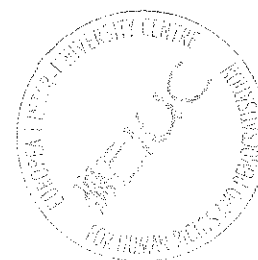


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European Master's Degree in Human Rights and Democratisation  
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To be or not to be Justiciable: Enforcing the  
Economic, Social and Cultural Rights of  
Children Orphaned and Made Vulnerable by  
HIV/AIDS in South Africa

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July 2004  
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## Abstract

This thesis researches the impact of HIV/AIDS on children in South Africa and their human rights enjoyment. A first part determines that not only children who lost their biological parents, but also children who lost the adult caring for them (social parents) and children who live with a terminally ill caregiver, are affected by HIV/AIDS. They constitute the target group of the study, referred to as children orphaned and made vulnerable by HIV/AIDS or OVC.

The second part ascertains that HIV/AIDS sets these children on a long trail of painful experiences, depriving them of the enjoyment of their human rights to, among others, health care, social security and education. An analysis of pertinent human rights standards demonstrates, however, that they provide valuable guidelines to respond to and address the needs of OVC.

The third and final part explores the evolving South African jurisprudence that seeks to enforce economic, social and cultural rights. It is argued that the South African reasonableness test offers far better perspectives to judicially enforce this set of rights, compared to the minimum core obligation approach. The case law is then applied with a view to assess its relevance for mitigating the impact of HIV/AIDS on the human rights enjoyment of OVC.

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## General Introduction

HIV (human immunodeficiency virus) is a rapidly mutating retrovirus causing the fatal disease AIDS (acquired immunodeficiency syndrome). It affects essential white blood cells, erodes the immune system and eventually leads to its complete deterioration, leaving the victim vulnerable to infections, malignancies and neurological disorders. It was first recognized as a disease in 1981.<sup>1</sup>

HIV/AIDS can no longer be conceived as merely a disease, when one considers the wide reaching devastating repercussions it has on human life and communities. As stated by the United Nations Secretary General Kofi Annan "AIDS has become a major development crisis. It kills millions of adults in their prime. It fractures and impoverishes families, weakens workforces, *turns millions of children into orphans*, and threatens the social and economic fabric of communities and the political stability of nations."<sup>2</sup> What the Secretary General touched upon just summarily, found strong confirmation and further elaboration in the final document of the United Nations General Assembly Special Session on HIV/AIDS.<sup>3</sup>

*"By 2003, develop and by 2005 implement national policies and strategies to: build and strengthen governmental, family and community capacities to provide a supportive environment for orphans and girls and boys infected and affected by HIV/AIDS, including by providing appropriate counselling and psycho-social support; ensuring their enrolment in school and access to shelter, good nutrition, health and social services on an equal basis with other children; to protect orphans and vulnerable children from all forms of*

<sup>1</sup> "AIDS" and "HIV", in P. Lagasse (ed.), *The Columbia Encyclopedia 6<sup>th</sup> Edition*, USA, Columbia University Press, 2000, p. 40-41 and 1297.

<sup>2</sup> "UN Secretary-General calls on Governments to take up AIDS challenge", Press Release SG/2068 AIDS/1, New York, 20 February 2001 (emphasis added).

<sup>3</sup> The United Nations General Assembly Special Session on HIV/AIDS, New York, 25-27 June 2000, 1 adopted the "Declaration of Commitment on HIV/AIDS: Global Crisis-Global Action". It generated an unprecedented level of global leadership, awareness and support in response to the HIV/AIDS crisis at the highest political plan.

*abuse, violence, exploitation, discrimination, trafficking and loss of inheritance;*

*Ensure non-discrimination and full and equal enjoyment of all human rights through the promotion of an active and visible policy of destigmatisation of children orphaned and made vulnerable by HIV/AIDS;*

*Urge the international community, particularly donor countries civil society as well as the private sector to complement effectively national programmes to support programmes for children orphaned or made vulnerable by HIV/AIDS in affected regions, in countries at high risk and to direct special assistance to sub-Saharan Africa.<sup>4</sup>*

In this manner the inspiration emerged to critically assess the impact the disease has on the human rights of children orphaned and made vulnerable in South Africa. These children form an especially vulnerable group suffering from the devastating and pervasive effects of the epidemic. Concurrently, due their already vulnerable status as minors in society, they lack the voice to make their interests and needs heard.

By focusing on just one country, this thesis aims to make a genuine in-depth study of the complex situation in which these children find themselves. It is important to consider that HIV/AIDS impacts the sub-Saharan region the most; South Africa leads the statistics in terms of HIV prevalence rates in the world. In the long term South Africa will thus have to look after the highest number of children orphaned and made vulnerable by HIV/AIDS.

Furthermore, South Africa's developing jurisprudence on social and economic rights makes it even more interesting for a case-study: on the one hand, the enjoyment of social and economic rights is imperative to children, and the South African approach to the justiciability of these rights might be a means to realise children's rights, on the other hand.

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<sup>4</sup> UNGASS, Declaration of Commitment on HIV/AIDS: "Global Crisis-Global Action", Annex to Resolution General Assembly S-26/2, 26<sup>th</sup> Special Session, 27 June 2001, nrs. 65-67.

The first chapter will delineate whom this thesis deals with *ratione personae*: children orphaned and made vulnerable by HIV/AIDS. These children constitute a group of which the main features need to be defined. The main issue that needs to be raised: why are children orphaned by HIV/AIDS as well as children made vulnerable by HIV/AIDS brought together in this research?

Secondly, the impact of the disease on these children is examined, identifying the needs and vulnerabilities these children face in the context of the HIV/AIDS epidemic. The disease impacts as well on the children's enjoyment of their human rights. Subsequently, an analysis of pertinent human rights standards demonstrates that they provide valuable guidelines to respond to and address the needs of OVC. Although the research deals broadly with the plight of these children, the main focus will be on the children's rights to health care, education and social security.

The third and last chapter is dedicated to an extensive analysis of economic, social and cultural rights in both theory and practice. The practical analysis is based on the recent jurisprudence handed down by the South African judiciary concerning this set of rights. Two major standards that developed to monitor and ensure compliance with economic, social and cultural rights are compared. The "reasonableness test" is the South African answer to the justiciability-dilemma surrounding these rights, the "minimum core obligation approach" is the international attempt to enforce them. The South African case law will then be applied with a view to assess its relevance for enforcing the social and economic rights of children orphaned and made vulnerable by HIV/AIDS.



## First Chapter: Children orphaned and made vulnerable by HIV/AIDS

### Introduction

One of the most devastating and tragic consequences of the HIV/AIDS pandemic is the vast and growing numbers of children affected by the disease. This human crisis is just starting to unfold. As today's young adults increasingly fall sick and die, the number of vulnerable and orphaned children is expected to rise dramatically.

The proceeding chapter clarifies who is envisaged when discussing children orphaned and made vulnerable by HIV/AIDS. To whom do we refer to as 'orphan'?<sup>5</sup> What does it mean to be rendered vulnerable by HIV/AIDS? Highlighting certain features of the two "apparent" distinct categories, it becomes clear why they form together the focus of attention for this research. This chapter will also present some estimates, mainly of children orphaned by HIV/AIDS, to illustrate the challenge and threat this epidemic is posing to mankind.

### I. Children orphaned by HIV/AIDS

#### A. International agencies

At the international level, considerable attention has already been paid to the pending orphan crisis as a result of parents dying from HIV/AIDS. Several international and national agencies or organisations have taken account of it, both quantifying the extent of and qualifying a possible response to the state of affairs.

Turning to the estimates first, the most well known projections of children orphaned due to HIV/AIDS are those issued by UNICEF (United Nations Children's Fund), UNAIDS (Joint United Nations Programme) and USAID (United States Agency for

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<sup>5</sup> The term AIDS orphan, though frequently used in the literature, is consistently avoided throughout the study since it carries a degrading and therefore negative connotation.

International Development). The three organisations worked together to produce the latest report, entitled "Children on the Brink 2002".<sup>6</sup> The estimates in the report are based on methods developed by the UNAIDS Reference Group on Estimates, Modelling and Projections and reflect the extent of the orphan crisis at the international, regional and national level.<sup>7</sup> Although HIV/AIDS has reached almost every part of the world, no other region has been so greatly affected as sub-Saharan Africa, an area home to nearly three quarters of the world's people living with HIV/AIDS.

The statistics alone illustrate the severity of the HIV/AIDS crisis. By the end of 2002, over 29 million people in that region were HIV infected.<sup>8</sup> At the end of 2001, the region counted 34 millions orphans, of whom a third or 11 million were orphaned by HIV/AIDS. By 2010, HIV/AIDS will have deprived an estimated 20 million children of one or both parents.<sup>9</sup>

The data available for South Africa follow the same trend, revealing that at the end of 2001 around 662,000 children were orphaned by HIV/AIDS and this number is expected to rise to approximately 1.7 million by 2010.<sup>10</sup>

The definition of 'orphan-hood' employed by these agencies prior to 2002, only applied to a person under 15 years of age, and was based solely on the loss of a mother (maternal orphans) or both parents (double orphans). This definition is beyond doubt very limited since it excludes those children who have lost their father (paternal orphans) and those in the age bracket 15-18 who may have suffered the loss of a mother, father or both parents.<sup>11</sup>

A mother as the primary caregiver is indeed a powerful image across societal and cultural boundaries. It should not obscure, however, that the loss of a father to

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<sup>6</sup> UNICEF, UNAIDS, USAID, *Children on the Brink 2002: A Joint Report on Orphan Estimates and Program Strategies 2002*, Washington D.C., TvT Associates/The Synergy Project, July 2002 (hereinafter *Children on the Brink 2002*).

<sup>7</sup> UNAIDS Reference Group on Estimates, Modelling and Projections (2002), *Improved Methods of Assumptions for Estimation of the HIV/AIDS Epidemic and Its Impact: Recommendations of the UNAIDS Reference Group on Estimates, Modelling and Projections*, in "AIDS", vol. 16, no. 9, p. 1-14;

<sup>8</sup> UNAIDS, *Report on the global HIV/AIDS epidemic*, Geneva, UNAIDS, 2002.

<sup>9</sup> *Children on the Brink 2002*, p. 22 and p. 28.

<sup>10</sup> *Ibidem*, p. 22 and p. 28.

<sup>11</sup> S. Phire and D. Webb, *The Impact of HIV/AIDS on Orphans and Programme and Policy Responses*, in G. Andrea Cornia (ed.), *AIDS, Public Policy and Child Well-Being*, Florence, UNICEF Innocenti Research Centre, 2002, p. 5.



HIV/AIDS severely affects children too, as illustrated by the following anecdote. A mother and her five children, living in a rural area in South Africa were left behind when the husband died of AIDS. At a certain point, she wanted to remarry a man living in the same village. According to her inferior personal status under traditional African law, it was incumbent on her new husband to decide whether the children could move into his house. Since he refused, they were left alone and their mother was no longer allowed to look after them. Having lost their father and subsequently deprived of their mother's care, the children became in a very short period of time de facto "double orphans". Hence, losing a father can have serious consequences for his offspring.<sup>12</sup> The latest report, *Children on the Brink* 2002, has made a welcome shift by extending the definition to cover also paternal orphans.<sup>13</sup>

Another important restriction of the definition relates to the age that is taken into consideration: children are aged between 0 and 14 years, adults between 15 and 49 years. The age limit is, however, not in line with international law nor consistent with many domestic traditions. The United Nations Convention on the Rights of the Child, the international human rights standard in respect of children, generally speaking, determines 18 years as the legal upper age limit for children (unless domestic law provides differently).<sup>14</sup> Since the CRC has nearly reached universal ratification, being ratified or acceded to by 192 states, it could be argued that 18 years is the appropriate age to limit childhood, and should perhaps be adopted as a universal guideline. At the regional level, the African Charter on the Rights and the Welfare of the Child does not even leave room for slight domestic variation, stipulating that a child means every human being below the age of 18 years.<sup>15</sup> Moreover, at the national plan, the Bill of Rights of the South African Constitution determines in Section 28(3) that a child means a person under the age of 18 years. If the overwhelming majority of pertinent legal texts concerning children's human rights consider 18 years as the end of childhood, it appears inappropriate to base statistics on other assumptions.

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<sup>12</sup> Interview conducted with Ms. Ramuhaheli Rendani, student at the Agricultural Department, University of Pretoria, Wednesday 21 April 2004; Other research supporting this statement, N. Monk, *A Study of Orphaned Children and their Households in Luweero District, Uganda*, presented at the XIII International AIDS Conference, Association Francois-Xavier Bagnoud, Boston, 2000.

<sup>13</sup> *Children on the Brink* 2002, p. 8.

<sup>14</sup> Article 1, United Nations Convention on the Rights of the Child, GA Resolution 44/25 of 20 November 1989 (entered into force on 2 September 1990) (hereinafter CRC).

<sup>15</sup> Article 2, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, July 1990 (entered into force on 29 November 1999) (hereinafter African Children's Charter).



Notwithstanding the strength of this argument, some more recent reports produced by UNICEF still consider children as all persons below 15 years.<sup>16</sup>

In conclusion, a first problem of the definition of orphans, here under review, is cured since the relevant agencies now consider a child having lost his or her father as an orphan. The other issue relating to the inappropriate age-limit of childhood will most probably continue to be irresolute for the foreseeable future.

#### B. South Africa

To date there are more people infected with HIV in South Africa than in any other country around the globe. Ultimately, South Africans are likely to have to care for the highest numbers of children orphaned as a result of parents dying from AIDS.<sup>17</sup> It was therefore acknowledged that both the size and the demographic profile of the orphan population should be properly understood, if successful strategies are to be implemented to meet the overwhelming needs this disease has created.<sup>18</sup>

A recent study presented such a detailed quantification of the orphan population in South Africa.<sup>19</sup> The model used to produce the estimated numbers of orphaned children is the ASSA 2000 Orphans Model, which operates parallel with the ASSA 2000 AIDS and Demographic Model, a spreadsheet model developed by the Actuarial Society of South Africa to assist the public in estimating and assessing the impact of the AIDS epidemic in South Africa.<sup>20</sup>

Three versions of the ASSA 2000 Orphans Model are developed: one to estimate numbers of maternal orphans, one to estimate numbers of paternal orphans and one to estimate numbers of double orphans. Hence, the model does not presuppose that the plight of maternal orphans is more desperate than that of paternal orphans.

<sup>16</sup> UNICEF, *Africa's Orphaned Generations*, New York, 26 November 2003, p. 52; UNICEF, *The State of the World's Children Report*, New York, 11 December 2003, p. 117.

<sup>17</sup> See Annex I, figure 1.

<sup>18</sup> D. Bradshaw, L. Johnson, H. Schneider, D. Bourne and R. Dorrington, *Orphans of the HIV/AIDS epidemic: the time to act is now*, Medical Research Council Policy Brief No. 2, May 2002, accessed at <<http://www.mrc.ac.za>>.

<sup>19</sup> L. Johnson and R. Dorrington, *The Impact of AIDS on Orphanhood in South Africa: A Quantitative Analysis, Monograph No. 4*, Centre for Actuarial Research, UCT, 2001, pp. 43, accessed at <<http://www.commerce.uct.ac.za/care>>.

<sup>20</sup> Visit <<http://www.assa.org.za>> where you can register to download the ASSA 2000 AIDS and Demographic Model.

Furthermore, the projections are more consistent with reality since they define children as all persons below 18 years. This position is explained by reference to both the Constitution (see *supra*) and the fact that the needs of orphans do not merely cease beyond the age of 15.<sup>21</sup> Even more interesting is the study's effort to make estimates based on the 15-years as well as the 18-years age-limit. The number of maternal orphans under the age of 15 will peak at about 2.07 million in 2015; the number of maternal orphans under the age of 18 is likely to peak at roughly 3.05 million in 2015.<sup>22</sup> The model further projects that in the absence of any significant treatment intervention or change in sexual behaviour, the number of paternal orphans will rise up to 4.17 million in 2015; the number of double orphans is expected to amount to 2 million by 2015; and the total number of children having lost one or both parents is likely to reach its highest level around 2015, at 5.7 million.<sup>23</sup>

Identical assumptions underlie the draft South African Children's Bill defining an orphan as a child under 18 years old who has no surviving parent caring for him or for her after one of them has died.<sup>24</sup> The South African Law Reform Commission proposed this new piece of legislation in January 2003 to the Minister of Social Development, who wanted to reform the branch of law affecting the lives of children. The Department of Social Development then took the process further through various consultations and finalised its review of the draft on 12 August 2003. That draft of the Children's Bill is now tabled with the Parliament.<sup>25</sup>

Admittedly, the approach taken in South Africa towards defining and quantifying orphans at the research and policy level is beyond doubt more sensitive to reality than the one adopted in the international policy arena. In particular, using the age of 18 as indicative of ceasing childhood results in a considerably higher estimate. Nevertheless the definition remains too narrow, as will be demonstrated in section II.

<sup>21</sup> L. Johnson and R. Dorrington, *o.c.*, p. 13.

<sup>22</sup> *Ibidem*, p. 6 and 13; see Annex I, figure 2.

<sup>23</sup> See Annex I, figure 3, 4 and 5.

<sup>24</sup> 12 August 2003 Draft Children's Bill of the Republic of South Africa, section 30.

<sup>25</sup> Interview conducted with Ms. Ann Skelton, Centre for Child Law and Co-ordinator Children's Litigation Project, University of Pretoria, Wednesday 28 April 2004; according to Ms. Skelton the enactment of the Children's Bill will take at least another year.

## II. Children made vulnerable by HIV/AIDS

In the context of HIV/AIDS and its impact on children's lives, the current definitions and resulting quantifications of 'orphan-hood' would appear inadequate, inasmuch that they fail to depict the effects of the HIV/AIDS crisis in its entirety. The shortcomings are twofold.

First, *children who live with sick parents* due to HIV/AIDS are not taken account of, regardless of the fact that they too are left extremely vulnerable as a result of the disease.<sup>26</sup> Children living in households with persons who are terminally ill share many experiences similar to those of children who have lost their biological parents. They drop out of school to care for their sick parent(s) and to work in order to generate an income that is necessary for treatment and survival. Older children assume responsibilities for the younger ones, since they have to be fed, washed, clothed and so on. Girls are mostly in charge of caring and nursing the sick, a factor that explains why they are more likely to leave school prematurely in comparison to boys. Additionally, these children experience the psychologically draining ordeal of witnessing the slow and often painful death of a parent.<sup>27</sup> They could even be referred to as 'virtual orphans,' since the process of orphan-hood apparently begins long before the death of one or both parents.

Secondly, the notion of "orphan" is centred exclusively around the loss of biological parents and consequently fails to take account of the widespread *phenomenon of "social parenting"* in the African context. When identifying the impact of HIV/AIDS on children, special regard must be had to common household forms, care-giving practices and notions of "the family" in South Africa. There is a long history in South Africa where children are raised for all or part of their lives by other adults than their biological parents. Especially children living in poverty tend to reside with relatives

<sup>26</sup> L. Johnson and R. Dorrington, *o.c.*, p. 27.

<sup>27</sup> S. Giese, H. Meintjes, R. Croke and R. Chamberlain, *Health and Social Services to Address the Needs of Orphans and Other Vulnerable Children in the context of HIV/AIDS*, Research Report and Recommendations developed by the Children's Institute of the University of Cape Town, Cape Town, January 2003, p. 22 (hereafter referred to as Health and Social Services to Address the Needs of OVC Report).

or other adults as caregivers for at least some periods of their lives.<sup>28</sup> In this context of fluid household boundaries and poverty-related mobility of children, the institution of social parents gains its importance.

Linking that phenomenon with the present discussion on orphan-hood leads to the interesting but inevitable conclusion that being labelled as an orphan is in many local contexts not so much dependent on having lost biological parents as on a lack of care and/or resources.<sup>29</sup> It is therefore of the utmost importance to recognise the needs of children cared for and looked after by adult caregivers (social parents) other than their biological parents. Living with an adult caregiver who contracted HIV is as traumatic for them as it is for children living with sick biological parents. Likewise, the death of the caregiver exposes the children to a multitude of vulnerabilities that are shared by orphans when they experience the loss of their parents.

A shift in conceptual thinking about orphan-hood is therefore required. Children under 18 years old who have lost one or both biological parents constitute but one segment of the group. This definition should be broadened to take account of all the effects of the epidemic on the lives of many children in South Africa and elsewhere. It should seek to ensure the inclusion of both children who face similar vulnerabilities since they live with terminally ill parents and children whose care is compromised when their social parents become ill and die.

### III. Conclusion: re-conceptualising orphan-hood

International policy views the concept of orphans in a very restricted way. South Africa's new Constitution, in conformity with its international and regional human rights obligations, determines 18 years as the end of childhood. Newly developing legislation regarding children accordingly defines orphans as all those under 18 years who have no surviving parent caring for them. Notwithstanding this more inclusive approach, it still discounts the interests of many children, namely those who are made vulnerable by HIV/AIDS and those who are socially orphaned.

<sup>28</sup> H. Meintjes, D. Budlender, S. Giese and L. Johnson, *Children "in need of care" or in need of cash? Questioning social security provisions for orphans in the context of the South African AIDS pandemic*, A Joint Working Paper by the Children's Institute and the Centre for Actuarial Research of the University of Cape Town, University of Cape Town, South Africa, 2003, p. 10.

<sup>29</sup> S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 18.

The Research Report, "Health and Social Services to Address the Needs of Orphans and Other Vulnerable Children in the Context of HIV/AIDS", has considered these elements and conclusively recommended the following definition of orphans:

"Children whose care is compromised as a result of one or more of the following:

- (1) The terminal illness of an adult who contributes to the care and/or financial support of the child
- (2) The death of an adult who contributed substantially to the care and/or financial support of the child."<sup>30</sup>

This approach has the advantage of establishing the link between children orphaned and children made vulnerable by HIV/AIDS. Regarding these children as the target group of this research is based on the fact that they face similar needs and vulnerabilities as a result of the unfolding epidemic.

Some clarification in respect of the terminology is still necessary. The terms "children orphaned and made vulnerable by HIV/AIDS" and "orphans and other vulnerable children" both correspond to the above-mentioned definition and can be used interchangeably. To refer to these terms, the acronym OVC will be utilised too.

Children orphaned by HIV/AIDS are all those children who lost either the biological or the social parents; children made vulnerable by HIV/AIDS are all those children living with terminally sick adult caregivers.

The notion "adult caregiver" covers biological as well as social parents, the latter group embracing all adult persons caring for a child.

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<sup>30</sup> S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 24-25. The Research Report and Recommendations are researched and developed by the Children's Institute of the University of Cape Town and submitted to the National HIV/AIDS Directorate, Department of Health in January 2003.

## Second Chapter: Framework for the protection, care and support of children orphaned and made vulnerable by HIV/AIDS

### Introduction

The common tenet of children orphaned and made vulnerable by HIV/AIDS is their compromised care due to the terminal illness or death of the adult caregiver, who contributes or contributed substantially to the care and financial support of the child. The present chapter places the compromised care of these children central.

To understand, in the first place, how and to what extent their care is compromised, the multiple needs and vulnerabilities OVC face in the context of HIV/AIDS must be identified. It immediately attracts attention that the enjoyment of basic human rights is compromised. As the available space for this research is limited, the focus is on children's right to health (care), social security and education.

The second part of this chapter analyses the pertinent human rights standards in respect of children with a view to assess their relevance for addressing the needs of OVC. Since South Africa incurs human rights obligations at three different levels, the analysis will follow that pattern. Subsequently an overview is given of the current state policy responding to the needs of OVC. An assessment of the adequacy and efficiency of this governmental response constitutes the third and final part of this chapter.

#### I. The impact of HIV/AIDS on OVC

##### A. Caught in a vicious circle

The Preamble to the CRC "recognizes that, in all countries, there are children living in exceptionally difficult conditions and that such children need special consideration". That is exactly the case for children orphaned and made vulnerable by HIV/AIDS in South Africa and elsewhere. The illness and loss of the adult caregiver(s) sets them on



a long trail of painful experiences, strikingly illustrated by the diagram depicted in Annex II.

### 1. The material needs

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As mentioned before, HIV/AIDS takes a toll on children long before the death of the caregiver. When the caregiver falls sick, children come under severe stress. They often have to take on a heavy burden of caring and nursing for the sick. This leads in many cases to dropping school attendance ratios, particularly but not exclusively as regards to girls.

Drop out of school is caused too by the fact that children will have to assume economic responsibilities. HIV/AIDS primarily affects the economically active age bracket of the population. As a result, the earning capacity is seriously compromised. Children will as a consequence leave school and attempt to generate income.<sup>31</sup>

Moreover, the loss of income due to the illness of the adult caregiver affects school attendance of children more directly in a lot of cases: without income, the school fees and expenses cannot be paid. Notwithstanding the guarantee in the ICESCR that at least primary education shall be compulsory and available free to all, this is still not a reality in South Africa.<sup>32</sup>

Taking up economic responsibility leads in many cases to exploitation of children subjecting them to hazardous labour conditions. Rapid assessments carried out by the International Labour Organization of the situation of working children found that orphaned children are much more likely than non-orphans to be working in commercial agriculture, domestic service, commercial sex and as street vendors.<sup>33</sup>

Even if an income is available, the costs of treating the opportunistic infections caused by HIV/AIDS place a huge economic burden on families. Most of the income will be

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<sup>31</sup> S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 51.

<sup>32</sup> Article 13(2)(a) ICESCR.

<sup>33</sup> A. Mushingeh et al., *HIV/AIDS and Child Labour in Zambia: A rapid assessment on the case of Lusaka, Copperbelt and Eastern Provinces*, Paper no. 5, International Labour Organization, International Programme on the Elimination of Child Labour, Geneva/Lusaka, 2002: this study reported that in Zambia in 2002 the average age of children engaged in prostitution was 15, about half of them were double orphans and 24 % single orphans. The need to earn money was the main reason given for entering into prostitution.

diverted to the treatment of the sick household member. This means that fewer resources can be used to satisfy the other needs of the household.

In addition, the people infected by HIV/AIDS in South Africa are, generally speaking, the black Africans and poor socio-economic communities.<sup>34</sup> HIV/AIDS exacerbates the poverty these population groups already suffer to the point where basic needs go unmet, such as education, food, medical care and clothing. In this cycle of impoverishment children are the first to experience the many deprivations.<sup>35</sup>

Under these circumstances, it is not uncommon to sell important economic assets such as land or livestock in order to ensure short-term survival. Sale of these productive assets that are key to future survival will, however, amplify long-term impoverishment and intensify the vulnerability of both adults and children.<sup>36</sup>

## 2. The psychosocial needs

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When it comes to assessing the impact of HIV/AIDS on children the material, economic, nutritional and other physical needs attract all attention. The psychosocial needs tend to be overlooked, although these needs are critical as well, as they have a direct repercussion on all the developmental aspects of a child.<sup>37</sup>

In the first place, the illness and loss of a caregiver leaves young children without consistent responsive care. They lack love, attention and affection and parental guidance through crucial life-stages of identity formation and socialisation into adulthood, which may be detrimental to the development of their personality and their social skills.<sup>38</sup>

Secondly, the psychological distress for OVC while witnessing the illness and death of their caregiver should be addressed as well.<sup>39</sup> The children are for a significant amount of time confronted with the disturbing course of the disease. In that process, they often have to care and nurse the sick and dying person and make difficult decisions.

