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Rights Relationships and the Experience of Children Orphaned by AIDS

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The global AIDS pandemic has left more than fifteen million children orphaned. These children constitute one of the most vulnerable populations, yet their situation has received relatively little scrutiny from legal scholars. This Article intends to fill that void by explicating the experience of children orphaned by AIDS, situating it in the broader context of the HIV/AIDS pandemic, and evaluating protections available under international human rights law. Analyzing human rights law as applied to children orphaned by AIDS exposes the extent to which rights are interrelated. This Article contends that the impact of the relationships among specific rights has not been adequately analyzed but is a necessary

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step in developing a more precise understanding of the contours of each individual right and the exact nature of the corresponding state obligation. Therefore, this Article analyzes the significance of the interrelationship among specific rights with a view toward identifying the key challenges it raises and the implications of such challenges. Ultimately, a clearer articulation of states' obligations is critical to measuring compliance with human rights law accurately and systematically, and a better understanding of the interrelationship among rights is an essential step toward that goal.

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INTRODUCTION

For over twenty-five years, AIDS has devastated communities around the globe, leaving in its wake more than fifteen million children orphaned.¹ The number of children orphaned by AIDS living today is almost double the population of New York City,² and, by 2010, is expected to reach twenty-five million.³ It is a crisis of global proportions.

Throughout the world, children orphaned by AIDS are among the most vulnerable and marginalized populations. Whether or not they are HIV-positive (in fact, most are not),⁴ these children are often

¹ See UNAIDS ET AL., CHILDREN AND AIDS: A STOCKTAKING REPORT 2 (2007) (reporting 15.2 million children have lost one or both parents due to AIDS). “Children” includes individuals below the age of 18. See Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/Res/44/25 (Nov. 20, 1989) [hereinafter CRC] (establishing in Article 1 that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”); ILO Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, *adopted* June 17, 1999, 38 I.L.M. 1207, 1208 (*entered into force* Nov. 10, 2000) [hereinafter ILO Convention No. 182] (establishing in Article 2 that “child” shall apply to all persons under the age of 18”). For purposes of research in this area and in this Article, unless otherwise specified, statistics on orphans include those who have lost one or both parents. See UNAIDS & UNICEF, THE FRAMEWORK FOR THE PROTECTION, CARE AND SUPPORT OF ORPHANS AND VULNERABLE CHILDREN LIVING IN A WORLD WITH HIV AND AIDS 7 (2004).

The term “AIDS orphans” is not used herein because of concerns that it further stigmatizes these children. See, e.g., U.N. Comm. on the Rights of the Child, *Report on the Nineteenth Session*, ¶ 231, U.N. Doc. CRC/C/80 (Oct. 9, 1998) (reporting on General Discussion Day on children living in world with HIV/AIDS on October 5, 1998) (recognizing “the need to choose language carefully and avoid terminology that referred, for example, to children with HIV/AIDS as ‘victims’ or to children orphaned by AIDS as ‘AIDS orphans’”).

² See U.S. Census Bureau, <http://www.census.gov> (last visited Nov. 15, 2007) (reporting 8,008,278 people living in New York City in 2000). Using metropolitan area statistics, children orphaned by AIDS are equivalent to the world’s sixth largest city, trailing Tokyo (26.5 million people), Sao Paolo (18.3 million), Mexico City (18.3 million), New York (16.8 million), and Mumbai (16.5 million), but larger than Los Angeles (13.3 million), Beijing (10.8 million), and Rio de Janeiro (10.8 million). See U.N. POPULATION DIV., DEP’T OF ECON. & SOC. AFFAIRS, WORLD URBANIZATION PROSPECTS: THE 2001 REVISION 3, 8 (2001).

³ UNAIDS ET AL., CHILDREN ON THE BRINK 2002: A JOINT REPORT ON ORPHAN ESTIMATES AND PROGRAM STRATEGIES 3 (2002); UNAIDS & UNICEF, *supra* note 1, at 5.

⁴ See WORLD HEALTH ORGANIZATION (WHO), BREASTFEEDING AND REPLACEMENT FEEDING PRACTICES IN THE CONTEXT OF MOTHER-TO-CHILD TRANSMISSION OF HIV 3 (2001). Maternal-child transmission rates are estimated at 15% to 30% where the mother does not breastfeed her child, 25% to 35% where there is breastfeeding through six months,

presumed to be and discriminated against based on this presumption. This discrimination has serious repercussions for a broad range of their rights, increasing the likelihood that these children will be ostracized by their communities, denied access to education and health care, and exploited by means of forced labor, prostitution, or other harmful activities. Moreover, the fact that the overwhelming majority of children orphaned by AIDS live in resource-constrained settings, primarily in sub-Saharan Africa, makes it even more difficult to ensure that they receive adequate protection and assistance.

In light of the challenges faced by children orphaned by AIDS, this Article aims to achieve several important objectives that have implications at the levels of both rights theory and human rights programming. First, while children orphaned by AIDS have garnered some attention in recent years in the international arena, their experience has received relatively little scrutiny from legal scholars.⁵ This Article intends to fill that void by taking the initial steps of explicating the experience of children orphaned by AIDS, situating it in the broader context of the global HIV/AIDS pandemic, and assessing existing protections available under international human rights law. Second, analyzing human rights law as applied to the situation of children orphaned by AIDS also exposes the extent to which rights are interrelated. The interrelated nature of individual rights has significant implications, particularly for marginalized populations.

In current scholarship, the interrelationship among rights, for the most part, is acknowledged only in passing. Typically, brief reference is made to the idea that civil and political rights and economic, social, and cultural rights are “indivisible” or “interdependent.”⁶ However,

and 30% to 45% if the child is breastfed through 18 to 24 months. *Id.*

⁵ UNAIDS, WHO, UNICEF, and certain NGOs have focused more recently on the plight of children orphaned by AIDS. In addition, psychological and social impacts have been studied by researchers. See, e.g., *A GENERATION AT RISK: THE GLOBAL IMPACT OF HIV/AIDS ON ORPHANS AND VULNERABLE CHILDREN* (Geoff Foster et al. eds., 2006) (covering human rights issues at more general level).

⁶ See, e.g., Comm’n on Human Rights, Question of the Realization in all Countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social, and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights, Comm’n on Human Rights Res. 2001/30, Comm’n on Human Rights Doc. E/CN.4/RES2001/30, ¶ 4(d), (April 20, 2001) (reaffirming “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms”); Philip Alston, *Economic and Social Rights*, 26 *STUD. TRANSNAT’L LEGAL POL’Y* 137, 147-48 (1994) (stating that “support for the notion that the two sets of rights [civil and political and

while the idea that these two broad categories of rights are interrelated is advanced, comparatively little discussion occurs regarding the relationship among specific rights and the implications of such relationships.⁷ Today, the idea that rights are interrelated seems to be generally accepted without objection⁸ but also without further meaningful analysis. While the former is a positive step, I believe that the latter is a shortcoming; that is, the impact of rights relationships has not been adequately analyzed. Third, the final aim of this Article, therefore, is to demonstrate the importance of a more specific focus on the interrelationship of rights. The intent behind calling for greater scrutiny of rights relationships, however, is not to retread old ground; rather, I believe that developing a more thorough and sophisticated understanding of how rights interact with each other will advance rights discourse significantly. As this Article's analysis of the experience of children orphaned by AIDS reveals, rights are deeply intertwined, particularly for the most vulnerable populations. The interdependent characteristic of rights challenges scholars and advocates to develop a more precise understanding of the contours and content of each individual right, the overlap between rights, and the exact nature of states' obligations with respect to each right. Ultimately, a clearer articulation of states' obligations is critical to the ability of governments, international organizations, and NGOs to measure countries' compliance with human rights law accurately and systematically.

Thus, in starting with the current situation confronting children orphaned by AIDS, in Part I, I aim to expose both the circumstances that make children orphaned by AIDS particularly vulnerable to human rights abuses and the rights violations they suffer. This

economic, social and cultural rights] are interdependent is widespread and is clearly reflected in international human rights instruments"); Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards A Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769, 779 (1989) ("The standard expression of the interrelationship among human rights in UN parlance take the following form: '[A]ll human rights and fundamental freedoms are indivisible and interdependent.'" (alteration in original)).

⁷ One exception to this is Scott, *supra* note 6.

⁸ See Int'l Comm'n of Jurists, et al., *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, ¶ 4, Jan. 22-26, 1997 (United Nations 1997) [hereinafter *Maastricht Guidelines*] ("It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity."); World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/24 (Oct. 13, 1993) [hereinafter *World Conference on Human Rights*] ("All human rights are universal, indivisible and interdependent and interrelated.").

analysis also requires assessing the impact of HIV/AIDS generally, as an understanding of this broader context is necessary to comprehend both the challenges these children face and the interrelated nature of rights, discussed later in this Article. In uncovering the multitude of pressures facing children orphaned by AIDS, Part I reveals that the experience of the most vulnerable populations is markedly different from and implicates the interrelationship of rights much more so than that of the general population.

After analyzing the plight of children orphaned by AIDS, in Part II, I evaluate the international human rights law applicable to these children. Part II evaluates children's legal rights and the corresponding state obligations with respect to the following key issues: survival and development; discrimination; health; education; severe forms of exploitation; and the family environment. The analysis in Part II reveals that, taking each right individually, human rights law on the above issues addresses a great number of the hardships faced by children orphaned by AIDS. What is not readily apparent is that the sum of these hardships is greater than its parts. This is confirmed by the analysis of these rights as applied to children orphaned by AIDS set forth in Part III.

Viewing rights applied to the context of a particularly vulnerable population enables us to observe the full extent to which individual rights are interrelated. The array of rights implicated by the plight of children orphaned by AIDS makes it practically impossible to address any one right in isolation. Analysis of their experience provides important evidence of the interdependent nature of rights. It also provides the first step in advancing the debate on the interrelationship among rights beyond the general discussion of the interdependence between civil and political rights and economic, social, and cultural rights to a more detailed analysis of specific rights, which I submit is essential for understanding and monitoring state obligations under international human rights law.

Thus, in Part IV, I return to the right to education for children orphaned by AIDS as a case study in order to articulate a clearer analysis of the relationship among rights when applied in context. This examination reveals that for children orphaned by AIDS, the right to education is deeply intertwined with a host of other rights. This interrelationship poses fundamental questions at the levels of both rights theory and human rights programming.

Building on the right to education case study, my aim in Part IV is to uncover the fundamental challenges posed by rights relationships, with a view to laying the groundwork for a better understanding of both the relationship among various individual rights and the effects

of this interdependence on states' obligations to ensure individual rights. Accordingly, I believe that this Article can be of use to scholars, advocates, and others interested in the nature of human rights and state obligations, as well as those concerned about children's rights, the collateral consequences of HIV/AIDS, and the experience of marginalized populations. Ultimately, a deeper understanding of the relationship among rights will help provide a more nuanced understanding of the contours of both individual rights and states' obligations under international human rights law. In turn, this understanding should improve the international community's ability to assess state compliance with precision, a step that offers the hope of better protection not only for children orphaned by AIDS but for all individuals at risk of human rights violations.

I. THE EXPERIENCE OF CHILDREN ORPHANED BY AIDS

This section explores the impact of AIDS on children, focusing in particular on the circumstances that make children orphaned by AIDS particularly vulnerable to human rights abuses and the rights violations they suffer. The situation of children orphaned by AIDS is probed in depth here, as is the broader impact of HIV/AIDS on communities, because it is only by a thorough assessment of their circumstances that we can comprehend fully the experience of marginalized populations such as children orphaned by AIDS and the pressures exerted on almost all of their rights.

A. *Impact of HIV/AIDS on Children*

In 2007, AIDS killed approximately 330,000 children under age fifteen, and an estimated 2.1 million additional children under age fifteen were living with HIV.⁹ Every day, hundreds of children join the ranks of individuals infected with HIV.¹⁰ By far, the most common means of HIV infection among children is maternal-child transmission of the virus during pregnancy, labor, delivery, or breastfeeding.¹¹

⁹ UNAIDS & WHO, AIDS EPIDEMIC UPDATE 1 (2007).

¹⁰ UNAIDS ET AL., CHILDREN ON THE BRINK 2004: A JOINT REPORT OF NEW ORPHAN ESTIMATES AND A FRAMEWORK FOR ACTION 14 (2004).

¹¹ See CTRS. FOR DISEASE CONTROL AND PREVENTION, HIV SURVEILLANCE REPORT NO. 14, at 20 (2002) (reporting that perinatal transmission is responsible for 96% of HIV-infected children in United States); WHO, ANTIRETROVIRAL DRUGS AND THE PREVENTION OF MOTHER-TO-CHILD TRANSMISSION OF HIV INFECTION IN RESOURCE CONSTRAINED SETTINGS 1, 20 (2004) (stating that maternal-child transmission is responsible for overwhelming majority of infections among children).

