harmful child labour and/or sexually exploited for cash or to obtain ‘protection’, shelter or food.”<sup>114</sup>

Article 24 of the CRC grants children the right to be able to protect themselves from HIV infection. The article requires states to recognise the right of the child to the enjoyment of the highest attainable standard of health and to strive to ensure that no child is deprived of his or her right of access to such health care services. This section<sup>115</sup> further requires that states provide the necessary medical assistance and health care to all children with emphasis on the development of primary health care. Since HIV/AIDS is a primary health care issue, the duty on the State to ensure that children have access to HIV protection service as a form of primary health care<sup>116</sup> is stipulated in section 24 (b) of the CRC.

### **2.3.6 The right to access HIV care and treatment**

Testing positive to HIV is the entry point to accessing HIV/AIDS treatment for children. The treatment and management of the health of the child infected by HIV is crucial.<sup>117</sup> The provision of life-saving ARV for children is a fundamental right in Botswana<sup>118</sup> and South Africa.<sup>119</sup> What makes the provision of ARV for children important is the fact that ARV are the only known

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<sup>113</sup> J Catalan, A Burgess, A Pergami *et al* ‘The psychological impact on staff caring for people with serious diseases: The case of HIV infection and oncology’ (1996) 40 *Journal of Psychosomatic Research* 425–435.

<sup>114</sup> UNICEF – *Framework for the Protection Care And Support of OVC Living in a World with HIV /AIDS* (2004) 9

<sup>115</sup> Article 24 (b) of the CRC.

<sup>116</sup> B Gerbert, BT Maguire, T Bleecker *et al* ‘Primary Care physicians and AIDS attitudinal and structural barriers to care’ (1991) 1 *Journal of the American Medical Association* 266.

<sup>117</sup> WHO *Entry points to antiretroviral treatment* (2000)

available at [http://www.who.int/3by5/publications/briefs/entry\\_points/en/index.html](http://www.who.int/3by5/publications/briefs/entry_points/en/index.html) (Accessed on 23 September 2012).

<sup>118</sup> If the provision of ARV is linked to the right to access to health care which provided for in article 15 and the right to life in section 10 of the Children’s Act (CAP 28:04) of 1981.

<sup>119</sup> The provision of ARV is linked to the right of access to health care services in section 27 and the right to basic health care in section 28 of the South African Constitution and the right to life. The right of access to health care right will be dealt with later in this chapter.

medicine that can be used to prolong the lives of children infected by HIV and an unacceptably high number of children are currently living with HIV. As has been observed in many industrialised countries, the provision of antiretroviral (ARV) can transform AIDS from a deadly disease into a more manageable, albeit still incurable, chronic illness.<sup>120</sup> Thus, from this perspective, the WHO suggests that people who undergo HIV tests must be assured that testing is linked to accessible and relevant HIV/AIDS treatment, care and other services.<sup>121</sup>

According to statistics in South Africa, in 2011, 95% of women received ARV therapy to reduce HIV transmission during pregnancy and only 2.7 % of babies born to HIV-positive mothers tested positive to HIV by 6 weeks of age. This is a considerable decline when compared to 8% in 2008.<sup>122</sup> HIV/AIDS is one of the main contributors to South Africa's infant mortality rate, which increased significantly between 1990 (44 deaths per 1000 infants) and 2008 (48 per 1000).<sup>123</sup> There were 13 200 new HIV infections among children and 58% of eligible children younger than 15 years old were receiving ARV therapy by the end of 2011.<sup>124</sup>

In Botswana, recent research shows that there is a relatively low infection rate among babies because of the proper administration of prevention of mother to child transmission treatment (PMTCT). Botswana is one of the countries in Africa with very high PMTCT rates. Currently, 94% women receive PMTCT drugs to reduce HIV transmission during pregnancy.<sup>125</sup> Recent statistics also show that the rate of HIV infection among children is very low. At the end of 2011, there were about 500 new HIV infections among children under age fifteen,<sup>126</sup> and 83% of eligible children were receiving the lifesaving ARV treatment.<sup>127</sup>

The right to health<sup>128</sup> and the right to life<sup>129</sup> are fundamental rights recognised under the South African Constitution. The Constitution of Botswana protects the right to life,<sup>130</sup> while the right to

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<sup>120</sup> E Wouters 'Public-sector ART in the Free State Province, South Africa: Community support as an important determinant of outcome' (2009) *Journal of Social Science & Medicine* 1-9.

<sup>121</sup> A Castro, P Farmer, 'Understanding and addressing AIDS related stigma: from anthropological training to clinical practice in Haiti' (2005) 95 *American Journal of Public Health* 53 in S Rennine & F Behets 'Desperately seeking targets: the ethics of routine HIV testing in low income countries' (2006) 84 *Bulletin of WHO* 55.

<sup>122</sup> 2011 Statistics released by South Africa's Medical Research included in the UNAIDS 2012 *Global AIDS report and the 2011 South African PMTCT impact study* available at <http://www.scribd.com/doc/100619881/Media-Brief-19-July-2012-Mother-to-child-HIV-transmission-rates-fall-to-2-7-percent-in-South-Africa> (Accessed on 23 January 2013).

<sup>123</sup> UNICEF State of the World's Children (2009).

<sup>124</sup> UNAIDS *Report on the Global AIDS Epidemic 2012* [http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120\\_UNAIDS\\_Global\\_Report\\_2012\\_with\\_annexes\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_with_annexes_en.pdf) (Accessed on 19 January 2013).

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> See section 27 of the South African Constitution.

<sup>129</sup> See section 11 of the South African Constitution.

health is guaranteed in the Botswana Children's Act.<sup>131</sup> South Africa and Botswana have ratified a number of treaties which recognise and protect the right to health of citizens and even children.<sup>132</sup> Thus, if it is agreed that either the right to health or right to life (or both) are guaranteed in Botswana and South Africa, then the provision of life-saving ARV is a crucial condition to protect the right to life of children with HIV/AIDS.

It is clear that both countries are striving to ensure universal access to treatment, care and prevention for PLWHA and children are considered in the provisions of ARV. In Botswana, ARV coverage exceeds 90% and the estimated annual number of AIDS-related deaths has declined to 8 732.<sup>133</sup> The provision of ARV for children is in line with the state obligations in international documents such as the CRC, ICESCR, ACHPR and the ACRWC, which guarantee the right to health and the right to life.

## 2.4 Cross cutting legal complexities

There are a number of complex issues regarding the rights of children affected by HIV/AIDS.

### 2.4.1 HIV testing of children<sup>134</sup>

The first step to assisting a child that is infected with HIV is to diagnose them by conducting an HIV test on them. There are a number of ethical and legal considerations for testing a child for HIV in both South Africa and Botswana.<sup>135</sup>

The issue of HIV testing for children is very sensitive, because of the human rights issues involved.<sup>136</sup> Parents may be cautious of the stigma and discrimination attached to people who test positive to HIV and they fear that their child will be prejudiced if they test positive. This expresses

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<sup>130</sup> See section 4 of the 1966 Constitution of Botswana.

<sup>131</sup> Although the constitution has no express provision on the right to health, it does make provisions for protection from conduct injurious to health. It makes provisions to limit rights, such as the rights to property and privacy, in the interests of public health. See M Mulumba, D Kabanda, V Nassuna *Constitutional Provisions for the Right to Health in East and Southern Africa* (CEHURD) EQUINET Discussion Paper 81(2010) 7.

<sup>132</sup> Examples of these treaties include the CRC, ACHPR, the ACRWC, and the ICESCR etc.

<sup>133</sup> UNAIDS *Progress Report of the National Response to the 2001 Declaration of Commitment on HIV/AIDS Botswana Country Report 2008-2009* (2010).

<sup>134</sup> The statutory provisions relevant to HIV/AIDS testing for children in South Africa and Botswana are discussed later in this thesis. This section only discusses the issue as a complexity to the protection of the rights of children affected by HIV/AIDS.

<sup>135</sup> This section does not deal with the statutory provisions on HIV/AIDS testing for children as this is discussed later in this topic. This section only gives a general overview of the position in both countries.

<sup>136</sup> HIV testing raises a number of human rights issues such as stigmatisation and discrimination of people who test positive, in the case of children, there is the issue of right to express their own opinion and make decisions concerning their health, the right to privacy and the right to health as contained in the CRC.

the need to ensure that the rights of children are respected when they are subjected to HIV testing. Children, like adults, need to have their rights to privacy protected.<sup>137</sup> They have the right to the respect for their persons, the right to participate in decisions concerning them<sup>138</sup> and the obligation on the health care worker and every person dealing with children to treat them with respect and to act in their best interests.<sup>139</sup> The complexity of HIV testing is such that testing a young child has direct implications for the parents, particularly the mother. For instance, a positive test result of a 2 year old child might suggest that the mother is HIV-positive and this fact often acts as a barrier to mothers agreeing to get their children tested.

The legal and ethical considerations for testing children for HIV infection involve issues of confidentiality, consent (which has to be both voluntary and informed) and the provisions of medication, care and support for the child after the test. Confidentiality is a crucial factor in all cases of HIV testing for children and this is due to the stigma attached to HIV/AIDS. Confidentiality is an important principle in health care, because it imposes a boundary on the amount of personal information and data that can be disclosed without consent.<sup>140</sup>

Confidentiality arises where a person disclosing personal information reasonably expects his or her privacy to be protected, such as in a relationship of trust. The relationship between health care providers and their patient/client centres on trust and trust is dependent on the patient/client being confident that personal information they disclose is treated confidentially.<sup>141</sup> The child whose confidentiality is breached may risk discrimination and therefore HIV tests are highly confidential and the health-care provider has a responsibility to keep the confidentiality of the patient under all circumstance, except in certain exceptional cases and as stipulated by legislation.<sup>142</sup> The requirements of confidentiality in accessing HIV testing and other health care facilities are listed in legislation and policy documents in Botswana<sup>143</sup> and South Africa.<sup>144</sup> Informed consent is another very important prerequisite in all cases of HIV testing for children. Informed consent is the legal procedure to ensure that patients or clients know everything involved in a treatment they are going to receive. The elements of informed consents in HIV testing have been listed in legislation and

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<sup>137</sup> Article 16 of the CRC. See S Moses (note 131) 330.

<sup>138</sup> Article 12 of the CRC.

<sup>139</sup> Article 3 of the CRC.

<sup>140</sup> S Moses 'Children and participation in South Africa: An Overview' (2008) 16 *International Journal of Children's Rights* 327-342.

<sup>141</sup> RE Jürgens & M Palles, *HIV Testing and Confidentiality: A Discussion Paper* (1997) 1.

<sup>142</sup> These circumstances are listed in section 133 of the Children's Act of 2005 (Act No. 38 of 2005) (Children's Act).

<sup>143</sup> Botswana Ministry of Health's Policy on HIV/AIDS (NACP Series No. 5) paragraph 6.3.

<sup>144</sup> Children's Act 2005 and South Africa National Policy on Testing for HIV (Schedule to the National Policy for Health Act, 1990 (Act No. 116 of 1990)

policy documents in Botswana<sup>145</sup> and South Africa.<sup>146</sup> Informed consent entails a balance between telling clients too much and telling them too little.<sup>147</sup> It is crucial to provide clients with information about the therapeutic relationship<sup>148</sup> and the manner in which it is done. Child consent is allowed in South Africa if the child has reached a certain age and understanding, as recognised under the law to give informed consent. The parent or other designated persons can also give consent on behalf of the child after pre-test counselling if the child cannot legally give informed consent.<sup>149</sup>

Pre and post-test counselling are very important components of any HIV test and it should be done by a counsellor who is equipped with the required skills for counselling. This will provide the necessary psychological support especially if the child tests positive for HIV. Both the child and the parents/guardian will be counselled on how to manage the health of the child.<sup>150</sup>

#### **2.4.2 Evolving capacity and accessing sexual and reproductive health services below the age of majority**

The presence of HIV/AIDS in the world today has impacted the way societies view children with regard to their sexuality. One of the new complexities of the HIV/AIDS epidemic with regard to children is the fact that sexually active children have to take charge of their sexual health, in order to ensure that they are not infected with HIV or other sexually transmitted diseases (STDs).

In contemporary times, issues such as teenage pregnancies, STD among adolescents and the lower age of sexual debut amongst young adolescents<sup>151</sup> are very common. These give weight to the fact that there is a need to ensure that children are able to express their right to sexual rights and inevitably take charge of their sexual health. This has led to some countries now allowing access to contraceptives and other sexual health protection services to children from as young as 12 years old.<sup>152</sup>

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<sup>145</sup> See section 3 of the *Botswana HIV/AIDS and Human Rights Charter* available at <http://www.ditshwanelo.org/bw/images/new%20charter.pdf> (Accessed on 25 August 2011).

<sup>146</sup> Department of Justice *South Africa National Policy on Testing for HIV (Schedule to the National Policy for Health Act, 1990)* (Act No. 116 of 1990) available at [http://www.greengazette.co.za/documents/regulation-gazette-32781-of-11-dec-2009-vol-534-no-9200\\_20091211-GGR-32781.pdf](http://www.greengazette.co.za/documents/regulation-gazette-32781-of-11-dec-2009-vol-534-no-9200_20091211-GGR-32781.pdf) (Accessed on 14 February 2014).

<sup>147</sup> G Corey, MC. Schneider *Issues and Ethics in the Helping Professions* 8 ed. (2011) 161.

<sup>148</sup> *Ibid.*

<sup>149</sup> See the section 130 (2) of the South African Children's Act 2005.

<sup>150</sup> This is provided for in section 132 of the South African Children's Act 2005.

<sup>151</sup> T Boezaart *Child law in South Africa (Special Child protective measures in the Children's Act)* (2009) 221.

<sup>152</sup> In different countries the ages of independent access to contraceptives vary. For instance, in South Africa, children can access contraceptives without parental consent from 12 years of age. In Ghana, the policy makes contraceptives and reproductive health services available to adolescents and anybody who engages in sexual activity, regardless of age. In Botswana, only persons above 18 years can access contraceptives while in Zimbabwe, contraceptives are made available from 16 years. See the UNICEF and the Namibian Ministry of Gender Equality and Child Welfare *Consent*

The CRC stipulates that states must:

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

This is the foundation for allowing adolescents to make decisions regarding the manner in which they chose to protect their rights, including sexual and reproductive health rights in a manner in which their privacy and confidentiality is not breached.<sup>153</sup> The recognition of this right “is crucial not only to promote and protect children’s rights but to dynamic understanding and response to [the needs of the children] in the face of the HIV/AIDS epidemic”.<sup>154</sup>

The recognition of sexual and reproductive health rights developed from the 1994 International Conference on Population and Development in Cairo and the 1995 Fourth World Conference on Women held in Beijing. The delegates at the Beijing Women's Conference adopted the Platform for Action and this signalled the recognition of sexual reproductive health.<sup>155</sup> The UN has declared access to family planning (contraceptives) a human right which must be made available to anyone that wants it.<sup>156</sup> Thus, for children in need of contraceptives, they should be made available to them on the basis of their need for it.

#### **2.4.3 The rights of children participating in HIV/AIDS related scientific research**

Children are in some circumstances indispensable to scientific research into diseases of childhood and conditions to which children are particularly susceptible.<sup>157</sup> The results of such research may

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*To Medical Treatment Contraceptives And Testing* (2007) <http://www.lac.org.na/projects/grap/Pdf/CCPA18-MedicalConsent.pdf> (Accessed on 23 January 2013).

<sup>153</sup> R Cook & BM Dickens ‘Recognising adolescents’ ‘evolving capacities’ to exercise choice in reproductive healthcare’ (2000) 70 *International Journal of Gynaecology and Obstetrics* 13-21.

<sup>154</sup> D Tarantola & S Gruskin ‘Children Confronting HIV/AIDS: Charting the Confluence of Rights and Health’ (1998) 3 *JOSTOR Health and Human Rights* 62.

<sup>155</sup> UNPFA – N.Sadik *The Right to Reproductive and Sexual Health* available at <http://www.un.org/ecosocdev/geninfo/women/womrepro.htm> (Accessed on 12 January 2013). See also A Glasier, AM Gülmezoglu, GP Schmid *et al*, ‘Sexual and reproductive health: a matter of life and death’ (2006) 368 *The Lancet* 1595–1607.

<sup>156</sup> UNPFA *The State of the World Population - Choice, Not By Chance* (2012) available at <http://www.unfpa.org/swp/> (Accessed on 24 January 2013).

<sup>157</sup> International Ethical Guidelines for Biomedical Research Involving Human Subjects Prepared by the Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization (WHO) (2002), Commentary on Guideline 5.



result in new HIV/AIDS management methods and techniques. It may facilitate the development of new facilities (drugs, vaccines and services) for the use of people in the HIV/AIDS epidemic.<sup>158</sup>

Scientific research with human participants raises many legal and ethical concerns because of the kind of risks people may be subjected to in the course of the research. In the case of children, there are many ethical-legal complexities relating to the participation of children in HIV/AIDS related research.<sup>159</sup> It is difficult to claim that the scientific research is in the individual child trial participant's best interests. Such children will effectively be exposed to such risks for the greater good, to generate data that can be used to develop an efficacious paediatrics HIV/AIDS treatment or vaccine.<sup>160</sup> Thus it is uncontroversial that to expose children to an unacceptable risk level is not in the best interests of children.<sup>161</sup>

People will generally accept risks and inconvenience primarily to advance scientific knowledge and to benefit others. However, the long-term effects of the risks people are exposed to during research can be devastating. Although some research offers the prospect of direct benefit to research participants, most research does not.<sup>162</sup>

As with HIV/AIDS testing, there are a number of legal and ethical requirements when children are used as subjects in HIV/AIDS research. These requirements are set to ensure that researchers act in the best interests of the children and that the rights of children are protected in the process. Some of the requirements include respecting the dignity,<sup>163</sup> privacy and autonomy of the child.<sup>164</sup> It also requires obtaining informed consent;<sup>165</sup> making sure that the consent was given voluntarily;<sup>166</sup> ensuring that the right of the child to participate in decisions concerning the child is respected;<sup>167</sup> and that all information obtained is treated with the utmost confidentiality.<sup>168</sup>

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<sup>158</sup> International Ethical Guidelines for Biomedical Research Involving Human Subjects Prepared by the Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the WHO (2002), Commentary on Guideline 5.

<sup>159</sup> AA Van Niekerk & LM Kopelman *Ethics and AIDS in Africa: the challenge to our thinking* (2005) 190

<sup>160</sup> Ibid.

<sup>161</sup> AA Van Niekerk & LM Kopelman (note 152) 192.

<sup>162</sup> E Leslie, JD Wolf, *Ethical Dimensions of HIV/AIDS* (2005) available at <http://hivinsite.ucsf.edu/InSite?page=kb-08-01-05#S3.1X> (Accessed on 23 June 2012).

<sup>163</sup> The right to dignity of the child is expressed in several parts of the CRC including the preamble, articles 28,37,39,40. See also article 5 of the African Charter on the Rights and Welfare of the Child (ACRWC).

<sup>164</sup> See article 16 of the CRC and article 10 of the ACRWC. See also paragraph 6 of the Committee on the Rights of the Child, GC No. 3, on HIV/AIDS and the right of the child, OHCHR *UNCRC (2003)* available at [www2.ohchr.org/english/bodies/crc/docs/.../CRC-C-GC-12.doc](http://www2.ohchr.org/english/bodies/crc/docs/.../CRC-C-GC-12.doc) (Accessed on 16 February 2011).

<sup>165</sup> See paragraphs 20, 23, 24 and 29 of GC No 4 on *UN HIV/AIDS and the right of the child* available at <http://www1.umn.edu/humanrts/crc/comment3.htm> (Accessed on 16 February 2011).

<sup>166</sup> See paragraphs 20, 22, 26 of GC No 4 on HIV/AIDS and the right of the child. Ibid.

<sup>167</sup> UN *Committee on the Rights of the Child, General Comment (GC) No. 4, on Adolescent health and development in the context of the CRC, U.N. Doc. CRC/GC/2003/4 (2003)* available at

In addition, because research cannot be entirely free of risk, some research participants may incur a research-related injury, even if the study is carried out without negligence and in full conformity with the protocol; research participants injured as a result of a product defect or malfeasance or incompetence in the design and execution of the study are required to be given fair compensation.<sup>169</sup>

Obtaining informed consent to participate in an HIV related research project involves a process by which (prospective) participants are informed about the facts of a specific research so that they can decide whether or not to participate or continue to participate in a specific clinical trial. The consent must be express; it might involve signing a written consent form, which will form the basis of the person's willingness to participate in a trial. The informed consent form is not supposed to be a contract, but it is to ensure that a person takes part in a trial out of his/her own free will.<sup>170</sup> It should be borne in mind that a child's participation in a research cannot be based on contract as the child does not necessarily have contractual capacity because of the immaturity of the child. The general principle in Roman-Dutch law is that a child is considered to be immature throughout his minority and is thus not bound by any contract that he signs.<sup>171</sup> In the words of Tindal JA, in *Dhanabakium v Subramanian*<sup>172</sup> a minor cannot bind himself by contract without the assistance of his guardian subject to certain qualifications. The only situation where the child's consent alone to a contract to participate in a research process is entirely binding and enforceable at the behest of the child is where the contract calls for performance only from the researcher and not from the child and is entirely to the child's advantage.<sup>173</sup>

In using children for HIV/AIDS research, the vulnerability of the child needs to be acknowledged and research involving children must be carried out within strictly circumscribed limits to ensure children are not exposed to undue risk.<sup>174</sup>

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[www2.ohchr.org/english/bodies/crc/docs/.../CRC-C-GC-4.doc](http://www2.ohchr.org/english/bodies/crc/docs/.../CRC-C-GC-4.doc). Commenting on the need to respect the views of the child stated that : The right to express views freely and have them duly taken into account (art. 12) is also fundamental in realising adolescents' right to health and development. States parties need to ensure that adolescents are given a genuine chance to express their views freely on all matters affecting them, especially within the family, in school and in their communities. See also GC No 12 in paragraphs 98 – 104.

<sup>168</sup> See paragraphs 20, 22, 24 and 40 (c) of GC No 4 on HIV/AIDS and the right of the child. Available at <http://www1.umn.edu/humanrts/crc/comment3.htm> (Accessed on 16 February 2011).

<sup>169</sup> NCBI *Improving Human Research Participant Protection Programme Performance and Clarifying Roles* available at <http://www.ncbi.nlm.nih.gov/bookshelf/br.fcgi?book=nap10508&part=a20006031ddd00132> (Accessed on 17 August 2010).

<sup>170</sup> E Leslie, JD Wolf, (note 155).

<sup>171</sup> See the leading judgment of J.A. Van Der Heever in *Edelstein V Edelstein* 1952 3 (SA) 1 (A).

<sup>172</sup> 1943 AD 160 at 167.

<sup>173</sup> RH Christie 'The law of Contract in South Africa' in CM Fombad *Protecting Children's Rights in Social Science Research in Botswana: Some Ethical and Legal Dilemmas* () available at <http://www.bris.ac.uk/Depts/DeafStudiesTeaching/ethics/resource/ethics%20in%20botswana.pdf> (Accessed on 22 October 2010).

<sup>174</sup> L Hagger (note 45).

In South Africa, the legislation on the ethical aspects of HIV/AIDS research includes the National Health Act No. 61 of 2003 (NHA),<sup>175</sup> and the South African Children's Act. The NHA requires dual consent for research from parents or legal guardians and where children are capable of understanding, the children themselves.<sup>176</sup> Thus informed consent can be given by the child if he/she is of the age of understanding, and the parent or legal guardian of the child.<sup>177</sup>

In Botswana, HIV research protocols involving human subjects are reviewed and approved by the national ethical review committee of the Department of HIV/AIDS Prevention and Care, Ministry of Health.<sup>178</sup> The provisions on ethical research of HIV/AIDS are set out in the draft Ethical Research Policy for HIV/AIDS.<sup>179</sup> There are significant procedural protections through for example, requiring ethical approval for health research. They are based on amongst other the principles of public health, an ethical and legal rationale for respecting human rights, and privacy and self-determination of persons living with HIV/AIDS, in line with the country's Constitution.<sup>180</sup>

## **2.6 The development of a child-centred and HIV/AIDS aware jurisprudence**

Courts are responsible for resolving a wide variety of issues, including those involving children affected by HIV/AIDS. Courts often hear child-related proceedings, such as those involving child abuse and neglect, adoption, paternity. The courts are involved in cases of child protection which involve proceedings for child support, domestic violence, criminal conduct, juvenile delinquency, child custody, mental health and directly related proceedings such as termination of parental rights and adoption.<sup>181</sup>

The role of the courts in the protection of children, generally, and those affected by HIV/AIDS, specifically, is important. This is due to the fact that courts are legally charged with the duty to interpret the law and this power enables courts to enforce the provisions of the law through their

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<sup>175</sup> Department of Justice *National Health Act 2003, No. 61* available at [www.info.gov.za/view/DownloadFileAction?id=68039](http://www.info.gov.za/view/DownloadFileAction?id=68039) (Accessed on 17 August 2010).

<sup>176</sup> It should be noted that this part of the NHA is not yet in operation.

<sup>177</sup> A Strode, C Slack & Z Essack 'Child consent in South African law: Implications for researchers, service providers and policy-makers' (2010) *The South African Medical Journal* 247.

<sup>178</sup> UNAIDS *Progress Report of the National Response to the UNGASS Declaration of Commitment on HIV/AIDS* (2008) available at [http://data.unaids.org/pub/Report/2008/botswana\\_2008\\_country\\_progress\\_report\\_en.pdf](http://data.unaids.org/pub/Report/2008/botswana_2008_country_progress_report_en.pdf) (Accessed on 17 August 2010).

<sup>179</sup> *Ibid.*

<sup>180</sup> L Louw *HIV/AIDS and human rights in* (2004) 2.

<sup>181</sup> WG Jones *Child Abuse and Neglect Working with the Courts in Child Protection* Children's Bureau, Office Publication (2006).

decisions and orders. The courts are empowered to hear cases concerning children and they have the competence to take evidence and give judgements on crimes committed against children.

Botswana and South Africa have enacted legislation to protect the rights of children and the legislation recognises the jurisdiction of the courts in matters concerning children. The South African Children's Act provides for the establishment of a children's court to listen to cases concerning children and to make certain orders on the cases regarding children. The South African Children's Act grants every magistrate's court the power to act as a children's court and the jurisdiction to decide any matter arising from the application of the Act for the area of its jurisdiction.<sup>182</sup> The Children's Court is a court of record and it has a similar status to that of a magistrate's court at district level.<sup>183</sup>

The Court is empowered to make orders on matters concerning the care of the child, placing the child in alternative care, child protection order, supervision order for children in child-headed households, adoption orders, shared care orders and a host of protective orders concerning the child.<sup>184</sup> A matter concerning the child may be brought before the court by any child who is affected by, or involved in, the matter to be adjudicated; anyone acting in the interest of the child; anyone acting on behalf of a child who cannot act in his or her own name; anyone acting as a member of, or in the interest of, a group or class of children; and anyone acting in the public interest.<sup>185</sup>

Botswana legislation recognises the role of the courts in the protection of children affected by HIV/AIDS. Botswana Children's Act provides for the establishment of a children's court which shall have jurisdiction to hold an enquiry in respect of a child alleged to be in need of care; and any other matter which may be conferred upon it by the Act or any other law.<sup>186</sup>

The courts in South Africa and Botswana have decided cases which relate to children affected by HIV/AIDS. They have dealt with cases of rape, indecent assault and the stigmatisation of children infected by HIV/AIDS. In both countries, the courts have been exemplary in the way they have dealt with cases involving children. They have been progressive in upholding children rights and have made the best interests of the child the paramount principle in cases concerning children. The courts have been able to demonstrate the value of rights of the child in deciding cases, even where

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<sup>182</sup> See Section 42 of the Children's Act 2005.

<sup>183</sup> See Section 43 and 45 of the Children's Act 2005.

<sup>184</sup> See section 46(1) of the Children's Act 2005.

<sup>185</sup> See section 49 of the Children's Act 2005.

<sup>186</sup> See section 36 of Botswana's Children's Act

the parents of the child are involved. For instance, in the case of *Government of the Republic of South Africa & Others v Grootboom & Others*,<sup>187</sup> the Constitutional Court held that homeless parents should be provided accommodation together with their children on the basis of the child's rights to shelter.<sup>188</sup> The court found that the parents should be able to live with their children, in the shelter as it was not in the best interests of children to be separated from their families.

South African courts, in the case of *AD and Another v DW and Others*<sup>189</sup> indicate the reliance on international standards such as the Hague Convention of 29 May 1993, on the Protection of Children and Co-operation in Respect of Inter-country Adoption, the CRC and the ACRWC on the protection of children. The courts have moved towards allowing children's views to be heard in cases such as *I v S*,<sup>190</sup> where the court held that the best interests of children are served by giving weight to their expressed preference.

The courts in Botswana have, in fact, in the absence of definitive laws protecting the rights of the child taken the initiative to look elsewhere for references to human rights standards that adequately protect child rights. The Court in the celebrated case of *Unity Dow V Attorney General*<sup>191</sup> said the courts must interpret domestic laws in a way that is compatible with the State's responsibility not to be in breach of international law, as laid down by creating treaties, conventions, agreements and protocols within the UN and the AU.

The courts in Botswana also consider the international obligations of the states even in the absence of domestication. For instance, the Court noted the strong persuasive value of international human rights treaties, including the CRC, in cases concerning the child, even where they have not been directly incorporated into domestic law.

The High Court in the case of *Ndlovu v Machele*<sup>192</sup> held that the standard to be applied in cases concerning contact with children, whether their parents are married or not, is that of the best interest of the child. Similarly in the case of *Motlogelwa v Khan*<sup>193</sup>, handed down by the High Court of Lobatse, Botswana, the Court made reference to international instruments in relation to a case

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<sup>187</sup> 2000 11 BCLR 1169 (CC).

<sup>188</sup> S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 235.

<sup>189</sup> (CCT48/07) [2007] ZACC 27.

<sup>190</sup> 2000(2)SA 993 (C)

<sup>191</sup> CA No. 4/91 Court of Appeal. Unreported.

<sup>192</sup> (MAHLB-000522-07) [2008] BWHC 293 (6 October 2008).

<sup>193</sup> A Skelton (note 114) 489.

where custody was in dispute, and the best interests of the child was considered to be the paramount principle, even in the context of customary law.

It is therefore commonplace that the courts in both countries have created sound jurisprudence on the protection of children's rights through the courts and they have relied on domesticated and non-domesticated international instruments in their decisions. The persuasive value of these instruments on the protection of the rights of children has therefore been demonstrated positively in the decisions of these courts.

## **2.7 Conclusion**

This chapter clarifies the concepts which are crucial to this thesis and discussed what these concepts signify in relation to the protection of the rights of children. It shows the role of the human rights in the protection of the rights of children affected by HIV/AIDS.

Chapter 2 elucidates the human rights dimension to the legal approach to the protection of the rights of children affected by HIV/AIDS, by discussing the specific rights-based issues that the epidemic can impact upon. Finally it gives an in-depth explanation of the role of the courts in the protection of the rights of children and demonstrates examples of how the courts have handled cases involving the rights of children in both countries.

## **Chapter 3    Comprehensive audit of international standards relevant to the protection of children affected by HIV/AIDS in South Africa and Botswana**

### **3.0    Introduction**

*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>1</sup>*

This chapter discusses the UN standards on the rights of children affected by HIV/AIDS. It presents a comprehensive discussion of the relevant international norms and how they can be applied in national legislation, policy and principles guiding service delivery.

There are various international standards on the duties and obligations of governments regarding the rights of these children. It is, however, necessary to shed light on the status and role of such standards as they describe the rights of children affected by HIV/AIDS and how they can be applied in the national legislative and policy frameworks in both countries.

### **3.1    Status of international HIV/AIDS standards in the legal systems of South Africa and Botswana**

Both South Africa and Botswana are members of the UN. South Africa was admitted to the UN at its inception on the 7 November 1945, while Botswana was admitted on 17 October 1966.<sup>2</sup> They thus have an obligation<sup>3</sup> to abide by the provisions of any instruments emanating from the UN.<sup>4</sup>

Botswana<sup>5</sup> follows the dualist approach to treaty ratification. In other words, international laws can only be officially recognised domestically after an act of domestication has been performed, as

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<sup>1</sup> Paragraph 5 of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993. Adopted by The World Conference on Human Rights in Vienna, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) (Accessed on 23 June 2010).

<sup>2</sup> UN *List of UN Member States* (2000) available at [http://www.un.org/List\\_of\\_United\\_Nations\\_member\\_states](http://www.un.org/List_of_United_Nations_member_states) (Accessed on 30 March 2010).

<sup>3</sup> This position is reflected in the dictum by the Appellate Division of the Supreme Court (as it was then) in *South Africa in Pan American World Airways Incorporated v SA Fire and Accident Fire Insurance Company Ltd* 1965 (3) SA 150 (A), where Steyn CJ stated: ‘...in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law, except by legislative process... In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the right of the subject.’

<sup>4</sup> Even the non-binding documents may impose obligations as they are part of customary international law.

stipulated under the national laws of the country concerned.<sup>6</sup> In the absence of domestication, international law will not be applicable to national matters.<sup>7</sup>

In South Africa, application of international law follows the hybrid monist approach where certain treaties do have the force of law within the domestic legal system even when they have not been domesticated.<sup>8</sup> Under this approach, domestic courts play a reasonably active role in treaty enforcement. In addition, “private parties who are harmed by a violation of their treaty-based rights can obtain a domestic legal remedy, even though the courts do not apply treaties directly”<sup>9</sup> This approach is in line with section 231(4) of the South African Constitution which stipulates that

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

In applying UN instruments in a country, it is important to point out that international laws can either be self-executing or have an interpretive role. For international law to be self-executing, it means that they can be directly enforced by the courts without prior legislation by the parliament. A non-self-executing treaty is one which may not be enforced without prior domestication.<sup>10</sup> This means that when the State ratifies the treaty, it is required to review its national laws to ensure that they conform to the provisions of the treaty. Thus in a number of situations, a non-self-executing intentional instrument has a persuasive value and can be used by the court for interpretive guidance.

The UN Commission on Human Rights (UNCHR) does not have the powers to impose sanctions on any State for its failure to act in accordance with the obligations specified in the instruments. One of the basic principles governing the creation and performance of legal obligations, whatever their

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<sup>5</sup> Botswana High Court Judge Dr Key Dingake noted during an address at a Joint SADC PF and SADC Tribunal Workshop in Botswana that “Treaties do not have the same status as laws enacted by the Botswana Parliament. Ratified treaties have to be transformed into domestic laws first. There are no constitutional provisions dealing with the status of international laws in Botswana. See Southern Africa Litigation Centre *Botswana HIV/Aids Legislation Crucial*(2009) (Available at [http://www.southernafricalitigationcentre.org/news/item/Botswana\\_HIV\\_Aids\\_legislation\\_crucial](http://www.southernafricalitigationcentre.org/news/item/Botswana_HIV_Aids_legislation_crucial) (Accessed on 23 June 2010)).

<sup>6</sup> SN Achilihu *Do African Children Have Rights? A Comparative and Legal Analysis of the UN Convention on the Rights of the Child* Universal (2010) 121.

<sup>7</sup> International Court of Justice, *Legal Effect of Unilateral Declarations Nuclear tests case (Australia & New Zealand v France)* 1974 ICJ 253@ 457 available at <http://www.iilj.org/courses/documents/LegalEffectsUnilateralDeclarations.pdf>(Accessed on 3 May 2010).

<sup>8</sup> D Sloss *Treaty Enforcement in domestic courts a comparative analysis* in DSloss *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 7.

<sup>9</sup> Ibid.

<sup>10</sup> C M Vazques ‘Four doctrines of self-executing treaties’ (1995) 89 *American Journal of International Law* 695.



source, is the principle of good faith, as seen in the *S v Makwanyane* case,<sup>11</sup> and this principle has to be applied by State parties when dealing with all international instruments.

South African courts are obliged to consider international law when interpreting constitutional rights.<sup>12</sup> The Constitution of the Republic of South Africa clarifies the position of international law particularly in the field of human rights law<sup>13</sup> and section 232 provides that “the rules of customary international law are binding on the Republic, unless they are inconsistent with this Constitution or an act of parliament, or form part of the law of the Republic”.<sup>14</sup> Although a court is normally only obliged to apply treaties to which South Africa is a party, the Constitutional Court has held that it is required to consider all relevant general or multilateral treaties under s35(1) of the Constitution, whether South Africa is a party to the multilateral treaty in question or not.<sup>15</sup>

For instance, the CRC has significantly influenced cases where children’s civil and political rights were at issue. On this, the South African Constitutional Court has ruled that, for example, applying minimum sentences to children was unconstitutional because it violated their rights to be imprisoned only as a last resort and only for the shortest period of time.<sup>16</sup> This right is embedded in the CRC.<sup>17</sup>

The position in Botswana<sup>18</sup> is similar to that in South Africa, with the court holding in the case of *Kenneth Good v Attorney General*,<sup>19</sup> that:

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<sup>11</sup> In *S v Makwanyane* 1995 (3) SA 391 C, the court held that the obligation to consider under section 35 of the Interim Constitution extends to binding and non-binding international law. It submitted that under the 1996 constitution, section 39(1) (b) cannot be used to apply provisions of International Law (whether it is Treaty Law or International Customary Law) which are not binding and/or applicable to the Republic in terms of sections 231 to 233 of the Constitution.

<sup>12</sup> Section 39 of the Constitution.

<sup>13</sup> J Dugard ‘Role of International Law in Interpreting the Bill of Rights’ (1994) 10 *South African Journal on Human Rights*.58.

<sup>14</sup> Ibid.

<sup>15</sup> K Henrard *Minority Protection in Post-Apartheid South Africa- Human Rights, Minority Rights and Self-Determination* Greenwood (2002) 134.

<sup>16</sup> A Skelton ‘From Cook County to Pretoria: A Long Walk to Justice for Children Symposium: Justice for the Child’ (2011) 6 *NorthWestern University Journal of Law and Social Policy* 413. The Constitutional Court has applied the CRC when interpreting section 28 of the Constitution.

<sup>17</sup> P Mahery *Children’s rights: How is South Africa faring?* Children’s Institute, University of Cape Town Publication available at [http://www.ci.org.za/depts/ci/pubs/pdf/homemiscellaneous/op-ed\\_crc.pdf](http://www.ci.org.za/depts/ci/pubs/pdf/homemiscellaneous/op-ed_crc.pdf) (Accessed on 11 March 2010).

<sup>18</sup> Judge Dingake’s statement at the joint SADC Parliamentary Forum and SADC Tribunal workshop in Botswana. “In the absence of legislation, what are the courts of law to do when they are confronted with issues in which the applicants seek relief not governed by any legislative framework? Are the courts to turn away litigants on the basis that there is no law?”

When domestic courts get stuck for lack of laws, that is the point at which international law should come in. He explained that in some countries international treaties are included in the country’s legal system and therefore form part of the country’s laws. In some instances, treaties have “self-executing status” and breach of treaty obligation may be enforceable in a court of law.” See Southern Africa LawCentre *Botswana: HIV, Aids legislation crucial* 14th October 2009, available at [http://www.southernafricalawcenter.org/news/item/Botswana\\_HIV\\_Aids\\_legislation\\_crucial](http://www.southernafricalawcenter.org/news/item/Botswana_HIV_Aids_legislation_crucial) (Accessed on 2 April 2010).

...It is trite and well recognised that signing such a treaty does not give it the power of law in Botswana and its provisions do not form part of the domestic law of this country until they are passed into law by parliament.

Despite this ruling however, the General Provisions and Interpretation Act of 1984 (Interpretation Act) in Botswana, Section 21(4) of the Act provides that:

For the purpose of ensuring that which an enactment was made to correct and as an aid to the construction of an enactment a court may have regard to any relevant international treaty, agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject matter but not to the debates in the Assembly.

The Interpretation Act authorises courts in Botswana to consider an international treaty when interpreting domestic legislation especially legislation, that is designed to incorporate a treaty.<sup>20</sup> Thus the Interpretation Act empowers the judiciary of Botswana to have recourse to rules of international law as embodied in treaties when interpreting ordinary domestic law and the Constitution.<sup>21</sup>

Currently, there is no legally binding HIV/AIDS-specific treaty or convention in international law; however, there are a number of non-binding HIV specific declarations, guidelines and statements. There are also child-specific conventions which, although silent on HIV/AIDS, can be invoked to protect children affected by HIV/AIDS.

The following section discusses the international instruments which are relevant to the rights of children affected by HIV/AIDS. The instruments discussed here have been arranged in order of the date on which they were adopted. They fall into two main categories – binding and non-binding documents. The legally binding norms are found in treaties, statutes, protocols and conventions which set out the rights of children affected by HIV/AIDS. These are binding on states that ratify or accede to them.<sup>22</sup> The non-binding documents are mainly declarations, charters and guidelines. Though not binding, they have a moral force and provide practical guidance to states in their conduct and they can be used by the courts in the process of interpretation.<sup>23</sup>

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<sup>19</sup> 2005 2 BLR 337.

<sup>20</sup> C M Fombad *A critical Assessment of the legal responses to the HIV/AIDS Pandemic in Botswana* (2009) 239.

<sup>21</sup> Ibid.

<sup>22</sup> Signature, ratification and accession can be defined as follows: "Signature of a treaty is an act by which a state provides a preliminary endorsement of the instrument. Signing does not create a binding legal obligation but does demonstrate the state's intent to examine the treaty domestically and consider ratifying it. While signing does not commit a state to ratification, it does oblige the state to refrain from acts that would defeat or undermine the treaty's objective and purpose. Ratification is an act by which a state signifies an agreement to be legally bound by the terms of a particular treaty. To ratify a treaty, the state first signs it and then fulfils its own national legislative requirements. Accession is an act by which a state signifies its agreement to be legal bound by the terms of a particular treaty. It has the same legal effect as ratification but is not preceded by an act of signature".

See The United Nations International Children's Emergency Fund (UNICEF) Introduction to the Convention on the Rights of the Child: Definition of Terms available at <http://www.unicef.org/crc/files/Definitions.pdf> (Accessed on 23/03/2010).

<sup>23</sup> UNHCHR *International law* (2000) available at <http://www2.ohchr.org/english/law/> (Accessed on 23/03/2010).

## **3.2 UN standards on the protection of children affected by HIV/AIDS**

### **3.2.1 Binding, non HIV/AIDS-specific instruments**

South Africa and Botswana have adopted a number of treaties, declarations, resolutions<sup>24</sup> and other documents of relevance to the rights of children affected by HIV/AIDS, many of which are non-HIV/AIDS-specific.

Although some of these instruments are not binding on South Africa and Botswana because they have not been ratified, some of the provisions have been incorporated into the national legislation in both countries. In the absence of domestication under the legal systems of both countries they are not justiciable.<sup>25</sup> They only serve as persuasive instrument in the hands of the courts. The international instruments that are relevant to the rights of children affected by HIV/AIDS are described in the following sections.

#### **3.2.1.1 The international Covenant on Civil and Political Rights (1969) (ICCPR)<sup>26</sup>**

The ICCPR was adopted by the General Assembly Resolution 2106 (XX) 2. It opened for signature, ratification and accession in December 1965 and entered into force in January 1969, in accordance with article 19. It was ratified by South Africa on 10 March 1999 and by Botswana on 8 September 2000.

The ICCPR does not deal directly with children or HIV/AIDS but it contains provisions that regulate how states ought to deal with the protection of the civil rights that are connected to children affected by HIV/AIDS. These rights include the protection from discrimination, the right to life, the protection of human dignity, the protection from torture or cruel, inhuman or degrading treatment and the right to privacy.

Article 2 of the ICCPR provides that:

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<sup>24</sup> Resolutions are non-binding under international law they are however reflective of the acceptance of an international norm. They in a number of cases request that governments comply with their obligation.

<sup>25</sup> Section 231(2) of the Constitution of South Africa provides that: "An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)". The Constitution of Botswana does not make such reference.

<sup>26</sup> UN *The international Covenant on Civil and Political Rights* (1969) available at [www2.ohchr.org/english/law/ccpr.htm](http://www2.ohchr.org/english/law/ccpr.htm) (Accessed on 30 June 2010).

Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights in the present convention without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status.

Of crucial importance to children living with HIV/AIDS is the fact that article 26 prohibits any discrimination and guarantees equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status, to all persons. These provisions are necessary to protect children from all forms of discrimination, including that based on HIV/AIDS. Although this provision does not expressly include HIV/AIDS as one of the grounds for non-discrimination, nothing in the article or elsewhere indicates that the phrase “other status” cannot be construed to extend to the protection from discrimination based on HIV/AIDS status. In fact, the UNCHR has described article 26 of the ICCPR as *prohibiting* discrimination based on HIV/AIDS.<sup>27</sup>

While expressing the scope of the application of the ICCPR, article 5 indicates that:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

In protecting the right to life, article 6 obliges State parties to protect the right, in line with the interpretation of this right in the UNCHR’s GC 6 issued in 1982 and the rights of the child under article 24, as interpreted by UNCHR GC17 issued in 1989. These obligations include the need to adopt positive measures to reduce infant mortality and increase life expectancy, especially in the context of epidemics like HIV/AIDS.<sup>28</sup>

The prohibition of torture or to cruel, inhuman or degrading treatment or punishment and, in particular, not subjecting anyone to medical or scientific experimentation without his free consent<sup>29</sup> is very significant and this can be invoked to protect children from being used as subjects in experiments and HIV vaccine testing. The importance of this article cannot be over-emphasised considering the fact that there is an increasing need for children to be enrolled in trials of HIV

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<sup>27</sup> It was expressly stated at the fifty- third meeting of the UN Commission on Human Rights that the “discrimination based on HIV or AIDS status, actual or presumed is prohibited by existing international human rights standards” in that the term “or other status” in international human rights instruments (including the ICCPR and the CRC) “can be interpreted to cover health status including HIV/AIDS”. See Commission on Human Rights, "The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)," Resolution 1995/44, adopted without a vote, March 3, 1995.

<sup>28</sup> DHRCU *Trade-related intellectual property rights, access to HIV/AIDS medicines and the fulfilment of civil and political rights*(2004) available on [http://www.3dthree.org/pdf\\_3D/3DHRCUGandaBrief04en.pdf](http://www.3dthree.org/pdf_3D/3DHRCUGandaBrief04en.pdf) (Accessed on 09/04/2010).

<sup>29</sup> Article 7 of the ICCPR.

prevention and treatment products in order to generate relevant data on the safety, immunogenicity and efficacy of the products.<sup>30</sup> This will help children that are at risk of HIV infection to benefit from the development of HIV preventive products, including vaccines.<sup>31</sup> However, children are considered vulnerable thus consent is required for all medical and scientific procedures. In the case of children who have not attained the age at which they can freely give their consent, parental consent is needed.<sup>32</sup>

Another crucial provision on the protection of children affected by HIV/AIDS is article 17, which protects the right to privacy, and prohibits unlawful interference with any person's family, home and correspondence. This provision could form the basis for the prohibition of unlawful interference with all aspects of the child's life and the protection of privacy of a child when accessing health care facilities, either for treatment or for HIV prevention services.

Article 23 recognises the essence of the family and recommends its preservation. It affirms that "the family is the natural and fundamental group unit of society which is entitled to protection by society and the State." This is crucial to the protection of the rights of children affected by HIV/AIDS, because the high orphaning rate due to the HIV/AIDS epidemic, and the potential this has to disrupt the family structure can have a devastating effect on the rights of children. Thus the recognition and protection which this instrument gives to the family and the subsequent duty on the society and the state to protect it is very important for the children within the family.

The ICCPR<sup>33</sup> underscores the duty of the family, society and the State to protect every child (as required by his status as a minor) without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth.

The protection afforded to the child in the family, as a member of the family, is also emphasised in article 24. Based on this, the Committee on Civil and Political Rights issued CG19 on article 23. This was adopted at the 39th session of the UNCHR, on 27 July 1990.<sup>34</sup> GC 19 recognises that the family can take different forms. This does not impact the State's obligation to protect the family in whatever form it might take.

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<sup>30</sup> C Slack & M Kruger 'The South African Medical Research Council's Guidelines on Ethics for Medical Research – implications for HIV preventive vaccine trials with children' (2005) 95 *South African Medical Journal* 269 - 271.

<sup>31</sup> *Ibid.*

<sup>32</sup> Article 7 of the ICCPR and this is in line with section 130 of the South African Children's Act.

<sup>33</sup> Article 24 of the ICCPR.

<sup>34</sup> Protection of the Family, the Right to Marriage and Equality of the Spouses.

State parties are also required under GC19 to adopt legislative, administrative or other measures to guarantee the protection under article 23 of the ICCPR and to provide detailed information concerning the nature of such measures and the means whereby their effective implementation is assured. Since children are part of the family and the state has an obligation to protect the family, the protection will also be applicable to children.

### **3.2.1.2 Human Rights Resolution 2003/47; The Protection of Human rights in the Context of HIV/AIDS<sup>35</sup>**

The UNCHR adopted the Human Rights Resolution 2003/47; The Protection of Human Rights in the Context of HIV/ AIDS, on 23 April 2003. It recognises the position of children in the HIV/AIDS epidemic and makes provisions for the protection of the rights of children affected by HIV/AIDS. The 10<sup>th</sup> preambular paragraph of the Resolution notes the negative impact of HIV/AIDS on children (number of orphans); “the disproportionate burden borne by women at the personal, family and community levels, as well as the higher health and social costs.”The protection of children features largely in this Resolution thus implying that children are one of the groups which this Resolution aims to protect. It specifically mentions some of the areas where children’s rights are being compromised and suggests that states make use of special rapporteurs in such areas.

### **3.2.1.2 Human Rights Resolution 2005/84 on The Protection of Human Rights in the Context of HIV/ AIDS<sup>36</sup>**

In addition to the 2003 Resolution, there is the Human Rights Resolution 2005/84 on The Protection of Human Rights in the Context of HIV/ AIDS, which was adopted by the UN HCR on 21 April 2005. This Resolution takes the need to protect children in the epidemic into cognisance. The reference made to the plight of children in the HIV/AIDS epidemic cannot be over emphasised. In its 5<sup>th</sup> preambular paragraph, it notes the high number of children made vulnerable to, infected with, orphaned by, or killed by, HIV/AIDS. The Resolution also referred to GC 3 adopted by the Committee on the Rights of the Child on HIV/AIDS and the rights of the child.<sup>37</sup> Various sections of the Resolutions stipulate how states should deal with the rights of children, especially those

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<sup>35</sup> OHCHR *Human Rights Resolution 2003/47; The Protection of Human rights in the Context of HIV/ AIDS* available at [www.refworld.org/docid/43f3133c0.html](http://www.refworld.org/docid/43f3133c0.html) (Accessed on 23 June 2009).

<sup>36</sup> Ibid.

<sup>37</sup> UN *CRC GC3* (2003) available at <http://www1.umn.edu/humanrts/crc/crc-generalcomment3.html> (Accessed on 23 June 2009).

orphaned or made vulnerable by HIV/AIDS and the needs of their caregivers, access to education, counselling and medication for children affected by HIV/AIDS.

It can therefore be concluded that the ICCPR is a crucial instrument in the protection of the rights of children affected by HIV/AIDS. The Convention demonstrates respect for human dignity, the right to life and the need to prevent stigma and discrimination. These are very sensitive aspects of the HIV/AIDS epidemic. The protection of everyone from medical or scientific experimentation without free consent, the rights of children, especially within the family, and the need for their protection, also feature prominently among the ICCPR provisions which are adaptable for the protection of children affected by HIV/AIDS.

### **3.2.1.4 International Covenant on Economic, Social and Cultural Rights (1976) (ICESCR)<sup>38</sup>**

The ICESCR was adopted by GA Resolution 2200A (XXI) and was opened for signature, ratification and accession on 16 December 1966. It entered into force on 3 January 1976, in accordance with article 27. The ICESCR has not been ratified by Botswana. It was signed by South Africa on 3 October 1994 and there has been cabinet approval for its ratification.<sup>39</sup> Despite not being ratified by South Africa, the Constitution of South Africa guarantees ESCR, and these are justiciable.<sup>40</sup> Thus the ICESCR remains an important document in shaping the way the courts interpret cases involving ESCR.

In the *Grootboom*<sup>41</sup> case, the South African Constitutional Court, using the ICESCR as a guide, recognised that there are insufficient resources and legacies of oppression and inequality which make it impossible to fully realise the right to housing in South Africa, at present. But this does not mean the right does not entail present obligations, or that the actions of the government cannot be reviewed for their consistency with the right to housing.<sup>42</sup>

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<sup>38</sup> UN *International Covenant on Economic, Social and Cultural Rights* (1976) available on [www2.ohchr.org/english/law/cescr.htm](http://www2.ohchr.org/english/law/cescr.htm) (Accessed on 12 March 2010).

<sup>39</sup> UGO Pulse *South African Cabinet agreed to ratify the ICESCR* (2013) available at <http://www.ngopulse.org/press-release/south-africa-ratify-international-socio-economic-rights-covenant> (Accessed on 23 May 2013).

<sup>40</sup> See Section 27 and 28 of the Constitution of South Africa.

<sup>41</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 20011 SA 46; 2000(11) BCLR 1169; (4 October 2000).

<sup>42</sup> B Porter *The Domestic Implementation of the ICESCR: The Right to Effective Remedies, the Role of Courts and the Place of the Claimants of ESC Rights* available on [http://www.srap.ca/publications/porter\\_the\\_domestic\\_implementation\\_of\\_the\\_icescr.pdf](http://www.srap.ca/publications/porter_the_domestic_implementation_of_the_icescr.pdf) (Accessed on 12 March 2010).

In Botswana, the 1966 Constitution does not incorporate ESCR;<sup>43</sup> it only recognises civil and political rights. However, with the enactment of the new Children's Act, a number of ESCR have become justiciable through their incorporation into the Bill of Rights contained in the Children's Act. This means that the ESCR and developmental rights are now officially recognised thereby making ESCRs justiciable for persons under the age of 18 in Botswana.

It should be noted that certain phrases are important in understanding the application of the articles in the ICESCR. These phrases include "to the maximum of available resources", "achieving progressively the full realisation of the rights" and "all appropriate means".<sup>44</sup> The UN<sup>45</sup> interprets the phrase "to the maximum of available resources" to indicate that the State should invest both public expenditure and all its other resources that can be applied towards the full realisation of ESCR.<sup>46</sup> The phrase "progressive realisation" component also obliges the State "notwithstanding the level of national wealth, to move as quickly as possible towards the realisation of ESCR." The "Covenant requires the effective and equitable use of all available resources immediately".<sup>47</sup> In determining what are "all appropriate means," Heyns and Brand<sup>48</sup> relied on the Committee's suggestion that, "although legislative measures are highly desirable and often indispensable, the adoption of such measures is by no means exhaustive of the obligations imposed on State parties. A number of other measures may thus be deemed appropriate and reasonable, depending on the circumstances.

Baderin and Manisul<sup>49</sup> reason that these are very subjective terms, because when one tries to determine what "resources are available to any State to give effect to the substantive right under the ICESCR"; one needs to determine "whether the State has used such available resources to the maximum." In the light of this, it is argued that the use of the word "available" leaves "much wriggle room for the State."<sup>50</sup> This makes it difficult to define the content of the progressive obligation and to establish when a breach of this obligation arises.<sup>51</sup>

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<sup>43</sup> F Viljoen *International Human Rights Law in Africa* 2ed (2012) 555.

<sup>44</sup> G Bekker *The Right to Education in the South African Constitution* (2005) available at [http://www.chr.up.ac.za/centre\\_projects/socio/compilation2part1.html](http://www.chr.up.ac.za/centre_projects/socio/compilation2part1.html) (Accessed on 30 June 2010).

<sup>45</sup> UN OHCHR *Economic, Social And Cultural Rights: Handbook for National Human Rights Institution Professional Human Rights Training Series* 12(2006)10.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> C Heyns & D Brand *Introduction to socio-economic rights in the South African Constitution* (2005) 3.

<sup>49</sup> M Baderin & M Manisul Sseyonjo, *International Human Rights Law: Six Decades After the UDHR and Beyond* (2010) 62.

<sup>50</sup> R Robertson, 'Measuring state compliance with the obligation to devote the maximum available resources to realising economic social and cultural rights' (1996) in M Baderin & M Manisul Sseyonjo *International Human Rights Law: Six Decades After the UDHR and Beyond*(2010) 62.

<sup>51</sup> S Joseph *et al*, 'The International Covenant on Civil and Political Rights: Cases, Materials and Commentary' in MBaderin( *ibid*) 62.



The Constitution of South Africa distinguishes between the two categories of socio-economic rights, in section 27 and section 28. The socio-economic rights set out in section 27 are subject to “progressive realisation,” while the socio-economic rights of children (set out in section 28(1) of the Constitution) are not subject to “progressive realisation” by government, but are directly enforceable.<sup>52</sup>

The ICESCR does not deal directly with children or HIV/AIDS; however, it contains provisions which regulate how the State should deal with the protection of the economic, social and cultural rights that are applicable to children affected by HIV/AIDS. The economic, social and cultural rights that are relevant in the case of children affected by HIV/AIDS include the right to health, education, an adequate standard of living and the right of everyone to be free from hunger.

The ICESCR in article 2(2) encourages states to undertake to guarantee that the rights enunciated in the ICESCR “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The grounds for non-discrimination are similar to those of the ICESCR and, similarly, despite the fact that this provision does not expressly include HIV/AIDS as one of the grounds for which discrimination in enjoying the rights in the ICESCR, is prohibited and there is nothing in the article or elsewhere that indicates that the phrase “other status” cannot be extended to include HIV/AIDS status.

In deciding the extent of the obligations on the states regarding its obligations to conform to the provisions, the ICESCR provides that developing countries need to decide the extent to which they are able to guarantee the economic rights recognised ICESCR to non-nationals.<sup>53</sup> This provision is crucial in the case of children affected by HIV/AIDS as states can – based on this article - deny certain socio-economic rights such as the provision of ARVs and other health care facilities to non-citizens. Article 9 also stipulates the obligation on states to guarantee the right of everyone to social security, including social insurance”.<sup>54</sup> Further elucidating the need for social assistance, article 10 recommends that states should take special measure to ensure “protection and assistance on behalf of all children and young persons without any discrimination for reasons of parentage and other conditions...”<sup>55</sup>

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<sup>52</sup> *Centre for Child Law and Others v Member of the Executive Council, Gauteng Provincial Government and Another*, case no. 19559/06 (TPD) available at [www.childlawsa.com](http://www.childlawsa.com) See *Minister of Education, Western Cape and others v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA).

<sup>53</sup> Article 2 (3) of the ICESCR.

<sup>54</sup> Article 9 of the ICESCR.

<sup>55</sup> Article 10 of the ICESCR.

These provisions are crucial to the protection of children affected by HIV/AIDS, as these protect them from the brunt of poverty which usually accompanies the HIV/AIDS epidemic. The right to an adequate standard of living is guaranteed to everyone in article 11. This article lists the elements of adequate standard of living to include “adequate food, clothing and housing, and to the continuous improvement of living conditions.” It requests state parties to take appropriate steps to ensure the realisation of this right. This thesis argues that the protection of the right to an adequate standard of living is very important to all children but, particularly, those affected by HIV/AIDS, as the right sets out the basis for the protection of several socio-economic rights which are too often necessary for children affected by HIV/AIDS, given the link between the epidemic and poverty.<sup>56</sup>

The need for the protection of the right to health for children affected by HIV/AIDS cannot be gainsaid. Article 12 of the ICESCR recommends that states protect everyone’s right to the enjoyment of the highest attainable standard of physical and mental health. The standard laid down here is very high and states are required to take appropriate steps to achieve the full realisation of this right.

To further elucidate the protection of the right to health, the Committee issued General Comment 14 (GC14) (2000) on the right to the highest attainable standard of health in line with article 12 of the ICESCR.<sup>57</sup>

The committee<sup>58</sup> enunciates that:

Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living life in dignity. The realisation of the right to health may be pursued through numerous complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organisation (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable.

The committee discussed the various international documents that guarantee the right to health and how the state parties are expected to ensure that this right is adequately protected. Elaborating on the intent of the instrument in protecting the right to health, it adds that “the right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State Party...”<sup>59</sup>

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<sup>56</sup> P Piot, R Greener *et. al* ‘Squaring the Circle: AIDS, poverty, and human development’ (2007) 4 *Public Library of Science Medical Journal*, 314.

<sup>57</sup> This provides an interpretation of article 12 of the ICESCR. General Comment 14 is not binding because it has not been ratified by South Africa or Botswana. They will only serve as suggestions to South Africa and will be based on the principle of minimum core obligations as stated in General Comment No. 3 where the Committee stated that it is of the view that states will ensure the satisfaction of “minimum essential levels” of Covenant rights, (see note 37).

<sup>58</sup> The UN Committee on ESCR.

<sup>59</sup> See Para 12 of the Comment.

Guaranteeing the right to education, the ICESCR agrees that “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”<sup>60</sup> Both the rights to health and education have been unequivocally guaranteed by the ICESCR. This is important to the children affected by HIV/AIDS because of the role which both health and education plays in the survival of children.

The ICESCR is an important document in the protection of the ESCR of children living with HIV/AIDS since it contains a much more comprehensive exposition of socio-economic rights than that contained in the Universal Declaration on Human Rights (UDHR).<sup>61</sup> Although this Convention has not been ratified by both countries, it remains an important document in determining the way the courts interpret cases that involve children affected by HIV/AIDS.

### **3.2.1.5 The Ottawa Charter for Health Promotion (1986)<sup>62</sup>**

The Ottawa Charter was adopted in 1986 by the WHO at the first international conference for health promotion. The conference was primarily a response to growing expectations for a new public health movement around the world. Discussions focused on the needs in industrialised countries, but took into account similar concerns in all other regions. It built on the progress made through the Declaration on Primary Health Care at Alma-Ata, the WHO Targets for Health for All document, and the recent debate at the World Health Assembly on intersectoral action for health.<sup>63</sup>

The Ottawa Charter defines health promotion “as the process of enabling people to increase control over, and to improve their health. To reach a state of complete physical, mental and social well-being, an individual or group must be able to identify and to realise aspirations to satisfy needs and to have or cope with the environment. Health is therefore seen as a resource for everyday life, not the objective of living... therefore, health is not just the responsibility of the health sector, but goes beyond healthy lifestyles to well-being.”

The Charter listed the fundamental conditions and resources for health as:

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<sup>60</sup> Article 13 of the ICESCR.

<sup>61</sup> G Bekker (note 44).

<sup>62</sup> Ottawa Charter for Health Promotion (1986) available at [www.who.int/hpr/NPH/docs/ottawa\\_charter\\_hp.pdf](http://www.who.int/hpr/NPH/docs/ottawa_charter_hp.pdf) (Accessed on 10 April 2010).

<sup>63</sup> Ibid.

Peace, shelter, education, food, income, a stable eco-system, sustainable resources, social justice, and equity; ...that an improvement in health requires a secure foundation in these basic prerequisites.

The Charter specifically states that good health goes beyond healthy lifestyles. It describes the area of general well-being. In the case of children, well-being will involve having access to a good life, which includes adequate and satisfactory nutrition as well as a good home environment, in which the basic necessities of life are provided.

Although this Charter does not make any reference to HIV/AIDS, it is clear that the Charter recognises that the provisions can be extended to HIV/AIDS as some of the concepts which the Charter recognises as fundamental resources for health are also crucial for the protection of the rights of children affected by HIV/AIDS.

### 3.2.1.4 The CRC (1990)<sup>64</sup>

The CRC was adopted and opened for signature, ratification and accession by General Assembly (GA) Resolution 44/25 of November 1989 and entered into force on 2 September 1990.<sup>65</sup> The CRC was ratified by South Africa on 16 June 1995 and by Botswana on 14 March 1995.

South Africa has taken bold steps in implementing the CRC through national legislation and progressive court rulings.<sup>66</sup> For example, the South African Constitutional Court, in the case of *M v The State*<sup>67</sup> involving the impact of a mother's imprisonment on her children, declared that the CRC principles guide all policy and decisions in relation to children.<sup>68</sup> In the case, it was stated that:

[16] Section 28 of the Constitution must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC). Section 28 has its origins in the international instruments of the UN. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice...

[17] Regard accordingly has to be paid to the import of the principles of the CRC as they inform the provisions of section 28 in relation to the sentencing of a primary caregiver. The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation...

Botswana courts have pronounced that "Botswana is a member of the community of civilised states which have undertaken to abide by certain standards of conduct and, unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts

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<sup>64</sup> The CRC (1990) available at <http://www2.ohchr.org/english/law/crc.htm> (Accessed on 23 May 2010).

<sup>65</sup> It was ratified by South Africa on 16 July 1995 and was acceded to by Botswana on 14 March 1995. It is binding on both countries.

<sup>66</sup> J Sloth-Nielsen & BD Mezmur 'Domestication of the CRC in South African Jurisprudence' (2008) 16 *International Journal of Children's Rights* (2002-2006).

<sup>67</sup> 2008 (3) SA 232 (CC) 261.

<sup>68</sup> P Mahery *Children's rights: How is South Africa faring?* (2009) available at [http://www.ci.org.za/depts/ci/pubs/pdf/homemiscellaneous/op-ed\\_crc.pdf](http://www.ci.org.za/depts/ci/pubs/pdf/homemiscellaneous/op-ed_crc.pdf) (Accessed on 11 March 2010).

with the international obligations Botswana has undertaken.”<sup>69</sup> Botswana’s new Children’s Act has also shown its dedication to the CRC by incorporating some of the CRC standards.<sup>70</sup> The Court demonstrated this in the case of *Motlogelwa v Khan*.<sup>71</sup> The High Court of Lobatse, Botswana, made reference to these instruments in relation to a case where custody was in dispute, and the best interests of the child were considered to be the paramount principle, even in the context of customary law.<sup>72</sup> On this issue, Molokomme J said:

In his well-researched heads of argument, counsel also refers the court to the provisions of various international and regional instruments which adopt the principle of the best interests of the child, such as the 1989 UN Convention on the Rights of the Child and the ACRWC. Although these instruments have not been specifically incorporated into the Botswana domestic law, this country is a state party to the UNCRC and therefore its provisions have strong persuasive value on the decisions of this court.

The CRC is the foremost UN instrument on the protection of the rights of the child. Defining a child, the CRC states in article 1 that:

For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.