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<sup>34</sup> HIV/AIDS/STD Strategic Plan for South Africa 2000-2005, Department of Health, Government of South Africa, p. 8, accessed at <<http://www.doh.gov.za/aids/docs/aids-plan/>>; L. Johnson and R. Dorrington, *o.c.*, p. 11; see Annex I, figure 6.

<sup>35</sup> UNICEF, *Africa's Orphaned Generations*, p. 18 and the interesting references mentioned there.

<sup>36</sup> World Bank, *Confronting AIDS: Public Priorities in a Global Epidemic: A World Bank Policy Research Report*, London, 1997.

<sup>37</sup> S. Phiri and D. Webb, *o.c.*, p. 24.

<sup>38</sup> D. Bradshaw et al., *Orphans of the HIV/AIDS epidemic*, p. 2.

<sup>39</sup> S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 65.



Thirdly, the HIV/AIDS-related illness and death of caregivers make OVC often the victims of stigma, discrimination, secrecy and social isolation. Relationships with relatives, friends and neighbours weaken or even break up. At school, teachers and peers tease them. Moreover, children are reluctant to share their feelings or to ask for help since they fear that others would discover that someone in their household is HIV-positive. Such a discovery would bring stigmatisation and discrimination with it.<sup>40</sup> The UN Committee on the Rights of the Child (CCRC), the monitoring body of the CRC<sup>41</sup>, has identified orphans, children affected by HIV/AIDS and children of parents with HIV/AIDS as groups vulnerable to discrimination in its examination of Initial Reports.<sup>42</sup>

In short, the emotional repercussions of the epidemic for children are more subtle, but no less traumatic than the physical, material consequences. Therefore, these needs should be equally addressed.

Confronted with several material and psychosocial needs, the effective enjoyment of several human rights such as the right to education and the right to health care is affected for OVC. As will be shown later, access to social security could to a certain degree alleviate their plight. As things are, however, a number of reasons impede access to this right too. The examination demonstrates that a programme or policy aimed at responding to the needs and vulnerabilities of OVC should be integrated and multi-faceted.

#### B. Under the common thread

What links both children orphaned and children made vulnerable by HIV/AIDS is their compromised care. Moving beyond this common feature, two more issues deserve to be highlighted: HIV-infection among OVC and children heading households. From the outset it should be underlined that only limited numbers of OVC actually experience these realities, but since they present additional burdens in the vicious cycle of interrelated needs, due consideration is given to them.

<sup>40</sup> Ibidem, p. 70.

<sup>41</sup> Article 43 CRC; The Committee shall examine the progress made by States Parties in achieving the realisation of the obligations incurred under the CRC.

<sup>42</sup> R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child: fully revised edition*, Geneva, Atar SA, 2002, p. 28.

## 1. Living with HIV/AIDS

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So far the discussion approached OVC as merely being affected by HIV/AIDS. Though, some of these children are infected with HIV/AIDS too.<sup>43</sup> Reliable data on this aspect of the crisis are not widely available. One report estimated the total number of children under 15 years living with HIV/AIDS in sub-Saharan Africa by the end of 2001 at 3 million.<sup>44</sup> According to these estimates South Africa was home to 250.000 HIV positive children. Note, however, that these numbers do not distinguish between children as such and orphans and other vulnerable children.

In a recent study conducted by the Human Sciences Research Council among South African children, it was found that the HIV-prevalence among children aged 2 to 18 years is between 5.4%.<sup>45</sup> The same study further reported that the prevalence among orphans who have lost both parents is highest (12%), followed by maternal orphans (6.3%) and paternal orphans (4.5%).<sup>46</sup> It is submitted, however, that the number of HIV positive orphans constitutes a relatively minor proportion of the total orphan population, based on the fact that roughly two thirds of the babies born to HIV positive mothers will not be infected. And most infected orphans do not live long enough to make up a sizeable group of children.<sup>47</sup>

This is correct if only the vertical mode of transmission of HIV is considered, which is the major responsible for infecting children. In that case HIV positive women transmit the virus to their babies. Around 30% of these women will effectively transmit the disease to their babies, either through the birth process or through subsequent breastfeeding if no programme for the prevention of mother-to-child transmission available is.<sup>48</sup> A study pointed out that the majority of infected children will show signs of HIV disease or AIDS in the first year of their lives and half of them

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<sup>43</sup> UNICEF, *Africa's Orphaned Generations*, p. 11.

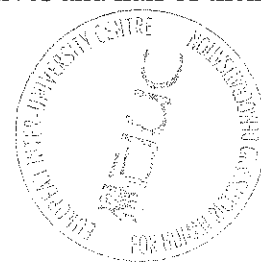
<sup>44</sup> Ibidem, p. 48.

<sup>45</sup> Human Sciences Research Council, *The National Household HIV Prevalence and Risk Survey of South African Children*, Cape Town, HSRC Publishers, 2004, p. 17 (hereinafter National Household HIV Prevalence Survey).

<sup>46</sup> Ibidem, p. 22.

<sup>47</sup> L. Johnson and R. Dorrington, *o.c.*, p. 8; see Annex I, figure 7.

<sup>48</sup> Human Sciences Research Council, *National Household HIV Prevalence Survey*, p. 3.



will die by the end of the second year. However, 25% of infected children will survive to five years and, with good care, this figure may increase.<sup>49</sup>

Over and above vertical transmission, however, children contract HIV through sexual abuse. In the specific context of HIV/AIDS, the illness or death of the adult caregiver(s) leaves many children without adequate care and protection against sexual abuse from relatives, neighbours or other members of the local community.<sup>50</sup> There is evidence that child rape has become more common in recent years. Far too many girls, one report states, have no safe haven from sexual violence as they are coerced to have sex and otherwise subjected to sexual harassment and violence by male relatives, schoolteachers and male classmates.<sup>51</sup>

Moreover, child rape may occur in the specific context of the epidemic even more because the belief that sexual intercourse with a virgin can "cleanse" a person of HIV has wide currency in South Africa.<sup>52</sup>

The early onset of sexual activity also contributes to HIV prevalence among children.<sup>53</sup> Due to HIV/AIDS children assume economic responsibilities to generate income. This results often in living on the street, involving in petty crime and prostitution. Children and particularly girls take regularly recourse to "sex for survival strategies" in order to secure income for them and the other members of the household. The danger of contracting HIV is well known to them, but the short-term perspective of having some food or clothing is of more value.<sup>54</sup>

## 2. Child-headed households

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In the context of HIV/AIDS, one author holds that the notion of child-headed households refers to those children who have lost both parents due to HIV/AIDS and

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<sup>49</sup> R. Smart, *Children living with HIV/AIDS in South Africa – A Rapid Appraisal*, Johannesburg, Save the Children UK, 2000.

<sup>50</sup> L. Johnson and R. Dorrington, *o.c.*, p. 27.

<sup>51</sup> Human Rights Watch, *Deadly Delay: South Africa's Efforts to Prevent HIV in Survivors of Sexual Violence*, New York, vol. 16, no. 3(A), 2004, p. 9-10.

<sup>52</sup> *Ibidem*, p. 12.

<sup>53</sup> Human Sciences Research Council, *National Household HIV Prevalence Survey*, p. 5.

<sup>54</sup> UNAIDS, *Orphans and Children in a World of AIDS*, Fact Sheet issued on the occasion of the United Nations General Assembly Special Session on HIV/AIDS "Global Crisis-Global Action", New York, 25-27 June, p. 27; S. Phiri and D. Webb, *o.c.*, p. 11.

have become the effective head of the household and breadwinner of younger siblings.<sup>55</sup> Consistent with the working definition of children orphaned and made vulnerable by HIV/AIDS accepted earlier, this description of child-headed households could be changed in two ways. First, "parents" should be substituted with the term "adult caregivers" to take account of the diverse child-raising and household forms operative in South Africa. Secondly, explicit reference should be made to the conditions of children living with terminally ill caregivers, who will assume the role of effective breadwinner prior to the death of the caregiver. One could speak in this respect of "virtual child-headed households".

There are still relatively few households –less than 1% in most countries- headed by children under the age of 18.<sup>56</sup> The most recent data available for South Africa seem to confirm this.<sup>57</sup> The low percentage of child-headed households indicates that many orphans are absorbed into formal or informal care arrangements.

A stringent problem for child-headed households is that they have absolutely no access to the social security system. Since the head of the house is a child and, as will be recalled, access to social security benefits is generally granted to adult persons, these households are deprived of all state support. Since these children are most in need, the current legal framework must be adjusted.

#### C. The first line of response

The present section takes for two reasons a closer look at some of the care arrangements for OVC. On the one hand, because those in need of special care and assistance can largely rely on informal networks and structures, which tend to perform the first line of response. On the other hand, the crisis has already enormous dimensions although the full impact of HIV/AIDS on OVC has not yet been felt. The question can be posed whether the informal structures will persist in the face of increasing demands.

<sup>55</sup> J. Sloth-Nielsen, *Too Little? Too Late? The implications of the Grootboom case for state responses to child-headed households*, in "Law, Democracy and Development", vol. 7, no. 1, 2003, p. 114 (hereafter referred to as *Too Little? Too Late?*).

<sup>56</sup> UNICEF, *Africa's Orphaned Generations*, p. 22.

<sup>57</sup> Human Sciences Research Council, *National Household HIV Prevalence Survey*, p. 23.

## 1. Africa's solidarity: the extended family structure

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One can distinguish between the formal (statutory) and informal care system: the former consists of foster care placements, adoption, and institutional care (places of safety). The latter covers essentially the extended family.<sup>58</sup> This system of informal care provision has historically formed an intricate system of social security whereby families raise children who are not members of the immediate (nuclear) family.<sup>59</sup>

HIV/AIDS is waging a war in its own sort in sub-Saharan Africa and South Africa in particular. As things are, the extended family is the first and foremost source of support and care for OVC. Most of the time, relatives of the sick or deceased person - such as brothers, sisters, grandparents- step in to look after the children left behind or left without adequate care. In South Africa care and support by relatives currently constitutes the most widespread and comprehensive response to the impact of HIV/AIDS on children.<sup>60</sup>

## 2. Sustainable care?

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Yet, there is compelling evidence that the extended family becomes increasingly overextended, if not completely unraveled, and unable to provide its traditional level of protection and support for OVC.<sup>61</sup> Families are themselves decimated by the epidemic. Those who under normal circumstances provide the economic resources for subsistence fall sick and debase. As a consequence extended family households, mostly headed by the elderly, must stretch their meager resources even further to accommodate the very young. Put differently, households with orphans are more likely to become poorer because of the increased "dependency ratio", meaning that in these households the income of fewer earning adults is sustaining more dependents.<sup>62</sup>

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<sup>58</sup> J. Sloth-Nielsen, *Too Little? Too Late?*, p. 116: besides the extended family, mention should be made of community-based care which emerged in recent years.

<sup>59</sup> UNICEF, *Africa's Orphaned Generations*, p. 13.

<sup>60</sup> S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 63; D. Bradshaw et al., *Orphans of the HIV/AIDS epidemic*, p. 4.

<sup>61</sup> Human Rights Watch, *World Report 2002: Children's Rights*, New York, 2002, p. 22, accessed at <<http://www.hrw.org/wr2k2/children.html>>.

<sup>62</sup> UNICEF, *Africa's Orphaned Generations*, p. 15.

Apart from the families, the larger community or neighbourhood feels the burden of the epidemic as it exacerbates poverty. Households that are affected by illness or death related to HIV/AIDS rely in many cases on some kind of extra-household support in order to survive. The community at large, however, has to cope likewise with increasing numbers of affected households and finds itself less able to sustain the informal security networks, which gradually weaken and collapse.<sup>63</sup>

In addition, it happens that OVC absorbed into family and communal life suffer various degrees of discriminatory treatment or exploitation. They are often forced to leave school and made to work to supplement the household income. Often they are treated differently from the caregiver's own children and given an excessive burden of household chores, or are abused physically or sexually.<sup>64</sup>

In the light of the foregoing, one needs to be alert to avoid idealizing and romanticizing the extended family as the key solution to the problems of OVC. The responsibility of caring for children orphaned and made vulnerable by HIV/AIDS is a major factor in pushing many extended families beyond their ability to cope. Poverty-stricken families are hardest hit by HIV/AIDS in South Africa. The epidemic deepens poverty, which in turn accelerates and amplifies the process rendering children vulnerable.

#### D. The interplay between HIV/AIDS and poverty

The role of HIV/AIDS in deepening poverty in South Africa is acknowledged. It therefore appears that combating the former effectively requires strategies to tackle the latter. The provision of social security grants is one of the ways in which the South African government has attempted to respond. Two grants are pertinent for the purpose of this research.

<sup>63</sup> S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 53-55.

<sup>64</sup> Ibidem, p. 62; L. Johnson and R. Dorrington, *o.c.*, p. 27.

## 1. Child Support Grant

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This grant by definition aims at poverty alleviation. Under the current Social Assistance Act 59 of 1992<sup>65</sup>, poor children under the age of nine in South Africa are eligible to receive a Child Support Grant (CSG) of 160 Rant per month.<sup>66</sup> Anybody who takes full-time care of the child and who the child lives with, can apply for the grant. The primary caregiver needs to qualify in terms of an income-based means test, which means that the combined income of the caregiver and his/her spouse must not pass a certain limit.

The CSG appears at first glance an effective means to address the needs of children made vulnerable by HIV/AIDS, since they still live with an adult caregiver. As the scope of application of the grant covers the situation of a child raised by social parents, extended families taking care of orphans can apply for the CSG too until the child turns 9 years.

The provision of effective relief through the CSG is, however, seriously hampered. First, the age limit of nine years is very low. For children made vulnerable by HIV/AIDS and orphans absorbed into extended families, there is no adequate social security in place beyond that age. Admittedly, the age limit for the CSG was increased in 2003 from seven years to nine already, with provision for the extension of the grant to children up to 14 years old by 2006. Rightly, however, there is a strong lobby for the extension of the grant to all children up to 18 years.<sup>67</sup>

A second obstacle is the application process, which is very lengthy and in which several official documents –birth certificates and identity papers- have to be presented. Many poor applicants are not able to present these documents and lack means of transport to contact the issuing authorities when living in remote rural areas. In case they do get there, they receive hardly any assistance in obtaining the documents.<sup>68</sup>

The income-based means test is by many perceived as another barrier to access the grant. This has not so much to do with the fixed amounts being too high, but rather

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<sup>65</sup> Republic of South Africa, Social Assistance Act No. 59 of 1992.

<sup>66</sup> This is the amount as set by the South African Government in April 2003, Government Notice No. 461, 31 March 2003.

<sup>67</sup> H. Meintjes et al., *Children "in need of care" or in need of cash?*, p. 5.

<sup>68</sup> Ibidem, p. 24.



with the lengthy procedure to assess whether applicants remain under the limits set. That in turn is due to many applicants living on informal earnings. Possible changes to the means test are currently under review.<sup>69</sup>

## 2. Foster Care Grant

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Children who have been orphaned and who fit the criteria outlined above are eligible for the CSG. However, the higher-value Foster Care Grant (FCG) is in general regarded to be the key social security mechanism in place for addressing the needs of orphans. The Child Care Act and the Social Assistance Act govern the process to access the grant.<sup>70</sup>

Sections 13 to 15 of the Child Care Act No. 74 allow the courts, with the support of social workers, to place children considered to be "in need of care", in the custody of a foster parent. Placement is considered a temporary measure and, hence, the foster parent remains under the supervision of the social worker. Section 14(4) of the same Act spells out a set of criteria to determine whether children are in need of care. One of the criteria, that the child has no parent or guardian, opens the door for children orphaned due to HIV/AIDS to be placed by court order in the care of a foster parent. He or she is then eligible in terms of the Social Assistance Act No. 59 to apply for a FCG, currently equal to 500 Rant per month per fostered child, up to the maximum of 18 years old.<sup>71</sup> In legal terms foster care placement is intended to perform a critical role in the protection of children, who cannot remain within the biological family.<sup>72</sup>

Providing this high-value grant demonstrates South Africa's commitment to address the vulnerabilities and needs of orphaned children. As things are, orphans in the common sense –having lost their biological parents- are automatically considered to be in need of care.<sup>73</sup> Unfortunately, the processing of these grants is subject to several flaws. First, the application process is lengthy, complex and extremely labour-intensive. Social workers need to conduct initial interviews, open files for appropriate

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<sup>69</sup> K. Barret-Grant, D. Fine, M. Heywood and A. Strode (eds.), *HIV/AIDS and The Law: A Resource Manual*, 2<sup>nd</sup> Edition, Johannesburg/Cape Town, AIDS Law Project/AIDS Legal Network, 2001, p. 282.

<sup>70</sup> Republic of South Africa, Child Care Act No. 74 of 1983; Republic of South Africa, Social Assistance Act No. 59 of 1992.

<sup>71</sup> This is the amount as set by the South African Government in April 2003, No. 461, 31 March 2003.

<sup>72</sup> H. Meintjes et al., *Children "in need of care" or in need of cash?*, p. 6.

<sup>73</sup> Ibidem, p. 6.



cases and conduct extra interviews during home visits. Then they may take the application to the court and, if approved, supervise the placement. Every two years the placement must be renewed which requires again reports to justify the extension of the placement.<sup>74</sup>

Second, the legal framework does not match the social reality. In South Africa the extended family automatically takes responsibility for orphans. Whether these children are really "in need of care" is questionable. But because these children and the households in which they are raised are "in need of cash", families go through the whole procedure to better their living conditions. The consequence is that the purpose of foster care placement is de facto shifted from child protection to poverty alleviation.<sup>75</sup>

Third, for those households headed by children none of the grants here discussed is available. Availability is conditional upon an application made by the primary caregiver (CSG) or the foster parent (FCG) on behalf of a child living in circumstances of poverty or being orphaned due to HIV/AIDS.<sup>76</sup> The head of the household is, however, a child and cannot therefore perform certain key acts with respect to the law such as applying for a grant. It is the paradox of a system that acquiesces in an 11-year-old running a household but not entitling him or her to a grant.<sup>77</sup>

Altogether, the social security system looks promising and is to some degree beneficial. It should be noted, however, that many barriers impede effective access to the grants, what results in low take-up rates as will be seen further. The system is not comprehensive, since it does not make provision for many poor children older than 9 years, although their needs are acute. Moreover, the analysis revealed another serious gap in the social security system. Children made vulnerable by HIV/AIDS are until 9 years eligible for the low CSG, whereas orphans placed in foster care may claim a high FCG. Nevertheless both categories of children face similar vulnerabilities.

In short, many OVC continue to lack the resources needed to meet their basic needs, such as education, health care, food and clothing.

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<sup>74</sup> Ibidem, p. 16-23.

<sup>75</sup> Ibidem, p. 15.

<sup>76</sup> H. Meintjes et al., *Children "in need of care" or in need of cash?*, p. 4-6.

<sup>77</sup> Interview conducted with Ms. Mary Crewe, Director and Mr. Barry Van Wyck, Research Assistant of the Centre for the Study of AIDS in Africa, University of Pretoria, Wednesday 21 April 2004.

## E. Conclusion

The phrase "caught in a vicious cycle" perfectly describes the impact of HIV/AIDS on OVC. The analysis of their experiences demonstrates that the enjoyment of basic rights is compromised, among others the right to education and to health care. Furthermore, the traditional system of extended families providing care is constrained, because it has to operate in a context of high HIV rates and extreme poverty in South Africa. A comprehensive and accessible social security system could constitute a way out of the dead end. To date, however, OVC are to a large extent barred from enjoying their right to social security as well. From the angle of interdependence of human rights, the foregoing should exemplify how the absence of or reduced access to the enjoyment of one right has direct implications for the enjoyment of another.

It should be underlined once more that the problems arising for OVC in the context of HIV/AIDS are strongly interrelated. Any attempt to address this major challenge must avoid one-sidedness and come up with integrated approaches.

## II. South Africa's policy towards children orphaned and made vulnerable by HIV/AIDS

### A. Preliminary remarks

The analysis of government policies cannot be conducted without taking due consideration of the human rights obligations of a State. Human rights are so fundamental that they form the first and foremost constraint on state conduct: all state action and/or omission has to be guided by and, in the case of litigation, reviewed in the light of human rights. The same is true for a possible policy response of the government of South Africa towards OVC.

Therefore this section starts with taking a closer look at the human rights obligations in respect of children resting on South Africa, in an attempt to assess the relevance of human rights standards in addressing the needs of OVC.

Second, an overview of the current policy is given. The main legislative and other measures put or to be put in place are sketched. This subsection makes the shift from Sollen (what ought to be) to Sein (what actually is).

The third step in the analysis consists of an assessment. It seeks to establish whether the South African government adequately translated its human rights obligations into policy measures that adequately respond to the needs and vulnerabilities of OVC.

## B. Ad Fundum

Earlier, this study ascertained that OVC are barred from enjoying education, lack adequate health care and have no or limited access to social security. The corresponding human rights that secure these basic values for children are dealt with here. Likewise, the entitlement of children to family care and how it is framed in human rights law are examined. The human rights obligations of South Africa are located at the international, regional and national level, all of which will be looked at.

### 1. International human rights standards

#### a. The era of declarations

It might appear common sense stating that children need special care and assistance. That very idea, however, had to fought lengthy battles for formal legal recognition for the simple reason that states are reluctant to assume legal responsibilities that can be enforced. The first international document acknowledging the need to extend particular care to the child was the *Geneva Declaration of the Rights of the Child of 1924*, stipulating, "Mankind owes to the child the best it has to give".<sup>78</sup> The Geneva Declaration, endorsed by the League of Nations, is not binding on the States Signatories of the document: like all declarations, it is considered as a mere statement of goodwill, a political commitment. This means that while states agree with what the Declaration has to say about for example children's rights, they are not legally obliged to ensure that those rights are upheld in their countries.<sup>79</sup>

<sup>78</sup> Preamble to the Geneva Declaration on the Rights of the Child of 1924, taken from G. Van Bueren, *International Documents on Children*, Dordrecht, Martinus Nijhoff Publishers, 1993, p. 3; the Geneva Declaration was drafted by the founder of the International Save the Children Alliance, Ms. Eglantyne Jebb in 1923 and then adopted by the League of Nations, the predecessor of the United Nations, in 1924.

<sup>79</sup> R. Jennings and A. Watts (eds.), *Oppenheim's International Law 9<sup>th</sup> Edition*, vol. 1 (part 1), New York, Addison Wesley Longman, 1996, p. 48-49.

A second important step marks the adoption of the *Universal Declaration of Human Rights* (UDHR) by the United Nations General Assembly on 10 December 1948. Article 25(2) of the Universal Declaration states "Motherhood and *childhood* are entitled to special care and assistance".<sup>80</sup> It is yet another declaration in the (international) legal sense but it must be borne in mind that this particular declaration has obtained nowadays the status of customary international law. As a result it binds all states and they are all legally obliged to live up to the obligations set forth in the UDHR.<sup>81</sup>

A decade later, on 20 November 1959, the General Assembly of the United Nations adopted the *Declaration of the Rights of the Child*. More detailed than the two previous ones, the Declaration recognises that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including *appropriate legal protection*, before as well as after birth".<sup>82</sup>

#### b. The International Covenants

Appropriate legal protection was, however, for the first time afforded to children in 1966 when the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted.<sup>83</sup> These international human rights treaties form together with the UDHR, the International Bill of Rights. They marked a notable step forward in the protection of human rights: the rights in question are set out in some detail, in a legally binding form and provision is made for a system of implementation and enforcement.<sup>84</sup> South Africa ratified the ICCPR on 10 December 1998, but only signed the ICESCR.<sup>85</sup>

<sup>80</sup> Article 25(2) Universal Declaration of Human Rights, G.A. Resolution 217A (III), U.N. Doc A/810 (1948) (emphasis added).

<sup>81</sup> R. Jennings and A. Watts (eds.), *Oppenheim's International Law 9<sup>th</sup> Edition*, vol. 1 (part 2 to 4), New York, Addison Wesley Longman, 1996, p. 1004.

<sup>82</sup> Third Consideration of the Preamble to the Declaration of the Rights of the Child, G.A. Resolution 1386 (XIV), U.N. Doc. A/4354 (1959) (emphasis added).

<sup>83</sup> International Covenant on Civil and Political Rights, G.A. Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), entered into force on 23 March 1976; International Covenant on Economic, Social and Cultural Rights, G.A. Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), entered into force on 3 January 1976.

<sup>84</sup> P. Alston, *The Commission on Human Rights*, in P. Alston (ed.), *The United Nations and Human rights: A Critical Appraisal*, New York, Clarendon Press, 1992, p. 127.

<sup>85</sup> The ICESCR was signed on 3 October 1994.

In principle, the human rights enshrined in the ICCPR and the ICESCR apply to individual adults and children alike, the main argument being the principle of non-discrimination stipulated in both Covenants.<sup>86</sup>

Moreover, the Covenants also contain provisions specifically concerning children. Adopting specific provisions benefiting children was, however, subject to discussion during the drafting, but the arguments pro inclusion prevailed. A strong claim was made that the rights proclaimed in Article 25(2) of the UDHR and in the UN Declaration of the Rights of the Child of 1959 should be converted into legal obligations.<sup>87</sup>

(i) Article 24 ICCPR

*"1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. [...]"*

(ii) Article 10(3) ICESCR

*"3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law."*

The entitlement of children to special protection and assistance represents the core idea of these provisions. That recognition opened the door for the legal breakthrough to protecting children's human rights.

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<sup>86</sup> Article 2(1) ICCPR; Article 2(2) ICESCR.

<sup>87</sup> S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague, Martinus Nijhoff Publishers, 1999, p. 2.

c. The United Nation Convention on the Rights of the Child

The long path to international recognition of the special needs of children as human beings was finally walked with the entry into force, on 2 September 1990, of the Convention on the Rights of the Child (CRC). The UN General Assembly adopted this Convention on 20 November 1989 and to date the CRC has almost reached universal acceptance, being ratified or acceded to by 192 states.<sup>88</sup>

This international human rights instrument stands out for its comprehensiveness and its emphasis on the interdependence and indivisibility of all human rights, containing civil and political rights as well as economic, social and cultural rights.<sup>89</sup> The Republic of South Africa ratified the CRC on 16 June 1995.<sup>90</sup>

By way of conclusion, I quote the following words:

*"A century that began with children having virtually no rights is ending with children having the most powerful legal instrument that not only recognizes but protects their human rights."*<sup>91</sup>

In the following, the treaty provisions pertinent to this research are examined and their significance for OVC assessed. The UN Committee on the Rights of the Child (CCRC) is the supervisory body of the CRC. It monitors state compliance with the obligations under the CRC.<sup>92</sup> As it has shown considerable interest in the challenge of HIV/AIDS for the rights of children, the work of the CCRC is given substantial consideration as well. In 1998 it held a General Discussion on "Children living in a World with AIDS". Following the General Discussion it formulated detailed recommendations.<sup>93</sup> In 2003 it even issued a General Comment titled "HIV/AIDS and

<sup>88</sup> United Nations Convention on the Rights of the Child, G.A. Resolution 44/25 of 20 November 1989, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); Only two countries have not ratified, the United States and Somalia, which have signalled their intention to ratify by formally signing the Convention.