However, many youth — including girls and boys forced into prostitution, as well as sexually active youth — contract the disease through sexual transmission of the virus. Children are more susceptible to contracting HIV, as their bodies are physically less mature and thus more prone to tearing and bleeding during the course of sexual acts, increasing their risk of infection.¹²

The impact of the disease on children reaches well beyond those children infected with HIV/AIDS. Children who do not contract HIV nonetheless may feel the devastating effects of AIDS when it strikes their families or communities. AIDS has left millions orphaned.¹³

Children in sub-Saharan Africa have been hit hardest; eight of every ten children who have lost parents due to AIDS live in the region.¹⁴ The percentage of orphans in sub-Saharan Africa whose parents died because of AIDS increased from 3.5% in 1990 to 32% in 2001.¹⁵ And the problem is growing; by 2010, an estimated fifty million children in the region will be orphaned, and more than one-third of them will have lost parents due to AIDS.¹⁶

Africa is not the only region affected. Because of AIDS, there are an estimated 1.8 million orphans living in South and Southeast Asia, 330,000 in Latin America, 250,000 in the Caribbean, and 85,000 in East Asia and the Pacific.¹⁷ Moreover, with HIV infection rates increasing most rapidly in Asia and Eastern Europe, we can expect the numbers of children orphaned by AIDS to rise quickly in those

¹² See RON O'GRADY, *THE CHILD AND THE TOURIST* 112 (1992). This is particularly true for young children forced to engage in sexual activity with more physically developed adults. *Id.*

¹³ See *supra* note 1 and accompanying text.

¹⁴ UNICEF, *AFRICA'S ORPHANED GENERATIONS* 6 (2003); see also UNAIDS & UNICEF, *supra* note 1, at 7 (reporting that 82% of children orphaned by AIDS live in Sub-Saharan Africa). Certain African countries have been particularly hard hit by HIV/AIDS and, as a result, have substantial numbers of children orphaned by AIDS. Such countries include: Malawi (an estimated 500,000, as of 2003), Zambia (630,000), Kenya (650,000), Uganda (940,000), Tanzania (980,000), Zimbabwe (980,000), South Africa (1.1 million), and Nigeria (1.8 million). See UNAIDS ET AL., *supra* note 10, at 26.

¹⁵ See UNICEF, *supra* note 14, at 10. Today, more than 34 million orphans live in sub-Saharan Africa, 11 million due to HIV/AIDS. *Id.* at 8.

¹⁶ Press Release, UNICEF, *Children On The Brink 2004 — Global Orphan Numbers Would Be Falling Without AIDS* (July 13, 2004), available at http://www.unicef.org/media/media_22247.html.

¹⁷ See All-Party Parliamentary Group on AIDS, *April 2003: Responding to the Needs of Children Affected by HIV in Developing Countries* (April 2003), http://www.appg-aids.org.uk/Meetings_Minutes/April_2003.htm (providing report of meeting of parliamentary group of U.K. government).

regions. By 2010, the number of children orphaned by AIDS might reach twenty-five million globally.¹⁸ And for every one of these children, the impact of AIDS can be overwhelming.

B. Life as a Child Who Lost Parents Due to AIDS

The loss of a parent or parents has a devastating impact on children. The effects include psychological and emotional trauma, as well as economic and social costs.¹⁹ In the context of HIV/AIDS, the trauma and costs begin exacting a toll prior to the children becoming orphans.²⁰

1. Prior to Becoming Orphans

By the time children become orphans, they usually have suffered greatly.²¹ In situations where parents die of AIDS-related complications, children experience tremendous emotional trauma witnessing, and struggling to care for, their parents as the parents become increasingly ill and die. As UNAIDS explains, “[a] myriad of interrelated factors take their toll: grief over the death of a parent, fear about the future, separation from siblings, distress about worsening economic circumstances, and HIV/AIDS-related discrimination and isolation.”²²

That individuals living with HIV/AIDS are subjected to discriminatory practices is well-documented.²³ As a result of discrimination aimed at their HIV-positive parents, children often suffer even before their parents die. The social stigma of HIV/AIDS

¹⁸ UNAIDS & UNICEF, *supra* note 1, at 5.

¹⁹ See UNAIDS ET AL., *supra* note 10, at 9; Laurie Bauman & Stefan Germann, *Psychosocial Impact of the HIV/AIDS Epidemic on Children and Youth*, in A GENERATION AT RISK, *supra* note 5, at 93-115; Mary Jane Rotheram-Borus et al., *Adolescent Adjustment Before and After HIV-Related Parental Death*, 73 J. CONSULTING & CLINICAL PSYCHOL. 221, 221 (2005).

²⁰ See Arjan de Wagt & Mark Connolly, *Orphans and the Impact of HIV/AIDS in Sub-Saharan Africa*, 34 FOOD, NUTRITION AND AGRIC. 2 (2005) available at <http://www.fao.org/docrep/008/y5906m/Y5906M04.htm#4>; Bauman & Germann, *supra* note 19, at 96-99; Michael J. Kelly, *The Response of the Educational System to the Needs of Orphans and Children Affected by HIV/AIDS*, in A GENERATION AT RISK, *supra* note 5, at 71.

²¹ Accordingly, identifying vulnerable children and intervening early is essential to responding successfully to the needs of these children.

²² UNAIDS ET AL., *supra* note 3, at 9.

²³ E.g., UNAIDS, *Stigma and Discrimination*, http://www.unaids.org/en/Issues/Prevention_treatment/stigma.asp (last visited Oct. 13, 2007).

may result in the family's isolation as the disease progresses, further burdening the children. Workplace discrimination may lead to parents losing their jobs, increasing the financial strain on the family. This, in turn, may have an adverse impact on the health, education, and development of the children.

As a parent grows ill, children frequently assume more familial responsibility, including care of the parents and/or younger siblings, food production, and income-generating activities.²⁴ To help compensate for the loss of income due to parents' illnesses, children often enter the workforce early, where they are at risk of further physical and emotional hardships.²⁵

As AIDS consumes an increasingly larger share of the family's income, the likelihood of children's education being interrupted increases. Pressure comes from dual sources. As the costs of caring for a sick parent mount, it becomes more difficult for families to afford to send their children to school. At the same time, the loss of the parent's income and subsequent pressure on the children to earn income to help support the family make it less and less feasible for children to continue with school. Consequently, many children from families affected by AIDS are unable to realize their right to education.²⁶ In turn, being forced to drop out of school early limits their employment opportunities, contributing to the continuation of the cycle of poverty.

Furthermore, discrimination against individuals with HIV/AIDS often extends to family members. Children of parents with AIDS may suffer discrimination directly or be stigmatized when others in their communities assume that they, like their parents, have AIDS.²⁷ These children often are ridiculed by peers, shunned by the community, prevented from attending school, and refused access to health care facilities and social services.²⁸

By the time a parent dies from AIDS, a child likely has suffered the effects of discrimination and also emotional trauma from being ostracized by peers or the community at large.²⁹ Tragically, it is at this

²⁴ *Id.*

²⁵ See U.N. Comm. on the Rights of the Child, *General Comment No. 3: HIV/AIDS and the Rights of the Child*, ¶ 36, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003) [hereinafter *General Comment No. 3*].

²⁶ See Kelly, *supra* note 20, at 67.

²⁷ See *General Comment No. 3*, *supra* note 25, ¶ 7.

²⁸ See UNICEF, ENHANCED PROTECTION FOR CHILDREN AFFECTED BY AIDS 14 (2007).

²⁹ See *General Comment No. 3*, *supra* note 25, ¶ 33 ("The trauma HIV/AIDS brings to the lives of orphans often begins with the illness and death of one of their parents,

point of heightened vulnerability that the child loses the greatest source of protection — her parents — and is left alone to face many potential rights violations.

2. Following the Loss of Parents

As an initial matter, all children, whether or not their parents are alive, are inherently more vulnerable to exploitation and abuse than adults. Political obstacles, such as not having the right to vote, and developmental issues, such as the more limited verbal skills of younger children, make children more susceptible to exploitation and also leave them less capable of drawing attention to violations of their rights when they occur.³⁰ When children lose their parents, they lose what is usually their greatest source of protection. As a result, orphans, whether orphaned by AIDS or another cause, are typically more susceptible to human rights violations than children whose parents are alive.³¹

Children who have lost parents because of AIDS face the additional social stigma associated with HIV/AIDS, which compounds the problems that they face and heightens their vulnerability to exploitation. Children perceived to be living with HIV, such as when a parent is known to have died of AIDS, are stigmatized and isolated by their communities.³² Thus, they frequently are victims of discrimination by association, even when they are not HIV-positive.³³

In addition to being more vulnerable to various forms of exploitation, children orphaned by AIDS are affected in more routine

and is frequently compounded by the effects of stigmatization and discrimination.”). Therefore, assistance must reach these children and their families long before the children are orphaned. Many international organizations and NGOs have recognized the need for early intervention and, thus, often focus programming on “orphans and vulnerable children.” See, e.g., UNICEF, *supra* note 28, at 4 (noting that many international and non-governmental organizations have endorsed this approach).

³⁰ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD*, at xx (1995); Jonathan Todres, *Women’s Rights and Children’s Rights: A Partnership with Benefits for Both*, 10 *CARDOZO WOMEN’S L.J.* 603, 605-06 (2004).

³¹ For example, in India, Human Rights Watch found that the “death of parents or husbands may push girls and women into sex work, especially if they have not been educated and thus lack skills and qualifications for other work.” HUMAN RIGHTS WATCH, *FUTURE FORSAKEN: ABUSES AGAINST CHILDREN AFFECTED BY HIV/AIDS IN INDIA* 142 (2004).

³² ANN STRODE & KITTY BARRETT GRANT, *SAVE THE CHILDREN UK, THE ROLE OF STIGMA AND DISCRIMINATION IN INCREASING THE VULNERABILITY OF CHILDREN AND YOUTH INFECTED WITH AND AFFECTED BY HIV/AIDS* 15 (2001).

³³ *Id.*

ways. As mentioned above, AIDS takes a severe toll on families' resources because of the cost of care and lost wages due to illness-driven absenteeism from work.³⁴ The loss of parents often forces children into the role of wage earner to support themselves and their younger siblings. This may interrupt or end altogether children's schooling.³⁵

While dropout rates or interruptions in education are the clearest evidence of the impact on children's education, there are more subtle effects as well. Orphans who are in school are less likely to be at the age-appropriate grade level.³⁶ Although the impact of HIV/AIDS on children's education typically manifests itself before these children become orphans, it is often exacerbated once the parent dies.³⁷

Education is also critical to keeping children out of exploitative work environments. Children who are not in school are more susceptible to economic exploitation.³⁸ Children are pressed to work in a variety of often-exploitative settings, including as domestic servants, agricultural workers, child prostitutes, and factory workers. An estimated 250 million children between the ages of five and fourteen work for a living; almost half work full-time.³⁹ Orphans are at greater risk of being exploited both in the workplace and in informal work settings, because there may be no adult to advocate on

³⁴ For example, households in rural Zimbabwe with orphans earned approximately 31% less than households unaffected by AIDS. See UNAIDS & UNICEF, *supra* note 1, at 9; see also *infra* notes 60-61 and accompanying text.

³⁵ UNICEF, *supra* note 14, at 27 (reporting that orphans are less likely to go to school and, if in school, more likely to fall behind and drop out of school). The loss of both parents further jeopardizes a child's education. In Tanzania, 71% of non-orphan children living with at least one parent attend school, whereas only 52% of children who have lost both parents are in school. As these figures do not include children living on the streets or in institutional settings, the actual percentage of orphans in school is probably even lower. *Id.*; see also Adam Burton, *A Grave and Gathering Threat: Business and Security Implications of the AIDS Epidemic and a Critical Evaluation of the Bush Administration's Response*, 35 GEO. J. INT'L L. 433, 437-38 (2004) (reporting that in Mozambique, 68% of children with both parents regularly attend school, but only 24% of children with no living parents attend school on regular basis).

³⁶ UNICEF, *supra* note 14, at 28 (noting one study which found that over 25% of orphans reported that their performance in school had deteriorated, in large part because of interruptions in schooling and additional stress of their situation).

³⁷ See Kelly, *supra* note 20, at 74 (reporting on World Bank study).

³⁸ E.g., L. GUARCELLO ET AL., CHILD LABOUR AND EDUCATION FOR ALL: AN ISSUE PAPER 14 (2006); INT'L SAVE THE CHILDREN ALLIANCE, REWRITE THE FUTURE: EDUCATION FOR CHILDREN IN CONFLICT-AFFECTED COUNTRIES (2006) (discussing education systems in conflict-affected countries and factors affecting student attendance).

³⁹ See RACHEL HODGKIN & PETER NEWELL, UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 477 (2002) (citing ILO statistics).

their behalf. In Ethiopia, more than 75% of child domestic workers are orphans, working an average of eleven hours a day, seven days a week.⁴⁰ A study in Zambia found that almost half of the children involved in prostitution had lost both of their parents, and an additional 24% had lost one parent.⁴¹

Furthermore, children orphaned by AIDS are subjected to human rights violations in health care. Evidence exists of health care workers refusing to treat not only HIV-positive patients but also their family members.⁴² Even where children and their families are not subjected to discriminatory treatment, family resources may be extremely limited. As a result, these children may struggle to access basic drugs or receive little or no assistance in coping with the psychological trauma they experience.⁴³

Children are also at risk of violations of property and inheritance rights. Both children orphaned due to AIDS and widows of AIDS victims suffer as a result of “property grabbing” — the rapid claiming of property of a deceased individual before the authorities can ensure that assets are distributed to the rightful beneficiaries.⁴⁴ Property grabbing and, more generally, the financial strains on homes that have lost their primary wage earners are often so significant that many children orphaned by AIDS end up homeless and living on the street.⁴⁵ In turn, street children are vulnerable to a host of abuses, including violence at the hands of the police.⁴⁶

All of these burdens come at a time when these children are trying to overcome the emotional pain and grief of losing their parents. Coping with all of these burdens simultaneously is seemingly an

⁴⁰ UNICEF, *supra* note 14, at 28.