This definition is consistent with the constitutional and the Children’s Act definitions of a child in South Africa<sup>73</sup> and the interpretation section of the Children’s Act of Botswana<sup>74</sup> which defines a child as a person who is under the age of 18 years, in line with the CRC.<sup>75</sup>

Various sections of the CRC safeguard all the rights necessary for the well-being of the child in society. The Committee on the Rights of the Child issued the General Comments 3 (GC3) which was adopted at the 32nd Session of the Committee on the Rights of the Child, from 13 to 31 January 2003 which was issued specifically in connection with children affected HIV/AIDS.<sup>76</sup>

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<sup>69</sup> J Amisshah in *Attorney-General vUnity Dow*, Court of Appeal, 1992 Botswana Law Reports 119. See UN *Committee on the Rights of the Child Consideration of Reports Submitted by states Parties under Article 44 of the Convention. Botswana Initial Reports of states Parties Due In 1997* available at [http://www.law.yale.edu/rcw/rcw/jurisdictions/afs/botswana/Botswana\\_CRC\\_Report.pdf](http://www.law.yale.edu/rcw/rcw/jurisdictions/afs/botswana/Botswana_CRC_Report.pdf) (Accessed on 4 June 2010).

<sup>70</sup> These standards are contained in the Bill of Rights enshrined in the Act.

<sup>71</sup> 2006 2 BLR147 HC.

<sup>72</sup> Botswana Department of Justice *The Botswana Law Reports: Cases Determined by the High Court and the Court of Appeal*, Vol. 2 (2007) 150.

<sup>73</sup> See Section 28(3) of the South African Constitution and the Interpretation Section in Chapter 1 of the Children’s Act 2005.

<sup>74</sup> The Constitution of Botswana, though silent on the definition of a child, extends franchise to any citizen of Botswana who has attained the age of 18 in section 67(1) (b) of the Constitution.

<sup>75</sup> When Botswana acceded to the CRC, she entered a reservation to Article 1 on the definition of the child, due to a lack of uniformity in the various national statutes with respect to the definition of a child in Botswana. See CRIN *NGO Complementary Report on the Status of the CRC Implementation in Botswana* available at [http://www.crin.org/docs/resources/treaties/crc.37/Botswana\\_ngo\\_report.pdf](http://www.crin.org/docs/resources/treaties/crc.37/Botswana_ngo_report.pdf) (Accessed on 23 May 2010).

<sup>76</sup> CRC GC3 (note 37 above).

General Comments are used by human rights treaty bodies to interpret the provisions of relevant international legal instruments, with a view to assisting states to fulfil their obligations under such instruments.<sup>77</sup> The GC set out the most appropriate interpretation of the standards in the CRC and these interpretations are binding in as much as the CRC has been ratified by a country.<sup>78</sup> Thus GC 3 is a binding instrument in-as-much as the CRC has been ratified by South Africa and acceded to by Botswana. This is the only binding HIV/AIDS-specific instrument that can be evoked for the protection of children living with HIV/AIDS.

The GCs noted that the CRC employs the holistic child rights-based approach to implanting the CRC because of the serious challenges the HIV/AIDS epidemic is posing to the attainment of some of the rights guaranteed under the CRC. A number of rights were listed in the comments as requiring the holistic rights-based approach to implement.<sup>79</sup>

Article 2 of the CRC<sup>80</sup> guarantees the rights of all children without distinction or discrimination of any kind. Although article 2 does not explicitly prohibit discrimination based on HIV/AIDS status, it recognises the prohibition of discrimination based on “other status” and it can be inferred that this includes HIV/AIDS status.<sup>81</sup> GC3 specifically stresses the prohibition of discrimination based on HIV/AIDS status.<sup>82</sup>

This has also been applied in the South African case of *Hoffmann v SAA*<sup>83</sup> where the court dealt with HIV discrimination, even though HIV is not a listed ground and stated that:

Having regard to all these considerations, the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. This conclusion makes it unnecessary to consider whether the appellant was discriminated against on a listed ground of disability, as set out in section 9(3) of the Constitution...<sup>84</sup>

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<sup>77</sup> African Commission *General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2012) Paragraph 1 available at <http://www.achpr.org/news/2012/11/d65> (Accessed on 23 February 2014).

<sup>78</sup> C Blake *Normative instruments in International Human Rights Law- Locating the General Comments* (2008) available at <http://chrgj.org/wp-content/uploads/2012/07/blake.pdf> (Accessed on 18 December 2013).

<sup>79</sup> J Sloth-Nielsen, 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *International Journal on Children's Rights* 137- 156

<sup>80</sup> State parties shall respect and ensure the rights set forth in the present Convention to each child within its jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

<sup>81</sup> General Comment 3 on the CRC has stated that HIV does fall within “other status”.

<sup>82</sup> CRC GC 3 (note 37 above).

<sup>83</sup> *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000) See Paragraph 27. <http://www.saflii.org/za/cases/ZACC/2000/17.html>

<sup>84</sup> *Ibid* Paragraph 40.

GC3 addressed a number of sections of the CRC which are significant to the rights of children in the HIV/AIDS epidemic and these are elucidated in its main objectives. Commenting on the right to non-discrimination in GC3, the committee interprets "other status" in article 2 of the CRC to include the HIV/AIDS of the child or the parent(s). This comment categorically states that HIV/AIDS status is one of the unlisted grounds for non-discrimination protected under the law.

Another instrument of relevance to children affected by HIV/AIDS is the GC4<sup>85</sup> which was issued by the Committee on the CRC at its 33rd session held from 19 May to 6 June 2003. Dealing with protection from discrimination, it implores State Parties to "ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art. 2), including with regard to race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."<sup>86</sup>

Still addressing the right to non-discrimination, article 2(2) of the CRC implores state parties to take appropriate measures to ensure that children are protected against all forms of discrimination. Article 3 contains recommendations for states to undertake in order to ensure that the best interests of the child shall be a primary consideration in all actions concerning children.

According to Zermatten,<sup>87</sup> the best interest of the child is a fundamental legal principle of interpretation developed to limit the extent of adult authority over children (parents, professionals, teachers, medical doctors, judges, etc.). The principle is based upon the recognition that an adult is only in a position to undertake decisions on behalf of a child because of the child's lack of experience and judgment.<sup>88</sup> The principle of the best interest of the child is one of the four general principles of the CRC and it requires that the child's best interest must be evaluated in all matters concerning the child.

The Committee on the Rights of the Child has emphasised that article 3(1) is fundamental to the overall duty to undertake all appropriate measures to implement the Convention for all children in

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<sup>85</sup> General Comment 4 on Adolescent Health and Development in the context of the Convention on the Rights of the Child available at <http://www1.umn.edu/humanrts/crc/crc-generalcomment4.html> (Accessed on 25 May 2011). This is also binding in as much as the CRC has been ratified by South Africa and acceded to by Botswana.

<sup>86</sup> These grounds also cover adolescents' sexual orientation and health status (including HIV/AIDS and mental health). Adolescents who are subject to discrimination are more vulnerable to abuse; other types of violence and exploitation, and their health and development are put at greater risk. They are therefore entitled to special attention and protection from all segments of society.

<sup>87</sup> J Zermatten 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18*The International Journal of Children's Rights* 484.

<sup>88</sup> *Ibid.*

article 4.<sup>89</sup> Commenting on article 3 of the CRC in GC3, the committee states that policies and programmes for the prevention, care and treatment of HIV/AIDS have generally been designed for adults, with scarce attention to the principle of the best interests of the child as a primary consideration.

Based on this, this thesis argues that the obligations attached to Article 3(1) of the CRC are fundamental to guiding the actions of states in relation to child-specific responses in the HIV/AIDS epidemic. Thus, the child should be placed at the centre of the response to the epidemic and strategies should be adapted to suit children's rights and needs. For instance, where a plan of action for children is proposed, the “best interests” principle should be fully integrated. This must show that the development of mechanisms, the impact of the action and yardstick to assess the results of actions on children all fully incorporate the principle. The incorporation of the principle in practice can therefore involve taking the views of children into account when making decisions concerning them, for example child health care, child education and other child specific services.

The best interest principle demands that, in all actions that will affect persons affected by HIV/AIDS, the impact of such actions on children must be fully taken into consideration. This will require making child-sensitive legislation, policies and service delivery.

The right to life, survival and development are protected in article 6 of the CRC. Commenting on this in the GC3, the committee states that children have the right not to have their lives arbitrarily taken, as well as to benefit from economic and social policies that will allow them to survive into adulthood and develop in the broadest sense of the word. It reaffirms the states' obligation to ensure that this right is adequately protected. It stresses the need to give careful attention to sexuality, as well as to the behaviours and lifestyles of children, even if they do not conform to what society determines to be acceptable under prevailing cultural norms for a particular age group.

The committee reiterates the need for the protection of the female child, as they are often subject to harmful traditional practices, such as early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection. Finally, it suggests that effective HIV/AIDS prevention

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<sup>89</sup>*CRC explanatory notes on best interest of the child* Der Text Stammt aus dem „Survey über die Abschließenden Beobachtungen des UN-Kinderrechtsausschusses der letzten Staatenberichte der EU-MS“, der vom ChildONEurope Sekretariat, Florenz, im Auftrag des BMSG anlässlich der Veranstaltung im Rahmen der österreichischen EU-Präsidentschaft „L'Europe de l'Enfance“, Mai 2006, im Auftrag des BMSG verfasst wurde available at [http://www.kinderrechte.gv.at/home/upload/crc\\_on\\_best\\_interest\\_of\\_the\\_child.pdf](http://www.kinderrechte.gv.at/home/upload/crc_on_best_interest_of_the_child.pdf) (Accessed on 4 June 2010).



programmes are those that acknowledge the realities of the lives of adolescents, while addressing sexuality by ensuring equal access to appropriate information, life skills and preventive measures.

The right to express views are provided for in article 12 of the CRC. Commenting on this, the committee states in the GC3 that children are rights holders and have a right to participate, in accordance with their evolving capacities, in raising awareness by speaking out about the impact of HIV/AIDS on their lives and in the development of HIV/AIDS policies and programmes. It prescribes the obligation on states to ensure that international agencies and non-governmental organisations provide children with a supportive environment for their participation in policy making, programme conceptualisation, design, implementation, co-ordination, monitoring and review.

Article 19 of the CRC sets out the right of the child to be protected from all forms of abuse, neglect and exploitation. It reiterates the need for the child to be given special protection and assistance by the State. It encourages states parties to ensure alternative care for the child in accordance with their national laws.<sup>90</sup> Based on this, GC4 encourages state parties to take effective measures to ensure that adolescents are protected from all forms of violence, abuse, neglect and exploitation (arts. 19, 32-36 and 38), paying increased attention to the specific forms of abuse, neglect, violence and exploitation that affect this age group. In particular, they should adopt special measures to ensure the physical, sexual and mental integrity of adolescents with disabilities, who are particularly vulnerable to abuse and neglect. State parties should ensure that adolescents affected by poverty who are socially marginalised are not criminalised.<sup>91</sup> It stipulates the measures to be taken by the State to ensure that the right is adequately protected.

Although the CRC does not specifically deal with the sexual and reproductive health rights of children, paragraph 20 of GC3 addresses the rights of adolescent children to health care services. It requires that states should ensure that health care services for children are “friendly and supportive, provide a wide range of services and information, are geared to their needs, give them the opportunity to participate in decisions affecting their health, are accessible, affordable, confidential and non-judgemental, do not require parental consent and are not discriminatory.”<sup>92</sup> It stipulates that states should ensure that children have access to health care services, such as confidential sexual

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<sup>90</sup> Article 20 of the CRC.

<sup>91</sup> This means that states should take steps to ensure that the socio-economic rights of children are protected such that children who are affected by low socio-economic standards do not make dangerous and criminal choices of survival and that if they find themselves involved in criminality, they are not treated as criminals but that their conditions are taken into consideration in a bid to help them.

<sup>92</sup> Paragraph 20 of the UN GC 3.

and reproductive health services, and free or low-cost contraceptive methods and services, as well as HIV-related care and treatment if and when needed, in order to ensure that they protect themselves from HIV infection.

The evolving capacities of the child should be taken into consideration when ensuring access to these services. The rights of children such as the rights to privacy and non-discrimination should be taken into account when offering access to HIV-related information and “states parties should ensure that health services employ trained personnel who fully respect the rights of children”.<sup>93</sup>

Article 24 of the CRC upholds the right to the highest attainable standard of health for the child and specifies measures to be taken by the State to ensure that no child is denied the right to access the highest attainable standard of health care. It encourages State parties to pursue the full implementation of the right to health.

Ensuring the right to the highest attainable standard of health in the case of children affected by HIV/AIDS means that the State must create conditions in which every child can be as healthy as possible. Such conditions range from ensuring the availability of health care services, healthy and safe living conditions, adequate housing and nutritious food. The right to health does not simply mean the right to be healthy but it extends to all actions which reduce child mortality and which protect the general well-being of the child.<sup>94</sup>

The child's right to education is recognised and adequately safeguarded in the CRC with a view to achieving the right progressively and on the basis of equal opportunity.<sup>95</sup> Article 28 (d) encourages states to take measures to encourage regular attendance at schools and the reduction of drop-out rates. This is crucial in the case of children that are affected by HIV/AIDS as many children from child-headed households or homes where the parents are very ill with AIDS have had to drop out of school to care for the family, or to work and to contribute to the family's finances.<sup>96</sup> Children affected by HIV/AIDS often face barriers which inhibit their access to education or which can make getting educated a daunting task for them.

Subbarao and Coury contend that children in child-headed households may suffer stress from shouldering adult parental responsibilities, especially when they are unable to fulfil their

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<sup>93</sup> Ibid.

<sup>94</sup> WHO *Fact Sheet* (2007) – *the right to health* available at <http://www.who.int/mediacentre/factsheets/fs323/en/index.html> (Accessed on 4 June 2010).

<sup>95</sup> Article 28.

<sup>96</sup> C Campbell *Letting them die: why HIV/AIDS intervention programmes fail* (2003) 5.

educational and other needs due to poverty.<sup>97</sup> In addition family poverty caused by HIV/AIDS can inhibit children's access to education, where care-givers are not able to provide their educational needs such as books, uniforms or bags.<sup>98</sup> The loss of the children's birth or medical records after the death of their parents can inhibit their access to education especially if the care givers do not know how to get them alternative records.<sup>99</sup> In certain rare cases however, stigma and discrimination attached to HIV/AIDS can prevent children affected by HIV/AIDS from accessing education especially if they do not want their peers to become aware of the HIV/AIDS in their family, to avoid being teased or ostracised.<sup>100</sup>

Article 32 encourages states to recognise the right of the child to be protected from economic exploitation and from performing work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development. This will help to protect children from exploitation, especially in the case of children who have been orphaned or left vulnerable to exploitation by HIV/AIDS. This protection is important because children orphaned by HIV/AIDS are often vulnerable to economic exploitation. Economic hardship resulting from death of the parents may force many of these children to make harmful survival choices in the face of desperation. They are often forced to assume the burden of caring for their younger siblings.

Children orphaned by HIV/AIDS are therefore more exposed to exploitation, abuse and violence. Conversely, many situations in which children have inadequate protection, including sexual exploitation, trafficking, violence, armed conflict, recruitment by armed forces or groups, displacement, detention and imprisonment and child marriage, may make them more vulnerable to HIV infection.<sup>101</sup> In other cases where the children are absorbed into extended families, the children might be forced to contribute to the family by doing more of the house chores or ending up as child labourers to augment the finances of the family with whom they live.<sup>102</sup>

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<sup>97</sup> KSubbarao & DCoury 'Reaching out to Africa's Orphans: A Framework for Public Action' in EBonthuy *Legal capacity and family status in child-headed households: Challenges to legal paradigms and concepts* (2010) 6 *International Journal of Law in Context* 57.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> R Parker, PAggleton, KArtawellet *alHIV/AIDS-related Stigma and Discrimination: A Conceptual Framework and an Agenda for Action* (2002) 762.

<sup>101</sup> G Foster, C Levine & J Williamson *A Generation at Risk: The Global Impact of HIV/AIDS on Orphans and Vulnerable Children* (2005) 105.

<sup>102</sup> C Bellamy *The State of the World's Children (2005): Childhood under Threat* (2005) 25. See also HDHindman, *The World of Child Labour: An Historical and Regional Survey* (2009) 177.

The other issues raised in the GC3 on the rights of children affected by HIV/AIDS include the fact that obstacles which hinder effective prevention, delivery of care services and support for community initiatives on HIV/AIDS are mainly cultural, structural and financial. It states that “prevention, care, treatment and support are mutually reinforcing elements and they provide a continuum within an effective response”. It further sets out the various components of "prevention, care, treatment and support" and how these ought to be addressed by states.<sup>103</sup>

Finally, the Committee acknowledges that the vulnerability of children to HIV/AIDS, resulting from political, economic, social, cultural and other factors, determine the likelihood of them being left with insufficient support to cope with the impact of HIV/AIDS on their families and communities. One other major strength of the CRC is the fact that it acknowledges that vulnerability to HIV/AIDS is most acute for children living in refugee and internally displaced persons' camps, children in detention, children living in institutions, children living in extreme poverty, children living in situations of armed conflict, child soldiers, economically and sexually exploited children, and disabled, migrant, minority, indigenous and street children. This succinctly sheds light on the group of children who are most vulnerable to HIV/AIDS. It maintains that states should, even in times of severe resource constraints, protect the rights of vulnerable members of society and that many measures can be pursued with minimum resource implications. It acknowledges that reducing vulnerability to HIV/AIDS requires first and foremost that children, their families and communities be empowered to make informed choices about decisions, practices or policies affecting them, where in relation to HIV/AIDS is concerned.

Although the CRC does not expressly refer to HIV, there are general provisions that can be applied in the protection of children affected by HIV/AIDS. GC 3 and 4 address the issue of HIV/AIDS directly and these can be used to interpret and apply the broad provisions within the CRC to children affected and infected by the epidemic. Together GC 3 and 4 employ a holistic approach to the protection of children affected by HIV/AIDS. They recognise the factors that affect the children and those that place the children in vulnerable situations. They further list the duties and obligations on the State to ensure that needed remedies and protection are provided. Hence, the CRC together with its GCs are the most complete international instruments which deal with the rights of children affected by HIV/AIDS.

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<sup>103</sup> GC3 addresses how Information on HIV prevention and awareness-raising, education, Child and adolescent sensitive health service, HIV counselling and testing, Prevention of Mother-to-child transmission, Treatment and care, Involvement of children in research, can, in line with the CRC be employed in the protection of children from HIV/AIDS transmission.

### **3.2.2 HIV/AIDS-specific instruments**

South Africa and Botswana as members of the UN have made commitments which are linked to the protection of children affected by HIV/AIDS. These are non-binding instruments but they exist as a guide to the government so that the national interventions conform with the international standards.

#### **3.2.2.1 The World Health Assembly (WHA) Resolution 41.24 on the Avoidance of Discrimination in relation to HIV infected People and People with AIDS (1988)**

This WHA Resolution was adopted on 13 May 1988 by the World Health Assembly (the supreme law-making body of the WHO). It deals with how states should protect PLWHA against discrimination and it encourages member states to take steps to ensure that the rights and dignity of PLWHA are protected.

Although it does not deal directly with children, its focus on PLWHA, with emphasis on the avoidance of discrimination, the protection of confidentiality and human dignity, suggests that it can be applied to children as well. The Resolution calls on member states to take steps to ensure that the rights of people affected by HIV/AIDS are protected. This will include the avoidance of discriminatory service provision or policies. This Resolution reiterates the other UN instruments on equality and non-discrimination against people infected or affected by HIV/AIDS.

#### **3.2.2.2 The International Guidelines on HIV/AIDS and Human Rights (1996) (the Guidelines)<sup>104</sup>**

The Guidelines were adopted in 1996 by a consultative meeting convened by two UN bodies, UNAIDS and the Office of the High Commissioner for Human Rights. The Guidelines arose because of various calls for their development, in light of the need for guidance for Governments and others on how to best promote, protect and fulfil human rights in the context of the HIV epidemic.<sup>105</sup>

The Guidelines were issued by a group of 35 experts in the field of HIV/AIDS and human rights, comprising governmental, non-governmental and academic experts. Despite the limited number

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<sup>104</sup> UN *Proceedings of the first International Consultation on AIDS and Human Rights* (1989). Participants discussed the possible elaboration of guidelines to assist policymakers and others in complying with international human rights standards regarding law, administrative practice and policy.

<sup>105</sup> UNAIDS *The International Guidelines on HIV/AIDS and Human Rights* available at [data.unaids.org/Publications/IRC.../jc1252-internguidelines\\_en.pdf](http://data.unaids.org/Publications/IRC.../jc1252-internguidelines_en.pdf) (Accessed on 23 April 2010).

of people working on them they are widely used as a benchmark for government action.<sup>106</sup> The purpose of these Guidelines is to assist states in creating a positive, rights-based response to HIV that is effective in reducing the transmission and impact of HIV/AIDS and is consistent with human rights and fundamental freedoms.<sup>107</sup>

The Guidelines contain extensive provisions that can be invoked to protect children affected by HIV/AIDS. Although it does not define children as members of a vulnerable group, it places children in the same group with other known marginalised and vulnerable groups. The 4<sup>th</sup> paragraph of the foreword to the guidelines reiterates the commitment of the international human rights to the HIV/AIDS epidemic and the impact of the epidemic on the poor, the vulnerable and marginalised groups. It reiterates the fact that HIV status is a prohibited ground of discrimination.

In accordance with these Guidelines, children fall within the same category as “other vulnerable groups” and can be seen as members of the group. The Guidelines further encourage state Parties to take “particularised steps” in protecting children affected by HIV/AIDS;<sup>108</sup> to “enact or strengthen anti-discrimination laws and other laws protecting people with HIV/AIDS;” and to ensure the widespread availability of preventative measures and medication. Importantly, states need to go beyond legislating for HIV/AIDS specifically, by addressing underlying inequalities and stereotypes especially concerning women and children.<sup>109</sup>

The Guidelines<sup>110</sup> recommend that states should “develop and implement national plans to progressively realise universal access to comprehensive treatment, care and support for all persons living with HIV.” They recommend that states take positive steps to address factors that hinder access to treatment, especially for vulnerable groups such as rural populations, children, women migrants, refugees and displaced populations and to ensure monitoring and enforcement mechanisms to guarantee HIV-related human rights and legal aid to those in need.

Although it is not specifically for the protection of children affected by HIV/AIDS, there is no gainsaying the fact that the Guidelines employ a human rights-based approach and lay down the position on the protection of children vulnerable groups. It clearly recognises the need for states

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<sup>106</sup> Two reasons in particular explain the high level of acceptance: The Guidelines were subsequently “welcomed” by the UN Commission on Human Rights (Resolution 1997/33), and were translated and widely disseminated.

<sup>107</sup> UNAIDS (note 105).

<sup>108</sup> See paragraph 8(d) of the *Background and Summary of the Guidelines See the International Guidelines on HIV/AIDS and Human Rights* available at [http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines\\_en.pdf](http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf) (Accessed on 12 April 2010).

<sup>109</sup> Guideline 4 of the International Guidelines on HIV/AIDS and Human Rights.

<sup>110</sup> Guideline 6 of the International Guidelines on HIV/AIDS and Human Rights.

to protect children affected by HIV/AIDS and is clearly stated in the foreword<sup>111</sup> to the Guidelines and several other sections of the document clearly expressed this view.

### 3.2.2.3 The Millennium Development Goals (2000) (MDGs)<sup>112</sup>

The MDGs were adopted in September 2000, at the UN Millennium Summit, when world leaders from about 189 countries, including South Africa and Botswana, met at the UN headquarters in New York to adopt the UN Millennium Declaration, committing their nations to a new global partnership to reduce extreme poverty and setting out a series of time-bound targets, with a deadline of 2015.

The MDGs are a set of 8 specific goals that states endeavour to achieve within the next three years.

- MDG 1- Eradicate extreme poverty and hunger
- MDG 2- Achieve universal primary education
- MDG 3- Promote gender equality and empower women
- MDG 4- Reduce child mortality
- MDG 5- Improve maternal health
- MDG 6- Combat HIV/AIDS, malaria and other diseases
- MDG 7- Ensure environmental sustainability
- MDG 8-Develop a Global Partnership for Development

Of most immediate importance to HIV/AIDS is goal 6, with its target of halting and beginning to reverse the spread of HIV/AIDS by 2015, and combating malaria and other diseases. Other goals specific to children include the eradication of poverty (MDG 1), the achievement of universal primary education (MDG 2) and the reduction of child mortality (MDG 4).

Some of the MDGs are targeted towards children generally and those living with HIV/AIDS specifically. Since children form part of the reasons for developing the MDGs, some of the goals are formulated with children in mind.

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<sup>111</sup> ...At the same time, the impact of HIV highlighted the inequities and vulnerabilities leading to increased rates of infection among women, children, the poor and marginalised groups, and thereby contributed to a renewed focus on economic, social and cultural rights. In this regard, the content of the right to health has been increasingly defined and now explicitly includes the availability and accessibility of HIV prevention, treatment, care and support for children and adults. SeeUNAIDS *International Guidelines on HIV/AIDS and Human Rights 2006 Consolidated Version* available at [http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines\\_en.pdf](http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf) (Accessed on 9 June 2010). U

<sup>112</sup> UN *The MDGs – What are they?* (2000) Available at <http://www.unmillenniumproject.org/goals/index.htm> (Accessed on 15 June 2011). General Assembly resolution 55/2 The MDGs set out the goals which countries aim at meeting before the cut-off date of 2015. Setting them helps countries to aim at meeting the target.

So far, some of the goals have been partially met, while others have not even been partially met. For instance, Botswana increased the enrolment of children in primary schools much faster than many other developing countries, but may not meet the goal of 100% enrolment by 2015.<sup>113</sup> South Africa made some progress in combating HIV/AIDS. In 2009, the HIV prevalence among the 15 to 24 year-olds (which is the MDG 6, Target 7, indicator 18) remained the same, unchanged from the 2008 estimate of 21.7%. This MDG group constituted almost 50% (N = 16 367) of the survey population. There is a slight decrease in HIV prevalence among young women in the age group 15 to 19 years, from 14.1% in 2008 to 13.7% in 2009, a decline of 0.4%, which is not statistically significant.<sup>114</sup>

However, despite these improvements, much still needs to be done in order to realise the MDGs. Africa is still not progressing at the expected rate. In Sub-Saharan Africa, primary school enrolment was lower than the 90% found in the other parts of the world. HIV/AIDS and malaria still remain one of the greatest killers of children in the world. About one quarter of all children in developing countries are considered to be underweight and are at risk of long-term effects of under-nourishment. In addition, more than 500 000 prospective mothers in developing countries die annually in childbirth, or of complications from pregnancy.<sup>115</sup>

The MDGs are important as they continue to be the yardstick against which we can measure national progress in the fight against HIV/AIDS, child mortality, poverty and hunger, universal primary education, maternal health and a host of other factors affecting children affected by HIV/AIDS.

#### **3.2.2.4 UNCHR, Human Rights Resolution 2001/51: The Protection of Human Rights in the Context of HIV and AIDS (2001)<sup>116</sup>**

This Resolution was adopted by the UN HCR on 24 April 2001. It addresses the plight of vulnerable groups and, among other things:

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<sup>113</sup> F Al-Atraqchi *The UN targets 2015 success* (2008) available at

<http://english.aljazeera.net/focus/humanrights/un/2008/12/2008123151653805310.html> (Accessed on 9 June 2010).

<sup>114</sup> Department of Health, *2010 Antenatal Sentinel HIV and Syphilis Prevalence Survey in South Africa* (2009).

<sup>115</sup> UNDP MDGS Strategies

[http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus\\_areas/focus\\_mdg\\_strategies/](http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_mdg_strategies/) (Accessed on 15 August 2013).

<sup>116</sup> UNCHR, Human Rights Resolution 2001/51: The Protection of Human Rights in the Context of HIV and AIDS (2001) available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2001.51.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2001.51.En?Opendocument) (Accessed on 9 June 2010).



Urges states to ensure that their laws, policies and practices respect human rights in the context of HIV/AIDS, prohibit HIV/AIDS-related discrimination, promotes effective programmes for the prevention of HIV/AIDS, including through education and awareness raising campaigns and improved access to high quality goods, services for preventing transmission of the virus, and promote effective programmes for the care and support of persons infected and affected by HIV/AIDS, including through improved and equitable access to safe and effective medication for the treatment of HIV infection and HIV/AIDS related illnesses.<sup>117</sup>

Although children are not the main target of this Resolution, it specifically employs a rights-based approach and directs states to ensure that their laws, policies and practices respect human rights in the context of HIV/AIDS and prohibit HIV/AIDS-related discrimination among other things.

### **3.2.2.5 The UN National Assembly (UNGASS) Declaration of Commitment on HIV/AIDS (2001)<sup>118</sup>**

The Declaration was adopted by UNGASS in June 2001. Despite the fact that its specific aim is not the protection of children, it made specific reference to the need for the protection of children affected by HIV/AIDS. In its 4<sup>th</sup> preambular paragraph, the Declaration noted that “all people, rich and poor, without distinction as to age, gender or race, are affected by the HIV/AIDS epidemic” that people in developing countries are the most affected and that women, young adults and children, in particular girls, are the most vulnerable”.

Of specific relevance to the protection of children affected by HIV/AIDS is paragraph 63 of the Declaration. It provides specifically for the protection of children orphaned and affected by HIV/AIDS by suggesting that national actions such as policies and strategies should aim at building and strengthening “governmental, family and community capacities to provide a supportive environment for orphans and girls and boys infected and affected by HIV/AIDS.”<sup>119</sup>

These paragraphs sum up the human rights of children affected by HIV/AIDS. They deal with a wide range of rights which are required to protect children. Their relevance to the protection of children cannot be understated. Finally, the Declaration agrees that there is a need to alleviate the social and economic impact of HIV/AIDS.<sup>120</sup>

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<sup>117</sup> See paragraph 5.

<sup>118</sup> UNGASS Declaration of Commitment on HIV/AIDS (2001) available at <http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html> (Accessed on 9 June 2010).

<sup>119</sup> See paragraph 65, 66 and 67 of the Declaration.

<sup>120</sup> See paragraph 68 of the Declaration.

This thesis submits that if states develop and accelerate the implementation of national poverty eradication strategies, this will help to alleviate the socio-economic impact of HIV/AIDS on families, thereby ensuring better living conditions for children in their families and communities.

The UNGASS Declaration was an historic commitment to mobilising a comprehensive response to the global challenge of HIV/AIDS, including action to address stigma and vulnerability, prevention, care and treatment. The Declaration noted the crucial importance of developing new tools, to broaden and improve options for people,<sup>121</sup> particularly women, young adults and children, to prevent HIV transmission.

### **3.2.2.6 Political Declaration on HIV/AIDS (2006) Res/60/262<sup>122</sup>**

This Declaration was adopted on 2 June 2006 by the General Assembly after a meeting to review the progress achieved in realising the targets set out in the UNGASS Declaration of Commitment on HIV/AIDS. It reaffirms the 2001 Declaration of Commitment on HIV/AIDS and the MDGs, in particular the goal to halt and begin to reverse the spread of AIDS by 2015.<sup>123</sup>

Although it does not focus specifically on children, the Declaration contains provisions relevant to their protection. A number of sections in its preamble point to the fact that children featured significantly during the deliberations.<sup>124</sup>

The Declaration expresses the commitment of member states to issues such as addressing, as a priority the vulnerabilities faced by children affected by, and living with, HIV; providing support and rehabilitation to these children and their families, women and the elderly, particularly in their role as care-givers; promoting child-oriented HIV/AIDS policies and programmes and increased protection for children orphaned and affected by HIV/AIDS; ensuring access to treatment and intensifying efforts to develop new treatments for children; and building, where needed, and supporting the social security systems that protect them.

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<sup>121</sup> UNGASS Reviewing the UNGASS Declaration of Commitment on HIV and AIDS the Need for Microbicides available at [http://www.ipmglobal.org/pdfs/english/microbicide\\_publications/microbicides\\_ungass\\_2006\\_en.pdf](http://www.ipmglobal.org/pdfs/english/microbicide_publications/microbicides_ungass_2006_en.pdf) (Accessed on 9 June 2010).

<sup>122</sup> UN General Assembly *Resolution adopted at the 87th plenary meeting 2 June 2006* available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/503/32/PDF/N0550332.pdf?OpenElement> (Accessed on 15 June 2011).

<sup>123</sup> UNAIDS *2006 Political Declaration on HIV/AIDS* available at <http://www.unaids.org/en/aboutunaids/unitednationsdeclarationsandgoals/2006politicaldeclarationonhivaids/> (Accessed on 15 June 2011).

<sup>124</sup> See the preamble to the Declaration.

Although the Declaration does not focus specifically on children, it notes the effect of HIV/AIDS on children and recognises the need to protect a number of important rights of children which are consequential upon HIV/AIDS.

It demonstrates a commitment to dealing with children's rights to health by making medication available specifically for children' as well as resolving to make policies that address, as a priority, the vulnerabilities faced by children, to strengthen the support systems available to children affected by HIV/AIDS and to strengthen existing national health and social systems, all with the hope of impacting the lives of children affected by HIV/AIDS.

### **3.2.2.7. Resolution adopted by the General Assembly Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV/AIDS 65/277<sup>125</sup>**

This Resolution was adopted by the UN General Assembly at its 95th plenary meeting on 10 June 2011. It reaffirms the 2001 Declaration of Commitment on HIV/AIDS and the 2006 Political Declaration on HIV/AIDS and the urgent need to scale up significantly the efforts towards the goal of universal access to comprehensive prevention programmes, treatment, care and support.

Although it is not a child-specific instrument, it recognises that more than 16 million children have been orphaned because of AIDS<sup>126</sup> and welcomes all the national efforts directed towards the mitigation of the impact of the epidemic in relation to the effect of the epidemic on children.<sup>127</sup> The fact that it recognises and affirms the central role of the family, bearing in mind that in different cultural, social and political systems various forms of the family exist, in reducing vulnerability to HIV, *inter alia* in educating and guiding children, and takes account of cultural, religious and ethical factors to reduce the vulnerability of children and young people...<sup>128</sup> makes it an important reference tool in measuring the national efforts in relation to the protection of the right to family. Furthermore, its dedication to the prevention of MTCT and the protection of OVC cannot be gainsaid.<sup>129</sup>

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<sup>125</sup> UNAIDS *Resolution adopted by the General Assembly Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV/AIDS* available at [www.unaids.org/en/media/unaids/.../20110610\\_un\\_a-res-65-277\\_en.pdf](http://www.unaids.org/en/media/unaids/.../20110610_un_a-res-65-277_en.pdf) (Accessed on 28 December 2012).

<sup>126</sup> See paragraph 8 of the *Resolution adopted by the General Assembly on Political Declaration on HIV and AIDS*.

<sup>127</sup> See paragraph 12 and 19 of the *Resolution adopted by the General Assembly on Political Declaration on HIV and AIDS*.

<sup>128</sup> See paragraph 43 of the *Resolution adopted by the General Assembly on Political Declaration on HIV and AIDS*.

<sup>129</sup> See paragraph 60, 68 and 82 of the *Resolution adopted by the General Assembly on Political Declaration on HIV and AIDS*.

### 3.3 Conclusion

International law plays an important role in the protection of children generally and those affected by HIV/AIDS specifically. State parties that become privy to an international instrument are required to adjust their national laws to conform to the standards set in the international instrument. This is necessary in countries such as Botswana, which operates a dualist approach to treaty domestication.

There is a well-established international framework for children's rights, established primarily through the CRC. The CRC is significant for a number of reasons, but not least because it is so widely accepted and is binding on states which have ratified it. Apart from the ICESCR and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, all the other binding instruments discussed in the chapter have been ratified and acceded to by both Botswana and South Africa. They are thus fully bound to implement their provisions in their national legislation.

It is of concern, however, that the binding international instruments that expressly deal with HIV/AIDS are the GC 3 and 4 of the CRC. Of all the non-binding documents which deal with HIV/AIDS, most are only adaptable to the protection of children and many of the HIV/AIDS-specific declarations only identify children as a vulnerable group. They do not give much guidance on how to actually respond in detail to the impact of HIV/AIDS on children. They do not expressly deal with the rights of children affected by HIV/AIDS. The UNGASS Declaration of Commitment on HIV/AIDS (2001),<sup>130</sup> is the exception, as paragraphs 63, 65, 66 and 67 of the Declaration specifically recognise the protection of children orphaned and affected by HIV/AIDS and suggest national strategies for the preservation and protection of the family to protect orphans and girls and boys infected and affected by HIV/AIDS.”<sup>131</sup>

Nevertheless, the instruments that have not been ratified and the non-binding instruments have an undeniable moral force and provide practical guidance to states in their conduct;<sup>132</sup> they help shape the domestic laws and how the courts interpret the cases that are relevant to the subject matter of the international law. When read together, it is clear that the international norms discussed in this

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<sup>130</sup> UN *UNGASS Declaration of Commitment on HIV/AIDS (2001)* available at <http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html> (Accessed on 9 June 2010).

<sup>131</sup> See paragraph 65, 66 and 67 of the Declaration.

<sup>132</sup> UN *UNGASS Declaration of Commitment on HIV/AIDS (2001)* note 130 above.

chapter can be adapted to provide the most comprehensive set of standards for the protection of the rights of children affected by HIV/AIDS.

## Chapter 4 African regional standards relating to the protection of children affected by HIV/AIDS in South Africa and Botswana

### 4.0 Introduction

This chapter discusses the AU regional and SADC sub-regional standards on the rights of children affected by HIV/AIDS and how they can be applied in national legislation, policy or even service delivery.

The AU and SADC instruments discussed fall into two main categories, namely binding and non-binding instruments. The legally binding instruments include AU and SADC treaties, statutes, and protocols which set out the laws and rights of children affected by HIV/AIDS in Africa. The non-binding ones are the AU and SADC declarations, resolutions and guidelines. Though not binding, they have an undeniable moral force and provide practical guidance to states in their conduct.<sup>1</sup>

Currently, there is no legally binding HIV/AIDS-specific treaty or convention under the African regional system; however, there are a number of non-binding HIV specific declarations, guidelines and statements. There are child-specific conventions which, although silent on HIV/AIDS could be invoked to protect children affected by HIV/AIDS.

Both countries are members of the AU and SADC. South Africa<sup>2</sup> and Botswana<sup>3</sup> joined the AU (then the Organisation of African Unity, OAU) on 6 June 1994 and 31 October 1966, respectively. They are thus bound by the instruments emanating from these organisations. These regional standards are non-binding HIV/AIDS-specific instruments. They exist to guide the governments towards what is expected from them to deal with the HIV/AIDS epidemic. These instruments do not have any binding effect on the member states; they however operate on the principle of good faith; trust and confidence, which are inherent in international co-operation.<sup>4</sup>

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<sup>1</sup> OHCHR *Document from Office of the UN High Commission for Human Rights International Law* available at <http://www2.ohchr.org/english/law/> (Accessed on 23/03/2010).

<sup>2</sup> While South Africa was ruled under the system of apartheid, it was ineligible and uninterested in membership of the AU. Following a democratic revolution in 1994, it joined the OAU that June 6. See AU *Geography of the AU-Art.11 AU* (2003) available at [http://au.int/en/sites/default/files/PROTOCOL\\_AMENDMENTS\\_CONSTITUTIVE\\_ACT\\_OF\\_THE\\_AFRICAN\\_UNION.pdf](http://au.int/en/sites/default/files/PROTOCOL_AMENDMENTS_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION.pdf) (Accessed on 30 March 2010).

<sup>3</sup> Ibid.

<sup>4</sup> A Skelton 'The development of fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2008) 9 *African Human Rights Law Journal* 489.

The regional standards have been divided into two sections, the HIV/AIDS-specific and the non HIV/AIDS-specific, and these are discussed in the next section.

#### 4.1 Binding non-HIV/AIDS-specific instruments

##### 4.1.1 The African Charter on Human and Peoples Rights (1981) (ACHPR)<sup>5</sup>

The ACHPR was adopted in Nairobi, Kenya on 27 June 1981 and it entered into force on 21 October 1986. This Charter was ratified by South Africa on 09/07/1996 and by Botswana on 17/07/1986. Both countries are thus bound by its provisions. It is the foremost human rights instrument of the AU and it is legally binding on member states that have ratified it. It is not an HIV/AIDS-specific charter, but it contains certain provisions that are applicable to the protection of the rights of children affected by HIV/AIDS.<sup>6</sup>

The various sections which are relevant to the rights of children affected by HIV/AIDS include:

Article 2, which guarantees the enjoyment of the rights and freedoms recognised and guaranteed in the Charter, without distinction based on any of the grounds listed in the ACHPR. Although it does not include HIV/AIDS as one of the grounds for non-discrimination, the phrase “other status” can be construed to include HIV/AIDS. In the words of the African Commission on Human and Peoples’ Rights (African Commission):

The non-discriminatory principle laid down in article 2 is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for everyone to enjoy all the rights provided under the Charter.<sup>7</sup>

Article 2 was applied in the Botswana case of *Attorney General v. Dow*,<sup>8</sup> where the constitutional definition of discrimination was challenged. In this matter the court had to decide whether discrimination or different treatment of different persons was limited to the listed grounds specifically referred to in the Constitution, namely, race, tribe, place of origin, political opinions, colour and creed. In this particular case the applicant was arguing that she had been unfairly discriminated against on the basis of sex. The Court of Appeal decided that in compliance with Botswana’s obligations under the ACHPR, it is an offence against human dignity to discriminate

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<sup>5</sup>AU ACHPR (1981) available at [www1.umn.edu/humanrts/instree/z1afchar.htm](http://www1.umn.edu/humanrts/instree/z1afchar.htm) (Accessed on 23 June 2010).

<sup>6</sup>Ibid.

<sup>7</sup> AU 16<sup>th</sup> Annual Activity Report of the African Commission 2002-2003. Assembly/AU/7 available at [www.achpr.org/english/\\_doc\\_target/documentation.html](http://www.achpr.org/english/_doc_target/documentation.html) (Accessed on 2 July 2010).

<sup>8</sup> 1992 BLR 119 (CA) 3 July 1992, Court of Appeal.

against women and thus the equality clause should be interpreted to comply with international obligations.<sup>9</sup>

Even though this case does not relate to children or HIV/AIDS, the approach of the court when considering unlisted grounds of non-discrimination and the role which the principles of the ACHPR played in the case is significant. It shows that unlisted grounds such as HIV/AIDS can be subsumed into certain listed grounds.

In article 4 the ACHPR makes reference to the protection and respect of a person's right to life. Article 4 states that "human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person..." This provision can be linked to the protection of the lives of PLWHA and can be traced back to article 6 of the ICCPR.<sup>10</sup> The ACHPR places an obligation on states to protect the right to life of all its citizens. The provision of the life-prolonging treatment, care and support by the state for PLWHA will prolong and preserve the lives of PLWHA including children, thus ensuring their right to life.

Article 5 guarantees every individual's right to the respect of the dignity inherent in a human being and to the recognition of his legal status. The article prohibits all forms of exploitation and degradation of man. In particular, slavery, the slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. The guarantee which the ACHPR provides for the dignity of all persons is also important for PLWHA, since the nature of HIV/AIDS in itself and the way it is perceived by people have the potential to demean the dignity of affected persons.

Article 16, which deals with the right to health, guarantees that every individual shall have the right to enjoy the best attainable state of physical and mental health and that states to the Charter shall take the necessary measures to protect the health of their people. The state is to ensure that they receive medical attention when they are sick. It is significant that the ACHPR protects the right to the highest attainable standard of physical and mental health. This is a very high standard and the

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<sup>9</sup>See also the Court's ruling in the case of *Sarah Diau v Botswana Building Society case*, Industrial Court 50/2003 (J 992) 19 December 2003.

The where the court relied on Botswana's commitment under international instruments to hold that the termination of the applicant's contract of employment after the refusal of an HIV/AIDS test was in breach of her contractual rights, the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work, adopted in June 1998, the Convention no 111 (Discrimination Employment and Occupation Convention, 1958) that Botswana has ratified, the constitutional principle of the elimination of discrimination at the workplace and was substantively unfair as it had been tainted by the unfairness of the test.

<sup>10</sup> M Evans & R Murray (eds.) *The African Charter on Human and Peoples' Rights- The System in Practice*, 1986-2000 (2002) 147.



fact that it is unequivocally protected in the Charter goes a long way to showing the kind of attention states are expected to pay to the health of their citizens.

Still dealing with the right to the best attainable state of physical and mental health and access to treatment, the African Commission at its 29th Ordinary Session held in Tripoli from 23 April to 7th May 2001,<sup>11</sup> stated, in its Final Communiqué, that:

The Commission considers [the] HIV/AIDS pandemic as a serious threat to the human rights of Africans. It underscored the difficulties that HIV/AIDS patients face in accessing treatment as a major obstacle to exercise their right to health, as provided for by the ACHPR.<sup>12</sup>

This further demonstrates the intention of the Charter to include HIV/AIDS as one of the issues which states should pay attention in relation to the protection of the right to health.

Article 17 is also important in protecting the right to education of children affected by HIV/AIDS. The protection of this right is important as the school is one of the first places where the right to education and non-discrimination of children infected by HIV/AIDS is tested.

Article 18 acknowledged that the family is the natural unit and basis of society and calls for its protection by the state. It further delegates the state with the duty to assist the family as the state is the custodian of morals and traditional values recognised by the community. The section further prohibits all forms of discrimination against woman and children as stipulated in international declarations and conventions.<sup>13</sup>

The recognition of the family in article 18 is very important for all children and, more especially, children who are affected by HIV/AIDS. The provision is wide enough to protect the basic and secondary functions which the family performs. The statement that the state shall have the duty to assist the family... can be construed to mean that the state needs to take steps to preserve the family especially those affected by HIV/AIDS. It has been reasoned that the provision of life prolonging medication for parents living with HIV/AIDS will preserve the families of the people (especially the mothers) who have access to the drugs.

Article 18(3) deals with “state obligations guaranteed in various international instruments on the elimination of discrimination...” which is very useful to protect children from discrimination based

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<sup>11</sup> The AU while deliberating on the withdrawal of the suit brought against South Africa by the pharmaceutical companies on generic medicines for the treatment of HIV/AIDS in 2001.

<sup>12</sup> ACHPR (note 5).

<sup>13</sup> Article 18 (1-3) of the ACHPR.

on their HIV status. The fact that the article categorically states that “every discrimination against women”... and “the protection of the rights of the woman and the child” indicates that this can be applied to the protection of children against HIV/AIDS. It can also be applied while interpreting article 2 of the ACHPR.

Regarding the HIV/AIDS epidemic, the African Commission issued the Resolution on HIV/AIDS Pandemic - Threat against Human Rights and Humanity (2001)<sup>14</sup> - at its 29th ordinary session in Tripoli, Libya from 23 April 7 May 2001. While the Resolution does not deal specifically with children, it declares that “the HIV/AIDS pandemic is a human rights issue which is a threat to against humanity.”<sup>15</sup> It further calls on states parties and governments to “allocate national resources that reflect a determination to fight the spread of HIV/AIDS, ensure human rights protection of those living with HIV against discrimination, provide support to families of the care of those dying of AIDS”.

This is one of the instruments that recognise the need for states to channel state resources to the fight against HIV/AIDS. It recognises the need for the protection of the rights of the people infected and affected by HIV/AIDS and the need to stop discrimination based on the HIV status of the person.

The African Commission issued the Resolution on the Situation of Women and Children in Africa (2004)<sup>16</sup> at its 35th ordinary session in Banjul from 21 May to 4 June 2004. Even though this is not an HIV/AIDS-specific instrument, it is child-specific.

The Resolution addresses the position of 2 groups of people who are considered marginalised-women and children. It addresses various practises and human rights violations that affect them. It also links these practices and violations to the spread of HIV among these groups. It then urges states to provide special protection for women and children and to ensure that programmes are available to mitigate the hardship they face and the spread of HIV/AIDS among them.

The most recent Resolution issued by the Commission is the Resolution on the Establishment of a Committee on the Protection of the Rights of PLWHA and Those at Risk, Vulnerable to and

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<sup>14</sup>Centre for Human Rights *Compendium of key documents relating to human rights and HIV/AIDS in Eastern and Southern Africa* (2008) 80.

<sup>15</sup> See paragraph 1 of the Resolution on HIV/AIDS Pandemic - Threat against Human Rights and Humanity (2001).

<sup>16</sup> AU Art.11 See note 2.

affected by HIV.<sup>17</sup> The Resolution mandated the Committee to give special attention to persons belonging to vulnerable groups, including women and children. The Committee has the power among other things to undertake fact-finding missions, where necessary, to investigate, verify and make conclusions and recommendations regarding allegations of human rights violations.<sup>18</sup> The committee has since been inaugurated<sup>19</sup> and it gave its first inter-session report at the 49th session of the ACHPR.<sup>20</sup> In the reporting period, the Committee had engaged in a number of activities geared towards accomplishing the purpose of the inauguration of the Committee.

#### **4.1.2. The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>21</sup>**

In addition to the ACHPR, there is the ACRWC.<sup>22</sup> This is not an HIV/AIDS-specific instrument; nonetheless it is applicable to the protection of certain rights of vulnerable children and other rights that are consequential upon HIV/AIDS. Of relevance is the right to non-discrimination,<sup>23</sup> the right to the protection of privacy,<sup>24</sup> the right to the best interest of the child<sup>25</sup>, the right to survival and development,<sup>26</sup> the right to access to health care<sup>27</sup>, and the right to education,<sup>28</sup> the right to protection from abuse and torture,<sup>29</sup> the right to parent care and protection,<sup>30</sup> the right to protection against harmful cultural practices, the right to protection from sexual exploitation<sup>31</sup> and adoption rights.<sup>32</sup>

In giving special attention to the plight of children, based on the rights guaranteed in the ACRWC, the AU has set up the African Committee of Experts on the Rights and Welfare of the Child to look into matters relating to the rights and welfare of children in Africa. The Committee draws its mandate from Articles 32 to 46 of the Charter.

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<sup>17</sup> AU ACHPR/Res163 (XLVII): *Resolution on the Establishment of a Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV* 2010. Available at [http://www.achpr.org/english/resolutions/Resolution163\\_en.htm](http://www.achpr.org/english/resolutions/Resolution163_en.htm) (Accessed on 15 June 2010).

<sup>18</sup> Ibid.

<sup>19</sup> The Committee was inaugurated on 26th May 2010.

<sup>20</sup> AU *The Intersession Report of the Committee on the Protection of the Rights of People Living with HIV (PLHIV)* available at <http://www.achpr.org/english/Commissioner's%20Activity/49th%20OS/Special%20Mechanism/PLHIV.pdf> (Accessed on 3 September 2011).

<sup>21</sup> The ACRWC was ratified by South Africa on 7 January 2000 and Botswana on 10 July 2001.

<sup>22</sup> AU ACRWC available at <http://www.au.int/en/content/african-charter-rights-and-welfare-child> (Accessed on 20 February 2012).

<sup>23</sup> See article 3 of the ACRWC.

<sup>24</sup> See article 10 of the ACRWC.

<sup>25</sup> See article 4 of the ACRWC.

<sup>26</sup> See article 5 of the ACRWC.

<sup>27</sup> See article 14 of the ACRWC.

<sup>28</sup> See article 11 of the ACRWC.

<sup>29</sup> See article 16 of the ACRWC.

<sup>30</sup> See article 3 of the ACRWC.

<sup>31</sup> See article 27 of the ACRWC.

<sup>32</sup> See article 24 of the ACRWC.

In line with its mandate, a Consultative Workshop<sup>33</sup> was held by the Committee on protecting OVCs and a Plan of Action was generated. The Plan of Action lays emphasis on resource allocation for implementing child programmes; enhancing the life chances of children; overcoming HIV/AIDS to ensure child survival; developing the potential of children by realising their right to education; protecting children to ensure their development and survival; ensuring the participation of children.

#### **4.1.3 The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (The Protocol).<sup>34</sup>**

The Protocol was adopted by the 2nd Ordinary session of the Assembly of the Union in Maputo on 11 July 2003. It has not been ratified by either South Africa or Botswana.<sup>35</sup>

This is not an HIV/AIDS or child-specific instrument; nonetheless, the definition section of the Protocol in article 1(k) recognises that the term “women” as used in the Act refers to persons of female gender, including girls. It recognises the need for the protection of the girl child.

Article 13 (g) requires states' parties to “introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child”. This will ensure that the girl child is protected from exploitation (including sexual) and all forms of work which will predispose them to HIV infection.

Article 1 requires states to “ensure that the right to health of women, including sexual and reproductive health, is respected and promoted”. Of particular to this discussion is the fact that articles 14(1) (d) and (e) encourages states to ensure that women have:

- d. the right to self-protection and to be protected against STIs, including HIV/AIDS;
- e. the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices.

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<sup>33</sup> In the report of the 5<sup>th</sup> meeting of the African Committee of Experts on the Rights and Welfare of the Child was held at the Nairobi Safari Club in Nairobi, Kenya from 8to 12<sup>th</sup> November 2004.

<sup>34</sup> The Protocol to the ACRWC was ratified by South Africa on 7 January 2000 and Botswana on 10 July 2001.

<sup>35</sup> AU *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* available at <http://www.achpr.org/instruments/women-protocol/ratification/> (Accessed on 20 February 2014).

This is a far-reaching provision in the sense that it is the first binding document in Africa which stipulates the protection of the sexual and reproductive health right of women in Africa. The fact that it recognises the need for women to be protected against STIs including HIV/AIDS infection will go a long way to ensure adequate protection for the rights of the girl child.

It is also important to mention that article 15 recognises women's rights to nutritious and adequate food. In protecting this right, states are to ensure that there are appropriate measures in place to ensure access to "clean drinking water, sources, of domestic fuel, land, and the means of producing nutritious food; and to ensure food security". Likewise, article 16 guarantees women's equal access to housing and to acceptable living conditions, in a healthy environment.

These are important for the girl child as they ensure that some of their socio-economic needs which are connected to the HIV/AIDS epidemic are provided, so that they do not engage in risk behaviour which will predispose them to HIV infection.

The AU also made its first GCs on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>36</sup> The GCs refer to the distinction between the right to self-protection and the right to be protected from HIV, in Article 14 (1) (d). In relating to this distinction,<sup>37</sup> the Commission states that the "right to self-protection and to be protected includes women's rights to access information, education and sexual and reproductive health services."<sup>38</sup> "The right to self-protection and the right to be protected are also intrinsically linked to other women's rights, including the right to equality and non-discrimination, life, dignity, health, self-determination, privacy and the right to be free from all forms of violence."

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Relating to the Preamble to the Constitution of the WHO,<sup>40</sup> the African Commission defines the right to sexual and reproductive health in article 14 (1) (e) to include "the right to be informed on

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<sup>36</sup> African Commission GCs on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Available at [http://www.achpr.org/news/2012/11/d65#\\_ftnref4](http://www.achpr.org/news/2012/11/d65#_ftnref4) (accessed on 23 February 2014).

<sup>37</sup> Paragraph 10 of the GCs on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>38</sup> Paragraph 11 of the GCs on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>39</sup> Ibid.

<sup>40</sup> As adopted by the International Health Conference, New York, 19-22 June, 1946 and entered into force on 7 April 1948.

one's health status and the health status of one's partner."<sup>41</sup> In the context of HIV/AIDS, this right includes the rights of women to access adequate, reliable, non-discriminatory and comprehensive information about their health, "access to HIV testing, CD4 count, viral-load, TB and cervical cancer screening."<sup>42</sup>

The right in article 14 (1) (e) requires that women should be able to receive information through pre-test counselling which will enable them to "make a decision based on informed consent before taking the test, as well as post-test counselling services on preventative measures or available treatment depending on the outcome of the HIV test."<sup>43</sup>

Paragraph 16 of the GC stresses the importance of being informed on the health status of one's partner. This information will help the woman to "make informed decisions about their own health, especially where they may be exposed to a substantial risk of harm." In the context of HIV/AIDS, this knowledge will prevent the transmission of HIV and other sexually transmitted infections as the women will be able to decide on how best to protect themselves from HIV infection without coercion. Obtaining information on a partner's health status must be with informed consent of the partner, in line with international standards and with the primary aim of preventing harm to one's health.

The GCs also lists the general state obligations to respect, protect, promote and fulfil the rights of women<sup>44</sup> as well as the specific state obligations in relation to the protection of rights.<sup>45</sup>

## **4.2 Non-binding HIV/AIDS-specific instruments**

These instruments were adopted by the AU to deal specifically with HIV/AIDS however; most of them do not specifically deal with the protection of children. However, these instruments are discussed in the following sections.

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<sup>41</sup> Paragraph 12 of the GCs on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>42</sup> Paragraph 13 of the GCs on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>43</sup> Paragraph 14 of the GCs on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>44</sup> Paragraphs 20 – 24 of the GCs on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>45</sup> Paragraphs 25 – 52 of the GCs on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

#### **4.2.1 Tunis Declaration on AIDS and the Child in Africa (1994)**

The Tunis Declaration was adopted in June 1994 by the Assembly of Heads of state and Government. The Declaration takes cognisance of the previous Declarations and documents such as the Declaration AHG/Decl. 3 (XXVII) on the Current African Health Crisis, adopted in Abuja in 1991, the Declaration AHG/Decl. 1 (XXVIII) on the AIDS Epidemic in Africa, adopted in Dakar in 1992 and the Document CM/1780 (LVIII) on the Report of the Secretary-General on the Implementation of the Six Point Action Agenda of the Declaration of the AIDS epidemic in Africa, adopted in Cairo Resolution AHG/Res. 223 (XXIX). The purpose of the Tunis Declaration is to resolve to undertake the magnitude of the problem of the HIV infection.

The Declaration noted the devastation which the HIV epidemic has on men, women and children. It affirms that prevention is the key to slowing the spread of AIDS in Africa and that effective national HIV/AIDS programmes require broad-based, multi-sectoral support from all sectors of government. The Tunis Declaration specifically deals with protection of children in the HIV/AIDS epidemic. It delves into almost all the issues that affect children in the HIV/AIDS epidemic and looks into how national policies can be used to address them. It emphasises that prevention is the key to slowing the spread of AIDS in Africa and the effect which support from all sectors of government can have on national HIV/AIDS programmes. It stresses the fact that substantial budgetary provisions should be made to meet the identified requirements for preventative programmes among children.

#### **4.2.2 The Resolution on Regular Reporting of the Implementation Status of OAU Declarations on HIV/AIDS in Africa (1996)<sup>46</sup>**

This Resolution was adopted in July 1996 by the Assembly of Heads of State and Government of the OAU. it urges African leaders to implement those Resolutions adopted in the past, especially the Tunis and Dakar Declarations.<sup>47</sup>

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<sup>46</sup> AU *The Resolution on Regular Reporting of the Implementation Status of OAU Declarations on HIV/AIDS in Africa (1996)* available at [http://www.africa-union.org/official\\_documents/Heads%20of%20State%20Summits/hog/6HoGAssembly1996.pdf](http://www.africa-union.org/official_documents/Heads%20of%20State%20Summits/hog/6HoGAssembly1996.pdf) (Accessed on 21 June 2011).

<sup>47</sup> The Resolution -

Takes note of the Report of the Secretary-General and the specific actions taken by countries on the implementation of HIV/AIDS Declarations and the lessons learned about the weakness of that implementation;  
Reaffirms its personal commitment and that of their sectoral Ministries to continue to work with the Ministry of Health so as to ensure that member States fully participate in the fight against HIV/AIDS in their respective countries;

This instrument deals with the procedural aspects of the implementation of Resolutions and Declarations. Safeguarding and adhering to the procedural aspects of the human rights instruments will ensure that the true spirit of the instruments is realised and this will eventually positively affect the people the instrument was made to protect, including children affected by HIV/AIDS.

#### **4.2.3 Grand Bay (Mauritius) Declaration and Plan of Action (1999)<sup>48</sup>**

The Grand Bay Declaration was adopted by the Heads of State and Government at the 1st OAU Ministerial Conference on Human Rights in Africa, meeting from 12 to 16 April 1999 in Grand Bay, Mauritius.<sup>49</sup> It does not deal specifically with children or HIV/AIDS, but it does emphasise the need to protect and promote the rights of all people, including children.

The Grand Bay Declaration is a result of the first ministerial Conference on human rights in Africa. It categorically states that the promotion and protection of human rights is a matter of priority for Africa. Despite the fact that it is not HIV/AIDS-specific, it recognises the rights of people with disability and PLWHA, in particular women and children. It recognises that the strengthening of the family unit as the basis of human society, the removal of harmful traditional practices and consultation with community leaders should all be seen as building blocks in the process of creating an environment conducive to human rights in Africa. This Resolution is very important in the protection of children, because the protection and strengthening of the family is very important for children affected by HIV/AIDS, as well as OVCSs.

#### **4.2.4 Lomé Declaration on HIV/AIDS in Africa (2000)<sup>50</sup>**

The Lomé Declaration was adopted by the Heads of State and Government of the OAU at the 36th Ordinary Session of the Assembly in Lomé, Togo, from 10 to 12 July 2000.

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Urges the UNAIDS and international partners and donors to continue to assist Africa in its effort to face the challenges outlined in the Report of the Secretary-General on the Follow-up of OAU Declarations on HIV/AIDS in Africa Doc CM/1963 (LXIV);

Requests all member states to continue to report regularly to the Secretariat on the implementation of these Declarations, using the provided matrix format;

Further urges all member states of the OAU to participate actively in the First African Youth Conference on Sexual Health under the theme, “The Youth and AIDS: Challenge for the 21st century”, scheduled to be held in Accra, Ghana from 30 September to 4 October 1996;

Further requests the Secretary-General with the support of UNAIDS and all relevant partners to continue reporting on the implementation of the Declarations and its progress every year to the Assembly of Heads of State and Government.

<sup>48</sup>AU *Grand Bay (Mauritius) Declaration and Plan of Action (1999)* available at <http://www.achpr.org/instruments/grandbay/> (Accessed on 27 May 2012).

<sup>49</sup>*Ibid.*

<sup>50</sup>AU *Lomé Declaration on HIV/AIDS in Africa 2000*, available at [http://www.africa-union.org/Special\\_Programs/CSSDCA/cssdca-solemndeclaration.pdf](http://www.africa-union.org/Special_Programs/CSSDCA/cssdca-solemndeclaration.pdf) (Accessed on 22 June 2011).



The Declaration does not deal specifically with the protection of children however it makes reference to previous Declarations and documents which provide for children affected by HIV/AIDS.<sup>51</sup>

It consists of commitments by the governments of the member states of the AU concerning how to deal with the HIV/AIDS epidemic. This Declaration recognises the role of leadership in controlling the spread of HIV/AIDS. It refers to previous instruments in which African leaders undertook to support HIV/AIDS OVCSs and children infected with HIV/AIDS.

#### **4.2.5 Abuja Declaration and Plan of Action on HIV/AIDS, tuberculosis and other related Infectious Diseases (2001)<sup>52</sup> and the Abuja framework for action for the fight against HIV and AIDS, Tuberculosis and Other Related Infectious Diseases (ORID)**

The Abuja Declaration was adopted in Nigeria on 27 April 2001 by the Heads of State and Governments of the OAU. In order to address the challenges of HIV/AIDS, Malaria and TB in Africa, African heads of state and government pledge to dedicate 15% of their annual budget to the health sector. The scope of the Abuja Declaration extends beyond HIV/AIDS alone. It extends to other diseases which adversely affect the African populations, such as malaria and tuberculosis.

The Abuja framework for action in the fight against HIV/AIDS and ORID was adopted by the heads of state and government at the Lusaka Summit in July 2001. It was adopted in furtherance of the Abuja Declaration. It translates the commitments made in the Abuja Declaration on HIV/AIDS, Tuberculosis and ORID into strategies followed by subsequent activities. The primary goal of the Abuja Framework for Action was to arrest and reverse the accelerating rate of HIV infection, TB and ORID.

The Framework for Action sets out guiding objectives to achieve the goals. A number of sections in the Abuja Declaration recognise the effects of HIV/AIDS on children. Consequently, the heads of state declared to place the fight against HIV/AIDS at the forefront of, and as the highest priority issue in our respective national development plans.<sup>53</sup>

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<sup>51</sup> See the 4<sup>th</sup> preambular paragraph which states that - ...previous Declaration AHG/Decl.(XXIII) on Health, as a Foundation for Socio-Economic Development, endorsed in 1987 in Addis Ababa, Ethiopia, as well as our Dakar (1992) and Tunis (1994) Declarations on HIV/AIDS in Africa in which we committed ourselves to mobilise all segments of the society in our countries, to fight against the HIV/AIDS pandemic.

<sup>52</sup>(OAU/SPS/ABUJA/3).

<sup>53</sup> See paragraph 23 of the Declaration.

The Abuja Declaration is an important step forward in fighting the HIV/AIDS epidemic. It is one of the first AU documents to directly demand that a certain percentage of states' budgetary allocation be channelled specifically towards HIV/AIDS. Although the Declaration is not specifically dedicated to the protection of children affected by HIV/AIDS, the allocation available to HIV/AIDS in any state will have a direct bearing on the quality and quantity of support that will be available to children.

#### **4.2.6 Maputo Declaration on HIV/AIDS, Tuberculosis Malaria and Other Related Diseases (2003)-<sup>54</sup>**

The Maputo Declaration was adopted on 12 July 2003 by Heads of State and Government of the AU meeting at the 2nd Ordinary Session in Maputo, Mozambique. The instrument is not specifically aimed at the protection of children, but it recognises the burden of HIV/AIDS on children and made some affirmations on them.

The preamble to the Declaration noted ... the majority of those infected with and affected by HIV/AIDS in our continent are women, children and young people; especially the poor who have limited access to effective care and support... and reaffirms the commitments enshrined in the Abuja Declaration and Plan of Action on Roll Back Malaria and the Abuja Declaration and Framework Plan of Action on HIV/AIDS, TB and ORID. It reiterates our commitment to intensify and consolidate efforts for their implementation.

The Declaration targets in particular OVCs and women. Its effort to address the HIV/AIDS epidemic is aimed at among other things, scaling up of treatment; seek effective partnerships with international donors, civil society, business sector and PLWHA. This will help to extend effective care, support and treatment to the maximum number of people, particularly women, HIV/AIDS OVCs, in conformity with the principles of equal access and gender equity.