<sup>89</sup> S. Detrick, *o.c.*, p. 4.

<sup>90</sup> Status of ratifications consulted at <<http://www.unicef.org/crc/crc.htm>>.

<sup>91</sup> Carol Bellamy, Executive Director UNICEF at <<http://www.unicef.org/crc/crc.htm>>.

<sup>92</sup> T. Hammarberg, *Children*, in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights – A Textbook*, The Hague, Martinus Nijhoff Publishers, 2001, p. 354.

<sup>93</sup> CCRC, Report on the nineteenth session, September-October 1998, CRC/C/80 (hereafter Report on the 19<sup>th</sup> Session).



the Rights of the Child”, aiming to promote the realisation of the human rights of children in the context of HIV/AIDS.<sup>94</sup>

(i) Article 20 CRC: family care

*“1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*

*2. States Parties shall in accordance with their national laws ensure alternative care for such a child.*

*3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.”*

This article is particularly relevant for OVC who might lack a family environment or should be removed from it. In that case, Article 20(2) CRC requires the State to ensure alternative care and Article 20(3) CRC lists some of the (formal care) options. Continuity in the child's upbringing as well as the specific background of the child must, however, determine every solution regarding alternative care. That is a significant statement in light of the South African tradition of extended families absorbing OVC into their care.

Hence it is incumbent on the South African government to recognise the important role of the extended family as “alternative care provider”. It is true, though, that children associate the extended family sometimes with abuse and neglect. Abuse and neglect emerge mainly because many families try to cope within a downward spiral of high HIV prevalence and deepening poverty. This provokes insecurity and frustration. The State should intervene and direct support and assistance to the extended families. The CCRC seems to favour this option too, unless the burden of HIV/AIDS on the

<sup>94</sup> CCRC, General Comment No. 3 (2003), HIV/AIDS and the Rights of the Child, Thirty-second session, 13-31 January 2003, CRC/GC/2003/3, p. 2 (hereinafter General Comment No. 3 (2003)).

extended family weighs disproportionately. In that case States should provide, as far as possible, for family-type alternative care, e.g. foster care or institutional care, which is generally the least-favoured option.<sup>95</sup>

The government could rely on Article 20 and Article 3 (best interests of the child) CRC if it wants to recognise and assist child-headed households. Such households generally provoke public outcry although social research stressed how diverse the experiences of children can be. They sometimes prefer to head a household rather than being neglected, abused or discriminated against in extended families or formal care arrangements.<sup>96</sup> If the best interests of the child are served in such an environment, the State should act appropriately. General Comment No. 3 (2003) of the CCRC takes a similar stance stating that States are encouraged to provide support, financial and otherwise, when necessary, to child-headed households.<sup>97</sup>

(ii) Article 24 CRC: health

*"1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*

*2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:*

*(a) To diminish infant and child mortality;*

*(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;*

*(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean*

<sup>95</sup> Ibidem, p. 10.

<sup>96</sup> For some interesting case-studies see, S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 61-64 and 73; L. Johnson and R. Dorrington, *o.c.*, p. 29-30 where it is argued that the formation of child-headed households can be allowed as a temporary measure and on the condition that social services can provide regular support to the household.

<sup>97</sup> CCRC, General Comment No. 3 (2003), p. 11.



*drinking-water, taking into consideration the dangers and risks of environmental pollution;*

*(d) To ensure appropriate pre-natal and post-natal health care for mothers;*

*(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;*

*[...]*

Article 24 affords children the right to the highest attainable standard of health. The Constitution of the World Health Organization defines "health" as a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity.<sup>98</sup>

Reading Article 2 CRC –the non-discrimination clause- together with Article 24 leads to the conclusion that no child may suffer discrimination in accessing health care services. The CCRC identified in its examination of Initial Reports children affected by HIV/AIDS or living with parents with HIV/AIDS as groups that suffer discrimination.<sup>99</sup> The government of South Africa should consequently take steps to guarantee that OVC have unimpeded access to health care.

In the context of HIV/AIDS, Article 24(2)(a) juncto (d) takes a special place. If proper pre-natal health care is offered to mothers by means of a comprehensive programme to prevent the mother-to-child transmission of HIV (PMTCT), the State can be said to comply also with its obligation to reduce infant and child mortality. Apart from this human rights grounded argument in favour of programmes for PMTCT, economic research shows that the universal roll-out of PMTCT is cost-effective, meaning that the costs to the health sector (of South Africa) of not introducing PMTCT are greater than the total costs incurred if programmes or nationwide implemented.<sup>100</sup>

<sup>98</sup> B.C.A. Toebes, *The Right to Health as a Human right in International Law*, School of Human rights Research Series, Antwerpen, Intersentia, vol. 1, 1999, 23

<sup>99</sup> R. Hodgkin and P. Newell, *o.c.*, p. 28.

<sup>100</sup> For a comprehensive and very understandable analysis of the cost-effectiveness of PMTCT, N. Nattrass, *The Moral Economy of AIDS in South Africa*, Cambridge Africa Collection, Cambridge, Cambridge University Press, 2004, p. 70-73; essentially you compare the cost of the PMTCT programme (including the cost of voluntary counseling and testing, administration of the programme

That HIV/AIDS is a challenge to children's rights is fully acknowledged by the CCRC. Following the General Discussion on "Children living in a world with AIDS, the CCRC recommended States, amongst others, to define HIV/AIDS care broadly and inclusively to cover not only the provision of medical treatment, but also of *psychological attention* and social reintegration, as well as protection and support, including of a legal nature.<sup>101</sup> In General Comment No. 3, "HIV/AIDS and the Rights of the Child" the CCRC encourages States to offer sensitive health services which are affordable, accessible, non-discriminatory and respectful of children's rights to privacy.<sup>102</sup> Moreover, States were urged to take steps for PMTCT, including the provision of essential drugs, e.g. antiretroviral drugs, appropriate antenatal, delivery and post-partum care and making HIV voluntary counselling and testing services available to pregnant women and their partners.<sup>103</sup>

(iii) Article 26 CRC: social security

*"1. States Parties shall recognize for every child the right to benefit from social security, including social insurance and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.*

*2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child."*

OVC can heavily benefit from social security. Earlier it was demonstrated that HIV/AIDS prevalence rates are higher among the black, marginalized and poverty-stricken population of South Africa. Their very low incomes are in the face of the epidemic basically diverted to the health care of the sick and dying, which results in decreasing amounts of money spent on the basic needs of the household. It forces

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and provision of antiretroviral therapy) and the costs of caring for all HIV-positive children (because PMTCT interventions reduce but do not eliminate HIV transmission to babies) with the cost of caring for all the HIV-positive children if no PMTCT programme was in place.

<sup>101</sup> CCRC, Report on the 19<sup>th</sup> Session, para. 243.

<sup>102</sup> CCRC, General Comment No. 3 (2003), p. 7.

<sup>103</sup> Ibidem, p. 8.

children to take up economic responsibilities, implying school drop-out, hazardous labour conditions, exploitation and increased vulnerability to HIV-infection. The provision of social security benefits could break this vicious circle to a certain extent because welfare programmes play a fundamental role in poverty alleviation. They provide a safety net for the impoverished, and a foundation for the development of poor people's capacity to participate in other social service areas, such as education and health care.<sup>104</sup> The State should therefore seek to design a comprehensive social security system, also because realising the right to social security advances the realisation of other basic human rights, such as the right to education, to health care and to an adequate standard of living.

Social security can take the form of cash transfers or social services. If the amount of the transfer is reasonable or the delivery of services regular, it may mitigate the economic impact of HIV/AIDS on the household budget. On the crucial question whether a comprehensive system of social security provisioning is feasible and sustainable will be commented in section III, D.

(iv) Article 28 CRC

*"1. States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall in particular:*

- (a) Make primary education compulsory and available free to all;*
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;*
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;*

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<sup>104</sup> J. Sloth Nielsen, *What is Left for the Right? Children's Right to Social Services, Social Security and the Primary Prevention of Child Abuse in South Africa: some Conclusions in the Aftermath of Grootboom*, in P. Van der Auweraert, T. De Pelsmaeker, J. Sarkin, J. Vande Lanotte (eds), *Social, Economic and Cultural Rights – An Appraisal of Current European and international Developments*, Antwerpen, Maklu, 2002, p. 321 (hereafter referred to as *What is Left for the Right?*).

- (d) *Make educational and vocational information and guidance available and accessible to all children;*
- (e) *Take measures to encourage regular attendance at schools and the reduction of drop-out rates. [...]*

The right to education may be characterised as an “empowerment right” since it enables a person to experience the benefit of other rights. Civil and political rights such as freedom of expression, freedom of association or the right to political participation, obtain substance and meaning only when a person is educated.<sup>105</sup> The 1990 World Summit for Children declared that the provisions of basic education and literacy for all are among the most important contributions that can be made to the development of the world’s children.<sup>106</sup>

Education should correspond to the well known 4A-scheme elaborated by the UN Committee on Economic, Social and Cultural Rights (CESCR) with regard to Article 13 ICESCR. Functioning educational institutions and programmes have to be **available** in sufficient quantity within the jurisdiction of the State; educational institutions and programmes have to be **accessible** to everyone, without discrimination, within the jurisdiction of the State party; the form and substance of education, including curricula and teaching methods, have to be **acceptable** (e.g. relevant, culturally appropriate and of good quality) to students; education has to be flexible so it can **adapt** to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.<sup>107</sup>

Accessibility comprises three overlapping dimensions, two of them are relevant for OVC. The first is non-discrimination: education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any grounds. In practice this means that children living with HIV positive caregivers should not be

<sup>105</sup> F. Coomans, *In search of the core content of the right to education*, in D. Brand and S. Russel (eds), *Exploring the core content of socio-economic rights: South African and international perspectives*, Pretoria, Protea Book House, 2002, 160-161 (hereinafter “Core content of the right to education”).

<sup>106</sup> World Declaration on the Survival, Protection and Development of Children, New York, 1990, para. 13; T. Hammarberg, *o.c.*, p. 353.

<sup>107</sup> CESCR, General Comment No. 13, The Right to Education (Art. 13), E/C.12/1999/10, 8 December 1999, p. 4 (hereafter referred to as General Comment No. 13); the third dimension is physical accessibility, meaning that education must be within safe physical reach.

the most vulnerable groups, in law and fact, without discrimination on any grounds. In practice this means that children living with HIV positive caregivers should not be excluded from attending school. Article 2 CRC could be used too to challenge discriminatory practices towards OVC in respect of their access to education. This provision obliges States to ensure all rights set forth in the CRC without discrimination of any kind irrespective of the child's [...] birth or status. The CCRC interprets "other status" to include the HIV/AIDS status of the child or his/her parents.<sup>108</sup> In my view, the interpretation must be extended to cover the HIV/AIDS status of any adult caregiver in order to take account of the child-raising practices operative in South Africa.

The other pertinent dimension is economic accessibility: education has to be affordable to all. Article 13(2)(a) ICESCR stipulates that primary education shall be available "free to all".<sup>109</sup> Article 28(1)(a) CRC puts more emphasis on the progressive realisation of the right to primary education (use of the verb "to make"). Article 13 ICESCR is thus more mandatory and strict.<sup>110</sup>

For OVC, as for many other children, the claim for free and compulsory primary education is of the utmost importance. On the one hand, the household budget is severely constrained due the costs of treating HIV/AIDS. On the other hand, education as a means to disseminate appropriate information on HIV transmission and care for those living with AIDS is arguably the most effective way of combating the epidemic over the long term (adaptability of education).<sup>111</sup>

#### (v) Concluding remark

The CRC is not only comprehensive in scope, it is also nearly universally accepted. The treaty-monitoring body, the CCRC, has taken inspiring initiatives in the area of HIV/AIDS. Most importantly, it recommended States to incorporate the rights of the child in their national HIV/AIDS policies and to recognise the rights of children to participate fully and actively in the formulation and implementation of HIV/AIDS

<sup>108</sup> CCRC, General Comment No. 3 (2003), p. 4.

<sup>109</sup> Ibidem, p. 4.

<sup>110</sup> F. Coomans, In search of the core content of the right to education, in A. Chapman and S. Russell (eds.), *Core obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerpen, Intersentia, 2002, 224-228.

<sup>111</sup> Human Rights Watch, *World Report 2002: Children's Rights*, New York, 2002, p. 19.



strategies, programmes and policies.<sup>112</sup> South Africa should take this recommendation and all comments made with regard to the normative provisions just discussed into consideration when framing and implementing policies and programmes at the national level to address the needs of OVC.

## 2. Regional human rights standards

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The African States resolved to reinforce the links between them by establishing and strengthening common institutions in 1963: the Organization of African Unity (OAU) was born with the adoption of the Charter of the OAU.<sup>113</sup> Recently, the OAU was converted into a new regional organisation, the African Union (AU) and the Charter of the OAU replaced by the Constitutive Act of the African Union.<sup>114</sup>

One of the objectives of the AU is promoting and protecting human and peoples' rights.<sup>115</sup> The most important human rights instruments within the African regional system pertinent to our discussion are the African Charter on Human and People's Rights (Banjul Charter)<sup>116</sup> and the African Charter on the Rights and Welfare of the Child (African Children's Charter).<sup>117</sup> South Africa ratified the former on 9 July 1996 and the latter on 7 January 2000.<sup>118</sup>

### a. The Banjul Charter

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#### (i) Article 18(3) Banjul Charter: general child protection

*"3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."*

Article 18 of the Banjul Charter deals with the protection of the family and of certain categories of persons. Article 18(3) envisages the protection of children's rights but

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<sup>112</sup> CCRC, Report on the 19<sup>th</sup> Session, para 243.

<sup>113</sup> Charter of the Organization of African Unity, Addis Abeba, 25 May 1963.

<sup>114</sup> Constitutive Act of the African Union, adopted at the Lome Summit, 10 July 2000.

<sup>115</sup> Article 3(h) Constitutive Act of the African Union.

<sup>116</sup> African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev.5, Banjul, 27 June 1981 (entered into force 21 October 1986).

<sup>117</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, Addis Abeba, July 1990 (entered into force 29 November 1999).

<sup>118</sup> Status of ratifications consulted at <<http://www.africa-union.org>>.



this procedure is obviously not very satisfactory and its appropriateness is doubtful, one author argues.<sup>119</sup> For example, ten years after the adoption of the African Children's Charter, it was ratified only by 12 States.

Fortunately, the tide has turned to date, since 31 States ratified or acceded to it. Anyway, Article 18 is drafted in too general terms to place any obligation whatsoever on the State.<sup>120</sup>

#### b. The African Children's Charter

To put this instrument into context, one has to recognise that the CRC was a source of inspiration for the African Children's Charter. It does also go further than the CRC in that it addresses uniquely African issues.<sup>121</sup>

##### (i) Article 25 African Children's Charter: separation from parents

Article 25 is the equivalent of Article 20 CRC. Since the two articles are almost identical in wording, Article 25 is not reproduced here. It determines in the same way that any child without a family environment or who should be removed from it, shall be entitled to special protection and assistance. It is incumbent on the State to provide alternative family care under such circumstances such as foster placement or institutional care, but any alternative shall pay due regard to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

Therefore, one can conclude that all observations made in relation to Article 20 CRC and aimed at fleshing out the significance of that provision for OVC, give equally flesh to the human rights obligations that South Africa incurs in respect of Article 25 African Children's Charter.

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<sup>119</sup> F. Ouguergouz, *The African Charter on Human and People's Rights – A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, The Hague, Martinus Nijhoff Publishers, 2002, p. 193.

<sup>120</sup> Ibidem, p. 197.

<sup>121</sup> T. Davel, *The African Charter on the Rights and Welfare of the Child, family law and children's rights*, in "De Jure", Jaargang 35, vol. 2, 2002, p. 282.



(ii) Article 14 African Children's Charter: health and health services

Article 14 deals with health and health services for children and resembles to a large extent its CRC counterpart, Article 24. The African provision differs since it adds three specific measures States Parties to the Charter shall undertake with a view to pursue the full implementation of the right to health.

*“(g) to integrate basic health service programmes in national development plans.*

*(i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;*

*(j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.”*

Governments shoulder a great burden to detect and respond to all needs living in society. In order to share part of the burden, governments increasingly attempt to mobilise civil society. The government of South Africa does appeal to civil society with a view to integrate non-governmental (NGO's), community-based (CBO's) and faith-based organisations (FBO's) in the practical implementation of policies and programmes. These organisations have the advantage of specialisation: they know both a certain region and its local residents very good, which renders them the ideal partners to counter local challenges. Article 14(2)(i) approves this practice of co-operation with NGO's, local communities and the beneficiary population.

Ensuring the meaningful participation of the beneficiary population advances the proper identification of existing needs and vulnerabilities. This provision elaborates to some degree the general principle contained in Article 4 African Children's Charter: in all actions concerning the child, the *best interests of the child* shall be the primary consideration and opportunity shall be provided for the *views of the child to be heard*.

The Research Report “Health and Social Services to Address the Needs of Orphans and other Vulnerable Children in the context of HIV/AIDS” underlined that the children, taking part in the research, repeatedly demonstrated their ability and resilience in coping with the difficulties of their everyday lives. This empirical finding

requires acknowledgement and OVC must, as a consequence, be enabled to contribute to decisions that affect them.<sup>122</sup>

(iii) Article 20 African Children's Charter: parental responsibilities

A general provision recognising the right of the child to benefit from social security like Article 26 CRC does not figure in the African Children's Charter. The provision that comes closest to such recognition is Article 20(2)(a).

*"2. States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures:*

*(a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;"*

It should, however, be clear that this provision does not equal a general right to social security. First of all, Article 20 deals with parental responsibilities and not with an entitlement of children as such. Parents and other persons responsible for the child have the primary responsibility for the upbringing and development of the child, but the state should assist them. Second, the kind of assistance envisaged by Article 20 is limited to material assistance and support programmes. Social security normally includes cash transfers too. Article 26 CRC thus offers more appropriate protection in respect of a child's right to social security.

(iv) Article 11 African Children's Charter: education

Article 11 deals with the right of the child to education as well as with the aims of education, whereas the CRC devoted two separate articles to these different aspects.<sup>123</sup> Compared to Article 28 CRC, Article 11 African Children's Charter makes only extra provision for female, gifted and disadvantaged children, for the rights and duties of parents and legal guardians to choose for their children's schools and for children who become pregnant before completing their education.<sup>124</sup>

<sup>122</sup> S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 75.

<sup>123</sup> Article 29 CRC sets out the aims of education.

<sup>124</sup> Since these extra provisions have no bearing on the present discussion, they are not reproduced here.

For the rest, the two provisions are identical. Reason why the comments made in relation to Article 28 CRC to explore its significance for OVC, are equally relevant for giving substance to the human rights obligations that South Africa derives from Article 11 African Children's Charter.

(v) Concluding remark

South Africa is party to those African human rights instruments that have a direct bearing on the present analysis. It should be noted, however, that the important right to social security lacks. On the other hand, the reference to local organisations, communities and the addressees of measures as potential partners in planning and managing of programmes should be valued rightly.

A striking feature of the African Children's Charter is its resemblance with the CRC, although the former makes sometimes extra provision to take account of African peculiarities. The resemblance with and –in the case of the Banjul Charter- explicit reference to the international conventions reveals the significance of the analysis of these human rights treaties for an understanding of the human rights obligations incumbent on South Africa under the regional human rights protection system. The African Committee of Experts on the Rights and Welfare of the Child, established in July 2001 to monitor the implementation of the African Children's Charter, now has the task to spell out these obligations in more detail.<sup>125</sup>

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<sup>125</sup> T. Davel, *o.c.*, p. 296; A. Lloyd, *Report of the second ordinary session of the African Committee on the Welfare and Rights of the Child*, in "African Human Rights Journal", vol. 3, no. 2, 2003, 330-331.

### 3. National human rights standards

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#### a. Introduction

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Before 1994, effective protection of human rights was virtually impossible in South Africa. The Apartheid regime was dominated by the doctrine of parliamentary sovereignty. As a result the Parliament representing only the white minority could make any law it wished and no person or institution –including the courts- could challenge the laws on the ground that it violated human rights.<sup>126</sup>

The change of the regime led to a new approach to constitutionalism and human rights protection. The Interim Constitution of 27 April 1994 entrenched a number of human rights, but was transitional in nature.<sup>127</sup> One of its principal purposes was to set out the procedures for the negotiation and drafting of a final Constitution. On 8 May 1996 the democratically elected Constitutional Assembly adopted the Final Constitution, which the Constitutional Court (CC) refused to certify for non-compliance with the Constitutional Principles set out in the Interim Constitution.<sup>128</sup> An amended text was submitted to the Constitutional Court that found the text to be consistent with the Constitutional Principles.<sup>129</sup> The Constitution was signed into law on 4 February 1997, bringing to an end a long and bitter struggle to establish constitutional democracy in South Africa.<sup>130</sup>

#### b. The Bill of Rights and children

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Chapter 2 of the Constitution embodies the Bill of Rights, a modern, comprehensive and entrenched instrument for the effective protection of fundamental human rights

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<sup>126</sup> J. De Waal, I. Currie, G. Erasmus, *The Bill of Rights Handbook*, 4<sup>th</sup> Edition, Lansdowne, Juta & Co Ltd, 2001, p. 3.

<sup>127</sup> Interim Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>128</sup> Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment), 1996 (4) SA 744 (CC).

<sup>129</sup> Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 (Second Certification Judgment), 1997 (2) SA 97 (CC).

<sup>130</sup> J. De Waal, I. Currie and G. Erasmus, *o.c.*, p. 6.

and liberties.<sup>131</sup> In terms of section 7 of the Constitution, the Bill of Rights is a cornerstone of democracy in South Africa.

It should be borne in mind, however, that the dualism in children's rights protection encountered at the international level is also a feature of domestic South African human rights law. The rights of children at the global level are protected in "general" human rights treaties and in "child-specific" human rights treaties.<sup>132</sup> Children are part of the "everyone" as for example in the ICCPR, the ICESCR and the Banjul Charter and accordingly enjoy all the entitlements afforded to everyone. On the other hand, they are targeted in a protective framework specific for children, the CRC and the African Children's Charter constituting the best examples, in which the bearers of rights are children.<sup>133</sup>

The same distinction exists at the domestic level in South Africa: in section 28 one finds a number of rights listed in respect of which children alone are the bearers. But children are part of "everyone" and consequently qualify for all the rights under the Constitution unless they are explicitly excluded as bearers of rights.<sup>134</sup>

In the following, the different rights are listed first and subsequently some comments are brought together under one heading.

(i) Section 28 Constitution: the children's clause

*"(1) Every child has the right to:*

- (a) to a name and a nationality from birth;*
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;*
- (c) to basic nutrition, shelter, basic health care services and social services;*
- (d) to be protected from maltreatment, neglect, abuse or degradation;*
- (e) to be protected from exploitative labour practices;*

<sup>131</sup> R. Malherbe and D. Brand, *Constitutional Law of South Africa*, in R. Blanpain (General Editor) and A. Alen, G.A. Tarr, R.F. Williams (eds.), *International Encyclopedia of Laws – Constitutional Law*, The Hague, Kluwer Law International, 2001, p. 135.

<sup>132</sup> G. Van Bueren, *Of Floors and Ceilings: Minimum core obligations and children*, in D. Brand and S. Russell (eds.), *Exploring the core content of socio-economic rights: South African and international perspectives*, Pretoria, Protea Book House, 2002, p. 184.

<sup>133</sup> F. Viljoen, *Children's Rights: A response from a South African perspective*, in D. Brand and S. Russell (eds.), *Exploring the core content of socio-economic rights: South African and international perspectives*, Pretoria, Protea Book House, 2002, p. 201.

<sup>134</sup> *Ibidem*, p. 202.



- (f) *not to be required or permitted to perform work or provide services that*
  - (i) *are inappropriate for a person of that child's age; or*
  - (ii) *place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;*
- (g) *not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be*
  - (i) *kept separately from detained persons over the age of 18 years; and*
  - (ii) *treated in a manner, and kept in conditions, that take account of the child's age;*
- (h) *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;*
- (i) *not to be used directly in armed conflict, and to be protected in times of armed conflict.*
- (2) *A child's best interests are of paramount importance in every matter concerning the child.*
- (3) *In this section "child" means a person under the age of 18 years."*

Section 28(1)(b) provides for alternative care if the child is deprived of a family environment. Its international and regional counterparts are Article 20 CRC and Article 25 African Children's Charter respectively.

Section 28(1)(c) provides for basic health services, a provision that equals to some extent Article 24 CRC and Article 14 African Children's Charter. The latter standards, however, comprise much more than just basic health services stipulating that a child is entitled to the highest or best attainable state of health. This apparent "defect" is cured if one considers the other rights in the Constitution to which children, falling under "everyone", are entitled as well.

(ii) Section 27(1)(a): health care services

*“(1) Everyone has the right to have access to*

*(a) health care services, including reproductive health care;”*

Section 27(1)(a) guarantees the right of everyone -including children- to have access to health care, including reproductive health care. Children thus appear to enjoy two overlapping rights to health care: a general one under section 27 and one to basic health services under section 28. It is important to note that, unlike the socio-economic rights in sections 26 and 27, the rights laid down in section 28 are not qualified by reference to progressive realisation and available resources.<sup>135</sup> Further this distinction will be discussed in more detail.

(iii) Section 27(1)(c): social security

*“(1) Everyone has the right to have access to*

*(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”*

Section 27(1)(c) guarantees the right of everyone to have access to social security. What a child is not directly entitled to by virtue of section 28, he or she derives from this section. Hence, Article 26 CRC does have an equivalent at the national level.

(iv) Section 29(1)(a): basic education

*“(1) Everyone has the right*

*(a) to a basic education, including adult basic education;”*

Section 29(1)(a) safeguards the right to basic education for everyone, and thus for children too. As such, one of the core ideas of Article 28 CRC and Article 11 African Children's Charter has been anchored in South Africa's Bill of Rights as well. Note that this right is not qualified either.

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<sup>135</sup> J. Sloth Nielsen, *What is Left for the Right?*, p. 316.