⁴¹ *Id.*

⁴² See, e.g., HUMAN RIGHTS WATCH, *supra* note 31, at 42-43 (reporting on incidences in India of health care workers refusing to treat HIV-positive patients or offering only substandard care).

⁴³ See *id.* at 52-59.

⁴⁴ See Joanne Csete, *Several for the Price of One: Right to AIDS Treatment as Link to Other Human Rights*, 17 CONN. J. INT'L L. 263, 268 (2002) (finding that “property grabbing” has been widely documented against children orphaned by AIDS and widows of AIDS sufferers”); see also WHO & UNICEF, ACTION FOR CHILDREN AFFECTED BY AIDS: PROGRAMME PROFILES AND LESSONS LEARNED 7 (2000); UNAIDS-AFRICASO, REPORT OF TANZANIA NEEDS ASSESSMENT ON HIV/AIDS AND HUMAN RIGHTS 7 (2003).

⁴⁵ See Csete, *supra* note 44, at 267.

⁴⁶ See *id.* (noting that police abuse of street children has been documented in numerous countries, including reports by Human Rights Watch of such abuses occurring in Kenya, Bulgaria, Guatemala, and India).

impossible task, and yet children orphaned by AIDS confront still one more significant challenge — the broader impact of AIDS.

C. *The Effects of HIV/AIDS on Communities and Countries*

To understand fully the challenges facing children orphaned by AIDS, it is essential to place their struggle in the broader context of the current global HIV/AIDS pandemic. This context is important for two reasons. First, it provides a better picture of the extent of the obstacles confronting children orphaned by AIDS. Second, the broader effects of HIV/AIDS raise questions about states' obligations to these children under international human rights law, which are discussed in Part IV.

HIV/AIDS has had a devastating impact on our world for over twenty-five years. "In the hardest-hit countries, it is erasing decades of health, economic and social progress, reducing life expectancy by decades, slowing economic growth, deepening poverty, and contributing to and exacerbating chronic food shortages."⁴⁷ In 2007, the AIDS epidemic killed an estimated 2.1 million people, making it the fourth leading cause of death globally.⁴⁸ Among people ages fifteen to forty-nine years, AIDS is the number one cause of death worldwide.⁴⁹

An estimated 33.2 million people, including 15.4 million women, live with HIV today.⁵⁰ Increasingly, women and girls are feeling the impact of HIV/AIDS. According to UNAIDS, "[w]omen and girls make

⁴⁷ UNAIDS, 2004 REPORT ON THE GLOBAL AIDS EPIDEMIC 41 (2004).

⁴⁸ UNAIDS & WHO, *supra* note 9, at 1; Simon Dixon et al., *The Impact of HIV and AIDS on Africa's Economic Development*, 324 BRIT. MED. J. 232, 232 (2002) (reporting that AIDS trails only heart disease, stroke, and acute lower respiratory infection).

⁴⁹ UNAIDS ET AL., *supra* note 3, at 3.

⁵⁰ UNAIDS & WHO, *supra* note 9, at 1 (reporting that approximately 2.5 million individuals contracted HIV in 2007). Exact figures are difficult to obtain. UNAIDS reports that between 30.6 and 36.1 million people were living with HIV in 2007 with 33.2 million being the best estimate. *Id.* The 2007 figures represent a decline in the overall numbers as compared to those reported in 2006, due primarily to "improved and expanded epidemiological data and analyses that present a better understanding of the global epidemic." Press Release, UNAIDS Geneva, Global HIV Prevalence Has Levelled Off; AIDS Is Among the Leading Causes of Death Globally and Remains the Primary Cause of Death in Africa (Nov. 20, 2007) (*available at* http://data.unaids.org/pub/EPISlides/2007/071119_epi_pressrelease_en.pdf). The 2006 report had estimated that 39.5 million individuals were living with HIV/AIDS. UNAIDS & WHO, AIDS EPIDEMIC UPDATE 1 (2006). Sexual transmission of HIV is the most common mode of transmission, and heterosexual transmission is responsible for the majority of new HIV infections. See Global HIV Prevention Working Group, *Global Mobilization for HIV Prevention: A Blueprint for Action*, 1 SEATTLE J. FOR SOC. JUST. 297, 312 (2002).

up almost 57% of all people infected with HIV in sub-Saharan Africa, where a striking 76% of young people (aged 15-24 years) living with HIV are female. In most other regions, women and girls represent an increasing proportion of people living with HIV[.]”⁵¹

Sub-Saharan Africa, home to over two-thirds of the people infected with HIV globally, is the world’s hardest hit region.⁵² But no region has escaped AIDS’ impact; in fact, the incidence of HIV is growing faster in other areas of the world. Between 2002 and 2004, the number of people living with HIV increased by 50% in East Asia (driven largely by the rapid spread of the disease in China) and by 40% in Eastern Europe.⁵³ The number of people with HIV in sub-Saharan Africa has increased at a less dramatic rate, although that obscures the fact that large numbers of people still are becoming newly infected. These individuals are simply “replacing” in the overall statistics those who die of AIDS.⁵⁴ In Southern Africa, those numbers are substantial; the region accounts for approximately one-third of all AIDS deaths globally.⁵⁵

Although the number of people living with HIV and the deaths caused by AIDS present a stark picture, these statistics only begin to convey the impact of HIV/AIDS. HIV/AIDS affects every sector of society.

HIV/AIDS has erased much of the progress in health care over the last several decades. Since 1999, life expectancy has declined in thirty-eight countries, due primarily to AIDS.⁵⁶ In some of the hardest hit countries, life expectancy has dropped to levels not seen since the nineteenth century. Today, average life expectancy in Africa is forty-seven years; it would be sixty-two years without AIDS.⁵⁷ The table below demonstrates the impact of AIDS on life expectancy in select African countries by 2010, if dramatic steps are not taken to intervene.⁵⁸

⁵¹ UNAIDS & WHO, AIDS EPIDEMIC UPDATE 4 (2004).

⁵² UNAIDS & WHO, *supra* note 9, at 7.

⁵³ *Id.*

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 2-4. All seven countries in Southern Africa have HIV prevalence rates of at least 17%, with Botswana and Swaziland having prevalence rates in excess of 35%. UNAIDS, *supra* note 47, at 32.

⁵⁶ UNAIDS, *supra* note 47, at 42.

⁵⁷ See J.S. Mukherjee et al., *Tackling HIV in Resource Poor Countries*, 327 BRIT. MED. J. 1104, 1104 (2003).

⁵⁸ WORLD BANK, DISEASE AND MORTALITY IN SUB-SAHARAN AFRICA 13 (2d ed. 2006); see also Jenni Fredriksson & Annabel Kanabus, *The Impact of HIV and AIDS on Africa*, <http://www.avert.org/aidsimpact.htm> (last visited Nov. 7, 2007).

Table. Average life expectancy in eleven African countries (age in years).⁵⁹

Country	Before AIDS	2010	Country	Before AIDS	2010
Angola	41.3	35.0	Rwanda	54.7	38.7
Botswana	74.4	26.7	South Africa	68.5	36.5
Lesotho	67.2	36.5	Swaziland	74.6	33.0
Malawi	69.4	36.9	Zambia	68.6	34.4
Mozambique	42.5	27.1	Zimbabwe	71.4	34.6
Namibia	68.8	33.8			

These macro numbers tell only part of the story. HIV/AIDS has a tremendous impact on the economic and social welfare of individuals and families. Lost income is a significant issue for families in which the primary wage earner misses work because he or she is infected with HIV or needs to stay home to care for family members infected with HIV.⁶⁰ In South Africa and Zambia, for example, monthly incomes of AIDS-affected households declined by 66% to 80% due to the costs of dealing with AIDS-related illness.⁶¹ These dramatic declines in family income often hit poor families that are only just surviving before AIDS takes its toll, and they have significant implications for the rights of children.

HIV/AIDS has also damaged the agricultural sector of numerous countries, exacerbating the problem of food insecurity for huge populations, particularly the poor.⁶² AIDS has caused the loss of 5% to 10% of Zimbabwe's agricultural workforce.⁶³ In Ethiopia, non-AIDS affected households spend an average of thirty-three hours per week performing agricultural work, whereas AIDS-affected households

⁵⁹ Presbyterian Church (USA), Int'l AIDS Ministries, *Generation at Risk: African Churches Respond to the AIDS Pandemic*, <http://www.pcusa.org/aids-international/matteroffaith/generation.htm> (last visited Oct. 31, 2007) (attributing credit to AVERT, international AIDS charity, as source of chart and data).

⁶⁰ UNAIDS, *supra* note 47, at 45.

⁶¹ *Id.* In Cote d'Ivoire, families coping with AIDS-related illness have household incomes that are half the average household income. See Fredriksson & Kanabus, *supra* note 58.

⁶² Agriculture accounts for 24% of Africa's gross domestic product, 40% of its foreign exchange earnings, and 70% of its employment. See UNAIDS, *supra* note 47, at 50.

⁶³ *Id.* at 46.

average only eleven to sixteen hours per week.⁶⁴ Reductions in the agricultural workforce affect not just rural families but also urban populations dependent on the agricultural sector for their food supply.

Social services suffer as well. Health care budgets are overburdened, draining resources needed for other programs. The cost of HIV treatment often exceeds developing countries' available resources.⁶⁵ In 2001, health care expenditure per capita was \$202 in Botswana, \$23 in Haiti, \$13 in Malawi, \$12 in Mozambique, \$225 in South Africa, \$12 in Tanzania, \$15 in Uganda, and \$20 in Zambia.⁶⁶ In contrast, the cost of anti-retroviral treatment in low-income countries was estimated in 2001 by the Harvard Consensus Statement at \$1,123 per patient and in 2004 by the World Health Organization ("WHO") at \$488 per patient.⁶⁷ Even as the cost of anti-retroviral treatment continues to fall, it remains an overwhelming burden on many countries' health care budgets.

The cost of treating patients with HIV/AIDS is not the only concern for the health care sector of developing countries. High incidences of HIV infection have been reported among health care workers, leading to absenteeism and high vacancy rates that further strain already-exhausted systems.⁶⁸ In countries with HIV prevalence rates of at least 20%, only in South Africa and Namibia is the ratio of HIV-patients to doctors less than 100 to 1.⁶⁹ In Zimbabwe, vacancy rates for hospital-based nursing positions range from 27% to 50%.⁷⁰

Similar effects are seen in education, as schools lose teachers temporarily or permanently due to HIV/AIDS-related illnesses and deaths. In Swaziland, the government "will have to train 13,000 teachers over the next seventeen years, just to keep services at their

⁶⁴ *Id.*; see also SABINE BECKMANN & PALLAVI RAI, ILO, SWAZILAND: HIV/AIDS, WORK AND DEVELOPMENT 15 (2005) (finding dramatic reductions in Swaziland's agricultural production due to AIDS, including 54.2% reduction in household maize production).

⁶⁵ Moreover, the cost of treatment is just one element of the economic burden. See Markus Haacker, *The Impact of HIV/AIDS on Government Finance and Public Services*, in INT'L MONETARY FUND, THE MACROECONOMICS OF HIV/AIDS 198, 212 (Markus Haacker ed., 2004) ("Total resource needs for low- and middle-income countries in 2005 are estimated at \$11.6 billion, just over half of which (52 percent) goes toward prevention-related activities, 9 percent for social expenditure, 33 percent for treatment, and 6 percent largely for overhead expense and research.").

⁶⁶ *Id.* at 219.

⁶⁷ *Id.* at 227.

⁶⁸ See *id.* at 200, 203-07.

⁶⁹ *Id.* at 222; see also Dixon et al., *supra* note 48, at 232 (reporting 20% of student nurses in South Africa are infected with HIV); Kaiser Family Foundation, *The HIV/AIDS Epidemic in Namibia* (Oct. 2005), <http://kff.org/hivaids/upload/7362.pdf>.

⁷⁰ Haacker, *supra* note 65, at 224.

1997 levels — 7,000 more than it would need to train if there were no AIDS deaths.”⁷¹ In Zimbabwe, of the estimated 6,500 new teachers needed, more than half would replace teachers who have died for AIDS-related reasons.⁷²

The impact of HIV/AIDS is not limited to social services or even the public sector in general; business also feels the effects. The South African Business Coalition on HIV & AIDS puts it plainly: “HIV/AIDS is a risk of doing business in South Africa. It is right up there with the other major identified risks such as asset security, exchange rate volatility, crime, [and] political and infrastructural risk.”⁷³ So significant is the effect on business that the Johannesburg Stock Exchange requires publicly listed companies to report on actions they are taking vis-à-vis prevention and treatment of HIV/AIDS.⁷⁴ In Botswana, Debswana, the country’s largest mining entity, reported that 37.5% of employee deaths in 1996 were due AIDS.⁷⁵ Just three years later, that figure had increased to 59.1%.⁷⁶ Elsewhere, illness and reduced productivity due to HIV/AIDS added annual costs of \$17 per employee for a Kenyan car manufacturer and \$300 per employee for the Ugandan Railway Corporation.⁷⁷

HIV/AIDS increases the cost of doing business, reduces productivity, and lowers demand for goods and services.⁷⁸ The impact on businesses includes: increased absenteeism; loss of experienced personnel; higher labor turnover; increased recruitment and training costs; and higher health care, disability and pension costs.⁷⁹ All of this leads to reduced income for businesses and, in turn, lower tax revenues for governments, further straining government budgets for HIV/AIDS programs.⁸⁰

⁷¹ Fredriksson & Kanabus, *supra* note 58.