#### **4.2.7 Solemn Declaration on Gender Equality in Africa (2004)<sup>55</sup>**

The Solemn Declaration was adopted by Heads of State and Governments of Member States of the AU, at the 3rd Ordinary Session of the Assembly in Addis Ababa, Ethiopia, on 8 July 2004. While

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<sup>54</sup> AU *Maputo Declaration on HIV/AIDS, Tuberculosis Malaria and Other Related Diseases (2003)* available at <http://www1.chr.up.ac.za/undp/regional/docs/audeclaration9.pdf>

<sup>55</sup> AU *Solemn Declaration on Gender Equality in Africa (2004)* available at [http://www.chr.up.ac.za/centre\\_projects/gender/docs/AfricaSolemnDec04.pdf](http://www.chr.up.ac.za/centre_projects/gender/docs/AfricaSolemnDec04.pdf) (Accessed on 12 April 2010).

South Africa is a member state of the Solemn Declaration, Botswana has neither signed nor ratified the Declaration and, as such, has not submitted any report to date.<sup>56</sup>

This Declaration is not aimed specifically at the protection of children, but it contains some affirmations on gender that can be evoked to protect the girl child.

The Declaration further reaffirms the commitment of African leaders to the principle of gender equality as enshrined in Article 4 (1) of the Constitutive Act of the AU, as well as other existing commitments, principles, goals and actions set out in the various regional, continental and international instruments on human and women's rights.

Its dedication to HIV/AIDS and other issues affecting girls cannot be over-stated. It aims to address the gender-sensitive issues that make girls more susceptible to HIV infection by promoting and protecting all the human rights of women and girls, including the right to education for girls.

Paragraph 12 of the Solemn Declaration on Gender Equality in Africa requires member states to submit an annual report on the progress made in terms of gender main streaming and to support and champion issues raised in the Declaration. In line with this requirement, South Africa submitted its report in June 2006.<sup>57</sup> In this report, South Africa reported on the progress made in terms of the institutional mechanisms and policy framework for gender equality. It states that there is the South African National Policy Framework for Women's Empowerment and Gender Equality, which creates the national vision of a "society in which women and men are able to realise their full potential and to participate as equal partners in creating a just and prosperous society for all".<sup>58</sup> The report discusses the national gender machinery which is "an integrated package" of structures located at various levels of state, civil society and within the statutory bodies.<sup>59</sup>

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<sup>56</sup> AU *Report of the Chairperson on the Implementation of the Solemn Declaration on Gender Equality in Africa (2012)* available at <http://www.peaceau.org/uploads/ex-cl-729-xxi-e.pdf> (Accessed on 22 February 2014).

<sup>57</sup> The Presidency *South Africa's Report to the AU Secretariat on the Implementation of the AU Heads of States' Solemn Declaration on Gender Equality in Africa (2006)* available at <http://www.africa-union.org/root/au/Conferences/Past/2006/October/WG/doc.htm> (Accessed on 23 February 2014).

<sup>58</sup> Page 3 of the report.

<sup>59</sup> The point to note is that the function of gender main-streaming in South Africa is that of all government, civil society and NGO bodies. The components of the gender machinery are facilitators of the gender programme, and primarily all have co-ordination and monitoring roles.

The report states that the following steps have been taken by South Africa to accelerate the implementation of gender-specific economic, social and legal measures aimed at combating HIV/AIDS: <sup>60</sup>

- i. Legislative measures such as the Comprehensive HIV/AIDS Prevention, Care, Management and Treatment Plan for South Africa.
- ii. Elements of the Comprehensive Treatment Plan which include: Life Skills programme; PEP, PMTCT, femidoms (female condoms) and other Partnership Programmes
- iii. The establishment of a Revised National TB Control Programme which was established based on the Directly Observed Treatment Short Course (DOTS) Strategy.
- iv. Mechanisms to for the treatment of malaria
- v. A specific campaign addressing young women has been put in place. The campaign includes messaging to encourage the promotion of healthy lifestyles.

#### **4.2.8 The Gaborone Declaration on a Road Map towards Universal Access to Prevention, Treatment and Care (2005)**

The Declaration was adopted by the Ministers of Health of the Member States of the AU, on the occasion of the 2nd Ordinary Session of the Conference of African Ministers of Health in Gaborone, Botswana, from 13-14 October 2005.

The Declaration is not targeted specifically at the protection of children, but it contains some provisions that can be evoked to protect children. The preamble to the Declaration makes reference to previous documents which have a bearing on the protection of children affected by HIV/AIDS. <sup>61</sup>

The Declaration establishes the need for states to ensure access to prevention, treatment and care for people affected by HIV/AIDS. It refers to the affirmation made by states in the MDGs to develop sustainable access to prevention, treatment and care and calls on states to work towards achieving this. The Declaration calls on states to ensure that the health of children is guaranteed through the reduction of child mortality, the provision of medicines, health care facilities and other disease prevention facilities.

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<sup>60</sup> The Presidency (note 56).

<sup>61</sup> 7<sup>th</sup> preambular paragraph states that - Further recalling the recommendations of the International Conference on Population and Development (ICPD), UNGASS on AIDS (2001) and on Children (2002) and the commitment to the attainment of the MDGs adopted in the Millennium Declaration 2000, while the 13<sup>th</sup> preambular paragraph states that Alarmed by the persistently high levels of maternal, new-born and child morbidity, mortality and disability, mostly due to preventable causes and curable conditions;

#### **4.2.9 Continental Framework for Harmonisation of Approaches among Member states and Integration of Policies on Human Rights and People Infected and Affected by HIV/AIDS in Africa (2005) (The Continental Framework)**

This Framework was developed by high-level experts in human rights and HIV management at national, regional, continental and international levels and was organised by the AU Commission in Addis Ababa, Ethiopia from 29 to 30 November 2005.

It does not deal specifically with the protection of children, but it makes reference to previous instruments that provide for children affected by HIV/AIDS, such as the ACHPR, the Abuja Declaration, the ACRWC and the Solemn Declaration on Gender Equality. This is evident in the introduction to the Framework which refers to the ACHPR and the ACRWC, while emphasising its non-discrimination principle in the enjoyment of the rights and freedoms of the child.<sup>62</sup> The objectives of the Framework also stipulate the impact it proposes to have on the human rights of PLWHA. Although this does not specifically refer to children, its dedication to the protection of the human rights of PLWHA cannot be overlooked.<sup>63</sup>

The Framework recognises the disproportionate burden borne by members of the vulnerable groups in the HIV/AIDS epidemic and seeks a rights-based approach to address this. It provides a number of tools to address the plight of people affected by HIV/AIDS. These include awareness raising, use of legislative mechanism, addressing known cases of violation of human rights of people affected by HIV/AIDS and other human rights approaches, at a continental or regional level. Although these are not specifically targeted at children, they are still applicable in the case of children, as children are people affected by HIV/AIDS.

#### **4.2.10 Brazzaville Commitment on Scaling Up Towards Universal Access to HIV/AIDS Prevention, Care and Support in Africa by 2010 (2006)<sup>64</sup>**

The Brazzaville Commitment was adopted by the participants in the Continental Consultation on Scaling up towards Universal Access in Africa, convened by the AU with support from WHO, UNAIDS, Economic Commission for Africa (ECA) and the Department for International

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<sup>62</sup> See paragraph 4 of the Continental Framework.

<sup>63</sup> See paragraph 7 of the Continental Framework.

<sup>64</sup> SARPAN Brazzaville Commitment on Scaling up towards Universal Access to HIV/AIDS Prevention, Care and Support in Africa by 2010 (2006) <http://www.sarpan.org/documents/d0001921/index.php> (Accessed on 23 June 2012).

Development (DFID) representing governments, parliaments, civil society, PLWHA, women and young people, faith-based organisations and the private sector of 53 member states of the AU. The Commitment does not deal specifically with the protection of children, but it takes into cognisance certain instruments dealing with children affected by HIV/AIDS.

Paragraph 3 of the Commitment acknowledges the brunt borne by the vulnerable groups while paragraph 4 recognises that the expansion of health, social and development programmes and services has to be underpinned by several key human rights-based principles such as respect for human rights, placing vulnerable people at the centre of the HIV/AIDS response, using gender sensitive approaches, making HIV prevention, care and support available to children and young people and ensuring the availability of basic medicines and other basic commodities to all who need it in Africa

Some of the aims of the Brazzaville Commitment were attaining the targets of the Abuja summits and the MDGs. The Commitment places a high priority on the care of the members of vulnerable groups, including OVCs, and extending prevention facilities to vulnerable people e.g. women, young people and OVC. Issues concerning children as well as respect for human rights, especially with regard to fighting stigma and discrimination and to advancing equity, feature prominently in its principles.

#### **4.2.11 Abuja call for Accelerated Action towards Universal Access to HIV/AIDS, Tuberculosis and Malaria Services in Africa (2006)<sup>65</sup>**

This is the product of a meeting to review the progress made in implementing the Abuja Declaration and Plan of Action on Roll Back Malaria (RBM) of 2000, and the Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and ORID of 2001. It was adopted by the Heads of State and Government of the AU, meeting in Abuja, Nigeria, from 2 to 4 May 2006. The focus of the deliberations was on “Universal Access to HIV and AIDS, Tuberculosis and Malaria Services by a United Africa by 2010”.

The instrument does not deal specifically with children, but it contains requests to governments to rededicate their efforts to previous instruments on HIV/AIDS. Some parts of this instrument relating

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<sup>65</sup> AU *Abuja call for Accelerated Action towards Universal Access to HIV/AIDS, Tuberculosis and Malaria Services in Africa (2006)* available on <http://pages.au.int/carmma/documents/abuja-call-accelerated-action-towards-universal-access-hivaids-tuberculosis-and-mal> (Accessed on 29 June 2012).

to the protection of children affected by HIV/AIDS include paragraph 8.<sup>66</sup> Paragraph 10 deals with the protection of human rights and children.

The Instrument focuses on the provision of HIV prevention facilities, as well as treatment, care and support facilities. It provides for the protection of a number of rights relevant to PLWHA. These include some socio-economic rights which are primary to the protection of children affected by HIV/AIDS, such as the right to health care, the right to medicines, gender rights and the rights of children.

#### **4.2.12 Africa's Common Position to the UN General Assembly Special Session on AIDS (2006)<sup>67</sup>**

This instrument was adopted by the Heads of Member States of the AU, at a meeting in Abuja Nigeria from 2 to 4 May 2006. It does not deal specifically with the protection of children, but contains sections that can be evoked to protect children. The preamble to the instrument makes reference to the MDGs, previous AU Declarations on HIV/AIDS, such as the Abuja Declaration, and the Khartoum AU Assembly for an African Common Position to be prepared as Africa's contribution to the forthcoming UN General Assembly Special Session on AIDS.

Addressing the brunt borne by children in the epidemic, its preamble covers with deep concern, the impact which HIV/AIDS has on the morbidity and mortality rates and economic losses on the continent, especially concerning young people, women and children; the impact of unimproved services on the spread of HIV/AIDS and the need to scale up the response to underserved and marginalised groups. The impact of extreme poverty and low levels of education in nearly all nations are the underlying causes of the high burden of disease and the increasing number of orphans and children affected by HIV/AIDS. These children have no childhood and are deprived of education options for the future and protection from exploitation and abuse.

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<sup>66</sup>Which states that "we still consider AIDS, Tuberculosis and Malaria as a State of Emergency in our continent. They are major threats to our national and continental socioeconomic development, peace and security. We reaffirm the commitments contained in the 2000 and 2001 Abuja Declaration and Plans of Action, the MDGs and subsequent commitments";

<sup>67</sup> AU *Africa's Common Position to the UN General Assembly Special Session on AIDS (2006)* available at [http://www.africa-union.org/root/au/conferences/past/2006/may/summit/doc/en/SP\\_Assembly\\_ATM3I\\_AFRICAN\\_POSITION\\_PAPER.pdf](http://www.africa-union.org/root/au/conferences/past/2006/may/summit/doc/en/SP_Assembly_ATM3I_AFRICAN_POSITION_PAPER.pdf) (Accessed on 30/1/2010).

The Heads of State of Member States of the AU set a target to intensify the fight against HIV/AIDS and achieve other internationally agreed goals on health by 2010. They also agreed to gear national policies, strategies and operational plans towards achieving certain targets by 2010.<sup>68</sup> Specific targets to be met by the Heads of Member states of the AU by 2010 are to conduct an audit of existing legislation as appropriate, develop, implement and enforce policies and laws to reduce stigma and discrimination and protect the rights of PLWHA, address the needs of vulnerable groups especially women and children, and support these with advocacy campaigns.

This instrument represents the position of the AU Heads of State and Governments presented before the UN on how to deal with the HIV/AIDS epidemic in Africa. Its guiding principles represent their dedication to the protection of the rights of those PLWHA. These include the reduction of HIV prevalence in young people between 15 and 24 years; providing protection and support for 5 million children orphaned by AIDS; provision of PMTCT to at least 80% of pregnant women; and ensuring that at least 80% of those in need, (particularly children), have access to HIV/AIDS treatment, especially antiretroviral, as well as care and support.

### **4.3 SADC Instruments on HIV/AIDS**

The standards discussed in this section are the sub-regional standards relevant to the protection of children affected by HIV/AIDS. Some of these instruments are binding while some are not. The non-binding instruments operate on the principle of good faith, trust and confidence, since both South Africa and Botswana are members of the SADC.

South Africa acceded to the SADC Treaty on 29 August 1994 and the accession was approved by its Senate and National Assembly on 13 and 14 September 1994, respectively.<sup>69</sup> On the other hand, Botswana was one of the forerunners of SADC and became a member when the Community was established in April 1980.<sup>70</sup>

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<sup>68</sup> The targets are-

Reduce HIV prevalence in young people between 15 and 24 years, by at least 25% in ALL African countries  
Protect and support in 2010, 5 million children orphaned by AIDS and ensure that 80% of orphans and vulnerable children have access to basic services.

At least 80% of pregnant women have access to Prevention of Mother-To-Child Transmission (PMTCT), and treatment for HIV-positive women and children.

At least 80% access for those in need, (particularly children), have access to HIV/AIDS treatment, especially antiretroviral, as well as care and support.

<sup>69</sup> South African Department of Foreign Affairs *SADC history and present status* available at <http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm> (Accessed on 30 March 2010).

<sup>70</sup> The Origins of SADC available at <http://www.sadc.int/index/browse/page/54> (Accessed on 30 March 2010).



The sub-regional standards have been divided into two sections, the HIV/AIDS-specific and the non-HIV/AIDS-specific.

#### **4.3.1 Binding non-HIV/AIDS-specific-**

These are binding instruments that are non-HIV/AIDS-specific. They are applicable in the protection of children affected by HIV/AIDS, because they contain sections that address the rights of PLWHA and these can be invoked to protect children affected by HIV/AIDS.

##### **4.3.1.1 Treaty of SADC (1992)<sup>71</sup>**

This Treaty was adopted in Windhoek, Namibia, on 17 August 1992 and entered into force on 30 September 1993. The Treaty was ratified by Botswana on 7 January 1998 and was acceded to by South Africa on 29 July 1994. Even though it is not HIV/AIDS or child-specific, it contains some sections that address the protection of PLWHA and these can be evoked in the protection of children affected by HIV/AIDS.

One of the founding principles of the SADC is human rights, democracy, and the rule of law.<sup>72</sup> The objectives of the SADC Treaty are to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation, with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration<sup>73</sup>

Combating HIV/AIDS and other deadly or communicable diseases is one of the objectives of the SADC Treaty.<sup>74</sup> The Treaty tries to ensure that the members states of the SADC realise the urgent need to address the HIV/AIDS epidemic and the rights of the people affected by HIV/AIDS. This includes the unequivocal prohibition of discrimination based on ill-health or “such other ground as may be determined by the Summit”.

Although this Treaty does not list HIV/AIDS as one of the prohibited grounds for discrimination, it is clear that HIV/AIDS can be inferred from the listed grounds (ill-health or “such other ground as may be determined by the Summit).

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<sup>71</sup>SADC *SADC Treaty* available at <http://www.sadc.int/index/browse/page/119> (Accessed on 28 June 2010).

<sup>72</sup> See article 4 of the SADC Treaty.

<sup>73</sup> See Article 5 (a) of the SADC Treaty.

<sup>74</sup> See article 5 (i) of the SADC Treaty.

The SADC Treaty addresses the need to enhance the socio-economic position of the people in a the country and embark on poverty alleviation mechanisms. This is very important in the fight against the spread of HIV/AIDS, as poverty is one of the known factors that aggravate the spread of HIV/AIDS. The fact that human rights, democracy, the rule of law and equity, balance and mutual benefit are some of the guiding principles of the Treaty indicates that the respect of human rights is a guiding principle in all the activities of the governments of the member states.

#### **4.3.1.2 SADC Protocol on Health (1999)<sup>75</sup>**

The SADC Protocol was adopted on 18 August 1999 in Maputo, Mozambique by the Heads of State and Government of SADC countries. Both South Africa and Botswana are parties to the Protocol.<sup>76</sup> This instrument does not deal specifically with children, but it contains sections that specifically address the right to health of citizens thus this can be evoked in the protection of children affected by HIV/AIDS.

The preamble to the Protocol indicates the awareness of the Heads SADC countries to the fact that a healthy population is a prerequisite for sustainable human development and increased productivity in member states.

In pursuit of the objectives of the Protocol, state parties are required to act in common pursuit of the objectives of the Protocol, which shall be implemented in accordance with the principle of promoting health care for all through better access to health services. It establishes the dedication of the state parties to co-operate in addressing health problems and challenges facing them through effective regional collaboration and mutual support under this Protocol, to develop common strategies to address the health needs of women, children and other vulnerable groups.

It also deals with childhood and adolescent health and shows how states should deal with issues of child and adolescent health to ensure their growth and development.

The Protocol on health is an attempt to formulate regional health policies and strategies consistent with the principles contained in article 4 of the SADC Treaty. It is set to promote health care for all

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<sup>75</sup> SADC *SADC Protocol on Health* available at <http://www.sadc.int/index/browse/page/152> (Accessed on 20 January 2010).

<sup>76</sup> SADC Protocol on Health was signed by the Heads of State of Botswana and South Africa on 18 August 1999. Thus both countries are parties to the Protocol.

in the region, through the provision of better access to health services. Its focus on the health needs of children and adolescents cannot easily be overlooked. It sets out the obligation on the state to provide for appropriate child and adolescent health services essential for the critical foundation for growth and development of children. All of these are laid down with the respect for the rights of children in mind.

#### **4.3.2 Non-binding Instruments**

These are the HIV/AIDS-specific instruments that have been adopted by the SADC Parliamentary Forum (SADC PF). They are useful in determining what the goals of the states are in dealing with the HIV/AIDS epidemic. These non-binding instruments will be discussed in the following section.

##### **4.3.2.1 The SADC Model Law (2008)<sup>77</sup>**

The SADC Model Law is a non-binding instrument<sup>78</sup> adopted by the SADC PF at its 24th Plenary Assembly convened in Arusha, Tanzania, from the 20th to 27th November 2008.

The SADC PF responses to HIV/AIDS “have taken two different but complementary pathways, linked to and informed by global and continental initiatives, such as UN General Assembly declarations on HIV/AIDS and the 2001 Abuja Declaration on HIV/AIDS, TB and ORID in Africa summit of the Organisation of African states, predecessor of the AU”.<sup>79</sup>

The Model Law describes its aims as being to provide a legal framework for national law reform on HIV in conformity with international human rights law standards; to promote effective prevention, treatment, care and research strategies and programmes on HIV and AIDS; to ensure the respect, protection and realisation of human rights for people living with or affected by HIV; and to promote the adoption of specific national measures to address the needs of vulnerable and marginalised

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<sup>77</sup> SADC PF *The SADC Model Law (2008)* [http://www.justice.gov.za/vg/hiv/docs/2008\\_Model-Law-on-HIV-in-Southern-Africa.pdf](http://www.justice.gov.za/vg/hiv/docs/2008_Model-Law-on-HIV-in-Southern-Africa.pdf) (Accessed on 13 March 2014).

<sup>78</sup> While a treaty is open for ratification, model legislation is not. While treaty provisions become binding on a state upon ratification, the provisions of a model law are not binding under international law. Model legislation like international declarations is not binding. Declarative standards guide States and are often vaguely formulated. A model law has some of the characteristics of both treaties and declarations. As it stands, a model law is not binding. Similar to international declarations, its provisions serve as examples and inspiration to domestic law-makers. In some sense, then, treaties and model laws both require States to “domesticate” their provisions. Both treaties and model laws need to be given effect in the domestic legal arena. See F Viljoen *Model legislation and regional integration: Theory and practice of model legislation pertaining to HIV in the SADC* 2008 De Jure 383- 399 also available at [http://www.up.ac.za/dspace/bitstream/2263/10062/1/Viljoen\\_Model \(2008\).pdf](http://www.up.ac.za/dspace/bitstream/2263/10062/1/Viljoen_Model%20(2008).pdf) (Accessed on 29 April 2010).

<sup>79</sup> R Johnson ‘*The Model Law on HIV in Southern Africa: Third World Approaches to International Law insights into a human rights-based approach*’ (2009) 9 African Human Rights Law Journal 128.

groups in the context of AIDS. It seeks to be particularly informed by compatible provisions of existing HIV laws within countries of and beyond the region.<sup>80</sup>

It is a comprehensive instrument and it contains provisions that address the gaps in HIV-related legislation and policy in Southern Africa. This focuses specifically on the current inadequate protection against discrimination, the lack of protection and services for vulnerable and marginalised groups and insufficient protection against violence for women, girls and children.<sup>81</sup> Its purpose is to provide countries with the minimum standards that they should include in their laws when legislating on HIV.

The focus of the Model Law on women and children and members of the vulnerable groups is very clear. The Model Law deals with majority of the issues that are relevant to children affected by the HIV/AIDS epidemic and clearly sets out the obligation on the state parties. It has the capacity to provide leadership of a different kind. It is explicitly human rights focused and indigenous to the region in origin, mandate and process, and unfolding. It is a collaborative exercise between regional legislators and key social movements.<sup>82</sup> Thus it is aimed at assisting member states in particular policy makers and legislative drafters, to address all the relevant areas of HIV/AIDS in need of legislative reform without usurping the authority of national legislatures.<sup>83</sup>

The Model Law deals with the consent of the child, especially with regards to HIV testing and counselling. It reiterates the importance of parental consent or the consent of a legal guardian when an HIV test is performed on a child under 16 (or any suitable age decided in the state but not above 16). A mentally incapacitated person shall be tested with the consent of the parents or the legal guardian of the child or that person. It however states that when the best interest of the child demands otherwise, or if the child is an emancipated minor, the absence of parental or guardian's consent (relevant court) has jurisdiction to decide.<sup>84</sup> This requirement of consent also applies in the testing of mentally incapacitated persons.<sup>85</sup>

Article 15(2) stipulates that the results of an HIV test conducted on a child under 16, or any suitable age in the state but not above 16 or a mentally incapacitated person, shall be given, in the presence

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<sup>80</sup> The model law has adapted provisions drawn from laws in place across eight different countries, of which seven are African States, as well as UN and AU instruments. See Johnson R. (note 569 above) 142.

<sup>81</sup> F Viljoen *SADC PF Model Law on HIV: Analysis of issues and processes* available at [http://www.chr.up.ac.za/centre\\_projects/ahrru/docs/Prof%20Frans%20Viljoen.pdf](http://www.chr.up.ac.za/centre_projects/ahrru/docs/Prof%20Frans%20Viljoen.pdf) (Accessed on 29 April 2010).

<sup>82</sup> R Johnson (note 78 above) 149.

<sup>83</sup> SADC *SADC PF Communiqué Announcing the adoption of the SADC PF Model Law on HIV* available at <http://www.sadcpf.org/Announcement-Model%20law%20Endorsement.pdf> (Accessed on 24 June 2010).

<sup>84</sup> See article 13 of the *Model Law*.

<sup>85</sup> See subsection 5 of the *Model Law*.

of the parents or the legal guardian of that child or that the person, unless the best interest of the child requires otherwise or if the child is an emancipated minor. In the event of a dispute, the (relevant court) has jurisdiction to decide.

On post-test counselling,<sup>86</sup> the Model Law stipulates that in the case of a positive result, the person providing treatment, care or counselling service has a duty to counsel the tested person or in the case of a child under 16 or any suitable age decided by the state but not above 16 or a mentally incapacitated person, the parents or the legal guardian of that child or that person, shall counsel on appropriate matters including- the medical consequences of living with HIV.

The Model Law guarantees the right to education and the prohibition of the isolation or exclusion of a child, learner or student from an educational institution on the sole account of his or her actual or perceived HIV status or the actual or perceived HIV status of his or her partners and close relatives. The obligation on the state to ensure that the HIV status of children, learners, students or that of their parents or close relatives is kept confidential by the administration section of educational institutions including schools and universities, if they receives such information.<sup>87</sup>

The Model Law also deals with the obligation on the state to protect all the rights of children living with or affected by HIV, including orphans, under the law, in international instruments pertaining to children, in particular the CRC and the ACRWC.<sup>88</sup> Children are also protected from discrimination on the account of their actual or perceived HIV status. The status of their parents or legal guardians or close relatives when exercising their rights, children may not be subjected to any discrimination.

The Model Law deals with the care of children orphaned by AIDS,<sup>89</sup> by providing the obligation on the state to ensure that any surviving children of persons deceased due to AIDS, related illnesses are given appropriate alternative care, including foster care or adoption. It also provides for the care of children living in a child-headed household and the obligation on the state to provide all the necessary support and assistance for these children. This shall include access to health care, education and the facilitation of their access to all other social assistance schemes available in the state.

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<sup>86</sup> Article 16(2) of the *Model Law*.

<sup>87</sup> Article 22 of the *Model Law*.

<sup>88</sup> See article 24. This also includes the protection of children against abuse and exploitation and adopt specific measures to safeguard inheritance rights, land tenure and property rights for children.

<sup>89</sup> See article 25 of the *Model Law*.

Discussing the protection of women and girls, article 26 of the Model Law gives women and girls, regardless of their marital status, equal access to adequate and gender-sensitive HIV-related information and education programmes and means of prevention and health services, including women-specific and youth-friendly sexual and reproductive health services for all women of reproductive age and women living with HIV.

The Model Law sets out the state obligation to ensure that women and girls are protected against all forms of violence, including sexual violence, rape and other forms of coerced sex, as well as against traditional practices that might negatively affect their health. It safeguards the right of females by stating that marriage or any other relationship shall not constitute a defence to a charge of rape.<sup>90</sup>

The rights of women to equality and non-discrimination is protected in article 28, which guarantees equal legal rights in all areas including matters such as marriage, divorce, inheritance, child custody, property and employment for women. It states that women shall not be discriminated against on the grounds of their sex, or their actual or perceived HIV status. The protection of women and children from discrimination based on their sex and perceived or actual HIV status will go a long way to ensuring that women and children's rights are further protected in the HIV/AIDS epidemic.

State obligations related to treatment, care and support is addressed in article 36, which requires the state to take all the relevant measures to provide access to affordable, high-quality ARV and prophylaxis to treat or prevent HIV or opportunistic infections for PLWHA including children living with HIV and members of vulnerable and marginalised groups.

Consent to research and clinical trial addressed in article 38. The Model Law prohibits the undertaking of any HIV-related biomedical research or clinical trials on another person or on any tissue or blood removed from such person, except:

- a. with the written informed consent of that other person; or
- b. if that other person is a child or a mentally incapacitated person, with the written informed consent of a parent or the legal guardian of the child or person.

Finally, the Model Law requires the state to support organisations of people living with or affected by, HIV and regulation of community home-based care, ensuring the meaningful application of the

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<sup>90</sup>Article 27 of the *Model Law*.

GIPA principle by involving PLWHA, including women and children living with HIV, in the design and implementation of HIV-related legislation, programmes and policies, at both national and local levels.

It has the value of a declaration and it benefits from the authority and legitimacy of the SADC PF as the regional organisation of SADC parliaments. It falls under the category of a “soft law,” which has a persuasive and not a binding value and a reaffirmation of the human rights approach to HIV-related legislation in Southern Africa. It stimulates debate and advocacy in the region.<sup>91</sup> Although not a child-specific instrument, its application to the protection of the rights of children will go a long way to protect the rights of children because of the wide scope of rights which the Model Law covers. Its domestication by states in the region will honour human rights as universally understood, and bring consistency to issues of HIV/AIDS prevention, treatment, care and support.<sup>92</sup>

#### **4.3.2.2 SADC Protocol on Gender and Development (2008) <sup>93</sup>**

The SADC Protocol on Gender and Development was adopted in August 2008b by the Heads of State or Government of the SADC. This is a binding instrument which was signed by South Africa on 17 August 2008. Botswana is not yet a party to the Protocol.

The Protocol is not HIV/AIDS and child-specific but, they recognise the need for the protection of women and female children, and contain sections that can be evoked in the protection of children affected by HIV/AIDS.

The Protocol expresses the commitment of the Heads of State or Government of the SADC to the protection of the human rights of women and children; the protection of the reproductive and sexual rights of women and the girl child; the measures needed to reduce the increasing levels of violence against women and children and other measures to ensure the respect of the human rights of women and children.

The dedication of the Protocol to the protection of the rights of children affected by HIV can be seen right from the 6<sup>th</sup> preambular paragraphs to the Protocol where it recognises the obligation on member states to “meet their commitments and set targets under the said instrument and that the fragile gains made face new threats of inter alia, HIV/AIDS, globalisation, human trafficking....”

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<sup>91</sup> F Viljoen (note 77 above).

<sup>92</sup>SADC PF Communiqué, Same *ibid*.

<sup>93</sup>SADC *SADC Declaration on Gender and Development and Addendum* (2008) available on [http://www.sadc.int/files/8713/5292/8364/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf) (Accessed on 23 June 2012).

Part 7 of the Protocol addresses the issues of health and HIV/AIDS which it strongly addresses issues of equality and the rights of women in marriage and within the family.<sup>94</sup> It also discusses the rights of widows and widowers<sup>95</sup> as well as the rights of the girl and the boy child.<sup>96</sup>

It also condemns violence against women and children in all its forms in article 20 to 25 and stipulate a number of measures to combat violence against women and children. These include legal, social, economic, cultural and political, education, training and awareness building measures and other services.

Finally, the Protocol proposes that a number of regional policies, programmes and mechanisms to enhance the security and empowerment of women and children, be adopted and their implementation monitored. It also suggests adoption of integrated approaches to the prevention of gender based violence against women and children, with the aim of halving it by 2015.<sup>97</sup>

The Protocol acknowledges the need to recognise the rights of women and children in the SADC region and is committed to the promotion, protection and respect of gender-based rights. It declares gender equality as a fundamental human right and pledges to mainstream gender in to its activities.

The Protocol remains critical for service delivery especially for girls affected by HIV/AIDS. This is because it recognises the need to protect and promote certain gender-specific rights associated to HIV/AIDS. These rights include the reproductive and sexual rights of women and girls, protection from violence, the right to quality education for women and girls, and the removal of gender stereotyping in the curriculum. It recognises the importance of career choices and professions as well as changing social practices which still subject women to discrimination as well as empowering gender sensitive laws.

#### **4.3.2.3 Maseru Declaration on the Fight against HIV/AIDS in the SADC region (2003)<sup>98</sup>**

The Declaration was adopted in Maseru on 4 July 2003 by the Heads of State or Government of the SADC. The Declaration does not deal specifically with the protection of children but it recognises

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<sup>94</sup> Articles 7 and 8 of the SADC Protocol on Gender and Development.

<sup>95</sup> Article 10 of the SADC Protocol on Gender and Development.

<sup>96</sup> Article 11 of the SADC Protocol on Gender and Development.

<sup>97</sup> Article 25 of the *SADC Protocol on Gender and Development*.

<sup>98</sup> Maseru Declaration on the Fight against HIV/AIDS in the SADC region available at <http://www.sadc-tribunal.org/docs/HIV-AIDS.pdf> (Accessed on 29 April 2010)



the need for the protection of children in the HIV/AIDS epidemic. The Declaration recognises ... the commitments made by SADC member states in the Abuja and UNGASS Declarations on the need to fight HIV/AIDS and other communicable diseases such as Malaria and Tuberculosis makes reference to previous declarations relating to HIV/AIDS and children including the UN General Assembly Declaration on Children.<sup>99</sup>

In reaffirming their commitment, the Heads of State declared certain priority areas requiring their urgent attention and action. These include areas such as prevention, social improving care; access to counselling and testing services, treatment and support by strengthening family and community based care as well as support to orphans and other vulnerable children, accelerating development and mitigating the impact of HIV/AIDS.<sup>100</sup>

The Maseru Declaration recognises the need for urgency in dealing with the HIV/AIDS epidemic. It outlines 5 broad priority areas requiring urgent attention and action. These areas of action are foremost in the plan and illustrate the urgent pace with which the Declaration expects the issues to be dealt with. A number of child-specific actions were included in the plans set out in the Declaration. This includes the call to establish mechanisms for mitigating the impact of the HIV/AIDS pandemic, including the provision of support to families, orphans and other vulnerable children, and strategies to ensure a sustained labour supply; to strengthen families and community based care as well as to support orphans and other vulnerable children.

Despite the fact that the Maseru Declaration is not a child-specific instrument, its dedication to the protection of the rights of children affected by HIV/AIDS cannot be over looked. The fact that it also sees the family and the community as role-players in the protection of orphans speaks volumes about the dedication of the instrument to the protection of children.

#### **4.3.2.4 HIV/AIDS Framework and Programme of Action 2003 – 2007<sup>101</sup>**

The Strategic Framework was adopted at the 2003 Heads of State or Government Summit on HIV/AIDS in Maseru, Lesotho, on 14 July 2003. It mainstreams HIV/AIDS within all policies and

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<sup>99</sup> See the Preamble to the Maseru Declaration.

<sup>100</sup> See the preamble to the Maseru Declaration.

<sup>101</sup> UNDP *HIV/AIDS Framework and Programme of Action 2003 – 2007* available at <http://www.chr.up.ac.za/undp/subregional/docs/sadc3.pdf> (Accessed on 30 April 2010).

programmes undertaken by SADC and reflects the challenges and priorities of the region in responding to the epidemic.<sup>102</sup>

The Strategic Framework does not deal specifically with the protection of children, but the objective of the Framework recognises the need to protect children and youths and lays down steps to take to achieve this:

- To review the needs of children (including OVCS) and youth to develop appropriate policies and programmes.
- To review national policies relating to property rights, and develop guidelines to ensure protection for women and children.

Specific actions set out in the Framework states that efforts will be undertaken in the Health Sector to support the development of a comprehensive plan for care and support to vulnerable populations, especially children, and to address the special needs of migrant and mobile populations, including refugees.

The Strategic Framework is a multidimensional response to HIV/AIDS by SADC. It is aimed at intensifying measures and actions to address the devastating and pervasive impact of the HIV/AIDS pandemic, in a comprehensive and complementary way. The focus of the response is on the prevention of HIV/AIDS, care and support and the mitigation of the impact of the epidemic in order to ensure sustainable human development in the SADC region.<sup>103</sup>

#### **4.4 Conclusion**

Both the AU and SADC have the duty to protect all the people of Africa, they also have the duty to extend this protection to children affected by HIV/AIDS. The mandate of the AU in this regard has been transmitted to the recent Resolution on the Establishment of a Committee on the Protection of the Rights of PLWHA and Those at Risk, Vulnerable to and Affected by, HIV.<sup>104</sup> Most of the instruments discussed in this chapter acknowledge the need to protect children affected by HIV/AIDS, despite the fact that many of them are not made specifically for the protection of children affected by HIV/AIDS. Children are also regarded as members of a vulnerable group and in most of the instruments, the protection available to the members of the vulnerable groups is available to children.

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<sup>102</sup> Maseru Declaration, see note 97.

<sup>103</sup> See the preamble to the Maseru Declaration.

<sup>104</sup> *AU Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV*  
[http://www.achpr.org/english/resolutions/Resolution163\\_en.htm](http://www.achpr.org/english/resolutions/Resolution163_en.htm) (Accessed on 3 May 2010).

The AU has worked hard to that the rights of PLWHA are protected on the continent. Although many of the instruments adopted are non-binding instruments. There is no gainsaying the fact that these are HIV/AIDS-specific instruments and they focus on different aspects of the HIV/AIDS epidemic. For instance, the Tunis Declaration deals with HIV/AIDS and the rights of the child; the Lomé Declaration addresses the role of governments in combating HIV/AIDS; the Abuja Declaration and Plan of Action on HIV/AIDS, TB and other related Infectious Diseases and the Abuja Framework for Action for the right against HIV/AIDS, TB and ORID and the Maputo Declaration on HIV/AIDS, TB, Malaria and Other related Diseases address how African states would fight the spread of HIV and other diseases and how states would reverse the accelerating rate of infection. The Gaborone Declaration on a Road Map towards Universal Access to Prevention, Treatment and Care deals with the provision of sustainable access to HIV prevention, treatment, care and support for PLWHA in African states while the Brazzaville Commitment on Scaling Up Towards Universal Access to HIV/AIDS Prevention, Care and Support commits African states to strategies to scale up prevention, care and support for PLWHA.

The focus of the Continental Framework for Harmonisation of Approaches among member states and integration of policies on human rights and PLWHA in Africa is on the incorporation of human rights principles into the strategies employed by member states, in order to ensure that the rights of PLWHA are respected. The Abuja Call for Accelerated Action Towards Universal Access to HIV/AIDS TB and Malaria Services in Africa further stresses the implementation of Universal Access to HIV/AIDS Treatment for PLWHA. The African Common Position to the UNGASS on AIDS identified the specific strategies of African governments to achieve internationally agreed goals on health and HIV/AIDS by 2010.

The SADC also had a mandate to combat HIV/AIDS and is engaging in a number of on-going programmes in this regard. Binding instruments such as the SADC treaty makes combating HIV/AIDS and other communicable diseases one of its objectives. The non-binding HIV/AIDS-specific instruments which have been adopted include the SADC Model Law ,which employs a rights-based approach to protect PLWHA by focusing more on the rights of vulnerable and marginalised groups and suggests ways by which different countries can mainstream the rights of PLWHA into their domestic legislation. The Maseru Declaration on the Fight against HIV/AIDS in the SADC region deals with how states can fight the HIV/AIDS epidemic and suggests strategies for mitigating the impact of the epidemic on PLWHA; and The HIV/AIDS Framework and Programme of Action suggests how states can intensify their measures and actions in order to fight the spread of HIV and to address the HIV/AIDS epidemic.

The SADC Model Law contains the most extensive guidance on how legal frameworks should respond to HIV, as it single-handedly deals with a wider array of HIV/AIDS-related issues than any other single instrument in Africa. It addresses, amongst others, issues relating to discrimination, HIV testing, access to education and the right to alternative care. However the other 3 documents also refer to children and in particular the obligations on the state to address the rights of OVC. It can be accepted therefore, that there is guidance for countries legislating on HIV and children because the Model Law provides a number of minimum standards which could be incorporated into children's laws, or dedicated HIV Acts. There is, however, a need for more specific child focus guidance at the SADC level, as the Model Law does not deal with a number of complex issues such as guardianship, protecting a child's property rights and the sexual and reproductive rights of children to protect themselves against HIV infection.

The instruments discussed in this chapter<sup>105</sup> are documents that emanate from the AU and the SADC PF and are either binding or not. It depends on the nature of the instrument itself. Treaties, conventions and statutes are binding on the states that have ratified them, while declarations or guidelines are not binding on the state; however, they create a background for domestic laws to be made. Domestic laws are to be shaped around the international obligations of the individual states.

Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. States like Botswana and South Africa may take cognisance of unilateral declarations, and place confidence in them, and are entitled to require that the obligation thus created be respected.<sup>106</sup>

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<sup>105</sup> A combination of all the international and regional instruments contain sections that are necessary for the protection of all the rights of children affected by HIV/AIDS. This thesis mainly employs these instruments as a template for analysing the level of conformity of both South Africa and Botswana to the standards set out in the international and regional instruments. Discussion of the extent of the protection and the gaps which international and regional instruments provide for the rights of children affected by HIV/AIDS will be discussed in relation to the level of conformity of domestic standards, in later chapters of this thesis.

<sup>106</sup> *Nuclear Test Cases (Australia v France and New Zealand v France)* International Court of Justice (ICJ) *ICJ Report (1974)* 268 Paragraph 46.

## Chapter 5 Legislative and policy framework for responding to children affected by HIV/AIDS in South Africa

### 5.0 Introduction

The initial response of the government of South Africa to the HIV/AIDS epidemic was “lukewarm”<sup>107</sup> and slow.<sup>108</sup> This was despite the mounting number of people infected with HIV/AIDS in the early 1990s, when an estimated 74,000-120,000 South Africans were living with HIV and the national antenatal survey showed 0.8% of pregnant women were infected.<sup>109</sup> The government’s first significant response to the epidemic came when the former President, Nelson Mandela, addressed the newly formed National AIDS Convention of South Africa (NACOSA), with the purpose of developing a national strategy to cope with HIV/AIDS epidemic.<sup>110</sup>

Since the slow start, the government has made impressive progress in instituting both legal and non-legal standards for addressing the effects of the epidemic on children. Currently, there are a vast number of legislative and policy instruments describing the duties and obligations of parents, guardians, care-givers, other persons, institutions and the state, on the rights of children. Many of these are relevant to the rights of children affected by HIV/AIDS.

This chapter discusses the existing legal and policy frameworks for protecting the rights of children in South Africa and their applicability to all aspects of the lives of children affected by HIV/AIDS.<sup>111</sup> Policies, where they exist, are also examined, as they provide the operating framework for dealing with the HIV/AIDS epidemic.<sup>112</sup>

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<sup>107</sup> L Grundlingh ‘A Critical historical analysis of government responses to HIV/AIDS in South Africa, as reported in the media’ (2001) *South African Historical Journal* 67. According to Grundlingh, this was because of the prejudices against homosexuals and the apartheid government was caught unprepared when the first HIV cases were reported in the heterosexual population.

<sup>108</sup> N Nattrass *The Moral Economy of AIDS in South Africa* (2006) 41.

<sup>109</sup> J McNeil *A History of Official Government HIV/AIDS Policy in South Africa* available at <http://www.sahistory.org.za/topic/history-official-government-hiv-aids-policy-south-africa> (Accessed on 30 January 2011).

<sup>110</sup> ILO Reading No 4- *The history of AIDS in South Africa* available at [www.ilo.org/gimi/gess/ResFileDownload.do?resourceId=13306](http://www.ilo.org/gimi/gess/ResFileDownload.do?resourceId=13306) (Accessed on 23 December 2010).

<sup>111</sup> This chapter sets out the available legislation and policies, as well as the extent to which they conform to the international standards on the rights of children affected by HIV/AIDS. A comprehensive critique of the legislation and policies will be dealt with in chapter 7 which elucidates the gaps and strengths.

<sup>112</sup> N Zungu-Dirwayi ‘An audit of HIV/AIDS policies in Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe’ (2004) *Human Sciences Research Council* 21.

## 5.1. Provisions regulating the rights of children affected by HIV/AIDS in South Africa<sup>113</sup>

... the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.<sup>114</sup>

It is trite that the protection of children's rights is a prerequisite for national development. Thus there is a duty on the family, as well as the state, to ensure that the general well-being of all children is guaranteed, to enable the personal and social development of all children.<sup>115</sup>

Children have a constitutional right to access nutrition, health care services and other socio-economic rights.<sup>116</sup> This includes a corresponding obligation on the state to ensure they are treated in a way that improves their health and well-being. The right to health is linked to the rights to dignity, bodily integrity (autonomy) and equality and all these should inform and have an impact on the protection of the right to health.<sup>117</sup>

In South Africa, the socio-economic rights of children (as set out in section 28(1) of the Constitution) are not subject to the "progressive realisation" principle and are directly enforceable.<sup>118</sup> It is submitted that South Africa is taking steps to ensure that its duties and obligations to the protection of children affected by HIV/AIDS are in line with international standards. In this regard, a number of policies and laws have been enacted to ensure that children are adequately protected. The laws and policies applicable to the protection of children affected by HIV/AIDS will be discussed.

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<sup>113</sup> The approach used in this section is to examine the Constitution of South Africa and the Children's Act and the extent to which their provisions can be applied to the protection of children affected by HIV/AIDS. The later part of the chapter further examines various other legislation and policies to see how their provisions can be applied in the protection of the rights of children affected by HIV/AIDS.

<sup>114</sup> 6<sup>th</sup> Preambular paragraph to the CRC,

<sup>115</sup> This duty rests on a number of players to ensure that the child enjoys his/her rights as set out in national and international legislation. The family has the foremost, to ensure that the rights of the child are protected. The state has a duty in this regard, as well as civil society, in the case where mandatory reporting of abuse is compelled.

<sup>116</sup> Socio-economic rights are justifiable in South Africa. This was decided in the case of *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996*, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) at para. 78.

<sup>117</sup> AIDS Law Project *Health and Democracy* available at [http://www.alp.org.za/index.php?option=com\\_content&task=view&id=53&Itemid=4](http://www.alp.org.za/index.php?option=com_content&task=view&id=53&Itemid=4) (Accessed on 3 May 2010).

<sup>118</sup> See *Centre for Child Law and Others v Member of the Executive Council, Gauteng Provincial Government and Another*, case no. 19559/06 (TPD), see also *Minister of Education, Western Cape and others v Governing Body, Mikro Primary School 2006* (1) SA 1 (SCA).

### 5.1.1 The Constitution<sup>119</sup> of the Republic of South Africa 1996<sup>120</sup>

The Constitution was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997. It is the supreme law of the land and no other law or government action can supersede the provisions of the Constitution. South Africa's Constitution is one of the most progressive in the world and enjoys high acclaim internationally.<sup>121</sup>

The Bill of Rights enshrined in the Constitution is the foremost instrument concerning the protection of people's rights in South Africa. All laws must conform to the principles in it and laws and policies must foster the principles of human rights contained in the Constitution.

Section 28 of the Bill of Rights<sup>122</sup> specifically provides for the rights of children. The inclusion of this section signifies the importance of specifically protecting children's rights. These rights are applicable to children without any distinction, as the opening statement in the section says "every child..." implying all children, without distinction.<sup>123</sup>

Section 28 sets out a range of civil and political and socio-economic rights which provide protection for children. This is additional to the provisions in the other parts of the Bill of Rights.<sup>124</sup> Thus children are entitled to all the rights in the Bill of Rights, except for the right to vote, which is restricted to "every adult citizen."<sup>125</sup>

Section 28(1) (b) imposes a duty on the parents and family of the child to care for them, before spelling out the duty imposed on the state in section 28 (1) (c). Section 28 entrenches certain socio-economic rights for children that supplement the general socio-economic rights to housing, health care, nutrition and social security, in Section 26 and 27 of the Constitution. These sections accord children the right to basic nutrition shelter, health care and social services. At the same time, children are accorded the right to family and parental care.<sup>126</sup> Section 28 therefore places a duty on

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<sup>119</sup> The first section discusses the child-specific section in section 28 and a few child-specific rights in section 27 of the Constitution. It does not focus on specific rights as these are discussed in the later part of this chapter.

<sup>120</sup> The South African Government *Constitution of South Africa 1996* available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf> (Accessed on 30 January 2010).

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Bhe and others v Khayelitsha Magistrate and Others*, 2005 (1) BCLR (CC) para 52.

<sup>124</sup> One would endorse the view that section 28(1) (c) is an express manifestation of the minimum core obligations and is intended to ensure that children are provided for, without delay. See C Mbazira, *Litigating Socio-economic Rights in South Africa – A Choice between corrective and distributive Justice* PULP (2009) 60.

<sup>125</sup> I Currie & J de Waal *The Bill of Rights handbook* (2007) 401.

<sup>126</sup> *Ibid.*

the state to ensure that a child is provided with these basic requirements and to provide the family of the child with the means to support both those requirements and the duty to provide family care.<sup>127</sup>

Apart from the socio-economic rights, the section also guarantees, for every child, the right to a name and nationality from birth, certain additional rights to children who are detained and, importantly, a right to legal representation at state expense in civil proceedings where substantial injustice would otherwise result.<sup>128</sup> The best interests principle is also enshrined in this section and it is considered to be of paramount importance in any matter concerning the child, thus constitutionalising the test used by the courts over the last 50 years to decide issues such as who is the most appropriate custodial parent of a child.<sup>129</sup>

The duty to provide basic health care and social services is directed towards the state in terms of section 27.<sup>130</sup> The socio-economic rights in this section are justiciable.<sup>131</sup> However, the rights have an inbuilt limitation which provides that the obligation on the state is to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of each of these rights.<sup>132</sup> The justiciability of socio-economic rights was discussed in the *Grootboom* case,<sup>133</sup> where the Court stated that:

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state “to respect, protect, promote and fulfil the rights in the Bill of Rights” and the courts are constitutionally bound to ensure that they are protected and fulfilled.

In line with the provisions of section 27(2), some parts of this section have been incorporated into legislation and policies. Section 27(1) (c), dealing with social security, was incorporated into the Social Assistance Act No. 13 of 2004 and the National Department of Social Development Strategic Plan 2002/2003 & 2005/2005-2009/10. Section 27(3), dealing with the non-refusal of emergency medical treatment, has been incorporated into both the National Health Act No. 61 of 2003 and the Patient’s Rights Charter. Although children are not specifically mentioned in this section, it can be inferred that the word “everyone” intends that children be included.<sup>134</sup>

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<sup>127</sup>Ibid.

<sup>128</sup>I Currie & J de Waal (note 19) 402.

<sup>129</sup>*Fletcher v Fletcher* 1948 (1) SA 130 (A), quoted in I Currie & J de Waal *ibid.*

<sup>130</sup>D Brand & C Heyns (eds.) *Socio-Economic Rights in South Africa* (2005) 107.

<sup>131</sup>Socio-economic rights are justifiable in South Africa. This was decided in the case of Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) at para. 78.

<sup>132</sup>See section 27 (2) of the Government of South Africa *South African Constitution available at* [www.gov.za/documents/constitution/1996/a108-96.pdf](http://www.gov.za/documents/constitution/1996/a108-96.pdf) (Accessed on 28 December 2011).

<sup>133</sup>*Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000).

<sup>134</sup>All these are discussed later in this chapter.



### 5.1.2 The Children's Act of 2005 (Act No. 38 of 2005)-<sup>135</sup>

The Children's Act<sup>136</sup> is one of the most important and far-reaching pieces of legislation in recent South African history. It comprehensively sets out the principles relating to the care and protection of children and it defines parental responsibilities and rights.<sup>137</sup>

The Act recognises the impact which HIV/AIDS has on children and how it affects other aspects of their lives and accordingly has included a number of HIV specific provisions into its text. It provides for a range of social services that are primarily aimed at strengthening and supporting families and communities to care for and protect children. If families are unwilling or unable to care for their children, it provides for alternative care to be provided by the state.<sup>138</sup>

Section 6 deals with the general principles of the Act and it establishes the child-centred approach in respect of all legislation, proceedings and state measures relating to children. It sets out general principles that must guide the decisions by organs of state relating to a specific child or children in general.<sup>139</sup> Section 6 is applicable to the protection of children affected by HIV/AIDS. Importantly, these general principles cover amongst others the protection of children from discrimination on any ground including on their health status,<sup>140</sup> and the protection of children with disabilities.

The section operationalises the obligation to respect, protect, promote and fulfil the child's rights set out in the Bill of Rights and the best interests of the child standard. These are not subject to any lawful limitation.<sup>141</sup> The fact that the section protects children from discrimination, based on their health status or disabilities of the child or that of their family members of the child, is desirable, since children affected by HIV/AIDS are often more susceptible to discrimination based on their own health status and that of their family members.

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<sup>135</sup> The Children's Act of 2005 available at <http://www.info.gov.za/view/DownloadFileAction?id=67892>. This Act was promulgated on 8 April 2006 and part of it came into force on 1 July 2007.

<sup>136</sup> It has repealed other legislation, including the Children's Act of 1960, Age of Majority Act of 1972, Child Care Act of 1983, Children's Status Act of 1987, Guardianship Act of 1993, Natural Fathers of Children born out of Wedlock Act of 1997 and section 4 of the Prevention of Family Violence Act of 1993.

<sup>137</sup> S Govender & D Masango *Govt Explain New Children's Act July (2007)* available at <http://www.southafrica.info/services/rights/childact-030707.htm> (Accessed on 26 May 2010). See J Sloth-Nielsen & Z Du Toit *Trials and Tribulations, Trials and Tribulations Developments in International, African and South African Child and Family law* (2008).

<sup>138</sup> P Proudlock & L Jamieson *The Children's Act: Providing a strong legislative foundation for a developmental approach to child care and protection* in P Proudlock & L Jamieson (eds.) *The South African Child Gauge* (2008) 35.

<sup>139</sup> J Heaton 'The law of Persons and Family Law' (2007) *Annual Survey of South African Law* 886.

<sup>140</sup> The term "health status" used in this section is not defined in the Act, but it can be understood to mean conditions that are conducive to the child's physical and emotional well-being and development.

<sup>141</sup> Section 6 (2) of the Children's Act, note 29.

The principles of the Act call for the prioritisation of the best interests of the child. The Act echoes section 28(2) of the Constitution and endorses the paramountcy of this standard. In order to guide the process of determining what is in the best interests of the child, section 7 provides for what is termed “the best interests of the child standard”. This comprises a list of relevant factors to be considered to ascertain what is in the best interests of the child.<sup>142</sup>

The Children’s Act specifies that childhood ends and adulthood begins at the age of 18.<sup>143</sup> This clarifies the confusion that existed when the Age of Majority Act of 1972 stipulated that the age of 21 was the age of majority, yet a child was defined in the Constitution as someone under the age of 18.<sup>144</sup>

The objects of the Act, as set out in section 2, explicitly show the commitment of the legislation to strengthening the ability of families to protect the wellbeing of children, the obligations on the state to provide social services and other amenities and ensuring the protection of the rights of children. These are all in line with the Constitution. The fact that the preamble acknowledges several international standards dealing with the protection of child shows the level of reliance that the Act places on international norms.

#### **5.1.2.1 HIV/AIDS specific sections of the Children’s Act**

Apart from the general provisions which are contained in the Children’s Act, there are a number of HIV/AIDS-specific sections which include:

##### **i. HIV testing**

Section 130 of the Act deals with HIV testing and this section describes the conditions under which HIV testing can be conducted on a child. It reiterates the requirement of ensuring that the best interests of the child is served in the process of obtaining the consent of the child for HIV testing.

The Act provides that HIV testing is to be treated differently from other forms of medical treatment. Consent requirements for HIV testing are different from requirements for other medical interventions, such as medical treatment. A child can consent independently to HIV testing at 12,

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<sup>142</sup> T Boezaart *Child law in South Africa (Special Child protective measures in the Children’s Act)* (2009) 22.

<sup>143</sup> Section 17 of the Children’s Act.

<sup>144</sup> S Govender & D Masango *Gov explain new Children’s Act* (2007) available at <http://www.southafrica.info/services/rights/childact-030707.htm> (Accessed on 26 May 2010).

but for other forms of medical treatment they must be twelve and have “sufficient maturity”<sup>145</sup> For children below the set age, the legislation allows consent from either the parent or a care-giver, or the provincial head of the Department of Social Development if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test, or where there is no parent to give consent or where the parent is not immediately available or the parent unreasonably withholds consent. Section 130 (1) (b) (i and ii) of the Children’s Act provides for the mandatory testing of a child after an occupational hazard. This section separates health care worker, from anyone else working with a child by stipulating that a child may be tested (even if consent was not given) if it is necessary to establish that a health care worker has been exposed to HIV by the child during a medical procedure involving the child. In the case of any other person working with children, a court order is needed to be able to carry out the test to establish that a person contracted the HIV from a blood substance transmitted from the child’s body.

The second part of the section changes the approach of the law as it was set out in the previous Child Care Act 74 of 1983, which allowed children to consent independently to medical treatment from the age of 14.<sup>146</sup> The current law lowers the age of consent for HIV testing to 12 years.<sup>147</sup> It addresses the requirement of counselling before and after HIV testing, where section 132 takes into account the maturity of the child when prescribing the mode of counselling. This section lays down strict requirements when subjecting a child to an HIV test. These are stricter than the norms that apply when an HIV test is provided to adults.<sup>148</sup> The Department of Health has indicated in its policy framework that the pre- and post-test counselling obligation requires HIV-testing facilities that test children to<sup>149</sup> be staffed with persons who should be able (through experience and/or training) to assess the developmental capacity of children to ensure that they are of sufficient maturity to understand the benefits, risks and social implications of such a test, in terms of the Children’s Act.<sup>150</sup> They must ensure that both pre- and post-test counselling is offered in every instance; establish the child’s maturity to understand the benefits, risks and social implications of the counselling before offering the child pre- or post-test counselling; counsel children who are mature enough to understand the implications of the HIV test; inform children who are not mature enough to understand the implications of the HIV test that their parents or care-givers need to be

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<sup>145</sup> The other differences include that the children under 12 can consent independently for HIV testing while they cannot with medical treatment. In addition, there is no best interest requirement for medical treatment and the Children’s Act does not specify when medical treatment can be done without consent but it does allow this with HIV testing

<sup>146</sup> A Van Niekerk & LM Kopelman *Ethics & Aids in Africa: The Challenge to Our Thinking* (2005) 201.

<sup>147</sup> Section 130 of the Children’s Act.

<sup>148</sup> J Heaton (note 33).

<sup>149</sup> P Mahery, P Proudlock & L Jamieson *A guide to the Children’s Act for health professionals* (2010) 4.

<sup>150</sup> Section 132 (1) (a) of the Children’s Act.

involved in the counselling process to assist them; and advise children with the maturity to undergo counselling on their own that they may voluntarily involve their parents or care-givers in the counselling process.<sup>151</sup>

**ii. HIV testing for foster care or adoption purposes-**

Section 131 deals with HIV testing for foster care or adoption. It provides that if HIV testing of a child is done for foster care or adoption purposes, the state must pay the cost of such tests, where circumstances permit. This section is a deviation from the old Child Care Act, which was silent on HIV testing or otherwise of a child for foster care or adoption purposes. Although the Act does not prohibit HIV testing for adoption and fostering purposes, such testing would still have to be in the best interests of the child. So for instance, if the adoptive parents want to know the HIV status of a baby they are adopting they would have to demonstrate that the test would promote the child's physical, emotional, spiritual welfare and would not have a detrimental effect on the child.

**iii. Pre-and post-test counselling before all HIV testing**

Section 132 imposes an obligation on appropriately trained service providers to give proper pre and post-test counselling for the child. If the child's parent or care-giver has knowledge of the test, he or she must receive pre-and-post HIV testing.<sup>152</sup> This changes the old law which merely required the health care provider to obtain informed consent.<sup>153</sup> It could be argued that this requirement is necessary considering the fact that the legislature lowered the age of consent for HIV testing to 12 years old.<sup>154</sup>

The Children's Act does not stipulate the contents of the counselling and the extent of the information to be provided to the child or parent or care-giver. Nevertheless, the National HIV Counselling and Testing Campaign Strategy (2010) provides some detail on the information which should be included in the counselling session.<sup>155</sup> Although the information is not child

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<sup>151</sup> Department of Health *HIV Counselling and Testing (HCT) Policy Guidelines* (2010) 32.

<sup>152</sup> J Heaton (note 33 above) 887.

<sup>153</sup> A Strode & C Slack *Children's Act: Implications for Research* (2009) available at <http://www.saavi.org.za/childrens.pdf> (Accessed on 28 May 2010).

<sup>154</sup> The HCT Policy Guidelines also stipulate that "where children are counselled and tested, staff should have appropriate understanding or specific training in child development, communication with children, and appropriate counselling guidelines" Department of Health (note 45 above) 73.

<sup>155</sup> See Paragraph 3.4.4 of the National HIV Counselling and Testing Campaign Strategy 2010.

focused, it can be adapted.<sup>156</sup> This principle takes full cognisance of the impact of HIV on children and its role in increasing their vulnerability to HIV infection.

#### **iv. Right to confidentiality regarding HIV status**

Section 133 deals with the confidentiality of information on the HIV/AIDS status of children. The section upholds the patient confidentiality rule enshrined in the National Health Act No. 61 of 2003 (the NHA) and applies it directly to children undertaking HIV testing.<sup>157</sup> The confidentiality principle in the NHA requires health care practitioners to ensure that all information concerning a user (patient), including information relating to his or her health status, treatment or stay in a health establishment is kept confidential.<sup>158</sup> The section prohibits any person from disclosing information on health status, treatment or a user's stay in a health establishment, except with their written consent or by a court order on situations where a law requires that disclosure; or when *non-disclosure* of the information represents a serious threat to public health.<sup>159</sup>

This section reiterates the rights of children who are being tested for HIV to have their confidentiality protected and sets out the narrow exceptions to the rule, i.e. the conditions under which the confidentiality may be breached.<sup>160</sup> It sets out the conditions under which the consent to disclose the HIV status of the child in sub-section 1 is obtained. It requires that the consent to have the HIV status of a child disclosed has to be given in terms of section 2. This is an important innovation, as the Child Care Act 74 of 1983 did not specifically protect a child's right to confidentiality.

Since the disclosure of a positive HIV status has serious personal and social consequences, especially for children who are particularly vulnerable in society, the Act protects the privacy and physical integrity of the child by requiring consent for the disclosure of his or her HIV status.<sup>161</sup> The Act allows the child to give consent for the disclosure of his or her HIV status if he or she is 12

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<sup>156</sup> The Human Sciences Research Council has launched national guidelines on HIV testing on children, which deals with this gap, in Feb 2013. "A new set of guidelines and training tools dealing with the legal, ethical and counselling issues related to HIV testing of children is now available for HIV/AIDS practitioners working with children. Dr Heidi van Rooyen explains that "These guidelines explore, in simple and practical terms, the psychosocial implications, as well as the legal and policy obligations relating to HIV counselling and testing of children." The tools describe what practitioners can do to ensure that HIV testing of children takes place in a way that protects and promotes their rights and is conducted in their best interests available at [http://www.hsrc.ac.za/Media\\_Release-444.phtml](http://www.hsrc.ac.za/Media_Release-444.phtml) (Accessed on 10 April 2013).

<sup>157</sup> Department of Justice *National Health Act No. 61 of 2003*, available at <http://www.info.gov.za/view/DownloadFileAction?id=68039> (Accessed on 2 September 2011).

<sup>158</sup> Section 14 of the NHA.

<sup>159</sup> *Ibid.*

<sup>160</sup> See section 133 (1) of the Children's Act.

<sup>161</sup> T Boezaart (note 36) 220.

years or older, or under the age of 12 and sufficiently mature to understand the benefits, risks and social implications of such a disclosure. In situations where the child is not legally able to consent to the disclosure of his or her HIV status, the Act lists the people who can give consent on behalf of the child.

An interesting dilemma may nonetheless arise from the HIV testing and disclosure provisions, when read with the medical treatment provisions. For instance, Boezaart<sup>162</sup> cites the example of an 11-year-old who consents to an HIV test independently and is found to be positive and in need of further treatment, but refuses to consent to the disclosure of his or her HIV status to his or her parents or guardian. On the face of it, the child cannot obtain medical treatment without parental assistance, because he or she is below the age of consent [to medical treatment], but his parents cannot be requested to consent to his treatment without the medical practitioner disclosing the child's HIV status to the child.<sup>163</sup>

The question which arises here is whether, in such a case, the health provider can use section 13 (1) (d) of the Act to disclose the child's HIV status. The application of the best interests of the child principle in this case has the potential to limit the confidentiality of information on the health of the child. However, in order to circumvent the breach, the children's court may be approached to overrule the child's "unreasonable refusal". This thesis therefore submits that, although it might be impractical to require health providers to approach a children's court every time a child refuses the disclosure of his HIV status, given the general consequence of such disclosure, a stringent approach might be justified (if only within the confines of the HIV context).<sup>164</sup>

It should ultimately be noted that the lowered age of consent has practical implications for children, the health system and health care workers. By reducing the age of consent, the law-makers have opened the door for a larger range of children to be able to consent to their own treatment and surgery. This empowerment can reduce delays or denial of health service experienced when children attempt to access health care without parents and they are turned away.<sup>165</sup>

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<sup>162</sup> T Boezaart (ed.) *Child law in South Africa*, in R Ngidi *Upholding the Best interest of the Child in South African Customary law* (2009) 2.

<sup>163</sup> T Boezaart (note 56) 220. This dilemma (for the medical practitioner) can be resolved by applying section 13 of the Children's Act and this confidentiality can only be broken where maintaining such confidentiality is not in the best interests of the child.

<sup>164</sup> *Ibid.*

<sup>165</sup> T Boezaart (note 56) 213.

The obligation to report abuse does not affect the right to confidentiality. Children, like everyone else, have a right to privacy, guaranteed in the Bill of Rights,<sup>166</sup> and this was restated by the court in *Tsabalala-Misimang and Another v Makhanya and others*<sup>167</sup> where it was held that:

[i]n terms of the Constitution, as well as the NHA, the private information contained in health records of a user, relating to the health status or treatment or stay in a health establishment of that user is worth protecting as an aspect of human autonomy and dignity.

It should be noted that these rights are not absolute and can be limited. In some cases, the Children's Act creates internal limitations on children's rights to confidentiality. Such limitations are either general or specific. Section 13(1) (6) notes generally that a child has the right to confidentiality regarding his or her health status and the health status of a parent, caregiver or family member, except where maintaining such confidentiality is not in the best interests of the child.<sup>168</sup>

The Children's Act further places the duty to compulsorily report cases of deliberate neglect of children and abuse against children on certain individuals. The Regulations to the Children's Act<sup>169</sup> set out some indicators to assist the reporter of abuse to assess risk factors that would support a conclusion of abuse and neglect on reasonable grounds. Some guidelines are set in the Regulations to further assist the reporter to assess the "total context of the child's situation" before coming to a conclusion that there was abuse or neglect.

#### **5.1.2.2 Non-HIV/AIDS-specific sections in the Children's Act which are relevant to the protection of children affected by HIV/AIDS**

In addition to the sections that deal specifically with HIV/AIDS, there are a number of provisions which, although not specifically dealing with HIV/ADS, have a bearing on the rights of children affected by HIV/AIDS. These sections include:

##### **i. Protection of children's rights**

Section 150 (1) of the Act gives a very wide definition of a child in need of care and it places the obligation to investigate each and every case appropriately when determining the appropriate action

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<sup>166</sup>T Boezaart (note 56) 222.

<sup>167</sup>(2008) 6 SA102 W, para 27.

<sup>168</sup>T Boezaart (note 56) 223.