(v) General comments regarding all rights listed

It is a fact that the wording and elaboration of the specific rights encapsulated in the CRC or African Children's Charter on the one hand, and the Constitution of South Africa on the other hand, differ considerably. The former elaborate extensively on most of the rights discussed, whereas the Constitution of South Africa approaches the entrenchment of human rights in a concise manner.

Is it then justified to assume that the observations and comments made in regard of the normative provisions of the CRC and the African Children's Charter may equally give substance and content to the constitutional human rights obligations of the South African government in respect of OVC? The answer is undoubtedly yes for a number of reasons. First, the core idea in terms of the entitlement of a child to a certain right, invariably remains the same. Second, all rights discussed are second-generation human rights, also known as economic, social and cultural rights. Given that the socio-economic rights in the South African Constitution were largely modelled on those in the ICESCR, both the Covenant and the interpretations of the CESCR of these rights are a valuable source of guidance for the South African government to understand its constitutional obligations.<sup>136</sup> Third, the CRC was an important source of inspiration for drafting section 28. Moreover, South Africa ratified the CRC in 1995. This means that domestic law must be consistent with its provisions.<sup>137</sup> Above all, the Constitution itself expressly obliges a court, tribunal or forum to consider international law when interpreting the Bill of Rights. Section 39(1)(b), together with section 233<sup>138</sup>, ensures that courts will be guided by international norms and the interpretation placed upon these norms by international courts and other institutions.<sup>139</sup>



<sup>136</sup> In the same sense J. De Waal, I. Currie and G. Erasmus, *o.c.*, p. 437; this is an important statement knowing that South Africa only signed and not yet ratified the ICESCR.

<sup>137</sup> Ibidem, p. 458; A. Pantazis and T. Mosikatsana, *Children's Rights*, in M. Chaskalson et. al. (eds), *Constitutional Law of South Africa: Operational Provisions of the Chapter on Fundamental Rights*, Cape Town, Rustica Press, 1998 (revised edition), no. 33-1.

<sup>138</sup> Section 233 requires a court when interpreting legislation to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

<sup>139</sup> J. Dugard, *International Law: A South African Perspective*, 2<sup>nd</sup> Edition, Western Cape, Rustica Press, 2001, p. 264.

(vi) Concluding remark

At the domestic level, South Africa has strongly committed itself to respect, protect, promote and fulfill human rights. Its response to OVC in the context of HIV/AIDS accordingly should be rooted in the Constitution too.

C. The current policy of South Africa towards children orphaned and made vulnerable by HIV/AIDS.

In the foregoing, it was described how a policy addressing the needs of OVC ought to be. In the following, the policy currently in place is presented. Without going into detail, the main legislative and other measures as well as policies and programmes are sketched. That suffices to find out whether the government of South Africa is aware of the problems and has developed a vision to both combating the spread and mitigating the impact of HIV/AIDS on OVC.

1. Combating the spread of HIV/AIDS

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Mitigating the impact of HIV/AIDS on OVC will have a hollow ring if no steps are taken to stop the spread of the epidemic at the same time.

a. National AIDS Plan 1994

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The comprehensive National AIDS Plan 1994 showed the commitment of the new democratic South African government to stem the epidemic. The National Plan entailed an integrated response to HIV/AIDS and comprised six key elements: education and prevention; counseling; health care; human rights and law reform; welfare and research. Importantly, the National Plan did not view the epidemic primarily as a medical issue, all sectors of government were to be involved in the fight against HIV/AIDS.<sup>140</sup> By 1999, however, the HIV prevalence rate had risen dramatically highlighting South Africa's failure to manage and control the spread of HIV. The scale of the failure becomes clearer when one notes that the HIV prevalence

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<sup>140</sup> H. Marais, *To the Edge*, in M. Crewe (ed.), *AIDS Review 2000*, Centre for the Study of AIDS, University of Pretoria, Pretoria, 2000, p. 12.

rate in both Thailand and South Africa was less than 1% in 1990; eight years later it was 1.5% in Thailand compared to 22.8% in South Africa.<sup>141</sup>

b. The HIV/AIDS/STD Strategic Plan for South Africa 2000-2005

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The Strategic Plan constitutes the second attempt to guide the response of the country to the epidemic. Likewise, the Plan recognises that no single sector, ministry, department or organization is by itself responsible for addressing the HIV/AIDS epidemic.<sup>142</sup>

Four key priority areas are outlined to reducing the number of new HIV-infections and for reducing the impact of HIV/AIDS on individuals, families and communities: prevention; treatment, care and support; research, monitoring and evaluation; human and legal rights. The "treatment, care and support" component of the Strategic Plan embraces the development and expansion of care to children and orphans.<sup>143</sup>

## 2. Mitigating the impact of HIV/AIDS on OVC

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a. The National Integrated Plan for Children Infected and Affected by HIV/AIDS

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As stated above, the breadth of the needs and vulnerabilities of OVC demonstrates that a genuine multi-departmental, integrated response on behalf of the South African government is required to effectively address their experiences. A remarkable step in that direction constitutes the National Integrated Plan for Children Infected and Affected by HIV/AIDS (NIP) for which the responsibility is jointly shared by the National Departments of Health, Education and Social Development.<sup>144</sup> The overall objective of the NIP is to ensure access to an appropriate and integrated system of prevention, care and support services for children infected and affected by HIV/AIDS. The NIP consists of three core components.

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<sup>141</sup> Ibidem, p. 7.

<sup>142</sup> HIV/AIDS/STD Strategic Plan for South Africa 2000-2005, p. 5.

<sup>143</sup> Ibidem, p. 18 and p. 21.

<sup>144</sup> The National Integrated Plan for Children Infected and Affected by HIV/AIDS grew out of a meeting of the respective National Departments.

(i) The HIV/AIDS Lifeskills Programme

Delivered primarily by the Department of Education, its goal is to implement an HIV/AIDS education programme that will assist youth to acquire knowledge, develop skills and establish values that will enable them to make responsible choices.<sup>145</sup>

(ii) Home- and Community-based Care and Support (HCBCS)

These HCBCS services fall under the joint responsibility of the Health and Social Development Departments. The aim is to empower the family/community to take care of their own health and welfare; to reduce unnecessary visits and admissions to health facilities by providing palliative care at home and at the community level and ensure that children and families who are affected by HIV/AIDS have access to social development services in the community.<sup>146</sup> The vast majority of HCBCS services on the ground are delivered through NGOs, CBOs and FBOs.

(iii) HIV/AIDS Voluntary Counseling and Testing (VCT)

This programme, delivered through the Department of Health, envisages that 100% of health facilities and many non-medical testing sites such as youth centres would have VCT. There are reportedly 438 operational sites nationally with rapid VCT, which is less than 10% of the health facilities.<sup>147</sup>

b. Alternative care

The framework of formal care under South African law comprises mainly three models of care. *Foster care* is the model when a person or people agree to look after a child on a temporary basis. In the case of *adoption*, a person or people agree to permanently take care of a child who is not their own. The adoptive parents become the legal guardians of the child. A third option is institutional care and is open to children who are removed from a parent or any person if the child is considered to be in need of care.<sup>148</sup>

The informal pillar comprises the extended family, shouldering largest part of the burden in the crisis of increasing numbers of OVC. The recent phenomenon of child-

<sup>145</sup> S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 272.

<sup>146</sup> Ibidem, p. 271-272.

<sup>147</sup> Ibidem, p. 273.

<sup>148</sup> K. Barret-Grant, D. Fine, M. Heywood and A. Strode (eds.), *o.c.*, p. 256-258.

headed households could be seen as part of the informal pillar as well. In these cases, older children effectively become the caregiver for younger brothers and sisters.

Note that the transformation of the child and youth care system is currently under review with the draft Children's Bill.

#### c. Health care

From the legislative point of view, the National Health Bill of 10 June 2000 marks an innovative development in the health care of young children. It provides that government hospitals have to give free medical services to pregnant women and children below six years.<sup>149</sup>

Regarding policies, programmes and campaigns, the Department of Health launched the "Health Sector Strategic Framework: 2000-2005" which makes provision for reducing infant and under 5-mortality and set as an objective the search for affordable and practical strategies to reduce MTCT.<sup>150</sup> In South Africa, given the number of births annually and the current HIV prevalence rates, an effective programme for MTCTP can save the lives of thousands of babies.

#### d. Social security

The Social Assistance Act is the law that says when and how people can qualify for government assistance. It aims to protect and provide assistance to people who cannot support or maintain themselves for different reasons. Under that Act, two grants have importance for children orphaned and made vulnerable by HIV/AIDS.

The FCG is paid to somebody who takes care of a child that has been placed in his or her care under the Child Care Act. The CSG is given to a person who is caring for a child and whom the child lives with.

Notwithstanding the positive aspects of the current grants, the system struggles with important shortcomings, as discussed earlier. In May 2000, the South African government established an Inter-Ministerial Committee of Inquiry into a Comprehensive Social Security System, to undertake research and consultations around the current system's limitations and reform requirements.<sup>151</sup>

<sup>149</sup> Ibidem, p. 285.

<sup>150</sup> S. Giese et al., *Health and Social Services to Address the Needs of OVC Report*, p. 275.

<sup>151</sup> Ibidem, p. 284; S. Liebenberg, *The right to social assistance: the implications of Grootboom for policy reform in South Africa*, in "South African Journal on Human Rights", vol. 17, no. 2, 2001, 233 (hereafter referred to as "The right to social assistance").



#### e. Education

From the legislative point of view, the South African Schools Act of 1996 governs basic education for all children aged 7 to 15 years. According to the Act, all parents are liable to pay the school fee agreed upon by the school governing body unless you apply for and were granted an exemption.<sup>152</sup>

Considering policies, programmes and campaigns, the "Education for All Campaign" set the goal to ensure that all children have access to and are able to complete primary education that is free, compulsory and of good quality by 2015 (accessibility). In 1999 the Minister of Education launched the "National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and training Institutions" (National Policy on HIV/AIDS for Learners and Educators). It stipulates that age-appropriate education on HIV/AIDS must form part of the curriculum for all learners and students (adaptability).<sup>153</sup>

#### D. Critical assessment

##### 1. The National AIDS Plan 1994 and the HIV/AIDS/STD Strategic Plan for South Africa 2000-2005

The National AIDS Plan 1994 was comprehensive in scope. Its failure to tackle the epidemic is attributed largely to the fact that it was not implemented as envisaged. This was caused by the difficult climate of transition in which the former apartheid administration had to be restructured. The decision to keep the National Directorate for HIV/AIDS and STDs, responsible for facilitating and co-ordinating the implementation of the Plan, in the Department of Health fed the unwillingness of other departments to take responsibility for HIV/AIDS. There was a general lack of political commitment. Moreover, a series of debacles prevented to move forward, such as the Sarafina II scandal (a very costly musical which had not been tendered correctly nor proven to be awareness raising) and the Virodene P058 controversy (a

<sup>152</sup> South African Schools Act, Act No. 84 of 1996.

<sup>153</sup> Consulted in K. Barret-Grant, D. Fine, M. Heywood and A. Strobe (eds.), *o.c.*, Appendix 6, pp. 529-547.

drug developed with approval of the government but not respecting established ethical and procedural guidelines and which ultimately was found to be dangerous).<sup>154</sup>

The HIV/AIDS/STD Strategic Plan for South Africa 2000-2005 apparently wants to make up for the deficiencies of its predecessor, which are analysed extensively.<sup>155</sup> The South African Human Rights Commission (SAHRC) noted that the National Department of Health had not provided the former with details about the achievements of the Strategic Plan.<sup>156</sup> On the basis of independent research, however, the SAHRC concludes that South Africa has not succeeded in implementing the Strategic Plan sufficiently to make an impact on the reduction of the prevalence of HIV/AIDS and deaths due to the disease. The factors that contributed include lack of capacity, lack of commitment, inequality of access to adequate prevention and care and resource constraints.<sup>157</sup>

## 2. NIP

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Overall, the NIP is a very progressive plan endeavouring to address as many needs as possible. The HIV/AIDS Lifeskills Programme contributes to awareness building among children. Through HIV/AIDS education, children are enabled to understand the (effects of the) disease and the importance of safe sex. This may in turn lead to the creation of understanding and elimination of social exclusion, discrimination and stigmatization.

The HCBCS services might perform very supportive functions at home and community level, taking away part of the burden placed on children who assume caregiving and nursing roles when they live with ill caregivers. It has been reported

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<sup>154</sup> H. Marais, *o.c.*, p. 15-20; p. 22-24; p. 27-29; p. 33-42.

<sup>155</sup> HIV/AIDS/STD Strategic Plan for South Africa 2000-2005, p. 9-11.

<sup>156</sup> South African Human Rights Commission, Fourth Economic and Social Rights Report 2000-2002, Johannesburg, Mantuba Bussiness Communication, p. 118 (hereafter referred to as 4<sup>th</sup> Economic and Social Rights Report); The South African Human Rights Commission has the constitutional mandate to request information from relevant organs of state on measures taken towards the realisation of the various social and economic rights set out in the Constitution (section 184(3)). Sofar the SAHRC has issued five Reports to monitor and assess the observance of a range of socio-economic human rights in South Africa. The Reports can be consulted at <[http://www.sahrc.org.za/economic\\_and%20social\\_rights.htm](http://www.sahrc.org.za/economic_and%20social_rights.htm)>.

<sup>157</sup> SAHRC, 4<sup>th</sup> Economic and Social rights Report, p. 129.



that lack of trained personnel and budget constraints are a major impediment to the success of this arm of the NIP.<sup>158</sup>

The VCT services offer confidential testing and counseling at public health facilities to ascertain a person's HIV status, which is of the utmost importance for a person to take responsible and informed decisions. The NIP wanted to reach 100% of all health facilities by 2003 but as to January 2003 less than 10% has an operational VCT programme.

Budgets for the NIP have been progressively increased between 2000-2005. It indicates a positive degree of commitment to addressing the impact of HIV/AIDS on children. Nevertheless, what exactly has been achieved to date is difficult to say in part because progress with the implementation of the NIP is not well documented.<sup>159</sup>

The limited data available, though ill suited for general conclusions, do indicate that the implementation of the NIP faces several obstacles.

### 3. Alternative care

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The models of formal care do not always meet the needs of children. It takes a long time to put them in place and they do not reflect the reality of what is actually happening in many communities.<sup>160</sup> Because relatives or other members of the community take in many children orphaned and made vulnerable by HIV/AIDS, the South African government should direct substantial support and assistance to extended families. As such, it promotes continuity in the child's upbringing. In the short term, an equal claim could be made for child-headed households. If they serve the best interests of the co-residing children, the state must support them appropriately.

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<sup>158</sup> Ibidem, p. 129.

<sup>159</sup> S. Giese, H. Meintjes, R. Croke and R. Chamberlain, *Health and Social Services to Address the Needs of OVC Report*, p. 271.

<sup>160</sup> K. Barret-Grant, D. Fine, M. Heywood and A. Strode (eds.), *o.c.*, p. 260.

#### 4. Health care

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In addition to VCT, the provision of affordable drugs to prevent and fight HIV infections must be a priority. Prevention and treatment costs are too elevated and place consequently a huge burden on the household budget of the poor in South Africa. Children orphaned and made vulnerable by HIV/AIDS are the first to feel the brunt of deprivation under these circumstances.

In the first place, programmes for MTCTP must be implemented nationwide. Although the reduction of HIV transmission from expectant mother to newborn babies is a human rights imperative and an economic cost-effective intervention, it took a Constitutional Court ruling to oblige the state to implement a comprehensive MTCTP programme.<sup>161</sup> Since this ruling, programmes for MTCTP have been implemented to nearly universal coverage in some provinces, but some others still lag behind.

Secondly, treatment of people living with AIDS by means of highly active antiretroviral therapy (HAART) must be paid due regard too. This therapy is capable of completely suppressing the replication of the virus within a HIV positive individual. With successful HAART treatment, the immune system recovers with a significant improvement in survival rates and life expectancy.<sup>162</sup> The importance of HAART therapy is not too difficult to demonstrate: it will prolong the lives of hundred of thousands of South Africans, these people will remain economically productive and capable of taking care of their families. This suggests that the implementation of anti-retroviral programmes may reduce the number of OVC.<sup>163</sup>

In August 2003, after many years of resistance and outcry, the South African government finally bowed to public pressure and announced its support in principle for public-sector provision of HAART.<sup>164</sup>

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<sup>161</sup> Minister of Health & Others v Treatment Action Campaign & Others (1) 2002 (10) BCLR 1033 (CC); this case will be discussed more extensively in the next chapter.

<sup>162</sup> P. De Vos, *So much to do, so little done: The right of access to anti-retroviral drugs post-Grootboom*, in "Law, Democracy and Development", vol. 7, no. 1, 2003, p. 87 (hereinafter "So much to do, so little done").

<sup>163</sup> Ibidem, p. 103; L. Johnson and R. Dorrington, o.c., p. 25; see Annex I, figure 9.

<sup>164</sup> N. Nattrass, o.c., p. 13; BBC News, "South Africa gives out free AIDS drugs" at <<http://www.newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/africa/358>>.

## 5. Social security

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Evidence has been adduced that the State should adequately support the extended family. That is one of the most important ways to sustain the first line of response to the increasing numbers of children orphaned and made vulnerable by HIV/AIDS. These families cope with both high HIV prevalence and deepening poverty and consequently largely depend on state aid. In that regard, the absence of any sort of social assistance for poor children between the age of 9 and 18 years, of whom many are affected by HIV/AIDS since they live with terminally ill caregivers, is hard to understand. The Committee of Inquiry into a Comprehensive Social Security System also found that the lack of policy to address income poverty has been a constraining feature in South Africa's socio-economic programmes.<sup>165</sup>

The Joint Working Paper on "Children "in need of care" or in need of cash?", having identified the shortcomings of the present CSG and FCG, sought to indicate what social security provisions will best support children in the context of the AIDS epidemic. The Paper argues for the full extension of the CSG to all children up to 18 and the removal of the means test. The monetary value of the CSG appears at first glance to be so much smaller than a FCG, but the broader spread of a universal CSG would result in a greater net monetary transfer to neighbourhoods. In addition, the provision of a grant targeted towards some children only, is not a cost-effective way of adequately supporting the largest possible number of children who require assistance.<sup>166</sup>

## 6. Education

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In the educational field, a school fee exemption process exists but is rarely applied. School principals claim the necessity of charging school fees because the fees constitute the only discretionary income the school has. As a consequence, those who

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<sup>165</sup> Ibidem, p. 174.

<sup>166</sup> H. Meintjes, D. Bundlender, S. Giese and L. Johnson, *Children "in need of care" or in need of cash?*, p. 53-55.

are not able to pay school fees are suspended or discriminated against.<sup>167</sup> The state urgently needs to address this situation.

In addition, the school curriculum should include HIV/AIDS education if it is to meet the requirement of adaptability under the 4A-scheme of education. Both the NIP and the National Policy on HIV/AIDS for Learners and Educators work towards this goal. Comprehensive data to assess the success of including HIV/AIDS education in curriculum are not yet available. It seems, however, that these policies are neither supported by skills development nor staffing. As the SAHRC commented, policies may be good on paper, if the operational and logistical aspects are not given attention, the implementation of such policies will flounder.<sup>168</sup>

#### E. Conclusion

The present analysis ran through different stages. First, the human rights obligations of South Africa were identified and their significance for the specific situation of OVC examined. These obligations exist at the international, regional and national level and therefore constitute a well-established frame to guide the South African response to children orphaned and made vulnerable by HIV/AIDS.

Second, policies, programmes and campaigns as well as the current legislative framework were sketched.

Finally, the critical assessment revealed on the one hand that the South African government in many instances adopted progressive legislation or launched promising policies, programmes and campaigns. On the other hand, it emerged that compliance with legislation is not always guaranteed and implementation of the policies regularly lacked. In addition, some legislation does not adequately respond to the needs of OVC. This is primarily the case for the social security legislation.

<sup>167</sup> S. Giese, H. Meintjes, R. Croke and R. Chamberlain, *Health and Social Services to Address the Needs of OVC Report*, p. 185-193.

<sup>168</sup> SAHRC, 4<sup>th</sup> Economic and Social Rights Report, p. 285-286.



## Third Chapter: South Africa's socio-economic jurisprudence and its meaning for children's rights

### Introduction

This study deals with children who are increasingly made vulnerable and orphaned by HIV/AIDS because the enjoyment of their basic human rights is compromised. This chapter raises and aims at providing an answer to the challenging question how to advance the cause of these children.

Throughout this study the focus was on certain human rights. In a first part, the nature of these human rights is determined. Starting point is a distinction that is traditionally drawn between two important categories of human rights. This rigid distinction is, however, increasingly challenged in international legal doctrine.

The second part explores the South African perspective on the radical categorisation of human rights and its main consequence, the non-justiciability of economic, social and cultural rights. Since an approach developed to make these rights enforceable both at the international and national level, a comparison will be undertaken.

The third part assesses whether the South African answer to justiciability of economic, social and cultural rights may contribute to furthering the cause of children orphaned and made vulnerable by HIV/AIDS.

#### I. Human rights: amicorum disciplinorumque liber.

##### A. The nature of human rights

In the process of the legal genesis of human rights, different categories or generations of human rights emerged. Civil and political rights constitute the first generation of human rights, dating back to the eighteenth and nineteenth century. These rights laid the foundation of the notion of equality of all members of society before the law and allowed for broader participation in the exercise of sovereign power.<sup>169</sup>

Economic, social and cultural rights are associated mainly with normative and doctrinal developments taking place since the beginning of the twentieth century making it possible for all members of society to enjoy satisfactory conditions of life. The second-generation rights were born.<sup>170</sup> The theory of the three generations does not imply any hierarchy or lower or higher stages in the development of human rights law. It solely provides an illustration how the major categories of human rights emerged in political philosophy as well as in the history of national constitutions and international law.<sup>171</sup>

In respect of the particular human rights this study deals with, the same question as to their nature can be posed.

### 1. Alternative care

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The right of the child to parental care and in the absence thereof to alternative care, ensured by the Government is guaranteed in Article 20 CRC, Article 25 African Children's Charter and Section 28(1)(b) of the Constitution. Providing care is about fulfilling one's needs. It requires both the delivery of material goods and services and attention for the psychosocial needs of a person. Following this description, the right to parental or alternative care is clearly about the enjoyment of satisfactory conditions of life and can thus be construed as forming part of the set of economic, social and cultural rights.

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<sup>169</sup> A. Eide, *Economic, Social and Cultural Rights as Human rights*, in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 27 (hereafter referred to as "Economic, Social and Cultural Rights as Human rights").

<sup>170</sup> A. Rosas, *So-called Rights of the Third Generation*, in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 243. The emergence of a third generation of human rights has been recognized as well, the so-called solidarity rights, see K. Vasak, *A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, in "Unesco Courier", 1977, p. 29 and following.

<sup>171</sup> M. Nowak, *The Right to Education*, in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 195-196 (hereafter referred to as "The Right to Education").



## 2. Health care

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The child's right to health care is enshrined in Article 12 ICESCR, Article 24 CRC, Article 14 African Children's Charter, Section 28(1)(c) and Section 27(1)(a) of the Constitution. Its inclusion in the ICESCR indicates that it constitutes a second-generation right. Furthermore, it is argued that individuals have the right (to have access) to health care, not a right to be healthy. It is recognized that factors enhancing and jeopardizing human health reach far beyond the sector of health, and encompass access to employment and/or income-generation, access to housing, adequate nutrition, water and sanitation.<sup>172</sup> Hence, adequate health care forms part of the larger frame of satisfactory conditions of life, which second generation rights aim too realise.

## 3. Social security

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The right to social security is anchored in Article 9 ICESCR, Article 26 CRC and Section 27(1)(c) of the Constitution.<sup>173</sup> Nominally speaking there is little room left for doubt whether this is a social right. Second, it is covered in the ICESCR. Furthermore, the introduction of social security schemes aims at economic protection in case of sickness, disability, old age and so on. The need for such legislation can be argued on the basis of social justice or social equality, as well as in terms of securing social and political stability.<sup>174</sup> The provision of social security thus directly influences the enjoyment of satisfactory conditions of life.

## 4. Education

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<sup>172</sup> K. Tomasevski, *Health Rights*, in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 125-126.

<sup>173</sup> In the field of social security mention should be made of the Social Security Minimum Standards Convention No. 102 (1952) of the International Labour Organization.

<sup>174</sup> M. Scheinin, *The Right to Social Security*, in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 159.



Article 13 ICESCR, Article 28 CRC, Article 11 African Children's Charter and Section 29 of the Constitution embody the right to education. Contained in the ICESCR, the right to education is generally considered to be a cultural right. This is confirmed by history which shows that education has always been characterized by two major concerns of cultures and peoples, namely to transmit to the young the technical skills necessary to master the tasks of daily life as well as the religious, philosophical, cultural and social values of the respective peoples and societies.<sup>175</sup>

In conclusion: all rights under review are second-generation rights, also known as economic, social and cultural rights.

## B. Different generations, different features: the traditional discourse on human rights

### 1. Preliminary remarks

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The UDHR comprises in one consolidated text nearly the entire range of what today are recognised as human rights and fundamental freedoms. When the United Nations Commission on Human Rights, however, started to draft conventions on human rights the Western States were able to convince the Commission to divide the rights contained in the UDHR into two separate international covenants, one on civil and political rights (ICCPR) and the other on economic, social and cultural rights (ICESCR).<sup>176</sup> The identification of two separate groups of rights was thus a result of the ideological rivalry between the East and the West: the Soviet States, on the one hand, championed the cause of economic, social and cultural rights, which they associated with the aims of the socialist society. Western States, on the other hand, asserted the priority of civil and political rights as being the foundation of liberty and democracy in the "free world".<sup>177</sup> As a result, it has become common to consider the International Bill of Rights to consist of two distinct categories of human rights. The

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<sup>175</sup> M. Nowak, *The Right to Education*, p. 189-190; see also, A. Eide, *Cultural Rights as Individual Human Rights*, in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 237.

<sup>176</sup> A. Eide and A. Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights: A Textbook*, Dordrecht, Martinus Nijhoff Publishers, 1995, p. 15.

<sup>177</sup> M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford, Clarendon Press, 1998, p. 9.

present section goes deeper into the distinction between the two sets of rights and its implications.

## 2. Civil and political rights

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Philosophically, the first generation human rights have their roots in the natural rights philosophies of Hobbes and Locke of the 17<sup>th</sup> and 18<sup>th</sup> centuries. One of the principal tenets of the natural rights theory was its emphasis on individualism and freedom from State interference.