⁷² Haacker, *supra* note 65, at 233.

⁷³ S. AFR. BUS. COAL. ON HIV & AIDS, *THE ECONOMIC IMPACT OF HIV/AIDS ON BUSINESS IN SOUTH AFRICA 2003*, at 1 (2004).

⁷⁴ Martha L. Salomon, *AIDS is Risky Business: Examining the Effect of the AIDS Crisis on Publicly Traded Companies in South Africa and the Implications for Both South African and U.S. Investors*, 37 VAND. J. TRANSNAT’L L. 1473, 1476 (2004).

⁷⁵ BROOKINGS INST., *THE ECONOMIC IMPACT OF HIV/AIDS IN SOUTHERN AFRICA: CONFERENCE REPORT NO. 9*, at 5 (2001).

⁷⁶ *Id.* In March 2001, Debswana initiated a program for the provision of anti-retroviral drugs to HIV-positive employees and one spouse and agreed to cover 90% of the costs of the drugs and related care. *Id.* at 6.

⁷⁷ Dixon et al., *supra* note 48, at 233.

⁷⁸ S. AFR. BUS. COAL. ON HIV & AIDS, *supra* note 73, at 30.

⁷⁹ *Id.* at 23.

⁸⁰ See Dixon et al., *supra* note 48, at 233.

In addition to lost tax revenues, governments themselves are experiencing all of the above-mentioned AIDS-driven pressures on their own capacity to operate effectively.⁸¹ In some countries, the loss of civil servants due to AIDS is leading to high vacancy rates (e.g., a study of five government ministries in Malawi found vacancy rates of 37% to 77%), suggesting that governments are having difficulty finding qualified replacements.⁸² In turn, this inability to replace significant numbers of civil servants further reduces the government's capacity to deliver needed services to its population.

All of these effects — whether on families, government services or the private sector — have a significant impact on the overall economy of affected countries. Most studies have estimated that in recent years, HIV/AIDS has reduced national growth rates in Africa by 2% to 4% annually.⁸³

In short, HIV/AIDS is having a dramatic impact on all sectors of society. In this resource-depleted environment, children orphaned by AIDS must cope with the loss of their parents and violations their rights. Meanwhile states face having to address the rights of children orphaned by AIDS with diminished resources. These pressures on children orphaned by AIDS, and on the states that are supposed to ensure their well-being, have implications for the relationship among rights and states' obligations to ensure rights.

II. THE RESPONSE OF INTERNATIONAL HUMAN RIGHTS LAW

International human rights law — most notably the Convention on the Rights of the Child (“CRC”) — sets forth states' obligations to protect the rights of all children, including those orphaned by AIDS. The CRC's breadth and the fact that every country in the world but two has ratified it make it the starting point of almost any discussion of international legal protections available to children.⁸⁴ That said,

⁸¹ Haacker, *supra* note 65, at 200-01 (reporting that in Namibia AIDS accounts for 90% of deaths in 20-54 age group — the age range that includes most civil servants).

⁸² *Id.* at 202.

⁸³ See Dixon et al., *supra* note 48, at 233 (noting that these figures, which inevitably must oversimplify elements, are likely to underestimate actual economic impact of HIV/AIDS on national economies in Africa). For a detailed analysis of the economic impact of HIV/AIDS today, see INT'L MONETARY FUND, *supra* note 65, available at <http://www.imf.org/external/pubs/ft/AIDS/eng/>.

⁸⁴ CRC acceptance is almost universal: 193 countries are party to the CRC, while only the United States and Somalia are not. Although the CRC is the preeminent children's rights instrument, international law concerning children dates back to the early twentieth century, decades before the birth of the modern international human rights movement. See, e.g., International Convention for the Suppression of the

numerous other international human rights treaties address the risks to which children orphaned by AIDS are exposed. Principal among them are the CRC's Optional Protocols,⁸⁵ the International Covenant on Civil and Political Rights ("ICCPR"),⁸⁶ the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),⁸⁷ the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"),⁸⁸ ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,⁸⁹ the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("Trafficking Protocol"),⁹⁰ and several regional human rights

Traffic in Women and Children, *adopted* Sept. 30, 1921, 9 L.N.T.S. 415 (*entered into force* June 15, 1922); ILO Convention Concerning the Night Work of Young Persons Employed in Industry, *adopted* Nov. 28, 1919, 38 U.N.T.S. 93 (*entered into force* June 13, 1921); ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment, *adopted* Nov. 28, 1919, 38 L.N.T.S. 81 (*entered into force* June 13, 1921); International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45 (*entered into force* Feb. 8, 1913); International Agreement for the Suppression of White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 (*entered into force* July 18, 1905). The first international document that asserted the child rights concept — the Declaration of the Rights of the Child (Declaration of Geneva) — was adopted by the League of Nations in 1924. See Cynthia Price Cohen, *Introductory Note, United Nations: Convention on the Right of the Child*, 28 I.L.M. 1448, 1448 (1989).

⁸⁵ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (May 25, 2000) (*entered into force* Jan. 18, 2002) [hereinafter *CRC Sex Trafficking Protocol*]; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (May 25, 2000) (*entered into force* Feb. 12, 2002) [hereinafter *CRC Armed Conflict Protocol*].

⁸⁶ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (*entered into force* Mar. 23, 1976) [hereinafter *ICCPR*].

⁸⁷ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (*entered into force* Jan. 3, 1976) [hereinafter *ICESCR*].

⁸⁸ Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, at 193,34, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) (*entered into force* Sept. 3, 1981) [hereinafter *CEDAW*].

⁸⁹ See ILO Convention No. 182, *supra* note 1.

⁹⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Nov. 15, 2000) (*entered into force* Dec. 25, 2003) [hereinafter *Trafficking Protocol*].

instruments.⁹¹ In addition, the Universal Declaration of Human Rights establishes the general principle for human rights law that children “are entitled to special care and assistance.”⁹²

Collectively, these and other human rights instruments offer children orphaned by AIDS a comprehensive set of protections. The discussion herein focuses on a select number of issues particularly relevant to children orphaned by AIDS, including: (1) survival and development; (2) non-discrimination; (3) health; (4) education; (5) severe forms of exploitation (including forced labor, prostitution, use in armed conflict, and trafficking); and (6) the family environment.⁹³ Although there are minor differences in language used in the various treaties, those distinctions are not material to this discussion. As such, this section examines the requirements set forth in the CRC, the most comprehensive source of children’s rights.

⁹¹ Regional human rights systems exist in Africa, the Americas, and Europe, but not in Asia. As Africa is home to over 80% of the world’s children orphaned by AIDS, this Article focuses primarily on African regional human rights instruments, notably: African Charter on Human and Peoples’ Rights, *adopted* June 27, 1981, 21 I.L.M. 58 (1982) (*entered into force* Oct. 21, 1986) [hereinafter African Charter], and African Charter on the Rights and Welfare of the Child, *adopted* July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990) (*entered into force* Nov. 29, 1999). The Inter-American system and European Union also have promulgated regional human rights instruments relevant to children orphaned by AIDS. On the Inter-American system, see, for example, American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (*entered into force* July 18, 1978) [hereinafter American Convention]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *signed* Nov. 17, 1988, O.A.S. Treaty Series No. 69 (*entered into force* Nov. 16, 1999). On the European system, see, for example, Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1; Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953), *amended* by Protocols Nos. 3, 5, and 8. See Protocol No. 3 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* May 6, 1963, E.T.S. 45 (*entered into force* Sept. 21, 1970); Protocol No. 5 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Jan. 20, 1966, E.T.S. 55 (*entered into force* Dec. 20, 1971); Protocol No. 8 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Mar. 19, 1985, E.T.S. 118 (*entered into force* Jan. 1, 1990).

⁹² Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

⁹³ International human rights law covers other issues applicable to children. The issues discussed herein were selected because they are particularly relevant to children orphaned by AIDS.

A. *Survival and Development of the Child*

The CRC obligates states parties to “ensure to the maximum extent possible the survival and development of the child.”⁹⁴ Ensuring the survival and development of the child requires action on a broad range of issues affecting children. In effect, the child’s right to survival and development serves as an umbrella principle for other rights of the child.

A related guiding principle is the “best interests of the child” standard, which has been a cornerstone of children’s rights law since the Declaration of Geneva and is one of the CRC’s foundational principles.⁹⁵ Article 3(1) of the CRC provides that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁹⁶ With this provision, drafters of the CRC established that any decision affecting children must be taken with primary consideration for the child’s best interests.⁹⁷

This provision of the CRC also establishes the broad-based applicability of the CRC. The phrase “[i]n all action concerning children” is intended to be interpreted broadly, so as to encompass any action that directly or indirectly affects children.⁹⁸ Professor Geraldine Van Bueren suggests that “all actions” includes not only

⁹⁴ CRC, *supra* note 1, art. 6(2); *see also* African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 5(2). The child’s right to life is a related but distinct right also protected under international law. *See, e.g.*, CRC, *supra* note 1, art. 6(1); ICCPR, *supra* note 86, art. 6(1); UDHR, *supra* note 92, art. 3. International law is ambiguous on the point when life begins, leaving that determination to individual states.

⁹⁵ *See* Thomas Hammarberg, *The UN Convention on the Rights of the Child — How to Make It Work*, 12 HUM. RTS. Q. 97, 99 (1990); Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 170 (1998). Although the best interests of the child standard has been utilized by courts and governments for over 100 years, it is not without its critics. For an analysis of the standard, *see, for example*, CLAIRE BREEN, *THE STANDARDS OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW* (2002); Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in *CHILDREN’S RIGHTS VOL. II*, at 183 (Michael D.A. Freeman ed., 2004).

⁹⁶ CRC, *supra* note 1, art. 3(1). CRC, *supra* note 1, arts. 9, 18, 20, 21, 37, 40 also explicitly refer to the best interests of the child principle.

⁹⁷ *See* THOMAS HAMMARBERG, *MAKING REALITY OF THE RIGHTS OF THE CHILD — THE UN CONVENTION: WHAT IT SAYS AND HOW IT CAN CHANGE THE STATUS OF CHILDREN WORLDWIDE* 9 (1990).

⁹⁸ *See* Philip Alston, *The Legal Framework of the Convention on the Rights of the Child*, 91/2 BULL. HUM. RTS. 1 (1992); Todres, *supra* note 95, at 171.

state action but also actions by private actors.⁹⁹ The language “all actions concerning children” also implies that the CRC may be invoked not only when the action in question applies to a particular child, but also when the action in question affects children generally.¹⁰⁰ Broad application of the CRC offers children the greatest level of protection. Together, these two CRC provisions provide that, in every action concerning children, states must determine what it in the best interests of the child and take action that will ensure to the maximum extent possible the survival and development of each child.

B. Non-discrimination

Most major international human rights instruments contain a non-discrimination clause requiring countries to ensure the rights enumerated in such treaties to all individuals without discrimination of any kind.¹⁰¹ The CRC’s non-discrimination provision reads:

States Parties shall respect and ensure the rights set forth in the [CRC] to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language,

⁹⁹ VAN BUEREN, *supra* note 30, at 46; *see also* HODGKIN & NEWELL, *supra* note 39, at 42 (noting Article 3(1)’s “scope is very wide, going beyond State-initiated actions to cover private bodies too”).

¹⁰⁰ Todres, *supra* note 95, at 171. Courts in a number of countries have applied Article 3 of the CRC to a wide range of cases. *Id.* at 172. Moreover, the Committee on the Rights of the Child — the body responsible for interpreting the CRC and reviewing states parties’ compliance — has emphasized that the phrase should be interpreted as broadly as possible. *See* Alston, *supra* note 98, at 7-10.

¹⁰¹ *See, e.g.*, ICCPR, *supra* note 86, art. 2(1); ICESCR, *supra* note 87, art. 2(2); UDHR, *supra* note 92, art 2(1); African Charter, *supra* note 91, art. 2; American Convention on Human Rights, *supra* note 91, art. 1(1); European Convention, *supra* note 91, art. 14. Certain human rights conventions do not contain a non-discrimination clause, but only because such a provision is inapplicable or superfluous. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951). As prohibition on genocide and other crimes against humanity by definition apply to acts against “national, ethnical, racial or religious group[s],” a non-discrimination clause is unnecessary. *Id.* Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) does not need a separate non-discrimination clause as the subject of CERD is discrimination. *See* International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, at 47, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1966) (*entered into force* Dec. 21, 1965).

religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.¹⁰²

Like other human rights conventions, the CRC requires states parties to “respect” and “ensure” the rights of every individual. The former term obligates governments not to infringe upon the rights of children, whereas the latter term obligates states parties to take affirmative steps to protect children from any threat of human rights violations.¹⁰³

Distinct from other treaties, the CRC’s non-discrimination clause contains a more extensive list of protected characteristics.¹⁰⁴ Thus, it includes prohibitions on discrimination based on disability, birth status, and social or other status, all of which may be relevant for children orphaned by AIDS.¹⁰⁵ While the CRC includes a lengthy list of protected characteristics, its clause parallels that of other international instruments in that they all require states parties to respect and ensure the rights of all children (or individuals) “without discrimination of any kind.” In other words, the list of protected characteristics is not a closed list; rather, it is illustrative of the bases of discrimination that are prohibited.¹⁰⁶

¹⁰² CRC, *supra* note 1, art. 2(1); *see also* ICCPR, *supra* note 86, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

¹⁰³ *See* Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS* 72, 77 (Louis Henkin ed., 1981).