<sup>169</sup> This means the Children's Act, together with the Amendment Act.

to take concerning the child on a designated social worker.<sup>170</sup> If after investigation, a social worker finds that a child is not a child in need of care and protection, as contemplated in subsection (1), the social worker must, where necessary, take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.<sup>171</sup>

## ii. Definition of a care-giver

The Act provides a wide definition of a care-giver in section 1; the definition takes into account the traditional, as well as the conventional family structure, which has emerged as a result of the HIV/AIDS epidemic. It expands the definition of a “family member”, in relation to a child. The definition includes any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship. The importance of this definition in the context of children affected by HIV/AIDS also rests on the fact that it recognises the child who is the head of a child-headed household as being a care-giver if they are over 16.<sup>172</sup>

Boezaart<sup>173</sup> reasons that the expansive definition of who is a child’s family member dispels the notion that a family is only a nuclear family and, more importantly, embraces the role that extended families can play in the upbringing of the child. By incorporating members of the “extended family” in the definition of who a child’s family member is, the Children’s Act accommodates the principle that the child belongs to a family group, albeit that of his or her unmarried mother or married father.<sup>174</sup> This is very important in the HIV/AIDS epidemic, considering the damage which the HIV/AIDS orphaning rate does to the nuclear family structure.

## iii. Best interest of the child

Section 7 deals with the best interests of the child<sup>175</sup>; it states that:

In all matters concerning the care, protection and well-being of a child the standard that the child’s best interests is of paramount importance, must be applied.

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<sup>170</sup> Section 150(2) of the Children’s Act.

<sup>171</sup> C J Davel & AM Skelton (eds) ‘Protection of Children’ in *Commentary on the Children’s Act (2007)* 7.1- 7.25

<sup>172</sup> See the interpretation section of the South African Children’s Act.

<sup>173</sup> T Boezaart (note 36) 2.

<sup>174</sup> T Boezaart (note 56) 215.

<sup>175</sup> This concept has been discussed in Chapter 2 of this thesis as it relates to international law.



This section is in keeping with the provision of section 28(2) of the Constitution, which provides for the best interests of the child principle. This principle is one of the four pillars of the CRC<sup>176</sup> and is included in the ACRWC.<sup>177</sup> The concept of the “best interests” of children has been the subject of more academic analysis than any other concept included in the CRC.<sup>178</sup> In the ACRWC, this principle is required to be *the* primary consideration, setting a higher standard than that set out in the CRC.<sup>179</sup>

Section 7 contains an exhaustive list of factors that must be taken into consideration in determining the best interests of the child. However, prior to the enactment of the Children’s Act, the courts had developed a list of factors flowing from *Mc Call v Mc Call*,<sup>180</sup> onwards establishing a list of factors that could be used to determine the best interests of the child. In *Mc Call’s* case<sup>181</sup>, Justice King listed 13 factors which could be used to determine the best interests of the child.<sup>182</sup> In line with this, section 7 of the Children’s Act contains a list quite similar to that established in the *Mc Call* case. The list in the Children’s Act is, however, more comprehensive<sup>183</sup> and it has a wider application.<sup>184</sup> It has nonetheless been stated that the standard of the best interests of the child should be flexible, as individual circumstances will determine which factors secure the best interests of a particular child.<sup>185</sup>

Applying this principle to children affected by HIV/AIDS means that health care providers must take all steps to ensure that the health and well-being of the child is considered at all times.

#### **iv. Right to participate in any matter concerning the child**

Section 10 of the Children’s Act requires that every child that has reached the age of maturity and stage of development to be able to participate in any matter concerning him or her to be given the opportunity to participate in an appropriate way and to express their views.

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<sup>176</sup> See article 3 of the CRC.

<sup>177</sup> See article 4 of the ACRWC.

<sup>178</sup> F H Beshir *CRC on the Best Interest of the Child*, available at [http://www.kinderrechte.gv.at/home/upload/crc\\_on\\_best\\_interest\\_of\\_the\\_child.pdf](http://www.kinderrechte.gv.at/home/upload/crc_on_best_interest_of_the_child.pdf) (Accessed on 16 July 2010).

<sup>179</sup> B Goldblatt & K Mc Lean *Women’s Social and Economic Rights: Developments in South Africa* (2011) 157.

<sup>180</sup> 1994 (3) SA 201 (C) at 204.

<sup>181</sup> Although the principle was applied in the *Mc Call* case in relation to a child’s custody case, the application of the best interest of the child’s principle as applied in the *McCall’s* can be adopted to a wider array of matters in as much as the interest of the child has to be determined. This is due to the fact that the principle provides the main factors to be considered with respect to determining what is best for the child.

<sup>182</sup> The list is included in appendix iii.

<sup>183</sup> R Bregman *The Best interest of the Child* (2005) available at <http://roylaw.co.za/home/article/the-best-interest-of-the-child/pageid/children> (Accessed on 2 June 2010).

<sup>184</sup> See also *S v M (Centre for Child law as Amicus Curiae)* 2008 (3) SA 232 at para 24.

<sup>185</sup> *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC) para 18.

This provision emphasises the fact that child participation is a right protected by law. Thus the fact that the parent of a child has consented to a matter concerning the child does not mean that the child's consent or at least assent must not be sought. This section applies to children who have such an age, maturity and stage of development as to be able to participate in any matter concerning them. This principle allows for the child's opinion to be heard and taken into account in all matters that would affect the child. This is crucial for children affected by HIV/AIDS if decisions relating to matters concerning them for example, the removal of the child from their family and placement in foster care after the death of their parents or even in cases relating to HIV/AIDS testing and treatment of the child that they be given an opportunity to participate in such a decision.

The provision places a responsibility on health care workers and other providers of services to children affected by HIV/AIDS to ensure that the children who have the maturity to participate in decision-making are included in informed consent processes either by way of assent or in terms of sections 7 and 8 of the National Health Act by giving full informed consent alongside their parents/guardians if they can demonstrate "understanding."<sup>186</sup>

There is no express constitutional right for children to participate in decisions affecting them. However, such a right is in conformity with international instruments like the CRC and the ACRWC.<sup>187</sup> The UN Committee on the Rights of the Child, commenting on the right of children to be participate in health care stated that-<sup>188</sup>

100. The children, including young children, should be included in decision-making processes, in a manner consistent with their evolving capacities. They should be provided with information about proposed treatments and their effects and outcomes, including in formats appropriate and accessible to children with disabilities.

101. States parties need to introduce legislation or regulations to ensure that children have access to confidential medical counselling and advice without parental consent, irrespective of the child's age, where this is needed for the child's safety or well-being. Children may need such access, for example, where they are experiencing violence or abuse at home, or in need of reproductive health education or services, or in case of conflicts between parents and the child over access to health services.

These recommendations aim at ensuring that children are involved in decision-making related to their or her health, especially if it is likely to significantly change, or to have an adverse effect on, the child's health. This means that the child should be given the necessary information in a child-friendly way to enable the child to express his or her opinion.<sup>189</sup>

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<sup>186</sup> A Strode, C. Slack & Z Essack 'Child consent in South African law: Implications for researchers, service providers and policy-makers' (2010) *The South African Medical Journal* 247247.

<sup>187</sup> P Mahery, L Jamieson & P Proudlock *Children's Act Guide for Child and Youth Care Workers* 1 ed. (2011).

<sup>188</sup> General Comment 12 (2009) CRC/C/GC/12 20 July 2009,

<sup>189</sup> P Mahery, L Jamieson & P Proudlock (note 43).

#### **iv. Role of a guardian and the transfer of guardianship**

The definition section of the Children's Act defines a guardian as the parent or other person who has the guardianship of a child. The Act defines a care-giver as a person other than the parent or guardian who factually cares for the child... and provides for the duties of parents and guardians in section 18 (3). This indicates that there is a clear legal distinction between a guardian and a care-giver. It establishes that there are certain roles which only a parent or the guardian of the child can perform, thereby suggesting that the role of a guardian is similar to the role of a parent, under the law.

The Children's Act deals with the process of transferring guardianship from the natural parents to a guardian in section 23 (1), which states that "any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant".

Section 27 indicates that guardianship may be transferred from the parent of a child to a fit and proper person in the event of the death of the parent. Section 27 (2) allows for the appointment of the guardian in terms of a will made by the parent. Once a person has been appointed as a guardian in terms of section 24 and 27 of the Children's Act, such a person has rights and can perform duties which are similar to those of the parents, in terms of sections 41, 129, 150 and 151, among others.

#### **v. Recognition of child-headed households and the inclusion of the child at the head of a child-headed household in the definition of a "care-giver"**

The definition section of the Children's Act attests to the recognition of child-headed households and defines a child-headed household as a household "recognised as such in terms of section 137" of the Children's Act.

Section 137 of the Act states that a child-headed household may be recognised if:

- a) The parent, guardian or care-giver of the household is terminally ill, has died or has abandoned the children in the household;
- b) No adult family member is available to provide care for the children in the household;
- c) A child over the age of 16 years has assumed the role of the care-giver in respect of the children in the household; and
- d) It is in the best interest of the children in the household.

This recognition is crucial for children whose parents are terminally ill from HIV/AIDS, or those who have lost their parents or guardians to HIV/AIDS. It ensures that the children are kept together as a family unit and that they do not have to be split up or placed in “strange” environments, where they might take years or months to adjust to their new families or environments. It is noteworthy that the Children’s Act recognises the right of children living in child-headed household to social security and other grants in section 137 (5). This is very important for the survival of the children and for ensuring that the children have access to the basic necessities of life in order to ensure their survival and well-being.

It is significant that the Act lays down strict conditions for the recognition and supervision of child-headed households and takes the age, maturity and stage of development of the other children in the household into account in establishing the existence and functioning of the household.<sup>190</sup> The section specifies strict conditions under which child-headed households will exist. Section 137 (2) stipulates that the household must function under the general supervision of an adult designated by either a children’s court, an organ of State or an NGO. It further states the duties of the supervising adult in subsection 3, and those who are not fit to supervise a child-headed household.

In the definition section, a child-giver is “any person other than the parent or guardian of a child, who factually cares for the child” and includes “the child at the head of a child-headed household”. This innovation ensures that the head of a child-headed household has all the responsibilities<sup>191</sup> and the rights<sup>192</sup> and recognition given to a care-giver by the Children’s Act. Nevertheless, given their youthful age (16 or above) the Act provides for careful supervision of such households. This meets the constitutional obligations to protect children. It allows them for example, to consent to medical treatment on behalf of a younger sibling.

#### **vi. Right to decide whether to participate in social, cultural and religious practices**

Section 12 gives the child the right to decide whether or not to participate in social, cultural and religious practices. This sets out the social, cultural and religious practices that are potentially detrimental to the physical health and psychological well-being of the child. A number of these practices have implications for HIV prevention. Firstly, it prohibits a number of practices from being performed on female children. Some of these practices include genital mutilation, and child

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<sup>190</sup> Section 137 (6, 7 and 8) of the Children’s Act.

<sup>191</sup> See sections 32, 62, of the Children’s Act.

<sup>192</sup> See sections 129, 130, 132, 133, 134, of the Children’s Act.

marriage or engagement of a child younger than 16 years and virginity testing. The minimum age for a valid marriage is set out under this section and the consent of the child is required in all marriages. The section is in keeping with the provisions of Article 16 (2) of CEDAW, which prohibits under-aged marriages and sets the minimum age for marriage at 18 years.

Virginity testing is an African tradition in certain parts of South Africa, the proponents of which believe that it will curb sexual exploitation and prevent HIV in a way which is consonant with indigenous African knowledge.<sup>193</sup> Other community-based women's groups argue that it exposes young women who may have been raped and that reinforces sexual double standards, which place the sole responsibility for controlling sexual interaction on women.<sup>194</sup> Bonthuys and Albertyn<sup>195</sup> maintain that proponents and opponents of virginity testing should formulate their arguments in terms of gender equality and the rights of girl children to bodily integrity and privacy. In order not to get entangled in the debate regarding the validity of virginity testing, the Children's Act adopts a passive approach which allows the practice on girls above 16 years of age who give their consent and under conditions which aim to protect young girls who may have been the victims of sexual assault.<sup>196</sup>

Male circumcision is another practice which may be carried out for religious and cultural reasons.<sup>197</sup> Recent findings have indicated that it can be an important way of reducing female to male transmission of HIV.<sup>198</sup> Guidelines have been issued by the WHO and UNAIDS on how to carry out the practice in a way that is consistent with human rights standards.<sup>199</sup>

Despite the desirability of male circumcision in preventing HIV transmission, sections 12 (9) (10) and (11) of the Children's Act only allows circumcision on boys older than 16 years if they give their consent, after proper counselling. It must be in the manner prescribed.

Section 12 (8) also allows circumcision on boys younger than 16 years if the circumcision is performed for:

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<sup>193</sup> AC Van Dyk *HIVAIDS Care and Counselling*, 4 ed. (2008) 456.

<sup>194</sup> E Bonthuys & C Albertyn *Gender, law and justice* (2007) 167.

<sup>195</sup> Ibid.

<sup>196</sup> See section 12 of the Children's Act.

<sup>197</sup> L Gable, *World Bank, Global HIV/AIDS Programme Legal aspects of HIV/AIDS: a guide for policy and law reform* (2007) 38.

<sup>198</sup> In March 2007, the first set of information from the trials led to the WHO and UNAIDS issuing the first set of guidelines on male circumcision as an HIV prevention intervention. The Guidelines are cautious and they stress that male circumcision is never completely efficacious and should never replace other known methods of HIV prevention methods. It should, however, be considered as part of a comprehensive HIV prevention package.

<sup>199</sup> C Zabus & Nelungo W A *After the Kenyan harvest in Fearful Symmetries: Essays and Testimonies Around Excision and Circumcision* (2008) 283.

- (a) religious purposes in accordance with the practices of the religion concerned and in the manner prescribed;
- (b) medical reasons on the recommendation of a medical practitioner.<sup>200</sup>

The Act requires that the circumcision of male children is performed under conditions which are not dangerous to the health and well-being of the child by a properly trained medical practitioner or a trained person from the religion and that the procedure is performed under hygienic conditions. In the case of male circumcision which is undertaken for cultural reasons (for instance, during an initiation rite into manhood), provincial legislation exists in various provinces to guide the procedure.<sup>201</sup> A key gap is that the Act does not provide who may give consent to male circumcision when the boy is under 16.<sup>202</sup>

### **vii. Right to access information on the child's health, sexuality and reproduction**

Section 13 guarantees every child the right to have access to information on his or her health, sexuality and reproduction. This includes information regarding the treatment which the child receives.

The child has the right to confidentiality regarding the information on the health status of a parent, care-giver or family member. The only exception to this is when maintaining such confidentiality is not in the best interests of the child. In granting the child access to information regarding their health status the health-care provider must ensure that the information is relevant to the child and is presented in such a way that the child is able to understand it. Consideration must be given to the needs of disabled children when making information regarding their health available to them.

### **viii. Parental responsibility and parental rights**

Section 18, dealing with parental responsibility and parental rights, sets out the parental responsibilities and rights that a person may have in respect of a child. The Children's Act shifts from parental authority to a focus on parental responsibility and rights.<sup>203</sup> This is to stress the

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<sup>200</sup>Ibid.

<sup>201</sup> This includes, for example, the Northern Province Circumcision Schools Act 6 of 1996, The Application of Health Standards in Traditional Circumcision Act 6 Of 2001 of the Eastern Cape and the Free State Initiation Schools, Act 1 of 2004.

<sup>202</sup> The regulations only refer to male circumcision for religious purposes and stipulate that both parents must sign the consent for the procedure. However, this might pose some problems to single parents who do not have the support of the other parent.

<sup>203</sup>T Boezaart (note 56) 63.

importance of responsibility towards children first, while recognising the validity of parental rights.<sup>204</sup>

This section is crucial for children affected by HIV/AIDS who have lost their families to the epidemic. This is because the section recognises that there is a diverse range of family forms and different kinds of care arrangement that can be made for children and allows parental responsibility and rights to be acquired either by arrangement or court order by other persons who are not parents.<sup>205</sup>

#### **vi. Right to consent to medical treatment**

Section 129 of the Act gives a child the right to consent to his or her own medical treatment, or to the medical treatment of his or her child<sup>206</sup> if the child is over the age of 12 years; and if the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment. In the case of a surgical operation, however, the child may consent to the performance of a surgical operation if the child is over the age of 12 years; and if the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation and if he or she is duly assisted by their parent or guardian.<sup>207</sup>

According to Boezaart<sup>208</sup> this implies that the weight to be attached to a child's views regarding consenting to medical treatment is not only dependent on the age of the child, but their ability to express those views; these must be assessed on an individual basis.<sup>209</sup> Thus the rights of parents, guardians and care-givers, in terms of section 129, are subject to the condition that, before a major decision is made that may significantly change or have an adverse effect on the child's health or well-being, the views and wishes expressed by the child must be given due consideration, bearing in mind the child's age, maturity and stage of development.<sup>210</sup> This only applies where the child is below 12.

#### **ix. Right to access contraceptives**

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<sup>204</sup> Parental rights remain important in the protection of their children from the arbitrary action by the state or by third parties something the Constitution stresses in section 28 (1) (b). See T Boezaart (Ibid).

<sup>205</sup> Ibid.

<sup>206</sup> Section 129 (2) of the Children's Act.

<sup>207</sup> Section 129 (2) of the Children's Act.

<sup>208</sup> T Boezaart (note 56).

<sup>209</sup> T Boezaart (ibid at 215)

<sup>210</sup> Ibid.

Section 134 prohibits anyone from refusing to sell or to provide condoms to any child over the age of 12 years if the condoms are provided or distributed free of charge. It gives permission to make contraceptives other than condoms available to a child on request by the child and without the consent of the parent or care-giver. It sets out the conditions under which contraceptives may be made available to the children and these include if the child is at least 12 years of age; where proper medical advice is given to the child; and where a medical examination has been carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child. The section reiterates that the confidentiality of any child who obtains condoms, contraceptives or contraceptive advice in terms of this Act must be maintained subject to section 110.

The provision of contraceptives to children of 12 years and older is in conformity with the right to access reproductive health care services. The availability of contraceptives is necessary for the exercise of reproductive freedom. In the previous Child Care Act, which was repealed by the Children's Act, contraceptives fell within the scope of medical treatment, thus making the age of consent for a child to access contraceptives 14 years or older. The Children's Act has again improved on the previous provisions of the Child Care Act so as to respond more effectively to current realities such as the problem of teenage pregnancies and the lower age of sexual debut amongst young adolescents.<sup>211</sup> This provision "was met with some consternation by the public;"<sup>212</sup> however, considering that many young people are having sex well before the age of 14,<sup>213</sup> this is a "sensible provision."<sup>214</sup>

The provision of contraceptives to children below the age of 14 years "was prompted by concerns for children's reproductive health and policies that privilege the protection of children over cultural objections or opposition from parents."<sup>215</sup> This thesis agrees with Goldblatt and McLean's<sup>216</sup> submission that parental approval and involvement in contraception may be the ideal, but the reality in South Africa is that many girls live in families that do not talk about sex. In addition, children have the right to bodily integrity, which includes the right to control in and over their own body without outside interference.<sup>217</sup> All this means that children have a right to seek medical assistance in line with their right to health and confidentiality when they seek health care services.

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<sup>211</sup> T Boezaart (note 56) 221.

<sup>212</sup> B Goldblatt & KS McLean (eds) *Women's Social and Economic Rights: Developments in South Africa* (2011) 67.

<sup>213</sup> National Department of Health Policy *Guideline on Youth and Adolescent Health* (2001) 37.

<sup>214</sup> B Goldblatt (note 105).

<sup>215</sup> M Freeman (ed) *Law and Childhood Studies: Current Legal Issues* (2012) 130.

<sup>216</sup> B Goldblatt (note 105).

<sup>217</sup> T Boezaart (note 56) 222.



## **x. Reporting of children in need of care and protection**

Chapter 9 of the Children's Act sets out the law relating to children in need of care and protection. It highlights the importance of the child remaining in family care and securing the stability of a child who may be in need of alternative care and makes this its most important principle. It also enumerates the possible forms of alternative care and the principles underlying alternative care.<sup>218</sup>

Section 150 defines a child in need of care and lists the category of children who are deemed to be in need of care.<sup>219</sup> Section 150 (2) elucidates the role of the social worker in the investigation of cases of child abuse in relation to children in need of care. Section 151 sets out the conditions under which the court may order the removal of a child to a temporary safe place, while section 152 stipulates the conditions upon which the child may be removed to a temporary safe place without the court order, but upon the order of the social worker or police officer. In these cases, the best interests of the child must be considered while deciding that a child in need of care and protection must be removed and placed in temporary place of safe care.<sup>220</sup>

### **5.1.3 Other legislation and policies dealing with specific rights of children affected by with HIV/AIDS**

In addition to the Constitution and the Children's Act, there are laws and policies<sup>221</sup> in place to address the rights crucial for the enjoyment of the human rights of children affected by HIV/AIDS. The laws and policies discussed in this chapter are in line with the CRC and some other international instruments and they are classified according to the framework on the right which they exist to protect. These include frameworks which

- protect the right to treatment and health care
- protect the right to maintenance
- protect the right to equality and freedom from discrimination
- protect the right to care and access to social services for the children affected by HIV/AIDS
- protect vulnerable people from crimes which expose them to the risk of HIV infection

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<sup>218</sup> CRIN *A Legal Analysis of South Africa's Implementation of the UN Convention on the Rights of the Child* available at [www.crin.org/docs/South\\_Africa.doc](http://www.crin.org/docs/South_Africa.doc) (Accessed on 14 May 2010).

<sup>219</sup> See section 150 (1) (a - i) of the Children's Act.

<sup>220</sup> See section 152 (4) of the Children's Act.

<sup>221</sup> A "policy" is very much like a decision or a set of decisions and they are "made", "implemented" or "carried out" just as we do with decisions; thus a policy is a set of decisions which are oriented towards a long-term purpose or to a particular problem. See FAO *Corporate Document Repository: Better livestock policies for Africa...* available at <http://www.fao.org/wairdocs/ILRI/x5499E/x5499e03.htm> (Accessed on 21 February 2010).

- protect the right to education
- protect the rights of employees
- protect the right to guardianship, property or inheritance

In this regard, the legislation and policy framework which serve as guideline standards to regulate the implementation of government programmes to protect and achieve these principles include:

### **5.1.3.1 The legal and policy framework protecting the right to treatment and health care-**

There are legislation and policies in place for the protection of the right to health and the right to access health care in South Africa. Some of the most important legislation which addresses the rights of children affected by HIV/AIDS to address health care services will be discussed.

#### **i. National Health Act (No. 61 of 2003)<sup>222</sup>**

This Act was not enacted specifically for HIV/AIDS or children. It deals with the standards applicable to the treatment of users (patients) accessing national health care facilities. These include children affected by HIV/AIDS. Until it was passed, the legislative framework for South Africa's health system remained fragmented, due to its apartheid legacy.<sup>223</sup>

Section 4 of the Act reiterates the constitutional provision concerning the right, to health as provided for in section 27. Section 5 prohibits the health-care provider, health worker or health establishment from refusing a person emergency medical treatment is in furtherance of section 27(3) of the Constitution dealing with the right to emergency health.<sup>224</sup> Section 8 states the user's right to participate in any decision affecting his or her personal health and treatment and to give informed consent regarding the medical procedure and treatment. It states that users can only give informed consent if they are capable of understanding the information regarding their treatment even if they lack the legal capacity to give the informed consent required by section 7. These sections take the rights of children when they access the health care services into account. This will ensure that children affected by HIV/AIDS will be able to enjoy the right to the highest attainable standard of health care whenever they access health care facilities.

<sup>222</sup> Department of Justice *National Health Act* (2003) <http://www.polity.org.za/article/national-health-act-no-61-of-2003-2003-01-01> (Accessed on 28 December 2010).

<sup>223</sup> AIDS law Project *Health and Democracy* (Chapter 4), available at <http://www.alp.org.za/publications/healthanddemocracy/Chapter4.pdf> (Accessed on 14 May 2010).

<sup>224</sup> See the dictum of the Court in *Sobramoney v Minister of Health KZN* 1998 (1) SA 756 (CC) on this.

Section 14 upholds the confidentiality principle in line with the provisions of the Children's Act<sup>225</sup> by requiring all information concerning a user to be kept confidential. This is to protect the right to privacy of individuals. It will ensure that information regarding the health of children affected by HIV/AIDS and that of their parents and family members are treated confidentially, so as not to expose them to possible stigma and discrimination.

The National Health Act makes the availability of health care services free for some groups of people and these include children below the age of six years.<sup>226</sup> This provision is in line with the country's declaration to provide access to health care in a number of international documents.<sup>227</sup> The MDG 4 of preventing child mortality will be accomplished if children under 6 years are able to access free health care services.

Policies which specifically address the rights of children affected by HIV/AIDS to access health care in South Africa include:

**ii. The Guidelines for the Management of HIV Infected Children, 2010 edition<sup>228</sup>**

This is a Department of Health guideline which aims to direct health practitioners on how to manage children affected by HIV/AIDS. These are clinical guidelines and they do not have any legal background. The guidelines acknowledge key human rights principles in the CRC and take the best interests of the child principle into account.

**iii. HIV Counselling and Testing (HCT) Policy Guidelines 2010<sup>229</sup>**

This policy was issued by the national Department of Health to guide health care practitioners on how to conduct HCT. It describes the circumstances under which HIV testing may be conducted<sup>230</sup> and sets core ethical principles which guide the way in which testing is to be conducted. It deals with issues such as obtaining informed consent, consent from persons who are unable to write, and maintaining confidentiality, privacy and non-discrimination.

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<sup>225</sup> Section 133 and 13 of the Children's Act.

<sup>226</sup> See section 4 (3) of the NHA.

<sup>227</sup> International instruments such as the ICESCR, the CRC and ACRWC.

<sup>228</sup> The Guidelines for the Management of HIV Infected Children 2010, available at <http://www.rhru.co.za/Resources/Documents/2010%20Paediatric%20Guidelines.pdf> (Accessed on 9 September 2011).

<sup>229</sup> HIV Counselling and Testing (HCT) Policy Guidelines 2010

[http://web.up.ac.za/sitefiles/file/45/1335/877/HideAndSeek\\_HCT\\_Policy\\_FINAL.pdf](http://web.up.ac.za/sitefiles/file/45/1335/877/HideAndSeek_HCT_Policy_FINAL.pdf) (Accessed on 7 February 2012).

<sup>230</sup> Section 4 of the HTC Policy Guidelines.

Section 7 deals with HIV counselling and testing for children and sets out the conditions under which a child may be tested.<sup>231</sup> It specifically recommends routine HIV testing for specific groups of children, including abandoned infants, when the status and whereabouts of the mother is unknown.<sup>232</sup> It deals with counselling to children before and after HIV testing, child consent for HIV testing, the testing of infants and services for child survivors of sexual assault.

The objectives of the policy include to “provide core requirements and guidance to ensure the delivery of standardised, high quality, ethical HIV counselling and testing services” and to “ensure compliance with a legal and human rights approach to HIV counselling and testing”, among others.

It is significant that the policy framework deals directly with HIV testing for young people.<sup>233</sup> The definition of a child in the policy is in line with the Children’s Act.<sup>234</sup> It reiterates the “NSP position and subsumes persons in the 15-49 age groups under these two broad categories is “young people” (i.e. those who fall in the 10 to 24 year-old age group).”

It recognises that “as a group, young people face particular risks for HIV,” due to activities such as “early sexual debut, sex with multiple sexual partners, unprotected sex, substance and drug abuse leading to unprotected sex, high risk of sexual coercion and abuse, high frequency of sex, age differences in relationships, peer pressure and a need to belong”, hence the need for HIV testing for children.

### **5.1.3.2 The right to maintenance**

The legal framework in place to ensure that children affected by HIV/AIDS have access to maintenance will be discussed briefly.

#### **i. Maintenance Act No. 99 of 1998<sup>235</sup>**

This is a child-specific Act which deals with the maintenance of children in South Africa. This Act is in line with article 27 of the CRC that provides for a child’s right to a standard of living which is adequate for the child’s physical, mental, spiritual, moral and social development. It sets out the

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<sup>231</sup> Paragraph 7.1.1 of the HTC Policy Guidelines.

<sup>232</sup> See paragraph 4.1.4 of the HTC Policy Guidelines.

<sup>233</sup> Paragraph 7.4 of the HTC Policy Guidelines

<sup>234</sup> Ibid.

<sup>235</sup> Government of South Africa *Maintenance Act No. 99 of 1998* available at <http://www.info.gov.za/view/DownloadFileAction?id=70757> (Accessed on 9 September 2010).

obligation on the parents to support the child in all cases. This duty to support the child becomes essential if one of the parents is unable to provide the appropriate standard of living for the child when the parent is suffering from HIV/AIDS.

The preamble to the Act acknowledges the high priority given to the rights of children, to their survival and to their protection and development, as evidenced by its signing of the World Declaration on the Survival, Protection and Development of Children, in New York on 30 September 1990, and its accession on 16 June 1995 to the Convention on the Rights of the Child, signed in New York on 20 November 1989.

Of specific importance to children is section 15, which sets out the duty of parents to support their children. It shows that the duty extends to such support as a child reasonably requires for his or her proper living and upbringing. It includes the provision of food, clothing, accommodation, medical care and education.<sup>236</sup> It sets out the penalty for non-maintenance and the procedure to be followed to claim maintenance by the aggrieved parent.

The relevance of this Act to children affected by HIV/AIDS lies in the fact that both parents should share the responsibility of supporting the child. When one of the parents infected by HIV gets sick, or dies from the disease, there is a duty on the other parent to support the child, both financially and emotionally. This duty exists irrespective of whether a child is born in or out of wedlock, or is born of a first or subsequent marriage. Failure to do so by one of the parents implies a breach of the Act.

### **5.1.3.3 The right to equality and freedom from HIV/AIDS-related discrimination**

Some of the important legislation and policies which address the right of children affected by HIV/AIDS will be disrobed.

#### **ix. The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000<sup>237</sup>**

This Act does not provide specifically for HIV/AIDS or children. Nonetheless, it addresses the principles of equality and non-discrimination described in the Constitution and can be applied in the

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<sup>236</sup> Section 15 (1-3) of the Maintenance Act.

<sup>237</sup> Government of South Africa *The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000* available at [http://www.chr.up.ac.za/chr\\_old/indigenous/documents/South%20Africa/Legislation/Promotion%20of%20Equality.pdf](http://www.chr.up.ac.za/chr_old/indigenous/documents/South%20Africa/Legislation/Promotion%20of%20Equality.pdf) (Accessed on 30 January 2010). This Act has been amended by The Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002, Judicial Matters Second Amendment Act 55 of 2003, Judicial Matters Second Amendment Act 22 of 2005 and Judicial Matters Second Amendment Act 66 of 2008.

protection of children affected by HIV/AIDS on the basis that the protection from discrimination is on unlisted ground, as indicated in the case of *Hoffmann v South African Airways*.<sup>238</sup> The Act was promulgated to give effect to section 9 of the Constitution. It endeavours to facilitate the transition to a democratic society, united in its diversity and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.<sup>239</sup>

This Act is crucial in protecting the rights of all people, including children affected by HIV/AIDS. The link which the Act has to the equality and discrimination clause in the Constitution cannot be overlooked. It addresses many of the factors that predispose people to discrimination.

Section 34 discusses the directive principle on HIV/AIDS, nationality, socio-economic status, family responsibility and status. It acknowledges the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status. It recommends that special consideration must be given to the inclusion of these grounds in the definition of “prohibited grounds.”

In addition to the available legislation on the freedom from discrimination, there are policies which exist to ensure that children affected by HIV/AIDS are not unfairly discriminated against.

#### x. **National Strategic Plan for HIV and AIDS, STIs and TB, 2012-2016 (NSP)**<sup>240</sup>

The NSP was drawn up by the South African National AIDS Council (SANAC). This is the current plan for the prevention and treatment of HIV/AIDS in South Africa.

The current NSP describes the national response to HIV/AIDS until 2016. There are 4 pillars which form the basis of the plan. These are:

- Addressing social and structural barriers to HIV, STI and TB prevention, care and impact
- Preventing new HIV, STI and TB infections
- Sustaining health and wellness

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<sup>238</sup> See the case of *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000), where the definition of unfair discrimination was established and the court stated in paragraph 28 that – “in view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity.”

<sup>239</sup> This purpose and object of the Act indicate the link which the Act has to the Constitution. See note 14.

<sup>240</sup> Government of South Africa *NSP 2012-2016*, available at [http://www.sanac.org.za/files/uploaded/519\\_NSP%20Draft%20Zero%20110808%20pdf%20%20final.pdf](http://www.sanac.org.za/files/uploaded/519_NSP%20Draft%20Zero%20110808%20pdf%20%20final.pdf) (Accessed on 2 February 2012).

- Increasing the protection of human rights and improving access to justice.

Although the plan was not developed specifically for the protection of children, it contains some provisions which deal with children affected by HIV/AIDS. The NSP lists the mitigation of the impact of HIV, STIs and TB on OVCs and youths as one of the sub-strategies of its plan.<sup>241</sup> The reduction of the transmission of HIV from mother to child to less than 2% at six weeks after birth and less than 5% at 18 months of age, by 2016 is another sub-strategy.<sup>242</sup> On its strategic objective 3, the NSP addresses the improvement of access to treatment for children, adolescents and youth as a means of reducing disability and death resulting from HIV and TB.<sup>243</sup>

While addressing the populations at which the NSP interventions should be targeted,<sup>244</sup> the NSP acknowledges that young women between the ages of 15 and 24, the OVCs and youth, are key populations for whom specific interventions will be implemented as primary prevention for HIV. as well as to mitigate impact and to break the cycle of on-going vulnerability and infection.<sup>245</sup>

Apart from the direct commitment to reversing the HIV and TB epidemics, the NSP suggests government-led initiatives, such as dealing more comprehensively with OVCs, as one of the government-led initiatives that will contribute to the achievement of the NSP goals.<sup>246</sup> It also proposes that the Department of Social Development strengthens its programmes targeting this group with interventions which promote the concept of family.<sup>247</sup>

The NSP also expresses the need for “implementing interventions to address gender inequities and gender-based violence as drivers of HIV and STIs”<sup>248</sup> and submits that girls and women are particularly vulnerable to HIV infection because of their biological vulnerability and gender norms, roles and practices. It promotes the use of education as a means of “reducing the vulnerability of young people to HIV infection by retaining them in schools, as well as providing post-school education and work opportunities.”<sup>249</sup> Most importantly, the NSP states the role of children in mitigating the impact of HIV and TB on OVC and youths<sup>250</sup>

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<sup>241</sup> Sub-strategy 4 of the NSP

<sup>242</sup> See page 15 of the NSP.

<sup>243</sup> See page 16 of the NSP.

<sup>244</sup> See page 25 of the NSP.

<sup>245</sup> See page 26 of the NSP.

<sup>246</sup> See page 32 of the NSP.

<sup>247</sup> Ibid.

<sup>248</sup> See Sub-Objective 1.3 of the NSP.

<sup>249</sup> See Sub-objective 1.4 of the NSP.

<sup>250</sup> Ibid.

The conspicuous involvement of children in the focus of the NSP on the protection of human rights is noteworthy.<sup>251</sup> The “NSP explicitly provided for the promotion and protection of human rights and attempts to create benchmarks for compliance with human rights standards and the reduction of stigma.”<sup>252</sup>

#### **5.1.3.4 The right to care and access to social services for children affected by HIV/AIDS**

The right to family protection and care is extensively protected in the Constitution,<sup>253</sup> as well as in the Children’s Act.<sup>254</sup> However, the right is also addressed in laws and policy documents.

##### **i. The Social Assistance Act No. 13 of 2004<sup>255</sup>**

This legislation does not deal specifically with children affected by HIV/AIDS but it contains sections that are crucial to the protection of the rights of children affected by HIV/AIDS in South Africa. It refers to the constitutional provision dealing with citizens’ rights to access social security, if they are unable to support themselves and their dependants. It places an obligation on the state to provide appropriate social assistance, and to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.<sup>256</sup> It should be noted that the provision of social security is one of the ESCR in the Constitution that are subject to progressive realisation. The government is thus bound to provide the grant within its available resources.

Section 2 of the Act obligates the Minister of Social Development (subject to the provisions of this Act, and with the concurrence of the Minister of Finance, to use money appropriated by the Provincial Legislature concerned, for that purpose, to make a child-support grant available to a primary care-giver of a child who is under the age of seven years or such higher age as the Minister may determine by notice in the Gazette.<sup>257</sup> In line with this, a number of social assistance grants are available for people who are eligible for them. These grants include cash grants for children such as

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<sup>251</sup> See Strategic Objective 4 of the NSP on ensuring protection of human rights and improving access to justice.

<sup>252</sup> See page 53 of the NSP.

<sup>253</sup> Section 28 (b) of the South African Constitution.

<sup>254</sup> The objects of the Children’s Act indicate the need for the protection of the right to family in line with the Constitution. See section 2 of the Children’s Act.

<sup>255</sup> Government of South Africa *Social Assistance Act No. 13 of 2004* available on <http://www.socdev.ecprov.gov.za/documentscentre/Acts/Social%20Assists%20Act%2059%20of%201992.pdf> (Accessed on 4 April 2010).

<sup>256</sup> See Section 27 of the South African Constitution (note 14).

<sup>257</sup> This provision has been amended by s. 3 of Act No. 106 of 1997.



the child support grant<sup>258</sup>, the foster child grant<sup>259</sup> and the care dependency grant.<sup>260</sup> The grants available for children have a number of advantages in relation to children affected by HIV/AIDS.<sup>261</sup> In addition to these grants is the disability grant, which is given to any person with a physical or mental disability which leaves him/her unfit to work for a period of longer than six months.<sup>262</sup> The grant is given to persons above 18 years of age and this grant is extended to persons who have been incapacitated by AIDS.<sup>263</sup>

Section 4 sets the conditions for a person's eligibility for a child-support grant. It states that the grant will be available to any person who is the primary care-giver of a child, who is resident in South Africa at the time of the application for the grant in question; who is a South African citizen and who complies with the prescribed conditions.<sup>264</sup> The recognition of the head of a child-headed household comes into play with respect to access to social assistance.<sup>265</sup>

This Act is in furtherance of section 27 of the South African Constitution and the provision of child support grants to care-givers will assist the care-givers to take better care of the children. This is vital for children (especially those who are infected by HIV and OVCSs), as they have many needs which might be burdensome to the care-givers.

In addition to the legislation, a number of policies are in place to ensure that children affected by HIV/AIDS have access to social assistance which is crucial for their well-being.

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<sup>258</sup> The aim of the child support grant is to support families in caring for the children. The grant is made available to a primary care-giver – parent, grandparent of anyone who is responsible for caring for the child. The amount of the grant is R280 per month until the child turns 18. See Department of Social Development *Child Support Grant* available at [http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/childsupportgrant/en\\_ZA](http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/childsupportgrant/en_ZA) (Accessed on 23 July 2012).

<sup>259</sup> The foster care grant is made available to anyone who cares for a foster child. The amount of the grant is R770 per month until the child turns 18. See Department of Social Development *Foster Care Grant* available at [http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/fosterchildgrant/en\\_ZA](http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/fosterchildgrant/en_ZA) (Accessed on 23 July 2012).

<sup>260</sup> The care dependency grant is awarded to anyone who cares for a child who has a severe disability and is in need of full-time and special care. The amount of the grant is R1200 per month till the child turns 18. See Department of Social Development *Care Dependency Grant*, available at [http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/caredependencygrant/en\\_ZA](http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/caredependencygrant/en_ZA) (Accessed on 23 July 2012).

<sup>261</sup> Further comments on these grants are discussed in chapter 7.

<sup>262</sup> The disability grant – the amount is R1260 per month.

See Department of Social Development *Disability Grant*, available at [http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/disabilitygrant/en\\_ZA](http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/disabilitygrant/en_ZA) (Accessed on 23 July 2012).

<sup>263</sup> PLWHA have accessed disability grants once they have fulfilled the criteria set down by the Department of Social Development.

<sup>264</sup> Ibid.

<sup>265</sup> See section 5.1.2.2. (v) of the Social Assistance Act for discussion on recognition of the head of a child-headed households as a care-giver.

## **i. National Guidelines for Statutory Services to Child-Headed Households (2010)<sup>266</sup>**

This is a child-specific instrument targeted at the protection of children affected by HIV/AIDS.

The aims of these Guidelines are:

- to provide an understanding of the legal rights of children in child-headed households and to highlight the state's responsibilities and obligations towards such children, as dictated by the international and national instruments, including the Constitution of South Africa, Act No. 108 of 1996, and other relevant legislation and policies;
- to provide a broad picture and overview of the needs of children in child-headed households;
- to identify services, resources and safety nets available for children living in child-headed households;
- to provide guidance to social workers in rendering statutory services to child-headed households;
- to assist in developing and implementing the Strategic Plan of the Department.

These Guidelines are important in the protection of children affected by HIV/AIDS because they ensure that the family, which is a safety net for the children, is not broken and this is crucial for orphans. They ensure that the children living in child-headed households are given adequate protection when they are recognised as a family unit. The guidelines also ensure that they are monitored and are also able to access social services including social assistance which they are entitled to according to section 28 of the Constitution.

## **ii. Policy Framework for Orphans and Other Children Made Vulnerable by HIV/AIDS in South Africa (2005)<sup>267</sup>**

This is a child-specific instrument, targeted at the protection of children affected by HIV/AIDS. The foreword to the Policy Framework expresses the intention of the Framework to protect the rights of orphans and other children made vulnerable by HIV/AIDS. This is its cornerstone.

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<sup>266</sup> See Department of Social Development *The National Guidelines for Statutory Services to Child-Headed Households* available at [http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=147&Itemid=39](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=147&Itemid=39) (Accessed on 23 April 2012).

<sup>267</sup> Department of Social Development *Policy Framework for Orphans and Other Children Made Vulnerable by HIV/AIDS in South Africa (2005)* available at [http://www.dsd.gov.za/Nacca1/index2.php?option=com\\_docman&task=doc\\_view&gid=215&Itemid=39](http://www.dsd.gov.za/Nacca1/index2.php?option=com_docman&task=doc_view&gid=215&Itemid=39) (Accessed on 4 May 2010).

The main goals of the Policy Framework are the “realisation of the rights of orphans and other children made vulnerable by HIV/AIDS and the vigorous advancement of the social development agenda to restore their dignity and well-being.”<sup>268</sup>

The six key strategies, which assist in developing comprehensive, integrated and quality responses for orphans and other vulnerable children at programmatic level, are listed.<sup>269</sup> It also lists all the rights of children that are affected by the HIV/AIDS epidemic.

This Policy Framework is an important instrument in the protection of children affected by HIV/AIDS. It contains extensive provisions concerning the protection of the rights of all children made vulnerable by HIV/AIDS. This will have across-the-board consequences on the children it seeks to protect and will ensure that the effects of HIV/AIDS on these rights are minimal.

### **iii. National Guidelines for Social Services to Children Infected and Affected by HIV/AIDS (2001)**<sup>270</sup>

This instrument sets out the guidelines for the provision of social services, including home/community-based care and support programmes to assist children, families and communities who are affected by HIV/AIDS.

The objectives of the National Guidelines take the needs of children into account in the provision of social services and they highlight the role of the family in the care of orphans, by seeking to (among others,) identify family, community, cultural strengths and resources, as well as weaknesses, to help themselves through prevention programmes, counselling and support to those who have been traumatised. They emphasise the role of the family in assisting children, families, communities and provinces to identify the most vulnerable people, in order to help prioritise resources and to protect family life and support families, communities and other stakeholders to identify and implement strategies to promote children’s well-being.

These National Guidelines exist to guide social workers and other people working with children with the necessary information on how to deal with the social needs of children and families affected by HIV/AIDS so as to ensure that the children get optimum care and assistance even within the family.

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<sup>268</sup> See the Foreword to the Policy Framework for Orphans and Other Children Made Vulnerable by HIV/AIDS in South Africa issued by Dr ZST Skweyiya.

<sup>269</sup> See the *Executive Summary of the Policy Framework for Orphans and Other Children Made Vulnerable by HIV/AIDS in South Africa* (note 161).

<sup>270</sup> Department of Social Development *National Guidelines for Social Services to Children Infected and Affected by HIV/AIDS (2001)*, available at <http://www.doh.gov.za/docs/guidelines-f.html> (Accessed on 21 April 2010).

### **5.1.3.5 Protecting vulnerable groups, including children, from crimes which expose them to the risk of HIV infection**

South Africa recognises the fact that children are exposed to violence and crimes against them. In this regard, legislation and policies have been put in place to ensure that children are protected from the violence and that crimes against them are prevented.

#### **i. Criminal Law (Sexual Offences And Related Matters) Amendment Act No 32 of 2007 (Sexual Offences Act)<sup>271</sup>**

This not a child-specific Act, but the Act was made to enact comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled.

The preamble to the Act acknowledges that children are a vulnerable group who are more likely to become victims of sexual offences and that they require the protection of the law. It also links the need for the protection of children from all forms of violence including sexual offences to the protection of their rights as contained in the Bill of Rights in the Constitution

The objects of the Act state the need for the criminalisation of sexual abuse and exploitation. In addition, it exists to protect complainants of sexual offences and their families from secondary victimisation and trauma.<sup>272</sup>

Of importance to this thesis is chapter 3 of the Act which deals with sexual offences against children, and chapter 5, which provides for the services for victims of sexual offences and compulsory HIV testing of alleged sex offenders. The Sexual Offences Act is a far-reaching instrument in the protection of people from many sexual offences which can lead to HIV infection. Chapter 3 of the Act also has the potential for preventing the criminal transmission of HIV/AIDS to children who are, in many cases, victims of sexual abuse which exposes them to the risk of infection with HIV.

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<sup>271</sup> Government of South Africa *Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007* available at <http://www.info.gov.za/view/DownloadFileAction?id=77866> This Act amends the Sexual Offences Act 23 of 1957. The Act came into effect on the 16th of December 2007. Section 72 of the Act provides for the implementation of Chapters 1 to 4 and 7, which mainly deal with the creation of statutory sexual offences, special protection measures for children and persons who are mentally disabled. See Government of South Africa *The New Sexual Offences Act* available at [http://www.justice.gov.za/docs/InfoSheets/2008%2002%20SXOactInsert\\_web.pdf](http://www.justice.gov.za/docs/InfoSheets/2008%2002%20SXOactInsert_web.pdf) (Accessed on 4 May 2010).

<sup>272</sup> See the Objects contained in section 2 of the Sexual Offences Act.

One of the advantages of the Act for children is the creation of a National Register for Sex Offenders in chapter 5 of the Act. This register establishes a record of persons who are or have been convicted of sexual offences against children and persons who are mentally disabled.

The provision of post-exposure-prophylactic ARV (PEP) for victims of sexual abuse is also laudable. In terms of the Act, a victim may receive PEP for HIV infection at a public health establishment within 72 hours of the alleged sexual offence. The victim is also entitled to education about the importance of obtaining PEP for HIV infection within 72 hours of the alleged sexual offence taking place; the need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections; and other services provided to victims of sexual abuse. Section 30<sup>273</sup> addresses the issue of compulsory testing of sexual offenders for HIV<sup>274</sup> and section 34 deals with the use of the results of the HIV test.

Section 57 of the Act addresses the inability of children under 12 years, and persons who are mentally disabled to consent to sexual acts. This restates the age of sexual consent to 12 years in line with the Children's Act.

The Sexual Offences Act is comprehensive and far-reaching. It eliminates the differentiation drawn between the age of consent for different consensual sexual acts and provides for the prosecution and adjudication of consensual sexual acts between children older than 12 years, but younger than 16 years.<sup>275</sup>

## **ii. The Domestic Violence Act No of 1998<sup>276</sup>**

This Act is important for the protection of children affected by HIV/AIDS, as domestic violence is one of the ills which children affected by HIV/AIDS are subjected to.<sup>277</sup>

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<sup>273</sup> Section 31 of the Sexual Offences Act states the conditions to be considered by a magistrate for the issuance of an application for an order for an HIV test.

<sup>274</sup> Section 32 of the Sexual Offences Act.

<sup>275</sup> Further comments on this are contained in section 7.1.5 (iii) of chapter 7.

<sup>276</sup> The Government of South Africa *Domestic Violence Act* (1998) available at [www.info.gov.za/view/DownloadFileAction?id=70651](http://www.info.gov.za/view/DownloadFileAction?id=70651) (Accessed on 15 February 2010).

<sup>277</sup> HIV/AIDS and the rights of the child. Children may be exposed to various forms of violence and abuse which may increase the risk of their becoming HIV-infected, and may also be subjected to violence as a result of their being infected or affected by HIV/AIDS. General Comment NO.3 (2003) issued by the UN Committee on the Rights of the Child at its 32<sup>nd</sup> session 13-31 January 2003. Paragraph 37.

The preamble to the Act recognises the social ills which domestic violence presents to the victims and it has recourse to the Constitution and other international standards for the prevention of domestic violence.<sup>278</sup>

The Act compels members of the South African Police Service to render assistance to the complainant, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;<sup>279</sup> at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported.

An important provision of the Act includes the ability of the child to approach the court for a protection order without adult assistance and the removal of the perpetrator, rather than the victim, from the family. This is far-reaching and very important, as it will help preserve the child's right to a family environment in cases where the perpetrator of the violence is a close family member or the primary care-giver. Children orphaned by HIV/AIDS and who have been placed in foster care by family members will be protected if they are subjected to domestic violence at the hands of their foster parents,. The Act provides that the court can go as far as issuing an order for the removal of the perpetrator from the family, thus ensuring that the children are still able to enjoy the comfort of the family.

The fact that the Act recognises that children are victims of domestic violence, the different forms which domestic violence takes and that the acts of domestic violence may be committed in a wide range of domestic relationships are very important aspects of the Act, and are significant in protecting children affected by HIV/AIDS.

### **iii. Marriage Act 25 of 1961<sup>280</sup>**

The Marriage Act provides that a person under the age of majority (which has been reduced from 21 to 18 by the Children's Act<sup>281</sup> cannot marry without the consent of his or her parents or legal

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<sup>278</sup> The preamble to the Domestic Violence Act of 1998 stipulates that - Domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships: and that the remedies currently available to the victims of domestic violence have proved to be ineffective: having regard to the Constitution of South Africa and in particular, the right to equality and to freedom and security of the person: and the international commitments and obligations of the state towards ending violence against women and children, including obligations under the UN Conventions on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the CRC.

<sup>279</sup> See section 2(a) of the Act.

<sup>280</sup> Government of South Africa *Marriage Act 25 of 1961*, available at [http://www.justice.gov.za/salrc/reports/r\\_prj109\\_marr\\_2001may.pdf](http://www.justice.gov.za/salrc/reports/r_prj109_marr_2001may.pdf) (Accessed on 23 January 2012).

guardian. If there are no parents or guardian or, for some reason, they cannot give consent, a magistrate (acting as a commissioner of child welfare) may grant consent. If the parent, guardian or magistrate refuses consent, a judge of the High Court may grant consent if it is in the interests of the minor. The Act regulates the conditions for marriage and sets the penalty for the contravention of any of the sections of the Act.

Setting a minimum age for marriage will protect under-age children from child-marriage and allowing them to make informed choices that will safeguard them from risky behaviour disguised as marriage, which will predispose them to HIV infection.<sup>282</sup> It will deter perpetrators from engaging in under-age marriages.

### 5.1.3.6 Protecting the right to education

Legislation and policies are in place to ensure that children affected by HIV/AIDS enjoy their right to education.

#### i. The South African Schools Act No. 84 of 1996<sup>283</sup>

The purpose of the Act is to provide a uniform system for the organisation, governance and funding of schools. In providing uniform governance, all schools are to comply with the national regulation regarding organisation and funding. Despite the fact that this Act does not deal with HIV/AIDS in schools, its relevance to the right of children affected by HIV/AIDS to education cannot be overlooked. It specifies the parental<sup>284</sup> obligation to pay school fees and lays down the procedure to be followed by parents who cannot afford to pay their children's fees.

It provides for learners to be exempted from the payment of school fees under certain conditions.<sup>285</sup> It states that a parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act<sup>286</sup> One of the most important features of this Act is that it makes school attendance compulsory for learners between

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<sup>281</sup> Section 12 of the Marriage Act.

<sup>282</sup> SC Grover, 'Young People's Human Rights and the Politics of Voting Age' (2011) 6 *Ius Gentium: Comparative Perspectives on Law and Justice* 147.

<sup>283</sup> Government of South Africa *The South African Schools Act No. 84 of 1996* available at <http://www.cindi.org.za/files/Policy-Framework-for-OVC-Final.pdf> Accessed on 23 January 2012).

<sup>284</sup> According to the Act, a "parent" means the parent or guardian of a learner; b) the person legally entitled to custody of a learner; or c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school.

<sup>285</sup> Section 40 of the South African Schools Act.

<sup>286</sup> *Ibid.*

the ages of 7 and 15 years. This provision upholds the right to education since children affected by HIV/AIDS sometimes have to take up adult roles which affect their education. The legislation makes education compulsory and all children are compelled to be at school.<sup>287</sup> However, the Act allows for the exemption of learners from compulsory school attendance if it is in the interests of the learner.<sup>288</sup> Sick children may be exempted from compulsory school attendance if it is in the best interests of the child.

ii. **National Education Policy Act No 27 of 1996**<sup>289</sup>

This instrument regulates the nation's educational institutions. It does not deal specifically with children or HIV/AIDS but it contains provisions that can be evoked in protecting the rights of children affected by HIV/AIDS. Section 4 is applicable to the protection of children affected by HIV/AIDS. It provides that the government shall make policies directed towards the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 2 of the Constitution, and in terms of international conventions ratified by Parliament.

The above provision deals with issues relating to the rights of persons within the educational institutions. It contains a clause protecting every person from unfair discrimination on any ground, whatsoever. Other necessary rights that are related to access to education make it relevant in the protection of children affected by HIV/AIDS.<sup>290</sup> The HIV in Schools Policy was issued in terms of this Act.<sup>291</sup>

In addition to the available legislation, there are policies which regulate the protection of the right to education for children affected by HIV/AIDS in South Africa.

iii. **National Policy on HIV/AIDS For Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions (10 August 1999 Volume 410 Number 20372)**<sup>292</sup>

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<sup>287</sup> The South African Schools Act provides in s 4(1) that a head of department may exempt a learner entirely, partially or conditionally from compulsory school attendance if it is in the "best interests of the learner"

<sup>288</sup> Chapter 2 section 3 of the South African Schools Act deals with issues of compulsory school attendance while section 4 deals with the exemption of a learner from the compulsory school attendance rule.

<sup>289</sup> Government of South Africa *National Education Policy Act no 27 of 1996* available at [www.info.gov.za/acts/1996/a27-96.pdf](http://www.info.gov.za/acts/1996/a27-96.pdf) (Accessed on 8 September 2011).

<sup>290</sup> See section 9 of the Act. National Education Policy Act, 1996 (Act No. 27 Of 1996) Admission Policy For Ordinary Public Schools available at <http://www.education.gov.za/DocumentsLibrary/Policies/tabid/390/Default.aspx>

<sup>291</sup> This Policy is discussed later in this chapter.

<sup>292</sup> Government of South Africa *National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions* (1999) [http://www.chr.up.ac.za/undp/domestic/docs/policies\\_05.pdf](http://www.chr.up.ac.za/undp/domestic/docs/policies_05.pdf) (Accessed on 10 May 2010).



This policy sets out the basic directives, in keeping with international standards and in accordance with education law, and the constitutional guarantees of the right to a basic education, the right not to be unfairly discriminated against, the right to life and bodily integrity, the right to privacy, the right to a safe environment and the best interests of the child.<sup>293</sup> The purpose and the salient features of the policy contain standards aimed at prohibiting HIV/AIDS-related stigma, discrimination and other issues.<sup>294</sup>

This instrument sets out the necessary standards to guarantee the rights of students and educators in the HIV/AIDS epidemic. It aims to ensure that people within the educational institution are able to understand the epidemic, live in harmony with people that are infected and affected by it, to reduce stigma and equip people to protect themselves from infection in a non-discriminatory manner.<sup>295</sup>

The prohibition against unfair discrimination in schools would apply vertically in respect of public schools<sup>296</sup> (as organs of state) and horizontally in respect of independent schools (as juristic persons). Independent schools will therefore not be allowed to unfairly discriminate against learners.<sup>297</sup>

The Policy is important, as children with HIV/AIDS should lead as full a life as possible and should not be denied the opportunity to receive an education to the maximum of their ability. Their infection does not expose others to significant risks within the school environment. However, if it is ascertained that an infected learner poses a "medically recognised significant health risk" to others owing to secondary infections or behaviour which may give rise to HIV transmission, appropriate measures may be taken to protect the other children.<sup>298</sup>

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<sup>293</sup> Ibid.

<sup>294</sup> See section 4 of the National Policy on HIV/AIDS for Learners and Educators.

<sup>295</sup> Although this Policy deals with a number of other issues, the main issues which this section addresses are the right to education, and provisions of the freedom from HIV/AIDS related discrimination in furtherance of the right to education.

<sup>296</sup> Public schools are *inter alia* defined as schools that are funded by the provincial legislatures, and include ordinary public schools and public schools for learners with special education needs (sec 1(xviii) and Chapter 3 of the Schools Act). See *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B) 235-246 in which Friedman JP held universities to be organs of state as they were institutions established by statute and under the control of the Minister of Education. The same arguments could apply to public schools which are funded by the state (sec 34(1) of the Schools Act). These arguments may possibly even apply to independent schools which are registered by the Head of an Education Department (ibid in section 46) and which may receive subsidies from the state

<sup>297</sup> South African Law Commission *SLCR Project 85 Third Interim Report on Aspects of the Law Relating to Aids HIV/AIDS and Discrimination in Schools* (1998) 4, available at

[http://www.justice.gov.za/salrc/reports/r\\_prj85\\_hivschools\\_1998aug.pdf](http://www.justice.gov.za/salrc/reports/r_prj85_hivschools_1998aug.pdf) (Accessed on 9 September 2011).

<sup>298</sup> Ibid at 38.

### 5.1.3.7 Protecting the rights of employees

This framework is relevant for children between the ages of 15 and 18 years, as well as employed caregivers and household heads, ensuring that they cannot be discriminated against on the basis of their HIV/AIDS status.

#### i. Employment Equity Act No 55 of 1998<sup>299</sup>

The purpose of this Act is to achieve equity in the workplace, by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination.<sup>300</sup> Section 5 contains provisions aimed at eliminating unfair discrimination in any employment policy or practice.” It prohibits unfair discrimination directly or indirectly against any employee in any employment policy or practice, on one or more of some listed grounds, which include HIV/AIDS.<sup>301</sup> The objective of this Act to establish equal opportunity and fair treatment in employment through the elimination of unfair discrimination is crucial in the face of the HIV/AIDS epidemic.

Section 7 prohibits the testing of an employee to determine that employee’s HIV status, unless such testing is determined to be justifiable by the Labour Court in terms of section 50 (4) of the Act. In terms of the Act, HIV testing is specifically prohibited unless it is declared justifiable by the Labour Court.<sup>302</sup> This is similar to the principle that was upheld in the case of *Hoffmann v South African Airways*,<sup>303</sup> where it was stated that the reasons for testing employees and potential employees for any medical condition are, in general:<sup>304</sup>

- to see whether they are fit for the inherent requirements of the job;
- to protect them from hazards inherent in the job;
- to protect others (clients, third parties, etc.) from hazards;
- to promote and maintain the health of employees.

### 5.1.3.8 Protecting the right to property or inheritance

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<sup>299</sup> Government of South Africa *Employment Equity Act of No 55 of 1998*, available at [www.agsa.co.za/Portals/1/ACTS/EEA.pdf](http://www.agsa.co.za/Portals/1/ACTS/EEA.pdf) (Accessed on 9 September 2011).

<sup>300</sup> Section 2 of the Employment Equity Act

<sup>301</sup> Section 6 Employment Equity Act, this includes race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth.

<sup>302</sup> S Bendix *Industrial relations in South Africa* (2010) 145.

<sup>303</sup> In this case, it was stated that “the question of testing in order to determine suitability for employment is a matter that is now governed by section 7(2), read with section 50(4), of the Employment Equity Act.”

<sup>304</sup> See paragraph 14 of the *Hoffmann Case* (note 137 above).

The relevance of this framework is to ensure that the rights of children who have lost their parents to HIV/AIDS have their properties and inheritance safeguarded from family members and other adults who might want to deprive them of their inheritance through property grabbing.

#### **iv. Administration of Estates Act, 1965 (Act No. 66 of 1965)<sup>305</sup>**

The purpose of the Administration of Estates Act is to regulate the distribution of the property of minors and persons under curatorship. It provides for the rights of beneficiaries of the will.

The Act regulates the procedure for the administration of the estate of a minor by the natural guardian of a child. It sets out the fiduciary duty on the natural guardian and maintains that the natural guardian of a minor shall be entitled to receive any movable property to which the minor is entitled. It sets out the conditions for the payment of money to the natural guardian of the child on behalf of the child.<sup>306</sup> It provides for the liability of an executor who without good cause contravenes the fiduciary role which they are to perform.<sup>307</sup>

The fact that the Act protects the inheritance of all children and recognises rights of surviving spouses to the deceased's estate will go a long way in ensuring that the socio-economic well-being of HIV/AIDS orphans is not put at risk. In fact, this Act will override any provision of customary law which discriminates against spouses and female children and will protect the inheritance of all children where the customary laws provide otherwise.

#### **5.4 Other instruments which deal with the protection of children affected by HIV/AIDS**

In addition to the legislation listed above, other legislation is crucial to the well-being of children affected by HIV/AIDS.

##### **i. Refugees Act 130 of 1998<sup>308</sup>**

According to section 27 of the Act, refugee children are entitled to the protection of their rights in line with Chapter 2 of the Constitution. This includes the right to remain in the Republic in accordance with the provisions of this Act, the right not to be discriminated against on the basis of

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<sup>305</sup> Government of South Africa *Administration of Estates Act 1965* available at <http://www.justice.gov.za/legislation/acts/1965-066%20admin%20estates.pdf> (Accessed on 30 January 2012).

<sup>306</sup> Section 43 and 44 of the Administration of Estates Act.

<sup>307</sup> Section 46 of the Administration of Estates Act.

<sup>308</sup> Government of South Africa *Refugees Act 130 of 1998* <http://www.info.gov.za/view/DownloadFileAction?id=70666> (Accessed on 13 May 2010).

nationality and entitlement to the same basic health services and basic primary education which ordinary South Africans receive.<sup>309</sup> The fact that the child extends the enjoyment of the rights awarded to all persons, as spelt out in the Bill of Rights is comprehensive as it will ensure the protection of the rights of all children, whether they qualify as refugees or not.

**ii. The National Youth Policy (1997)<sup>310</sup>**

This is not an HIV/AIDS-specific instrument; but is directed toward young males and females aged from 14 to 35 years. The Policy acknowledges that young people in this age group require social, economic and political support to realise their full potential.

The Policy acknowledges a number of UN instruments on the rights of youths and agreed to work towards achievement of the purposes and principles of the Charter of the UN, which enable young men and women to enjoy full participation in the life of society.

The policy stipulates that it recognises the work of the Commonwealth in the support of national youth policies and highlights a number of key principles which will help to promote the health and well-being of the young people, especially those living with HIV/AIDS. These values include redressing imbalances, promoting a gender-inclusive approach, promoting of young people's participation in democratic processes, promoting youth development services, mainstreaming youth issues, encouraging responsiveness, cultural and spiritual diversity, sustainable development, transparency and accessibility, and promoting a rural emphasis. Addressing these issues and conforming to the international standards on the protection of youth well-being<sup>311</sup> will promote the health of these youths by protecting them “from disease and addiction” It will keep them “free from all types of violence; respect human rights and fundamental freedoms of all youths, without distinction as to race, sex, language, religion or any other forms of discrimination; enable their participation in decision-making processes; improve the living standards of young people in both rural and urban areas.”<sup>312</sup> All these will ensure the protection of the youths from communicable diseases and ultimately build their capacity and ability to protect themselves from HIV/AIDS and other preventable diseases.

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<sup>309</sup> CRIN (note 115).

<sup>310</sup> Government of South Africa *The National Youth Policy (1997)* available at <http://www.polity.org.za/polity/govdocs/policy/intro.html> (Accessed on 313 May 2010).

<sup>311</sup> These are all listed in paragraph 2.6 of the Youth Charter.

<sup>312</sup> Ibid.

The vision of the National Youth Policy will ensure “future for all young women and men in South Africa which is free from racial and gender discrimination, in promoting a democratic, united, peaceful and prosperous society where young women and men can enjoy a full and abundant life, enabling them to become active participants in activities which fulfil their potential, hopes, dreams and ambitions and are able to participate fully in economic, social, cultural and spiritual life”. This will ultimately work towards ensuring that the young people are empowered to protect themselves from all hazards, including the spread of sexually transmissible diseases, including HIV/AIDS.

## **5.5 Conclusion**

South Africa has an extensive legislative and policy framework for responding to HIV/AIDS. These have the potential of improving the lives of children affected by HIV/AIDS in South Africa, if they are appropriately implemented. This chapter mainly documents the position of the legal and policy framework on the protection of the rights of children affected by HIV/AIDS. The extent of the applicability of these instruments to children’s needs will be critically analysed later in the thesis to reveal the position of children affected by HIV/AIDS under the laws.

It is clear that the Children’s Act, which is the main document for the protection of the rights of children, provides extensive protection to all children in South Africa. It is a very useful document, even in the cases of those affected by HIV/AIDS. The fact that it employs a child-centred approach makes it significant in this regard. The Children’s Act places great weight on the principle of the best interests of the child and this is evident in all the provisions that are relevant to HIV/AIDS in the Act.

South African frameworks have succeeded in incorporating HIV/AIDS into most laws that are relevant to the protection of children and a number of different laws now protect children from discrimination on the grounds of HIV/AIDS. This is crucial to curb related stigma and discrimination in schools and public places. There is still room, however, to test the extent to which the frameworks safeguard the rights of children affected by HIV/AIDS as set out in international standards on the rights of children.<sup>313</sup>

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<sup>313</sup> This is addressed in Chapter 7 of this thesis.