This explains the nature of civil and political rights as negative human rights, requiring the State to respect the rights and fundamental freedoms of the individual. The State must refrain from interfering with the enjoyment of the individual's right. In that sense, these rights are "absolute" and "immediate": these rights can be realised immediately because no action on behalf of the State is required. As a result, civil and political rights are justiciable in the sense that individuals can invoke them before the courts and the latter can enforce them.<sup>178</sup>

## 3. Economic, social and cultural rights

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Philosophically, the second-generation human rights derive from the growth of social ideals in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries and the rise of the labour movement in Europe. It was argued that the ideals of freedom or moral autonomy can only be made meaningful if the individual also enjoys a certain degree of material security. Therefore economic, social and cultural rights constitute essential conditions for the full enjoyment of civil and political rights.

This explains why these rights are regarded as positive rights. The State must take positive steps to realise these rights, which are programmatic and can thus only be implemented gradually. As economic, social and cultural rights are considered to be directed primarily at States, they lack any degree of justiciability.<sup>179</sup>

## 4. Children orphaned and made vulnerable by HIV/AIDS: claiming or dreaming?

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<sup>178</sup> A. Eide, *Economic, Social and Cultural Rights as Human rights*, p. 22.

<sup>179</sup> *Ibidem*, p. 22.

Since the drafting of the covenants, the justiciable civil and political rights have attracted much attention in theory and practice, while the programmatic economic, social and cultural rights have often been neglected.<sup>180</sup> The 1951 decision of the United Nations General Assembly to draft two different covenants for the two categories of rights clearly intended not to imply any notion of relative value. Nevertheless, it has reinforced claims as to the hierarchical ascendance of civil and political rights.<sup>181</sup> As the Committee on Economic, social and Cultural Rights has pointed out:

*“the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.”*<sup>182</sup>

The same degree of skepticism with economic, social and cultural rights exists at the national level. Even in those States where these rights are constitutionally enacted or where the ICESCR forms part of domestic law, national courts have relied upon the assumption that these rights are not justiciable, with the result that they have rarely given them full effect.<sup>183</sup>

In 1993 the World Conference on Human Rights, in which 171 States took part, asserted that “all human rights are universal, indivisible and interdependent and interrelated”.<sup>184</sup> Fortunately, this statement did not remain dead letter. In recent times, the traditional discourse on human rights has been challenged and several approaches emerged to facilitate the monitoring and assessing of the implementation of economic, social and cultural rights.

<sup>180</sup> A. Eide and A. Rosas, *o.c.*, p. 15.

<sup>181</sup> M. Craven, *o.c.*, p. 9.

<sup>182</sup> CESCR, *Statement to the World Conference on Human Rights*, UN Doc. E/1993/22, para. 5.

<sup>183</sup> M. Craven, *o.c.*, p. 10.

<sup>184</sup> The World Conference on Human Rights: Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, Part I, para. 5.

### C. Of shells and bursts: challenging tradition

The major factor that led to the undervaluing of economic, social and cultural rights, is the standard of implementation specified in the ICESCR: Article 2(1) qualifies the State's obligation relating to these rights in three respects. The State is required "to take steps", "within its available resources" with a view to "progressively achieve the full realisation of the right".

#### 1. Obligations of immediate effect

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The CESCR acknowledges that the ICESCR limits the positive obligations of the State, but it also imposes various obligations, which are of immediate effect.<sup>185</sup>

States have the immediate obligation to ensure that the rights enunciated in the ICESCR will be exercised without discrimination of any kind in conformity with Article 2(2). Another obligation with immediate effect is the undertaking in Article 2(1) "to take steps", which in itself, is not qualified or limited by other considerations. While the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonable short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>186</sup>

At the level of particular rights, the CESCR stated that several aspects of economic, social and cultural rights are justiciable, such as: equal pay for equal work, trade union rights, child labour laws, a number of educational rights and academic, scientific and artistic freedom.<sup>187</sup>

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<sup>185</sup> CESCR, The Nature of States Parties Obligations (Art. 2(1)), General Comment No. 3, 5<sup>th</sup> Session, 1990, para 1 (hereafter referred to as General Comment No. 3).

<sup>186</sup> Ibidem, para 2.

<sup>187</sup> Ibidem, para 5; S. Russell, *Minimum State Obligations: International Dimensions*, in D. Brand and S. Russell (eds.), *Exploring the core content of socio-economic rights: South African and international perspectives*, Pretoria, Protea Book House, 2002, p. 13.

Furthermore, the CESCR argued that in matters involving the allocation of resources, which should be left to the political authorities, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters, which have important resource implications.<sup>188</sup> Indeed, civil and political rights are sometimes subject to progressive realization and thus resource-intensive too. The European Court of Human Rights (ECHR) recognises since a long time that the fulfillment of a duty under the European Convention for the Protection of Human Rights and Fundamental Freedoms sometimes requires positive action.<sup>189</sup> The most illustrative example is the Airey case, in which the ECHR interpreted the right to a fair trial in civil lawsuits as encompassing the right to legal aid for people of modest means. Such a dictum has beyond doubt financial implications for the State. The Court, however, justified its judgment as follows:

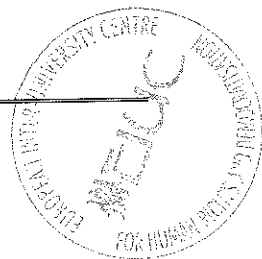
*“the Court is aware that the further realisation of social and economic rights is largely dependent on the situation –notably financial– reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present day conditions and is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essential civil and political rights many of them have implications of a social and economic nature [...] the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention.”*<sup>190</sup>

## 2. The “violations approach”

<sup>188</sup> CESCR, The Domestic Application of the Covenant, General Comment No. 9, 19<sup>th</sup> Session, 1998, para 4-10.

<sup>189</sup> I. E. Koch, *The Justiciability of Indivisible Rights*, in “Nordic journal of International Law”, vol. 72, 2003, p. 21; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222 (entry into force on 3 September 1953).

<sup>190</sup> Airey v. Ireland, E.C.H.R. Series A, no. 32, Judgment of 9 October 1979, para 26.





Another approach to monitoring economic, social and cultural rights, seeks to focus on identifying violations of the rights enumerated in the ICESCR.<sup>191</sup> A violation is defined as a failure, either by action or omission, by a State Party to comply with an obligation contained in the ICESCR.<sup>192</sup> Building on the Limburg Principles and the proposed "violations approach", a group of experts then drafted the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.<sup>193</sup>

On the one hand, this approach has the advantage that monitoring violations does not depend on access to extensive and good quality statistical data. On the other hand, the identification of violations in order to end and rectify abuses constitutes a higher priority than promoting progressive realization for its own sake.<sup>194</sup>

It was contended, however, that by concentrating on the most flagrant abuses, it would weaken the call for eventual full implementation of economic and social rights. Moreover, violations do not exist in the abstract, to understand a violation it is necessary first to understand the right being violated and thus one needs to delineate the scope of the right.<sup>195</sup>

### 3. Minimum core obligation

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The concept of "minimum core obligation" also aims at facilitating the assessment of State compliance with its obligations relating to economic, social and cultural rights. . The concept received its most authoritative expression in General Comment No. 3 of the CESCR:

*"The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of basic foodstuffs,*

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<sup>191</sup> A. Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, in 18 "Human Rights Quarterly" 23, 1996.(uitgever+pagina)

<sup>192</sup> T. van Boven, C. Flinterman and F. Westendorp, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, in 9 "Human Rights Quarterly" 121, 1987 (uitgever+pagina).

<sup>193</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, in 20 "Human Rights Quarterly" 691, 1998.

<sup>194</sup> A. Chapman, o.c., p. ???

<sup>195</sup> A. Chapman and S. Russell, *Introduction*, in A. R. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerp, Intersentia, 2002, p. 7-8 (hereafter referred to as "Introduction").

*essential primary health care, basic shelter and housing, or the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obliges each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."*<sup>196</sup>

This concept construes (the minimum essential levels of) economic, social and cultural rights as directly enforceable entitlements. A more detailed discussion of the minimum core follows in section II, B, 3.

#### D. Final remarks

The rights to alternative care, health care, social security and education are part of the economic, social and cultural rights as opposed to civil and political rights. For much too long these rights were regarded not just as second generation rights but even as second rate rights, mainly because they were viewed not to be justiciable.

The last decade witnessed the emergence of different attempts to upgrade the legal status of these rights, seeking to construe (aspects of) economic, social and cultural rights as enforceable rights. Justiciability enables the aggrieved individual to invoke a right before a court of law to hold the government accountable and seek redress for violations.

#### II. Taking "Justiciability" seriously: the South African example

<sup>196</sup> CESCR, General Comment No. 3, para 10.



In the South African legal order, the justiciability issue surrounding economic, social and cultural rights has attracted attention as well. First, the 1996 Constitution and its approach to economic, social and cultural rights is given a closer look. A second part analyses the recent South African jurisprudence on socio-economic rights and the commitment it has made to enforcing these rights. Subsequently, the South African "reasonableness standard" is compared to the internationally promoted doctrine of minimum core obligation.

## A. The Constitution of South Africa

### 1. To be or not to be justiciable

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Contemporary social and economic conditions in South Africa, such as extreme and widespread socio-economic deprivation, inequality and injustice led the drafters of the 1996 Constitution to entrench a wide range of socio-economic rights in the Bill of Rights. These rights are included not as a set of special rights or directive principles but as an indivisible and interrelated aspect of the Bill of Rights as a whole. As a consequence, no distinction is made between the nature and scope of civil and political rights and social and economic rights and the obligations engendered by them. This is particularly well illustrated by Section 7(2) Constitution, which stipulates that the State must respect, protect, promote and fulfil the rights in the Bill of Rights. The *duty to respect* implies an immediate obligation on the State to refrain from interfering with people's access to, or enjoyment of the right in question. The *duty to protect* requires the State to prevent a right from being violated by the conduct of third parties. The *obligation to promote* enjoins the State to create an atmosphere in which people can be able to exercise their rights and freedoms by promoting tolerance and raising awareness of the rights. The *obligation to fulfil* requires the State to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.<sup>197</sup> Hence, Section 7(2) has two components to it, the negative and positive aspects, implying that all the human rights in the Bill of Rights engender a combination of negative and positive duties.<sup>198</sup>

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<sup>197</sup> SAHRC, 4<sup>th</sup> Economic and Social Rights Report, p. 4-5.

<sup>198</sup> P. De Vos, *Transformative Justice: Social and Economic rights in the South African Constitution*, in P. Van der Auweraert, T. De Pelsmaecker, J. Sarkin and J. Vande lanotte (eds.), *Social, Economic and*

In Section 38 the Constitution furthermore ensures that the courts may enforce all the rights in the Bill of Rights<sup>199</sup>.

Their inclusion, however, was not unopposed, all possible objections against justiciable second-generation rights were raised during the drafting process.<sup>200</sup> The Constitutional Court of South Africa (CC) discussed the nature of social and economic rights and the problem of their enforcement in its First Certification Judgment and overruled the arguments contra.

*“ It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extensions of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers.*

*Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the New Constitution will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.”*<sup>201</sup>

The Court confirms that the socio-economic rights in the 1996 Constitution are justiciable. As to the extent of their justiciability, negative protection is merely the

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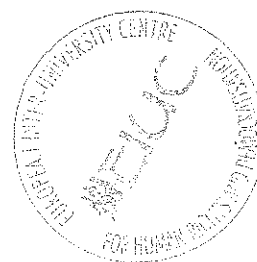
*Cultural Rights – An Appraisal of Current European and International Developments*, Antwerpen, Maklu, 2002, p. 246-247 (hereafter Transformative Justice).

<sup>199</sup> S. Liebenberg, *The Interpretation of Socio-Economic Rights*, no 33-1 (hereinafter Interpretation).

<sup>200</sup> J. De Waal, I. Currie and G. Erasmus, *o.c.*, p. 433.

<sup>201</sup> First Certification Judgment, para 77-78.

minimum extent to which the rights can be judicially protected and does not exhaust the possibilities of justiciability.<sup>202</sup>



## 2. Rights and qualifications

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The economic and social rights included in the Constitution can be mainly divided into two categories. The first category entrenches a set of qualified rights, namely the right of everyone "to have access to".<sup>203</sup> The obligations of the State regarding these rights are expressly qualified: the State must take reasonable legislative and other measures, to achieve the progressive realization of each of these rights, within its available resources. These rights do not impose a duty on the State to provide the full enjoyment of the rights in question on demand. One should bear in mind, however, that only the positive duties are limited. The qualifications have no impact on the negative duty of the State to respect these human rights.<sup>204</sup> Moreover, some of these negative duties are explicitly pronounced in the Constitution: Section 26(3) prohibits the State to arbitrarily evict anyone and Section 27(3) prohibits the refusal to anyone of emergency medical treatment.

A second category entrenches unqualified or direct rights. The obligation of the State regarding these rights is not qualified by reference to reasonable measures, progressive realization and resource availability.<sup>205</sup> At first glance, these rights impose absolute duties on the State, and if the State fails to discharge itself of its duty, it can only attempt to justify that failure in terms of the general limitations clause contained in Section 36 of the Constitution.<sup>206</sup>

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<sup>202</sup> J. De Waal, I. Currie and G. Erasmus, *o.c.*, p. 434.

<sup>203</sup> Socio-economic rights of this kind are found in Section 24, 25(5), 26(1), 27(1) and 29(1)(b) of the Constitution; the qualifications are mostly spelled out in a second subsection.

<sup>204</sup> S. Liebenberg, *The Protection of Economic, Social and Cultural Rights in Domestic Legal Systems*, in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, The Hague, Martinus Nijhoff Publishers, 2001, 61-62 (hereafter "ESC Rights in Domestic Legal Systems")

<sup>205</sup> *Ibidem*, p. 61; Socio-economic rights of this kind are found in Section 28(1)(c), 29(1)(a) and 35(2)(e).

<sup>206</sup> Section 36(1): "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic

For the purpose of this study, it is important to keep in mind that the socio-economic rights of children orphaned and made vulnerable by HIV/AIDS considered earlier fall into both categories: the right to family or appropriate alternative care (Section 28(1)(b)), the right to basic health care services (Section 28(1)(c)) and the right to basic education (Section 29(1)(a)) are unqualified rights. The entitlement to health care (Section 27(1)(a)) and the right to social security (Section 27(1)(c)) are qualified and hence limit the positive duties of the State.

## B. The judiciary of South Africa

### 1. Preliminary remarks

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“Pious wishes or directly enforceable human rights?: social and economic rights in South Africa’s 1996 Constitution” is the challenging title of a paper published in 1997 shortly after the entry into force of the final Constitution. The author states that the formal recognition of economic and social rights in the Constitution does not automatically guarantee their practical and effective protection.<sup>207</sup> Much depends on the commitment and the willingness of the judiciary to enforcing these rights. In three leading cases the CC indicated how it approaches the interpretation and enforcement of this set of rights.

### 2. South Africa’s evolving jurisprudence on socio-economic rights

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#### a. Soobramoney v Minister of Health, KwaZulu-Natal

In this first case, the applicant sought a positive order from the courts directing a state hospital to provide him with dialysis treatment since he suffered chronic renal failure. His claim was based on Section 27(3), the right against the refusal of emergency medical treatment, and Section 11 Constitution, the right to life.

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society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose”.

<sup>207</sup> P. De Vos, *Pious Wisher or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa’s 1996 Constitution*, in “South African Journal on Human Rights”, 1997, p. 67-68 (hereafter referred to as “Pious Wisher or Directly Enforceable Human Rights?”).

The application was dismissed in the High Court and taken on appeal to the CC, which decided that the demand for renal dialysis treatment at a state hospital did not fall within the scope of Section 27(3). It held that the condition of chronic renal failure was not a sudden catastrophe or unexpected trauma and fell consequently outside the ambit of an emergency.<sup>208</sup>

Then the Court considered the claim under Section 27(1)(a) and (2) containing the right to have access to health care services respectively the limits on the positive duty for the State. The Court was of the view that on account of scarcity of resources, the State was not violating its obligations under the relevant section. The CC would give a large margin of discretion to the political and administrative organs for the setting of budgetary priorities and would be slow to interfere with rational decisions taken in good faith.<sup>209</sup>

In *Soobramoney*, the real dispute was not whether the medical authorities had drawn up reasonable guidelines for determining which patients qualified for dialysis treatment, but whether sufficient funds had been allocated to provide the said treatment to those in the applicant's position.<sup>210</sup> The CC acknowledges that realising socio-economic rights is indispensable to the success of South Africa's constitutional democracy in which still millions of people live in deplorable conditions and in great poverty. However, the judgment reveals a Court anxious to establish a restrained role for itself in the enforcement of these rights, since it would afford wide latitude to the legislative and executive in realising these rights.<sup>211</sup> The Court showed itself concerned with the degree of interference in social and budgetary policies that a positive order would constitute.

Concern was expressed as well about the lack of any systematic approach to the determination of socio-economic rights. The Court indicated that it would intervene under Section 27(1) juncto (2) only in situations where policies and legislation were

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<sup>208</sup> *Soobramoney v Minister of Health, KwaZulu-Natal*, 1997 (12) BCLR 1696 (CC), para 18-20 (hereafter referred to as *Soobramoney*).

<sup>209</sup> *Ibidem*, para 28-33.

<sup>210</sup> *Ibidem*, para 23.

<sup>211</sup> S. Liebenberg, *South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?*, in "Law, Democracy and Development", vol. 6, 2002, p. 165-168 (hereafter referred to as "South Africa's evolving jurisprudence").

irrational in their formulation or implementation. However, no guidelines as how to understand the rationality standard were laid down.<sup>212</sup>

b. *Government of the Republic of South Africa and Others v Grootboom and Others*

The second case concerned a group of adults and children who moved onto private land from an informal settlement owing to the appalling conditions they were living in. Following an eviction from the private land, they camped on a sports field where they could not erect adequate shelters since their building materials had been destroyed during the eviction. Accordingly, they applied to the High Court for an order requiring the state or its organs to provide them with adequate housing or, in the alternative, basic shelter, relying on Section 26 –right to have access to adequate housing- and Section 28(1)(c) –children’s right to shelter- Constitution.

(i) High Court

The High Court held that there was no violation of Section 26 because the provincial authorities had produced clear evidence of a rational housing programme designed to solve a pressing problem in the context of scarce financial resources.<sup>213</sup> It upheld, however, the argument based on Section 28(1)(c). It reasoned that the primary responsibility to maintain a child rests on its parents but the state nevertheless incurs an obligation to provide rudimentary shelter for children when their parents are unable to do so. The parents enjoy under these circumstances a derivative right to be accommodated with their children in that shelter.<sup>214</sup>

The court was apparently prepared to impose a direct duty on the government to provide certain basic goods to individuals in certain circumstances.<sup>215</sup>

(ii) Constitutional Court

Before the CC, the amici curiae pointed to the unjust result of the reasoning of the High Court: adults without children would be excluded from shelter in crisis situations while those with children obtained relief. Therefore, they argued to read

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<sup>212</sup> Ibidem, p. 168; C. Ngweni, *Access to antiretroviral therapy to prevent mother-to-child transmission of HIV as a socio-economic right: an application of section 27 of the Constitution*, in “SA Publiekreg/Public Law”, vol. 18, no. 1, 2003, p. 92.

<sup>213</sup> *Grootboom v Oostenberg Municipality and Others*, 2000 (3) BCLR 277 (C), 286H-I.

<sup>214</sup> Ibidem, 288B-C and 289C-D.

<sup>215</sup> S. Liebenberg, *South Africa’s evolving jurisprudence*, p. 169.



into Section 26(1) juncto (2) a minimum core obligation –in line with the approach of the CESCR to State obligations under the ICESCR- for the State. The minimum core should ensure that those who are truly homeless and in crisis situations receive some rudimentary form of shelter; the state has a burden to demonstrate that it has used all resources at its disposal to satisfy, as a matter of priority, its minimum core obligation. Section 28(1)(c) is in that respect nothing more than a specific manifestation of this minimum core obligation.<sup>216</sup>

The CC thoroughly analysed Section 26(1) and (2). Subsection (1) it interpreted as imposing a negative obligation on the state and all other entities to abstain from preventing or impairing the right of access to adequate housing. As far as this negative duty is concerned, the resource or progressive realisation arguments cannot be relied upon by the State.<sup>217</sup>

Subsection (2) defines the positive obligations imposed on the State, which are limited because the State is only required to take reasonable measures, to achieve the progressive realization of the right to adequate housing within its available resources. In assessing the positive obligation, the Court did not endorse the notion of a minimum core obligation since it would be difficult to determine in abstract what the minimum threshold should be for the realisation of the rights as the opportunities for fulfilling these rights varied considerably and needs were diverse.<sup>218</sup> The real question is whether the measures taken by the State to fulfil its positive duties under Section 26 are *reasonable*.<sup>219</sup> A court considering reasonableness would not enquire whether more desirable or favourable measures could have been adopted, a wide range of possible measures could be adopted by the State. Provided that the State could show that the measures it adopted meet this standard of reasonableness, the Court would not interfere.<sup>220</sup>

Considering the unqualified socio-economic rights of children in Section 28(1)(c) read together with Section 28(1)(b), it held that the latter defines those responsible for

<sup>216</sup> Ibidem, p. 169-170; the amici curiae were the South African Human Rights Commission and the Community Law Centre of the University of the Western Cape.

<sup>217</sup> Government of the Republic of South Africa and Others v Grootboom and Others, 2000 (11) BCLR 1169 (CC), para 34 (hereafter referred to as Grootboom).

<sup>218</sup> Ibidem, para 31-33.

<sup>219</sup> Ibidem, para 33.

<sup>220</sup> Ibidem, para 41.

giving care, while the former enumerates various aspects of the care entitlement. Hence, the primary responsibility to realise a child's socio-economic rights rests on the parents or family. It is only when a child lacks family care that the State incurs an obligation to provide shelter to him or her. It follows that Section 28(1)(c) does not create any primary State obligation to provide shelter on demand to parents and their children if parents or families are caring for their children.<sup>221</sup> This evidences the Court's reluctance to interpret even the unqualified socio-economic rights provisions in the Constitution to include an individual claim for direct material assistance from the State.<sup>222</sup> Consequently, the Constitutional Court found no violation of the right of children to shelter.

### (iii) Reasonableness

Contrary to the approach in *Soobramoney*, the CC spelled out the "reasonableness standard". The following criteria for a reasonable government programme to realise socio-economic rights are found in the *Grootboom* judgment:

[1] The programme must be a *comprehensive and coordinated* one, which clearly allocates responsibilities and tasks to the different spheres of government and ensures that the appropriate financial and human resources are available.

[2] Policies and programmes must be *reasonable both in their conception and their implementation*.

[3] The programme must be *balanced and flexible* and make appropriate provision for attention to crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.

[4] Measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights is therefore most imperiled, must not be ignored. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the reasonableness test.<sup>223</sup>

In addition, the reasonableness review should take due account of the fact that the rights cannot be realised immediately. Programmes must examine legal, administrative, operational and financial hurdles and lower them over time. Socio-

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<sup>221</sup> Ibidem, para 76-77.

<sup>222</sup> S. Liebenberg, *South Africa's evolving jurisprudence*, p. 174.

<sup>223</sup> Grootboom, para 39-44.

economic goods and services must be made more accessible not only to a larger number of people but also to a wider range of people. Furthermore, the State cannot be required to do more than its available resources permit.<sup>224</sup>

Whether the nationwide housing programme was sufficiently flexible to respond to those in desperate need in society and to cater appropriately for immediate and short term requirements, was negatively answered by the CC. In its order, the Court declared that the programme did not comply with the State's obligation under Section 26(2) in that it failed to make reasonable provision within its available resources for people with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.<sup>225</sup>

#### (iv) Assessment

*Grootboom* has been hailed as a landmark in the development of the jurisprudence on socio-economic rights for a number of reasons. First, the Court considered international human rights jurisprudence and drew inspiration from the provisions of the ICESCR as an aid to constitutional interpretation.<sup>226</sup>

Second, it recognises the negative duty to respect (existing levels of) access to socio-economic rights under the first subsections of Section 26 and 27. This will facilitate direct challenges to measures that prevent or impair people's access to these rights, not at all hindered by considerations of available resources, progressive realisation or reasonable measures.<sup>227</sup>

Third, the CC has demonstrated a clear willingness to enforce the positive duties imposed by qualified socio-economic rights. The decision set out substantial criteria for judging whether the State has fulfilled its positive duties to realise the socio-economic rights in Sections 26 and 27 Constitution. The key question is whether the measures adopted by the state are "reasonable".<sup>228</sup>

But it was acknowledged at the same time that the judgment poses some key challenges. Children's rights activists have criticised the interpretation given by the

<sup>224</sup> Ibidem, paran 45-46.

<sup>225</sup> Ibidem, para 66-69 and 99.

<sup>226</sup> C. Ngweni, *o.c.*, p. 93.

<sup>227</sup> S. Liebenberg, *South Africa's evolving jurisprudence*, p. 178-179.

<sup>228</sup> S. Liebenberg, *The Courts and Socio-Economic Rights: carving out a role*, in "ESR Review", vol. 3, no. 1, 2002, p. 6.

CC to the socio-economic rights of children<sup>229</sup>: constitutionally construed as direct rights, the Court nevertheless does not confer a right upon the individual to claim basic goods and services from the State, unless the child would lack family or parental care.

Secondly, the refusal to read into Section 26 and 27 a minimum core obligation elicited criticism. On this particular point will be elaborated further when comparing the notion of minimum core with the reasonableness doctrine (3<sup>rd</sup> Chapter, II, B, 3).

#### c. Minister of Health and Others v Treatment Action Campaign and Others

In 2000, as part of its response to the HIV/AIDS crisis, the government devised a programme for PMTCT in the public health sector using Nevirapine as the anti retroviral drug of choice. The programme was confined to 18 pilot sites (2 in each province) and medical practitioners outside the sites were prohibited to prescribe Nevirapine. The government wished to monitor the safety of Nevirapine prior to extending the PMTCT programme and the pilot sites would be used to assess the human and material resources needed to develop a comprehensive and universal package for PMTCT. The Treatment Action Campaign (TAC), a pressure group founded in 1999 and the principal applicant, contended that the measures adopted by the government were deficient in two respects: first, because government prohibited the administration of the drug at public hospitals and clinics outside the pilot sites, even where the use of the drug was medically indicated. Second, because government failed to implement a comprehensive programme for PMTCT.

##### (i) High Court

The High Court approved both contentions. In the first place, it held that prohibiting the use of nevirapine outside the 18 pilot sites constituted an unjustifiable barrier to the progressive realisation of the right to have access to health care in Section 27(1)(a). In the second place, the current PMTCT programme failed the reasonableness test, as it did not constitute a comprehensive and coordinated plan to prevent or reduce mother-to-child transmission of HIV.<sup>230</sup>

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<sup>229</sup> Ibidem, p. 7.

<sup>230</sup> Treatment Action Campaign and Others v Minister of Health and Others, 2002 (4) BCLR 356 (T), 385D-E.

(ii) Constitutional Court

On appeal, two of the amici curiae<sup>231</sup> in the case attempted to persuade the Court to impose minimum core obligations under Section 27, arguing that every individual is entitled to a basic core of health care services comprising the minimum necessary for dignified human existence.