¹⁰⁴ This reflects, in large part, human rights law’s development over the latter half of the twentieth century. Drafted later in time than most of the other major human rights treaties, the CRC benefited from the collective learning of the international community. *Compare* CRC, *supra* note 1, art. 2(1) (enumerating protected traits of: color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status), *with* ICCPR, *supra* note 86, art. 2(1) (enumerating protected traits of: race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status).

¹⁰⁵ Many courts have extended disability law protections to HIV-infected individuals. *See infra* note 138. Moreover, although references to birth status are intended primarily to ensure that children born out of wedlock receive the same protection as other children, a reasoned reading of birth status should include children born to HIV-infected parents, as certainly it is intended that they would receive the same protection as other children. *See also* African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 10 (establishing child’s right to protection from interference with their privacy or attacks on their honor or reputation, which suggests need to protect them from stigmatization in local community and ensure confidentiality with respect to their HIV/AIDS status).

¹⁰⁶ *See, e.g.*, ICCPR, *supra* note 86, art. 2(1); ICESCR, *supra* note 87, art. 2(2);

Finally, the CRC's non-discrimination clause contains an additional element essential to combating discrimination against children: it obligates states parties to protect children from discrimination based on the status of the child's parents or legal guardians and not just the status of the child herself.¹⁰⁷ As we shall see in Part III, this prohibition on discrimination based on the status of the parents or guardians is directly relevant to the situation of children orphaned by AIDS, especially given that most of these children are not HIV-positive. For this section, it is sufficient to note that international law prohibits discrimination, and that children's rights law provides for protection against discrimination by association.

C. Health

Pursuant to the CRC, the child's right to health includes: (1) the right to the "highest attainable standard of health"; (2) the right to access health care services and treatment; and (3) state obligations to address particular issues relevant to children's health.¹⁰⁸

By employing the right to the "highest attainable standard of health"¹⁰⁹ formulation, human rights law acknowledges two important

UDHR, *supra* note 92, art. 2. The *Restatement* adopts a similar approach in determining customary international human rights law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. a (1987) (reading, in part, "The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future."); see also U.N. Secretary-General, *Report of the Committee on the Elimination of Racial Discrimination*, at 111-12, delivered to the General Assembly, U.N. Doc. A/57/18 (Jan. 1, 2002) (reaffirming that caste-based discrimination falls under prohibition set forth in CERD Article 1).

¹⁰⁷ CRC, *supra* note 1, art. 2(1)-(2) (obligating states to "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members"); see also African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 3 (protecting children from discrimination by association based on parents' status).

¹⁰⁸ See CRC, *supra* note 1, art. 24. See generally Benjamin Mason Meier & Larisa M. Mori, *The Highest Attainable Standard: Advancing a Collective Human Right to Public Health*, 37 COLUM. HUM. RTS. L. REV. 101, 114-15 (2005) (asserting that "individual right to health has been interpreted to embrace, as part of its minimum core content, basic provisions of emergency health care necessary to save lives, including the treatment of prevalent diseases, the provision of essential drugs, and safeguards against serious environmental health threats").

¹⁰⁹ See CRC, *supra* note 1, art. 24(1) (recognizing child's right to "the highest attainable standard of health"); see also ICESCR, *supra* note 87, art. 12(1) (recognizing every individual's right to "highest standard of physical and mental health"); African Charter, *supra* note 91, art. 16 (establishing right to enjoy "best attainable state of

variables — differences among individuals and countries.¹¹⁰ Not all individuals can enjoy the same level of good health, and the language in the CRC accounts for this. It also recognizes differences in available resources among states. For example, at present, Chad cannot afford to provide the health care services to its population that Canada can afford, and requiring the same outcomes from both is impractical.¹¹¹ Adopting a lowest common denominator approach would not help children either, as it would strip the right of any meaning except for the poorest children in the poorest countries. The CRC recognizes that developing countries have more limited resources and utilizes flexible language to make the right to health meaningful in all countries.¹¹²

physical and mental health”); African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 14 (recognizing children’s “right to enjoy the best attainable state of physical, mental and spiritual health[,]” and states parties’ obligation to “ensure the provision of necessary medical assistance and health care to all children”).

¹¹⁰ See, e.g., U.N. Comm. on Economic, Social & Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, ¶ 9, U.N. Doc. E/C.12/2000/4 (July 4, 2000) [hereinafter *General Comment 14*] (stating that ICESCR’s right to health “takes into account both the individual’s biological and socio-economic preconditions and the State’s available resources”).

¹¹¹ Canada’s per capita GDP is US\$29,480 and its per capita health care expenditures is US\$2,792, whereas Chad’s GDP per capita is only an estimated US\$1,020 and its per capita health care expenditure is US\$17. See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2004, at 139, 142, 156, 159 (2004), available at <http://hdr.undp.org/reports/global/2004/>.

¹¹² If the CRC drafters had adopted a more stringent, inflexible standard, some developing countries may have refused to ratify the CRC. Article 4 addresses developing countries’ concerns:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

During the drafting of the CRC, the delegations of Brazil, India, Venezuela, Libya, and Algeria led the opposition to a proposal by the United States that would have removed the “available resources” language. This opposition led to the compromise position in which economic, social, and cultural rights were addressed in a separate sentence and allowances were made for available resources with respect to these rights. See U.N. Comm’n on Human Rights, *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, at 30-31, U.N. Doc. E/CN.4/1989/48 (Mar. 2, 1989), reprinted in SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PRÉPARATOIRES” 115, 155 (1992). The resource qualifiers of the second sentence do not eliminate developing countries’ obligations with respect to economic, social, and cultural rights. They still are obligated to work toward full implementation of the

The second legal requirement embedded in children's right to health is that states ensure children access to treatment and facilities for care.¹¹³ A fundamental component of this obligation is ensuring access for all children without discrimination of any kind, as required by the CRC's non-discrimination provision. Similarly, the CRC's requirement that "no child [be] deprived of his or her right of access to such health care services," when combined with the prohibition on discrimination, obligates states to ensure children orphaned by AIDS receive the same services as other children.¹¹⁴

Finally, the CRC requires states parties to address specific health issues particularly relevant to children, including infant and child mortality and the provision of primary health care services.¹¹⁵

D. Education

International law recognizes each child's right to education.¹¹⁶ The CRC establishes different state obligations for primary, secondary, and higher education.¹¹⁷ States are required to make primary education "compulsory and available free to all."¹¹⁸ States must also make

CRC. The CRC requires that they do as much as possible with the resources they have, look to the international community to access additional resources, and build capacity so that they will have greater resources for ensuring children's rights in the future. See *Maastricht Guidelines*, *supra* note 8, ¶ 8 ("The State cannot use the 'progressive realization' provisions in article 2 of the [ICESCR] as a pretext for noncompliance.").

¹¹³ See, e.g., CRC, *supra* note 1, art. 24(1) (recognizing children's right "to facilities for the treatment of illness and rehabilitation of health" and establishing states' obligations to "strive to ensure that no child is deprived of his or her right of access to such health care services"); ICESCR, *supra* note 87, art. 12(d).

¹¹⁴ See also *General Comment 14*, *supra* note 110, ¶ 18 (emphasizing that ICESCR prohibits discrimination in access to health care on any of prohibited grounds including "health status (including HIV/AIDS)"). CEDAW provides additional support for children's health, as it contains provisions requiring states parties to ensure women's access to health care services, health care facilities, and "educational information to help to ensure the health and well-being of families," all of which have implications for children. See CEDAW, *supra* note 88, arts. 10, 12, 14. For more on the potential benefit of women's rights to children (and children's rights to women), see Todres, *supra* note 30.

¹¹⁵ CRC, *supra* note 1, art. 24(2).

¹¹⁶ CRC, *supra* note 1, art. 28(1); ICESCR, *supra* note 87, art. 13(1); African Charter, *supra* note 91, art. 17; African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 11; see also UDHR, *supra* note 92, art. 26(1).

¹¹⁷ CRC, *supra* note 1, art. 28.

¹¹⁸ *Id.* art. 28(1)(a); see also ICESCR, *supra* note 87, art. 13(2)(a); African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 11(3)(a); UDHR, *supra* note 92, art. 26(1).

secondary schooling “available and accessible” to every child.¹¹⁹ Finally, with respect to higher education, states are required to make it “accessible to all on the basis of capacity by every appropriate means.”¹²⁰ For many poorer countries with large numbers of younger children out of school, basic education for all takes priority over providing university education, and the less stringent obligation under international law for higher education is recognition of that situation.

Education rights also contain the requirement of progressive realization.¹²¹ Thus, while the strongest obligation resides at the primary education level, states cannot stop at providing the minimum. There must be a concerted effort to enable children to achieve higher levels of education. This is essential to giving communities the opportunity to break the cycle of poverty and enjoy lives beyond mere subsistence and survival.

E. Severe Forms of Exploitation

Marginalized children, such as children orphaned by AIDS, are vulnerable to severe forms of exploitation based on a number of factors including poverty, an increased likelihood that they are not in school, and the absence of a parent to guard against their exploitation. These children are at risk of abusive practices such as forced labor, prostitution, trafficking, and use in armed conflict.

There is an extensive body of law in international human rights aimed at combating such abusive practices. This body of law includes treaties and provisions that cover labor generally, such as CRC Article 32’s prohibition on economic exploitation of children,¹²² as well as law

¹¹⁹ CRC, *supra* note 1, art. 28(1)(b); *see also* ICESCR, *supra* note 87, art. 13(2)(b); African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 11(3).

¹²⁰ CRC, *supra* note 1, art. 28(1)(c); *see also* ICESCR, *supra* note 87, art. 13(2)(c) (“Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”); African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 11(3)(c) (requiring that states parties make “higher education accessible to all on the basis of capacity and ability by every appropriate means”).

¹²¹ On the issue of progressive realization, *see*, for example, Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS Q. 156, 172-77 (1987).

¹²² CRC, *supra* note 1, art. 32(2); *see also* ICESCR, *supra* note 87, art. 10(3) (“[Children’s] 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 paid employment of child labour should be prohibited and punishable by law.”); African Charter on the Rights and Welfare of Children, *supra* note 91, art. 15 (prohibiting child labor). For children affected by

that addresses specific forms of exploitative labor, including the CRC's Optional Protocols on the sale of children and children in armed conflict, respectively.¹²³ These treaties generally establish state obligations in three areas: (1) prosecution (2) prevention and (3) protection.¹²⁴

First, states are required to ensure that their laws prohibit such exploitative practices and that they undertake to enforce such laws.¹²⁵ Second, international law obligates states parties to implement prevention programs to combat exploitative practices such as prostitution, trafficking, or use of children in armed conflict.¹²⁶ Third,

HIV/AIDS who need to work to support their family, international law offers protections. See, e.g., ICESCR, *supra* note 87, art. 7 (requiring law ensuring fair wages and safe, healthy working conditions); African Charter, *supra* note 91, art. 15 ("Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work"); see also ILO Convention Concerning Minimum Age for Admission to Employment, *adopted* June 26, 1973, 1015 U.N.T.S. 297 (*entered into force* June 19, 1976) (requiring legislation prohibiting use of children in workplace until they have reached at least 15 years of age). For a detailed list of ILO conventions specifically related to children, see HODGKIN & NEWELL, *supra* note 39, at 483.

¹²³ See ILO Convention No. 182, *supra* note 1, arts. 1, 3(a) (obligating states parties to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency" including "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children"); *CRC Sex Trafficking Protocol*, *supra* note 85; *CRC Armed Conflict Protocol*, *supra* note 85; see also *CRC*, *supra* note 1, art. 35 (requiring states parties to "prevent the abduction of, the sale of or traffic in children for any purpose or in any form"); *id.* art. 36 (obligating states parties to "protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare"); *id.* art. 39 (requiring states parties to "take all appropriate measures to promote physical and psychological recovery and social reintegration" of every child victim of human rights abuses); CEDAW, *supra* note 88, art. 6 (requiring states parties to "suppress all forms of traffic in women" — a provision with applicability to girls); African Charter on the Rights and Welfare of Children, *supra* note 91, art. 29 (sale, trafficking, and abduction).

¹²⁴ E.g., *Trafficking Protocol*, *supra* note 90, arts. 2, 4-13; *CRC Sex Trafficking Protocol*, *supra* note 85, arts. 3-10, *CRC Armed Conflict Protocol*, *supra* note 85, arts. 1-4, 6-7.

¹²⁵ See, e.g., *Trafficking Protocol*, *supra* note 90, art. 5; *CRC Sex Trafficking Protocol*, *supra* note 85, art. 3. The *Trafficking Protocol*, which covers adults and children, sets a lower threshold for prosecution, providing that any "recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in [the definition of trafficking]." *CRC Sex Trafficking Protocol*, *supra* note 85, art. 3(c); see also *CRC Armed Conflict Protocol*, *supra* note 85, art. 6 (requiring states parties to "ensure the effective implementation and enforcement"); African Charter on the Rights and Welfare of Children, *supra* note 91, art. 22.