## Chapter 6 Legislative and policy framework for responding to children affected by HIV/AIDS in Botswana<sup>1</sup>

### 6.0 Introduction

The legal regime in Botswana recognises the need to protect the rights of all children especially children who have been made vulnerable by the HIV/AIDS epidemic.<sup>2</sup> This is very important in Botswana considering that the last national census held in 2001 revealed that 44% of the population was under the age of 18 years<sup>3</sup> and the HIV epidemic had caused an increase in the number of OVC<sup>4</sup> beyond levels which the country had ever seen before.<sup>5</sup>

To appreciate the evolution of the legal response to HIV/AIDS in Botswana, it is useful to understand the attitude of states towards the virus from when it was first discovered in the early 1980s. First, there was the initial shock, denial, blame and punishment.<sup>6</sup> However, Botswana was one of the few African states that quickly faced up to the existence of the virus within its midst and immediately started taking serious measures to control it.<sup>7</sup> In fact “over the last two decades Botswana has taken several important steps to mount a large-scale cohesive National Response to HIV/AIDS. The National Response came into being in 1987 as the then National AIDS Control Programme (NACP), under the Ministry of Health.”<sup>8</sup> The second stage involved engagement and mobilisation to find a cure for the disease, as well as to control its spread, while the third stage has been characterised by a mixture of determination, complacency, injustice and unfulfilled expectations.<sup>9</sup>

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<sup>1</sup> This chapter discussed only the version of the legislation and policies that were available at the time this research is being conducted. A few of the legislation and policies were under consideration for amendment but this fact was not taken into consideration due to the time constraint.

<sup>2</sup> The dedication of Botswana to the protection of children is obvious from the attention which the country pays to the rights of children and the recent enactment of the Children’s Act.

<sup>3</sup> Government of Botswana *Botswana Country report to the UN Human Rights Council* (2008)1A/HRC/WG.6/3/BWA/1.

<sup>4</sup> Government of Botswana *2008 Statistics* cited in I B Feranil, W J Herstad & R Mbuya-Brown *Assessing Implementation of Botswana’s Programme for Orphans and Vulnerable Children* (2010).

<sup>5</sup> In addition, Botswana was estimated to have the highest rate of orphaning in sub-Saharan Africa. In 2007, the National Situation Analysis on OVC in Botswana estimated the number of orphans at 137,805, constituting 17.2% of the number of children below 18 years. See note 3.

<sup>6</sup> C M Fombad *A critical Assessment of the Legal Responses to the HIV/AIDS Pandemic in Botswana* in The Organisation for Social Science Research in Eastern and Southern Africa (OSSREA) *HIV/AIDS, Vulnerable Groups, Human Rights and Development in Botswana* (2009) 56.

<sup>7</sup> C M Fombad (ibid).

<sup>8</sup> UNAIDS *Botswana National Aids Spending Assessment 2006 to 2008* available at [http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/report/2008/NASA\\_Botswana\\_2006-2008\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/report/2008/NASA_Botswana_2006-2008_en.pdf) (Accessed on 05 March 2013).

<sup>9</sup> C M Fombad & R Mupedziswa *HIV/AIDS, Vulnerable Groups, Human Rights and Development in Botswana* (2009) 56.

In addition to the enacted legislation to protect the rights of children affected by HIV/AIDS<sup>10</sup>, several policies have been developed to ensure that the rights of all children are protected.<sup>11</sup> This chapter examines the legal and policy frameworks to establish the extent to which they protect the rights of children affected by HIV/AIDS and ensure their access to the services available for their survival. It attempts a comprehensive discussion of the available legislation and policies and explores their application to the protection of children affected by HIV/AIDS.<sup>12</sup> A critique of these frameworks and the identification of key gaps are discussed in Chapter 7 where a comparative analysis of the extent of the protection in both countries is undertaken.

## 6.1 Provisions regulating the rights of children affected by HIV/AIDS in Botswana<sup>13</sup>

The determination on the part of the Government of Botswana is evidenced by the fact that it has committed itself to goal 5 of Botswana's National Strategic Framework for HIV/AIDS 2003- 2009, to "create a supportive, ethical, legal and human rights based environment conforming to international standards for the implementation of the national response." In so doing, the government has accepted the UNAIDS recommended human rights approach to dealing with the pandemic.<sup>14</sup> This approach requires that its legislative response to the pandemic should comply with certain human rights principles.<sup>15</sup>

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<sup>10</sup> See the discussions on the importance of the protection of children's rights in the context of HIV/AIDS in chapter 2.

<sup>11</sup> Before delving into the discussion of the legal framework, it is necessary to first discuss a number of terms which are crucial to the discussion of children affected by HIV/AIDS in Botswana. These terms include the definition of children and orphans. In Botswana, an orphan is defined as a child below 18 years who has lost one (single parents) or two (married couples) biological or adoptive parents.

According to the Social Welfare and Development Services (SWDS), the policy definition of a vulnerable child include- Street children; Child labourers; Children who are sexually exploited; Children who are neglected; Children with handicaps; Children in remote areas from indigenous minorities;

This is the definition of an orphan who can qualify for social benefits in Botswana. See R *Smart Policies for Orphans and Vulnerable Children A Framework for Moving Ahead Policy 2003* available at

[http://hivaidsclearinghouse.unesco.org/search/resources/OVC\\_Policies.pdf](http://hivaidsclearinghouse.unesco.org/search/resources/OVC_Policies.pdf) (Accessed on 21 February 2011).

<sup>12</sup> This chapter simply sets out the available legislation and policies as well as the extent to which they conform to the international standards on the rights of children affected by HIV/AIDS. The next chapter however gives the comprehensive critique of the legislation and policies bringing the gaps and strengths to the fore.

<sup>13</sup> The approach used in this section is to examine the Constitution of Botswana and the Children's Act and the extent to which their provisions can be applied to the protection of children affected by HIV/AIDS. The later part of the chapter further examines the various other legislation and policies to see how their provisions can be applied in the protection of the rights of children affected by HIV/AIDS.

<sup>14</sup> UNAIDS *HIV and the Law* available at

[http://www.unaids.org/en/PolicyAndPractice/HumanRights/20070618\\_HIV\\_Law.asp](http://www.unaids.org/en/PolicyAndPractice/HumanRights/20070618_HIV_Law.asp) (Accessed on 9 April 2013)

Inter-Parliamentary Union, UNAIDS and UNDP, *Taking Action against HIV: A handbook for parliamentarians (2007)* available at [http://data.unaids.org/pub/Manual/2007/20071128\\_ipu\\_handbook\\_en.pdf](http://data.unaids.org/pub/Manual/2007/20071128_ipu_handbook_en.pdf) (Accessed on 09 April 2013).

<sup>15</sup> Ibid.

Before delving into the discussion, it is crucial to point out that there is a lack of clarity on the definition of a child in Botswana. There are different definitions of a child under the legal and policy frameworks and the reason for this appears to be that the laws makers want the definitions to suit different purposes. For instance, the Constitution sets the age of maturity at 21. However, the Children's Act, defines a child as any person under the age of 14 years and a juvenile refers to a person who is 14 years but is still under the age of 18 years.<sup>16</sup>

This inconsistent approach is reflected in the reservation that Botswana entered into at the time of accession to the CRC regarding article 1 which deals with the definition of a child. The reservation states "The Government of the Republic of Botswana enters a reservation with regard to the provisions of article 1 of the Convention and does not consider itself bound by the same in-so-far as such may conflict with the Laws and Statutes of Botswana".<sup>17</sup>

Some of the laws which have been put in place to protect the rights of people affected by HIV/AIDS and which are applicable to the protection of children affected by HIV/AIDS will be discussed.

### **6.1.1 The Constitution of Botswana 1966<sup>18</sup>**

On 30 September 1966, the Bechuanaland Protectorate became the independent Republic of Botswana with Sir Seretse Khama as its first president. The Constitution of the Republic of Botswana came into effect on independence and provided for a republican form of government with three organs of state namely the legislature, the executive and the judiciary.<sup>19</sup> There is no explicit provision making the constitution the supreme law of the land in Botswana; this is assumed.<sup>20</sup>

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<sup>16</sup> "Because there is no standard definition of child in Botswana, different statutes address different issues relating to child victims differently. Botswana is, however, involved in a massive review of various laws affecting the status and welfare of children with an effort to harmonise them." See DM Mathumo *Country Report – Botswana Resource Material Series No. 70* available at [http://www.unafei.or.jp/english/pdf/RS\\_No70/No70\\_14PA\\_Mathumo.pdf](http://www.unafei.or.jp/english/pdf/RS_No70/No70_14PA_Mathumo.pdf) (Accessed on 21 February 2011).

<sup>17</sup> OHCHR *Declarations and reservations to the Convention on the Rights of the Child* available at <http://www2.ohchr.org/english/law/crc-reserve.htm#N14> (Accessed on 21 February 2011). Unless otherwise indicated, the declarations and reservations were made upon ratification, acceptance, accession or succession.

<sup>18</sup> Government of Botswana *The Constitution of Botswana 1966* available at [www.parliament.gov.bw/docs/documents/constitution.pdf](http://www.parliament.gov.bw/docs/documents/constitution.pdf) (Accessed on 23 July 2011).

<sup>19</sup> The Constitution of Botswana has been in effect since Botswana achieved independence. Although it has been amended several times, the amendments have not been substantial and the amendments have not been based on the Bill of Rights section. "The Bill of Rights has remained in the form in which it was drafted at independence and, to some extent reflects the traditional British attitude towards the entrenchment of human rights." C M Fombad (note 6) 6.

<sup>20</sup> L Boo *Botswana's Legal System and Legal Research* available at [http://www.nyulawglobal.org/globalex/Botswana.htm#\\_The\\_Constitution](http://www.nyulawglobal.org/globalex/Botswana.htm#_The_Constitution) (Accessed on 08/07/2011). The assumed supremacy of the Constitution of Botswana stems from the fact that in most countries, the Constitution is the supreme legislation and there is nothing in the legal system of Botswana that suggests a different approach in Botswana. Besides,



Chapter 2 of the Constitution contains the Bill of Rights. Although it does not explicitly protect the rights of children, it contains a wide array of rights which are applicable to children, especially those affected by HIV/AIDS. The Bill of Rights protects the fundamental rights and freedoms of the individual<sup>21</sup> and it stipulates that:

Every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely—

- a. life, liberty, security of the person and the protection of the law;
- b. freedom of conscience, of expression and of assembly and association; and
- c. protection for the privacy of his home and other property and from deprivation of property without compensation,

This section indicates that every person in Botswana has the right to have his or her rights protected without any discrimination based on race, place of origin, political opinions, colour, creed or sex. Section 15 guarantees protection from discrimination on the grounds of race and states that subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either in itself or in its effect. The section does not, however, list HIV/AIDS<sup>22</sup> as one of the grounds for non-discrimination in the enjoyment of human rights in Botswana<sup>23</sup> Nevertheless it is submitted that this section is applicable to the prohibition of laws and policies which are discriminatory to PLWHA, as there is a very broad definition of what is “discriminatory” in the Constitution.<sup>24</sup> Subsection 3 defines the expression "discriminatory" as affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

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most of the legislation in Botswana are in place to give effect to the provisions of the Constitution. For instance, section 9 of the Children’s Act state that “rights set out in this Part supplement the rights set out in Chapter II of the Constitution”.

<sup>21</sup>Section 3 of the constitution.

<sup>22</sup> The Constitution of Botswana does not list HIV/AIDS as one of the grounds for non-discrimination; neither does it mention the phrase “other status”. The mention of other status would have made it easy to subsume HIV/AIDS into the phrase. However, Botswana is a signatory to international human rights instrument which prevent discrimination based on HIV/AIDS. Thus it is incumbent on the State to ensure that PLWHA are protected from discrimination based on their HIV/AIDS status.

<sup>23</sup>*Attorney-General v. Unity Dow, Court of Appeal*, 1992 Botswana Law Reports 119. which is discussed later on in this chapter lays down very important jurisdiction on the recognition of unlisted grounds for non-discrimination in Botswana.

<sup>24</sup> This also includes prohibition of certain employment policies which tend to discriminate against people living with HIV/AIDS. See the *Botswana case of Botswana Building Society (BBS) v. Rapulana Jimson Civil Appeal No. 37 of 2003* See also Industrial Court Case No. 35 (2003).

The right to life, which is provided for in section 4, guarantees that “no person shall be deprived of his life intentionally; save in execution of the sentence of a court in respect of an offence under the law in force in Botswana at the time he or she was convicted.” This can be interpreted to mean that the government shall take all the necessary steps to protect the lives of everyone. Since not protecting the lives of all persons will contravene the constitutional stipulation to protect the rights to life in Botswana, it is argued that there is a duty on the government to take all the steps necessary to ensure everyone’s enjoyment of the right to life.

The protection of the right to life can also be linked to the provision of the life prolonging ARVS and all other medical treatments which will preserve the lives of persons infected with HIV/AIDS including children.<sup>25</sup> Thus it is argued that this section can be evoked in favour of children in need of ARVS and even in the provision of ARVS to prolong the lives of children whose parents are infected by HIV/AIDS.

Protection from inhuman treatment and torture which is guaranteed in section 7, can be interpreted to include protection from all discriminatory, stigmatising and other torturous practices which people infected by HIV/AIDS are often made to endure in society.<sup>26</sup> Discrimination and stigma against people affected by HIV/AIDS has a very serious consequence for most children affected by this condition.<sup>27</sup> The fact that the Constitution prohibits this form of conduct is crucial for the rights of all children affected by HIV/AIDS.

The right to privacy in section 9, which stipulates that “except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises”, can be translated as protecting the rights of children living with HIV to confidentiality. The right to privacy also protects children from unlawful intrusions of their privacy and integrity.<sup>28</sup> Accordingly, it can be reasoned that it protects children from being tested for HIV without their informed consent.

In as much as the Constitution of Botswana remains an important instrument in protecting many of the civil and political rights of children which are consequential upon HIV/AIDS, it falls short of a

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<sup>25</sup> The right to life has been linked to the provision of treatment for PLWHA in international instruments dealing with HIV/AIDS such as the ICCPR which Botswana is a party to. See Committee on Economic, Social and Cultural Rights (CESCR) *General Comment* available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument) (Accessed on 23 July 2011) which Botswana is a party to.

<sup>26</sup> Paragraph 3 of the General Comment of the CESCR See note 11 above.

<sup>27</sup> Paragraph 18 of the General Comment of the CESCR Ibid.

<sup>28</sup> See section 9 (1).

number of human rights standards which are important for children affected by HIV/AIDS. Firstly, the fact that it does not specifically provide for the protection of children rights is a major flaw. The Constitution's failure to expressly protect children's rights indicates the exclusion of important issues concerning children, including children rights to participate in matters concerning them, or to give their opinion or views on matters concerning their health.<sup>29</sup> Thus the narrowness of the collection of rights guaranteed in the Bill of Rights, especially with regard to rights which are relevant to children living with HIV/AIDS makes the Constitution inadequate to the needed standard especially considering the damage which the epidemic is causing to the human rights of children.

Secondly, the non-discriminatory clause<sup>30</sup> in section 15 does not specifically protect children from discrimination based on their HIV/AIDS status. The listed grounds on which discrimination is prohibited is not broad enough for HIV/AIDS status to be subsumed into. The non-discrimination clause is also not an absolute right as it does not apply to any law so far as that law makes provision - with respect to adoption, marriage, burial, divorce and devolution of property on death or other matters of personal law...<sup>31</sup>

Thirdly, the Constitution is silent on the protection of ESCR and these are regarded a non-justiciable set of rights. ESCR nevertheless are a very important set of rights for children affected by HIV/AIDS because of the nature of the rights and because of the manner in which HIV/AIDS affects the socio-economic status of families. Thus, the Constitution cannot be used to hold the state accountable for its failure to promote and protect these rights.

### **6.1.2 Children's Act of 2009 (Chapter 28:04)<sup>32</sup>**

In 1981, Botswana's Parliament adopted the Children's Act (CAP 28:04) of 1981. This was Botswana's first instrument to protect children from ill treatment, neglect, and other social vulnerabilities. The Act mainly addressed issues of custody, care, juvenile justice, and aspects of child protection.<sup>33</sup>

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<sup>29</sup> The Children's Act contains a Bill of Rights which is deemed supplementary to the rights set out in Chapter II of the Constitution.

<sup>30</sup> According to section 15 (4).

<sup>31</sup> This section allows for discriminative laws as long as the law makes certain provisions, as stated in section 15(4)(c).

<sup>32</sup> Children's Act 2009 available at

[http://www.aclr.info/images/stories/uploader/Publication\\_files/Acts/Botswana\\_Children\\_Act\\_08\\_of\\_2009.pdf](http://www.aclr.info/images/stories/uploader/Publication_files/Acts/Botswana_Children_Act_08_of_2009.pdf) (Accessed on 19 July 2011).

<sup>33</sup> I B Feranil, W J Herstad & R Mbuya-Brown (note 4) 9.

With the advent of HIV/AIDS and as the country's socio-political challenges progressed, there was a recognition that there was a need to revise the Children's Act of 1981 to encompass a rights-based approach for children.<sup>34</sup> In August 2006, Cabinet approved the drafting of a Bill to amend the Children's Act of 1981. The main thrust of the proposed amendments was to make the children's laws compliant with the CRC and the ACRWC, to which Botswana is a signatory. The amendments also seek to promote well-being of families and communities in Botswana as promoted in Botswana's Vision 2016.<sup>35</sup>

On June 16, 2009, Botswana's Parliament enacted the Children's Act of 2009. The new Children's Act includes a Bill of Child Rights that guarantees children 17 fundamental rights.<sup>36</sup> In this way, it bridges with the gap that exists within the Bill of Rights in the Constitution. The Children's Act also includes provisions on parental duties and rights, community and government support to parents, children in need of protection, alternative care of children, foster care, and children in conflict with the law. The Act is silent on the issue of HIV. Nevertheless, it creates the legal framework guiding Botswana's OVC programme and is a significant policy update from the 1981 law. It takes into consideration the current situation of OVC affected by HIV/AIDS and it attempts to protect the rights of children<sup>37</sup> which are consequential upon the HIV/AIDS epidemic.. This is in direct contrast to the 1981 Children's Act which is silent about HIV/AIDS and the children's rights which are connected to the epidemic.

The Children's Act is an attempt by Botswana to domesticate some of the rights and issues relating to the rights of children in the CRC and the ACRWC.<sup>38</sup> Its interpretation section defines a child as any person who is below the age of 18 years and this definition is also in line with the CRC and the ACRWC. Although the Children's Act does not contain HIV/AIDS-specific provisions, an analysis

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<sup>34</sup> For example, the Act stipulated fines for offences against children, but the small prescribed amount (approximately 100 Botswana Pula [BWP] or US\$14) did little to act as a deterrent to the abuse and neglect of children. Implementation and enforcement of the Act was also minimal and few parents or guardians were brought before a court for child neglect based on the Act.

<sup>35</sup> Ministry of Local Government (MLG) *Bulletin of the Botswana MLG on the Amendment of the Children's Act* available at <http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Local-Government-MLG1/News-and-Speeches/News/> (Accessed on 19 July 2011).

<sup>36</sup> The ones relevant to the protection of the rights of children affected by HIV/AIDS include- Right to life, Right to know and be cared for by parents, Right to appropriate parental guidance, Right to health, Right to shelter, Right to clothing, Right to education, Right to leisure, play and recreation, Right to freedom of expression, Right to privacy, Right to protection against harmful labour practices and the Right to protection against sexual abuse and exploitation. These rights are discussed in detail in the later part of this chapter.

<sup>37</sup> Especially the rights of children which are made vulnerable to HIV/AIDS.

<sup>38</sup> A variety of rights guaranteed under the Children's Act are in agreement with the CRC and the ACRWC.

of the Act shows that various sections could be used to protect the rights of children affected by HIV/AIDS.

The Act is silent on issues which directly affect children in the HIV/AIDS epidemic; such as the right of children to access contraceptives, HIV testing and medical treatment for HIV related illnesses without the consent of their parents, the treatment of OVC and children living in child-headed households and subjecting children to scientific tests relating to the HIV/AIDS epidemic. Despite the inadequacies of the Act regarding issues that affect children in the HIV/AIDS epidemic, there is no gainsaying the fact that the Act goes a long way to that many other rights of children which are consequential upon HIV/AIDS are protected.

In this regard, there are non-HIV/AIDS-specific sections of the Children's Act which are relevant to the rights of children affected by HIV/AIDS include:

#### **6.1.2.1 Non-HIV/AIDS-specific rights and principles relating to the protection of the rights of children affected by HIV/AIDS**

The objects of the Children's Act recognise the obligation of the State to promote the well-being of children, families and communities.<sup>39</sup> It also acknowledges the primary responsibility of parents and families to care for and protect children and the obligation on the State to support and assist them in carrying out that responsibility.<sup>40</sup> In addition, it provides for the State obligation to protect children from harm and all harmful practices including exploitative labour where the parents or their communities are not able to protect them.<sup>41</sup>

The guiding principles state the need for the protection of children from harm and the promotion of the wellbeing of the children, the families and their communities.<sup>42</sup> It also recognises the need for all children to be able to live in safe environments and it gives the child's parents, other relatives, guardian and any other people who are significant in the child's life an opportunity to participate in decision-making processes that are likely to have a significant impact on the child's life.<sup>43</sup>

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<sup>39</sup> See paragraph 4 (a-d) of the Children's Act.

<sup>40</sup> Ibid.

<sup>41</sup> See section 4 of the Children's Act.

<sup>42</sup> Section 7 of the Children's Act.

<sup>43</sup> Ibid.

## **i. Best interest of the child<sup>44</sup>**

The Children's Act acknowledges that the best interest of the child is the paramount consideration when a court decision is to be made concerning the child or in the exercise of any other power or function under the Children's Act.<sup>45</sup>

The acknowledgement of the best interest of the child as the paramount consideration in making decisions concerning the child is a welcomed progress in the new Act as it brings it in line with international standards on the application of the principle to the rights of the child. In addition, the Act lists various steps to be taken in determining the best interest of the child<sup>46</sup> and it even states that the listed factors are not to be construed as limiting the factors that may be taken into account in determining what is in the best interests of the child.<sup>47</sup> In deciding the best interest of the child, the courts have on previous occasions considered issues like material welfare, living conditions and educational facilities. For example, in the case of *Ovoya v Ovoya*,<sup>48</sup> the intention of the parents to live with the child themselves or hand them over to a relative was considered a crucial factor in the best interest analysis.<sup>49</sup>

The application of the best interest of the child principle to all matters which affect children in the HIV/AIDS epidemic will ensure that the interest of the children is protected and safe-guarded in the manner that is best for them. The application of this principle is crucial when deciding matters especially in relation to issues of access to health care, guardianship, maintenance and in accessing their socio-economic rights.

## **ii. Freedom from discrimination**

Section 7 of the Act provides the guiding principles under-pinning the administration of the Act. One of these principles is the protection of children from discrimination.

The impact of this section on discrimination is very important for the protection of children affected by HIV/AIDS. This is partly due to the fact that it could be argued that the phrase "other status"

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<sup>44</sup> See previous discussion on the best interest of the child principle, in Chapter 2.

<sup>45</sup> See section 5 of the Children's Act.

<sup>46</sup> See section 6 of the Act.

<sup>47</sup> See section 6 (2).

<sup>48</sup> *MC 7/76, Masala MC/1993, Isaac MC/1990* (all unreported High Court decisions, cited by A Molokomme *Custody and Guardianship of Children in Botswana Customary Laws and Judicial Practice within the Framework of the Children's Convention* (1998) in W Ncube Law, *Culture Tradition and Children's Rights in Eastern and Southern Africa*, (1998) 191.

<sup>49</sup> Committee on the Rights of the Child *Consideration of Reports Submitted By State Parties under Article 44 of the Convention Botswana Report CRC/C/51/Add. 9* (2003) Paragraph 126.

can be construed as including the HIV/AIDS status of the child. Secondly, there is a desperate need to protect children living with HIV/AIDS from the discriminative practices they are often subjected to in society. Thus the fact that the Act prohibits the taking of decisions that have the likelihood of discriminating against children on a wide variety of grounds makes it very important in the protection of the rights of children affected by HIV/AIDS.

**iii. Right to participate in any decision which is likely to have a significant impact on the child's life**

Recognising the child's right to participate in any decision which is likely to have a significant impact on the child's life, section 8 gives the right to every child who is of such age, maturity and level of understanding be able to participate in decisions concerning them. Once again, this is a good development, as it gives children affected by HIV/AIDS the right to have a say in decisions regarding them, in line with the CRC<sup>50</sup> and the ACRWC.<sup>51</sup> To enable the child to participate in the decision-making process, section 8(2) lays down the conditions which should be met to facilitate the child's participation in the decision making process. The right to participate in matters concerning the child is crucial for children affected by HIV/AIDS especially when dealing with matters affecting their health, guardianship and access to social services among other rights.

**iv. The right to life<sup>52</sup>**

This is the first right guaranteed in the Children's Act. The Act prohibits anyone from taking any action or making any decision which will deprive a child of survival and development to the child's full potential. This is a very important right for children, especially those living with HIV/AIDS because it is thought that this places an obligation on the government to ensure that in all its actions it targets the preservation of the lives of the children and ensures their development to their full potential. This can therefore be evoked when advocating for the provision of ARV treatment for children affected by HIV/AIDS, especially since this will be tantamount to an action to ensure the survival of the child.

**v. The right to know and be cared for by parents<sup>53</sup>**

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<sup>50</sup> Article 12 of the CRC.

<sup>51</sup> Article 7 of the ACRWC.

<sup>52</sup> Section 10 of the Children's Act.

<sup>53</sup> Section 13 of the Children's Act.

This right is linked to the best interest of the child and it emphasises the need for the child to know and be cared for by both biological parents and to appropriate alternative care when the child is removed from the family environment.<sup>54</sup> This is crucial in the protection of children especially since the loss of one or both parents is rife in the HIV/AIDS epidemic. Thus, the section recognises that in the case of a child who has lost only one of the parents, the other biological parent has the obligation to care for the child. Or in the case where the child needs alternative care other than the parents, an appropriate alternative has to be arranged while taking the best interest of the child into account.

The section also provides that a child born out of wedlock and not living with one or both of the biological parents has the right to access the absent parent, and to be nurtured, supported and maintained by such absent parent in accordance with the provisions of the Act and any other Act which deals with the care and maintenance of children. It also makes it an offence on the part of a parent or a legal guardian to neglect to take care of a child and it stipulates the punishment to be imposed on the erring parent.<sup>55</sup>

Finally, the section prohibits the separation of a child from its parents, other relatives or guardians unless it is in the child's best interests to do so. It also stipulates the punishment to be imposed on any person who contravenes the provisions.<sup>56</sup> This is very important for children affected by HIV/AIDS especially those whose parents are dying from the disease. The preservation of a broader family environment for these children is crucial and in line with the provisions of the CRC.<sup>57</sup>

#### **vi. The right to appropriate parental guidance<sup>58</sup>**

This is another positive provision in the Children's Act and it is in line with the provision of the CRC.<sup>59</sup> It places an obligation on the parents to provide guidance to the child and makes the child subjected to the guidance of the parents. This is imperative in the case of children living in any society affected by HIV/AIDS epidemic because parents have a duty to help their children to understand their rights without pushing them to make choices with consequences that they are too

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<sup>54</sup> Section 13 (1) of the Children's Act.

<sup>55</sup> Section 13 (2 and 3) of the Children's Act.

<sup>56</sup> Section 13 (4, 5 and 6) of the Children's Act.

<sup>57</sup> Article 9 of the CRC.

<sup>58</sup> Section 14 of the Children's Act.

<sup>59</sup> Article 5 of the CRC.



young to handle. It also encourages parents to deal with rights issues "in a manner consistent with the evolving capacities of the child".<sup>60</sup>

#### **vii. The right to health<sup>61</sup>**

This right is guaranteed to ensure that every child has the access to the "highest attainable standard of health and medical care". The section also guarantees that every child is able to enjoy the right to health, whether or not the parents, other relatives or guardian of a child are able or unable, to afford the cost of health care. The use of the phrase "highest attainable standard of health and medical care" in this section is very important for children affected by HIV/AIDS as it indicates the State obligation to ensure that all children will be able to access health care facilities they need in order to ensure that they have the highest attainable state of health.<sup>62</sup>

This takes into consideration the fact that the parents of the child might have certain constraints such as financial, physical disability, ill-health or other reasonable cause which can affect the child's inability to enjoy the right to the highest attainable standard of health. It then places an obligation on the Minister to take steps that are necessary to ensure the all children enjoy the right.<sup>63</sup> In addition, the protection of the right will go a long way to ensure that children infected by HIV have the right to access the necessary medication that will ensure that their lives are preserved. It is important to note that the enjoyment of this right is not subject to progressive realisation.

#### **viii. The right to adequate and safe housing<sup>64</sup>**

The Children's Act guarantees every child's right to adequate and safe housing and places an obligation on the parents and care givers to ensure that the child has adequate clothing.<sup>65</sup> These rights are in line with the adequate standard of living rights guaranteed under the CRC.<sup>66</sup> However, it is noteworthy that the Children's Act places the obligation to provide adequate and safe housing on the government while the obligation to cloth the child is placed on the parents of the child.

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<sup>60</sup> UNICEF *Fact Sheet: A summary of the rights under the CRC* available at [http://www.unicef.org/crc/files/Rights\\_overview.pdf](http://www.unicef.org/crc/files/Rights_overview.pdf) (Accessed on 23 June 2011).

<sup>61</sup> Section 15 of the Children's Act.

<sup>62</sup> *Ibid.*

<sup>63</sup> Section 15 (2) of the Children's Act.

<sup>64</sup> Section 16 of the Children's Act.

<sup>65</sup> Section 17 of the Children's Act.

<sup>66</sup> Article 27 of the CRC.

The importance of these rights on children affected by HIV/AIDS cannot be overemphasised. This is because poverty is usually a problem for families affected by HIV/AIDS, especially where the parents or the primary care givers are infected. Thus, the assistance of the government to provide housing for children and families will go a long way in alleviating the burden which the families face as a result of HIV/AIDS in the family.<sup>67</sup>

#### **ix. The right to education<sup>68</sup>**

This provision guarantees the right of the child to free basic education. This is in line with the CRC,<sup>69</sup> Botswana's MDG commitment as well as the Long Term Vision for Botswana (Botswana Vision 2016).<sup>70</sup> The section places an obligation on the government to ensure that all children have access to education which is free and places a duty on the parent, relatives or guardians to ensure that their children or wards have access to education. The fact that the Act stipulates that all children (without distinction) have a right to education will also protect children affected by HIV/AIDS from discrimination when seeking admission to a school.

It also sets out the sanction that can be imposed on any parent, relative or guardian who without reasonable excuse, denies a child the opportunity of going to school. Although this section does not stipulate the duration of the free basic education, policy documents such as the Revised National Policy on Education (RNPE) Government Paper No. 2 of April 1994, indicate the government's commitment to improve access to preschool education and the provision of 10 years of basic education for all children.<sup>71</sup>

#### **x. The right to leisure, play and recreation<sup>72</sup>**

The Children's Act also guarantees every child's right to leisure, play and recreation which are appropriate to the age, maturity and level of development of the child.<sup>73</sup> The protection of this right will ensure that children are not subjected to work or conditions which will deprive them of the ability to engage in recreation and play which is appropriate to their age.

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<sup>67</sup> This will also be in keeping with Botswana Vision 2016.

<sup>68</sup> Section 18 of the Children's Act.

<sup>69</sup> Article 28 of the CRC.

<sup>70</sup> Basic education is defined in terms of the National Policy on Education which guarantees for 10 years of free basic education for all children, a pledge indicative of Botswana's commitment to the MDG 2.

<sup>71</sup> Paragraph 2.4 of Botswana Federation of Trade Unions Policy on Education in Botswana March 2007

<sup>72</sup> Section 19 of the Children's Act.

<sup>73</sup> Ibid.

This right is crucial for children affected by HIV/AIDS, as it ensures that children who are left to fend for themselves and their families because of the effect of HIV/AIDS on their parents are also able to enjoy their childhood by being allowed to engage in play and other recreational activities which are in furtherance of their right to play and which will ensure that they enjoy their childhood.

**xi. Freedom of expression<sup>74</sup>**

Section 20 of the Children's Act protects children's freedom of expression. The protection of the freedom of expression indicates that children have a right to express their opinions, especially when adults are making decisions that affect children, their health and their lives. The protection of this right is crucial in the case of children affected by HIV/AIDS because the children are able to say what they think should happen especially in relation to matters which are crucial to their health and they have their opinions taken into account when deciding matters which are essential to their wellbeing.<sup>75</sup>

**xii. The right to privacy<sup>76</sup>**

Section 23 of the Children's Act protects the right to privacy by stating that "every child has a right to have his or her privacy protected". It further states that the right to privacy shall be "exercised subject to the child's best interests taking into account ... the public interest, national security, public morality, public health and the rights and freedoms of other people."<sup>77</sup>

Of particular relevance to children affected by HIV/AIDS is the fact that this section indicates that the right of the child to privacy is guaranteed and that one of the only conditions under which the right can be breached is if it conflicts with public health<sup>78</sup> among other things. Thus, the right to privacy of a child will be maintained as long as it does not affect issues of public health.

Although the Act does not indicate how issues of public health can warrant the abrogation of the child's right to privacy, it is agreed that the right is crucial for children living with HIV/AIDS. The respect of the child's right to privacy will ensure that the confidentiality of all the health records and the status of children living with HIV/AIDS are maintained when the child accesses health care facilities. Maintaining confidentiality will in turn ensure that the status of the health of the children

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<sup>74</sup> Section 20 of the Children's Act.

<sup>75</sup> UNICEF (note 60).

<sup>76</sup> Section 23 of the Children's Act.

<sup>77</sup> Section 23 (2) (c) of the Children's Act.

<sup>78</sup> Ibid.

and that of their family members are not disclosed and this will build the child's confidence in the health care system and protect the child from discrimination and stigmatisation.

**xiii. The right to protection against harmful labour practices and the right to protection against sexual abuse and exploitation<sup>79</sup>**

The Act protects children from work and other labour practices which are inappropriate for the child's age or work which places the child's education, physical or mental health, or spiritual moral or social development or well-being at risk.<sup>80</sup> This protection is important to children who are affected by HIV/AIDS because in many cases, children living in families affected by HIV/AIDS may have to take on paid work in order to help the family survive.<sup>81</sup> They may engage in child labour<sup>82</sup> and even in some instances child prostitution to supplement their family's income.<sup>83</sup> In many cases the children engaging in child labour are subjected to exploitation by people around them.<sup>84</sup> The Act also places a duty on parents, guardians, teachers and other persons to report a case of child abuse or exploitation.<sup>85</sup>

**xiv. Parental duties and rights**

Section 27 (1) of the Children's Act stipulates that the primary duty to care for and maintain a child shall rest upon the biological parents of the child. It also indicates that this duty shall be carried out jointly by both parents even where those parents do not live together, unless it would not be in the best interests of the child.<sup>86</sup> This right is very important as it indicates that both parents of the child have the duty to take care of the child. The section further clarifies that both parents of the child do not necessarily need to be married before they can assume parental responsibility. This aims at

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<sup>79</sup> Section 24 of the Children's Act.

<sup>80</sup> It further links this to the Employment Act Cap. 47:01 and allows the employment of a child only for the purpose of apprenticeship.

<sup>81</sup> Girls and boys who are deprived of the means of survival and development, particularly children orphaned by AIDS, may be subjected to sexual and economic exploitation in a variety of ways, including the exchange of sexual services or hazardous work for money to survive, support their sick or dying parents and younger siblings, or to pay for school fees. Paragraph 36 of GC 3 (2003) on HIV/AIDS and the rights of the child issued by the Committee on the Rights of the Child at its 32nd session on 13-31 January 2003.

<sup>82</sup> According to a census conducted by the National Alliance for Street Children (NASC), 13 275 children were living and working in the streets in 2004. See Department of Social Development Strategic Plan 2010–2015.

<sup>83</sup> See further information on this in section 2.3.2.2 in Chapter 2.

<sup>84</sup> See section 2.3.2.2 above.

<sup>85</sup> Section 25 (2) as well as section 43 (1) of the Children's Act. There is a penalty for the contravention of the law on the protection from sexual exploitation as stipulated in Section 63.

<sup>86</sup> Section 27 (2) of the Children's Act.

protecting children born out of wedlock from neglect by the father of the child in terms of some cultural beliefs which places the child born out of wedlock under the responsibility of the mother.<sup>87</sup>

In the case of a child whose parent is incapacitated by HIV or a child who has lost one parent to AIDS, this section indicates that the surviving biological parent also has a responsibility to take care of the child whether or not the parents were married.

Section 27 (3) also clarifies the regarding the appointment of a guardian in cases where both biological parents of the child are deceased. It stipulates that “where both or one of the biological parents is deceased, or the biological parents do not live together as a nuclear family and the absent parent plays no role in the child’s life, the other relatives, guardian, adoptive parent, stepparent or foster parent of the child shall be deemed to have assumed the parental duties associated with the biological parents of the child.”

This is also very crucial in the case of children who have lost their parents to HIV/AIDS in the sense that there is no cumbersome process of appointing a guardian for the child. The law merely recognises the care giver of the child as the legal guardian and they can assume parental duties and responsibilities in respect of the child.

Section 28 lays down the rights of parents in respect of the child and these are expected to be in the best interest of the child.<sup>88</sup>

#### **xv. Right to inheritance**

Section 27 (6) specifically protects the rights of HIV/AIDS orphans whose parents die intestate or where the parents fail to make adequate provision for their surviving child in a will or other bequest. It states that the child shall be awarded such portion of such parent’s estate as is required by the Administration of Estates Act or any other relevant law to be awarded to the child. It mandates the penalty for anyone who dispossesses a child of his or her inheritance.

This section is crucial for AIDS orphans especially as it contains provisions which can guard against property grabbing.<sup>89</sup>

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<sup>87</sup> Ibid.

<sup>88</sup> Section 27(4) of the Children’s Act.

<sup>89</sup> See section 2.3.2.3 in chapter 2.

### **6.1.3 Other legislation and policies dealing with specific rights of children affected by HIV/AIDS**

In addition to the Constitution and the Children's Act, there are laws and policies<sup>90</sup> in place to address the rights that are crucial for the enjoyment of the human rights of children affected by HIV/AIDS. The laws and policies discussed in this chapter are in line with the CRC and some other international instruments and they are classified according to the framework on the rights which they exist to protect. These include frameworks which:

- protect the right to treatment and health care
- protect the right to maintenance
- protection of the right to equality and freedom from discrimination
- protect the right to care and access to social services for the children affected by HIV/AIDS
- protect vulnerable people from crimes which expose them to the risk of HIV infection
- protect the right to education
- protect the rights of employees
- protect the right to guardianship, property or inheritance

In this regard, the legislation and policy framework which serve as guidelines standards to regulate the implementation of government programmes to protect and achieve these principles include:

#### **6.1.3.1 Framework which protects the rights to treatment and health care**

##### **i. The Public Health Act 44 of 1971 Chapter 63:01<sup>91</sup>**

The Public Health Act commenced on 30 January 1981 and from its stated intent<sup>92</sup> the Act is not an HIV/AIDS or child-specific Act. Nevertheless, it contains provisions which regulate the

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<sup>90</sup> A "policy" is very much like a decision or a set of decisions and they are "made", "implemented" or "carried out" just as we do with decisions; thus a policy is a set of decisions which are oriented towards a long-term purpose or to a particular problem.

<sup>91</sup> Government of Botswana *Public Health Act*(1971) available at <http://www.laws.gov.bw/VOLUME%2013/CHAPTER%20%2063%2001%20PUBLIC%20HEALTH.pdf> (Accessed on 23 September 2011).

<sup>92</sup> To make the notification of certain diseases compulsory and to control such diseases; to make provision regarding diseases subject to the International Health Regulations; to prevent the spread of smallpox; to prevent the introduction of diseases into Botswana; to control advertisements and publications concerning venereal disease; to regulate sanitation

administration of public health in the State and some of these provisions are relevant to the protection of people infected and affected by HIV/AIDS. These sections can be evoked for the protection of children affected by HIV/AIDS.<sup>93</sup>

The Act defines a child as a person who is under or appears to be under, 16 years of age.<sup>94</sup> The Act places, an obligation on the Ministry of Health to ‘carry out activities that could contribute to the realisation of the right to health.’<sup>95</sup> This is impressive since neither the Constitution nor the National Health Policy or the National Policy on HIV/AIDS expressly recognises the right to health.<sup>96</sup>

Although no reference is made to HIV/AIDS in the body of the Act, the Act states that “health measures shall be initiated forthwith, completed without delay, and applied without discrimination.”<sup>97</sup> This can be interpreted to mean that HIV/AIDS issues can be subsumed under the health measures which the Act refers to.

Despite the fact that the Act does not mention HIV/AIDS in its body while describing the communicable diseases, it does list some of the communicable diseases which are likely to afflict persons infected by HIV/AIDS.<sup>98</sup> It therefore imposes regulations in respect of certain diseases mentioned in section 17. In recognition of the protection of the right to health, the Act lists certain steps which are to contribute to the realisation of right to health for children affected by HIV/AIDS.<sup>99</sup> The Act also makes it a crime for any person who fails to furnish proof in regard of any child (of which he is the parent or guardian), and refuses to allow himself or such child to be vaccinated.<sup>100</sup> This provision will also be crucial for children especially those infected by HIV as these vaccines will help to further strengthen their immune systems. Thus, the failure of parents to vaccinate the child is a breach of the child’s right to health and such parent is in contravention of the provisions of the Act.

At the time of writing, Botswana was amending its Public Health Act.

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and housing; to provide for the protection of foodstuffs and of water supplies; to regulate the use of cemeteries; and generally to make provision for public health.

<sup>93</sup> It should be noted that Botswana is in the process of enacting a new Public Health Act. The advantages and disadvantages of this new Act in relation to children affected by HIV/AIDS are discussed in chapter 7.

<sup>94</sup> This is one of the different definitions of children adopted in legislation and policies in Botswana as discussed in section 6.1 of this section.

<sup>95</sup> The right to health is crucial for people children living with HIV/AIDS, thus any provision which fosters the right to health is relevant for children affected by HIV/AIDS.

<sup>96</sup> Molatlhegi & Associates *Draft final report consultancy to review laws and policies relating to HIV/AIDS* (2005) 57.

<sup>97</sup> Section 25 of the Public Health Act.

<sup>98</sup> Section 16. It is noted that the wide definition given to communicable diseases in the Act can be made to include HIV/AIDS.

<sup>99</sup> Section 26 (1) of the Public Health Act.

<sup>100</sup> Section 26 (2) of the Public Health Act.

Several policies exist to regulate the right to health.

**i. The National Policy on HIV/AIDS 2010<sup>101</sup>**

The national policy on HIV/AIDS is not a child-specific instrument; however, it outlines the national responses and interventions in terms of HIV/AIDS prevention, care and support. It describes the role of national leaders, various government ministries, the private sector, non-governmental and community-based organisations, persons living with HIV/AIDS, and individual community members in the national response.<sup>102</sup>

The policy forms the basis on which a national strategic plan was developed and it serves as a guide for all actors in HIV/AIDS prevention, care and support of PLWHA.<sup>103</sup> Despite the fact that it is not a child-specific instrument, it recognises the effect of the epidemic on children.<sup>104</sup> It indicates the need for the prevention of HIV infection transmission through other modes of transmission (e.g. through blood or blood products, transmission from mother to child and transmission through non-sterile instruments in traditional and modern health practices).<sup>105</sup>

It lists the different sectors of government and their roles in the fight against HIV/AIDS<sup>106</sup> and sets out the roles of each department in the development of programmes and mechanisms for the provision of welfare support for PLWHA. Children are not precluded.<sup>107</sup> It employs a number of human rights principles, such as requiring strict adherence to the confidentiality principle on the treatment of and the HIV status of individuals (patients, clients, employees, etc.) and that this cannot be normally divulged to others without the consent of the person concerned.<sup>108</sup> However, the Policy suggests that the principle of ‘shared confidentiality’<sup>109</sup> should be applied, whereby those who need to know in order for appropriate health and social welfare care to be provided, are told.<sup>110</sup>

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<sup>101</sup> Government of Botswana *Botswana National Policy on HIV/AIDS (2010)* available at [http://www.k4health.org/sites/default/files/Botswana\\_National\\_HIV\\_AIDS\\_Policy.pdf](http://www.k4health.org/sites/default/files/Botswana_National_HIV_AIDS_Policy.pdf) (Accessed on 04 April 2013).

<sup>102</sup> Paragraph 1.4 of the National Policy on HIV/AIDS

<sup>103</sup> Paragraph 1.5 of the National Policy on HIV/AIDS.

<sup>104</sup> See paragraph 3.2 of the National Policy on HIV/AIDS.

<sup>105</sup> See paragraph 4.5 of the National Policy on HIV/AIDS.

<sup>106</sup> See paragraphs 4.8 – 4.16 of the National Policy on HIV/AIDS.

<sup>107</sup> This is specifically directed at the Ministry of Local Government, Lands and Housing in paragraph 4.13.

<sup>108</sup> See paragraph 6.2 and 6.3 of the National Policy on HIV/AIDS.

<sup>109</sup> See paragraph 6.4 of the National Policy on HIV/AIDS.

<sup>110</sup> AIDS and Human Rights Research Unit *Human rights protected? Nine Southern African country reports on HIV, AIDS and the law* (2007)18.



## ii. The National Guidelines for HIV Testing and Counselling 2009<sup>111</sup>

The National Guidelines for HIV Testing and Counselling were developed by the Ministry of Health in 2009. These guidelines cover the procedural and operational requirements for both voluntary counselling and testing and routine HIV testing.<sup>112</sup> They also outline directions for scaling up service provision as well as monitoring and evaluation.<sup>113</sup>

The National Guidelines are adaptable to the protection of the rights of children especially when undergoing HIV testing and counselling and they are based on a number of human rights.<sup>114</sup> The Guidelines address the issue of stigma and discrimination<sup>115</sup> and discuss the ethical issues relating to informed consent. The Guidelines also state the 3 crucial elements in obtaining truly informed consent.<sup>116</sup> It discourages mandatory HIV testing stating that it is neither effective nor ethical as it denies individual choice and violates principles such as the right to health and privacy. Nonetheless, it can be considered in certain cases such as rape (testing the suspect for HIV after being counselled).<sup>117</sup> In line with the Guidelines, the other instance when mandatory testing can also be carried out is in the case of administering post-exposure prophylaxis (PEP) to a health care worker for needle-stick and related injuries when the HIV status of the source patient is unknown.<sup>118</sup>

The National Guidelines set the minimum age for HIV testing at 16 years.<sup>119</sup> Anyone above the age of 16 years should be able to give full independent informed consent for HIV testing. However, for children below 16 years, the informed consent of a parent or legal guardian suffices. In cases where the person is below 16 years and is married or is operating their own business, such person must be considered as an “emancipated minor” who can give consent for HIV testing.<sup>120</sup>

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<sup>111</sup> Government of Botswana *National Guidelines for HIV Testing and counselling* available at [www.gov.bw/Global/MOH/PC\\_MOH\\_01.pdf](http://www.gov.bw/Global/MOH/PC_MOH_01.pdf) (Accessed on 28 August 2011).

<sup>112</sup> There have been a number of human rights criticisms of routine HIV testing and issues on routine HIV testing will be discussed in chapter 7.

<sup>113</sup> UNAIDS *2010 Country Progress Report on Botswana* available at [http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/botswana\\_2010\\_country\\_progress\\_report\\_en.pdf](http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/botswana_2010_country_progress_report_en.pdf) (Accessed on 29 August 2011).

<sup>114</sup> Section 2.1 of the Guidelines.

<sup>115</sup> Section 2.1.1 of the Guidelines.

<sup>116</sup> Section 2.2 of the Guidelines.

<sup>117</sup> Section 2.3 of the Guidelines.

<sup>118</sup> In the case where the patient refuses the HIV testing, an HIV rapid test will be carried out on the patient, but the result will not be shared with the patient. If the patient physically hinders or obstructs the performance of the HIV rapid testing, then it is necessary to initiate PEP for the health care worker.

<sup>119</sup> Section 2.4.1 of the Guidelines.

<sup>120</sup> The Guidelines require additional training for those providing HTC to children.

Section 2.4.2 adds that the welfare of the child must be the primary concern when considering testing a child for HIV and that the maturity of the child should be determined so as to fulfil the requirement for informed consent.<sup>121</sup> The guidelines also address the requirement for confidentiality defining confidentiality as the right of the individual to privacy and dignity.<sup>122</sup> The right to confidentiality according to the guidelines are linked to the right to privacy and dignity and confidentiality must be maintained for people who receive HIV counselling, testing and referral services. It addresses the issue of disclosure<sup>123</sup> and states the requirement for the provision of PEP for rape victims.<sup>124</sup>

Botswana has two approaches to HIV testing and counselling namely Routine HIV Testing (RHT) and Voluntary Counselling and Testing (VCT). In both RHT and VCT, universal human rights requirements of the “3Cs” of confidentiality, counselling and informed consent with voluntarism are respected.

The Guidelines are based on human rights and ethical principles which are strongly upheld and which conform with international standards on the protection of the rights of PLWHA regarding HIV testing.

The respect which the Guidelines give to the rights of children is also remarkable, considering the fact that it is not a child-specific instrument. Its dedication to the right to privacy, confidentiality, non-discrimination and other human rights principles which are vital factors in determining the treatment which PLWHA, especially children, will receive when accessing the health care facilities in the country.

### **iii. The Second National HIV/AIDS Strategic Framework for HIV/AIDS (NSF) 2010-2016<sup>125</sup>**

The current NSF was adopted in 2010 purposely to outline the national priorities for the national response to HIV and AIDS for the period 2010 to 2016. The NSF is not a child-specific instrument, however, it does recognise the need to include children in the plan. It recognises the drivers of the epidemic, (verified through the consultation process and research), as multiple and concurrent

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<sup>121</sup> This requirement is in line with the principle of the best interest of the child and it adds that if the counsellor feels that the testing is not in the best interest of the child then the counsellor reserves the right not to test the child.

<sup>122</sup> Section 2.6.1 of the Guidelines.

<sup>123</sup> Section 2.7.1 of the Guidelines.

<sup>124</sup> Section 2.8 of the Guidelines. PEP should be commenced within 4 to 72 hours of the rape.

<sup>125</sup> Second National HIV/AIDS Strategic Framework for HIV/AIDS 2010- 2016 available at (Accessed on 25 August 2011).

sexual partnerships; the low rates of male circumcision; adolescent and intergenerational sex; gender inequalities and violence; substance abuse, in particular alcohol; and stigma and discrimination. Thus addressing the issues regarding children still forms a focal point in the current NSF.

In the previous NSF, children were the first priority group needing the most protection and guidance as means of achieving the vision of no new infections by 2016 thereby proclaiming youth and children as the key to turning around the epidemic in Botswana.<sup>126</sup> This NSF makes the reduction in the incidence of sexual transmission of HIV among females and males aged 10-49 years and the increase in the access to health care services for HIV prevention its first strategic objective.<sup>127</sup> In line with this objective, the NSF provides for the scaling up of access to treatment, care and support services specifically for children; and the strengthening of coordination mechanisms and a comprehensive family-centred plan of action for the protection, care and support of OVC and their care-givers.<sup>128</sup>

These responses are essential to ensure that there are appropriate policies and legislative responses on the protection which will include children in the epidemic and that the appropriate welfare services are made available to them. There is no gainsaying the fact that children represent a main focus group requiring protection in the NSF, especially with regards to achieving the main goal of the national response which is the Prevention of New HIV Infection by 2016.

#### **iv. The Prevention of the Mother-to-Child Transmission of HIV (PMTCT) Programme**

The PMTCT programme was introduced in 1999. By July 2000, a national rollout commenced and by November 2001 all public health facilities were offering the service. The PMTCT programme provides prophylaxis (Zidovudine) to all eligible positive pregnant women, and a 12-month supply of formula feed to babies who have been exposed to HIV. The programme successfully adapted the UN framework on HIV and infant feeding.<sup>129</sup>

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<sup>126</sup> Paragraph 2.5 of the National HIV/AIDS Strategic Framework 2003-2009.

<sup>127</sup> The NSF 2010 does not disregard the need to include children in the HIV/AIDS prevention strategy of the country, hence, it has included children in the age category for scaling up the HIV/AIDS prevention strategy of the NSF by setting the age category for the target group at 10 – 49 years. See Government of Botswana *NSF 2010 -2016 available at* [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_172465.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_172465.pdf) (Accessed on 28 December 2011).

<sup>128</sup> Paragraph 3.4.4 (1 and 4) of the NSF.

<sup>129</sup> UNAIDS (note 113).

The specific child survival goal of the PMTCT programme is to improve both the development and survival of the child through the reduction of morbidity and mortality. In 2010, 94.2% of pregnant women in need of PMTCT received it.<sup>130</sup>

#### **v. Botswana's Paediatric ARV Treatment Programme**

The ARV treatment programme was launched in 2005. Currently almost all the facilities can draw blood from infants 6 weeks to 18 months old using the dry blood spot technique for testing at the Botswana Harvard partnership laboratory in the capital city. All the 48 ARV sites in the country also provide paediatric drugs. Since 2003, the Botswana-Baylor Children's Clinical Centre of Excellence (BCCCCOE) provides specialised treatment for HIV positive children (up to 12yrs) as well as outreach and psychosocial services for children aged 12 to 18yrs.<sup>131</sup> In addition, 89.9 % of adults and children with advanced HIV infection were receiving antiretroviral therapy by the end of 2009.<sup>132</sup>

#### **6.1.3.2. Framework which protects the right to maintenance**

##### **i. Adoption of Children Act of 1952 (Chapter 28:01)<sup>133</sup>**

The HIV/AIDS epidemic in Botswana has had a negative impact on the welfare of children and placed enormous strain on family and community support structures. In 2004, Botswana was estimated to have the highest rate of orphaning in sub-Saharan Africa (UNAIDS *et al*, 2004) and the National Situation Analysis on OVC in Botswana estimated the number of orphans at 137,805, constituting 17.2% of the number of children below 18.<sup>134</sup>

The Adoption of the Children Act was enacted in Botswana at time when HIV/AIDS was absent in the country, thus the Act has no bearing on the HIV/AIDS epidemic. In spite of this, the Act contains provisions which are useful for the protection of children affected by HIV/AIDS especially those who have been orphaned by HIV/AIDS or those who the epidemic has decimated their family structure.

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<sup>130</sup> Ibid. Data include only women who delivered who were diagnosed with HIV infection during Ante-Natal Care (ANC).

<sup>131</sup> UNICEF Botswana Report *A world Fit for Children* available at [http://www.unicef.org/worldfitforchildren/files/Botswana\\_WFFC5\\_Report.pdf](http://www.unicef.org/worldfitforchildren/files/Botswana_WFFC5_Report.pdf)

<sup>132</sup> UNAIDS (note 113).

Data include only women who delivered who were diagnosed with HIV infection during ANC.

<sup>133</sup> The Adoption Act available at <http://www.laws.gov.bw/VOLUME%204/CHAPTER%2028-01%20ADOPTION%20OF%20CHILDREN.pdf> (Accessed on 25 July 2011).

<sup>134</sup> Government of Botswana, 2008 statistics Cited in WJ Herstad, (note 817 above).

Although, the Act does not employ an HIV/AIDS and rights-based approach, it contains provisions that are necessary for the administration of adoption processes in Botswana. The Act defines a child as any person below the age of 19 years<sup>135</sup> and it lays down the categories of people who can adopt a child.<sup>136</sup> It can be deduced that the purpose of these stipulations is to ensure a secured family base for the child who is being adopted into a family.

After adoption, the Act does not entirely sever the ties between the biological parents or guardians and the child.<sup>137</sup> In fact, the Act grants the biological parents (who consent to the disclosure of their identity at the time of the adoption)<sup>138</sup> access to the child under conditions determined by the courts. Nonetheless, the court shall not make such a direction if it will probably be to the disadvantage of the child.

Although the Act indicates that the welfare and interest of the child is important in adoption decisions, the Act is silent on the effects of the HIV/AIDS epidemic on the human rights issues relating to children (such as OVC, children made destitute by HIV in the family) concerning children affected by HIV/AIDS.

## **ii. The Deserted Wives and Children Protection Act 1963 (Chapter 28:03)<sup>139</sup>**

The Deserted Wives and Children's Act which specifies procedures followed in cases of deserted and divorced women and their children came into force on 25 July 1963. This was at a time when HIV/AIDS was unknown in Botswana. The main purpose of the Act is to provide for the making of orders for the maintenance of wives and children who have been deserted and are without adequate means of support.

Although not HIV/AIDS-specific, this Act is relevant in the protection of the rights of children affected by HIV/AIDS since it contains sections which are relevant to the protection of the socio-economic rights of children within the family. The Act defines a child as any person under the age of 16 years or who has attained the age of 16 years but has not attained the age of 21 years and is

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<sup>135</sup> Section 2 of the Adoption of the Children Act. This is another inconsistent definition of a child as was mentioned in section 6.1 of this chapter.

<sup>136</sup> Section 3 of the Adoption of Children Act.

<sup>137</sup> Section 7 of the Adoption of Children Act.

<sup>138</sup> Section 2(d) of the Adoption of Children Act

<sup>139</sup> Government of Botswana *The Deserted Wives and Children Protection Act* available at

<http://www.laws.gov.bw/VOLUME%204/CHAPTER%202803%20DESERTED%20WIVES%20AND%20CHILDREN%20PROTECTION.pdf> (Accessed on 27 July 2011).

not earning his own living.<sup>140</sup> The Act also defines a deserted child as a child<sup>141</sup> and gives a person the power to bring a complaint in a prescribed form that a child is without adequate means of support and is deserted by his father.

This Act is very important, especially in the case of children that have been abandoned by their fathers and who are living in families affected by HIV/AIDS, it will go a long way in ensuring a financially stable family life (depending on the father's income) for the child. The father's contribution to the upkeep of the child is crucial in a situation where the mother's income is limited either because of her health or the other financial responsibilities which she has to provide.

### **6.1.3.3. Framework which protects the right to equality and freedom from HIV/AIDS related discrimination**

The right to equality and freedom from HIV/AIDS related discrimination is also not expressly included in the Constitution of Botswana.<sup>142</sup> Nonetheless, section 15 of the Constitution of Botswana can be adapted for the protection of people from HIV/AIDS related discrimination.<sup>143</sup>

#### **i. Botswana HIV/AIDS and Human Rights Charter (2002) (The Charter)<sup>144</sup>**

The Botswana HIV/AIDS and Human Rights Charter was adopted in 1995 and revised in 2002. It is a non-legal document adopted by civil society in Botswana to guide the government and non-governmental sector on how to deal with the rights of PLWHA. It does not seek to enforce the rights provided for under the charter. It is rather a statement of the aspirations and beliefs of a particular group of PLWHA.<sup>145</sup>

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<sup>140</sup> Section 2 of the Deserted Wives and Children Protection Act. This is a different approach in the definition of a child as compared to the other definitions as this definition extends the age range of who a child is anyone who has not attained the age of 21 years and is not earning his own living. See section 6.1 of this chapter regarding the inconsistent definition of a child in Botswana.

<sup>141</sup> Section 2(b) of the Deserted Wives and Children Protection Act.

<sup>142</sup> However, the need for the protection of the right to equality is mentioned in different instruments such as the Children's Act which stresses the need for the right to equality and the protection of the right to equality in section 7 and Botswana's National Policy on HIV/AIDS which emphasises that PLWHA have civil, political, social and economic rights, to prevent discrimination against PLWHA and to improve the lives of PLWHA.

In addition Section 15 of the Constitution of Botswana guarantees protection from discrimination on the grounds of race and states that subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either in itself or in its effect. See section 6.1.1 of this chapter.

<sup>143</sup> See further discussion on this in section 6.1.1.

<sup>144</sup> Ditshwanelo Botswana HIV/AIDS and Human Rights Charter available at

<http://www.ditshwanelo.org.bw/images/new%20charter.pdf> (Accessed on 25 August 2011).

<sup>145</sup> Preambular statement in the Charter.

It aims to, among other things, “enrich constitutional rights and freedoms” and to highlight the provisions of the Botswana National Policy on HIV/AIDS so as to give it priority and help to put it into practice. It also aims at emphasising that PLWHA have civil, political, social and economic rights, to prevent discrimination of PLWHA and to improve the lives of PLWHA.

The existence of the Charter will ensure that children have a right to pre and post-test counselling<sup>146</sup> as well as a right to the respect of their confidentiality regarding their test result and this is maintained even after the death of the person.<sup>147</sup> The Charter provides for HIV/AIDS education and prevention and that all PLWHA (including children) should be included in the process in order to eliminate discrimination. It states that all people will have the right to health care facilities and the rights to appropriate information on the available treatment options and clinical trials.<sup>148</sup>

It contains provisions on the right to treatment and that the government should ensure that ARVs are made available to PLWHA<sup>149</sup> including children.<sup>150</sup> The charter specifically provides for the rights of children to participate in all efforts to curb HIV/AIDS and it brings the best interest of the child principle to the fore when it states that in all matters concerning children, the best interest of the children should be the paramount principle.<sup>151</sup>

The Charter brings to light the main rights which PLWHA aim to achieve and it is the belief of the drafters that it will assist the government and other sectors in their efforts to stop the HIV/AIDS epidemic and reverse the negative attitude of people to the epidemic as well as to ensure respect for the rights of PLWHA.

#### **6.1.3.4. Framework which protects the right to care and access to social services for children affected by HIV/AIDS**

##### **i. Children in Need of Care Regulations 2005 (Chapter: 28:04)<sup>152</sup>**

The Children in Need of Care Regulations (2005) were enacted at a time when Botswana was already a committed party to the CRC and when the impact of the HIV/AIDS epidemic on children

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<sup>146</sup> Article 3 of the Charter.

<sup>147</sup> Article 4 of the Charter.

<sup>148</sup> Article 5 of the Charter.

<sup>149</sup> Article 6 of the Charter.

<sup>150</sup> Article 7 of the Charter.

<sup>151</sup> Article 7 of the Charter.

<sup>152</sup> Government of Botswana *Children in Need of Care Regulations* available at [www.laws.gov.bw/VOLUME%204/Subsidiary/ch2804.pdf](http://www.laws.gov.bw/VOLUME%204/Subsidiary/ch2804.pdf) (Accessed on 26 July 2011).

had reached an alarming point.<sup>153</sup> The main intent of the Act is to protect the welfare of the children and this is relevant to the rights of children affected by HIV/AIDS. The Act in section 7 recognises that the principle of the best interest of the child makes it the paramount consideration when a children's court holds an enquiry to determine any question with respect to the removal of the child in need of care to an institution or a foster home. The Act also lays down the conditions to consider in determining if a decision is in the best interest of the child.

The Act defines a child as a person below the age of 14 years<sup>154</sup> and gives the social welfare officer the power to remove a child to a place of safety upon receipt of a report, or notification by any.<sup>155</sup> It also gives parents the power to bring a child before a children's court in terms of section 18 of the Act, on the grounds that he or she is unable to control the child and that it would be expedient to deal with the child as a child in need of care.<sup>156</sup>

The application of the best interest of the child principle to determine questions with respect to the removal of the child in need of care to an institution or a foster home is very crucial since prevention of family separation is called for in the UDHR (article 16) and in CRC (articles 5- 9, 18, and 24, 27-29).<sup>157</sup> Thus the courts need to consider if the removal of children to an institution will be in the best interest of the child especially since institutions have been shown to cause a wide range of problems for child development and that the structure of residential care may focus on the individual child and define the problem as inherent in the child.<sup>158</sup> On this, the courts have, on occasions, taken the views of the child into account and have tried not to disturb existing arrangements.<sup>159</sup> They have also tended to assume that it is in a young child's best interests to be in the custody of their mother<sup>160</sup> and adolescent boys should be with their fathers and girls with their mothers.<sup>161</sup>

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<sup>153</sup> In 2005, Botswana was one of the 3 countries with the highest HIV/AIDS prevalence rates in the world. It had an adult (15-49years) prevalence rate of 37.3% WHO *Botswana Sentinel Surveillance Report* available at [http://www.who.int/hiv/HIVCP\\_BWA.pdf](http://www.who.int/hiv/HIVCP_BWA.pdf) (Accessed on 30 August 2011).

<sup>154</sup> Section 2 of the Children in Need if Care Regulations. This is another inconsistent definition of a child as raised in section 6.1 of this chapter.

<sup>155</sup> Section 3 of the Children in Need if Care Regulations.

<sup>156</sup> Section 4 of the Children in Need if Care Regulations.

<sup>157</sup> B Motshegwe *Is residential care the best Option for Child Development?* The Botswana Gazette 13 April 13 2011. Available at [http://www.gazettebw.com/index.php?option=com\\_content&view=article&id=9264%3Ais-residential-care-the-best-option-for-child-development&catid=3%3Aletters&Itemid=2](http://www.gazettebw.com/index.php?option=com_content&view=article&id=9264%3Ais-residential-care-the-best-option-for-child-development&catid=3%3Aletters&Itemid=2) (Accessed on 26 July 2011).

<sup>158</sup> *Ibid.*

<sup>159</sup> Committee on the Rights of the Child Consideration of Reports Submitted by States Parties Under Article 44 Of The Convention Botswana Report submitted on 10 January 2003 CRC/C/51/Add.9 Paragraph 126.

<sup>159</sup> *Malope v Malope* Mc 67/1986, *Ovaya v Ovaya* C 7/1976 cited in A Molokomme *Custody and Guardianship of Children in Botswana Customary Laws and Judicial Practice within the Framework of the Children's Convention* in W. Ncube (note 48)193.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*



As an alternative to institutionalisation for the child, the Act provides for the fostering of children by well screened foster parents and regulates the procedure for the screening of prospective foster parents.<sup>162</sup> The Act also stipulates the duties of foster parents<sup>163</sup> and prohibits any person to act in any manner that is contrary to the welfare of any child placed in an institution or foster care.<sup>164</sup>

Part III of the Act goes further to stipulate the rights of natural parents of children in need of care<sup>165</sup>

Although the Act does not make any specific mention of the HIV/AIDS epidemic, there is no gainsaying the fact that the scope of the Act will accommodate children who are affected by HIV/AIDS because the Act stipulates that a child may qualify to be treated as child in need of care if any person has a reasonable cause to believe that a child he or she is observing is in need of care. The Act can therefore be evoked to protect the rights of children affected by HIV/AIDS.

The policies which regulate government's efforts to provide social services for orphans in Botswana include:

**ii. The Revised National Policy on Destitute Persons 2002<sup>166</sup>**

This policy is one of the efforts of the government of Botswana to ensure the protection of the socio-economic rights of people. It provides benefits for eligible, needy children as outlined in the OVC Policy 2008 and it provides a social safety net for destitute children. It also provides benefits for those who, albeit temporarily, have been rendered destitute.