This core right, they continued, is not subject to the limitations of resource constraints and progressive realisation under Section 27(2).<sup>232</sup>

Again, the CC rejected the idea of a minimum core obligation because courts are institutionally not equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards should be.<sup>233</sup> Therefore, individual right holders have no direct right to claim anything specific from the State under Section 27(1). All that can be expected from the State is that it acts reasonably to provide access to the socio-economic rights in Section 26 and 27.<sup>234</sup>

The CC then affirmed that Section 27(1) contains the negative duty for the State to refrain from preventing or impairing the enjoyment of the right to have access to health care, not limited by reference to resource availability or progressive realisation. In regard of the positive duty under Section 27(2), the CC applied the reasonableness test and answered the two contentions made by the applicants. First, the policy of restricting the provision of Nevirapine impacted seriously on a significant group of HIV positive mothers and children who did not have access to the research sites. As they were too poor to purchase the drug, they were effectively deprived of access to a simple, cheap and potentially life-saving medical intervention. This restrictive policy was unreasonable in that it was inflexible and did not take account of the needs of a particularly vulnerable group.<sup>235</sup>

Second, the CC found that the government had no comprehensive plan for PMTCT. It held that if it was not reasonable to restrict the use of Nevirapine to the research and training sites, the policy as a whole will have to be reviewed. Hospitals and clinics

<sup>231</sup> The Community Law Centre of the University of the Western Cape and the Institute for Democracy in South Africa (Idasa).

<sup>232</sup> S. Liebenberg, *South Africa's evolving jurisprudence*, p. 182.

<sup>233</sup> Ibidem, para 37.

<sup>234</sup> Minister of Health and Others v Treatment Action Campaign and Others, 2002 (10) BCLR 1033 (CC), para 29-35 (hereinafter the TAC case).

<sup>235</sup> Ibidem, para 70-73.

that have testing and counselling facilities should be able to prescribe the drug where that is medically indicated.<sup>236</sup>

### (iii) Reasonableness

In the *TAC* case, the CC added to the list of criteria constituting reasonableness the requirement of transparency. The Court held that a public health programme –and by extension any public policy- if it were to be implemented optimally, must be made known effectively to all concerned.<sup>237</sup> This additional constitutional requirement for valid socio-economic policy is potentially very important. If government policy is appropriately made known, the inconsistencies, the gaps and the inadequacies that can render it unconstitutional, can be more easily identified. As such, transparency is an important weapon in the hands of future socio-economic rights litigants.<sup>238</sup>

### (iv) Assessment

The most important feature of the *TAC* judgment is that it firmly anchors the reasonableness review for monitoring and enforcing the implementation of qualified socio-economic rights under the South African Constitution. The CC followed the doctrinal lines of the landmark decision in *Grootboom* and hence consolidated the approach taken in that decision, implying a rejection of the notion of minimum core obligation.<sup>239</sup> Since the Court described the elements to be taken into consideration when assessing the reasonableness of governmental policies, lower courts have clear guidance for settling future socio-economic litigation. Note that in the *TAC* case the CC added the requirement of transparency.

In the *TAC* case, the CC introduced on the other hand a subtle change to its interpretation of the scope of application of the direct socio-economic rights of children. The Court said that the provision of Nevirapine for the purpose of PMTCT is essential for children and thus falls within the ambit of basic health care (Section 28(1)(c)). It then repeated that the primary obligation to provide basic health care services rests on the parents of the child, but this does not mean that the State incurs no obligation in relation to children who are being cared for by their parents or

<sup>236</sup> Ibidem, para 95.

<sup>237</sup> Ibidem, para 123.

<sup>238</sup> D. Brand, *Annotation to Constitutional Court of South Africa 5 July 2002, Case CCT 8/02, Minister of Health v Treatment Action Campaign*, in "Tilburg Foreign Law Review", vol 11, no. 3, 2003, p. 694 (hereinafter Annotation).

<sup>239</sup> C. Ngwena, *o.c.*, p. 96.



families. The CC subsequently pointed out that the case concerned children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment. As a consequence, the State is obliged to provide basic health care to children of destitute parents.<sup>240</sup>

Another remarkable advance has to do with the remedial powers of the courts. The *Grootboom* decision, though praised for its innovativeness, failed to make a real change to both the situation of the shack dwellers and the government housing policy. The main reason lies with the declaratory orders the CC had handed down, which do not compel the State to take steps to ensure that its programme complies with the constitutional requirements nor do they contain time frames within which the state has to act.<sup>241</sup> In the *TAC* case, the Court stated that courts must grant effective relief and depending on the circumstances of the case, the relief required may be only a declaratory order, but may include both a mandatory order and a supervisory interdict.<sup>242</sup> Subsequently, the CC granted both declaratory and mandatory orders, specifically demanding government to make Nevirapine available and describing the conditions under which it must be provided. It did not, however, retain supervisory jurisdiction over the case requiring the State to report to it on a return date about the steps it had taken to implement the mandatory order.<sup>243</sup>

### 3. Minimum core obligation v reasonableness review

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In both *Grootboom* and *TAC* the argument was advanced to read into the relevant sections a minimum core obligation. The CC was not prepared to endorse the notion of a minimum core obligation and established instead the reasonableness standard as a means to enforce economic, social and cultural rights.

In the following, both approaches are compared and assessed.

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<sup>240</sup> *TAC*, para 79.

<sup>241</sup> K. Pillay, *Implementing Grootboom: Supervision needed*, in "ESR Review", vol. 3, no. 1, 2002, 14; K. Pillay, *Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights*, in "Law, Democracy and Development", vol. 6, no. 2, 2002, p. 264-265.

<sup>242</sup> *Ibidem*, para. 106 and 113.

<sup>243</sup> D. Brand, *Annotation*, p. 697.

a. The minimum core: a definitional problem

Core obligations identify a set of key requirements (minimum essential levels of economic, social and cultural rights) that are of immediate effect and do not vary for States. By definition these obligations apply irrespective of the availability of resources or any other considerations.<sup>244</sup> But is it possible to define a minimum core as such of each right? Having just superficially a look at the current levels of development and living conditions throughout the world, one has to admit large disparities exist. As things are, it may be extremely difficult to determine an *invariable minimum obligation*.

Take the example of free primary education for all, generally considered to be part of the core content of the right to education.<sup>245</sup> Many developing countries have not yet attained the implementation of this minimum service. Developed countries have in that respect realised more, but cope with serious challenges to adjust the educational institutions to the phenomenon of multiculturalism. Western countries witnessed the last decades an influx of migrants, whose needs require to be accommodated if the curriculum is to meet the requirements of adaptability and acceptability. It seems that any assessment of what is "minimum", will need to take account of various needs occurring in different settings and thus the application of different standards becomes inevitable. Largely due to the difficulties to define in abstract what the minimum threshold should be for the realisation of a right, the CC rejected the concept of minimum core obligation. It was counter argued that the courts are not called upon to define in abstract the necessities that must be provided. Instead they should define the general principles underlying the concept of minimum core obligations in relation to socio-economic rights, and apply these contextually on a case-by-case basis.<sup>246</sup> However, whether one can then still speak of a minimum core in the sense of key requirements not varying from state to state is questionable.

<sup>244</sup> A. Chapman, *Core obligations related to the right to health and their relevance for South Africa*, in D. Brand and S. Russell (eds.), *Exploring the core content of socio-economic rights: South African and international perspectives*, Pretoria, Protea Book House, 2002, p. 37.

<sup>245</sup> F. Coomans, *Core content of the right to education*, p. 168-172.

<sup>246</sup> S. Liebenberg, *South Africa's evolving jurisprudence*, p. 175.

b. The minimum core: a practical problem

If the minimum core comprises the essential elements without which a right loses its substantive significance<sup>247</sup>, the State is allegedly compelled to provide a certain basket of services and goods. This would once again overlook the fact that different levels of development require the provisioning of different goods and services.

In addition, it would require the courts in case of litigation to prescribe exactly what the authorities have to do to comply with their obligations regarding economic, social and cultural rights. Such a development would do away with the doctrine of the separation of powers which leaves the setting of policy priorities to the legislative and the executive and the reviewing of the latter's actions or omissions to the judiciary. Applying the reasonableness test to government policy does not risk prescribing what should be done, but opens the way for a constructive dialogue –rather than a powers struggle- between the judiciary and the political authorities.<sup>248</sup>

c. The minimum core: a resource problem

Another potential weakness in the approach is that its basic assumption, that minimum core obligations are by definition affordable, may be untenable.<sup>249</sup> To bridge minimum obligations with the necessary resources, several factors need special consideration, but none of them resolves the problem. First, the ICESCR and the General Comments do not anticipate that the necessary resources will come entirely from the State. The resources they refer to are those that are available within the society as a whole, from the private sector as well as the public.<sup>250</sup> Further, the ICESCR underlines the obligation of wealthier countries to make resources available to poorer countries in the frame of international cooperation. Above all, many resource problems root in the misallocation of resources so that a reordering of priorities will alleviate some of the resource burden.<sup>251</sup>

All this looks good on paper, but finds seldom practical application. Research cited earlier in this study, documents that primary education is still not cost-free. School principals can under South African legislation grant school fee exemptions to poor children, but since they need to guarantee the daily functioning of the school, this

<sup>247</sup> A. Chapman and S. Russell, *Introduction*, p. 9.

<sup>248</sup> E.I. Koch, *o.c.*, p. 36-37.

<sup>249</sup> A. Chapman and S. Russell, *Introduction*, p. 10.

<sup>250</sup> CESCR, General Comment No. 3, para 10.

<sup>251</sup> A. Chapman and S. Russell, *Introduction*, p. 11.

hardly happens. Resource mobilisation within the private sector is very difficult, sometimes impossible in poor countries, unless on a very small scale. Wealthy countries tend to disregard their international obligations. And it is politically sensitive for a UN treaty monitoring body to point to, for example, overspending on weaponry and underspending on food or primary health care.

d. The minimum core: a priority problem

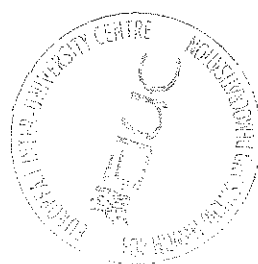
The CC interestingly observed in the *Grootboom* judgment that the minimum core obligation is generally determined under international law by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question.<sup>252</sup> Placing the minimum threshold, however, in the larger framework of *progressive realisation* of a right, various needs and opportunities for the enjoyment of such a right can be identified. This change appears subtle, but has significant consequences. The minimum core approach separates these two aspects, best expressed in the statement that, after a State has met its minimum obligations, it moves into the territory of progressive realisation.<sup>253</sup> The separation aims at increasing the effective enforcement of ESC rights because the core elements give rise to a self-standing and independent positive right enforceable irrespective of the considerations concerning reasonable measures, progressive realization and available resources.

However, regarding both aspects linked in one single frame of reference, one can completely grasp the issue of enforcing economic, social and cultural rights. First of all, it leads to the understanding that needs vary according to factors such as income, unemployment, availability of land and poverty, differences between urban and rural communities and depend on the economic and social history and circumstances of a country.<sup>254</sup> Taking account of the range of needs that should be addressed impedes that value judgments are made in respect of certain needs. It should therefore be left to the legislative and the executive to make the complex policy choices, because they are institutionally equipped to make the necessary and wide-ranging factual considerations.

<sup>252</sup> Grootboom, para 31.

<sup>253</sup> A. Chapman and S. Russell, *Introduction*, p. 14.

<sup>254</sup> Grootboom, para 32.



The reasonableness review prevents all three branches of State power from putting single emphasis on the needs of the most privileged group or the most disadvantaged one. To the contrary, the test requires a balanced plan, addressing at the same time long, medium and short term needs. A major advantage of this requirement is that the "floor" will not become the "ceiling". The focus on core obligations raises the concern that it might reveal to states how little they have to do in order to be in compliance with their obligation, and that states will do that minimum and nothing more.<sup>255</sup> A balanced and flexible plan, to the contrary, must identify and address all diverse needs with a view to progressively achieve the full realisation of a right for all concerned. Subsequently, the courts engage in policy-reviewing, establishing whether the multiple interests are reasonably addressed in the measures adopted, a task which lies perfectly in line with the doctrine of the separation of powers.

Furthermore, the test expressly demands the State to take account of those whose needs are most imperiled. The minimum core obligation, as defined in international law, finds in this way incorporation in domestic policy-making. In my opinion, requiring specific measures to cater for the urgent needs of vulnerable groups achieves the same net effect as that envisaged by the notion of minimum core obligation.

e. The reasonable test: a problem of focus?

One author correctly stated that the reasonableness review is a standard of justification. As such, it leads to a high degree of accountability of the authorities and provides incentives for public servants to consider carefully their reasons for taking decisions.<sup>256</sup> But he criticises this state of affairs because the distinctive role of socio-economic rights is not simply to draw attention to a failure in the justification of government policy; socio-economic rights adjudication should be concerned with and focused on the failure to adequately address certain vital interests that people have.<sup>257</sup>

Civil and political rights deal with equally vital interests and their protection is adequately guaranteed by the standard of justification encountered in civil and political rights litigation: the express limitations (clause) in general and the proportionality test in particular. Under the European Convention on Human Rights, a

<sup>255</sup> A. Chapmand and S. Russell, *Introduction*, p. 9.

<sup>256</sup> D. Bilchitz, *Placing basic needs at the centre of socio-economic rights jurisprudence*, in "ESR Review", vol. 4, no. 1, 2003, p. 2.

<sup>257</sup> *Ibidem*, p. 3.

State that interferes with the enjoyment of a certain civil or political right will have to justify the limitation imposed on that right. The European Court of Human Rights will first determine whether there is a legal basis for the interference. Then it looks whether the limitation is legitimate and finally it asks whether the limitation is necessary in a democratic society. The latter question involves showing that the action taken is in response to a pressing social need and that the interference is no greater than is necessary to address that pressing social need.<sup>258</sup>

Basically, the reasonableness test poses a similar question, requiring the government to establish that the measures adopted aim in a reasonable manner at achieving a specified result, namely the realisation of socio-economic rights.

So, both standards have the same effect. The difference between them is the very moment of application. The limitations clause and proportionality test play a (justifying) role only if the State interferes with the enjoyment of civil and political rights. One could call this *post-conditioning*. As far as economic, social and cultural rights are concerned, account must be taken of the internal limitations of these rights: reasonable measures, progressive realization and available resources. Due to the positive nature of these rights, the internal limits continuously influence State action or omission. One could call this *pre-conditioning*. Reasonableness provides the frame in which the efforts of the State to give effect to the internal limitations can permanently be assessed. The following scheme illustrates this point.

Civil/Political right	→ → → → →	In case of limitations: justifiable <i>if</i> some requirements respected.
Internal limits	→ → → → →	<i>Ongoing</i> role of guiding State behaviour in respect of ESC rights

It should be borne in mind, however, that the socio-economic rights in the South African Constitution may be limited as well in accordance with Section 36(1). The relationship between the qualified positive duties of the State and this general

<sup>258</sup> F. Jacobs and R. White, *The European Convention on Human Rights*, 2<sup>nd</sup> Edition, New York, Oxford University Press, 1996, 301-307.



limitations clause is complex. Should it be established at the first stage of constitutional inquiry that State conduct is unreasonable, it is difficult to conceive of situations where the State may nevertheless succeed in establishing a reasonable limitation of the right under Section 36.<sup>259</sup>

So, it is important to acknowledge that both tests are justification standards and the experience of the ECHR demonstrates how successful the proportionality test is in safeguarding the vital interests protected by civil and political rights.

f. The reasonable test: a problem of attention?

The CC has been criticised for not adopting an interest-based approach to enforcing socio-economic rights.<sup>260</sup> The judgments, however, reveal that the CC does pay attention to and places the interests of all concerned at the center of its reasonableness inquiry. At the abstract level, it stated that any programme for the realisation of socio-economic rights must be balanced and flexible and make provision for crises and *short, medium and long term needs*.<sup>261</sup> Furthermore, explicit reference is made to those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril.<sup>262</sup> At the concrete level, the Court explicitly identified the persons as well as their interests at stake. In *Grootboom*, the CC identified the people in the Cape Metropolitan area with no access to land, no roof over their head, and who were living in intolerable conditions or crisis situations as the interest-holders; their interest consisted in obtaining relief for the immediate and short-term housing crisis they were facing.<sup>263</sup> In the *TAC* case, all those mothers and their newborn children at public hospitals and clinics outside the research and training sites had an interest in receiving a short course treatment with Nevirapine.

The CC essentially wants to establish what the specific interests at stake are, rather than generalising about the vital interests of individuals. As a result, the Court will define the content of the rights enshrined in the Constitution on a case-by-case basis, rather than stipulating in abstract what the core content is of the rights.

<sup>259</sup> S. Liebenberg, *Interpretation*, no. 33-53.

<sup>260</sup> D. Bilchitz, *Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence*, in "South African Journal on Human Rights", vol. 19, no. 1, p. 11 and following.

<sup>261</sup> *TAC*, para. 68 (emphasis added).

<sup>262</sup> *Ibidem*, para. 67.

<sup>263</sup> *Grootboom*, para. 65-69.

g. The reasonable test: a problem of proof?

Litigants who allege a violation of their socio-economic rights bear a heavy burden to prove that government has failed to act reasonably. Litigants must review government policies, programmes and legislation within the national, provincial and local spheres of government. At the same time, they will have to identify and quantify the resources available to the State for realising the relevant socio-economic rights.<sup>264</sup> In the context of TAC, it has been pointed out that a case can be won if litigation is driven by a broad-based, broadly supported and well-organised political movement, in casu the Treatment Action Campaign, with ample human resources to gather and analyse information and to maintain pressure on government.<sup>265</sup> This does not offer very fruitful perspectives for the small groups of destitute people who are most likely to be the future claimants.

The following, however, cannot be lost out of sight. First, the burden of proof does not lie exclusively on the applicants. The introduction of the requirement of transparency in the reasonableness test allows for placing part of the burden on the government. If the existence and content of a policy or programme are not made known appropriately to all concerned<sup>266</sup>, litigants should claim that government's policy is not transparent. The burden then shifts to government to prove that it appropriately disclosed the substance of a programme. This argument finds additional support in Section 7(2) obliging the State to promote the rights in the Bill of Rights, meaning that the State has to raise awareness about the rights individuals enjoy.

Second, a thorough analysis of resource allocation is particularly difficult for anyone but an expert. Nevertheless, help and assistance might be found in the work of the SAHRC, which is constitutionally mandated to monitor and assess human rights observance by state organs. The Protocols that the SAHRC sends to relevant organs of state, ask for a listing of relevant policies and information on a set of various indicators such as budget allocation. Admittedly, the First and Second Report issued by the SAHRC merely compiled the gathered information. The Third, Fourth and Fifth Report started with actually assessing the information in the light of independently acquired data and formulate critiques and recommendations. The

<sup>264</sup> S. Liebenberg, *South Africa's evolving jurisprudence*, p. 178.

<sup>265</sup> D. Brand, *Annotation*, p. 702.

<sup>266</sup> TAC, para. 123.

reporting system still faces problems, such as institutional inertia with government departments not responding adequately, serious resource limits and understaffing.<sup>267</sup> Furthermore, the SAHRC should attempt to conduct more independent research on the spot, or in close collaboration with NGO's and civil society. This would enhance the objectiveness of the reports: with data collected from government alone, one never gets the full picture.<sup>268</sup> The SAHRC is well aware of the issues raised here and continuously works to improve the reporting system. The latest reports already mark a positive development and with some more necessary adjustments, the reports will become valuable sources of information, also for socio-economic rights litigants.

Third, challenging policies can occur at the infra level and the supra level. A challenge against a policy at the supra level, necessitates a review of the policy in its entirety. If a challenge is brought against just a certain aspect of a policy (the infra level), the burden of proof reduces considerably.<sup>269</sup> There is no need to unravel a whole policy and to link all the components of the policy with the allocation of budget and human resources. Essentially, the claimant checks whether certain provisions are put in place and/or correctly applied in his or her situation. In this way, there is no need to give content to both the vague constitutional rights and the constitutional requirements of reasonableness.

This is interesting in the South African context where many programmes and policies have been designed to mitigate the impact of HIV/AIDS on children. Several of them are progressive in approach but lack implementation, which constitutes a failure on behalf of the government.

Nevertheless, public interest litigation will continue to play a very important role in advancing the cause of underprivileged and often marginalised groups of people. To date, it has achieved major results in South Africa, meaning that this path of effecting social change is a very fruitful one and deserves more attention.<sup>270</sup>

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<sup>267</sup> Interview with Dr. Eric Watkinson, Deputy Director-Research and Documentation, South African Human Rights Commission, conducted at 29 April 2004, Johannesburg.

<sup>268</sup> D. G. Newman, *Institutional Monitoring of Social and Economic Rights: A South African case study and a new research agenda*, in "South African Journal on Human Rights", vol. 19, no. 2, 2003, p. 199-207 and 210.

<sup>269</sup> The distinction is derived from a discussion with D. Brand, Senior Lecturer at the Faculty of Law, University of Pretoria, held at Friday 23 April 2004.

<sup>270</sup> See also L. Gernholtz, M. Heywood and F. Hassan (eds.), *Your Victory is Our Victory, The Case of "A" v South African Airways: A Guide to Pre-Employment HIV Testing, Business Best Practices and*

h. Concluding remarks

In my opinion, the reasonableness test constitutes a more appropriate approach to enforcing economic, social and cultural rights compared to the doctrine of minimum core obligation. The test abstains from defining in abstract what the content is of a right, but identifies on a case-by-case basis the interests at stake and whether these are addressed. Hence, the standard avoids prescribing certain measures but requires the government to justify those adopted while taking due account of resource constraints. The burden of proof can be divided or even reduced in some cases.

This, however, does not imply that the minimum core approach is irrelevant, more analysis and research should be devoted to it. As early as 1990 the concept found expression in General Comment No. 3 of the CESCR, but it took the Committee until 1999 to draft General Comments again, identifying among others the obligations of the State. In the course of time, the CESCR will establish itself as a suitable forum to further develop the concept since it receives many reports from many different countries. Drawing from this amount of information, it acquires a valuable insight in the different needs in respect of economic, social and cultural rights existing at the global level. With this experience, it can formulate with some credibility minimum core obligations understood as general principles, which States have to translate into legislation, policies and programmes. Put differently, the search for core elements serves analytical purposes, because it is of the utmost importance to clarify vague treaty norms in order to make clear to governments and other actors what the precise meaning is of treaty obligations.<sup>271</sup>

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*the Rights of South Africans with HIV*, AIDS Law Project, Centre for Applied Legal Studies, University of the Witwatersrand, 2000, pp. 25.

<sup>271</sup> F. Coomans, *Core content of the right to education*, p. 179.

### III. A human rights based approach to children orphaned and made vulnerable by HIV/AIDS

#### A. The rights of children in the constitutional jurisprudence

Children are the worst affected by the epidemic.<sup>272</sup> Children orphaned and made vulnerable by HIV/AIDS form a particularly vulnerable group, because the enjoyment of basic socio-economic rights is compromised.

This final part of the study starts with an analysis of the South African socio-economic jurisprudence from the angle of the rights of children. It assesses the theoretical relevance of the principles set out in Grootboom and TAC for OVC.

Subsequently, an attempt is made to show how the developing case law could be used to enforce the right to health care, social security and education to the benefit of OVC.

##### 1. Grootboom

Since the respondents in *Grootboom* were 510 children and 390 adults<sup>273</sup>, the CC was invited to interpret the socio-economic rights of children. The Court judged that Section 28(1)(b) and Section 28(1)(c) Constitution must be read together. Subsection (1)(b) defines those responsible for giving care, while subsection (1)(c) lists various aspects of the care entitlement. The primary obligation to realise the rights of children rests on the parents or family. Hence, legislation and the common law impose obligations upon parents to care for their children.<sup>274</sup>

This implies that a direct entitlement by children to the provision of the socio-economic rights in Section 28(1)(c) only arises when children lack family care: that is, if they have been orphaned, abandoned or removed from the family environment.<sup>275</sup>

At first glance, children orphaned by HIV/AIDS will benefit from this court ruling since they per definition appear to lack parental or family care. However, in the

<sup>272</sup> L. Gernholtz, *HIV testing and treatment, informed consent and AIDS orphans*, in "ESR Review", vol. 4, no. 3, 2003, p. 11.

<sup>273</sup> Grootboom, para. 4.

<sup>274</sup> Ibidem, para. 75.

<sup>275</sup> Ibidem, para. 77; J. Sloth Nielsen, *Too Little? Too Late?*, p. 118; S. Liebenberg, *Interpretation*, no. 33-49.



specific South African setting the extended family structure absorbs many orphans in the context of HIV/AIDS. Of course, the question can be posed whether the South African law recognizes this form of informal care as genuine parental or family care. For a long time it did not, but nowadays the right to family care in Section 28(1)(b) includes the right to be cared for by the extended family.<sup>276</sup>

Put differently, for orphans in the care of extended family, the latter bears the primary responsibility to fulfil their social and economic needs. For orphans without extended family care, abandoned children and children living in child-headed households, the State incurs the responsibility to provide them with some form of (alternative) parental, family or institutional care and to realise their socio-economic rights.

## 2. TAC

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The issue raised in the *TAC* case directly concerned (newborn) children<sup>277</sup>, reason why the CC pronounced on the scope of application of children's rights again. The Court reiterated that the primary obligation to provide basic health care services rests on those parents who can afford to pay for such treatment. But this does not mean that the State incurs no obligation in relation to children who are being cared for by their parents or families. The State is obliged to ensure that children are accorded the protection contemplated by Section 28 when the implementation of the right to parental or family care is lacking.<sup>278</sup> This approach suggests that the direct duties of the State to provide the socio-economic rights in Section 28(1)(c) are also triggered when parents are too poor to provide for the basic needs of their children.

It is submitted that the approach in *TAC* is a definite and welcome advance over the *Grootboom* interpretation in securing children's access to socio-economic rights. This specific court ruling is relevant, on the one hand, for children orphaned by HIV/AIDS in the care of the extended family, which is unable to meet their basic needs. On the other hand, it is relevant for children made vulnerable by HIV/AIDS as well, who still

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<sup>276</sup> T. Mosikatsana, *Children*, in J. De Waal, I. Currie and G. Erasmus (eds.), *The Bill of Rights Handbook*, 4<sup>th</sup> Edition, Lansdowne, Juta & Co Ltd, 2001, p. 460.

<sup>277</sup> *TAC*, para. 78.

<sup>278</sup> *TAC*, para. 79.



live with the parents or family, but in indigent households in which their basic needs go unmet.