¹²⁶ *Trafficking Protocol*, *supra* note 90, arts. 9-12 (mandating prevention programs, including training for law enforcement, immigration, and other officials in prevention of trafficking, and information exchange with other states parties to help combat international trafficking rings); *CRC Sex Trafficking Protocol*, *supra* note 85, arts. 6, 7, 10

international law requires states to provide assistance to victims of trafficking, prostitution, use in armed conflict, and other harmful practices.¹²⁷

A number of treaties emphasize the need for states to address the physical, psychological, and social recovery and reintegration of victims of these worst forms of child exploitation.¹²⁸ In general, however, the obligations on states with respect to prevention and victim assistance are not as strong as the requirement to criminalize such acts. Some of the provisions related to victims of trafficking, for instance, merely require states to “consider” implementing these measures, leaving child victims with lesser protections.¹²⁹ Still, the expectation is that states will act on all three fronts to combat the exploitation of children.

F. Family Environment

Finally, the provision of alternative care arrangements is vital to many children, especially orphaned children. CRC Article 20 provides that “[a] child temporarily or permanently deprived of his or her family environment . . . shall be entitled to special protection and assistance provided by the State.”¹³⁰ In turn, other articles of the CRC (on the right to health, education, and an adequate standard of living, as well as protection from the worst forms of child labor) identify areas where governments must act to ensure that such children receive the special protection and assistance to which they are entitled.¹³¹ In

(requiring international cooperation in investigations into international trafficking rings and providing for seizure of assets used in or derived from trafficking).

¹²⁷ See Trafficking Protocol, *supra* note 90, arts. 6-8; *CRC Sex Trafficking Protocol*, *supra* note 85, art. 8; *CRC Armed Conflict Protocol*, *supra* note 85, art. 6(3).

¹²⁸ Trafficking Protocol, *supra* note 90, art. 6 (including “[a]ppropriate housing, [c]ounseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; [m]edical, psychological and material assistance; and [e]mployment, educational and training opportunities”); *CRC Sex Trafficking Protocol*, *supra* note 85, art. 8; CRC, *supra* note 1, art. 39.

¹²⁹ See, e.g., Trafficking Protocol, *supra* note 90, art. 6(3) (“Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons.”).

¹³⁰ CRC, *supra* note 1, art. 20(1); see also African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 25(2)(a) (requiring states parties to “ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment . . . be provided with alternative family care”).

¹³¹ See CRC, *supra* note 1, art. 24 (right to health); *id.* at art. 28 (right to education); *id.* at art. 27 (right to adequate standard of living); *id.* at 32 (prohibition of child labor); *id.* at 34 (prohibition of sexual exploitation); *id.* at 38 (prohibition of use of children in armed conflict); *id.* at 36 (prohibition of all other forms of exploitation of children).

addition, Article 20 imposes upon states parties an obligation to provide for alternative care arrangements if children are left without a guardian.¹³² Ensuring that orphans have alternative family care arrangements (either through extended family or a state designated guardian) is an essential initial step to ensuring the well-being of the child following the loss of parents.

G. Current State of the Law

As this discussion demonstrates, the international community has developed an extensive body of law to ensure the rights and well-being of children, the core of which is the CRC. As with any law, gray areas exist.¹³³ For human rights law, children orphaned by AIDS may well prove to be the ultimate test, compelling a re-examination of the nature and content of rights in order to better serve children in need.

III. APPLIED CHILDREN'S RIGHTS

Children orphaned by AIDS present human rights law with one of its biggest challenges in recent years, as nearly every right of theirs is in jeopardy. Efforts to enforce their rights shed light on the relationship among rights. Viewing the experience of children orphaned by AIDS vis-à-vis one right readily leads to a discussion of other related rights. This section reveals the extent to which rights are integrated with one another and, in doing so, raises questions about the precise nature of both the relationship between specific rights and the corresponding state obligation with respect to each right. This examination of rights as applied provides the first step in advancing the discourse on the interrelationship among rights beyond the general discussion of the interdependence between civil and political rights and economic, social, and cultural rights to a more detailed analysis and understanding of specific rights.

¹³² CRC, *supra* note 1, art. 20(2).

¹³³ This is an understandable occurrence in international human rights law, given that conventions are drafted so as to work in nearly 200 countries. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 21 (1982) (noting that human rights treaties, specifically ICCPR and ICESCR, "are broad enough in scope to surmount differences among various political, economic, and social systems, as well as among widely differing cultures and stages of development").

A. *Survival and Development*

All of the human rights abuses experienced by children orphaned by AIDS implicate their ability to survive and develop to their fullest potential. Therefore, ensuring the right to survival and development means addressing a broad range of practices. In practice, if a state is to ensure a child's right to survival and development, this necessarily implicates the child's right to health, education, an adequate standard of living, and many other rights.¹³⁴ With respect to children orphaned by AIDS, the right to survival and development would require states not only to ensure their access to health care, education, and basic means for survival, but also to ensure their right to birth registration,¹³⁵ protect their inheritance rights in order to prevent "property grabbing," and shield them from harmful practices, including forced labor, prostitution, and use in armed conflict. All of these rights are implicated even with a relatively narrow reading of the child's "development." A broader reading might implicate still other economic, social and cultural rights.¹³⁶ Even assuming a narrow reading, however, ensuring a child's right to survival and development "to the maximum extent possible" would mean a state must act on a number of fronts, across a range of rights.

B. *Non-discrimination*

The interrelationship among rights is perhaps most evident with regard to the child's right to live free from discrimination. The stigma associated with HIV/AIDS and resultant discrimination against children orphaned by AIDS leads to many other rights violations,

¹³⁴ See, e.g., Judith Karp, *Concepts Underlying the Implementation of the Convention on the Rights of the Child*, 4 LOY. POVERTY L.J. 113, 123 (1999) ("The principles of the right to life, survival, and development are inherently connected to many other rights under the Convention, like the right to health, education, access to information, and to the other three general principles, especially the principle of participation.").

¹³⁵ See *infra* note 183 and accompanying text.

¹³⁶ For example, the development of the child could be read to implicate CRC, *supra* note 1, art. 30 ("In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."), and *id.* art. 31 ("States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. . . . States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.").

including denial of the child's rights to health and education. Conversely, enforcement of health and education rights, among others, will not succeed in reaching the most marginalized children if discrimination is not accounted for when seeking to ensure these other rights.

Most countries have non-discrimination (or equal protection) provisions in their constitution, bill of rights, or national legislation.¹³⁷ Many have extended anti-discrimination law to HIV/AIDS status.¹³⁸ Although children orphaned by AIDS who are HIV-positive would be covered by such prohibitions on discrimination on the basis of HIV status, children orphaned by AIDS who are not infected with HIV may need to look to prohibitions on discrimination based on social origin or birth status for protection. Not all constitutions, however, refer to birth status explicitly.¹³⁹ If this protection is not assured constitutionally, countries should provide for it in national legislation.¹⁴⁰

¹³⁷ The Constitution of South Africa contains one of the most extensive set of protections of individual rights. See S. AFR. CONST. 1996, ch. 2 (identifying 32 interests protected by Bill of Rights). It establishes that everyone is equal before the law and has a right to equal protection, and provides that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth" and that "[n]o person may unfairly discriminate directly or indirectly against anyone on one or more [such] grounds." *Id.* art. 9(3)-(4). The South African Constitution also has the most extensive constitutional provision on children's rights. See *id.* art. 28. See generally Tshepo L. Mosikatsana, *Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution*, 3 MICH. J. RACE & L. 341 (1998) (describing South African Constitution's grant of fundamental rights to children).

¹³⁸ See, e.g., *Bragdon v. Abbott*, 524 U.S. 624 (1998) (deeming asymptomatic HIV is disability within meaning of ADA); *Hoffman v. S. African Airways*, 2001 (1) SA 1 (CC) at 42 (holding by South African Constitutional Court that airline improperly discriminated against employee on basis of his HIV status); *Martinez ex rel. Martinez v. Sch. Bd.*, 861 F.2d 1502, 1506 (11th Cir. 1988) (holding that AIDS is not barrier to child's classroom placement); *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 706 (9th Cir. 1988) (holding that AIDS-infected teacher should be allowed to teach in classroom).

¹³⁹ See, e.g., NAMIB. CONST., art. 10.2, available at http://www.oefre.unibe.ch/law/icl/wa00000_.html ("No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.").

¹⁴⁰ See NAT'L DEMOCRATIC INST. FOR INT'L AFFAIRS & THE S. AFR. DEV. CMTY PARLIAMENTARY FORUM, SURVEY OF LEGISLATIVE EFFORTS TO COMBAT HIV/AIDS IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) REGION 17 (2004) ("Parliaments need to enact additional legislation to ensure that all citizens are protected from discrimination and stigma.").

To comply fully with the requirements of non-discrimination under international law, states must account for the special circumstances of children. Law protecting individuals from discrimination based on their relationship with someone who is infected with (or died from) HIV/AIDS is essential. The protection of children from “discrimination by association” is required under international human rights law, including the CRC and the African Charter on the Rights and Welfare of the Child,¹⁴¹ but thus far states have not accounted sufficiently for discrimination by association.

Anti-discrimination law in the United States offers some guidance. The Americans with Disabilities Act (“ADA”),¹⁴² which targets workplace discrimination against persons with disabilities, addresses discrimination by association. Under the ADA, the term “discriminate” is defined, in part, to include “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.”¹⁴³ Congress included this provision in part based on testimony about an employee who was terminated from her position because she recently had started caring for her HIV-infected son, who had moved in with her.¹⁴⁴ “[T]he legislative history suggests that one situation the association provision was meant to cover involves beliefs and stereotypes about people who associate with, or who are related to, people with particular illnesses such as AIDS.”¹⁴⁵

¹⁴¹ CRC, *supra* note 1, art. 2(1) (requiring states parties to prevent “discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status” (emphasis added)). The CRC’s non-discrimination clause specifically references several characteristics relevant in the context of HIV/AIDS, namely disability (where HIV/AIDS has been deemed a disability), birth status, and other status. *See also* African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 3 (“Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status” (emphasis added)).

¹⁴² 42 U.S.C. §§ 12101-12213 (2000).

¹⁴³ *Id.* § 12112(b)(4). In the United States, plaintiffs have had little success suing under this provision. *See* Lawrence D. Rosenthal, *Association Discrimination under the Americans with Disabilities Act: Another Uphill Battle for Potential ADA Plaintiffs*, 22 HOFSTRA LAB. & EMP. L.J. 132, 133 (2004). *But see* Dollinger v. State Ins. Fund, 44 F. Supp. 2d 467, 482 (N.D.N.Y. 1999) (denying defendant’s motion to dismiss complaint alleging discrimination based on plaintiff’s association with HIV-positive individuals).

¹⁴⁴ *See* H.R. REP. NO. 101-485, pt. 2, at 30 (1990); *see also* Rosenthal, *supra* note 143, at 136-37.

¹⁴⁵ Rosenthal, *supra* note 143, at 138; *see also* 29 C.F.R. § 1630.8 (2005)

Subsequent interpretation of the ADA's association provision reflects the understanding that the parent-child relationship is precisely the type of "association" that is protected. One federal court wrote:

As the regulations make clear, the ADA's purpose is to prevent discrimination against . . . those who may have a close familial, social, or possibly even physical relationship with a disabled person. The paradigmatic case is that of the parent of a disabled child, whose employer may fear that the child's disability may compromise the employee's ability to perform his or her job.¹⁴⁶

In addition, in examining the association provision of the ADA, the Tenth Circuit noted that "it would be illegal for an employer to discriminate against a qualified employee because that employee had a family member or a friend who had a disability."¹⁴⁷ Although typically it is the parent who suffers discrimination in ADA cases, these cases demonstrate that the parent-child relationship is a covered "association." As children orphaned by AIDS are often discriminated against because of their parents' status, countries must follow the CRC or ADA model and adopt legislation that addresses discrimination by association.¹⁴⁸

(establishing that "[i]t is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association").

¹⁴⁶ *O'Connell v. Isocor Corp.*, 56 F. Supp. 2d 649, 653 (E.D. Va. 1999) (relying on *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995), and *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209 (4th Cir. 1994)).

¹⁴⁷ *Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1082 (10th Cir. 1997).

¹⁴⁸ Refugee and asylum case law is also instructive. Under refugee law, asylum is granted if a petitioner can demonstrate a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150 (*entered into force* Apr. 22, 1954). U.S. immigration law uses a similar formulation. In these cases, association with a persecuted individual, particularly if he or she is a family member, is given significant consideration. See, e.g., *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1184 (8th Cir. 2005) (holding "that disabled children and their parents constitute a statutorily protected group and that a parent who provides care for a disabled child may seek asylum and withholding of removal on the basis of the persecution the child has suffered on account of his disability"); *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987) (finding petitioner demonstrated well-founded fear of persecution through evidence that family members had been kidnapped and murdered); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) ("Perhaps a prototypical example of 'particular social group' would consist of the immediate members of a certain family, the family being a focus of

The urgency underlying the need to combat discrimination, including discrimination by association, is articulated by the U.S. Supreme Court in the landmark case of *Brown v. Board of Education*. Discussing race-based segregation, the Supreme Court wrote: “To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁴⁹ Similarly, discrimination against children orphaned by AIDS can have the same impact.¹⁵⁰

This impact is felt when addressing a host of other rights. The rights to health, education, and survival and development, among others, cannot be fully ensured for children orphaned by AIDS unless HIV/AIDS-related discrimination by association is addressed. Nor can these rights be ensured to all unless other forms of discrimination, including gender-based discrimination, are eradicated.¹⁵¹ These rights are all interdependent; failure to eliminate all forms of discrimination against children orphaned by AIDS leaves them at risk of not being able to realize many other rights.