The policy provides for the provision of a nutritionally balanced food basket, cash amounting to 81 Pula monthly, as well as some rehabilitation for the eligible. The rehabilitation component aims at providing individuals with relevant skills, knowledge and the right attitude to engage in sustainable economic and social activities to the extent that they are able to maintain a livelihood without direct dependence on the state.<sup>167</sup>

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<sup>162</sup> Section 12 of the Children in Need of Care Regulations.

<sup>163</sup> Section 14 of the Children in Need of Care Regulations.

<sup>164</sup> Section 15 of the Children in Need of Care Regulations.

<sup>165</sup> Section 3 of the Children in Need of Care Regulations.

<sup>166</sup> Government of Botswana *The Revised National Policy on Destitute Persons 2002*

[http://openlibrary.org/works/OL947227W/Revised\\_national\\_policy\\_on\\_destitute\\_persons](http://openlibrary.org/works/OL947227W/Revised_national_policy_on_destitute_persons) (Accessed on 12/07/2011)

<sup>167</sup> I B Feranil, WJ Herstad & R Mbuya-Brown (note 4) 7.

The policy also benefits members within a household and does not only target individuals who may be registered. The policy further makes provision for the construction of shelter for the most deserving. Destitute persons are also exempted from payment for publicly provided services like medical fees, water charges, service levies and electricity charges.<sup>168</sup>

To that extent, the intervening measure provides a major safety net for vulnerable children who are under 18 years old who were “not eligible for registration under the STPA”.<sup>169</sup> Under the Destitute Programme, children under the age of 18 years born to persons identified as destitute are provided with food baskets, clothes and school requirements.<sup>170</sup> Nevertheless, 31.2% of OVC aged 0-17 received free basic external support by the end of 2009.<sup>171</sup>

The Revised National Policy on Destitute Persons can be evoked for the protection of children affected by HIV/AIDS who require socio-economic amenities and facilities from the State. The fact that the policy also includes provisions that will automatically allow for orphans who attain the age of 18 years and are destitute to be catered for within their families makes it wide enough to protect children until they are regarded as adults and are able to fend for themselves.

### **iii. National Programme of Action for Children in Botswana (NPA), 2006 – 2016<sup>172</sup>**

The NPA is a guide for the implementation of key interventions; to facilitate co-ordination at the multi-sectoral level and to monitor key achievements and strides made for the benefit of the children (NPA 2006- 2016).

The dedication of the NPA to the rights of children makes an important instrument in the protection of children in Botswana. The NPA seeks to promote human rights via the promotion of several key areas (education and training; health and nutrition; children and HIV/AIDS; sport and recreation;

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<sup>168</sup> Ibid.

<sup>169</sup> Note that the STPA targeted primarily maternal or double orphans; destitute children were excluded unless there was evidence that the father had died.

<sup>170</sup> Save the Children *Legal Frameworks and Policies for Orphans and Vulnerable Children\_ SADC\_2010* available at [http://www.riatt-esa.org/sites/default/files/get\\_file\\_2ae902a1.pdf](http://www.riatt-esa.org/sites/default/files/get_file_2ae902a1.pdf) (Accessed on 12/07/2011).

<sup>171</sup> UNAIDS Botswana 2010 Country progress report available at [http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/botswana\\_2010\\_country\\_progress\\_report\\_en.pdf](http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/botswana_2010_country_progress_report_en.pdf) This indicator refers only to the last 12 months for psychological, and socioeconomic support

<sup>172</sup> National Programme of Action for Children in Botswana (NPA), 2006 – 2016 [www.crin.org/resources/infoDetail.asp?ID=1920](http://www.crin.org/resources/infoDetail.asp?ID=1920) (Accessed on 23 June 2011).

child protection; environment and safety; and policy and legislation). It provides various mechanisms and structures for its coordination and monitoring to actualise it.<sup>173</sup>

The Programme aims to correct the short-comings of the previous National Plan of Action and to provide quality services for vulnerable children in Botswana.<sup>174</sup> The NPA covers a wide category of vulnerable children and it goes a long way in addressing the needs and providing the necessary protection for the children according to the needs of each group. The fact that it covers a 10 year period will also go a long way to ensure continuation of the programme in the interest of the children. This will help to guarantee a stable source of support for the children in the period covered.

#### **iv. The National Guidelines on the Care of Orphans and Vulnerable Children 2008<sup>175</sup>**

The National Guidelines on the Care of OVC 2008 (National OVC Guidelines) defines a vulnerable child as any child under the age of 18 years<sup>176</sup> who lives in an abusive environment, a poverty-stricken family unable to access basic services, or a child-headed household; a child who lives with sick parents or outside family care; or who is HIV positive.

The National OVC Guidelines were approved in 2008 by the Ministry of Local Government (MLG)/Department of Social Services (DSS), following the recommendations of the Short-Term Plan of Action (STPA) to include vulnerable children in future policies and guidelines, rather than focusing only on orphans.

It is intended to promote a child-centred, family and community-focused, and child rights-based approach to addressing the needs and rights of OVC in Botswana.<sup>177</sup>

The OVC Guidelines<sup>178</sup> spell out the specific roles of key stakeholders and places the responsibility for developing a National OVC Policy and for co-ordinating OVC service providers on the MLG through the DSS. The Social Welfare and Community Development department in district

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<sup>173</sup> I B Feranil, W J Herstad & R Mbuya-Brown (note 4).

<sup>174</sup> Ibid.

<sup>175</sup> Government of Botswana *The National Guidelines on the Care of Orphans and Vulnerable Children 2008* available at [http://www.healthpolicyinitiative.com/Publications/Documents/1102\\_1\\_User\\_friendly\\_Guidelines\\_FINAL\\_acc.pdf](http://www.healthpolicyinitiative.com/Publications/Documents/1102_1_User_friendly_Guidelines_FINAL_acc.pdf) (Accessed on 23 June 2010).

<sup>176</sup> This is another inconsistent definition of a child as raised in section 6.1 of this chapter.

<sup>177</sup> Government of Botswana (note 170).

<sup>178</sup> Section 11 of the Guidelines.

government councils is responsible for implementing OVC activities in accordance with the National OVC Policy and other legislation.<sup>179</sup>

These guidelines serve as pointers to organisations and individuals working or who intend to work with orphans or vulnerable children by promoting effective responses and discouraging harmful practices. They will go a long way in ensuring that the rights of all OVCs are met without duplication of efforts when the specified stake holders take appropriate efforts to ensure that their duty is performed regarding the protection of the rights of OVC.

**v. National Monitoring and Evaluation Framework for Orphans and vulnerable Children of 2008<sup>180</sup>**

This Framework aims to provide information that will enable the tracking of progress and informed decision making in the implementation of interventions targeting OVCs and their families.<sup>181</sup> It helps organisations and stakeholders to develop, implement, and assess programmes responses to address OVC needs. It also helps to ensure accountability for performance monitoring and as an advocacy tool for government to meet the needs of OVCs in the country.

It also helps in the monitoring process for OVC programmes and sets out the duty-bearers for the process. This is important and in keeping with the “Three Ones Principle,”<sup>182</sup> the development and operation of a system to monitor and evaluate the national response for the protection, care and support of children affected by HIV/ AIDS. This is an integral part of the broader national monitoring and evaluation plan at country level.

**vi. National Poverty Reduction Strategy (NPS) 2003**

In 2003, the Government of Botswana developed this strategy to link and harmonise anti-poverty initiatives, provide opportunities for people to have sustainable livelihoods through the expansion of employment opportunities and improved access to social investment and to monitor progress

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<sup>179</sup> I B Feranil, W J Herstad & R Mbuya-Brown (note 4) 12.

<sup>180</sup> Save the Children *Legal Frameworks and Policies for Orphans and Vulnerable Children\_ SADC\_2010* available at [http://www.riatt-esa.org/sites/default/files/get\\_file\\_2ae902a1.pdf](http://www.riatt-esa.org/sites/default/files/get_file_2ae902a1.pdf) (Accessed on 12/07/2011).

<sup>181</sup> Ibid.

<sup>182</sup> UNAIDS Publication *Three Ones' key principles- Coordination of National Responses to HIV/AIDS. Guiding principles for national authorities and their partners* (2006) 10.

against poverty. Botswana's approach to poverty reduction follows a three-pronged approach, namely:<sup>183</sup>

- Empowerment through health, education and skills development;
- Creation of opportunities for gainful employment through growth and incentives for entrepreneurship and job creation; and
- Social welfare.

One of the major weaknesses of the NPS is the fact that it is adult-focused and does not include children's issues.<sup>184</sup>

#### **6.1.3.5 Framework which protects vulnerable groups including children from crimes which expose them to the risk of HIV infection**

##### **i. The Marriage Act 18 of 2001 (Chapter 29:01)<sup>185</sup> –**

The Marriage Act came into force on 28 December 2001. It is not specifically for the protection of children affected by HIV/AIDS nor is it an HIV/AIDS-specific Act, however, it contains sections which can be evoked to protect children. The Act in section 6(b) prohibits the issuance of marriage licences with respect to or for the marriage of any other person having minor children of a former marriage under any system of customary law, unless a certificate is produced signed by an administrative officer (other than a cadet) or by a magistrate to the effect that he is satisfied that adequate provision has been made to safeguard the maintenance of such children. The purpose of this section is to ensure that children from previous relationships are adequately provided for and not neglected if the parents intend to get married.

The Act prohibits marriage conducted upon the consent of an insane person or a person who is incapable of giving consent to a marriage and sets the legal age of consent to marriage at 18.<sup>186</sup> It also stipulates that person below 21 years of age requires the consent of his/her parents or guardian (only the father's consent is required if the person's parents are married) unless he/she is a minor

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<sup>183</sup> UNICEF *Report World Fit for Children Mid Term Review Report 2007* available at [http://www.unicef.org/worldfitforchildren/files/Botswana\\_WFFC5\\_Report.pdf](http://www.unicef.org/worldfitforchildren/files/Botswana_WFFC5_Report.pdf) (Accessed on 12/07/2011).

<sup>184</sup> Ibid.

<sup>185</sup> Government of Botswana *The Marriage Act* available at <http://www.laws.gov.bw/VOLUME%204/CHAPTER%2029-01%20MARRIAGE.pdf> (Accessed on 23 June 2011).

<sup>186</sup> Section 14 of the Marriage Act.

widow or widower.<sup>187</sup> These provisions purport to prevent underage marriage and child exploitation which are common situations which OVCs are subjected to.<sup>188</sup>

The Marriage Act prohibits marriage between persons who are related within the forbidden degrees and it defines the forbidden degrees as including marriage between parent and child, parent and grandchild by brother and sister, uncle and niece or grandniece. The purpose of this is to safeguard children from incest and certain sexual abuse and exploitation which vulnerable children are often subjected to.

In-as-much as the Marriage Act was not enacted specifically for the protection of children affected by HIV/AIDS, it does protect children from many societal issues which women and children experience as a result of marriage. In addition, the fact that it sets the age of marriage at 18 years is important as this will preclude girls from early marriages and all the associated risks which predispose them to HIV infection.

## **ii. The Criminal Procedure and Evidence Act 1939 (Chapter 08:02)<sup>189</sup>**

The Criminal Procedure and Evidence Act came into force on 1 January 1939 and since its enactment, it has undergone several amendments to bring it in line with the current situation in the country including the HIV/AIDS epidemic. This is important considering the high rate of crimes which tend to affect the health and safety of children and which predispose them to HIV infection.<sup>190</sup>

The Act is not a child or HIV/AIDS-specific instrument nonetheless, it contains sections which can be evoked for the protection of children from getting infected with HIV. These sections include the procedure for the trial of the following offences under the Penal Code, namely- rape, attempted

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<sup>187</sup> Section 15 of the Marriage Act.

<sup>188</sup> Children especially the female child is often subject to harmful traditional practices, such as FGM, early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection and such practices often interrupt access to education and information. See GC3 Paragraph 11.

<sup>189</sup> Government of Botswana *The Criminal Procedure and Evidence Act* available at [https://www.unodc.org/tldb/pdf/Botswana\\_Criminal\\_Procedure\\_and\\_Evidence\\_Act\\_1997.pdf](https://www.unodc.org/tldb/pdf/Botswana_Criminal_Procedure_and_Evidence_Act_1997.pdf) (Accessed on 27 July 2011). This Act has been amended by the Criminal Procedure and Evidence (Amendment) Act, Available at [https://www.unodc.org/tldb/pdf/Botswana\\_Criminal\\_Procedure\\_and\\_Evidence\\_Act\\_1997.pdf](https://www.unodc.org/tldb/pdf/Botswana_Criminal_Procedure_and_Evidence_Act_1997.pdf) (Accessed on 27 July 2011).

<sup>190</sup> Violence, including rape and other forms of sexual abuse, can occur in the family or foster setting or may be perpetrated by those with specific responsibilities towards children, including teachers and employees of institutions working with children, such as prisons and institutions concerned with mental health and other disabilities. See GC3 on The CRC and HIV/AIDS Paragraph 37.

rape, indecent assault on any woman or girl, defilement of a girl under the age of 16 years, and indecent assault on a boy under the age of 14 years. It also added that trials in relation to any of these offences shall be held within closed doors.<sup>191</sup> This is to protect the identity of the children and to protect them from prejudice and public scrutiny.

Most relevant to children living through the HIV/AIDS epidemic is the fact that the Act recognises of HIV infection as an aggravating circumstance and imposes a harsher punishment for a person who infects another with HIV during a rape. According to the law, the minimum sentence for rape is 10 years in prison, increasing to 15 years with corporal punishment if the offender is HIV-positive, and 20 years with corporal punishment if the offender was aware of his HIV-positive status. Corporal punishment is used more often in the customary courts than in the formal courts and typically consisted of strokes to the buttocks with a cane. A person convicted of rape is also required to undergo an HIV test before sentencing.<sup>192</sup>

Other sections of the Act which provide for the punishment of sexual offences against children include section 192 which provides for the punishment of a person charged with rape where the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 146, 147, 150, 168 and 246 of the Penal Code (relating to indecent assault on females, defilement of girls under 16 years of age, procuring defilement by threats, incest by males and common assault, respectively). The Act states that the person may be convicted of that offence although he was not charged with it.

In addition, section 193, dealing with the punishment of a person charged with the defilement of a girl under 16 years of age, provides that the person may be convicted of an offence under section 146 of the Penal Code (relating to indecent assault on females) if, in the opinion of the court he is not guilty of the offence for which he is charged but is guilty of an offence under section 146 (although he is not charged with the offence under section 146). The purpose of this is to ensure that justice is served even if an accused person is charged with the wrong offence.<sup>193</sup>

The importance of these provisions criminalising and punishing perpetrators of sexual offences is very crucial and it has so far had a positive effect on the society. This is evident in the fact that the

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<sup>191</sup> Section 178 (5) of the Criminal Procedure and Evidence Act.

<sup>192</sup> Government of Botswana 2010 *Human Rights Report: Botswana's report to the US Department of State Bureau of Democracy, Human Rights, and Labour* available at <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154332.htm> (accessed on 23 June 2011).

<sup>193</sup> This is to ensure that the accused person is not let loose on technical grounds if he is charged with the wrong offence. This will ensure that the accused person is punished of the actual offence committed.

number of reported rape cases decreased during the year from 1,539 as of December 2009 to 1,332 in November 2010.<sup>194</sup> The Act unfortunately does not provide for the compulsory provision of PEP<sup>195</sup> for victims of rape as is the case in South Africa, where PEP is offered to rape victims, in line with the Sexual Offences Act.<sup>196</sup>

### iii. The Penal Code of 1964<sup>197</sup>

The Penal Code came into force on 10 June 1964, with the purpose of establishing a code of criminal law within the country. The Penal Code is not a child-specific or HIV/AIDS Act; nonetheless, it contains sections which can be evoked to protect children affected by HIV/AIDS.

Under the Penal Code, persons below the age of 8 years are not criminally responsible for any act or omission;<sup>198</sup> while between the ages of 8 and 14 it is possible that children can be demonstrated to be criminally responsible if it is proved by the prosecution that the child had the capacity to know that he/she ought not perform the act or make the omission at the time. However a male child under 12 years of age is presumed to be incapable of having carnal knowledge (section 13 (3) and therefore cannot technically be responsible for rape.<sup>199</sup> This section is prejudicial<sup>200</sup> to the female child who has intercourse with a male child below the age of 12 years especially if she falls pregnant because she will have to bear the consequence of the sexual act alone without the male child facing any criminal liability especially if the intercourse was non-consensual. In as much as the section protects the male child from criminal liability, it denies the female child the protection of the law if a male child younger than 12 years old has unlawful carnal knowledge of her.

Consent to sexual intercourse can only be given by a girl of 16 years and above. Furthermore any person who unlawfully has carnal knowledge of any girl below the age of 16 is guilty of defilement.<sup>201</sup> On the other hand it is a defence to this charge that the person had reasonable cause to believe that the female was above 16 or was his wife. Indecently assaulting a boy under 14 is also considered to be a crime.<sup>202</sup>

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<sup>194</sup> 2010 Human Rights Report: Botswana available at <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154332.htm> (Accessed on 23 June 2011).

<sup>195</sup> The compulsory provision of PEP is guaranteed in paragraph 2.8 of the National Guidelines for HIV Testing and Counselling of 2009.

<sup>196</sup> See section 28 of the South African Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007.

<sup>197</sup> Government of Botswana *The Penal Code* available at <http://www.laws.gov.bw/> (Accessed on 16 August 2011).

<sup>198</sup> Section 13 (1) of the Penal Code.

<sup>199</sup> CRC/C/51/Add.9 27 February 2007 page 22

<sup>200</sup> Girls are able to conceive a child immediately after their first menstruation which can be as early as 9 years of age.

<sup>201</sup> S147 (3) of the Penal Code

<sup>202</sup> S166 of the Penal Code.



This Act is useful in the protection of all children including those affected by HIV/AIDS as it criminalises certain sexual acts against children and prescribes punishment for these offences.

**iv. Domestic Violence Act 2008 (Chapter 28-05)<sup>203</sup>**

The Domestic Violence Act came into force on 30 April 2008. It was not enacted specifically for the protection of children or to deal with HIV/AIDS issues; however, it recognises children and the burden they bear when subjected to domestic violence and it contains provisions that can be evoked for their protection.

The Domestic Violence Act defines "domestic violence" as any controlling or abusive behaviour that harms the health or safety of the applicant and includes:

- a) physical abuse or threat thereof;
- b) sexual abuse or threat thereof;
- c) emotional, verbal or psychological abuse;
- d) economic abuse;
- e) intimidation.
- f) harassment;
- g) damage to property;

While defining economic abuse, it recognises children and states the effect of "emotional, verbal or psychological abuse" on children. In order to protect children against domestic violence, the Act stipulated that an *ex parte* interim order may be issued by the court where it is satisfied with the number of conditions which indicate abuse.<sup>204</sup>

The purpose of the interim order in the case of a child is to direct a member of the Botswana Police Service, Local Police or Deputy Sheriff either to remove, immediately or within a specified time, the applicant, a child or the respondent from the residence; or to accompany, within a specified time, a specified person to the residence to supervise the removal of personal belongings of the applicant, child or respondent.<sup>205</sup>

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<sup>203</sup> Government of Botswana *Domestic Violence Act* <http://www.laws.gov.bw/VOLUME%204/CHAPTER%2028-05%20DOMESTIC%20VIOLENCE.pdf> (Accessed on 22 July 2011).

<sup>204</sup> Section 9 of the Domestic Violence Act.

<sup>205</sup> *Ibid.*

The order may also be issued to prohibit the respondent from committing an act of domestic violence; entering specific parts of the residence; entering the applicant's residence, work place or any other place of safety or refuge; or communicating with or contacting the applicant or other specified persons; or make any other provision that the court considers necessary to provide for the immediate protection of the applicant or child.

The Domestic Violence Act also provides for the issuing of an "occupation order,"<sup>206</sup> to grant the applicant or child the exclusive or non-exclusive right to live in the residence occupied or belonging to the applicant, the respondent or to the applicant and the respondent, for a specified or indefinite period.

Other order include the "tenancy order" which shall grant the applicant or child the exclusive or non-exclusive tenancy of the residence occupied by the applicant, the respondent or by both the applicant and the respondent, with such order as to payment of rental or mortgage as shall be just.<sup>207</sup>

Domestic violence is a very serious problem for children affected by HIV/AIDS especially where the children are residing with families other than their biological families. Thus the fact that the Domestic Violence Act recognises that children also experience domestic violence and provides various court orders to protect them from the violence will go a long way in ensuring a good quality of life for children affected by HIV/AIDS.

#### **6.1.3.6 Framework which protectsthe right to education**

##### **i. Education Act of 1967 (Chapter 58:01)<sup>208</sup>**

The Education Act came into force on 24 February 1967. It is not a child-specific or human rights-specific instrument. In fact, the purpose of the Act is clearly stated in the Act that it exists to provide for the proper development of education and for incidental matters. Thus the Act's main purpose is the management and administration of educational institutions in Botswana.

Despite the clearly stated intent contained in the Act, the dedication of the Act to the welfare and health of children is indicated in section 17 where while addressing the conditions for the

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<sup>206</sup> Section 10 of the Domestic Violence Act.

<sup>207</sup> Section 11 of the Domestic Violence Act.

<sup>208</sup> Government of Botswana *The Education Act* available at

<http://www.laws.gov.bw/VOLUME%2012/CHAPTER%20%2058%2001%20EDUCATION.pdf> (Accessed on 26 July 2011).

registration of schools, the Act requires the Permanent Secretary to register a school only if he is satisfied that the teaching and accommodation are or will be adequate to the class of school it purports to be and that the physical health and moral welfare of the pupils will be adequately protected.

The Education Act is silent on the right to access education in Botswana.<sup>209</sup> In fact, the Act does not make any mention of the access of the poor and destitute children to the educational facilities. The only indication of the fact that fees may be waived is in section 25 which provides that the Minister may prescribe the fees which shall be charged in any Government school, local government school or aided school. This section gives the Minister power to fix different fees for different categories of persons, pupils or schools and to prescribe the circumstances in which fees may be refunded or remitted in whole or in part.<sup>210</sup> The availability of fee waiver facilitates access to education for orphans. This is significant as orphanhood is frequently accompanied by prejudice and increased poverty and these are factors that can further jeopardise children's chances of completing school education.<sup>211</sup>

It is noted that the Education Act makes no mention of HIV/AIDS in schools and how it will be dealt with by the schools. It is also silent on the rights to access educational facilities for poor children who cannot afford to pay the school fees in the form of fee waiver or subsidised fees for poor children. Nevertheless, this Act lays emphasis on the health and safety of children and makes this one of the conditions which will allow the child to be registered.

The following policies are in place to regulate the government response to education in Botswana:

## **ii. The Revised National Policy on Education of 1994 (National Policy on Education)<sup>212</sup>**

The National Policy on Education exists to protect and further Botswana's dedication to protection of the rights of children to education in line with its obligations in the international instruments to which it is a signatory.<sup>213</sup>

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<sup>209</sup> Although the Children's Act addresses this gap, the Education Act also ought to provide for the right to Education.

<sup>210</sup> Section 25 (3)(a and b) of the Education Act.

<sup>211</sup> UNAIDS (note 113).

<sup>212</sup> The Revised National Policy on Education, March 1994 Issue 2 of Government paper.

<sup>213</sup> This includes the CRC (article 28), ACRWC (article 11), ICESCR (article 13).

The National Policy on Education has guided the activities of the Ministry of Education in terms of curriculum reforms and on-going improvements in the education system. The implementation of the National Policy on Education was intended to cover a timeframe of 25 years given that its recommendations had been classified for implementation in the short, medium and long term, respectively.

In line with its dedication to protect the rights of children, the National Policy on Education provides for 10 years of free basic education for all children, a pledge indicative of Botswana's commitment to the MDG 2.<sup>214</sup> It also has embedded in it "The Pregnancy Policy Guidelines"<sup>215</sup> that allows girl children to return to school 6 months after confinement, on the condition that they produce a medical certificate that certifies them ready to return to school.<sup>216</sup> This will help to ensure that the girl child's right to education is protected even in the event that she falls pregnant while still at school.

Despite its dedication to the protection of the right to education, the Revised National Policy on Education is passive in the protection of the rights of children with disabilities. This is evidenced by the fact that the education system makes minimal provision for children with disabilities.<sup>217</sup> There are very limited educational facilities for disabled children and a few disabled children are integrated into regular school classes, with limited special education curriculum.<sup>218</sup>

The following key recommendations of the National Policy on Education are relevant to the rights of children affected by HIV/AIDS:

- Achievement of universal access to 10 years of basic education
- Re-introduction of the three years Junior Certificate Programme.
- Increased access to senior secondary education beyond 50%.
- Establishment of the Botswana Examinations Council to manage and co-ordinate the conduct of all national examinations/assessment programmes.

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<sup>214</sup> Government of Botswana (note 170).

<sup>215</sup> This is in line with article 11(6) of the ACRWC which gives State Parties the responsibility to take appropriate measures to ensure that children who become pregnant before completing their education have an opportunity to continue with their education on the basis of their individual ability.

<sup>216</sup> See 11 of the ACRWC.

<sup>217</sup> On paper, the level of dedication to the protection of the rights of children with disabilities in the educational system appears limited, however, in practice some work is being done to facilitate the rights of children with disabilities accessing the educational facilities - although this is not yet adequate. The posts of "Senior Teachers Advisors - Learning Difficulties" has been created at both primary and secondary schools with the aim of assisting teachers to address the diverse needs of learners, including those with various forms of disabilities.

<sup>218</sup> State University *Botswana Educational System—Overview* [2011] available at <http://education.stateuniversity.com/pages/186/Botswana-EDUCATIONAL-SYSTEM-OVERVIEW.html> (Accessed on 23 August 2011). Although according to the National Policy on Education the provision of resource units in select primary schools to meet the needs of disabled learners are to be achieved in the course of its implementation.

- Raising awareness on HIV/AIDS through infusion of HIV/AIDS matters into the school curricula.

These programmes will ensure that the educational system, which is a strategic investment of the country will provide children with better capabilities which will ensure their survival and provide them with opportunities in their adulthood. The infusion of HIV/AIDS into the school curricular will also help to ensure that the children understand what the HIV/AIDS epidemic is about and how they can protect themselves from infection and how they can take care of themselves if they are already infected. Nevertheless, the passive approach which the National Policy on Education takes to the disabled children's right to education is not in the best interest of the children. The policy thus needs to have dedicated guidelines on how disabled children can access the necessary education in Botswana without any hindrance.

#### **6.1.3.7 Framework which protects the rights of employees**

##### **i. The Employment Act of 1984 Chapter 47:01<sup>219</sup>**

The Employment Act came into force on 14 December 1984 with the intent to regulate matters relating to employment in Botswana. The Act is not child or HIV/AIDS-specific, however Part XI of the Act deals with the employment of children and young persons.

The Act defines a child as any person who is under the age of 15 years.<sup>220</sup> It protects children from child labour,<sup>221</sup> exploitation and hazardous employment, work which is dangerous to their health and wellbeing, work during the night, or work which is likely to endanger his physical development. It also prohibits employment of any person under 15 and grants protection to persons

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<sup>219</sup> Government of Botswana *The Employment Act* available at <http://www.laws.gov.bw/VOLUME%2010/CHAPTER%2047%2001%20EMPLOYMENT.pdf> (Accessed on 23 July 2011).

<sup>220</sup> This is another inconsistent definition of a child as raised in section 6.1 of this chapter.

<sup>221</sup> Section 105 of the Employment Act. It however allows for the employment of child who has attained the age of 14 years and is not attending school may be employed on light work not harmful to his health and development-

- (a) by a member of the family of such child; or
- (b) if such work is of a character approved by the Commissioner,

who have reached the age 15 of but are still under 18 years of age.<sup>222</sup> The Act also regulates the condition of employment of work for children who have been permitted to work under special circumstances and sets the number of permitted hours of work for children to 30 hours a week.<sup>223</sup>

The protection of children from child labour in Botswana is very important, considering the effect that the epidemic has on the socio-economic position of many families, and how this has affected the choices of survival which families have to make, including children submitting themselves to child labour.<sup>224</sup>

Although the Employment Act is not a child-specific Act, its dedication to the protection of children from child labour will go a long way in ensuring the children affected by HIV/AIDS are protected from making risky choices of survival which will ultimately have a negative impact their wellbeing.

#### **6.1.3.8 Framework which protects the right to property or inheritance**

##### **i. Administration of Estates Act of 1974 (Chapter 31:01)<sup>225</sup>**

The Administration of Estates Act came into force on 1 July 1974. The intent of the Act is to regulate the administration of estates of deceased persons, minors, persons under curatorship, absent persons and all property given in trust by deceased persons.

Even though the Act was enacted in the period before Botswana was hit by the HIV epidemic, it is trite that the Act is very relevant for the protection of the rights of children who have been orphaned by HIV/AIDS.

The Act focuses on the procedure for administrating the estate of a deceased person and sets out the procedure to be followed for the estate of a deceased person to be legally executed.<sup>226</sup> Section 50 also provides that the natural guardian of a minor shall, subject to subsections (2) and (3) and to the terms of the will (if any) of the deceased, be entitled to receive any movable property to which the

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<sup>222</sup> It makes it an offence to employ children and sets out the penalty in penalties prescribed by section 151(d) of the Act.

<sup>223</sup> Section 105 (b) of the Employment Act.

<sup>224</sup> Ministry of Local Government Report (MLG 1999:5)

<sup>225</sup> Government of Botswana *Administration of Estates Act* available at <http://www.laws.gov.bw/VOLUME%204/CHAPTER%203101%20ADMINISTRATION%20OF%20ESTATES.pdf> (Accessed on 26 July 2011).

<sup>226</sup> Section 33 of the Administration of Estates Act.

minor is, according to any distribution account in any deceased estate, entitled as an heir from the executor for and on behalf of the minor.

The Act also protects the interests of unborn children and mentally ill patients. In addition, the Act requires a high degree of accountability from the Administrator of the estate of a minor and stipulates the mode of rendering of accounts regarding the estate to the minor or a person under curatorship, to the natural guardian, tutor or curator of such a minor or person.<sup>227</sup>

It is somewhat evident that the Act purports to protect the rights of children who have been orphaned by HIV/AIDS. This is very crucial considering problems such as property grabbing, exploitation and neglect, which orphans face in society after the death of their parents.

## **6.2 Conclusions**

HIV/AIDS legislation and policies play a large role in guiding the government's intervention to problems facing children in the epidemic. They also aid in the development of programmes and other responses to deal with the problems which affected children face. Nonetheless, there are laid down international law standards which such legislation and policies should meet.

It is evident that there is a well-developed and well-structured legal framework for the protection of children affected by HIV/AIDS in Botswana. However, one cannot ignore the fact that the legal structure still falls short of certain standards which have been set out in international instrument regarding the rights of children and the rights of those affected by HIV/AIDS. It is also concerning that the progressive new Children's Act, which includes a Bill of Rights for Children is silent on the issue of HIV. This was a missed opportunity, as it is unclear as to when the Act will be revised again in the future.

As noted in this chapter, some of the key gaps in the legal and policy framework of Botswana include the fact that there is an absence of norms on sexual and reproductive rights and how these rights affect the ability of children to protect themselves from HIV infection. Currently, children need parental assistance with getting STI treatment, ARVs and even participating in decision-

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<sup>227</sup> Section 72 (b) of the Administration of Estates Act.

making regarding their health care until the age of 16. This could act as a significant barrier to children accessing health care and HIV/AIDS prevention services.<sup>228</sup>

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<sup>228</sup> Section 2.4.1 of *Botswana's National Guidelines for HIV Testing and Counselling 2009*.



## **Chapter 7    The extent to which the legal responses in South Africa and Botswana meet the international legal and policy standards on the rights of children infected and affected by HIV/AIDS**

### **7.0    Introduction**

Directly or indirectly, HIV/AIDS has life-threatening consequences for children if they are born with the disease, lose one or both parents as a result of the epidemic or when they are at risk of HIV infection.<sup>1</sup> It is possible that the devastation of HIV/AIDS will deprive millions of children of the right to live, grow and develop in the caring and supportive environment of their families.<sup>2</sup>

Consequently, the epidemic has stimulated the international community to develop norms and standards which require states to take steps to protect and ensure the delivery of services to children.<sup>3</sup> The adoption of these international instruments dealing with HIV/AIDS, and most importantly the CRC,<sup>4</sup> has ensured that a comprehensive normative framework now exists which describes the protections which should be in place to ensure the well-being of children, including those infected and affected by HIV/AIDS.<sup>5</sup>

Since the advent of the HIV/AIDS epidemic, South Africa and Botswana have modified some of their laws to respond to the epidemic. To an extent, these law reforms meet the norms established under international law. For example, the objectives of the Children's Act of South Africa and Botswana show a clear commitment to international law principles, especially those contained in the CRC.<sup>6</sup> Despite the dedication which both countries have paid to the rights of children,<sup>7</sup> there are still a number of gaps in the laws and policies on the protection of children affected by HIV/AIDS.

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<sup>1</sup> ILO Programme on HIV/AIDS and the World Publication *HIV/AIDS and Work, global estimates, impact on children and youth and response* (2006) 25.

<sup>2</sup> K Annan *We the Children: Meeting the Promises of the World Summit for Children* UNICEF (2001) 74.

<sup>3</sup> These instruments include the CRC and its GCs 3 and 4, especially, the ICESCR, the ICPR and the ACRWC.

<sup>4</sup> These include the optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, and new standards for inter-country adoption, child labour and juvenile justice.

<sup>5</sup> K Annan (note 1042 above).

<sup>6</sup> The Botswana Children's Act exists to promote the well-being of children, families and communities; provide for the protection and care of children where their parents have not provided, or are unable or unlikely to provide, that protection and care; and protect children from harm, as well as the recognition of the best interest of the child as the paramount consideration in deciding matters concerning a child. These are indicative of the Act's commitment to the principles of the CRC. The objects of the South African Children's Act also expressly indicate that the Act exists to give effect to the Republic's obligations concerning the well-being of children, in terms of the international instruments binding on the Republic.

<sup>7</sup> Chapters 5 and 6 show the legal and policy frameworks on the protection of the rights of the child.

This chapter developed an analytical framework to identify the strengths, weaknesses and gaps in the legal and policy frameworks for responding to HIV/AIDS in both countries. The analytical framework is based on the key norms identified in Chapters 3 and 4. Chapter seven is an evaluation of the legal approaches employed in both countries to determine how they comply with the international standards on the protection of the rights of children affected by HIV/AIDS. The progress made towards achieving these norms is benchmarked within the respective countries. For the purpose of this analysis, children affected by HIV/AIDS have been divided into two main groups- those already living with HIV/AIDS and those vulnerable to HIV/AIDS.<sup>8</sup>

## **7.1 Key features of a well-functioning framework on the protection of children affected by HIV/AIDS**

It is argued that the basis of a well-functioning framework which protects children affected by HIV/AIDS can be found in the CRC, its Optional Protocols and General Comments, as well as the ACRWC. The adoption of the CRC<sup>9</sup> signalled the beginning of the establishment of international standards on the protection of the rights of children. A range of HIV-specific norms have been developed from these principles through various comments on the CRC and international statements.<sup>10</sup> These are currently the standards against which progress in meeting human rights norms for children affected by HIV/AIDS can be assessed.<sup>11</sup>

Under the CRC, governments agree to meet the standards in the Convention. They are obliged to bring their legislation, policy and practice into line with its standards, implement them and to abstain from any action that may preclude the enjoyment of those rights or violate them.<sup>12</sup> The identified standards are employed as the model for evaluating the extent of the protection offered by the existing frameworks in both countries.<sup>13</sup>

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<sup>8</sup> The distinction is necessary in this section, as children here have different needs. The needs of children already infected with HIV will be different from those of those who are vulnerable to HIV infection. Cross ref to the chapter where this is explained.

<sup>9</sup> This CRC articulates the rights of children comprehensively and provides a set of guiding principles that fundamentally shape the way in which we view children.

<sup>10</sup> See GCs 3 and 4 issued by the Committee on the Rights of the Child.

<sup>11</sup> G Foster, C Levine & J Williamson *A Generation at Risk: The Global Impact of HIV/AIDS on Orphans and Vulnerable Children* (2005) 105. See also UNICEF *Frequently asked questions on the Convention on the Rights of the Child* available at [http://www.unicef.org/crc/index\\_30229.html](http://www.unicef.org/crc/index_30229.html) (Accessed on 23 September 2011).

<sup>12</sup> Ibid.

<sup>13</sup> These are also factors incorporated into the framework of analysis used in this chapter.

### **7.1.1. Analysis of the protective framework for children who are affected, but not infected, by HIV/AIDS<sup>14</sup>**

The HIV/AIDS related frameworks discussed here are premised on the basis that children affected by HIV may be prejudiced and stigmatised because of their relationship with the virus. They may have lost their parents or may be affected by the inability of their parent(s) to provide for them and protect them from harm. Given that parents are responsible for providing care, guardianship and maintenance, laws and policies need to ensure that parents or other adults are able to take on these responsibilities.

#### **7.1.1.1 Meeting the social and economic needs of children**

The provision of an adequate standard of living is a socio-economic right which is guaranteed in the ICESCR.<sup>15</sup> This right is in line with the four principles of the CRC, as the right is guaranteed on the basis of non-discrimination, in furtherance of the best interest of the child and in line with article 27 of the CRC. Article 11 of the ICESCR encourages state parties to recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions protect of socio-economic rights, paragraph 16 of GC 14 on the right to the highest attainable standard of health<sup>16</sup> states that "the prevention, treatment and control of epidemic, endemic, occupational and other diseases" requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity.<sup>17</sup>

In the South African Constitution, the socio-economic rights which are set out in section 26 to 28<sup>18</sup> include the right to housing (section 26), the right to health care, food, water and social security (section 27), and children's rights, which include a number of child-specific, socio-economic rights

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<sup>14</sup> The aim of this section is to analyse the protective framework existing in both countries with regard to children who are not infected by HIV, but who are affected by the epidemic because of their proximity to the virus in their families, communities or even society at large; the other section (7.1.2) deals with an analysis of the protective framework available for children who are infected with HIV/AIDS in Botswana and South Africa.

<sup>15</sup> Article 11 of the ICESCR.

<sup>16</sup> Article 12 of the ICESCR.

<sup>17</sup> See GC 14 on article 12.2 (c) of the ICESCR.

<sup>18</sup> It is crucial to note that the socio-economic rights guaranteed in sections 26 and 27 of the South African Constitution are meant for everyone, while the rights guaranteed in section 28 are specifically meant for children, 1996 Constitution of the Republic of South Africa.

such as nutrition, shelter, basic health care services and social services (section 28 (c) and education, section 29).

The basis for the legal protection of socio-economic rights was highlighted in the TAC's<sup>19</sup> judgment, when the court held that the primary obligation for the fulfilment of the socio-economic rights in section 28 did indeed rest upon parents where they can afford to pay for such treatment.<sup>20</sup> Nevertheless, this did not absolve the State of all responsibilities towards children in parental or family care.<sup>21</sup> The Constitution of Botswana does not guarantee the protection of socio-economic rights but the Children's Act of 2009 unequivocally guarantees some socio-economic rights which promote adequate standards of living for children affected by HIV/AIDS. The socio-economic rights protected in the Children's Act include the right to health (section 15), shelter (section 16), clothing (section 17) and education (section 18).

In South Africa, the duty to provide the socio-economic needs of their children, according to their resources, is primarily on the parents. If the parents cannot afford to do this, the duty then shifts to the State to ensure the protection of the rights. Thus, for example, in the context of indigent parents, who give birth to children in public health facilities and who are unable to access private medical treatment essential to the protection of the child from HIV/AIDS, there would be a duty upon the public sector to ensure the availability of programmes to prevent-mother-to child transmission of HIV.<sup>22</sup>

In Botswana it can be argued that the absence of socio-economic rights in the Constitution relieves the government of the responsibility of protecting these rights; however, given the extent of the protection provided in the Children's Act, it appears that the State is nevertheless under obligation to ensure that children have access to socio-economic rights. This will alleviate the burden on indigent parents, especially those who are incapacitated by HIV/AIDS, from being obliged to provide some of the socio-economic needs of their children, as these are the responsibility of the government.

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<sup>19</sup> *Minister for Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721(CC), 2002 (10) BCLR 1033 (CC) at Para70 – 71.

<sup>20</sup> Ibid.

<sup>21</sup> *Grootboom's case* 2000 11 BCLR 1169 (CC) in paragraph 77. The reasoning behind this apparent *volfe face* is not evident from the rather cursory way in which the Government's argument was dismissed..

<sup>22</sup> J Sloth - Nielsen ed. *Child's rights in South Africa: A legal Perspective* (2008) 120.

In this regard, children's rights to an adequate standard of living imply that children need to be financially supported by the parents or the State<sup>23</sup> to enable them to survive and develop. It is submitted that laws and policies ought to exist to create frameworks for children affected by HIV.<sup>24</sup>

### **i. Access to social assistance and support for OVC**

The right of access to social security is widely recognised in numerous international human rights instruments.<sup>25</sup> The ICESCR guarantees the right of access to social security in articles 9, 10 and 11. The availability of social security is believed to be the road to ensuring an adequate standard of living.<sup>26</sup> Paragraph 31 of the CRC GC 3 also indicate the need for states to provide legal, economic and social protection to affected children to ensure their access to education, inheritance, shelter, health and social services. Specifically for children affected by HIV/AIDS, paragraph 31 of CRC GC3 emphasises the need for providing “legal, economic and social protection to affected children to ensure their access to education, inheritance, shelter and health and social services, as well as to make them feel secure in disclosing their HIV status and that of their family members when the children deem it appropriate.” It urges state parties to implement measures which will foster the realisation of the rights of children by “giving them the skills and support necessary to reduce their vulnerability and risk of becoming infected”.

The strength of the South African framework in the protection of the right to social security/ assistance lies in the fact that the Social Assistance Act<sup>27</sup> and its Regulations give effect to the right to access social assistance in terms of section 27(1) (c) of the Constitution. It governs the delivery

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<sup>23</sup> This is in situations such as poverty, death or any other factor, where the parents cannot meet their obligation to support their child.

<sup>24</sup> D Bilchitz Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1-26.

<sup>25</sup> The most widely cited instrument regarding social security are the standards defined and developed by the International Labour Organisation (ILO). The ILO views social security as public benefits offered to compensate for defined types of risks contained in the Social Security (Minimum Standards) Convention of 1952 (No. 102).<sup>4</sup> This Convention identifies nine forms of social security. These are: medical care (Part I); sickness benefit (Part II); unemployment benefit (Part III); old age benefit (Part IV); employment injury benefit (V); family benefit (Part VI); maternity benefit (Part VII); availability benefit (Part VIII); and survivor's benefit Part (IX). See SAHRC 3<sup>rd</sup> Economic and Social Rights Report 1999/2000 Chapter 2 Page 12.

<sup>26</sup> Social security within the discussion of the adequate “standard of living” has received considerable attention in the general discourse on ESCR. It was contended that “should neither property nor work produce sufficient income for the adequate standard of living, the right of access to social security provides the fall-back or supplementary benefit. See A Eide *The right to an adequate standard of living including the right to food* in A Eide *et al.* (eds.) *Economic, Social and Cultural Rights: A Textbook* (1999) 95.

<sup>27</sup> Social Assistance Act 59 of 1992, available at <http://www.socdev.ecprov.gov.za/documentscentre/Acts/Social%20Assists%20Act%2059%20of%201992.pdf> (accessed on 4 April 2010). Section 4 also sets the conditions for a person's eligibility for child-support grant. It states that the grant will be to any person who is the primary care-giver of a child; who is resident in South Africa at the time of the application for the grant in question; who is a South African citizen; and who comply with the prescribed conditions.

and administration of social assistance. In addition to the legislative framework, there are a number of HIV specific policies in place, including the National Guidelines for Social Services to Children Infected and Affected by HIV/AIDS (2001),<sup>28</sup> which provide the standards for HIV/AIDS related care and support programmes to assist children, families and communities who are affected by HIV/AIDS.

The South African social assistance programme includes a number of cash grants for children, namely the child support grant, the foster child grant and the care dependency grant.<sup>29</sup> The child support grant is given to the primary care-giver of the child and not necessarily the parents. Although the amount awarded is small when compared to the other grants, it does ensure that the care-givers of children who are affected by HIV/AIDS are able to access the grants, even when their biological parents are dead or are incapacitated by AIDS.

The foster care grant is given where there is a court ordered foster care placement, or where children have been removed from their family environment due to abuse or neglect.<sup>30</sup> Foster care grants have helped ensure that children affected by HIV/AIDS are well protected for and that orphaned siblings are kept together in foster homes, thereby discouraging child-headed households.<sup>31</sup> However, a key concern is that it is not available to relatives who care for children without any court order<sup>32</sup> ordering them to do so.<sup>33</sup> Given that many children affected by HIV are absorbed into the extended family, this provision acts as a barrier preventing such families from accessing social assistance and obtaining a buffer against the socio-economic effects of caring for additional children. Furthermore, there is the likelihood that if foster care grants were more broadly

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<sup>28</sup>Government of South Africa National Guidelines for Social Services to Children Infected and Affected by HIV/AIDS (2001), available at <http://www.doh.gov.za/docs/guidelines-f.html> (Accessed on 21 April 2010).

<sup>29</sup> The Welfare Laws Amendment Act deals with the grants available to children. See also Access Fact Sheet *Background on Child Support Grant* [http://www.ci.org.za/depts/ci/pubs/pdf/rights/facts/Extend\\_CSG\\_factsheet.pdf](http://www.ci.org.za/depts/ci/pubs/pdf/rights/facts/Extend_CSG_factsheet.pdf) (Accessed on 23 July 2012).

<sup>30</sup> K Hall & P Proudlock *Orphaning and the foster child grant: A return to the 'care or cash' debate* (2011) 1-6.

<sup>31</sup> Pietermaritzburg Child and Family Welfare Society have developed a cluster foster care scheme for children with HIV/AIDS. In terms of this scheme, potential cluster foster care (CFC) parents are recruited, screened and trained in home-based care, universal precautions and the management of AIDS-afflicted children. They are provided with a 'start-up pack' of, *inter alia*, milk formula, clothing, toiletries and, in some instances, material support until the foster care grant is received. CFC parents are also visited monthly, to offer support and to ensure that children are well cared for. Quoted from Chapter 17 of Children's Institute Publication on *FOSTER CARE* 726. [http://www.ci.org.za/depts/ci/plr/pdf/salrc\\_dis/20-dp103-ch17.pdf](http://www.ci.org.za/depts/ci/plr/pdf/salrc_dis/20-dp103-ch17.pdf) (Accessed on 25 April 2013).

<sup>32</sup> See the case of *SS v The Presiding Officer, Children's Court Krugersdorp and Others*, 2012 SA (6) 45 (GSJ). The court in this case held that in terms of s150 (1) (a) of the Children's Act the child in the case is an orphan in need of care and protection. Since the child is without any visible means of support, he is placed in the foster care of the Lamanis. It was ordered that a foster care grant in relation to the child is to be paid to the foster parents for the duration of the foster care order, backdated to 20 January 2011, when the Children's Court handed down its judgment.

<sup>33</sup> Children's Institute *Foster Care* 715 available at [http://www.ci.org.za/depts/ci/plr/pdf/salrc\\_dis/20-dp103-ch17.pdf](http://www.ci.org.za/depts/ci/plr/pdf/salrc_dis/20-dp103-ch17.pdf) (Accessed on 25 April 2013).

available it would encourage relatives to voluntarily care for AIDS orphans, particularly as the grant is awarded per child and more than one grant may be obtained per household.<sup>34</sup>

Care dependency grants are awarded to persons caring for children with severe disabilities and who are in need of full-time and special care.<sup>35</sup> It is reasoned that a child with an HIV-related disability could potentially qualify for this grant. This would provide families with support when adults have to miss work in order to care for a sick child.

The disability grant is given to any person with a physical or mental disability which makes him/her unfit to work for a period of longer than six months.<sup>36</sup> The grant is given to persons above the 18 years of age and this grant is extended to persons who have been incapacitated by AIDS.<sup>37</sup> Although children do not qualify for disability grants they may benefit from grants indirectly, if their care-givers are awarded one, as it results in financial assistance for the family as a whole.<sup>38</sup>

For the most part, South African laws and policies on the right to social assistance are adequate and appropriate.<sup>39</sup> They are to some extent compliant with international standards which recognise that HIV/AIDS predisposes people to poverty when they are unable to work.<sup>40</sup> Social assistance is available directly to children, including children affected by HIV/AIDS.<sup>41</sup> As a result, these social assistance programmes have been hailed as essential ways in which families are able to cushion themselves from the effects of poverty.<sup>42</sup> They also serve as an important 'lifeline' to PLWHA and their households, enabling them to, for example, adhere to treatment.<sup>43</sup>

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<sup>34</sup> Ibid at page 717.

<sup>35</sup> Government of South Africa *Care Dependency Grants* [http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/caredependencygrant/en\\_ZA](http://www.services.gov.za/services/content/Home/ServicesForPeople/Socialbenefits/caredependencygrant/en_ZA) (Accessed on 25 July 2013).

<sup>36</sup> See section 5.1.3.4 in Chapter 5.

<sup>37</sup> PLWHA have accessed disability grants once they have fulfilled the criteria set down by the Department of Social Development.

<sup>38</sup> T Barnett & A Whiteside *Poverty and HIV/AIDS: Impact, Coping and Mitigation Policy* (2002) 16.

<sup>39</sup> These include the Social Assistance Act and the Regulations, Welfare Laws Amendment Act, National Department of Social Development Strategic Plan 2010-2015, as well as the National Disability Strategy White Paper 1997.

<sup>40</sup> G A Cornia *Aids, Public Policy and Child Well-Being* (2007) 111.

<sup>41</sup> See Chapter 5 for discussion of the availability of social assistance.

<sup>42</sup> In The State of the Nation address by the then President of South Africa, Thabo Mbeki, to the joint sitting of the Houses of Parliament, Cape Town, 21 May 2004, President Mbeki summarised government's approach to poverty reduction as: "...encouraging the growth and development of the First Economy, increasing its possibility to create jobs; implementing our programme to address the challenges of the Second Economy; and, building a social security net to meet the objective of poverty alleviation". Available at <http://www.dfa.gov.za/docs/speeches/2004/mbek0521.htm> (Accessed on 25 April 2013).

<sup>43</sup> WHO, *Nutrient requirements for people living with HIV/AIDS* (2003) 11.

Although South Africa has a well-developed social assistance programme, a number of commentators<sup>44</sup> have criticised aspects of the government's programme:

- i. The extension of disability grants to PLWHA has been undermined by the subsequent disqualifying of persons who became healthier due to ARV programmes.<sup>45</sup> This has the unintended consequence of leading to PLWHA refusing to take their ARV treatment to avoid losing the disability grant.<sup>46</sup>
- ii. There is an absence of a comprehensive package of social assistance and this undermines the ARV roll-out programme, as patients with no stable form of income may be unable to attend monthly appointments, as required. This has an impact on the efficacy of the treatment roll out. It has been predicted that this may lead to potentially dangerous side-effects going undetected and may jeopardise people's continued involvement in the programme.<sup>47</sup>

On this, Hardy and Richter<sup>48</sup> explain that, as the aim of the disability grant is to provide relief for people who are physically or mentally incapable of engaging in employment, if a person living with HIV/AIDS becomes healthy enough to be considered capable of engaging in employment, he or she will no longer qualify for the disability grant.<sup>49</sup>

In Botswana there is no protection of the right to social assistance or nutrition. Nonetheless, the Children's Act<sup>50</sup> places an obligation on the Minister of Social Development to "provide or cause to be provided, for refugee and displaced children, such basic social services as are necessary for their survival or sustenance." It is submitted that this is a very narrow formulation, which does not place an obligation on the State to provide social assistance to OVC, unless they are either refugees or displaced children. However, there is a policy framework which provides for a number of social

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<sup>44</sup> C Hardy & M Richter 'Disability grants or antiretrovirals? A quandary for people with HIV/AIDS in South Africa' (2006) 5 *African Journal of AIDS Research* 85.

<sup>45</sup> *Ibid* at 90.

<sup>46</sup> The implications are the financial burden on the State to place the patient on an effective second line ARV treatment, which is more expensive, as well as the fact that the patient puts their lives at risk if they do not take the ARVs appropriately.

<sup>47</sup> C Hardy & M Richter (note 44) 92. This is echoed in research conducted by D Brand (2003). In his review of government food programmes, Brand (2003, p. 11) comes to the following conclusion: "It does not seem an overstatement to say that there is currently no single coherent, overarching policy framework dealing with the right to food in South Africa." In his study, Brand notes the following main problems with the provision of the right to food: a lack of co-ordination between different government departments, an emphasis on "longer-term capacity initiatives rather than on immediate food transfers" and the inability of government to recognise that there is "an endemic crisis of food security in South Africa."

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> Section 53 of the Children's Act.



assistance schemes for children affected by HIV/AIDS. The Destitute Programme<sup>51</sup> and the National Guidelines on the Care of OVC (2008) require social assistance to be provided to children affected by HIV/AIDS.<sup>52</sup> Likewise, the Remote Area Dwellers Programme and the National Poverty Reduction Strategy describe the nature of state social security and assistance programmes.<sup>53</sup>

The lack of legally defined social service obligations by the State is a significant gap in the Botswana legal framework.<sup>54</sup> It is lamentable that the drafters of the Children's Act elected to focus only on refugee and displaced children. There is a need for social assistance to be extended to all groups of vulnerable children, but particularly those in need of protection, as defined in section 42 of the Children's Act. Accordingly, Botswana does not meet the international norms on the provision of social assistance to children and families affected by HIV/AIDS. It is therefore submitted that there is the need for the enactment of social assistance laws which will regulate the provision of social assistance on a similar basis to the South African Social Assistance Act. Such legislation should ensure social assistance to people who are sick and those who are recovering from an illness.<sup>55</sup>

## **ii. Access to maintenance and support for children**

The basis for the protection of the right to maintenance is found in the principles of the CRC and Article 27 of the CRC, which provides for a child's right to "a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development." The UN General Assembly, in the 2001 Declaration of Commitment on HIV/AIDS, committed world leaders to

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<sup>51</sup> Children under the age of 18 years, born to persons identified as destitute, are provided with food baskets, clothes and school requirements Legal Frameworks and Policies for Orphans and Vulnerable Children\_ SADC\_2010, available at [http://www.riatt-esa.org/sites/default/files/get\\_file\\_2ae902a1.pdf](http://www.riatt-esa.org/sites/default/files/get_file_2ae902a1.pdf) (Accessed on 30 August 2011).

<sup>52</sup> These are based on the recommendations set forth by UNAIDS, UNICEF and USAID in *Children on the Brink, 2004* and UNICEF *et al. The Framework for the Protection, Care, and Support of Orphans and Vulnerable Children Living in a World with HIV and AIDS* (2004).

<sup>53</sup> This is strategy to link and harmonise anti-poverty initiatives, provide opportunities for people to have sustainable livelihoods through the expansion of employment opportunities and improved access to social investment and to monitor progress against poverty.

See UNICEF *World Fit for Children Mid-Term Review Report 2007*, available at [http://www.unicef.org/worldfitforchildren/files/Botswana\\_WFFC5\\_Report.pdf](http://www.unicef.org/worldfitforchildren/files/Botswana_WFFC5_Report.pdf) (Accessed on 12/07/2011).

<sup>54</sup> The law does not stipulate the availability of any social assistance from the State; rather the Children's Act categorically saddles parents with the duty to protect their children<sup>54</sup> and even takes no responsibility for the care of children with disabilities.

<sup>55</sup> Within this framework, not only do people with HIV/AIDS deserve social assistance, but, importantly, all people living in poverty without access to education, to employment, and to healthcare deserve state support, as mandated by South Africa's Bill of Rights. See C Hardy & M Richter (note 44) 92.

“addressing as a priority the vulnerabilities faced by children affected by and living with HIV; providing support and rehabilitation to these children and their families, women and the elderly.”<sup>56</sup>

In South Africa this right is protected in the Maintenance<sup>57</sup> and Children’s Acts.<sup>58</sup> In Botswana, these rights can be found in the Deserted Wives Act<sup>59</sup> and the Children’s Act.<sup>60</sup> Despite this legislation, in both countries the primary obligation is on the parents or care-givers to maintain children accordingly to section 18 (2 a-d) and section 27 (1) of the Children’s Acts of South Africa and Botswana, respectively. The legal framework on the protection of the right to care and maintenance will offer very little to help OVC, unless there is an obligation on the State to support parents through the implementation of policies and programmes for child well-being, as stipulated in section 31 of the Children’s Act.

The right to maintenance is a socio-economic right which is vital for the sound development and well-being of all children, especially OVCs and those affected by HIV/AIDS.<sup>61</sup> Although both frameworks have placed an obligation on the parents to protect their children, this does not necessarily help children affected by HIV, as their parents may be sick with HIV/AIDS and unable to adequately provide the basic necessities of life for the children, especially if the children are also sick. This obligation therefore falls back on the government to ensure that the right of children to adequate standard of living is guaranteed, according to international standards.<sup>62</sup>

### iii. The right to shelter<sup>63</sup> and safe housing<sup>64</sup>

The right to shelter and safe housing<sup>65</sup> under international law is explicitly guaranteed by Article 25(1) of the UDHR, article 11(1) of the ICESCR and article 27(3) of the CRC.<sup>66</sup> In addition, the

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<sup>56</sup> See paragraph 32 of the UN General Assembly in the 2006 High-Level Meeting on AIDS, held from 31 May to June 2006, which adopted the Political Declaration on HIV/AIDS, cited in UNICEF *Caring for Children affected by HIV and AIDS* November (2006).

<sup>57</sup> Section 15 (1-3) of the Maintenance Act. This provides for the protection of the right to adequate standard of living for the child. It sets out the duty of parents to support their children. The duty extends to support which a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.

<sup>58</sup> Section 16 of the Children’s Act, which guarantees the child’s right to adequate and safe housing as an element of adequate standard of living.

<sup>59</sup> Article 3 of the Deserted Wives Act, which Act provides that a father of a deserted child can be ordered by the court to pay a sum sufficient to provide the child with food and other necessities of life.

<sup>60</sup> Article 16 and 17 of the Children’s Act guarantees every child’s right to adequate and safe housing and adequate clothing, respectively, as elements of an adequate standard of living.

<sup>61</sup> D Ewing *Prevention means access to treatment now: Children and Aids* Children (2007) 4 FIRST 4.

<sup>62</sup> This point was addressed in the *Grootboom case* (note 21). It was established that the obligation of the State to protect ends at the point where the parents cannot legitimately provide.

<sup>63</sup> Section 28 (1) (c) of the South African Constitution and section 16 of the Children’s Act of Botswana.

<sup>64</sup> Section 26 of the South African Constitution and Section 16 of the Children’s Act.

Declaration on Cities and Other Human Settlements in the New Millennium unequivocally recognise the relevance and role of housing and shelter, or the living environments, in the prevention, care and treatment of HIV/AIDS.<sup>67</sup>

This right is guaranteed under section 26 of the South African Bill of Rights. This section requires the State to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” The complexity with the South African approach is that these rights are subject to the progressive realisation limitation<sup>68</sup> in section 26 (2).<sup>69</sup> This means that there is no immediate obligation on the government to provide shelter for children, especially those living with their parents, as this is within the scope of parental duties.<sup>70</sup> Furthermore, the Constitutional Court has held that the State has a duty “to provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28.”<sup>71</sup> Marauhn<sup>72</sup> maintains that this obligation requires the state to ensure that children are properly cared for by their parents or families and that they receive appropriate alternative care in the absence of parental or family care.

Pillay<sup>73</sup> submits that, if the legal framework on the right to housing in South Africa is to meet the needs of children affected by HIV, it must give priority to the needs of the sick as well as the poor. The housing policy should promote the effective functioning of the housing market, while levelling the playing field and taking steps to ensure equitable access for all; promote measures to prohibit unfair discrimination on the ground of HIV status and all other forms of unfair discrimination by actors in the housing development process and promote the housing needs of vulnerable children and other groups disadvantaged by unfair discrimination.<sup>74</sup> The weakness of the South African legal system is that housing policies do not specifically address the needs of children affected by HIV.

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<sup>65</sup> These rights are used interchangeably as the two countries have used different words for them.

<sup>66</sup> In Kalin (2009)'s view, the extent of the right to shelter, as explained by the Committee on ESCR GC 7, sets out to protect even against forced evictions. See W. Kalin 'Legal Annotations on the Guiding Principles' (2008) in L. Fox O' Mahony & J.A. Sweeney *The Idea of Home in Law: Displacement and Dispossession* (2011) 128.

<sup>67</sup> Statement of the Executive Director United Nations Centre for Human Settlements (Habitat), A. K Tibaijukato, at the Special Session of the United Nations General Assembly on HIV/AIDS in New York 27 June 2001.

<sup>68</sup> CMN Nicholson *The Comparative and International Law Journal of Southern Africa*, Vol. 35, Issue 3 (2002) 352. See also E. Bonthuys *The best interest of children in the South African Constitution*, available at <http://www.childjustice.org/docs/bonthuys2005.pdf> (Accessed on 30 January 2012).

<sup>69</sup> The right to shelter was upheld in the case of *Government of the Republic of South Africa & Others v Grootboom & Others* (note 21), where the High Court found that homeless parents should be provided accommodation together with their children on the basis of the children's rights to shelter.

<sup>70</sup> Ibid.

<sup>71</sup> See the dictum of the Court in the *Grootboom Case* (note 21) at paragraphs 5 and 11.

<sup>72</sup> T Marauhn *Internationaler Kinderschutz: Politische Rhetorik Oder Effektives Recht?* (2005) 193.

<sup>73</sup> K Pillay, R Manjoo & E Paulus *Rights, Roles and Resources: An Analysis of Women's Housing Rights – Implications of the Grootboom Case* IDASA (2002) 15.

<sup>74</sup> Ibid.

In Botswana there is no right to access housing or shelter in the Constitution. However, the Children's Act protects the rights of children to adequate and safe housing unequivocally.<sup>75</sup> Further details regarding a child's right to shelter is provided in the Revised National Policy on Destitute Persons 2002.<sup>76</sup> This focuses on the construction of shelter for eligible destitute persons, including children whose parents are terminally ill or incapable of caring for them. Although this provision does not automatically qualify children affected with HIV/AIDS for shelter, there is nothing in the policy which prohibits it from being evoked in the protection of their right to shelter.<sup>77</sup>

The strength of the provisions in the Children's Act is that there is no impediment attached to the enjoyment of the right to shelter. It follows that the use of the phrase "adequate housing" in the Act is deliberate and aims to ensure that the shelter meets the specification of the Committee on ESCR regarding adequate housing as is contained in its GC 4. The protection in Botswana is also far-reaching and can be used to protect the rights of children affected by HIV/AIDS to adequate and safe housing. The protection of the right to shelter in legal and policy instruments in Botswana is in agreement with international standards on children's right to shelter.

#### **iv. The right to food/nutrition**

The foundation of the protection of the right to food under international law is the ICESCR.<sup>78</sup> It is particularly important in the context of HIV, given the link between food security and HIV/AIDS, which has resulted in the WHO calling for the integration of nutrition into all packages of care, treatment and support for PLWHA.<sup>79</sup> In addition, paragraph 21 of the GC 12 on the CESCR<sup>80</sup> requires state parties to "take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. This will require the adoption of a national strategy to ensure food and nutrition security for all."

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<sup>75</sup>Section 16 of the Children's Act.

<sup>76</sup>Government of Botswana *Revised National Policy on Destitute Persons (2002)* available at <http://www.gov.bw/en/Ministries--Authorities/Local-Authorities/Lobatse-Town-Council/Tools-and-Services/Services/DESTITUTION/> (Accessed on 03 May 2012).

<sup>77</sup> The government of Botswana initiated the destitute programme in 1980 after the realisation that the extended family was disintegrating. Before Botswana's political independence, the extended family system served as a major safety-net, meeting all kinds of needs, be they material, social or emotional. See G N Tshenko *Situational analysis of the Socio-economic Conditions of OVC in Seven Districts in Botswana* Human Science Research Council (HSRC) (2007) 4.

<sup>78</sup>Article 11(1) of the ICESCR, General Assembly resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

<sup>79</sup> WHO made the call at the WHO conference on HIV/AIDS, food and nutrition security held in Durban, South Africa in 2005.

<sup>80</sup> UN *General Comment 12 on the right to adequate food (Art.11)*: 1999/05/12. E/C.12/1999/5 Available at

In order to ensure the protection of the right to food according to international standards, governments of both countries are obligated to provide income support and a means of maintaining a social security system, inclusive of social grants and certain direct food security interventions (e.g. the school nutrition programme and food parcels).<sup>81</sup>

The right to food is guaranteed in section 27(1) (b) of the South African Constitution and in 2002 the government formulated the Integrated Food Security Strategy for South Africa. Programmes have been put in place to ensure that children have access to basic nutrition through the establishment of nutrition schemes such as the School Nutrition Programme (Department of Education); Integrated Nutrition Programme (Department of Health); Social Assistance Programme (Department of Social Development); Poverty Relief Programme (Department of Social Development); and Emergency Food Relief Programme (Department of Social Development).<sup>82</sup>

The right to food in the Constitution is subject to the obligation on the State to progressively realise this right,<sup>83</sup> in keeping with international standards. Taking the link which the WHO drew between HIV/AIDS and the right to food into consideration,<sup>84</sup> it is accepted that much still needs to be done to ensure the realisation of the right, especially for PLWHA. It is of concern that the Integrated Food Security Strategy merely recognises the effect of the HIV/AIDS epidemic on the food security of households; it does not make any recommendations on how to give priority in the provision of food for households affected by HIV/AIDS. Brand<sup>85</sup> has noted that the weakness in the South African programmes is that there is no single coherent, overarching policy framework dealing with the right to food. Furthermore, there is a lack of co-ordination between different government departments, an emphasis on “longer-term capacity initiatives rather than on immediate food transfers” and an apparent inability of government to recognise that there is currently “an endemic crisis of food security in South Africa.”<sup>86</sup>

In Botswana, the right to food is founded only in policy documents such as the National OVC policy, which requires the government to provide facilities to address the food needs of OVCs, the

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<sup>81</sup> This statement is warranted by the fact that children affected BY HIV/AIDS are more likely to be living in poverty and their need to access to food is just one of their problems. They are faced with other poverty related problems.

<sup>82</sup> G Tshitauzi, *Personal communication to the Nutrition Directorate, National Department of Health, South Africa*, (2005) in C Hardy & M. Richter (note 44) 94.

<sup>83</sup> Section 27 (2) of the Constitution.

<sup>84</sup> At the WHO conference on HIV/AIDS, food and nutrition security held in Durban, South Africa, in 2005.