B. The rights of children orphaned and made vulnerable by HIV/AIDS in the (future) constitutional jurisprudence

The socio-economic jurisprudence dealt so far with the basic socio-economic rights contained in Section 28(1)(c). It must be noted, however, that the socio-economic rights of children are not only found in that section. This study took three specific human rights into consideration: the right to health care services, education and social security. It is therefore indispensable to consider whether the principles enunciated in respect of Section 28(1)(c) can be applied to the rights found in other constitutional provisions.

1. The right to health care

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The right to health care for OVC under South African constitutional law is found in two places. Section 28(1)(c) guarantees basic health care services for children only, including OVC. Section 27(1)(a) entitles everyone to have access to health care services for everyone, including OVC.<sup>279</sup>

a. Basic health care services

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At first glance, all OVC could directly claim basic health care services from the South African government. Those orphans who lack parental or family care can rely on the Grootboom reading of Section 28(1)(c). Orphans and children made vulnerable by HIV/AIDS, who are in the care of (extended) family, can rely on the TAC reading of the same section if the caregiver is indigent.

Why “at first glance”? Notwithstanding the apparently clear paragraphs of the judgments, it still seems questionable whether these groups of vulnerable children effectively have a direct, enforceable entitlement to basic health care services. Legal doctrine takes cautious positions, commonly stating that both judgments *can be read*

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<sup>279</sup> See *supra* Chapter 2, II, B, 3.

to suggest (emphasis added) that the State is under a direct duty to provide the basic socio-economic rights of Section 28(1)(c) where family care is lacking either in a physical or economic sense.<sup>280</sup> However, this conclusion could be ill founded since the Court has decided the two cases, not on the basis of Section 28(1)(c), but by applying the reasonableness standard under Section 26 and 27. One author therefore thinks that the Court will not recognise a subjective right for children in future litigation since such a decision would rearrange the budget of the State; the more likely option is that children can require the state, within whatever is the available pool of total resources, to absolutely prioritise measures to provide in their basic needs.<sup>281</sup>

The Court is well aware that it involves in controversial policy issues with the adjudication of socio-economic rights. Therefore, it repeatedly insists that determinations of reasonableness may have budgetary implications, but cannot be in themselves directed at rearranging budgets. This in turn explains why the Court at all expenses wants to abstain from prescribing directly certain obligations to government. It appears that the CC seeks to ascribe itself the role of legitimator of the post-apartheid social transformation project: this role allows the Court to build its legitimacy by endorsing the social transformation efforts of the political authorities. At the same time, the Court is able to give meaningful effect to the Bill of Rights, while remaining respectful of the political branches' prerogative to determine public policy.<sup>282</sup>

Does this automatically lead to the conclusion that the CC will not go as far as to immediately enforce the socio-economic rights of OVC in Section 28(1)(c)? It must be reminded that the pertinent paragraphs of the judgments are crystal clear: where family care is lacking either in a physical or economic sense, the state must intervene as the primary duty-bearer in respect of these children.

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<sup>280</sup> S. Liebenberg, *Interpretation*, no. 33-50: D. Brand, *Annotation*, p. 695-696, "This duty [to provide for the basic needs] is not qualified in the way that the positive duties imposed by Section 27 and 26 are; it does seem as though the state must provide these basic services regardless of resources and time".

<sup>281</sup> D. Brand, *Annotation*, p. 696.

<sup>282</sup> T. Roux, *Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court*, in S. Gloppen, R. Gargarella and E. Skaar (eds.), *Democratization Special Issue: Democratization and the Judiciary – The Accountability Function of Courts in New Democracies*, in "Frank Cass Journal", vol. 10, no. 4, 2003, p. 93.

It has so far not based its findings on this interpretation of Section 28(1)(c) because the children in *Grootboom* were accompanied by their parents, who are responsible for providing shelter. Moreover, the urgent needs of those adult respondents without children had to be accommodated as well. The order of the High Court, if upheld, carried with it the danger that children could become stepping stones to housing for their parents instead of being valued for who they are.<sup>283</sup>

In TAC, it was underlined that a programme for PMTCT is crucial for both expectant mothers and their newborn children. A significant reduction of the material transmission can be achieved by providing at least one dose of Nevirapine to a pregnant mother during pregnancy or childbirth and to the infant shortly after birth.<sup>284</sup> Since both have an equal interest that has to be addressed, the CC might have preferred to base its findings on Section 27, entitling *everyone* to health care. By handing down a mandatory order, the CC urged the government to act immediately.

In my view, the courts will give effect to the clear constitutional findings in respect of the rights of children. This prospect is based too on the acknowledgement that the South African judiciary has only recently begun to develop this sensitive jurisprudence. There is hardly any guidance or precedent on the international or domestic level. Moreover, the ruling elite in South Africa is member of the African National Congress, whereas the judiciary predominantly consists of a conservative white class. The latter takes account of the transformation project incumbent on the State, but seems at face value to be reluctant to limit government too much.

Perhaps if time elapses, the courts and the political branches are more willing to impose respectively accept stricter obligations. They are the key players in the sensitive debate surrounding socio-economic rights adjudication and have to get used to the rules and their role. Nowadays, everybody praises the European regional system for protecting human rights, hailing in particular the role of the European Court of Human Rights. The ECHR, however, had to overcome many obstacles in the course of time to establish its institutional legitimacy.

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<sup>283</sup> *Grootboom*, para. 70-71.

<sup>284</sup> P. De Vos, *So much to do, so little done*, p. 95.

## b. Health care services

OVC enjoy the right to have access to health care services in Section 27(1)(a). The State has the positive, though limited, duty to realise this right under Section 27(2).

OVC claiming access to health care services will have to prove that their access to existing levels of health care is impaired by the State, violating the negative duty in Section 27(1)(a). Or they can claim that policies are unreasonable under Section 27(2), in which case emphasis should be placed on the urgent needs of these children and the desperate situations they live in.

The National Health Bill makes provision for free medical services for children below 6 years. In case OVC are refused this treatment, this can be challenged on the basis of that law, reducing the burden of proof for the claimants. Section 27(1) (a) can support a claim as well, because the State is not allowed to prevent or impair the children's access to this health care service. Respect for the enjoyment of this right can be enforced directly from the State, independent of considerations of progressive realisation or resource availability.

Since the TAC ruling, the government of South Africa has started to implement programmes for PMTCT, but some provinces still lag behind. In such cases, the responsible authorities should be held liable on the basis of contempt of court.

## 2. The right to social security

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Everyone has the right to have access to social security according to Section 27(1)(c). Enforcing this right for children orphaned and made vulnerable by HIV/AIDS implies showing that the access to existing levels of social security is prevented or impaired by the State, violating the negative duty in Section 27(1)(c). Or, the unreasonableness of the current social security system must be challenged under Section 27(2). In the latter case, several issues can be raised.

First, OVC constitute a very vulnerable group, whose needs are most urgent and who are in desperate need. It should be underlined that having no or only limited access to social security benefits seriously affects the ability of OVC to enjoy all rights to which they are entitled (interdependence and indivisibility of all human rights). Social security means extra resources that can be diverted to fulfil the basic needs of children.

Second, policies and programmes must be reasonable both in their conception and their implementation. This means more specifically that the State has to provide for adequate institutional capacity and resources to deliver services effectively. The reality in South Africa shows that many barriers impede access to social security grants, such as: inadequate dissemination of information about the grants and the conditions of eligibility, difficulties and delays in obtaining official documents such as birth certificates, caregivers being unable to afford transport to the relevant government offices, long delays in processing the grant, lack of staff and so on.<sup>285</sup> The SAHRC reported that 3 308 467 children were eligible for the CSG, 1 574 927 children were receiving it. For the FCG 319 354 children were eligible, 90 680 were receiving it.<sup>286</sup> These numbers indicate that the implementation of the existing legislation is deficient.

Third, to be reasonable social security legislation and related regulations must be comprehensive and co-ordinated. However, the current system is marked by an enormous gap: for all poor children over the age of nine years, no social security provisioning is available. It is worthwhile to observe that also the CCRC expressed its concern about this gap. In its concluding observations on the initial report of South Africa under the CRC, it recommended that South Africa expand its Child Support

Grant programme or develop alternative programmes to include support to children up to the age of 18 years.<sup>287</sup>

On top of all this, the system reveals a major inequity. Orphans who are placed in formal foster care receive the high value FCG until they turn 18 years. Orphans in informal care and children made vulnerable by HIV/AIDS are normally not eligible for the FCG because they still have a caregiving adult. Only the low value CSG is available for them until the age of 9 years. All these children are similarly affected by HIV/AIDS and face similar needs and vulnerabilities though!

It was suggested that the full extension of the CSG to all children up to 18 and the removal of the means test will best support children in the context of HIV/AIDS. The question poses itself whether such a policy reform, addressing all mentioned

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<sup>285</sup> S. Liebenberg, *The right to social assistance*, p. 241-246.

<sup>286</sup> SAHRC, 4<sup>th</sup> Economic and Social rights Report, p. 203.

<sup>287</sup> Concluding Observations of the Committee on the Rights of the Child: South Africa, UN Doc CRC/C/15/Add. 122, 28 January 2000, cited in S. Liebenberg, *The right to social assistance*, p. 248.

shortcomings, can be effected by means of socio-economic rights litigation in favour of OVC? Government will most likely counter any challenge on the basis of resource availability. Social security is a very resource demanding aspect of public policy and the immediate introduction of a universal CSG for all children until 18 years will be viewed as too resource constraining. Even if the resource argument is set aside, the courts will probably not go any further than declaring that the existing policy is unreasonable. The choice will be left to the public authorities how to cure the unreasonableness.

### 3. The right to education

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The right of everyone to a basic education in Section 29(1)(a) is another example of an unqualified socio-economic right. The CC has not yet decided a case, which directly concerns the scope of the duties this right imposes.<sup>288</sup> It therefore remains difficult to say whether this section creates a directly enforceable right for OVC. One could argue it does not, or that at least the courts will not recognise it as such.

This right is guaranteed to everyone, including adults, and recognition of a direct entitlement would not only have budgetary implications, but would most probably come down to rearranging the budget. Moreover, Article 28 CRC expressly qualifies the obligation of States Parties stating that they, with a view to achieving the right to education progressively, should make primary education compulsory and available free to all. The courts could draw inspiration from this provision in accordance with Section 39(1)(b) to delineate the State's obligation under Section 29(1)(a).

As far as the cost of education is concerned, OVC should claim on the basis of the South African School Act of 1996, which foresees that children are exempted from school fees under certain conditions. This happens rarely because those concerned are not aware of the existing arrangements. That constitutes a violation of the obligation to promote in terms of Section 7(2), requiring the State to raise awareness of the rights individuals enjoy.

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<sup>288</sup> S. Liebenberg, *Interpretation*, no. 33-50.



Even if an exemption is granted, children face suspension or discrimination if the fees are not regularly paid. This constitutes a clear violation of the law, which should be challenged as such since children are deprived of what they are legally entitled to. This is a good example of bringing a challenge against policy at the infra level. The advantage is a relatively low burden of proof.

## Conclusion

This study arose out of concern about the impact and detrimental repercussions the HIV/AIDS epidemic causes to the lives of children. Such a wide subject area demanded a point of focus and the choice for South Africa was motivated by a number of reasons. In short, South Africa counts for the highest HIV prevalence rates around the globe, evidently epitomising the HIV/AIDS crisis for children in its entirety. It also formed the focus of this study due to its strong commitment to enforce economic, social and cultural rights.

The research was conducted in three stages. Initially it had to be ascertained which children constitute the sample group for this study. Until recently, the literature studying the impact of HIV/AIDS on children devoted its attention exclusively to the faith of children who lost their mother, father or both parents due to the disease. Fortunately, this approach is now shifting to include children who lost their adult caregiver (social orphans) and children who live with a terminally ill caregiver (virtual orphans). Introducing the concept of the adult caregiver accounts for the fluid household forms and different care giving practices adopted in South Africa.

The main reason for focussing on these children, referred to as children orphaned and made vulnerable by HIV/AIDS or OVC, is that they face similar needs and vulnerabilities in the context of HIV/AIDS. In the second stage, therefore, it had to be determined to what extent the care of OVC is compromised as well as establishing in what sense these children were barred from enjoying their human rights. The study focused on the fundamental rights to health care, social security and education.

The predicament these children face is a vicious cycle of unmet needs and increased vulnerabilities. This downward spiral appears difficult to break mainly due to the complex interplay between high HIV prevalence and widespread poverty among the informal structures, in particular extended families, which tend to provide care for orphans.

If the problems are detected, solutions need to be formulated. As a consequence, the provisions safeguarding health care, social security and education for children under

international, regional and domestic human rights law, were examined with a view to assess their relevance for addressing the needs of OVC. On the basis of extensive analysis, the right to health care for OVC was understood to oblige the State to implement programmes for PMTCT and to guarantee non-discriminatory access to health care services.

The importance and benefits of social security was underlined throughout the study. To summarise, due to HIV/AIDS the poor communities in South Africa are confronted with the emotional and financial costs of the sickness and losses of young adults, while simultaneously carrying the burden of providing care for the increasing numbers of OVC. Due to severely depleted resources, these communities are largely dependent on state assistance in order to cope.

In respect of the right to education, OVC would benefit from both cost-free and non-discriminatory access to education. The public at large would benefit from education on HIV/AIDS since it raises awareness about the disease, encourages responsible decision-making and may prevent discrimination, stigmatisation and social exclusion. The analysis demonstrates that the relevant human rights provisions provide sufficient guidance to frame an integrated response to mitigate the impact of HIV/AIDS on the needs of OVC.

The third and final stage of inquiry placed the developing South African jurisprudence on socio-economic rights central. The reasonableness test emerging in the case law of South Africa marks an innovative step forward in enforcing economic, social and cultural rights, which are traditionally viewed as non-justiciable. Compared to the doctrine of minimum core obligation, reasonableness review does not have the problem of having to define the core content of a right in abstract, since it identifies the interests at stake and determines whether these fall within the scope of a right on a case-by-case basis. Instead of prescribing certain measures, the test requires the government to justify those adopted on the basis of some substantial criteria. The judicial review occurs within the limits of two considerations: progressive realisation and available resources, which continuously frame the State's positive duties.

Both *Grootboom* and *TAC*, the landmark judgments, dealt with and set out some principles in respect of the basic socio-economic rights of children in Section 28(1)(c). In short, the judgments stated that, where parental or family care is lacking

for children, either in a physical or economic sense, the State incurs the primary responsibility to provide the children with their socio-economic rights. Subsequently, this research attempted to ascertain how this jurisprudence could be used as a tool to enforce the socio-economic rights of OVC, which are impacted on in the face of the HIV/AIDS epidemic.

Since OVC lack family care in a physical or economic sense, they must have a direct claim to the provision of the unqualified socio-economic right to basic health care in Section 28(1)(c). The judiciary appears somewhat reluctant to recognise such a direct entitlement. However, since the Constitutional Court is only developing its institutional legitimacy in this area and moreover, its findings in *Grootboom* and *TAC* leave no room for doubt, the judiciary can be expected to impose stricter obligations in the future. The right to basic education is an unqualified right as well, but there is to date no case law on the scope of the duties this right imposes. Nevertheless, the fact that the legal provision of school fee exemptions is consistently disregarded, must be challenged on the basis of the South African Schools Act of 1996.

The State has the qualified duty to realise the right of OVC to have access to healthcare and social security. In these cases, OVC can either allege violations of the negative duties to respect these rights, or demonstrate that state policy is unreasonable. The negative duty to respect is directly enforceable; a review of reasonableness necessarily considers the limits on the positive duty of the State. But as the needs of OVC are most imperilled, state policy has to pay special regard to them.

In the first place, this thesis posed and answered the question whether the cause of children orphaned and made vulnerable by HIV/AIDS can be advanced by taking a human rights based approach to the multiple needs and vulnerabilities they face in the context of HIV/AIDS. The human rights standards applicable to children lend themselves for an interpretation that accommodates the interests of OVC. Moreover, the South African jurisprudence on socio-economic rights indicates that these children can make claims directed at enforcing their socio-economic entitlements. In the second place, this thesis aimed at contributing to a better understanding of the justiciability of economic, social and cultural rights, taking deliberately an

interdisciplinary approach: the legal view had to clear space for sociological, anthropological, psychological, economic and actuarial perspectives. In doing so, the study presents a full account and understanding with regards to the complexity of the predicament these children are in. In turn, it raised the awareness that the issue of enforcing economic, social and cultural rights should no longer be a matter of rhetorical debate. To the contrary, with the amount of information available about human needs, public authorities find sufficient guidance to address them. One way to do so is by realising economic, social and cultural rights and, where appropriate implementing and enforcing these rights in the courts.

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<<http://www.hsrc.ac.za>>

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<<http://www.hrw.org/wr2k2/children.html>>