C. Health

Health rights are threshold rights. The old saying, “you have nothing without your health,” reflects the extent to which health is intertwined with all of life’s activities. While health rights do not equate to a guarantee of good health, children without access to health care are more likely to have unmet health needs and be in poorer

fundamental affiliational concerns and common interests for most people. . . . [We have] regarded evidence of persecution directed against a family unit as relevant in determining refugee status.”).

¹⁴⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

¹⁵⁰ See, e.g., *Doe v. Dolton Elementary Sch. Dist.*, 694 F. Supp. 440, 447 (N.D. Ill. 1988) (stating that “if AIDS-infected children are segregated, they will suffer that same feelings of inferiority the Supreme Court sought to eradicate in *Brown [v. Board of Education]* 34 years ago”).

¹⁵¹ See UNAIDS, UNFPA & UNIFEM, *WOMEN AND HIV/AIDS: CONFRONTING THE CRISIS* 7 (2004) (reporting that in countries where there is greater gender discrimination and position of women is lower, women and girls are more adversely affected by HIV/AIDS); COMM’N ON HIV/AIDS AND GOVERNANCE IN AFRICA (CHGA), *IMPACT OF HIV/AIDS ON GENDER, ORPHANS AND VULNERABLE CHILDREN: DISCUSSION OUTCOMES OF CHGA INTERACTIVE CAMEROON* 5 (2004), available at www.uneca.org/CHGA (noting gender gap among youth is particularly striking, as 75% of young people with HIV/AIDS are female). See generally Jonathan Todres, *The Importance of Realizing ‘Other Rights’ to Prevent Sex Trafficking*, 12 *CARDOZO J.L. & GENDER* 885, 889-97 (2006) (discussing link between various forms of discrimination and sex trafficking as example of how discrimination infringes rights).

health.¹⁵² This leads children to fall behind in school as a result of absenteeism and other health-related effects.¹⁵³ In other words, health and education rights are intricately related. Fulfillment of health rights also has a direct impact on the child's right to survival and development.

For children orphaned as a result of AIDS, shortcomings in health care leave them at greater risk. Infant and child mortality rates of orphans are higher than that of children whose parents are still alive.¹⁵⁴ Further, infant and child mortality rates are much higher among children of HIV-infected mothers (whether or not the child is infected) than among non-HIV-affected children.¹⁵⁵ Consequently, children orphaned by AIDS are among the most vulnerable populations just in terms of surviving until their fifth birthday. Thus, confronting infant and child mortality necessarily requires addressing the health needs of children orphaned by AIDS and ensuring their survival.

Under the CRC, states parties are also required to take "appropriate measures . . . to ensure appropriate pre- and post-natal health care for

¹⁵² See, e.g., ECON. OPPORTUNITY INST., *THE DILEMMA OF THE UNINSURED: POOR ACCESS TO CARE LEADS TO POOR HEALTH* (2001), available at <http://www.eoionline.org/HealthcareUninsuredDilemmaFS.pdf> (describing correlation between lack of access to health care and poor health); Dennis P. Andrulis, *Access to Care Is the Centerpiece in the Elimination of Socioeconomic Disparities in Health*, 129 *ANNALS INTERNAL MED.* 412 (1998) (discussing association between "lack of insurance (especially for persons who live in poverty), inability to obtain services, and adverse health outcomes").

¹⁵³ See JOY MILLER DEL ROSSO & TONIA MAREK, *CLASS ACTION: IMPROVING SCHOOL PERFORMANCE IN THE DEVELOPING WORLD THROUGH BETTER HEALTH AND NUTRITION* 11 (1996) (reporting that "[h]ealthier and better nourished children stay in school longer, learn more and become healthier and more productive adults"); Deborah L. Crooks, *American Children at Risk: Poverty and Its Consequences for Children's Health, Growth, and School Achievement*, 38 *AM. J. PHYSICAL ANTHROPOLOGY* 57, 57 (1995) ("Poor health and poor growth are likely to lead to poor school achievement via deficits in cognitive functioning, behavior and activity, and increased absenteeism and school failure."); The Partnership for Child Development, *Focusing Resources on Effective School Health: A FRESH Start to Improving the Quality and Equity of Education* 1 <http://www.schoolsandhealth.org/FRESH.htm> (last visited Nov. 16, 2007), ("Poor health and malnutrition are important underlying factors for low school enrollment, absenteeism, poor classroom performance, and early school dropout, as reflected in the World Declaration on Education for All. Programmes to achieve good health, hygiene and nutrition at school age are therefore essential to the promotion of basic education for all children.").

¹⁵⁴ See Marie-Louise Newell et al., *Mortality of Infected and Uninfected Infants Born to HIV Infected Mothers in Africa: A Pooled Analysis*, 364 *LANCET* 1236, 1241 (2004).

¹⁵⁵ *Id.*

expectant mothers.”¹⁵⁶ This is arguably one of the most important legal provisions for children orphaned by AIDS. Maternal-child transmission of HIV is the most common route of infection among children, accounting for over 90% of HIV cases among children.¹⁵⁷ Given the millions of children affected by HIV/AIDS and the fact that the majority of children with the disease are infected through maternal-child transmission of the virus, the CRC’s requirement of “appropriate pre- and post-natal health care for expectant mothers” must include treatment for the prevention of maternal-child HIV transmission if a state is to be responsive to children’s right to health.¹⁵⁸ It is a question of life and death for these children (i.e., 52.5% of infected children of HIV-infected mothers will die by age two years; whereas 7.6% of uninfected children of HIV-infected mothers will die by the same age).¹⁵⁹ Clearly, the rights to life, survival, and development are implicated, in addition to the right to health.¹⁶⁰

In addition, international human rights law does not limit health rights to the physical health of an individual. 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.”¹⁶¹ Although the WHO definition is very broad, it is not the only one to recognize the importance of mental well-being; the ICESCR makes explicit reference to mental health.¹⁶² For children orphaned by AIDS who have experienced the emotional trauma of watching their parents die and who often are ostracized by communities, mental health services are essential.

Under international law, states have an obligation to ensure that children orphaned by AIDS have access to health care services, are not discriminated against in the health care arena, and are provided the opportunity to enjoy their highest attainable standard of health via services that address key issues, such as infant and child mortality, primary health care, and pre- and post-natal care for expectant

¹⁵⁶ CRC, *supra* note 1, art. 24(2)(d).

¹⁵⁷ See *supra* note 11.

¹⁵⁸ See *General Comment No. 3*, *supra* note 25, ¶ 26.

¹⁵⁹ Newell et al., *supra* note 154, at 1236.

¹⁶⁰ See CRC, *supra* note 1, art. 6; ICCPR, *supra* note 86, art. 6.

¹⁶¹ CONST. OF THE WORLD HEALTH ORGANIZATION pmbl., 62 Stat. 6279, 14 U.N.T.S. 185 (July 22, 1946).

¹⁶² See ICESCR, *supra* note 87, art. 12. The CRC does not define “health.” However, the Committee on the Rights of the Child has commented on the mental health services of various states parties. See HODGKIN & NEWELL, *supra* note 39, at 364-68.

mothers. These steps are essential to enabling children orphaned by AIDS to realize their other rights.

D. Education

Of fundamental importance is that education must be truly accessible for all. One notable obstacle to education for children orphaned by AIDS is discrimination. The non-discrimination clauses of the CRC, ICESCR, and other human rights treaties guard against discriminatory practices in education.¹⁶³ In addition, under the African Charter on the Rights and Welfare of the Child, states parties are required to “ensure equal access to education for all sections of the community.”¹⁶⁴ If “all” truly means *all*, this language includes HIV-affected sections of the community. Provisions such as these, as well as the prohibition on discrimination under international law, must be taken into account in the context of education. In addition, making education theoretically available is insufficient if obstacles, such as the ones confronted by children orphaned by AIDS, make it impossible in practice for some children to stay in school.

Full implementation of the right to education is of paramount importance, as education is a key component of the foundation on which other rights are built. If children do not receive an education, they will be less equipped to exercise other civil, political, economic, social, and cultural rights.¹⁶⁵ Conversely, when children drop out of

¹⁶³ See, e.g., CRC, *supra* note 1, arts. 2, 28 (outlining states parties’ non-discrimination obligations in general and in relation to education); ICESCR, *supra* note 87, art. 2(2) (requiring countries to guarantee certain rights to individuals without discrimination based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); American Convention, *supra* note 91, art. 1 (requiring states parties to “respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”); African Charter, *supra* note 91, art. 2 (requiring states parties to ensure rights and freedoms of individuals “without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”).

¹⁶⁴ African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 11.

¹⁶⁵ See, e.g., Lee Ann Basser, *Justice for All? The Challenge of Realizing the Right to Education for Children with Disabilities*, 8 J. GENDER, RACE & JUST. 531, 534 (2005) (“The right to education crosses the divide between civil and political rights, and economic, social and cultural rights . . . and has an important role to play in the achievement of human rights. . . . Education is considered to be both an end in itself, that is, a process through which personal development and respect are obtained and a

school early, they are at greater risk of various forms of exploitation, including forced labor, prostitution, and use in armed conflict.¹⁶⁶ Children orphaned by AIDS are especially at risk, given the discrimination and stigma they face and the threats to their other rights.

E. Severe Forms of Exploitation

Children orphaned by AIDS, and orphans in general, are vulnerable to severe forms of exploitation based on a number of factors, including poverty, lack of birth registration, an increased likelihood that they are not in school, financial pressures that force them to enter the workforce at younger ages (and thus with fewer skills), and the lack of a parent to help guard against their exploitation. International law recognizes that certain individuals are at greater risk.¹⁶⁷ ILO Convention No. 182 emphasizes the need to identify and protect “children at special risk.”¹⁶⁸ As children orphaned by AIDS are at special risk, states parties to ILO Convention No. 182 must adopt special measures to protect and assist them.

Ensuring the child’s right to be free from the worst forms of child labor requires attention to other rights that address systemic issues and the root causes of trafficking, prostitution, and exploitation in armed conflict settings. These include such issues as the right to be free from all forms of discrimination, the right to birth registration, health rights, and education rights.¹⁶⁹ For example, the Trafficking Protocol requires states parties to take steps to “alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal

means to an end, that is, an integral part of the achievement of social citizenship.” (internal quotation marks omitted)).

¹⁶⁶ Jonathan Todres, *Birth Registration: An Essential First Step Toward Ensuring the Rights of All Children*, 10 No. 3 HUM. RTS. BRIEF 32, 34 (2003); see also L. GUARCELLO ET AL., *supra* note 38, at 14; INT’L SAVE THE CHILDREN ALLIANCE, *supra* note 38, at 7.

¹⁶⁷ See, e.g., UDHR, *supra* note 92, art. 25 (“Motherhood and childhood are entitled to special care and assistance.”); CRC Sex Trafficking Protocol, *supra* note 85, art. 9 (“States Parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol. Particular attention shall be given to protect children who are especially vulnerable to these practices.” (emphasis added)); CRC, *supra* note 1, art. 20 (“A child temporarily or permanently deprived of his or her family environment . . . shall be entitled to special protection and assistance provided by the State.”).

¹⁶⁸ ILO Convention No. 182, *supra* note 1, art. 7.

¹⁶⁹ See Todres, *supra* note 151, at 888-89.

opportunity.”¹⁷⁰ Similarly, the CRC Sex Trafficking Protocol emphasizes the need for social policies and programs to prevent trafficking.¹⁷¹ Treaties such as these demonstrate that for the most marginalized populations, additional efforts are required by governments to ensure their safety and well-being, as a plethora of rights violations make them more vulnerable to severe forms of exploitation.

F. Family Environment

As with severe forms of exploitation, certain children are at greater risk of being deprived of a family environment. Children of parents with AIDS are an obvious example. For children orphaned by AIDS, provision of alternative care arrangements is critical. As discussed above, the CRC establishes that children orphaned by AIDS “shall be entitled to special protection and assistance provided by the State.”¹⁷² Special protection and assistance means not only ensuring alternative care arrangements, but also ensuring that these children have access to health care and education and are protected from severe forms of exploitation.

Governments typically recognize that additional social services are needed for children placed in foster care or adoptive homes. In other words, the right to special protection and assistance is closely linked to other social and economic rights, including the child’s right to an adequate standard of living.¹⁷³ Following the loss of a parent or the parents, an orphaned child is at risk of being overwhelmed by the financial burden of carrying on without the family’s primary wage earner(s). This is especially true for children orphaned by AIDS, as

¹⁷⁰ Trafficking Protocol, *supra* note 90, art. 9(4).

¹⁷¹ CRC Sex Trafficking Protocol, *supra* note 85, art. 9(1).

¹⁷² CRC, *supra* note 1, art. 20(1); *see also* African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 25(2)(a) (requiring that states parties “ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment . . . be provided with alternative family care”).

¹⁷³ CRC, *supra* note 1, art. 27(1) (establishing child’s right to “a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”); *see also* ICESCR, *supra* note 87, art. 11(1) (recognizing “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”); UDHR, *supra* note 92, art. 25(1) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”).

most likely family resources are already depleted by the cost of caring for parents as they grew ill. Further, as discussed above, children are at risk of being exploited by property grabbing, which could leave them without a home. Threats of homelessness and food shortages are but two of the many issues facing these children that implicate states parties' obligations under CRC Article 27.