<sup>85</sup> This is echoed in research conducted by D Brand (2003) *Between availability and entitlement: the Constitution, Grootboom and the right to food*, in C Hardy & M Richter (note 43).

<sup>86</sup> This is echoed in research conducted by D Brand (2003). In his review of government food programmes, See D Brand (ibid).

Vulnerable Group Feeding Programme (VGFP), which provides food support to children younger than 5 years and lactating mothers (the Primary School Feeding Programme is a sub-programme of the VGFP),<sup>87</sup> and the Destitute Programme, which ensures the provision of a food baskets to people who qualify as destitute.<sup>88</sup> Neither the Children's Act nor the Constitution makes any reference to the protection of this right.

This is therefore a weakness in the framework, as the right to food is only found within policies which are not justiciable. In addition, it is reported that the food baskets provided are grossly inadequate and, in fact, despite the provision of food parcels for destitute children and families, families caring for orphans still face difficulties with the additional responsibilities of providing food and shelter for children from the extended families who are placed in their care.<sup>89</sup>

#### **v. Equal access to education**

The standard on the protection of the right to education is found in the UDHR, which recognises the right to education and makes elementary (primary school) education compulsory, while suggesting that higher education should be equally accessible to all, on the basis of merit. Technical and professional education should be made generally available.<sup>90</sup> Article 23(3) of the CRC contains provisions for equal access to education for disabled children.

Globally, education has been regarded as an end in itself and as a means for individual and societal growth. Its recognition as a human right is derived from the indispensability of education to the preservation and enhancement of the inherent dignity of the human person.<sup>91</sup>

In agreement with the protection given to the right to education in these international instruments, the South African Constitution unequivocally guarantees the right to compulsory basic education for children (section 29) and this right is not subject to immediate realisation. The right to further

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<sup>87</sup>Legal Frameworks and Policies for Orphans and Vulnerable Children\_ SADC\_2010 <[http://www.riatt-esa.org/sites/default/files/get\\_file\\_2ae902a1.pdf](http://www.riatt-esa.org/sites/default/files/get_file_2ae902a1.pdf)> (Accessed on 12/07/2011).

<sup>88</sup> See Revised National Policy on Destitute Persons 2002 (note 76).

<sup>89</sup> C M Miller & S Gruskin *et al.* 'Orphan Care in Botswana's Working Households: Growing Responsibilities in the Absence of Adequate Support' (2006) 96(8)*American Journal of Public Health* 1429–1435, See also <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1522103/> where it is submitted that only 2% of households reported receiving assistance from friends or neighbours and fewer than 1% reported receiving any type of support from community volunteers. Orphan households typically received support from other household members (43%), from relatives (39%), or from the government (34%). However, 15% of households received no assistance.

<sup>90</sup> See article 26 of the UDHR.

<sup>91</sup>University of Minnesota *Circle of Rights ESCR Activism Training manual* <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module16.htm> (Accessed on 12 September 2012).

education is nonetheless subject to progressive realisation. The legal framework makes school attendance compulsory for children from the age of 7 – 15 and there is a legal obligation on parents to ensure that their children go to school.<sup>92</sup> It also allows for the exemption of learners from compulsory school attendance if this is in the interests of the learner.<sup>93</sup>

The framework for the protection of the right to education in South Africa is in harmony with international standards.

- a. It allows equal access for all children, even those with HIV/AIDS who are often marginalised or poor. Within the current framework the provision of fee remission facilities to indigent learners is significant. If the parents can prove to the governing body of the school that they cannot afford the fees, they may be granted an exemption from paying. A learner may not be refused admission on the basis that his or her parent is unable to pay, or has not paid such fees.
- b. It prohibits unfair discrimination. Section 5 of the South African Schools Act expressly prohibits all forms of unfair discrimination in schools in South Africa. Although this Act does not expressly prohibit discrimination based on the grounds of HIV/AIDS status, the National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions prohibit unfair discrimination based on HIV status,<sup>94</sup> while the National Education Policy Act prohibits unfair discrimination based on any ground whatsoever.<sup>95</sup>
- c. It has a flexible standard which enables children to be exempted from school in certain circumstances, such as when they are ill.<sup>96</sup>

In Botswana, the right to free basic education is guaranteed in the Children's Act.<sup>97</sup> The Children's Act places a duty on parents, relatives or guardians to ensure that their children or wards have access to education. It sets out penalties for the contravention of this law by any parent, relative or guardian. This is in line with Botswana's National Policy on Education, which provides for 10 years

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<sup>92</sup>Section 3 of the South African Schools Act.

<sup>93</sup> Chapter 2 section 3 of the South African Schools Act deals with issues of compulsory school attendance, while section 4 deals with the exemption of a learner from the compulsory school attendance rule.

<sup>94</sup> See section 4 of the National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions.

<sup>95</sup> See section 9 of the National Education Policy Act, 1996 (Act No. 27 Of 1996). Admission Policy for Ordinary Public Schools.

<sup>96</sup> C Campbell *Letting them die: why HIV/AIDS intervention programmes fail* (2003) 5.

<sup>97</sup>Section 18 of the Children's Act.

of free basic education for all children,<sup>98</sup> a pledge indicative of Botswana's commitment to the MDG 2,<sup>99</sup> as well as the Long Term Vision for Botswana (Botswana Vision 2016).<sup>100</sup>

A weakness in the Framework of Botswana regarding the protection of the right to education is the fact that it is passive in the protection of the rights of children with disabilities and the education system makes minimal provisions for children with disabilities.<sup>101</sup> Despite the fact that the National Policy on Education raises awareness on HIV/AIDS through infusion of HIV/AIDS matters into the school curricula,<sup>102</sup> it does not expressly prohibit HIV/AIDS-based discrimination while accessing the educational facilities.

The fact that the Education Act of Botswana is silent on the protection of the right to education by not expressly providing fee remission facilities for poor children is a gap in the Act. However, the Children's Act and the Policy Framework have dealt with this by providing the right to 10 years of free basic education for all children. This is an indication of the fact that Botswana is taking steps to avail all children of their socio-economic rights. The policy documents which provide for the enjoyment of the right are set out the manner in which the right can be realised.

In both countries, poverty, being a consequence of the HIV/AIDS epidemic, is likely to prevent some children from enjoying the right to free basic education when parents and guardians are not able to provide the basic necessities for school, such as sandals, bags and uniforms for their children or wards to attend school. Hence, many of the government policies which are in place to protect the right to education ought also to mitigate the hardship caused by poverty by providing for the other necessities which are essential for alleviating the suffering caused by poverty.

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<sup>98</sup>Government of South Africa *Revised National Policy on Education (RNPE)*, Government Paper No. 2 of April 1994.

<sup>99</sup>Government of South Africa *Legal Frameworks and Policies for Orphans and Vulnerable Children SADC2010* available at [http://www.riatt-esa.org/sites/default/files/get\\_file\\_2ae902a1.pdf](http://www.riatt-esa.org/sites/default/files/get_file_2ae902a1.pdf) (Accessed on 12/07/2011).

<sup>100</sup> Long Term Vision for Botswana [http://www.vision2016.co.bw/tempimg/media/mediac\\_.pdf](http://www.vision2016.co.bw/tempimg/media/mediac_.pdf) (Accessed on 12/07/2011).

<sup>101</sup> On paper, the level of dedication to the protection of the rights of children with disabilities in the educational system appears limited. However, in practice, some work is being done to facilitate the rights of children with disabilities accessing the educational facilities - although this is not yet adequate. The posts of "Senior Teachers Advisors - Learning Difficulties" has been created at both primary and secondary schools, with the aim of assisting teachers to address the diverse needs of learners, including those with various forms of disabilities.

<sup>102</sup> See the key recommendation of Botswana's National Policy on Education (note 93).



### 7.1.1.2 Meeting the needs of children to a parent or guardian

Article 23 of the ICCPR recognises the basis for the protection of the right to family and recommends the preservation of the family. The ICCPR<sup>103</sup> underscores the duty of the family to protect the child in recognition of their status as minors. Since children have limited legal capacity and they need assistance with decision-making, a parent or guardian needs to assist them with this role until they reach adulthood. In this regard, there is the need for legal and policy standards to regulate the protection of children by their parents and guardians.

#### **i. Transfer of guardianship from the biological parents to adoptive ones, guardians or *de facto* parents**

Under international law, the basis for the provision of guardianship for children is found in the Guidelines on the Alternative Care of Children.<sup>104</sup> This stipulates that all children should be provided with alternative care in the absence of parental care. Decisions regarding alternative care should take into account the views of the child and should promote the best interests of the child.

When the parents of a child are not capable of assuming their parental rights and responsibilities, either due to death, illness or any other reason, the laws of both countries recognise any person who opts to take up the parental rights and responsibilities in respect of the child as the care-giver or the guardian of the child, if some formal requirements are fulfilled.

In South Africa, the process of transferring guardianship from the natural parents to a guardian is complex. For the purpose of this discussion, guardianship is looked at in a broad sense, as encompassing the care and control of the minor child, the administration of the minor's property and the power (and duty) to assist the minor in the performance of juristic acts,<sup>105</sup> such as those listed in section 18 (3) of the Children's Act in South Africa.

There are only 2 ways of transferring or appointing guardians for children in South Africa.<sup>106</sup> Problems may occur when children are being fostered by relatives or other adults who have not been named in the will as guardians, as they can only act as care-givers of the child. They cannot exercise some of the legal powers accorded to parents or "guardians" of a child.<sup>107</sup> Thus care-givers

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<sup>103</sup>Article 24 of the ICCPR.

<sup>104</sup> UNICEF, 2010. *Guidelines on Alternative Care*, G.A. Res 64/142, 24 February 2010.

<sup>105</sup> G Wille, F Du Bois *et al.* (eds) *Wille's Principles of South African Law* (2007).

<sup>106</sup>S E Sachs & J D Sachs 'Africa's children orphaned by AIDS' (2004) 364 *The Lancet* 1404.

<sup>107</sup>Section 18(3) of the Children's Act.

who have not been appointed as guardians cannot carry out any of the duties listed in section 18(3) of the Children's Act. They have limited legal capacity to act on behalf of the child. This limited capacity allows them to carry out many day-to-day rights and responsibilities to care for the child, in line with section 12 (2) of the Children's Act. For instance, they can consent to medical treatment, but not to research,<sup>108</sup> and they can enrol a child in school. They also lack the legal capacity to carry out any of the actions listed in section 18 (3) the Children's Act, on behalf of the child.<sup>109</sup>

The only recourse which caregivers who want to assume the role of guardians of a child have in respect of the child, as listed in section 18(3), is to approach the courts for an order declaring them as guardians of the children. This might be a problem if they are not able access the courts due to the financial constraints.<sup>110</sup>

In terms of Botswana's Children's Act, the process of assuming the duties and responsibilities of a parent in respect of an orphaned children is a simple one. Section 27 of Botswana Children's Act simply places the duty to care for, and maintain, the child on both parents of the child.<sup>111</sup> Upon the death of one<sup>112</sup> or both of the biological parents of a child. or where the biological parents do not live together as a nuclear family and the absent parent plays no role in the child's life, the Act gives persons who act as primary caregivers and other adults<sup>113</sup> who are responsible for the care of a child the power to assume the parental duties and rights,<sup>114</sup> similar to those which the biological parents of the child have.<sup>115</sup>

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<sup>108</sup> As research is not necessarily an act of caring for the child.

<sup>109</sup> Only a guardian of a child can perform the duties listed in section 18 (3). In terms of section 18 (3), the Act equates a guardian with a parent, thus suggesting that the role of a guardian is higher than that of a care-giver.

<sup>110</sup> CR Matthias & F Noel Zaal 'Supporting familial and community care for children: legislative reform and implementation challenges in South Africa' (2008) 18(3) *International Journal of Social Welfare* 296.

<sup>111</sup> It further adds that the duties will be carried out jointly by both parents, unless it would not be in the best interests of the child to do so. This Act nullifies the position under customary law, where the children born out of wedlock belong to their mother's family in terms of name and guardianship, whereas those born within wedlock will fall under the name and guardianship of their father, who will have the duty to maintain them.

"Common law rules regarding guardianship and custody treat children differently depending on whether they are born within or outside marriage. Guardianship vests in the father when the child is born within marriage and with the mother's family when the child is born outside marriage. This discrepancy is reflected in the law relating to the registration of births. Upon birth of a child within marriage, a duty is imposed on both parents to give notice of the birth and enter their names on registration documents in accordance with the provisions of the Births and Deaths Registration Act (Cap 30:01)."

However, with regard to a child born out of wedlock, provision is made in the Act that no one may be entered as the father of a non-marital child except with his written consent. See also section 28 (3) (a).

<sup>112</sup> According to the Children's Act, the other parent assumes the role of the guardian.

<sup>113</sup> The category of people is listed in this section.

<sup>114</sup> The duties of a guardian are not addressed in the Children's Act of Botswana, but, according to the Marriage Act Cap 29:01, a guardian may consent to the marriage of a minor child.

<sup>115</sup> Section 27(3) of the Children's Act.

This legislation does not indicate any elaborate process for assuming parental duties by other adults after the death of the biological parents of a child. In fact, it merely requires that the listed group of people (in section 27 (3)) may “assume” the role and duties of the parents when the parent is unable to carry out the duties; either when they are dead or when they are absent from the life of the child.

This simplified process of assumption of guardianship has its advantages. It does not unnecessarily delay the enjoyment of the child’s rights to alternative care and it ensures that all the decisions, duties and responsibilities associated with the biological parents of the child are not delayed.<sup>116</sup>

## ii. Protecting a child’s property rights

The international standard on the protection of the property rights of children, as well as those on women’s rights, require states to take all appropriate measures to protect the rights of women and children to own and to inherit property.<sup>117</sup> Paragraph 33 of GC3 obliges state parties to ensure that both law and practice support the inheritance and property rights of orphans, with particular attention to the underlying gender-based discrimination which may interfere with the fulfilment of these rights. Furthermore, CEDAW<sup>118</sup> require states to take all appropriate measures, including legislation, to abolish customs and practices that constitute discrimination against women.<sup>119</sup>

In South Africa, the legal framework<sup>120</sup> on the protection of property rights unequivocally guarantees the right to property. The Administration of Estates Act<sup>121</sup> recognises and protects the inheritance of all minors including unborn children whose parents die testate or intestate.

The strength of the legislative framework stems from the fact that the South African Constitution protects property rights,<sup>122</sup> prohibits discrimination based on gender<sup>123</sup> and gives the courts the power to declare discriminatory laws to be inconsistent with the Constitution.

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<sup>116</sup> Section 13 of the Children’s Act further clarifies the complexity in relation to the assumption of parental rights and responsibilities for a child of an unmarried mother, the child born out of wedlock charging both biological parents with the child’s right to care.

<sup>117</sup> CRC GC3 (note 354 above).

<sup>118</sup> Articles 2 and 5 of CEDAW.

<sup>119</sup> See, for example, B Duncan & C Brants, *Access to and Control Over Land from a Gender Perspective: A Study Conducted in the Volta Region of Ghana*. Ghana: McPherson, *Property Grabbing and Africa’s Orphaned Generation: A Legal Analysis of the Implications of the HIV/AIDS Pandemic for Inheritance by Orphaned Children in Uganda, Kenya, Zambia and Malawi* (2004).

<sup>120</sup> Section 25 of the Constitution of South Africa.

<sup>121</sup> Government of Botswana *Administration of Estates Act 1965* < <http://www.justice.gov.za/legislation/acts/1965-066%20admin%20estates.pdf> > (Accessed on 30 January 2012).

<sup>122</sup> See section 25 of the 1996 Constitution of South Africa.

<sup>123</sup> See section 9 and 25 of the 1996 Constitution of South Africa.

In Botswana, the Constitution<sup>124</sup> protects the right to privacy and guarantees everyone freedom from deprivation of their property without compensation. In addition, the Administration of Estates Act of 1974<sup>125</sup> regulates the administration of estates in line with each heir's interest in the estate. Despite these legal provisions, however, customary laws of some tribes in Botswana are discriminatory and disinherit female children, while favouring male children. Very recently, in the case of *Mmusi and Others v Ramantele and Another*,<sup>126</sup> the court ruled that the customary law of the Ngwaketse tribe on inheritance, which denies females the right to inherit intestate, solely on the basis of their sex, violates their constitutional right to equality under Section 3(a) of the Constitution of Botswana.

The legal frameworks of both countries protect the right to own property and this can be linked to the right to inheritance. Unlike the South African legal framework, which prohibits gender based discrimination, the framework of Botswana does not prohibit gender-based discriminatory practices in customary law, which can lead to girl children being discriminated against.

### 7.1.1.3 Meeting the needs of children to care

There is no denying the fact that children affected by HIV/AIDS have many needs which require adequate and appropriate attention. The protection of these rights are necessary in order to uphold the right to an adequate standard of living, as guaranteed to everyone in article 11 of the ICESCR. On the basis of this, it is important for national legislation to ensure that their laws and policies contain standards which ensure the following factors

#### i. Recognition of new family structures such as child-headed households

Child-headed households are one of the bitter consequences of the HIV/AIDS epidemic. It has led to the growing number of these households in South Africa<sup>127</sup> and Botswana.<sup>128</sup> A child-headed household is a living arrangement where all members are under 18 years.<sup>129</sup>

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<sup>124</sup>Article 3 of the Constitution.

<sup>125</sup>Government of Botswana *Administration of Estates*

Act <http://www.laws.gov.bw/VOLUME%204/CHAPTER%203101%20ADMINISTRATION%20OF%20ESTATES.pdf> (Accessed on 26 July 2011).

<sup>126</sup>*Mmusi and Others v Ramantele and Another* (MAHLB-000836-10) [2012] BWHC 1 (12 October 2012).

<sup>127</sup> While there is a dearth of accurate, national data on the prevalence of such child-headed households in South Africa; a 2006 analysis of the General Household Survey found 0.67% of children living in child-headed households. This is equivalent to roughly 122 000 children out of 18.2 million children in South Africa H Meintjesa *et al. Child-headed households in South Africa: A statistical brief* available at [http://www.childrencount.ci.org.za/uploads/brief\\_child\\_headed\\_households.pdf](http://www.childrencount.ci.org.za/uploads/brief_child_headed_households.pdf) (Accessed on 23 April 2012).

The recognition of child-headed households can be found in the recommendation of the UN Committee on the Rights of the Child in GC3, which “*inter alia* addresses the issue of child-headed households and the kinds of support that should be made available to such households.<sup>130</sup> The call for the recognition of child-headed households in GC3 is based on the notion that orphans are best protected and cared for when efforts are made to keep siblings together and in the care of relatives.<sup>131</sup>

The rise in the number of child-headed households in South Africa<sup>132</sup> necessitated the call for their formal recognition by the South African Law Reform Commission (SALRC) during its deliberation on the development of the new Children’s Act. The SALRC called for the legal recognition of child-headed households as a placement option for orphaned children in need of care. It was suggested that mechanisms should be put in place under which such a household should function, given the many challenges that children living under such conditions face.<sup>133</sup> Accordingly, child-headed households have been formally recognised and regulated under the South African legal framework.<sup>134</sup> In line with the recommendation of the SALRC, the Children’s Act sets out 4 conditions under which a child-headed household will be recognised.<sup>135</sup> There are also National Guidelines for Statutory Services to Child-Headed Households (2010) as a family unit.<sup>136</sup> This

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<sup>128</sup> Likewise in Botswana, estimates show that about 2% of households are headed by children UNEAC *Statistics on Botswana* available at <http://www.uneca.org/adfv/polls/botswana.pdf> (Accessed on 23 April 2012).

<sup>129</sup> The Human Sciences Research Council (HSRC) *Study on HIV/AIDS, Household Survey (2002)* 68. Many community-based assistance programs have also reported an increase in households headed by children, or consisting only of children, i.e. orphans or children without resident adult guardians. However, no national data on child-headed households has yet been reported. In a survey, just 3% of households were reported as being headed by a person between the ages of 12 and 18 years of age, and could thus be called a child-headed household (Gow & Desmond 2002). The percentage observed was 3.1% in urban formal areas, 4.2% in informal urban areas, 2.8% in tribal areas and 1.9% on farms.

<sup>130</sup> UN *CRC GC3* available at <http://www1.umn.edu/humanrts/crc/comment3.htm> (Accessed on 28 December 2011).

<sup>131</sup> T Boezaart (ed.) *Child law in South Africa (Special Child protective measures in the Children’s Act)* (2009) 197.

<sup>132</sup> Monama *Child-headed Households on the Rise in SA* Sowetan News 14 July 2009 quoted in T Boezaart (ibid) 196.

<sup>133</sup> T Boezaart (ed) (note 131).

<sup>134</sup> After several debates and consultations, Child-headed households have been recognised under “other protective measure” section 137 of the Children’s Act. The National Guidelines for Statutory Services to Child-Headed Households (2010) also in place regarding the regulation of child-headed households. The Guidelines are to be read together with the Children’s Act No. 38 of 2005 as amended and the Policy Framework for Orphans and Other Children Made Vulnerable by HIV and AIDS in South Africa.

<sup>135</sup> Section 137(1). These conditions require that- the main head of the household must be terminally ill, dead or have abandoned the children in the household; absence of any adult family member who can provide for the household; the child over the age of 16 years must be the care-giver of the children in the household; the existence of the household is in the best interest of the children in the household.

<sup>136</sup> The aims of these Guidelines are:

- to provide an understanding of the legal rights of children in child-headed households and highlight the State’s responsibilities and obligations towards such children as dictated by the international and national instruments, including the Constitution of South Africa, Act No. 108 of 1996 and other relevant legislation and policies;
- to provide a broad picture and overview of the needs of children in child-headed households;
- to identify services, resources and safety nets available for children living in child-headed households;
- to provide guidance to social workers in rendering statutory services to child-headed households;
- to assist in developing and implementing the Strategic Plan of the Department.

recognition<sup>137</sup> is a significant step forward as it enables such households to access social services including social assistance.<sup>138</sup> It also facilitates the head of the child head-headed household being recognised as the primary care-giver. This means that, in terms of the Act, such a child can consent to medical treatment on younger siblings and carry out many day-to-day parental duties and responsibilities for the children they are caring for. Nevertheless the Children's Act recognises that such a family grouping is highly vulnerable and requires the general supervision of an adult designated by the court, or an organ of the State.

In Botswana, child-headed households are not legally recognised. However; there is an informal acknowledgement of the existence of such households in the definition sections of instruments such as the Children's Act,<sup>139</sup> as well as Botswana's 2008 National Guidelines on the Care of Orphans and Vulnerable Children.<sup>140</sup> Other government policies and programmes aimed at OVCs are also currently being modified to incorporate provision for the children living in child-headed households.<sup>141</sup>

In South Africa the recognition of child-headed households as a family unit, with a head and dependants, is crucial, as it will allow the children in these households to remain together as a family unit and to access social services. It is therefore a gap in the legal framework of Botswana that this new family structure is not recognised and supported.

## **ii. Recognition of alternative models of care such as foster care**

The foundation for the protection of the right to alternative care for children under international law is the UNICEF Guidelines on the Alternative Care of Children.<sup>142</sup> The CRC encourages state

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See note 766 above, see comments in Chapter 5 above.

<sup>137</sup> Section 137 of the Children's Act lays out strict conditions for its recognition. See note 134.

<sup>138</sup> E Bonthuys *Legal Capacity and Family Status in Child-headed Households Challenges to legal paradigms and concepts* 2010 *International Journal of Law in Context* 57.

Vulnerable children need legal capacity to facilitate state and community support. Children's rights advocates argue strongly that the inability of children in child-headed households to access the Child Support Grant constitutes a breach of their fundamental constitutional rights. They suggest that ways should be found to pay the grant to heads of these households, even if they are younger than sixteen years old.

<sup>139</sup> Section 42 (e) of the Children's Act while defining a child in need of care.

<sup>140</sup> Which defines a vulnerable child as any child under the age of 18 years who lives in an abusive environment, a poverty-stricken family unable to access basic services, or a child-headed household; a child who lives with sick parents or outside family care; or who is HIV positive.

<sup>141</sup> I B Feranil, W JHerstad & R Mbuya-Brown *Assessing Implementation of Botswana's Program for Orphans and Vulnerable Children* (2010).

<sup>142</sup> UNICEF, 2010. *Guidelines on Alternative Care*, G.A. Res 64/142, 24 February 2010.

parties to ensure various forms of alternative care for children, in accordance with their national laws.<sup>143</sup>

Based on these stipulations, the Children's Acts of both South Africa<sup>144</sup> and Botswana<sup>145</sup> contain a number of significant standards which protect orphaned children or children that have been separated from their parents. Both frameworks protect the right of the child to know and be cared for by both of their biological parents; and for a child to be cared for by their family or appropriate alternative care where the child is removed from the family environment.<sup>146</sup> In fact, both frameworks recommend caring for children in a loving family environment<sup>147</sup> and place the primary responsibility of caring, safeguarding and promoting the child's well-being on the parents, family and community of the child.<sup>148</sup> The frameworks only suggest other alternative care, options as a last option for orphaned children.

Under the South African framework, the Children's Act suggests that the concept of parental responsibilities encompasses more than just biological parents.<sup>149</sup> The Act states that the people who have parental responsibilities need not be married. This widens the scope of those who can automatically act as guardians for a child in the case of the death of a parent. Importantly, it recognises the parental role of unmarried fathers.<sup>150</sup> It is also significant that underage parents are addressed in the Children's Act,<sup>151</sup> with the maternal grandmother of the child (who is the primary care-giver of the underage mother) the guardian of the grandchild automatically if the mother of the child is deceased or is under age.<sup>152</sup>

This is very similar to the position under the Children's Act of Botswana, where section 27 saddles both biological parents of the child with the responsibility of caring for and maintaining the child, whether or not they live together and whether or not they are married.<sup>153</sup> The Act also lists persons who can assume the parental duties in respect of the child in the event of the absence or death of the parents. These include other relatives, guardians, adoptive parents, step-parents or foster parents of

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<sup>143</sup>Article 20 of the CRC.

<sup>144</sup>Chapter 3 section 18 of the Children's Acts of both South Africa and Botswana respectively.

<sup>145</sup>Section 13 of the Children's Act.

<sup>146</sup>Section 46 in South African Children's Act and section 65 of Botswana Children's Act.

<sup>147</sup>The preamble of the South African Children's Act (paragraph 7) and section 13 of the Botswana Children's Act. This is in line with the UNICEF Guidelines on the Alternative Care of Children.

<sup>148</sup>The objects of the South African Children's Act in section 2 (a) (i) and the Guiding Principles of the Botswana Children's Act (paragraph 7(c))

<sup>149</sup>Section 18 of the Children's Act.

<sup>150</sup>See section 20 and 21 of the South African Children's Act.

<sup>151</sup>See Section 19 of the Children's Act.

<sup>152</sup>Ibid.

<sup>153</sup>Section 27 (1 and 2) Children's Act of Botswana.

the child.<sup>154</sup> This section, in effect, broadens the list of those who can play the role of parents to the child thereby ensuring that the child is not left without a parent figure at any time.

The frameworks in both countries uphold the application of the best interest of the child principle when deciding whether or not a child needs alternative care.<sup>155</sup> Another strength of the frameworks of both countries, in relation to the provision of alternative care for the child, is the fact that the courts are involved in deciding matters relating to adoption, the involvement of the courts in deciding matters relating to the placement of children in foster<sup>156</sup> care or in an institution also ensures that the best interest of the child principle is appropriately applied at all times. This is vital because the decision to place children in foster homes or for adoption is important, given the impact that this will have on the child's life.<sup>157</sup>

Another major strength of the Botswana framework lies in section 27 (3), which give a number of adults who are related to the child the parental responsibility in respect of the child without any burdensome applications or court declarations for guardianship. This will ensure that the child is not left without a guardian at any time and will ensure that the child can easily access facilities which require the help of the legal guardian or care-giver.

Despite these, the weakness of both frameworks lies in the fact that they fail to categorically discourage the institutionalisation of children.

### **iii. Prohibition of maltreatment, violence or abuse**

Paragraph 37 of the CRC GC 3 has indicated that there is a link between violence, abuse and the risk of children becoming HIV-infected. It acknowledges that violence and abuse can occur anywhere including within the family. It implores states to ensure that they take the necessary steps to protect children from all forms of violence and abuse within and outside the home.

In addition, CRC GC 13 on the right of the children to freedom from all forms of violence recommends that states should take appropriate legislative, administrative, social and educational measures to protect children from all forms of abuse.

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<sup>154</sup>Section 27 (3) Children's Act of Botswana.

<sup>155</sup> Section 6 (2) (a) of the South African Children's Act and section 27 (4) (a) of the Botswana Children's Act

<sup>156</sup>Section 36 (2) (c) of the Botswana Children's Act and section 45 (1) (i) of the South African Children's Act.

<sup>157</sup>Government of Botswana *Committee on the Rights of the Child Consideration of Reports Submitted by States Parties Under Article 44 of the Convention Botswana Report* submitted on 10 January 2003 CRC/C/51/Add.9 Paragraph 126.



In keeping with these recommendations, South Africa has a legal framework on the protection of children from violence and abuse. The preamble to the Sexual Offences Act links the need for the protection of children from all forms of violence, including sexual offences, to the protection of their rights as contained in the Bill of Rights in the Constitution. The South Africa Domestic Violence Act links the protection from violence to the Constitution and international norms. Of particular relevance to children is the fact that the Act compels members of the South African Police Service to render assistance to the complainant, including assisting the complainant to find a suitable shelter and to obtain medical treatment,<sup>158</sup> allows the child to approach the court for a protection order without adult assistance and recommends the removal of the perpetrator rather than the victim from the family.

The Sexual Offences Act states the need for the criminalisation of sexual abuse and exploitation and protects complainants of sexual offences and their families from secondary victimisation and trauma.<sup>159</sup> The mandatory reporting of physical and emotional abuse of children in terms of section 110 of the Children's Act acts as a protective measure to ensure that vulnerable children are assisted and protected from further abuse.

The strength of the South African legal framework lies in the fact that the definition of domestic violence recognises the link between domestic violence and the health and safety of the victim.<sup>160</sup> It recognises that "domestic violence" very broadly includes "physical abuse, sexual abuse, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent, where the parties do not share the same residence or any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant."<sup>161</sup>

It also recognises the burden which children bear when they are subjected to domestic violence and recommends steps to be taken to protect the children from violence. These points will ensure that children are not left alone to face the effects of violence, especially if they need to be moved away

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<sup>158</sup> See section 2(a) of the South Africa Domestic Violence Act.

<sup>159</sup> See the Objects contained in section 2 of the South Africa Domestic Violence Act.

<sup>160</sup> Section 1 (viii) of the Domestic Violence Act.

<sup>161</sup> M Govender 'Domestic Violence: Is South Africa Meeting Its Obligations in Terms of the Women's Convention?' (2003) 19 *South African Journal on Human Rights* 663.

from their homes because of the violence which they experience there.<sup>162</sup> The framework also deals with emotional and psychological abuse and the fact that children are able to approach the courts for protection and can be removed from the abusive environment.

In Botswana, the Domestic Violence Act defines domestic violence “as any controlling or abusive behaviour that harms the health or safety of the applicant.” It recognises that children experience domestic violence, especially where the children are residing with families other than their biological families. The Domestic Violence Act stipulates a number of interventions which can be issued by the courts to protect children from violence and abuse.<sup>163</sup> In addition to the Domestic Violence Act, the Procedure and Evidence Act punishes sexual offences against children in section 192. It denotes the punishment for rape, while sections 146, 147, 150, 168 and 246 of the Penal Code deal with the punishment of indecent assault on females, defilement of girls under 16 years of age, procuring defilement by threats etc., incest by males and common assault, respectively. These are crimes which expose children to HIV infection. Section 43 of the Children’s Act of Botswana requires any person who has a reasonable cause to believe that a child is in need of protection to report such a case to a social worker or a police officer in the district in which the child is resident.

The duty to report a child in need of protection is very similar to the duty in section 110 of the South African Children’s Act. It will ensure that there is a mechanism for protecting children from all activities which are likely to expose them to HIV infection. The strength of the Botswana Domestic Violence Act also lies in the fact that it makes reference to the link between violence and health and safety. The fact that this definition does not limit violence to assault and battery alone, but encompasses all acts which can cause harm to the individual, is laudable. In addition, the recommendation of a number of protection orders to protect victims of violence is commendable. The fact that criminal law prescribes the punishment for a number of sexual offences for children is a very important development in the legal framework of Botswana.

Despite these commendable stipulations in the frameworks, the fact that the legal frameworks in both countries do not clearly recognise the connection between violence and the spread of HIV, according to the CRC GC 3, is a shortcoming. This is indicative of the fact that the Acts are not specifically targeted towards the prohibition of acts which predispose children to HIV infection.

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<sup>162</sup>Section 7 (2) (5 and 6) of the Domestic Violence Act.

<sup>163</sup> See sections 9, 10, 11 or 12 of the Domestic Violence Act.

The provision of PEP for victims of sexual assault is not guaranteed in any legislation, as is in South Africa.<sup>164</sup> It is a guideline requirement.<sup>165</sup> This means it is not a justiciable provision and its contravention by any official cannot be punished.

#### **7.1.1.4 Meeting the needs of children to be able to protect themselves from HIV infection**

Very young children (infants) and older children (adolescents) are at risk of HIV infection. In order to protect them from exposure to the virus, the legal and policy frameworks in both countries have certain obligations.

##### **i HIV testing for children**

The basis for the provision of HIV testing for children can be found under article 3 of the CRC which requires all adults to act in the best interests of children. Article 12 of the CRC also gives children the right to respect for their persons and the right to participate in decisions concerning them.<sup>166</sup>

There is an obligation on the health-care worker and every person dealing with children to treat them with respect and to ensure that their right to privacy is protected, especially in the process of conducting an HIV test on the child.<sup>167</sup>

Based on these, the conditions for carrying out an HIV test on a child in South Africa are listed in section 130 of the Children's Act. The Children's Act of South Africa allows independent consent for HIV testing on a child from the age of 12 years and if the child is of sufficient maturity to understand the benefits, risks and social implications of such a test, where there is no parent to give consent, where the parent is not immediately available, or where the parent unreasonably withholds consent.

Section 132 lays down strict requirement when a child is subjected to an HIV test and takes into account the maturity of the child when prescribing the mode of counselling and requires that health

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<sup>164</sup> Section 28 of the Criminal Law (Sexual Offences And Related Matters) Amendment Act No 32 of 2007.<sup>164</sup>

<sup>165</sup> Paragraph 2.8 of the National Guidelines for HIV Testing and Counselling of 2009.

<sup>166</sup> Ibid.

<sup>167</sup> Article 16 of the CRC. See also S Moses 'Children and Participation in South Africa: An Overview' (2008) 16 *International Journal of Children's Rights* 330.

-care workers ensure that both pre- and post-test counselling is offered in every instance. The fact that section 133 requires a high degree of confidentiality of information on the HIV/AIDS status of children and applies the patient confidentiality rule enshrined in the National Health Act<sup>168</sup> directly to children undertaking HIV testing is remarkable. This strength in the legal framework will ensure that the privacy of children accessing HIV testing is protected and that their status is kept confidential under all circumstances.

In Botswana on the other hand, there is no legislation regulating HIV testing. In fact it is disappointing that the recently enacted Children's Act leaves out HIV testing of children and other HIV/AIDS related issues. The National Guidelines for HIV Testing and Counselling is the only policy framework<sup>169</sup> that regulates HIV testing and sets the minimum age for independent informed consent for HIV testing at 16 years.<sup>170</sup> For children below 16 years, it is only the parent or legal guardian than can give consent.<sup>171</sup> This is far higher than the 12 years set as the minimum age of full independent consent in South Africa.

A problem may arise in a case where there is no parent or guardian or where the child does not want to disclose his or her status to the parent or guardian. The gap in this policy lies in the fact that even though a child can give full independent consent to an HIV test at 16, the age at which a child can consent to medical treatment independently is 18 years. This will lead to a problem for children who do not wish to disclose their HIV status to their parent or guardian.

Despite these shortcomings, the Botswana framework affirms that the welfare of the child must be the primary concern when considering testing a child for HIV.<sup>172</sup> The fact that the Guidelines link privacy to the right to dignity, thus recognising the impact that a breach of confidentiality could have on a person's sense of self, is commendable.<sup>173</sup>

#### **i. Provision of PMTC programmes**

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<sup>168</sup>Government of South Africa *National Health Act* No. 61 of 2003 available at <http://www.info.gov.za/view/DownloadFileAction?id=68039> (Accessed on 2 September 2011).

<sup>169</sup>See section 6.1.3.1 (ii) of Chapter 6.

<sup>170</sup>Section 2.4.1 of the National Guidelines for HIV Testing and Counselling.

<sup>171</sup>In cases where the person is below 16 years and is married or is operating their own business, such person must be considered as an "emancipated minor" who can give consent for HIV testing.

<sup>172</sup>This requirement is in line with the principle of the best interest of the child and its adds that if the counsellor feels that the testing is not in the best interest of the child then the counsellor reserves the right not to test the child.

<sup>173</sup>Section 2.6.1 of the National Guidelines for HIV Testing and Counselling.

The basis for the provision of PMTCT to protect children from HIV infection is stated in paragraph 26 of CRC GC 3, which requires that state parties must take steps, including the provision of essential drugs which reduce the risk of transmission from mother to child. It requires that states provide support for mothers and children, including counselling on infant feeding options and to counsel HIV-positive mothers about the risks and benefits of different infant feeding options. Paragraph 70 of the Declaration of Commitment on HIV/AIDS requires that state parties improve prevention and therapeutic approaches and support and encourage methods to prevent mother-to-child transmission.

Based on this, the South African framework on the protection of PMTCT for pregnant women is found in the National PMTCT Programme of the Department of Health. The South African National Strategic Plan on HIV/AIDS and STIs from 2012-2016 prioritises scaling up coverage of PMTCT to reduce MTCT to 2% at 6 weeks after birth and less than 5% at 18 months of age by 2016.<sup>174</sup> The strength of the PMTCT programme lies in the fact that it applies some human rights principles in the NSP, such as “tackling inequality and poverty; using a human rights paradigm and life-course approach; respecting the rights of women, pregnant women and mothers to information; and ultimately protecting and respecting children.”<sup>175</sup> The application of these principles will ensure that the rights of women are respected and this will facilitate their access to the service and ultimately the protection of children affected by HIV/AIDS.<sup>176</sup>

In Botswana the PMTCT programme requires the provision of prophylaxis (Zidovudine) to all eligible positive pregnant women and a 12 month supply of formula feed to babies who have been

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<sup>174</sup> This goal has been achieved as the latest statistic of MTCT roll-out in South Africa shows that 95% of pregnant women with HIV received ARVs for PMTCT in 2011. See also UNAIDS 2012 Report on the Global AIDS Epidemic available at

[http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120\\_UNAIDS\\_Global\\_Report\\_2012\\_with\\_annexes\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_with_annexes_en.pdf) (Accessed on 19 January 2013).

<sup>175</sup> Government of South Africa *National Department of Health Policy and Guidelines for the Implementation of the PMTCT Programme* available at <http://www.info.gov.za/view/DownloadFileAction?id=77877> (Accessed on 17 December 2012).

<sup>176</sup> The Court upheld the justiciability of the right to health by ruling in favour of TAC, by ordering that Nevirapine be made available to infected mothers giving birth in state institutions and that the government present to the Court an outline of how it planned to extend provision of the medication to its birthing facilities, country-wide.

exposed to HIV.<sup>177</sup> The strength of this programme is the fact that it adapted the UN framework on HIV and infant feeding<sup>178</sup> and this has been very successful.<sup>179</sup>

The PMTCT programmes are a significant step in the policy frameworks of both countries. The fact that the programmes in both countries have recorded impressive success rates is a very positive step in line with international standards.

## **ii. Setting the minimum age for employment, prohibiting the worst forms of child labour and regulating working conditions**

The international basis for the regulation of the minimum age of employment is the Minimum Age Convention (No 138) 1973. Here the minimum age of admission to employment of work is set at 15 years and the minimum age for hazardous work is 18 years (16 years under certain strict conditions). The Committee of Experts on the Applications and Recommendations (CEACR) and on HIV/AIDS have drawn the links between access to free education, child labour and HIV/AIDS.<sup>180</sup>

The legal<sup>181</sup> and policy framework in South Africa sets standards for the protection of children from exploitation and harmful employment and criminalises the employment of under-aged children (child under the age of 15), except under listed circumstances.

The strength of the South African legal framework lies in the fact that the minimum age of employment set out in the framework is linked to the age at which a child is expected to be at school. A child younger than 15 years is not supposed to be out of school during school hours and anyone who employs a child younger than 15 years is guilty of stopping the child's education. This

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<sup>177</sup> J Donnelly *Saving the Babies: A Victory in Africa* (2007) Boston Globe newspaper report available at <[http://www.boston.com/news/science/articles/2007/08/27/saving\\_the\\_babies\\_a\\_victory\\_in\\_africa/](http://www.boston.com/news/science/articles/2007/08/27/saving_the_babies_a_victory_in_africa/)> (Accessed on 13 August 2010). Less than 4% of babies born to HIV positive mothers were infected - a rate comparable with the USA and Western Europe. See also AVERT *PMTCT in practice* available at <http://www.avert.org/pmtct-hiv.htm> (Accessed on 13 August 2010).

<sup>178</sup> UNAIDS *Botswana UNGASS Progress Report 2010* available at [http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/botswana\\_a\\_2010\\_country\\_progress\\_report\\_en.pdf](http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/botswana_a_2010_country_progress_report_en.pdf) (Accessed on 13 August 2010).

<sup>179</sup> This has been discussed in Chapter 2 (2.3 (ii)) of this thesis.

<sup>180</sup> See the Report of the CEACR on the Worst Form of Child Labour Convention 1999 available at <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displaycomment.cfm?hdroff=1&ctry=1010&year=2010&type=R&conv=C182&lang=EN> (Accessed on 23 December 2012).

<sup>181</sup> Section 43 Basic Conditions of Employment Act <http://www.labour.gov.za/downloads/legislation/acts/basic-conditions-of-employment/Act%20-%20Basic%20Conditions%20of%20Employment.pdf> (Accessed on 13 April 2012).

will ensure that children affected by HIV/AIDS are not inappropriately employed by people taking advantage of their need to support themselves or their families.

However, the fact that the framework<sup>182</sup> does not provide for the duty to report child labour as in the case of section 110 of the Children's Act, is a weakness. One might still supplement this lapse with the provisions of the Children's Act especially in the case of a child in need of care. This protection, as defined in section 2 of the Children's Act, includes a child performing child labour and this must be reported by certain professionals.<sup>183</sup>

The legal framework of Botswana<sup>184</sup> protects children from harmful labour practices and sets out the punishment for the contravention of the protection offered in this section. Although the Children's Act does not set the minimum age for employment, the Employment Act of 1984 defines a child as any person who is under the age of 15 years and protects children younger than 15 from child labour,<sup>185</sup> exploitation and hazardous employment, work which is dangerous to their health and wellbeing, work during the night, or work which is likely to endanger the child's physical development.

As in the case of South Africa, the strength of Botswana's legal framework lies in the fact that the Children's Act<sup>186</sup> stipulates the duty to report cases of a child in need of protection to a social worker or a police officer in the district in which the child is resident. A child that engages in child labour is within the scope of this section, in terms of section 42 (g) of the Act. The minimum age of employment, which is 15 years, is very advantageous for children, since at 15 years, children are supposed to still be at school. Thus setting the minimum age of employment at 15 years will ensure that children are not employed when they should still be at school.

The strength of the legal frameworks in both countries is that they are both clear on the minimum age for the employment of children. Both countries criminalise<sup>187</sup> the employment of under-aged children. They also clearly regulate the basic conditions for employment and set minimum ages according to the best interests of the child.<sup>188</sup>

### **iii. Prohibit criminal activities which predispose children to HIV infection**

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<sup>182</sup>Ibid.

<sup>183</sup> See section 110 of the Children's Act.

<sup>184</sup>Section 24 of the Children's Act.

<sup>185</sup> See further comments in section 105 of the Employment Act.

<sup>186</sup>Section 43 of the Children's Act.

<sup>187</sup>Section 151(d) of Botswana's Employment Act and section 43 of South African Basic Conditions of Employment Act.

<sup>188</sup>Article 105 (b) of Botswana's Employment Act.

Under international law, the basis for the protection of children from criminal activities which predispose them to HIV infection is found in paragraph 37 of the CRC GC3, and paragraph 1 of the CRC GC 13<sup>189</sup> on the right of the children to freedom from all forms of violence. The Committee recommends that state parties should take “appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence” and it goes further to recognise that sexual abuse is a form of violence which OVCs should be protected from.<sup>190</sup>

In line with these recommendations, the South African Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>191</sup> criminalises sexual abuse of children. It places an obligation on any person who is aware of any sexual offence having been committed against a child to report this to the police.<sup>192</sup> This duty to report comes into operation once the person is aware of a sexual offence involving a child.<sup>193</sup>

A weakness in this approach is that the Sexual Offences Act deals with a wide spectrum of sexual offences – these include crimes relating to both consensual and non-consensual sexual activities contained in sections 15, 16 and 56 (2) of the Act. These sections have been challenged in the recent *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* case.<sup>194</sup> The challenge on these sections in the case was based on the fact that the application of the mandatory reporting in section 54 (1) requirement to the consensual sexual offences means that a person is reporting peer sex as well as sections 50(1 )(a)(i) and 50(2)(a)(i) of the Act, which require the names of children convicted of certain sexual offences to be included in the National Register for Sex, Offenders and section 56(2) dealing with defences in respect of sections 15 and 16 of the Sexual Offences Act; and undermine the Constitutional right to privacy as well as the rights in the Children’s Act which allows access to a range of sexual and reproductive rights such as contraceptives;<sup>195</sup> HIV testing;<sup>196</sup> and the Choice of Termination of Pregnancy Act which allows girl-children to access abortions.<sup>197</sup> Since there is overwhelming

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<sup>189</sup> CRC/C/GC/13 Issued by the Committee on the Rights of the Child on 18 April 2011.

<sup>190</sup> JAnarfi (note 66 above) 281–306.

<sup>191</sup> Government of South Africa *Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007* <<http://www.info.gov.za/view/DownloadFileAction?id=77866>> (Accessed on 4 May 2010).

<sup>192</sup> Section 54(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

<sup>193</sup> A Strode & C Slacks ‘Sex, Lies and Disclosure’ (2009) 10 *Southern African Journal of HIV Medicine* 8.

<sup>194</sup> (73300/10) [2013] ZAGPPHC 1 (4 January 2013).

<sup>195</sup> Section 134 of the Children’s Act

<sup>196</sup> Section 130 (2) of the Children’s Act.

<sup>197</sup> Section 129 of the Children’s Act.



evidence that children are sexually active from as young as 12<sup>198</sup> and these provisions address this social reality.

The Constitutional Court has in turn ruled that various aspects of sections 15 and 16 of the Sexual Offences Act infringed a number of the constitutional rights of children because the provisions-<sup>199</sup>

- Were not in the best interests of children as they could harm them through forcing them to inter-face with the criminal justice system if they were charged with one of these offences. Furthermore they intruded into the 'intimate and private sphere of children's personal relationships' in a way that could cause harm to them;
- Infringed the rights of children to dignity; criminalising consensual sexual activity is stigmatising, such laws impact on the social lives and dignity of the affected population, they build 'insecurity and vulnerability', they are degrading and invasive and the harm caused by criminalisation impacts on the population's ability 'to achieve self-identification and self-fulfilment';
- Violated a child's rights to bodily integrity, which allows everyone the right to make decisions regarding their reproduction; and
- Infringed a child's right to privacy as they are entitled to a sphere of personal space and freedom in which to live their own lives.<sup>200</sup>

It was therefore declared that Parliament should ensure that sections 15 and 16 of the Sexual Offences Act be amended. Therefore it read as follows<sup>201</sup> –

Section 15

'A person ('A) who commits an act of sexual penetration with a child<sup>202</sup> ('B) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless at the time of the sexual penetration (i) A is a child; or (ii) A is younger than eighteen years old and B is two years or less younger than A at the time of such acts.'

Section 16

'A person ('A) who commits an act of sexual violation with a child ('B) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless at the time of the sexual violation A is a child'.

In Botswana, the age of consent for sexual activity is 16 years and this is the same as the age of consent for HIV testing.<sup>203</sup> Nonetheless, the fact that the Children's Act does not grant children the right to consent independently to any medical treatment before 18 years means that it does not grant children the needed autonomy which they require to be able to access reproductive health care facilities, or even validly access contraceptives and HIV prevention services, without the knowledge

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<sup>198</sup>N McGrath, M Nyirenda, V Hosegood *et al.* 'Age at first Sex in Rural South Africa' (2009) 85 *Sexually Transmitted Infections Journal* 49-55. In Addition, the Court stated in A Strode, J Toohey & C. Slack (2013). Brief memo on the *Teddy Bear Clinic for Abused Children and Prevention of Child Abuse and Neglect (RAPCAN) v Minister of Justice and Constitutional Development* case (case number 73300/10). CHAMPS: Choices for Adolescent Methods of Prevention in South Africa: 2013 that –

adolescents, like adults, are entitled to all of the above rights and that to subject private 'intimate personal relationships to the coercive force of the criminal law is to insert state control into the most intimate area of adolescents' lives, namely, their personal relationships. Any legislation which does so must be carefully and narrowly crafted to infringe on these vital constitutional rights as little as possible.

<sup>199</sup>Ibid.

<sup>200</sup>Ibid

<sup>201</sup>Ibid at paragraph 5.

<sup>202</sup>Note, a child is a person between the ages of 12 and 15 for the purposes of this section.

<sup>203</sup>The cabinet has recently lowered the age of consent for HIV testing to 16 years in the revised National HIV policy. There is also a proposed amendment of the Public Health Act to set the age of HIV testing consent at 16 years See University Research Co Technical Briefing Paper – Botswana *Child and Adolescent HIV Testing and Counselling Programme* January 2011 <http://www.urchs.com/uploads/resourcefiles/BotswanaChildandAdolescanttestingFinal.pdf> (Accessed on 6 December 2012).

or consent of their parents. This undermines HIV prevention programmes and is not in accord with the international norms.

**iv. Create a right to access information and education on HIV prevention for all children**

Paragraph 16 of CRC GC 3 stipulates that “in relation to the rights to health and information (arts. 24, 13 and 17), children should have the right to access adequate information related to HIV/AIDS prevention and care, through formal channels (e.g. through educational opportunities and child-targeted media) as well as informal channels (e.g. those targeting street children, institutionalised children or children living in difficult circumstances).”

Although there is no legislative framework for the protection of the right to access information and education on HIV prevention, the policy framework for the regulation of access to HIV/AIDS education in South Africa is the National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions.<sup>204</sup> The strength of the policy lies in the fact that it is drawn up in line with the South African Constitution and guarantees of certain human rights which are crucial for children and which are necessary for the survival and development of children living in a society with HIV/AIDS.

A weakness of the Policy is that it does not unequivocally stipulate that condoms should be made available to learners at schools. It merely signifies that “consultation on the school or institution implementation plan could address and attempt to resolve complex questions, such as discretion regarding mandatory sexuality education, or whether condoms need to be made accessible within a school or institution as a preventive measure, and if so under what circumstances,” thereby leaving the discretion to make condoms available to individual schools. There is evidence, however to support the fact that “when contraception is available through school clinics and condoms can be obtained easily and confidentially on school premises, many sexually active students make use of these services.”<sup>205</sup>

In Botswana there is no legislation on the protection of the right to access information and education on HIV prevention. The National Policy on Education particularly recommends “raising

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<sup>204</sup> See National Policy on HIV/AIDS For Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions [http://www.chr.up.ac.za/undp/domestic/docs/policies\\_05.pdf](http://www.chr.up.ac.za/undp/domestic/docs/policies_05.pdf) (Accessed on 10 May 2010).

<sup>205</sup> S Panday, M Makiwane, C Ranchod *et al.* *Teenage pregnancy in South Africa - with a specific focus on school-going learners* (2009) 84.

awareness on HIV/AIDS through infusion of HIV/AIDS matters into the school curricula.” In accord with this recommendation, life skills education is included in the school curriculum of schools to educate primary and secondary school students about HIV/AIDS and STIs and to teach skills to make healthy choices. The curriculum aims to impart knowledge, develop healthy attitudes, and instil skills for healthy decision-making.<sup>206</sup> The recent attempt to introduce sexuality education into the Junior Certificate curriculum was met with much resistance, especially from tribal and religious leaders.<sup>207</sup>

Condoms are not generally available in schools, but a study suggests that condoms may be obtained from the counselling and guidance departments in each school, if the student requests such a contraceptive. These departments at schools also provide sexual and reproductive health care services, among other services, to pupils.<sup>208</sup>

It is submitted that the right to life skills and sexuality education in both countries is still lacking, as there is no right to such education. Furthermore, there is no clear policy framework for the distribution of contraceptives at schools. This is particularly worrying as there is evidence to the effect that sex education can result in the delay of sexual debut and the promotion of safer sex.<sup>209</sup>

**v. Counter harmful traditional practices, through laws prohibiting FGM and early consensual or non-consensual marriage which enhance vulnerability to HIV**

The basis for the protection of children from harmful cultural practices which enhance the vulnerability of children to HIV infection is found in paragraph 11 of the CRC CG, which states the obligation of the State to protect children from harmful traditional practices, which violate their rights and make them more vulnerable to HIV infection. This is similar to the stipulation in paragraph 61 of the Declaration of Commitment on HIV/AIDS on the elimination of harmful traditional and customary practices on women and girls.

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<sup>206</sup>The Objectives of the Life Skills Curriculum contained in the *Guidelines for Using Living: Skills for Life, Botswana's Window of Hope*. See the Life Skills Curriculum Usage Guidelines available at <http://www.edc-hhd.co.bw/assets/Usage%20Guidelines%20Primary.pdf> (Accessed on 23 September 2012).

<sup>207</sup>B Kayawe & G Moen *Mixed reactions on sex education in JC curriculum* Mmegi Online Issue: Vol.28 No.115 Friday, 05 August 2011.

<sup>208</sup>A M Mwinga *Factors Contributing to Unsafe Sex Among Teenagers in the Secondary Schools of Botswana* Masters in Public Health Dissertation (2012) 60.

<sup>209</sup>A review of 56 curriculum-based programs in the US – half of which were implemented in the school setting, reported this. See D Kirby *Emerging Answers: Research Findings on Programmes to Reduce Teen Pregnancy and Sexually Transmitted Diseases. The National Campaign to Prevent Unplanned Pregnancy* (2007).

The link between HIV infection and harmful traditional practices such as FGM<sup>210</sup> and early marriage have long been established.<sup>211</sup> The South African Marriage Act and the Children's Act are at the centre of the legal framework for the protection of children from harmful cultural practices such as early marriage and FGM<sup>212</sup> in South Africa.<sup>213</sup> The age of majority in the Children's Act is 18.<sup>214</sup> This is also the age at which a child can independently consent to a marriage without the consent of his or her parents or legal guardian.<sup>215</sup>

In Botswana, the Marriage Act<sup>216</sup> and the Children's Act<sup>217</sup> are at the centre of the legal framework on the prohibition of children from early marriages and FGM.<sup>218</sup> The fact that the Marriage Act prohibits marriage conducted upon the consent of an insane person or a person who is incapable of giving consent to a marriage and sets the legal age of consent to marriage at 18<sup>219</sup> is laudable. In addition, it is significant that the Children's Act unequivocally prohibits FGM.

It is commonly agreed that setting a minimum age for marriage is important, as it ensures that children are protected from early marriage and potential vulnerability to HIV infection. At 18, a person is regarded as an adult and may have graduated from school thus the early marriage will not, therefore, necessarily affect his or her education directly.

#### **vi. Promote access to effective HIV prevention practices such as male circumcision**

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<sup>210</sup>GC 3 on the CRC as R J Cook, B M Dickens, M F Fathalla *et al. Reproductive health and human rights: integrating medicine, ethics, and law* Clarendon Press (2003).

<sup>211</sup> Children especially the females are often subject to harmful traditional practices, such as FGM, early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection and such practices often interrupt access to education and information. See GC3 on The CRC and HIV/AIDS @ Paragraph 11.

<sup>212</sup> "There is an emerging trend in the development of human rights law that suggests strongly that FGM should be considered as tantamount to criminal assault or torture." K A Kelson 'Female Circumcision in modern age: Should female Circumcision now be considered grounds for asylum in the United States?' (1998) 4 *Buffalo Human Rights Law Review* 185-209.

<sup>213</sup> FGM has been outlawed in South Africa. At the initial stages of the debate on whether or not to outlaw FGM, he parliament in the earlier stages of the deliberations on the outlawing of FGM compared it to male circumcision and argued that one could not be outlawed and not the other thus both FGM and male circumcision must be prohibited. See S Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Lawmaking* (2001) 161.

<sup>214</sup>Section 17 of the Children's Act.

<sup>215</sup>For younger children, parental consent is necessary. If there are no parents or guardian, or for some reason they cannot give consent, a magistrate (acting as a commissioner of child welfare) may grant consent. If the parent, guardian or magistrate refuses consent, a judge of the High Court may grant consent if it is in the interests of the minor.

<sup>216</sup>The Marriage Act <<http://www.laws.gov.bw/VOLUME%204/CHAPTER%2029-01%20MARRIAGE.pdf>> (Accessed on 23 June 2011).

<sup>217</sup>Section 62 of the Children's Act.

<sup>218</sup>Section 62 (c) categorically prohibits FGM.

<sup>219</sup>Section 14 of the Marriage Act.

Medical male circumcision has been hailed as one of the most significant breakthroughs in HIV prevention.<sup>220</sup> It is acclaimed to offer partial protection against HIV infection for men during sexual intercourse with HIV positive women, raising the hope that widespread male circumcision could significantly reduce HIV transmission in southern Africa.<sup>221</sup> Despite the fact that circumcision has been declared as an effective natural prevention of HIV/AIDS, “the South African Children’s Act distinguishes between children under the age of 16 years, and those that are 16 and older.”<sup>222</sup> There is therefore a complete prohibition on male circumcision on boys below 16 years unless it is for “medical or religious” reasons in South Africa.<sup>223</sup>

Section 12 (8) of the Children’s Act does not absolutely ban male circumcision, it limits the practice to religious reasons (in accordance with the practices of the religion concerned, for medical reasons and on children older than 16 years with the informed consent, proper counselling and “in the manner prescribed.” This tends to ensure that children are not forced into a non-indicated medical procedure against their will. Children are able to choose to be circumcised or not once they are older than 16 years and they understand the intricacies involved in the circumcision.

In Botswana, the Children’s Act allows male circumcision to be carried out if it is in the interest of the child, where it does not pose any risk to the child and only for medical reasons on the recommendation of a medical practitioner.<sup>224</sup> The Act also allows circumcision on boys after proper counselling of the child is obtained, subject to the child’s age, level of maturity and on a child above the age of 16 only if he consents to the procedure.<sup>225</sup> The situation in Botswana is similar to that of South Africa, except for the fact that in Botswana male circumcision can only be carried out for medical reasons.

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<sup>220</sup>Y Vawda & L NMaqutu ‘Neonatal circumcision: Violation of children’s rights? Or public health necessity?’ (2011) 4*South African Journal of Bioethics & Law* 36.

Apart from the prevention of HIV infection in sexually active males, infant male circumcision has been confirmed to have other benefits such as the prevention of urinary tract infections (a cause of renal scarring), reduction in risk of inflammatory foreskin conditions, such as balanoposthitis, foreskin injuries, phimosis and paraphimosis. It also helps prevent other viral sexually transmitted infections such as genital herpes and oncogenic human papillomavirus, as well as penile cancer. The risk of cervical cancer in female partner(s) is also reduced.

<sup>221</sup>Ibid.

<sup>222</sup>T Boezaart (note 131) 189.

<sup>223</sup>The prohibition of male circumcision is affirmed in sections 12 (9) (10) and (11) which allow circumcision on boys younger than 16 years if the circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed, or it is performed for medical reasons on the recommendation of a medical practitioner.

<sup>224</sup>Section 62 (3) (a, b, c) of the Botswana the Children’s Act.

<sup>225</sup>Section 62 (4) of the Botswana the Children’s Act.

Although Botswana's NSF confirms that the low rate of male circumcision is one of the drivers of the epidemic,<sup>226</sup> there is still no legislation or policy recommending or regulating the performance of medical male circumcision as an HIV prevention technique.

There are weaknesses in the legal and policy frameworks of both countries. In South Africa, the framework appears to be inappropriately restrictive and it makes the circumcision of male children difficult, whilst in Botswana it is inappropriately permissive, as there is no legal regulation of this practice.

### **7.1.2 Analysis of the protective framework for children who are infected with HIV**

The HIV/AIDS related frameworks discussed earlier on in this chapter apply to all children while the rights and standards discussed here are premised on the basis that children affected by HIV require more specific protection. In addition to losing their parents or their parent(s) being unable to provide for them or protect them from harm, they may be prejudiced and stigmatised because of their close relationship with the HI Virus.

Thus laws and policies need to also ensure that there are mechanisms for responding to the specific impact of HIV/AIDS on infected children.

#### **7.1.2.1 Outlawing unfair discrimination against children affected by HIV/AIDS**

##### **i. In relation to the accessing of health care for children affected by HIV/AIDS**

In accord with paragraph 16 of the CRC GC 3, prevention, care, treatment and support are mutually reinforcing elements within an effective response to HIV/AIDS. Unfair discrimination is prohibited in terms of article 2 of the CRC and this is further articulated in paragraph 7 of the CRC GC3, which categorically includes the HIV/AIDS status of the child as a ground for non-discrimination.<sup>227</sup> Paragraph 7 discusses the manner in which the right to health should be protected by states, to ensure that the rights of children while accessing healthcare services are protected, as contemplated under the CRC.

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<sup>226</sup> ILO *Second National HIV/AIDS Strategic Framework for HIV/AIDS 2010-2016* [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_146016.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_146016.pdf) (Accessed on 25 August 2011).

<sup>227</sup> GC 3 paragraphs 7- 9 categorically includes the HIV/AIDS status of the child as a ground for non- discrimination.

Dealing with the principle of non-discrimination in access to health care services, Carvalho<sup>228</sup> highlights the fact that accessibility is sub-divided into three categories which are non-discrimination in terms of access, physical accessibility and economic accessibility.<sup>229</sup>

Discrimination in relation to access to health care for people affected by HIV/AIDS is prohibited<sup>230</sup> in terms of section 9 of the South African Constitution as well as in terms of section 27 of the South African Bill of Rights. “Everyone’s right to health care,” makes it clear that irrational exclusions would be discriminatory. Section 28 guarantees the right of “every child to health care services” and section 20 of the NHA prohibits discrimination against any health care personnel on account of the health status of the health care personnel.

In Botswana, the Children’s Act prohibits discrimination based on unlisted grounds and there is no denying the fact that HIV/AIDS is undauntedly one of the unlisted grounds upon which discrimination is prohibited in section 7 of the Children’s Act.<sup>231</sup> However, the provision in the framework of Botswana which restricts non-citizens’ access to ARV goes against article 10 of the ICESCR, which requires States to extend economic rights to non-nationals and this constitutes a restriction in accessing health care for children of non-nationals and who are infected with HIV.<sup>232</sup>

In accessing health care, both the legal and policy frameworks of South Africa contain far reaching provisions which outlaw unfair discrimination of children affected by HIV/AIDS and this is applicable even while accessing HIV/AIDS related treatment and services.<sup>233</sup> The strength of the South African legal framework<sup>234</sup> in protecting children’s right to health on a non-discriminative

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<sup>228</sup>E.Carvalho ‘Measuring Children's Rights: An Alternative Approach’ (2008) 16 (4) *International Journal of Children's Rights* 559.

<sup>229</sup>Paragraph 6 of ICESCR. The principle of non-discrimination in access incorporates certain aspects of the principle of non-discrimination as defined by the CRC as well the human rights principle of non-discrimination (UN General Assembly, 1989: Art. 2 (1); UNDP, 2000: 95). Physical accessibility refers to the implementation of provisions and services taking into account that they are 'within safe physical reach, either at convenient geographic location or via modern technology' (CESCR, 1999: para. 6). Economic accessibility requires that provisions and services are affordable to all (ibid.).

<sup>230</sup>S Gruskin & M Grodin *Perspectives on Health and Human Rights: A Reader* (2005) 474. See also the case of *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235 ; [2000] 12 BLLR 1365 (CC) (28 September 2000) Paragraph 14.

<sup>231</sup>In Botswana, the phrase “other status” in the Children’s Act is wide enough to encompass HIV status.

<sup>232</sup>The Policies and legislation in Botswana only expressly provide access to ARV and free medical treatment for citizens only and this precludes non-citizens from accessing ARV. See Botswana UNAIDS 2012 report on Progress Report of the National Response to the 2011 Declaration Of Commitments on HIV/AIDS available at [http://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2012countries/ce\\_BW\\_Narrative\\_Report\[1\].pdf](http://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2012countries/ce_BW_Narrative_Report[1].pdf) (Accessed on 08/07/2013).

<sup>233</sup> See the National Youth Policy (1997); The National HIV Counselling and Testing Campaign Strategy (2010)

<sup>234</sup> See the Children’s Act (section 6 (2) (d)) and the Promotion of Equality and Prevention of Unfair Discrimination Act (sections 2 and 6).

basis is highlighted in the NHA<sup>235</sup> which upholds the Constitutional protection of the right to health by ensuring the availability of health care services to everyone, without discrimination and free of charge for some groups of people. These include children below the age of six years.<sup>236</sup>

The strength of Botswana's legal framework lies in the guarantee professed by the protection of the right to the highest attainable standard of health and medical care for "every child" in the Children's Act.<sup>237</sup> To maintain this strong commitment, the Public Health Act<sup>238</sup> contains provisions which contribute to the protection of the right to health, especially for children without any discriminatory limitations. However, the fact that discriminatory principles are included in the policy frameworks of Botswana is indicative of the extent of the protection given to the right to equality and non-discrimination in accessing HIV/AIDS related treatment for non-citizens.<sup>239</sup> It is therefore clear that the degree to which the frameworks in both countries address the equality and anti-discrimination principles show that inequality and discrimination especially against PLWHA is not emphatically prohibited.<sup>240</sup> Although the legal documents available do not specifically list HIV/AIDS status as one of the grounds for equality and non-discrimination. The emphatic prohibition of discrimination on "other status" shows that HIV/AIDS can unquestionably be subsumed into the phrase "other status."