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## ANNEX I

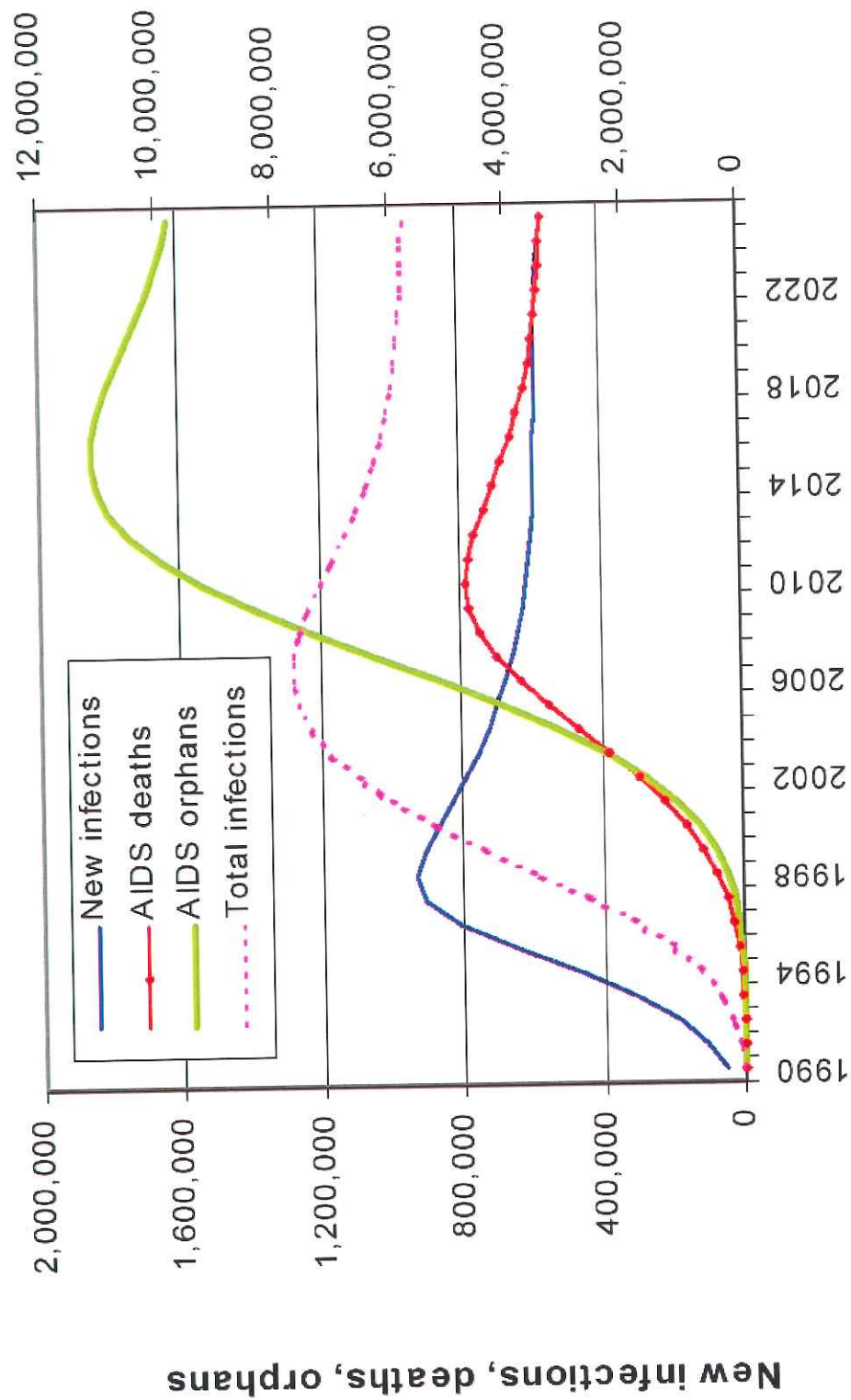


Figure 1: Waves of the AIDS epidemic

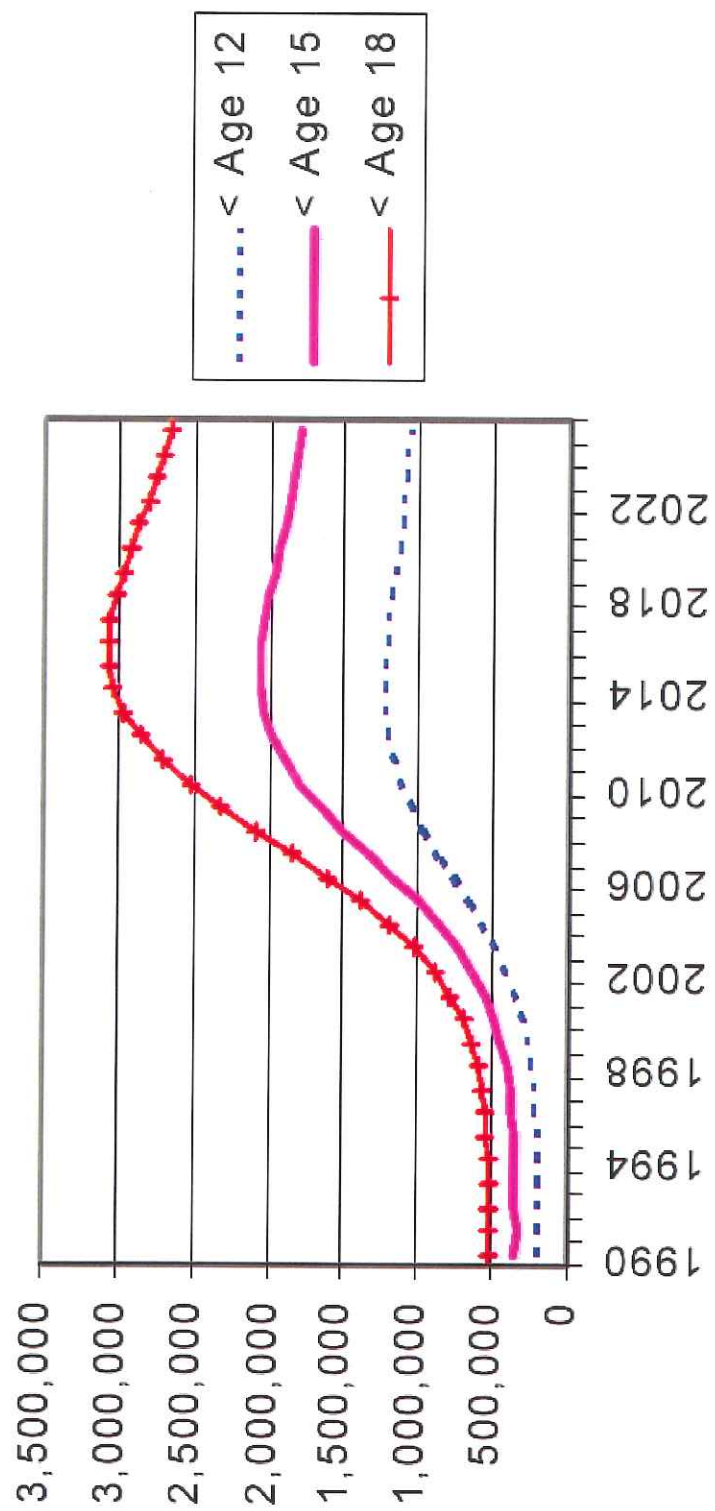


Figure 2: Numbers by alternative age definitions for maternal orphans



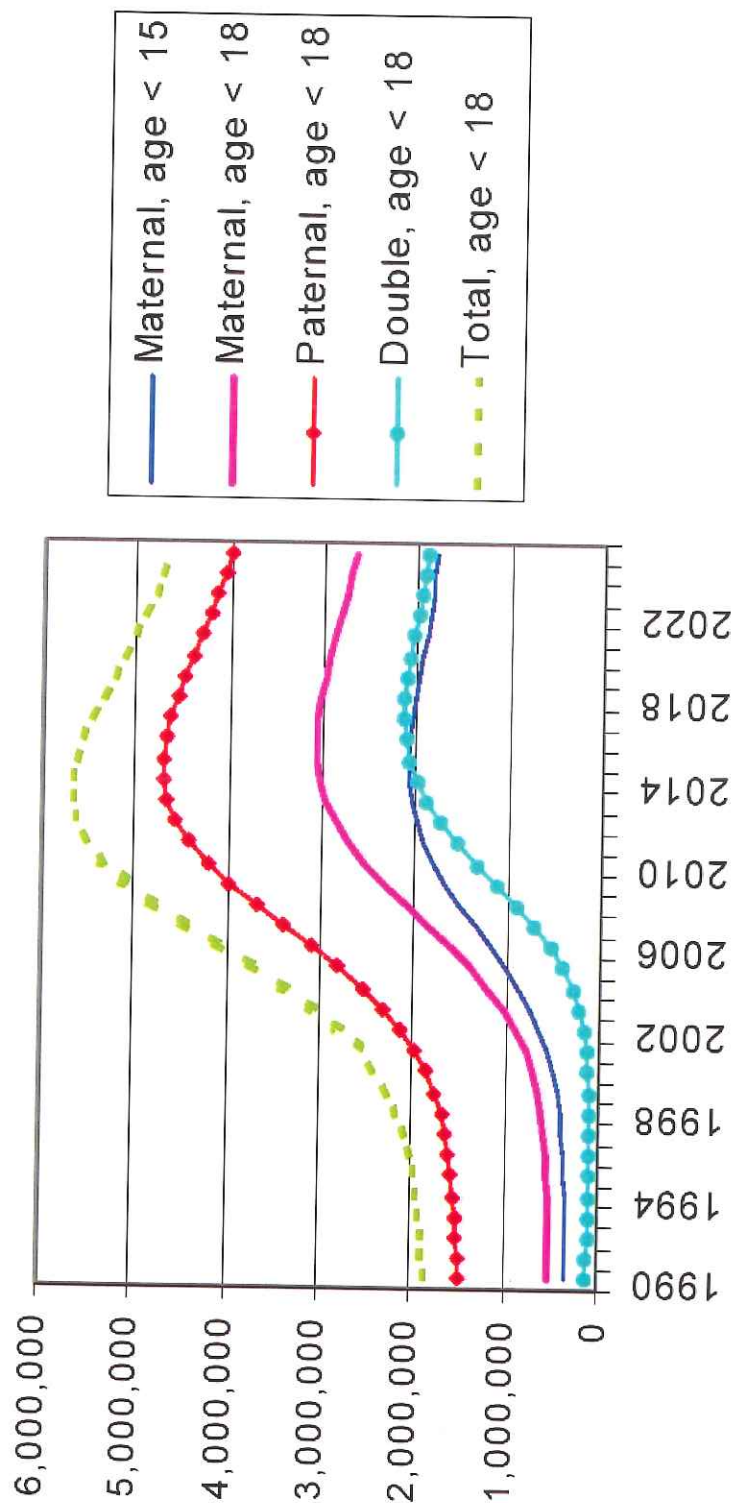


Figure 3: Comparison of maternal orphans below the age of 15 and 18

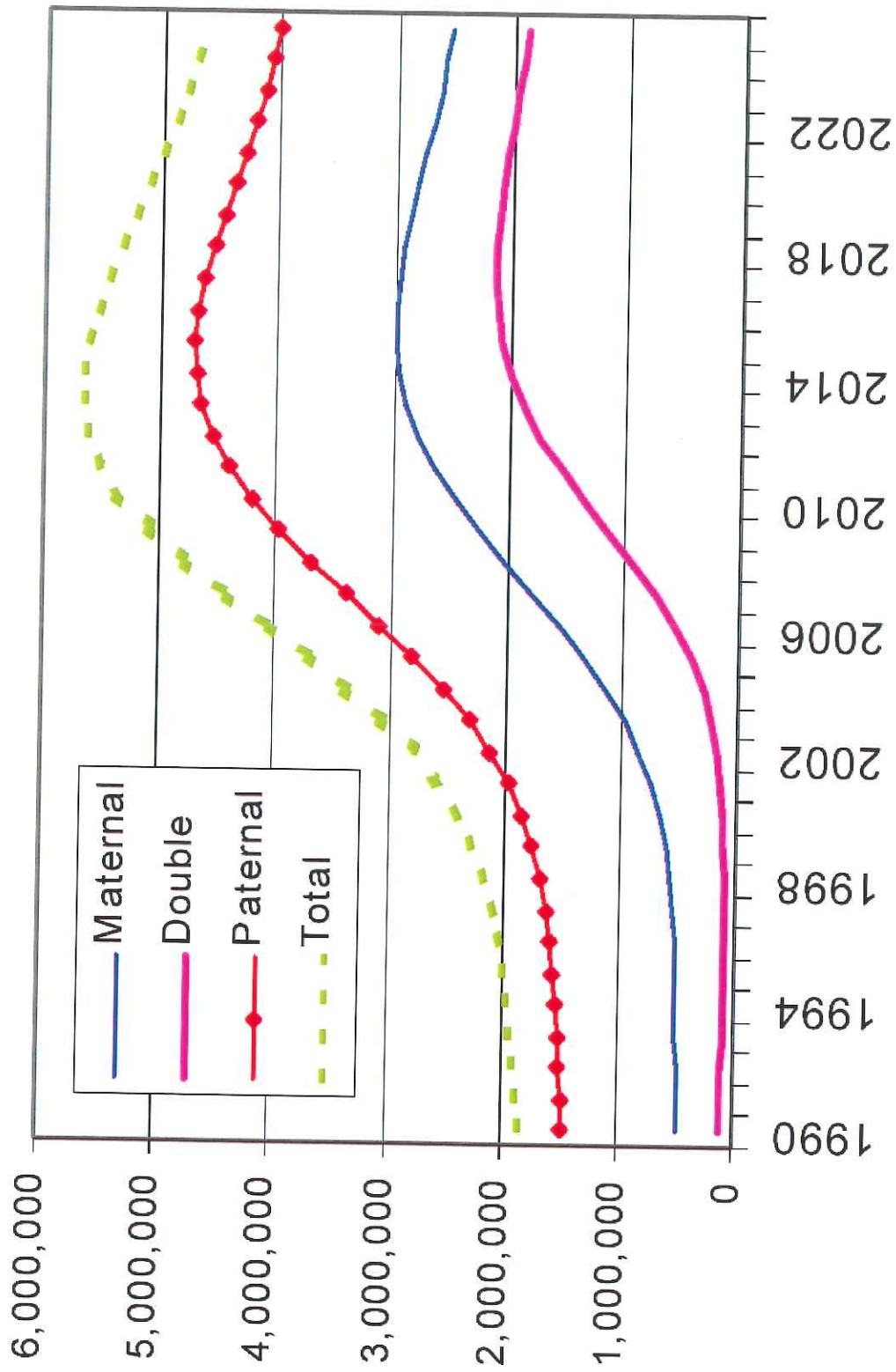


Figure 4: Maternal, paternal and double orphans under the age of 18

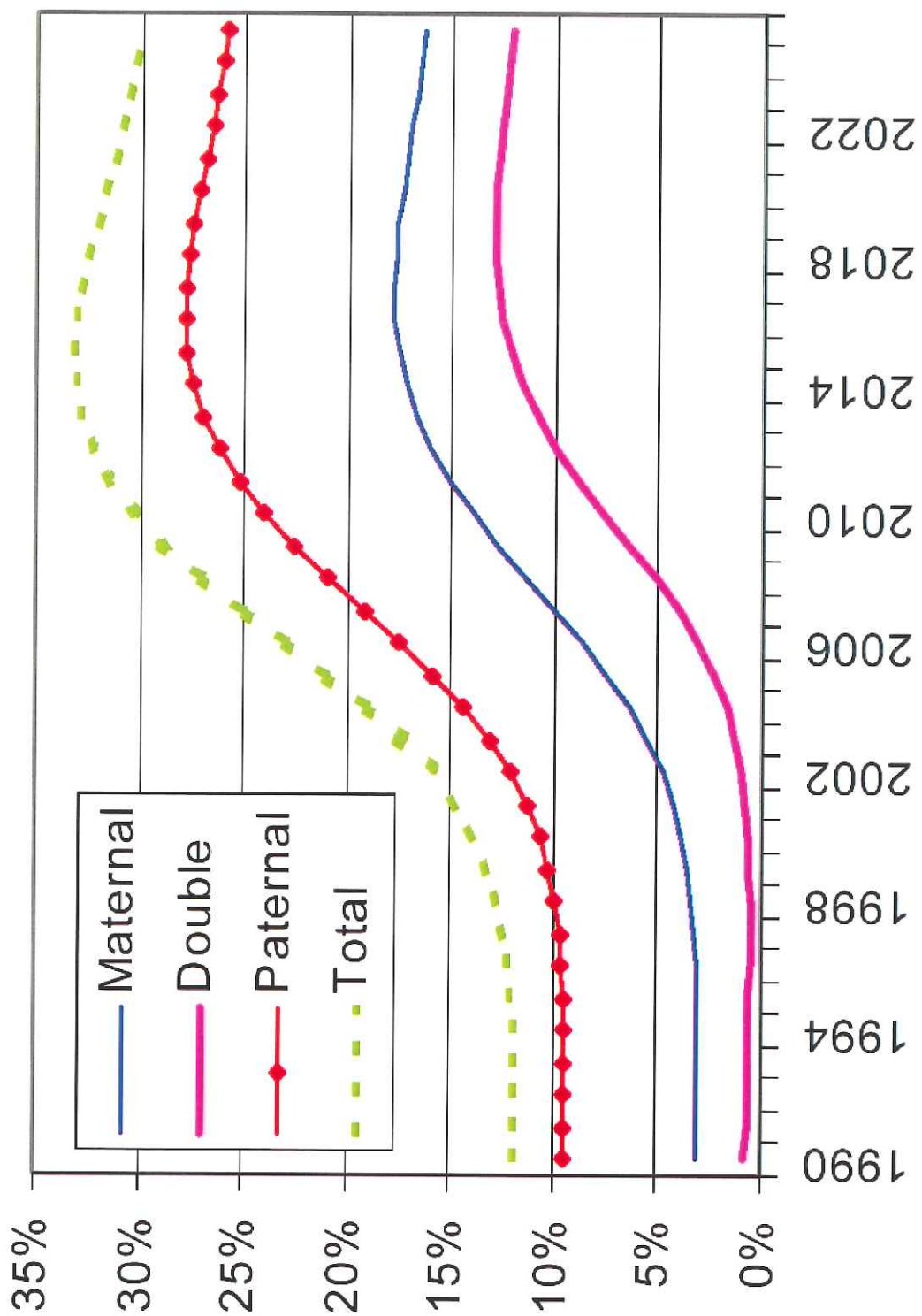


Figure 5: Percentage of children under the age of 18 orphaned

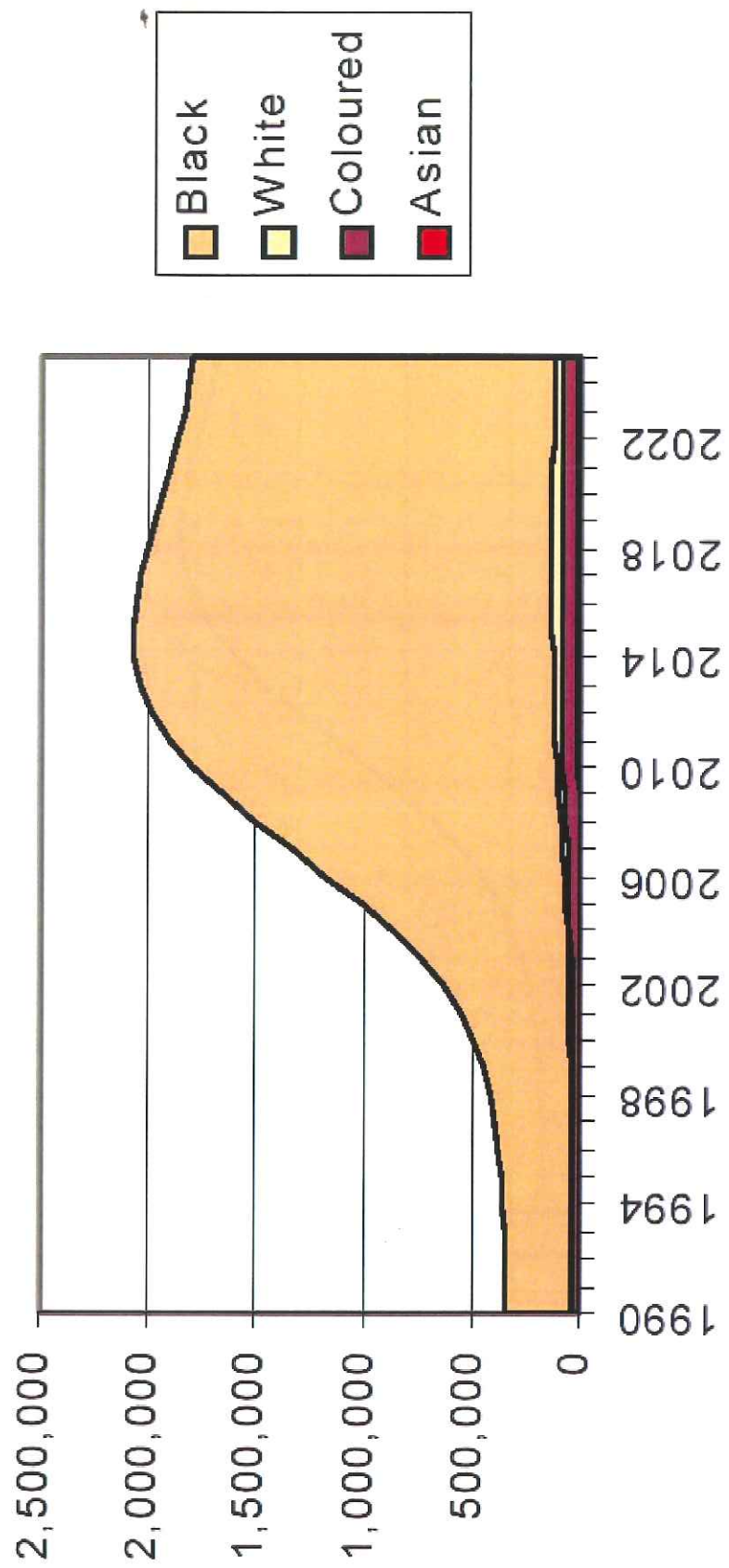


Figure 6: Composition of orphan population by race

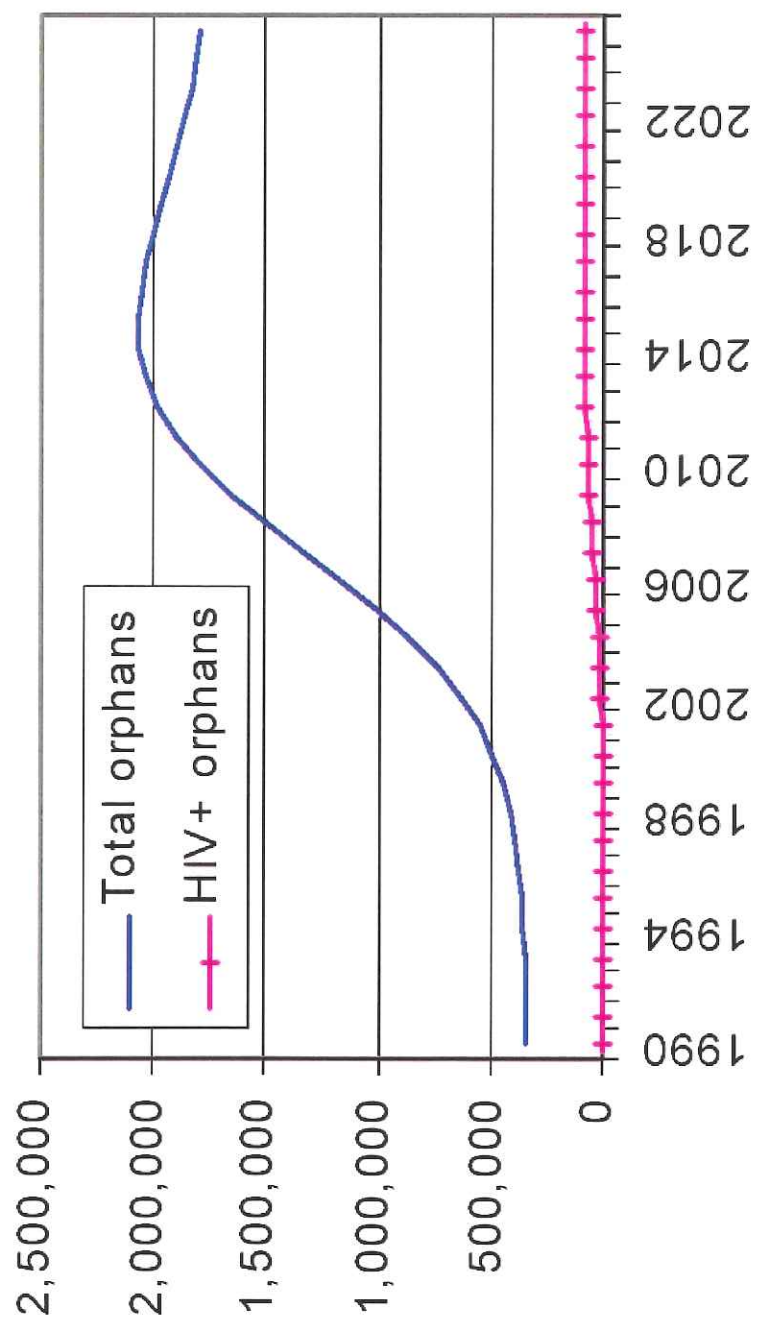


Figure 7: Number of HIV positive orphans relative to total orphans



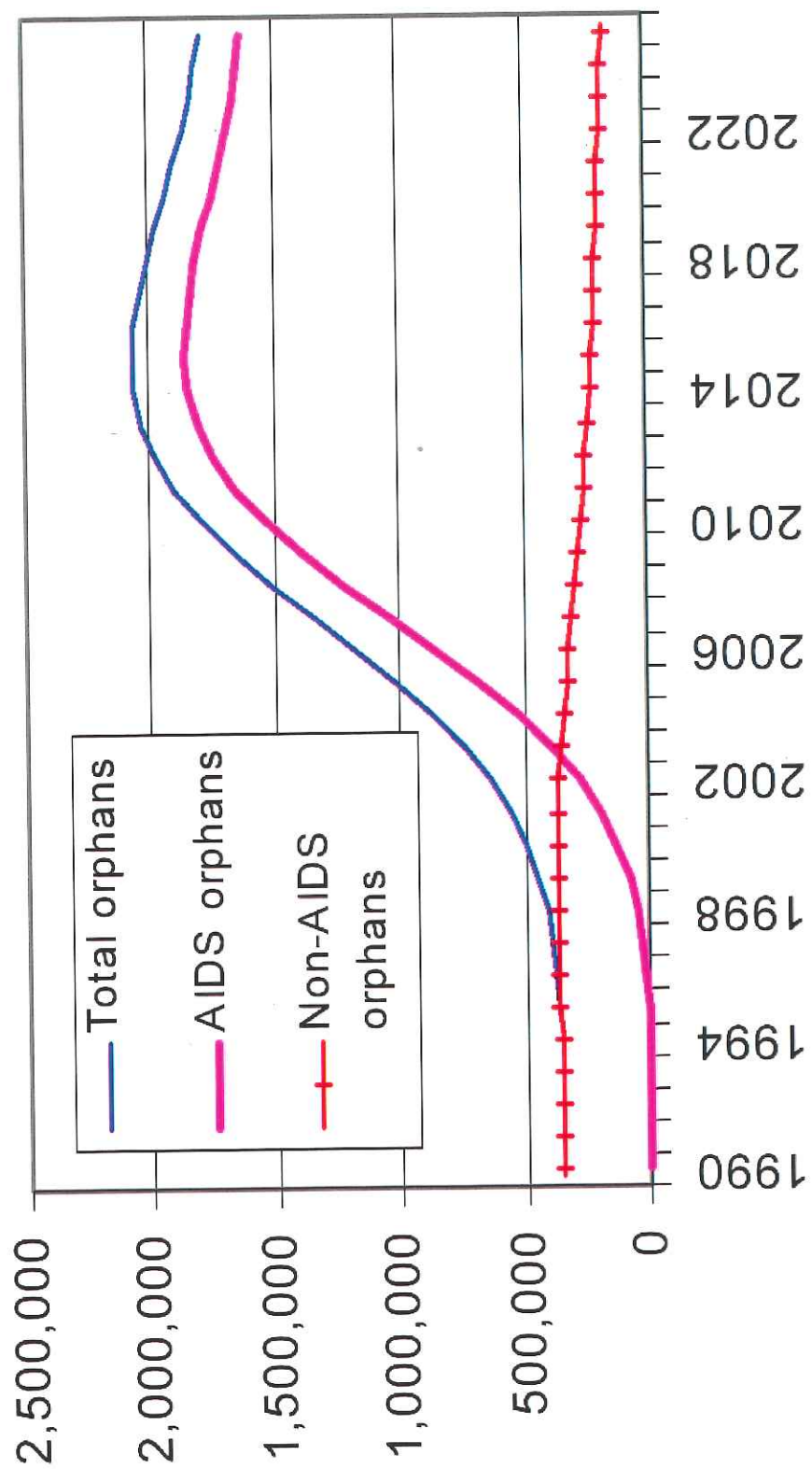


Figure 8: Numbers of AIDS orphans and non- AIDS orphan



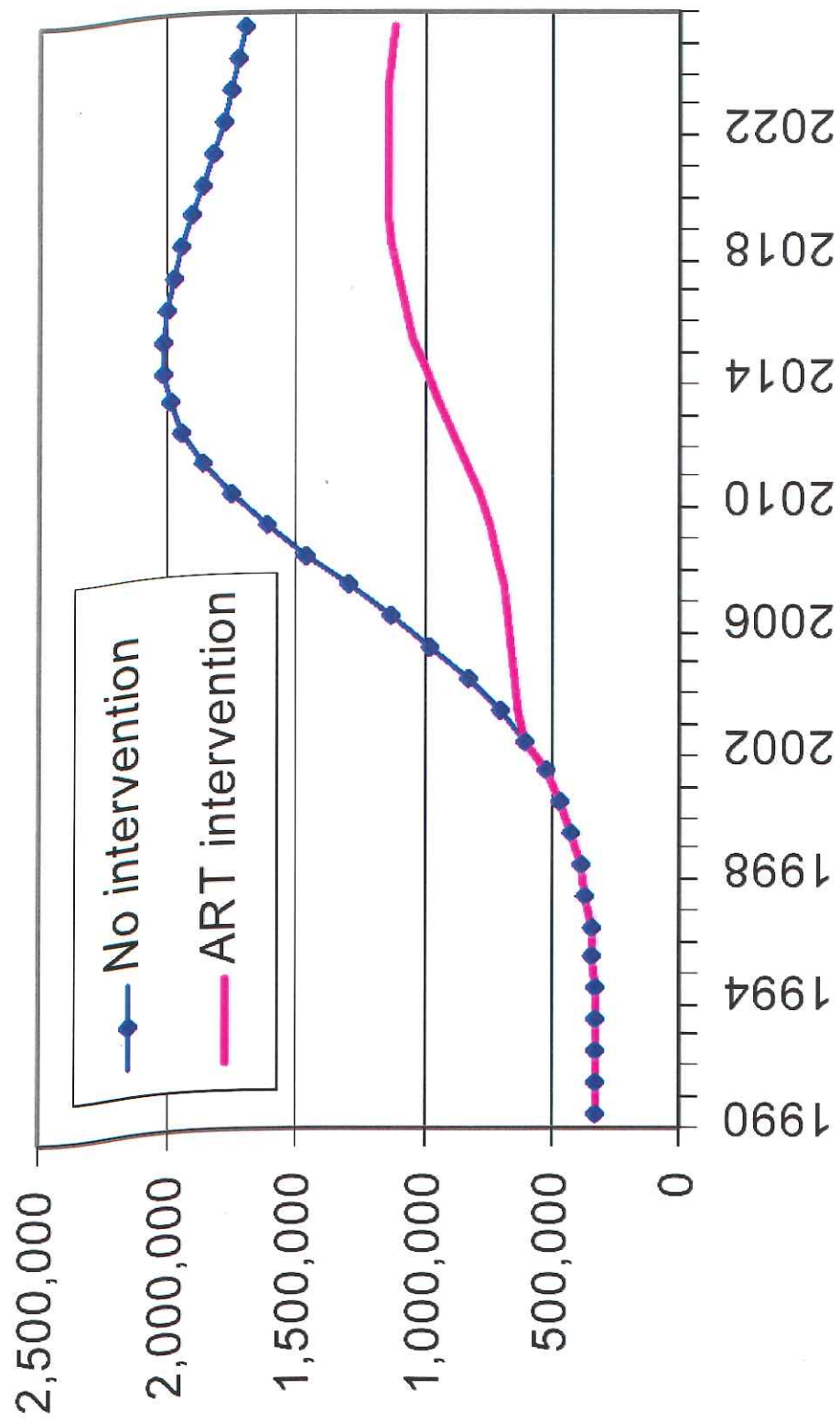
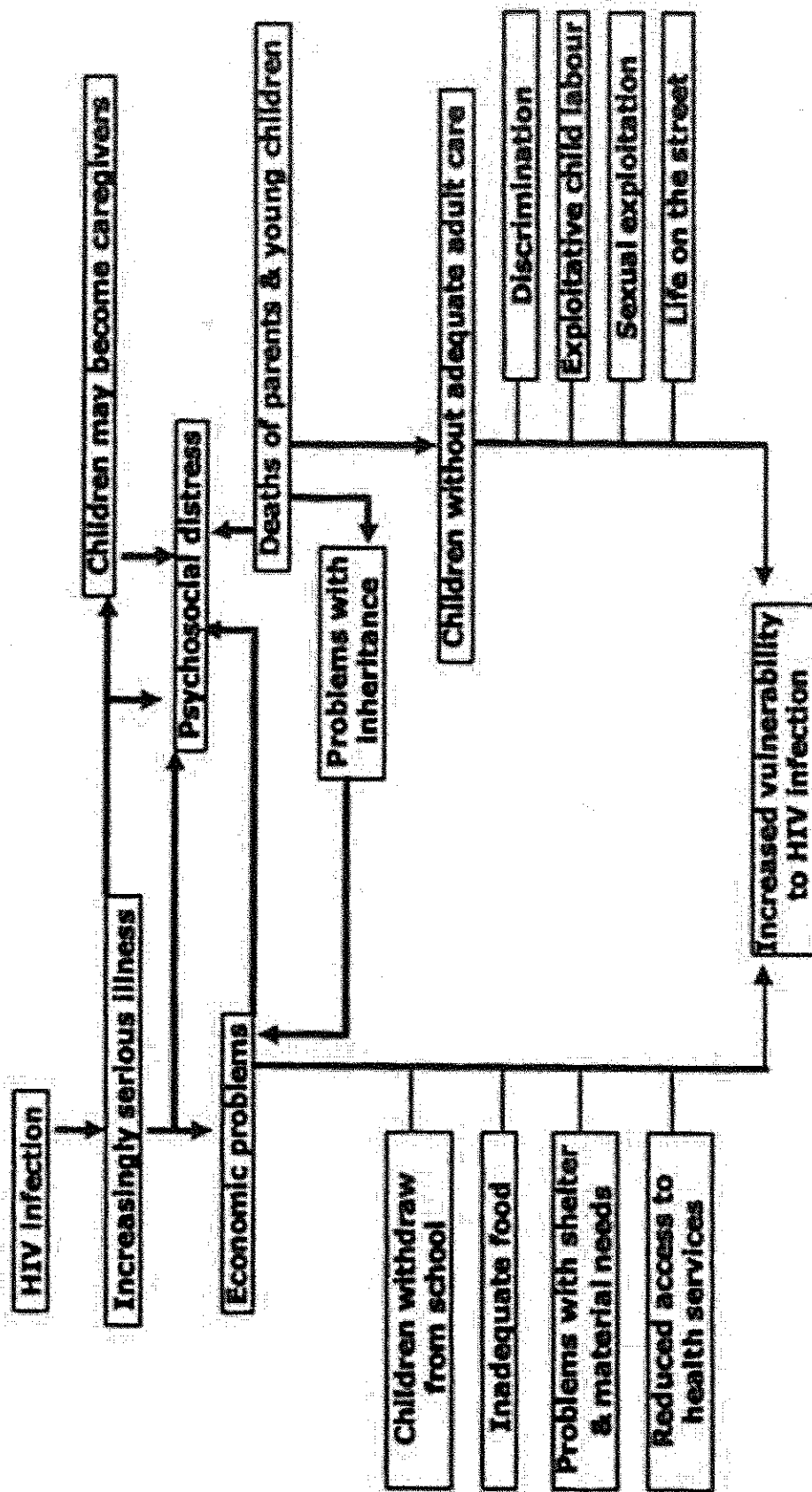


Figure 9: Numbers of orphans , with and without antiretroviral interventions

## ANNEX II

# Problems Among Children and Families Affected by HIV/AIDS



Source: Williamson March 2000