## **ii. Ensure unfair discrimination against children or their care-givers affected by HIV is prohibited**

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<sup>235</sup>Section 4 of the NHA. See also HIV/AIDS and STI Strategic Plan for South Africa 2007-2011 (NSP); National Guidelines for HIV Testing and Counselling (2009); Second National HIV/AIDS Strategic Framework for HIV/AIDS 2010- 2016.

<sup>236</sup>Section 4 (i) (a) of the NHA. The protection of user rights in chapter two of the NHA also ensures that the way in which health services should be provided is described. See chapter 2 of the NHA.

<sup>237</sup>Section 7 which guarantees access to the highest attainable standard of health and medical care to every child whether or not the parents, other relatives or guardian of the child are able or unable, to afford the cost of health care,

<sup>238</sup>It further places, an obligation on the Ministry of health to 'carry out activities that could contribute to the realisation of the right to health. These include directing that certain steps which include the emergency vaccination of children to ensure the realisation of right to health; the PHA does not contain any discriminatory provision which can limit the enjoyment of this right by anyone.

<sup>239</sup> Botswana National ART Guidelines prescribes access of free ART to citizens only. See CBosaletswe *Botswana faces UNHRC human rights abuse charges* Sunday Standard Online News paper 21 June 2013 available at <http://www.sundaystandard.info/article.php?NewsID=16013&GroupID=1> (Accessed on 21 June 2013). See also O Modikwa *No ARVs for technically stateless woman* Mmegi Online Edition Tuesday, 14 August 2012, Issue: Vol.29 No.119 available at <http://www.mmegi.bw/index.php?sid=1&aid=496&dir=2012/August/Tuesday14> (Accessed on 21 June 2103).

<sup>240</sup>See (Molatlhegi and Associates *Draft final report consultancy to review laws and policies relating to HIV/AIDS* (2005)104 – 105. "The Government has a comprehensive and integrated programme designed to ensure the availability of anti-retroviral drugs to the largest number of people. ARVs are provided to qualifying citizens free of charge. Free distribution of ARVs does not, however, apply to non-citizens and refugees staying outside the Dukwi Refugee Camp" (per Presidential Directive CAB.13/2002).



Article 2 of the CRC provides the basis for the protection of the right to unfair discrimination. This protection is echoed in paragraph 7 of the CRC GC3. The committee affirmed that “discrimination is responsible for heightening the vulnerability of children to HIV/AIDS, as well as seriously impacting the lives of children who are affected by HIV/AIDS, or are themselves HIV infected. It further states that girls and boys of parents living with HIV/AIDS are often victims of stigma and discrimination as they, too, are often assumed to be infected”...<sup>241</sup> and that laws, policies, strategies and practices should address all forms of discrimination that contribute to increasing the impact of the epidemic.<sup>242</sup>

In line with this, the crux of the legislative framework for the protection of equality and prohibiting stigma and discrimination under the South African legal framework includes the Constitution of South Africa.<sup>243</sup> South Africa’s apartheid history goes a long way in shaping the Constitution and many other laws. Because of discrimination, stigmatisation and inequality which occurred during the apartheid era, South African legislation and policies mostly tend towards equality and non-discrimination.

The fact that the framework strongly and unequivocally prohibits discrimination based on the health status of a child or that of the child’s parents or care-giver is another strong point in the legal framework of South Africa.<sup>244</sup> This is a positive move as it ensures that HIV/AIDS status (as a form of health status) is indirectly included as a prohibited ground for discrimination. Other pieces of legislation add strength to the legal framework of South Africa on the prohibition of discrimination based on the health status of a child or that of the child’s parents or care-giver and these are vital for children affected by HIV/AIDS.<sup>245</sup> In addition to the legal instruments are some policy documents<sup>246</sup> which reinforce this protection.<sup>247</sup> Thus the protection of the right to equality and freedom from discrimination for children living with HIV and those affected by HIV or their care-givers under the South African framework is adequate.

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<sup>241</sup> See paragraph 7 of GC 3.

<sup>242</sup> See paragraph 9 of GC 3.

<sup>243</sup> Section 9 of the Constitution; section 6 (2) (d) of the Children’s Act; the National Education Policy Act no 27; as well as Section 2 of the Refugees Act 130 of 1998 on the General prohibition of refusal of entry, expulsion, extradition or return to other countries in certain circumstances.

<sup>244</sup> Section 9 of the Constitution; section 6 (2) (d) of the Children’s Act; the National Education Policy Act no 27; as well as Section 2 of the Refugees Act 130 of 1998 on the General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances.

<sup>245</sup> Such as the EEA, the National Education Policy Act, the Refugee Act and the South African Children’s Act.

<sup>246</sup> Such as South African NSP as well as the National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions in South Africa.

<sup>247</sup> There is an appreciable legislation and policies which are although non-child specific, but which are adaptable to the protection of children from inequality, stigma and discrimination.

Further illustrating the prohibition of HIV/AIDS based discrimination is the case of *Perreira v Buccleuch Montessori Pre-school and Primary (Pty) Ltd and Others*<sup>248</sup> where questions arose between differentiation and unfair discrimination on the basis of the positive HIV status of a child, which led to her being refused admission into nursery school.<sup>249</sup>

In Botswana on the other hand, the protection of the right to equality and non-discrimination under the Constitution has not received the kind of unequivocal protection one would expect to see in a period where HIV/AIDS based discrimination is rife. This is due partly to the fact that Botswana's legal system still rests firmly on the Constitution which was enacted in 1966 by the old colonial government and the influence of certain customary law<sup>250</sup> principles which are inclined towards inequality and discrimination especially with respect to the sexes.<sup>251</sup> Although not explicitly stated, the protection of the right to equality and non-discrimination under Botswana's Constitution stems from section 3 which guarantees the rights and freedoms of all individuals, without discrimination based on race, place of origin, political opinions, colour, creed or sex. In this section, the right to enjoy one's right is limited by the rights and freedoms of others and public interest.

Section 15 deals with freedom from discrimination. It forbids the enactment of any law that is "discriminatory either of itself or in its effect." It forbids any person acting "by virtue of any written law or in the performance of the functions of any public office or any public authority" from acting in a discriminatory manner. In addition, the anti-discriminatory clause in section 15 is not an absolute provision as it allows discrimination in certain circumstances. It is clear from the wording of the section and any other section of the Constitution that HIV/AIDS is not one of the listed grounds on which discrimination is prohibited.

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<sup>248</sup> (4377/02) [2003] ZAGPHC 1 (21 October 2003).

<sup>249</sup> Richter M, Are Nursery Schools 'Nice Places for Children with HIV/AIDS? The Case of Karen Perreira V Buccleuch Montessori Pre-School and Primary (Pty) Ltd. The main issue was a determination of whether the postponement of the child's admission into the school was not a means of discrimination on the grounds of the child's HIV status. The Court held that the action of the school was fair discrimination so as to prepare the school adequately for handling children living with HIV/AIDS. See SALJ 06 Vol. 123 part 2 (2006) 220

<sup>250</sup> G NTsheko *Situational analysis of the Socio-economic Conditions of OVC in Seven Districts in Botswana* Human Science Research Council (HSRC) (2007) 43. Here it was shown that among the people of the Maun community, "the social constructs of women and men are that of gender inequality".

See also UNICEF Publication *Impact of the CRC in Diverse Legal Systems* Cambridge (2011) where it was shown that in Botswana, the Customary Courts Act states that customary laws is recognised only if it is not inconsistent with the provisions of any enactment or contrary to morality, humanity and natural justice.. See also

<sup>251</sup> According to the customary law of the Ngwaketse tribe, this dictated that the family home of a deceased individual was to be reserved to the last born male child. The rest of the property would be divided among the children, regardless of gender. See the case of *Mmusi and Others v Ramantele and Another* (MAHLB-000836-10) [2012] BWHC 1 (12 October 2012).

Despite Botswana's lack of constitutional protection from discrimination based on HIV/AIDS, the *Unity Dow case* recognised that discrimination can be prohibited on certain unlisted grounds if the section 3 of the Constitution is interpreted widely. This was set out in the dictum of Aguda J.<sup>252</sup>

“Section 3 of the Constitution guarantees every person in Botswana fundamental rights and freedoms without distinction as to their race, place of origin, political opinions, colour, creed or sex.”

The learned Judge of Appeal continued:

"The fundamental rule is that a Constitution is a meaningful document: Its voice carries higher and further than that of ordinary legislation, and every pronouncement of a Constitution must be presumed to enshrine a principle of abiding value."

He submitted that the importance of a Constitution like that of Botswana's is that its great purpose is to guarantee that there will be no discrimination on any basis against all the citizens or any of them governed by it. Botswana's Children's Act also progressively prohibits acts or decisions which might be discriminatory towards children on the basis of "any other status".<sup>253</sup> Although this does not mention HIV/AIDS, the inclusion of "other status" is wide enough to be construed to include the HIV/AIDS status of the child.

Further illustrating the prohibition of HIV/AIDS-based discrimination are the cases of *Botswana Building Society (BBS) v Rapulana Jimson*<sup>254</sup> and *Lemo v Northern Air Maintenance (Pty) Ltd*<sup>255</sup> the link between these judgements in the cases suggests "that it is incompetent to dismiss an employee solely on the grounds that such an employee is HIV positive".<sup>256</sup>

Hence, while the South Africa legal and policy frameworks contain very strong anti-stigmatisation and non-discrimination principles through broad equality laws mostly set out in the Constitution, the Children's Act of Botswana is the only legislation which suggests the prohibition of HIV-based discrimination through the interpretation of the unlisted ground of non-discrimination (other status) set out in section 7. This nonetheless makes up for the constitutional laxity. This Children's Act also comes out strongly in condemning inequality and this is applicable to children affected by HIV/AIDS.

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<sup>252</sup>See the *Unity Dow's Case* CA No. 4/91 Court of Appeal. Unreported.

<sup>253</sup>Section 7 of the Botswana's Children's Act.

<sup>254</sup>Civil Appeal No. 37 of 2003 See also Industrial Court Case No. 35 (2003).

<sup>255</sup>2004 (2) BLR 317 (IC).

<sup>256</sup>UNDP *Compendium of Key Documents Relating to Human Rights and HIV in Eastern and Southern Africa* (2008) 217.

It is therefore submitted that the Constitution of Botswana which is supreme and from which other legislation take their roots ought to provide a strong and clear enough basis for the prohibition of inequality and non-discrimination. This should be similar to the manner in which the Children's Act protects the right to equality and non-discrimination. There is also the need for the legislation to expressly indicate that HIV/AIDS is one of the grounds for non-discrimination.

However, unlike the legal framework, the policy framework in Botswana is more receptive towards the protection of equality and non-discriminatory principles. The NSP, the National Youth Policy, the National HIV Counselling and Testing Campaign Strategy 2010, the National Guidelines for HIV Testing and Counselling 2009, Botswana's NSF 2010- 2016 as well as the Botswana HIV/AIDS and Human Rights Charter are some of the documents which make up the policy framework for challenging discrimination against groups of people who are marginalised such as PLWHA including children.

It is therefore clear from the aforesaid that inequality and discrimination especially against children (people) living with HIV/AIDS) is prohibited in both countries through the inclusion of unlisted ground of non-discrimination in a number of laws and policies.

## **7.2 Conclusion**

The analytical framework developed for the analysis of the extent of protection available to the rights of children affected by HIV/AIDS in both countries takes into account the relationship of the children to the virus and brings to light the needs of children. It also shows the extent of the protection available for the different clusters of rights which are crucial for children at various stages of the epidemic.

Placing the protection of the rights of children affected by HIV/AIDS under the purview of the CRC and its General Comments, it is clear that some of the rights have been adequately guaranteed in the legal and policy framework of both countries while some are under-protective of the rights of children affected by HIV/AIDS. A brief synopsis of the extent of the protection are highlighted in the next chapter to show the extent to which some of these rights still need to be addressed especially under the legal and policy frameworks.

In conclusion, it is clear that the rights of children affected by HIV/AIDS are still not in accordance with international standards on the rights of children affected by HIV/AIDS. There is an urgent

need to bring them in line with international norms. This will ensure that the rights which are crucial for the well-being of children affected by HIV/AIDS are sufficiently addressed and guaranteed.

## Chapter 8 Conclusion and Recommendations

### 8.1 Introduction

There is no gainsaying the fact that South Africa and Botswana have some of the highest HIV-prevalence rates and some of the highest percentages of orphaned children among their populations worldwide.<sup>1</sup> The effect of the HIV/AIDS epidemic is felt in many facets of the lives of children in both countries especially when they are themselves infected with HIV/AIDS or when they live in households and communities that are affected by the HIV/AIDS epidemic.<sup>2</sup>

It is clear that both South Africa and Botswana have recognised the need for the protection of the rights of children affected by HIV/AIDS and both countries have taken steps to ensure that the rights of these children are expressly recognised and protected under their legal and policy frameworks.<sup>3</sup> Despite the extensive policy attention in both countries, this has not always been followed up with legal reforms on the rights of children affected by HIV/AIDS. This thesis has shown that much still needs to be done to fill lacuna and to enhance the protection offered by the legal and policy frameworks in both countries.

### 8.2 Concluding comments on the legal and policy frameworks protecting children affected by HIV/AIDS in Botswana and South Africa

In this conclusion, the research questions described in Chapter One are revisited and broad-based conclusions are made with regard to each one. Hereafter the chapter closes with a number of recommendations for legal and policy reform in both countries.

The three research questions, which, were addressed in this thesis, were:<sup>4</sup>

- iv. How does HIV affect the rights of children affected by HIV/AIDS?
- v. Can international standards serve as a template to shape the legal response to HIV in South Africa and Botswana?
- vi. Are the legal and policy frameworks in both countries in line with these international standards?

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<sup>1</sup> Statistics South Africa mid-Year Estimates 2010, available at <http://www.statssa.gov.za/publications/P0302/P03022010.pdf> (Accessed on 31 January 2010). See also the South Africa UNAIDS 2010 Country Progress Report which reports about 400 000 deaths in South Africa in 2009.

<sup>2</sup> C Barrett, A Strode & N McKerrow *et al Consultative Paper on Children Living with HIV/AIDS*, (1999) 8 -9.

<sup>3</sup> These laws have been analysed in the previous chapters.

<sup>4</sup> See section 1.5 in chapter 1.

With respect to the questions, the following conclusions can be drawn-

### **8.2.1 How does HIV affect the rights of children affected by HIV/AIDS?**

This question is answered in Chapter 2 of this thesis, where was been stated that:

#### **8.2.1.1 There are a number of issues, which impact the rights of children affected by HIV/AIDS and these in particular inhibit their rights to survival and development**

This thesis concludes that the HIV/AIDS epidemic affects the lives of millions of children, both directly and indirectly in sub-Saharan Africa. It affects the way in which children live, grow and develop. Accordingly this thesis has found that it has a number of implications for children's rights. At a micro-level this thesis concludes that HIV/AIDS affects children's right to survival and development in three key ways.

- (i) Given the generalised nature of the HIV epidemic in both South Africa and Botswana many children are at risk of being orphaned by the epidemic.<sup>5</sup> This can result in household poverty, child-headed households, property grabbing and inheritance practices, which result in the disinheritance of children.<sup>6</sup> The emotional stress on a grieving child may result in depression and anger, or cause them to engage in risky behaviour, such as survival sex, dealing in drugs and other behaviour, which may make them vulnerable to contracting HIV.<sup>7</sup> This thesis concludes that orphanhood has 3 primary legal consequences for children.<sup>8</sup> Firstly, it leaves children vulnerable as they lack the support and guidance of a legal guardian. Secondly, it makes children economically vulnerable as they lose the economic support provided by their parents. Thirdly, it may result in them losing their home through property grabbing and discriminatory inheritance laws.<sup>9</sup>

Even children, who are not orphaned, may be vulnerable due to the impact of HIV/AIDS on their family.<sup>10</sup> It can undermine the economic viability of extended families, through breadwinners being unable to work or having to carry the costs of long term chronic

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<sup>5</sup> See chapter 2 section 2.3.1.

<sup>6</sup> Ibid.

<sup>7</sup> J Zermatten 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *The International Journal of Children's Rights* 484.

<sup>8</sup> See chapter 2 section 2.3.

<sup>9</sup> See chapter 2 section 2.3.2.3.

<sup>10</sup> See chapter 2 section 2.3.2.

health care and funerals.<sup>11</sup> This in turn affects the socio-economic rights of children to survival and development with more children leaving school early and higher rates of poverty, malnutrition and ill health amongst affected children.<sup>12</sup> Children affected by HIV/AIDS may face child exploitation<sup>13</sup> and the psycho-social loss of a family legacy.<sup>14</sup>

- (ii) Due to the exponential growth in the HIV epidemic amongst young people, children are increasingly at risk of HIV infection before adulthood. If they are to develop and survive, they need to be able to protect themselves against HIV infection. This impacts on their rights to information on HIV prevention and access to sexual and reproductive health services, such as HIV testing and condoms; and
- (iii) Children infected with HIV/AIDS have special health needs. This affects their rights to access health care services and to not be discriminated against because of their HIV status. Legal issues include having to face HIV/AIDS-related stigma and discrimination<sup>15</sup> and enforcing their health care rights<sup>16</sup>.

In summary, this thesis concludes that HIV can affect a child's rights directly if they are infected with HIV themselves or at risk of infection. It can impact indirectly on a child's rights if a parent or care-giver is infected.

### **8.2.2. Can international standards serve as a template to shape the laws in South Africa and Botswana on the protection of the rights of children affected by HIV/AIDS?**

In answering the second research question on the appropriateness of international standards as a template to shape the national response to the rights of children affected by HIV/AIDS, chapters 3 and 4 examined the role, which international law ought to play in shaping national legislation. It was shown that the rights of children affected by HIV/AIDS under international law are scattered in various instruments. Hence, if examined collectively, there are 4 UN, 2 AU and 2 SADC binding but non-HIV/AIDS-specific instruments and there are 6 UN, 11 AU and 4 SADC non-binding instruments, which are, relevant to the protection of children's rights.<sup>17</sup> Thus to indicate the submission of both countries to the authority of international law, this thesis further shows that-

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<sup>11</sup> See chapter 2 section 2.3.1.1.

<sup>12</sup> See chapter 2 section 2.3.1.2.

<sup>13</sup> See chapter 2 section 2.3.2.2

<sup>14</sup> See chapter 2 section 2.3.2.3

<sup>15</sup> See chapter 2 section 2.3.4.1.

<sup>16</sup> T de Bruyn *HIV/AIDS and Discrimination: A Discussion Paper* (1998) 53.

<sup>17</sup> See chapters 3 and 4. .



### **8.2.2.1 Both countries are members of the international community and they have submitted to various international law standards**

As members of the international community, both countries acknowledge the weight of international law standards in the interpretation of national laws, especially in the field of human rights. Section 39 of the Constitution of South African obliges the courts to consider international law when interpreting constitutional rights.<sup>18</sup> On this, section 232 of the Constitution clarifies the position of international law particularly in the field of human rights law<sup>19</sup> when it provides that “the rules of customary international law are binding on the Republic, unless they are inconsistent with this Constitution or an act of parliament, or form part of the law of the Republic.”<sup>20</sup>

Likewise in Botswana, section 21(4) of the Interpretation Act of 1984 authorises courts in Botswana to have regard to international treaties when interpreting domestic legislation especially legislation that is designed to incorporate a treaty.<sup>21</sup> Thus the Interpretation Act “empowers the judiciary of Botswana to have recourse to rules of international law as embodied in treaties when interpreting ordinary domestic law and the Constitution.”<sup>22</sup>

### **8.2.2.2 The legal and policy frameworks of both countries show that international standards are relevant to the protection of certain rights, which affect the children affected by HIV/AIDS**

The relevance of international law to the protection of the rights of children affected by HIV/AIDS is evident in the role, which the CRC GC 3, and a number of other AU instruments such as the Tunis Declaration (1994),<sup>23</sup> Abuja Declaration and Plan of Action on HIV/AIDS, tuberculosis and other related Infectious Diseases (2001) and the Abuja framework for action for the fight against HIV and AIDS, Tuberculosis and Other Related Infectious Diseases (ORID),<sup>24</sup> Treaty of SADC (1992),<sup>25</sup> SADC Protocol on Health (1999),<sup>26</sup> the Maputo Declaration<sup>27</sup>, the SADC Model Law

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<sup>18</sup> See chapter 3 section 3.0.

<sup>19</sup> J Dugard ‘Role of International Law in Interpreting the Bill of Rights’ (1994) 10 *South African Journal on Human Right* 58.

<sup>20</sup> Ibid

<sup>21</sup> C M Fombad *Essays on the Law of Botswana* (2007) 239.

<sup>22</sup> Ibid.

<sup>23</sup> See Chapter 4 section 4.2.1.

<sup>24</sup> See Chapter 4 section 4.2.5.

<sup>25</sup> See chapter 4 section 4.3.1.1.

<sup>26</sup> See chapter 4 section 4.3.1.2.

<sup>27</sup> See chapter 4 section 4.2.5.

(2008)<sup>28</sup> and the Maseru Declaration on the Fight against HIV/AIDS in the SADC region (2003)<sup>29</sup> play in protecting the rights of children affected by HIV/AIDS.

Of particular relevance are the child-specific standards laid down by the CRC GC 3<sup>30</sup> for addressing of the children rights issues such as:

### **i. Orphanhood**

The CRC GC 3 while discussing vulnerability and children needing special protection specifically states in paragraph 31 that “special attention must be given to children orphaned by AIDS and to children from affected families, including child-headed households, as these impact on vulnerability to HIV infection.” It is therefore clear from the aforesaid that under international law, there is the recognition of the vulnerability of OVCs and the obligation to ensure that orphaned children are protected.

### **ii. HIV prevention**

The right of children to have access to HIV prevention is stressed in the objectives of the CRC GC3. Paragraph C indicates that one of the objectives of the GC3 is “to identify measures and good practices to increase the level of states’ implementation of the rights related to the prevention of HIV/AIDS and the support, care and protection of children infected with or affected by this pandemic.” Likewise, paragraph 6 of GC 3, while discussing the relevance of article 24 of the CRC indicates the extent to, which the health of the child ought to be protected and stipulates that adequate measures should be taken in order to ensure that the right to preventive health care, sex education, and family planning education and services are provided.<sup>31</sup> Paragraph 16 states the need for ensuring access to information on HIV prevention and paragraph 22 sets out the standards relating to the issue of HCT.

These indicate the standard required by international law; especially the CRC GC3 from national responses on HIV prevention. This thereby shows the extent to which it can serve as a template for designing legislation and policies relating to the protection the children from HIV infection.

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<sup>28</sup> See chapter 4 section 4.3.2.1.

<sup>29</sup> See chapter 4 section 4.3.2.3.

<sup>30</sup> This is the only binding instrument offering child-specific protection to the rights of children affected by HIV/AIDS.

<sup>31</sup> In line with article 24 (f) of GC 3.

### iii. Access to health care

Standards on the protection of the right of children affected by HIV/AIDS to access health care without discrimination; while taking into account differences in gender, age and the social, economic, cultural and political context in which children live are discussed under the CRC GC 3.<sup>32</sup> It lays down standards on the provision of health services which are responsive to the rights of children under 18 years of age in a non-discriminatory manner thereby ensuring that younger children are given independent access to HIV/AIDS-related health care without the consent of their parents.<sup>33</sup>

In addition to the CRC GC3, a number of other international instruments set out standards on children's right to access health care. These include the Tunis Declaration which stipulates that "young people must be given access to reproductive health care and the knowledge and skills to avoid sexual exploitation and unprotected sex."<sup>34</sup> Likewise the Maputo Declaration, which unequivocally targets women, children and young people in the provision of "all opportunities for scaling up treatment for HIV/AIDS"<sup>35</sup>

Thus, based on the express call for the application of and reliance on international law principles when interpreting legislation in both countries;<sup>36</sup> the child-specific standards which have been laid out under international law; and the specific call for the application of these standards to national frameworks, it is settled that international law has some remarkable qualities which domestic legislation can apply, hence, its value in shaping national human rights standards regarding the rights of children cannot be gainsaid.

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<sup>32</sup> Paragraph 21 of GC 3.

<sup>33</sup> Paragraph 20 of GC 3.

<sup>34</sup> Paragraph 2 (b) of the Tunis Declaration.

<sup>35</sup> Paragraph 4 of the Maputo Declaration.

<sup>36</sup> See chapter 8 section 8.2.2.1.

## **8.2.2 Are there adequate international law norms to address the rights of children affected by HIV/AIDS and the legal and policy frameworks in both countries in line with these international standards?**

In answering this question, this thesis finds that:

### **8.2.3.1 The CRC and its GCs are comprehensive documents which form an appropriate model for the design of legal and policy frameworks on the protection of children affected by HIV/AIDS**

This thesis agrees that the extent to which the CRC provides for the rights of children is unparalleled among the other international standards. This is because it specifically provides for the protection of the rights of children. It is a comprehensive document which addresses the civil and political rights and economic, social and cultural rights of children. Although the CRC itself does not deal specifically with HIV/AIDS, there are a number of GCs which have been issued in connection to the CRC. Of particular relevance to the children affected by HIV/AIDS are GC3<sup>37</sup> and GC4<sup>38</sup> which set out the extent of the state's obligations regarding the protection of children and adolescents. This thesis concludes that, although the CRC is not HIV-specific, given the detailed guidance in the GCs, the CRC forms an appropriate model which can be used as a framework for the design of legal and policy responses to children affected by HIV/AIDS. It can be used to protect any particularly vulnerable group including children affected by HIV/AIDS. Nevertheless as shown in response to the first research question, HIV/AIDS does impact on children's rights in different ways and this thesis concludes that specific guidance is given in the CRC GC 3 on certain issues especially on issues like orphanhood<sup>39</sup> and its implications<sup>40</sup>, keeping children HIV-negative<sup>41</sup> and accessing the highest attainable standard of health care for children who are infected.<sup>42</sup>

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<sup>37</sup> GC on HIV/AIDS and Children's rights adopted at the 32nd Session of the Committee on the Rights of the Child, from 13 to 31 January 2003.

<sup>38</sup> GC 4 on Adolescent health and development in the context of the Convention on the Rights of the Child issued by the Committee on the CRC at its 33rd session held from 19 May to 6 June 2003. See <http://www1.umn.edu/humanrts/crc/crc-generalcomment4.html> (Accessed on 25 May 2011). This is binding in as much as the CRC has been ratified by South Africa and acceded to by Botswana note above.

<sup>39</sup> Paragraphs 31 and 34 of GC 3 discuss the obligation on the state to ensure that special attention is paid to child-headed households. Part V of GC 3 deals with vulnerability and children needing special protection of what?

<sup>40</sup> Ibid.

<sup>41</sup> Section IV paragraph 16 and 17 of GC 3 deal with the procedure for providing information on HIV prevention and awareness raising (paragraph 23) discusses how to administer HIV testing on children.

<sup>42</sup> Section IV deals with the state obligation to provide prevention, care, treatment and support for children. Section C discusses child and adolescent sensitive health services and paragraph 20 of GC 3 deals with the provision of confidential HIV/AIDS treatment and confidential sexual and reproductive health services. Section F deals with

### **8.2.3.2 Apart from the CRC and its optional protocols, many of the existing, binding international standards on the protection of the rights of children are not HIV/AIDS-specific but they nevertheless protect children affected by HIV/AIDS**

This thesis concludes that there are various other international instruments which can be used and applied to protect children affected by HIV/AIDS in both countries.<sup>43</sup> For instance, the ICESCR contains standards which guarantee the right to access the best attainable standard of health care to everyone,<sup>44</sup> without any distinction despite the fact that this is not an HIV-specific standard. It can and has been used to argue for the right to access the best attainable standard of health care for persons infected with HIV.<sup>45</sup> Similarly the ICCPR prohibits any discrimination and guarantees “equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status to all persons” without any discrimination.<sup>46</sup> These provisions are comprehensive enough to serve as the framework upon which the national legislation and policies are based.

### **8.2.3.3 There are some African regional and SADC sub-regional standards on the protection of the rights of children affected by HIV/AIDS. The SADC Model law, a non-binding document is the most comprehensive instrument describing the rights of those affected by HIV/AIDS**

This thesis concludes that in addition to UN standards, there are a number of regional and SADC instruments dealing with the protection of people affected by HIV/AIDS. Many of these are applicable to children.<sup>47</sup> While most of the binding instruments are not HIV/AIDS-specific, for instance the ACRWC or the ACHPR, there are a number of non-binding HIV/AIDS-

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treatment and care and paragraph 28 of GC 3 disuses the provision of treatment and care for children affected by HIV/AIDS.

<sup>43</sup> See Chapters 3 and 4 on discussions of international and regional standards.

<sup>44</sup> See article 12 of the ICESCR.

<sup>45</sup> See other ESCR guaranteed in the ICESCR which are relevant in the case of children affected by HIV/AIDS. These include the right to health, education, adequate standard of living, right of everyone to be free from hunger among others.

<sup>46</sup> Article 26 of ICCPR. See CHR’s GC 6 issued in 1982 in connection to the ICCPR and the rights of the child under article 24, as interpreted by CHR GC17 issued in 1989. These obligations include the need to adopt positive measures to reduce infant mortality and increase life expectancy, especially in the context of epidemics like HIV/AIDS.<sup>46</sup>

<sup>47</sup> All these instruments have been discussed in Chapter 4.

specific instruments which are applicable to the rights of children affected by HIV/AIDS<sup>48</sup> especially with regard to access to ART.<sup>49</sup>

In addition to these standards, there is the SADC Model Law.<sup>50</sup> The SADC Model Law is the only African regional instrument which specifically deals with children in the HIV/AIDS epidemic. It deals with key human rights issues such as HIV testing,<sup>51</sup> it prohibits the exclusion of learners from school on the basis of their actual or perceived HIV status;<sup>52</sup> places obligations on the state to protect the rights of children living with or affected by HIV, including orphans;<sup>53</sup> and requires the state to care for children orphaned by AIDS.<sup>54</sup> At the SADC level, there are a number of child-specific and HIV-specific norms, which address orphanhood, as set out above but does not address the care for HIV positive children or HIV prevention for children.<sup>55</sup>

From the aforesaid, it is worth mentioning that although international law (through the application of some African regional standards have been criticised as the “toothless dog which can only bark but not bite,”<sup>56</sup> it is settled that the using these standards as a template for national legislation will go a long way in ensuring that the rights of children are protected appropriately and adequately.

In addressing with the second part of the 3<sup>rd</sup> research question on whether the legal and policy frameworks in both countries are in line with the international standards, this thesis submits that

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<sup>48</sup> For instance the Gaborone Declaration on a Road Map towards Universal Access to Prevention, Treatment and Care (2005), Continental Framework for Harmonisation of Approaches among Member states and Integration of Policies on Human Rights and People Infected and Affected by HIV/AIDS in Africa (2005) and the Brazzaville Commitment on Scaling Up Towards Universal Access to HIV/AIDS Prevention, Care and Support in Africa by 2010 (2006).

<sup>49</sup> See more discussion on the applicability of these instruments to the protection of children affected by HIV/AIDS in chapter 4.

<sup>50</sup> F Viljoen ‘Model legislation and regional integration: Theory and practice of model legislation pertaining to HIV in the SADC’ (2008) 33 *South African Yearbook of International Law* 310.

<sup>51</sup> See chapter 4 section 4.3.2.1 for further discussion on the applicability of the Model Law to children and HIV/AIDS.

<sup>52</sup> Article 22 of the SADC Model Law.

<sup>53</sup> Article 24 of the SADC Model Law.

<sup>54</sup> See article 25 of the SADC Model Law.

<sup>55</sup> See chapter 4, section 4.2 and 4.3. This is concerning and a more holistic regional response is needed

<sup>56</sup> “when the African Commission was constituted, it has been severely criticised as a *toothless bulldog* that only *barks but cannot bite* because the decisions of the Commission are not binding on state Parties” (N Udombana J. 2000) in T. F Yerima ‘Comparative Evaluation of the Challenges of African Regional Human Rights Courts’ (2007) 4 *Journal of Politics and Law* 120.

### **8.3. There are both strengths and gaps in the frameworks of Botswana and South Africa resulting in inadequate protection of the rights of children affected by HIV/AIDS<sup>57</sup>**

Chapter 7 of this thesis identified the strengths and weaknesses of the legal and policy frameworks of South Africa and Botswana. This thesis concludes that the key strengths of the framework are that-

#### **8.3.1 The strengths of the South African legal and Policy frameworks**

- i. Children's rights are protected in the Constitution and other laws:** Children's rights are enshrined in the Constitution which is the supreme law of South Africa.<sup>58</sup> This sets the framework for all legal and policy responses to HIV.
- ii. The Children's Act deals directly with some key HIV-related issues:** The inclusion of HIV/AIDS-specific provisions in the Children's Act<sup>59</sup> is a bold step which has ensured that certain HIV-related issues are addressed.<sup>60</sup> This provides express legal standards on the creation of an effective framework for some forms of HIV prevention; the lowered age of accessing contraceptives such as condoms and the ability to access HIV-testing independently from HIV prevention facilities; children's access to certain HIV/AIDS-specific issues such as- HIV testing,<sup>61</sup> HIV testing for foster care or adoption purposes,<sup>62</sup> regulation of pre and post-test counselling before all HIV testing<sup>63</sup> and the protection of the right to confidentiality regarding HIV status.<sup>64</sup>
- iii. The socio-economic rights of children are protected in the Constitution and other laws:** ESCR are enshrined in the Constitution of South Africa.<sup>65</sup> These rights can be used to alleviate the socio-economic problems which the children and their families may face as a

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<sup>57</sup> This section first discusses the strengths and gaps in the frameworks of South Africa and the strengths and gaps in the frameworks of Botswana are discussed in the next section.

<sup>58</sup> See the preamble to the Constitution.

<sup>59</sup> Section 130 – 134 of the Children's Act.

<sup>60</sup> See chapter 7 section 7.2.3.

<sup>61</sup> See section 130 of the children's Act.

<sup>62</sup> See section 131 of the children's Act.

<sup>63</sup> See section 132 of the children's Act.

<sup>64</sup> See section 133 of the children's Act.

<sup>65</sup> See the TAC case 2002 (5) SA 721(CC), 2002 (10) BCLR 1033 (CC) and the *Grootboom case* 2000 11 BCLR 1169 (CC).

result of the HIV/AIDS epidemic in the family. It is particularly significant that the right to social-assistance is expressly protected in the Constitution and other laws.<sup>66</sup>

**iv. South Africa's response is comprehensive; there are a wide range of generic laws including those on discrimination and the prohibition of exploitative labour practices:**

The South African legal framework contains sections which protect children from all forms of discrimination.<sup>67</sup> The Constitution contains an unequivocal prohibition of discrimination on all status and HIV/AIDS status can be subsumed into this.<sup>68</sup> There are also provisions on the prohibition of exploitative labour.<sup>69</sup>

**v. Child-headed households and other forms of alternative care are specifically recognised in the Children's Act:**

The recognition and regulation of child-headed households is laudable.<sup>70</sup> The framework enables a range of alternative models of care such as foster care. This facilitates the protection of children without parents.<sup>71</sup> Furthermore, the placement of children into alternative care is guided by the best interest of the child principle<sup>72</sup> under the authority<sup>73</sup> of the courts.<sup>74</sup>

**vi. Children are protected against violence and other actions which predispose them to HIV infection and HIV negative child victims of rape have the right to PEP:**

There is an enforceable duty on a listed group of adults<sup>75</sup> to report cases of abuse or neglect of any child if it comes to their knowledge.<sup>76</sup> In addition, there is the duty to provide PEP for victims of sexual abuse within 72 hours after the alleged sexual offence so that they can be protected from HIV infection. The victim is entitled to education about the importance of obtaining PEP for HIV infection within 72 hours after the alleged sexual offence took place.<sup>77</sup>

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<sup>66</sup> See section 26, 27 and 28 of the Constitution. See chapter 5 section 5.1.

<sup>67</sup> See the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000, NSP 2012-2016, Policy Framework for Orphans and Other Children Made Vulnerable by HIV/AIDS in South Africa (2005).

<sup>68</sup> Section 9 of the Constitution of South Africa.

<sup>69</sup> Employment Equity Act of No 55 of 1998 available at [www.agsa.co.za/Portals/1/ACTS/EEA.pdf](http://www.agsa.co.za/Portals/1/ACTS/EEA.pdf) (Accessed on 9 September 2011).

<sup>70</sup> This was discussed in chapter 7 section 7.1.2 (i).

<sup>71</sup> This is discussed in section 7.1.2. (ii).

<sup>72</sup> Section 6 (2) (a) of the South African Children's Act and section 27 (4) (a) of the Botswana Children's Act

<sup>73</sup> Committee on the Rights of the Child Consideration of Reports Submitted by states Parties Under Article 44 Of The Convention Botswana Report submitted on 10 January 2003 CRC/C/51/Add.9 Paragraph 126.

<sup>74</sup> Section 36 (2) (c) of the Botswana Children's Act and section 45 (1) (i) of the South African Children's Act.

<sup>75</sup> See section 110 (1) South African Sexual Offences Act.

<sup>76</sup> Ibid.

<sup>77</sup> Section 28 of the South African Sexual Offences Act.



vii. **The Children's Act contains certain non-HIV/AIDS-specific sections which protect children affected by HIV:** The recognition of the child's right to participate in any matter concerning the child,<sup>78</sup> the recognition of the duties of parents<sup>79</sup>, role of a guardian<sup>80</sup> and the transfer of guardianship,<sup>81</sup> the right of the child to decide whether to participate or not in social, cultural and religious practices,<sup>82</sup> the child's right to access information on child's health, sexuality and reproduction,<sup>83</sup> the right to consent to medical treatment,<sup>84</sup> the right to access contraceptives<sup>85</sup> and the protection of children in need of care and protection.<sup>86</sup> In addition, the legal framework deals with orphanhood,<sup>87</sup> HIV prevention<sup>88</sup> and access to treatment for children with HIV/AIDS.<sup>89</sup>

### 8.3.1.1 The weaknesses of the South African legal and policy frameworks

Despite these strengths, this thesis has identified the following weaknesses of the South African response:

i. **The constitutional right to nutrition is inadequately provided for in legislation or policies:** Although the South African Constitution guarantees the right to nutrition,<sup>90</sup> the framework for the protection of the right to food in South Africa is disjointed and there is a lack of coordination between different government departments. The balance between "longer-term capacity initiatives rather than on immediate food transfers" has not been achieved.<sup>91</sup> This results in an inadequate

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<sup>78</sup> Section 10 of the Children's Act.

<sup>79</sup> Section 18 (3) of the Children's Act.

<sup>80</sup> Ibid.

<sup>81</sup> Section 23 (1) of the Children's Act.

<sup>82</sup> Section 12 of the Children's Act.

<sup>83</sup> Section 13 of the Children's Act.

<sup>84</sup> Section 129 of the Children's Act.

<sup>85</sup> Section 134 of the Children's Act.

<sup>86</sup> Section 150 of the Children's Act.

<sup>87</sup> Child-headed households have been recognised under "other protective measure" section 137 of the Children's Act. The National Guidelines for Statutory Services to Child-Headed Households (2010) also in place regarding the regulation of child-headed households. The Guidelines are to be read together with the Children's Act No. 38 of 2005 as amended and the Policy Framework for Orphans and Other Children Made Vulnerable by HIV and AIDS in South Africa.

<sup>88</sup> See the policy framework for the regulation of access to HIV/AIDS education in South Africa is the National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions.

<sup>89</sup> See page 15 of the NSP 2012-2016 and Paragraph 3.4.4 (1 and 4) of the NSF.

<sup>90</sup> Section 28(1) (c) of the Constitution.

<sup>91</sup> See section 7.1.1.1 (iv) of chapter 7 for further discussion. See also D Brand *Between availability and entitlement: The Constitution, Grootboom and the right to food available at* <http://www.saflii.org/za/journals/LDD/2003/2.pdf> (Accessed on 30 January 2012).

protection of the right to nutrition which is crucial for the well-being of children affected by HIV/AIDS and their families when the parents cannot provide for themselves.

**ii. The framework does not actively discourage the institutionalisation of orphaned children:**

The South African framework does not categorically discourage the institutionalisation of children. This is contrary to article 44 of the CRC and article 25 of the SADC Model Law.<sup>92</sup>

**iii. The process of appointing a guardian for a child is cumbersome and legalistic:** The process of assuming the role of a legal guardian by an adult or primary care-giver who has not been named in a will is complex and legalistic.<sup>93</sup> Requiring potential guardians to approach a court is expensive and complex for those without access to legal service.<sup>94</sup>

**iv. Other weaknesses' include the fact that:** The best interest standard for HIV testing is too high as it has exceptionalised HIV testing and made the requirements for testing children for HIV different from the requirements for HIV testing on adults. This is believed to further contribute to HIV-related stigma, and stall attempts to normalise HIV testing practices.<sup>95</sup> In addition, the procedure for accessing medical male circumcision has been made difficult even though it is regarded as a key HIV prevention strategy. This is because section 12 (8) only allows circumcision on boys younger than 16 years if the circumcision is performed for –“religious purposes in accordance with the practices of the religion concerned and in the manner prescribed;” or “medical reasons on the recommendation of a medical practitioner.”<sup>96</sup>

### **8.3.2 The strengths of Botswana's legal and Policy frameworks include:**

Botswana has incorporated some of the international standards into its law. However it has not ensured a holistic legal response to the rights of children affected by HIV/AIDS. Thus, the key strengths with the approach that Botswana has taken include:

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<sup>92</sup> This was discussed in section 4.2.3.1.

<sup>93</sup> Where care-givers have not been appointed as guardians, they only have limited legal capacity to act on behalf of the child and they lack the legal capacity to carry out any of the actions listed section 18 (3) the Children's Act on behalf of the child unless and until they approach the courts for them to be declared as the legal guardians of the child.

<sup>94</sup> This was discussed in chapter 7 section 7.1.3 (i).

<sup>95</sup> L J Still *HIV exceptionalism and the South African HIV and AIDS epidemic: perspectives of health care workers in Pietermaritzburg* Mater of Arts dissertation submitted to the University of South Africa (2008) 92.

<sup>96</sup> C Zabus *Fearful Symmetries: Essays and Testimonies Around Excision and Circumcision* (2008) 283. See also chapter 5 section 5.1.2.2 (v).

- i. **Children's rights generally are protected in laws and policies:** The existence of a new Children's Act ensures the protection of the rights of children. This is a crucial step which ensures the existence of child-specific provisions which are crucial to the children affected by HIV/AIDS even though it is not HIV-specific.
- ii. **The socio-economic rights of children are provided for in the Children's Act:** The new Children's Act contains some justiciable socio-economic rights.<sup>97</sup> Of significance is the fact that the Children's Act and the policy framework<sup>98</sup> recognises and protects the right to adequate and safe housing.<sup>99</sup> In addition, the legal framework recognises the right to 10 years of free basic education<sup>100</sup> and again this makes it a justiciable socio-economic right.<sup>101</sup>
- iii. **A child's right to a family life is protected in the Children's Act:** The legal<sup>102</sup> and policy<sup>103</sup> framework recognises the child's right to a family<sup>104</sup>. In addition; the legal framework of Botswana recognises the duties and obligations of both parents in relation to their children.<sup>105</sup>
- iv. **The Children's Act provides children with the right to for alternative care:** It is significant that the frameworks of Botswana contain standards for the provision of alternative care for children without families or those removed from their families. The Children's Act regulate the provision of alternative care<sup>106</sup> and sets standards on how to place orphaned children or children that have been separated from their parents in foster care or in institutions.<sup>107</sup> It is also noteworthy that the framework for regulating the assumption of guardianship for children in Botswana gives persons who act as care-givers and other adults the power to assume parental duties and rights similar to those of the biological parents<sup>108</sup> of

<sup>97</sup> The socio-economic rights protected in the Children's right include the right to health (section 15), shelter (section 16), clothing (section 17) and education (section 18).

<sup>98</sup> Revised National Policy on Destitute Persons 2002.

<sup>99</sup> Section 16 See chapter 7 section 7.1.4 (i) of the Children's Act. This has been addressed in section 7.1.1 (i) of the previous chapter.

<sup>100</sup> This provision is highly commendable. South Africa only provides free basic education to poor indigent students in contrary to the guarantee in Botswana which covers 10 years of free basic education: Children's Rights References in the Universal Periodic Review <http://www.crin.org/resources/infoDetail.asp?ID=19209#sc> (Accessed on 27 July 2012)

<sup>101</sup> Section 18 of the Children's Act.

<sup>102</sup> Section 13 of the Children's Act.

<sup>103</sup> See the National Guidelines on the Care of OVC 2008 Botswana's 2008 National Guidelines on the Care of Orphans and Vulnerable Children define a vulnerable child as any child under the age of 18 years who lives in an abusive environment, a poverty-stricken family unable to access basic services, or a child-headed household; a child who lives with sick parents or outside family care; or who is HIV positive.

<sup>104</sup> Section 27 of the Children's Act sets out parental duties regarding the child.

<sup>105</sup> See section 27 of the Botswana Children's Act.

<sup>106</sup> Section 13 of the Children's Act.

<sup>107</sup> Refer to chapter 7 section 7.1.3 (iii) in the previous chapter.

<sup>108</sup> Section 27 of the Children's Act.

the child. This is comprehensive and will ensure that the child is not left without the protection of a guardian at all times.

- v. **Children are protected from being unfairly discriminated against:** The Children's Act prohibits discrimination against children on the basis of any "other status" and this thesis submits that HIV/AIDS can be subsumed into this phrase "other status".<sup>109</sup>
- vi. **Children are protected from possible abuse within the home:** The strength of the framework in Botswana lies in the fact that the legal framework recognises that children may experience domestic violence.<sup>110</sup> The Domestic Violence Act recognises the link between domestic violence and the harm which it may cause to the health<sup>111</sup> of the victim.<sup>112</sup>

### 8.3.2.1 The weaknesses of Botswana's legal and Policy frameworks include:

- i. **The Children's Act is silent on the issue of HIV:** The absence of HIV-specific provisions in the Children's Act is a significant gap given that the Act is less than 10 years old and Botswana is one of the countries most affected by HIV/AIDS in the world. The Children's Act should have contained specific provisions which are necessary for children in the HIV/AIDS epidemic. Some of the required provisions include those in the South African Children's Act.<sup>113</sup>
- ii. **The Children's Act does not grant children access to a number of HIV prevention services such as:** contraceptives including condoms and oral contraceptives.<sup>114</sup> Children under 18 are regarded as minors so they are not able to access STI treatment and abortion independently.<sup>115</sup> In addition, children are able to access HIV testing independently only at 16 and this is a policy requirement and not a legal standard.<sup>116</sup>

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<sup>109</sup> This has been discussed in chapter 7 section 7.2.1 (ii).

<sup>110</sup> See the interpretation section and various sections of the Act indicate that the Act recognises the burden which Domestic violence places on children and contemplates to protect them.

<sup>111</sup> See the interpretation section of the Domestic Violence Act.

<sup>112</sup> This was addressed in chapter 7 section 7.1.3 (iii) in the previous chapter.

<sup>113</sup> As discussed in section 8.3.1 above.

<sup>114</sup> See section 6.1.2 in Chapter 6.

<sup>115</sup> The cabinet has recently lowered the age of consent for HIV testing to 16 years in the revised National HIV policy. There is also a proposed amendment of the Public Health Act to set the age of HIV testing consent at 16 years See University Research Co *Botswana Child and Adolescent HIV Testing and Counselling Programme* January 2011 available at <http://www.unc-chs.com/uploads/resourcefiles/BotswanaChildandAdolescantestingFinal.pdf> (Accessed on 23 June 2013).

<sup>116</sup> See paragraph 2.4.1 of the National Guidelines for HIV Testing and Counselling 2009.

- ii. **The social security system is weak and outdated leaving children affected by HIV/AIDS vulnerable to poverty:** In Botswana, a key weakness is the out-dated welfare legislation that does not offer adequate social protection or assistance to children in the HIV/AIDS epidemic.<sup>117</sup>
- iii. **Children do not have the right to nutrition:** It is perturbing that there is an inadequate protection of the right to social assistance and nutrition.<sup>118</sup>
- iv. **The legal response to HIV/AIDS is largely founded in policy documents rather than laws:** There is over-reliance on non-legal instruments such as policies and guidelines for the realisation of rights of children.<sup>119</sup> This means that the rights protected under these instruments are non-justiciable hence they cannot be challenged in courts.
- v. **Customary law is not subservient to the Constitution and some of its provisions undermine the rights of children to an inheritance:** Customary laws which are repugnant to human rights, justice and equity negatively impact on the property rights of women and children especially the female child, further worsening the cycle of the poverty<sup>120</sup> when children cannot have access to their property.<sup>121</sup>
- vi. **Child-headed households are not formally recognised as a family structure thus leaving these units without social support:** The informal recognition of the existence of child-headed households is observable in the definition sections of documents such as the Children's Act<sup>122</sup> and other policy documents. Consequently the lack of formal recognition or regulation of child-headed households in Botswana will lead to the inability of children living in such households to fully enjoy their rights and access to social services, especially where adult consent or assistance is required.<sup>123</sup>

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<sup>117</sup> Examples of such legislation include- the Administration of Estates Act of 1974, the Constitution of Botswana which was enacted in 1966 at the time when HIV/AIDS was not present, Adoption of Children Act of 1952 (Chapter 28:01), The Deserted Wives and Children Protection Act 1963 (Chapter 28:03), Births and Deaths Registration Act 1969 (Chapter 30:01).

<sup>118</sup> Section 56 of the Children's Act merely places an obligation on the Minister to "provide or cause to be provided, for refugee and displaced children, such basic social services as are necessary for their survival or sustenance.

<sup>119</sup> A number of rights of children are subsumed into policies and frameworks in Botswana without reference to legal any legal basis for the protection of the rights.

<sup>120</sup> See the case of *Mmusi and Others V Ramantele and Another* [unreported] available at [www.southernafricanlitigationcentre.org/library/](http://www.southernafricanlitigationcentre.org/library/) decided on 12 October 2012 (Accessed on 23 January 2013).

<sup>121</sup> As discussed in section 7.1.1.2 (ii) of chapter 7.

<sup>122</sup> Section 42 (e) of the Children's Act while defining a child in need of care.

<sup>123</sup> This gap has been discussed in section 7.1.3 (ii) of the previous chapter.

- vii. **The legal framework does not support the implementation of HIV/AIDS prevention amongst young persons:** A gap in the framework lies in the fact that the legal framework of Botswana does not stipulate the provision of PEP to victims of sexual assault.<sup>124</sup> It is a guideline requirement which is contained in the National Guidelines for HIV Testing and Counselling of 2009.<sup>125</sup> This makes the access of PEP an unenforceable provision.

#### 8.4 Recommendations

The need for ensuring that adequate and appropriate protection is provided to children affected by HIV/AIDS is based on the fact that international standards “recognise and protect the idyllic image of childhood and they ensure that all children irrespective of their social, economic or cultural background have a fair chance in life”.<sup>126</sup>

It has been established that international law<sup>127</sup> employs a holistic child rights-based approach to implementing the rights of children affected by HIV/AIDS and this makes it the most suitable model for national HIV/AIDS initiatives to emulate.<sup>128</sup> Specifically, the CRC together with its GCs are well suited models for national legal and policy frameworks since they recognise the rights of children, the factors that affect the children and those that place the children in vulnerable situations. They further stipulate the duties and obligations on the state to ensure that protection and remedial action are provided.

Generally speaking, on the framework in Botswana, there is the need to ensure a legislative basis for the existing protection available to the rights of children affected by HIV and to mainstream HIV/AIDS into some laws and policies. In South Africa on the other hand, some legal and policy initiatives still require modifications in order to bring them in line with international standards.<sup>129</sup> Thus in order to bring the national frameworks of both countries in line with international standards, it is submitted that the following broad-based standards are needed -

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<sup>124</sup> This has been addressed on section 7.1.5 (iii) in the previous chapter.

<sup>125</sup> Paragraph 2.8 of the National Guidelines for HIV Testing and Counselling of 2009.

<sup>126</sup> L Hey-Young *Legally recognising child-headed households through a rights-based approach: the case of South Africa* PHD thesis University of Pretoria (2011) 261.

<sup>127</sup> The UN, African regional and SADC sub-regional standards.

<sup>128</sup> They contain very progressive provisions which are crucial to the rights necessary for the survival, development, participation and best interest of all children in the HIV/AIDS epidemic. The relevance of CRC GC3 to child-specific national HIV/AIDS legislation and policies are also demonstrated in its main objectives. These objectives briefly summarise the commitment of GC3 to the rights of children affected by HIV/AIDS and indicate the extent to which they can serve as a template for national frameworks.

<sup>129</sup> See the previous section on this point.

#### **8.4.1 Amendments to the Constitution of Botswana**

There is the need for more effective gender-based and HIV/AIDS-specific legislation and policy in Botswana which prohibits and can adequately respond to all forms of stigma and discrimination experienced by children.<sup>130</sup> This will be facilitated through the inclusion of broad equality provisions in the Constitution, thereby creating a platform for other laws to address all the issues which relate HIV/AIDS discrimination

#### **8.4.2 Amend the Children's Act of Botswana**

- i. In Botswana, social assistance remains inaccessible or inadequate thereby leaving children affected by HIV/AIDS and their families in deep poverty.<sup>131</sup> Adequate social assistance should be made available to children living in child-headed households and to children who are being fostered by relatives. This should be in line with the GC3<sup>132</sup> as it will help to discourage institutionalisation and the splitting of orphaned siblings. Thus, this thesis submits that there is an urgent need for the formal regulation of child-headed households in Botswana and calls for the inclusion of this in the Children's Act so as not to jeopardise the enjoyment of the rights of the children living in such households.
- ii. The Children's Act and other HIV/AIDS prevention frameworks in Botswana need to adequately promote and regulate HIV prevention interventions by providing effective and appropriate HIV/AIDS education among the school.<sup>133</sup> This will empower sexually active children to access HIV prevention services independently. The content of the information must encompass all that is necessary to allow the children to make informed choices in relation to their sexuality.<sup>134</sup> The education must ensure learners are informed about their rights especially to dignity, participation

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<sup>130</sup> Discussed in section 7.2.4 of chapter 7.

<sup>131</sup> This was highlighted in section 7.2.2 (ii) of chapter 7.

<sup>132</sup> See paragraph 34 of GC 3 - Orphans are best protected and cared for when efforts are made to enable siblings to remain together, and in the care of relatives or family members. The extended family, with the support of the surrounding community, may be the least traumatic and therefore the best way to care for orphans when there are no other feasible alternatives. Assistance must be provided so that, to the maximum extent possible, children can remain within existing family structures. This option may not be available due to the impact HIV/AIDS has on the extended family. In that case, states parties should provide, as far as possible, for family-type alternative care (e.g. foster care). States parties are encouraged to provide support, financial and otherwise, when necessary, to child-headed households. states parties must ensure that their strategies recognise that communities are at the front line of the response to HIV/AIDS and that these strategies are designed to assist communities in determining how best to provide support to the orphans living there.

<sup>133</sup> This was discussed in section 7.3.1 (ii) of chapter 7.

<sup>134</sup> This should also be in line with paragraphs 11 and 13 of GC3 and articles 24, 13 and 17 of the CRC.

and privacy while accessing HIV prevention facilities. This will ultimately reduce the vulnerability of this future generation to HIV.

### 8.4.3 Amend the Children's Act of both countries

- i. Both countries need to increase their efforts in developing mechanisms to respond to the child's right to guardianship in the absence of the parents-<sup>135</sup>

This can be done by enacting laws and policies to comprehensively address some of the issues which relate to the child's right to guardianship and family by appropriately regulating the process of appointing adults other than the biological parents to assume parental duties for the child if they are dead or unable to provide this care without placing too much burden on a care-giver by requiring them to approach the courts for the declaration of guardianship.<sup>136</sup> Specifically, section 18 (3) of the South African Children's Act, which contains some complex formalities for assuming the role of a guardian should be relaxed, so as to ease the process for legitimate and well-meaning care-givers who cannot afford the legal process. Accordingly, it is submitted that the South African Children's Act should be amended to do away with the legal process. Alternatively, a designated social worker the Department of Social/ Child Welfare can be saddled with the responsibility of registering an appropriate and suitable adult as the guardian of the child.

Section 27 (3) of the Children's Act of Botswana is laudable because it allows other relatives, adoptive parent, stepparent or foster parent of the child to take up the parental role in the absence of the biological parents of the child without having to go through cumbersome legal procedures. However, the thesis submits that there is a need for some form of registration of these "guardians" with the appropriate department in charge of children so that they can be identifiable and legally recognised.

- ii. Institutionalisation of OVCs should be actively discouraged<sup>137</sup>

There is the need for legislative and policies amendment to promote kinship fostering and care of orphans by members of their communities. This thesis agrees with Williamson's (2006)<sup>138</sup> position that kinship ties are especially important in Africa because they form the foundation of people's sense of connectedness and continuity. They are the basis upon which are built the

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<sup>135</sup> Discussed in sections 7.2.2 (iii) and (iv) of chapter 7.

<sup>136</sup> This is the case in South Africa.

<sup>137</sup> Discussed in section 7.2.6 of chapter 7.

<sup>138</sup> J Williamson *Generation at Risk: The Global Impact of HIV/AIDS on Orphans and Vulnerable Children* (2006) 6.



social, cultural, “all round life” skills are built for navigating the complexity of life on the continent.

This thesis therefore calls for the inclusion of provisions in the Children’s Act of both countries that encourage the raising of orphaned children by their extended families or by foster parents within their communities, in order to promote children’s ability to realise many of their fundamental rights which are linked to their right to family. Frameworks in both countries should be amended to deviate totally from the provision institutional care for children in certain cases.<sup>139</sup> Institutional care should only be allowed as a temporary solution for children for whom alternative care is not yet available<sup>140</sup> and should not be used for children within the ages 0 months to 5 years old as these ages are vital for the child and development within a family is very necessary. This will facilitate the integration of children into families which is the safest environment for OVC.

- iii. The Children’s Act of both countries should encourage foster care and should specify that children who are old enough to be integrated into families should be placed with their extended families and well-meaning family members while younger children should be placed with trusted foster parents. The Act should discourage the use of the kind of child and youth care centre described in section 158 of the South African Children’s Act.

#### **8.4.4 Amend the frameworks for social protection in both countries to provide appropriate livelihood support programmes which are suitable for parents who are incapacitated by AIDS<sup>141</sup>**

The Constitution of Botswana is silent on the protection of socio-economic rights, thus, this thesis calls for the inclusion of the protection of the right to social security and assistance into the Constitution of Botswana. In doing this, Botswana can emulate the practice in South Africa on the inclusion of the right to social assistance into the Constitution. Other policies and programmes to implement this right should ensure the inclusion of appropriate livelihood support programs for PLWHA.

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<sup>139</sup> See paragraph 35 of the GC3 which stated the undesirability of institutionalisation of children and that it must be used as a temporary resort if there is no other option.

<sup>140</sup> The pragmatic limitation of institutional care is demonstrated by the fact that worldwide, only about 1-3% of orphans are care for in orphanages K Subbarao & D Coury *A Template on Orphans in sub-Saharan Countries* (2003) See also (Mckerrow 1995) cited in M Richter, J Manegold & R Pather *Family And Community Interventions for Children Affected by AIDS* (2004) 38.

<sup>141</sup> Discussed in section 7.2.2 (ii) in chapter 7.

In South Africa, the livelihood support programmes will replace disability grants which might be withdrawn once the person gets better. This will discourage PLWHA from “substituting their health with the disability grant” by opting to remain sick so that they can continue to access the grant. The livelihood support programmes will not be based on health status of the person but on other factors which are non-HIV-related. This will ultimately ensure that the children and their families are able to make ends meet whether they have access to disability grant or not. This is in line with the recommendation of the Committee in GC 3.<sup>142</sup>

#### **8.4.5 Ensure that the legal frameworks in both countries are able to find a balance between legal and policy interventions which are HIV/AIDS-specific and interventions which protect the rights of all children<sup>143</sup>**

This will ensure that the laws can specifically address HIV/AIDS or child-related issues rather than adapting other non HIV-related legislation to cover the issues. This is based on the premise that the rights of children need specific and specialised protection in line with the international standards available on the rights of children or HIV/AIDS-related international standards.<sup>144</sup> For example, HIV/AIDS-specific provisions should be inserted into the Children’s Act of Botswana so as to address the issues which affect children in the epidemic. Issues which may be considered include- the right to consent to HIV/AIDS testing independently, the right to contraceptives and those similar to section 130 – 134 of the South African Constitution. There is the need to ensure that appropriate laws are in place to protect the rights which have been recommended in policy documents. This is crucial especially in Botswana where many rights are not included in any legislation but are only in policy documents which are not justiciable.<sup>145</sup>

## **8.5 Conclusion**

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<sup>142</sup> See paragraph 30 of GC 3 which states that – “Even in times of severe resource constraints, the Committee wishes to note that the rights of vulnerable members of society must be protected and that many measures can be pursued with minimum resource implications. ”

<sup>143</sup> Examples of such legislation include- the Births and Deaths Registration Act 1969 (Chapter 30:01), The Second National HIV/AIDS Strategic Framework for HIV/AIDS (NSF) 2010-2016, The National Guidelines for HIV Testing and Counselling 2009, The National Policy on HIV/AIDS 1998, The Public Health Act 44 of 1971 Chapter 63:01 and a host of others.

<sup>144</sup> See paragraph 40 of GC 3 which requires states parties – “To adopt and implement national and local HIV/AIDS-related policies, including effective plans of action, strategies, and programmes that are child-centred, rights-based and incorporate the rights of the child under the Convention, including by taking into account the recommendations made in the previous paragraphs of the present GC and those adopted at the UNGASS on children (2002).”

<sup>145</sup> This is in line with paragraph 40 (a, b, c, d, e) of GC3.

Reflecting back on the main research questions which were raised in the introductory chapter, this concluding chapter has identified the conceptual framework for evaluating the legal systems in Botswana and South Africa. This framework has been used to measure the extent of the protection available to the rights of children affected by HIV/AIDS in normative terms. The adequacy and appropriateness or otherwise of the protection given to the rights have been established and the extent to which initiatives go in protecting children have been determined. In addition, the legal and policy frameworks in both countries have been placed beside international norms on the protection of the rights of children affected by HIV/AIDS and these international standards have been employed as the template to make recommendations for the frameworks of both South Africa and Botswana. In an attempt to mitigate the hardship faced by children affected by HIV/AIDS, both countries have to embrace international norms set on the protection of the rights of children.

The approach which South Africa has taken in ensuring the protection of socio-economic rights of children both in the Constitution and in many other legal instruments is highly commendable. This allows for the enforceability of such rights and it places an onus on the government to ensure that the rights are available and accessible to all children. This is unlike the situation in Botswana where certain socio-economic rights are provided for only in Policy documents which are unenforceable.<sup>146</sup>

The South African Children's Act covers a wider array of rights and issues which are consequential upon the HIV/AIDS epidemic whilst the Children's Act of Botswana is silent on the protection of the rights of children affected by HIV/AIDS.

This thesis closes on the note that children are our future and they need the best chance to succeed. They depend on us for their protection, thus in everything we do, we must work towards the protection of the most vulnerable among them including those affected by HIV/AIDS.

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<sup>146</sup> Except for the ones guaranteed in the Children's Act which does not include the right to Social Assistance.

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### Appendix 1

Rank	Country	Prevalence Among Adults, 2008 (%)	Total Population	Likely Epidemic Trend	Index of Income Inequality	Children aged 0 to 14 living with HIV <sup>147</sup>	No. of Orphans due to AIDS	2010 estimates of Life expectancy <sup>148</sup>
1	Swaziland	26.1	1,123,913	decreasing	50.4	15 000	56 000	47.85
2	Botswana	23.9	1,990,876	significant decrease	60.5	15 000	95 000	61.85
3	Lesotho	23.2	2,130,819	mixed, decreasing or stable depending on location	63.2	12 000	110 000	40.38
4	South Africa	18.1	49,052,489	stable	57.8	280 000	1 400 000	48.98
5	Namibia	15.3	2,108,665	decreasing	74.3	14 000	66 000	51.24
6	Zimbabwe	15.3	11,392,629	mixed, significantl y	50.1	120 000	1 000 000	45.77

<sup>147</sup>UNAIDS Country Report 2009<<http://www.unaids.org/en/CountryResponses/Countries/default.asp>> (Accessed on 23 June 2010).

<sup>148</sup>CIA World Fact book <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2102rank.html>> (Accessed on 26 August 2010). 1

				decreasing or decreasing depending on location				
7	Zambia	15.2	11,862,740	stable	50.8	95 000	600 000	38.63
8	Mozambique	12.5	21,669,278	stable	47.3	100 000	400 000	41.18
9	Malawi	11.9	14,268,711	mixed, significantly decreasing or stable depending on location	39	91000	560 000	50.03

## Appendix 2

### Statistics of South Africa: Maternal orphans under 15 years

Year	Total Orphan	Total AIDS Orphans	Total non-AIDS Orphans
1991	346 751	227	346 524
1992	347 701	581	347 120
1993	350 631	1 398	349 234
1994	355 642	3 162	352 480
1995	363 299	6 736	356 562
1996	373 229	13 469	359 760
1997	388 824	25 520	363 305
1998	412 435	45 799	366 635
1999	447 522	77 887	369 636
2000	493 846	124 989	368 857
2001	555 684	190 993	364 691
2002	636 876	279 102	357 774
2003	739 572	391 052	348 520
2004	865 216	527 054	338 162
2005	1 011 457	684 364	327 093
2006	1 172 985	857 201	315 784
2007	1 336 483	1 034 085	302 398
2008	1 499 424	1 208 646	290 777
2009	1 647 293	1 367 926	279 367
2010	1 770 870	1 502 457	268 413

## Appendix 3

13 factors listed by Justice King, which are linked to the determination of the best interests of the child-

- a) The love, affection and other emotional ties which exists between parent and child and the parent's compatibility with the child;
- b) The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- c) The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity of the child's feelings;
- d) The capacity and disposition of the parent to give the child the guidance which he requires;
- e) The ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs- generally speaking, the provision of economic security;
- f) The ability of the parent to provide for the education well-being and security of the child, both religious and secular;
- g) The ability of the parent to provide for the child's emotion, psychological, cultural and environmental development;
- h) The mental and physical health and moral fitness of the parent;
- i) The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- j) The desirability or otherwise of keeping siblings together;
- k) The child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- l) The desirability or otherwise of applying the doctrine of same sex matching;
- m) Any other factors which is relevant to the particular case with which the Court is concerned.