The CRC Article 27 requires, in part, that states parties "provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing" to children in need.¹⁷⁴ In addition, the Committee on the Rights of the Child has noted specifically in the context of children orphaned by AIDS that states parties are "particularly reminded to ensure that both law and practice support the inheritance and property rights of orphans, with particular attention to underlying gender-based discrimination as it may interfere with the fulfillment of these rights."¹⁷⁵

In other words, for children orphaned by AIDS, international human rights law imposes obligations on states to provide several vital services. First, states must provide for alternative care arrangements, including foster care and adoption, when appropriate.¹⁷⁶ Second, states must assist children in need by providing basic necessities for an adequate standard of living, necessities that also help ensure the child's right to survival and development.¹⁷⁷ Finally, in assisting children orphaned by AIDS in this transition period, states are obligated to prevent property grabbing and inheritance loss that result from discrimination against AIDS-affected families.¹⁷⁸ Without these steps, the child's other rights are in jeopardy.

¹⁷⁴ CRC, *supra* note 1, art. 27(3).

¹⁷⁵ *General Comment No. 3*, *supra* note 25, ¶ 33.

¹⁷⁶ See, e.g., CRC, *supra* note 1, arts. 20, 21 (enumerating child's right to receive care when "temporarily or permanently deprived of his or her family environment"); see also African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 25(2)(a) (requiring that states parties "ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment . . . be provided with alternative family care").

¹⁷⁷ See *supra* note 173; see also CRC, *supra* note 1, art. 6.

¹⁷⁸ State obligations to protect children orphaned by AIDS from property grabbing can be found in any number of rights, including non-discrimination, the right to survival and development, the right to an adequate standard of living, and the right to be free from exploitation.

IV. TOWARD A BETTER UNDERSTANDING OF RIGHTS

As the prior section demonstrates, the task of ensuring the rights of children orphaned by AIDS is an enormous challenge. Implementation of any specific right quickly leads to the conclusion that no one right can be ensured in isolation. That is not to suggest that enforcement of one particular right — e.g., the right to education — provides no benefit. It does. Those benefits, however, are more apt to accrue to those children who are less marginalized. The most marginalized children, including children orphaned by AIDS, are more likely to be unable to reap the benefits of a focus on particular rights in isolation, because violations of their other rights prevent them from realizing the benefits of programs that address particular rights.

This section returns to the right to education, as a case study, not only to demonstrate the integrated nature of rights, but also to bring to light some of the issues presented by the interrelationship among rights. This examination reveals that for children orphaned as a result of AIDS, the right to education is deeply intertwined with a host of other rights. This interrelationship poses fundamental questions at the levels of both rights theory and human rights programming, and demonstrates the need for a more nuanced understanding of the relationship among rights, the contours of specific rights, and state obligations to ensure those rights.

In particular, by examining the contours of selected rights, we can begin to articulate with greater specificity states' obligations under international law. The goal here is to delineate the challenges for human rights law and advocacy that are posed by the interrelated nature of rights.

A. Rights Relationships — The Education Example

The right to education is crucial to the well-being and development of each child. States parties to the CRC are required to make primary education “free and compulsory for all” and secondary education “available and accessible to every child.”¹⁷⁹

There are a number of obstacles to the child's right to education. One of the primary barriers to education is school fees. School fees often prevent children from being able to enroll or stay in school.¹⁸⁰

¹⁷⁹ CRC, *supra* note 1, art. 28(a)-(b).

¹⁸⁰ STEPHEN LEWIS, RACE AGAINST TIME: SEARCHING FOR HOPE IN AIDS-RAVAGED

At the primary school level, school fees conflict with states' obligations to make primary education "free and compulsory" for all.¹⁸¹ Eliminating school fees will remove one of the principal barriers to education, and governments should adopt legislation to ensure free and compulsory education for all.¹⁸²

For a government seeking to implement the CRC and ensure children's right to education, removal of school fees would appear to be a significant, and perhaps even sufficient, step toward making primary education free for all. That step, however, likely will not be enough for all children, including many children orphaned by AIDS. This is because many other rights violations operate as barriers to education for the most marginalized children, even when school fees are eliminated.

For example, lack of birth registration — the official recording of a child's birth by a government agency — makes a child more likely to have her other rights unfulfilled.¹⁸³ Birth registration establishes the existence of the child under law and provides the foundation for ensuring many rights of the child.¹⁸⁴

AFRICA 89-90 (2006) (noting that when Malawi eliminated school fees, enrollment increased by more than 50%, while Uganda and Tanzania saw 70% and 100% increases, respectively, after eliminating school fees). Children orphaned by AIDS are by no means the only ones adversely affected by school fees. See, e.g., HUMAN RIGHTS WATCH, LETTING THEM FAIL: GOVERNMENT NEGLIGENCE AND THE RIGHT TO EDUCATION FOR CHILDREN AFFECTED BY AIDS 2 (2005) (noting additional difficulties AIDS-affected children have in paying for education).

¹⁸¹ CRC, *supra* note 1, art. 28(a). School fees also conflict with the idea of making secondary education "available and accessible" to all, as required by the CRC. *Id.* art. 28(b).

¹⁸² Support for, and adoption of, free education by governments and international institutions has been slow to come in the past. Structural adjustment programs in the past often led to the imposition of school fees as a means of reducing government expenditures. See MAC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 254 (2003) (noting that school fees as part of structural adjustment programs are inconsistent with ensuring education rights of children). Today, the World Bank no longer supports school fees for primary education. See WORLD BANK, SCHOOL FEES: A ROADBLOCK TO EDUCATION FOR ALL 2 (2004), available at http://siteresources.worldbank.org/EDUCATION/Resources/Education-Notes/EdNotes_Userfee_3.pdf.

¹⁸³ See UNICEF, BIRTH REGISTRATION: RIGHT FROM THE START 4-6 (2002); Todres, *supra* note 166, at 32.

¹⁸⁴ See sources cited *supra* note 183. The right to birth registration is established in the CRC, the ICCPR, and the African Charter on the Rights and Welfare of the Child. See CRC, *supra* note 1, art. 7(1) ("The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."); ICCPR, *supra* note 86, art. 24(2) ("Every child shall be registered immediately after birth and

Without birth registration, the child does not exist in government records, and, as a result, schools may be unaware of the child's existence when she reaches the age at which she should be enrolled, or may reject the child because of lack of proper documentation.¹⁸⁵ Lack of birth registration similarly may prevent a child from gaining access to health care services, including immunization programs, frustrating the child's right to the highest attainable standard of health. In turn, even if the child can enroll in school, she may suffer ill health as a result of being denied health care services, leading to absenteeism from school. Further, discrimination, whether based on HIV-status, gender, race, or other protected characteristics, also operates to prevent many children orphaned by AIDS from accessing schools.¹⁸⁶

In addition, children orphaned by AIDS, or those whose parents are dying of AIDS, often must contribute to the economic welfare of the family.¹⁸⁷ As a result, violations of the child's right to be free from economic exploitation, such as in abusive work settings, will further interfere with the child's right to education. Moreover, if a state has not provided special protection and assistance to children orphaned by AIDS and has not afforded these children alternative care arrangements, many will be left homeless. On the street, these children slip through the cracks unnoticed and not in school.¹⁸⁸ In addition, if a child and her family are not realizing the child's right to an adequate standard of living, the pressures from poverty may be so severe that the child cannot stay in school.¹⁸⁹

In other words, the failure to ensure all of these rights — the right to birth registration, the right to the highest attainable standard of health, the right to be free from all forms of discrimination, the right to be free from all forms of economic exploitation, and the right to a family environment — may bar a child from realizing her right to education. Or said another way, if a state is going to ensure the right

shall have a name.”); African Charter on the Rights and Welfare of the Child, *supra* note 91, art. 6(2) (“Every child shall be registered immediately after birth.”). In the CRC, the right to birth registration immediately follows the child's most basic and fundamental right — the right to life. See CRC, *supra* note 1, arts. 6, 7.

¹⁸⁵ See Todres, *supra* note 166, at 33.

¹⁸⁶ See HUMAN RIGHTS WATCH, *supra* note 180, at 1.

¹⁸⁷ See *supra* notes 24-25 and accompanying text.

¹⁸⁸ See Youth Advocate Program International, Street Children and Homelessness, <http://www.yapi.org/street/> (last visited Nov. 1, 2007) (reporting that children orphaned by AIDS often find “nowhere to go but the street”); see also The Plight of Street Children, G.A. Res. 49/212, at 236, U.N. GAOR, 49th Sess., Supp. No. 49, U.N. Doc. A/49/49 (Dec. 23, 1994).

¹⁸⁹ See Kelly, *supra* note 20, at 71.

to education for *all* children, then it must take account of the pressures exerted on these other rights of children orphaned by AIDS and other vulnerable children. Therefore, legislating and implementing education for all means incorporating into such law and programming provisions that address the related rights necessary to enable education rights to be realized by every child.

The interrelated nature of rights also works in the other direction. Just as the right to education relies on many other rights, other rights are dependent on the right to education being enforced. The child's right to be free from economic exploitation is more likely to be ensured if the child has realized her right to education.¹⁹⁰ Various civil and political rights, including the right to vote, are affected by whether a child has realized her right to education.¹⁹¹ In addition, gender-based discrimination itself is reduced through the education of girls.¹⁹²

The right to education is just one of many examples that demonstrate the indivisible nature of rights. The same relationship among rights emerges when we examine other rights. The right to birth registration not only has value for helping to ensure health and education rights, but it also is important as the child gets older.¹⁹³ It is essential for establishing the nationality and citizenship of the child, which is necessary if the child is to exercise a range of civil and political rights throughout life. Birth registration is also vital for proving the age of the child as she grows up. If a child's age cannot be proven, she may be unable to avail herself of certain legal protections, such as child labor laws or legal protections available to children in juvenile justice systems.¹⁹⁴ Furthermore, birth registration is important in combating gender-based discrimination.¹⁹⁵ Like the right to education, birth registration is illustrative of the interrelationship

¹⁹⁰ UNICEF, Millennium Development Goals: Achieve Universal Primary Education, <http://www.unicef.org/mdg/education.html> (last visited Oct. 14, 2007) ("Educated girls are more productive at home and better paid in the workplace, and more able to participate in social, economic and political decision-making. . . . Conversely, denying children access to quality education increases their vulnerability to abuse, exploitation and disease.").

¹⁹¹ See Manfred Nowak, *The Right to Education*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 189 (Asbjorn Eide et al. eds., 1995) (finding that education enables individuals to exercise many other rights).

¹⁹² See UNICEF, *supra* note 190.

¹⁹³ See Todres, *supra* note 166, at 33-34.

¹⁹⁴ *Id.* (stating that it is also easier to falsify age and identity of unregistered children, making unregistered children more susceptible to forced labor, prostitution, and trafficking).

¹⁹⁵ Female infanticide and education preference for boys is harder to detect among unregistered children of whom the government has no record. *Id.*

among rights. Alone, it may not guarantee a good life, and thus it depends on other rights to maximize its meaning. However, although birth registration by itself does not guarantee other subsequent rights, failure to register a birth puts the child's other rights in greater jeopardy.¹⁹⁶

In all of these scenarios, it is the most vulnerable and marginalized populations that are at greatest risk, as they face the prospect of multiple rights violations. However, such tough cases are precisely the reason for the existence of international human rights law; it is intended to protect those whose rights are most threatened.¹⁹⁷ Accordingly, understanding the interrelated nature of rights at the specific level is a vital step in ensuring the efficacy of the human rights regime. While there is general agreement that rights are interrelated, I submit that too little attention has been given to the implications of this fact. The next section sets forth several important considerations for human rights scholars and advocates in light of the integrated nature of rights.

B. *The Way Forward*

The interrelationship among rights raises several important issues, both for scholars interested in rights theory and for advocates engaged in human rights programming.

1. Human Rights Theory

The dynamic relationship among rights suggests several key issues merit further exploration. First, if the fulfillment of a particular right relies on the realization of other rights, especially when dealing with the most vulnerable individuals, then questions arise regarding the boundaries of rights. Can a state assert that it has met its obligations with respect to right X if it has not fully addressed related rights, thus leaving the most marginalized individuals without the benefits of right X? For example, if children orphaned by AIDS are denied access to health care services — either for physical illness or the emotional trauma that comes from losing one's parents — and thus are not well enough to attend school regularly, is a state meeting its obligation to make education “available and accessible to every child”?¹⁹⁸ Or if

¹⁹⁶ *Id.*

¹⁹⁷ Alston & Quinn, *supra* note 121, at 164 (stating that “it is in periods of extreme hardship . . . that human rights guarantees assume their greatest relevance”).

¹⁹⁸ CRC, *supra* note 1, art. 28(1)(b) (emphasis added). The interrelationship between health and education is an issue for all children, not just children orphaned

children are not prevented from attending school by discrimination but are forced to drop out of school for financial reasons resulting from the cost of AIDS, can states be said to be ensuring education rights for *all*?¹⁹⁹

As many children orphaned by AIDS must leave school in order to care for, or financially support, family members, human rights law's requirement that states make education truly *accessible*²⁰⁰ arguably imposes obligations on states that may not appear initially to fall under the rubric of providing education for all. In practice, for orphans forced to miss school because they must earn money to support themselves and their siblings, "free" schools are meaningless if there is no provision for financial and other support from the state to enable these children to attend school.²⁰¹ The interrelated nature of rights — including rights to health, education and an adequate standard of living, among others — raises questions as to the extent of state obligations under a particular right vis-à-vis the most vulnerable and marginalized individuals.

In response, some scholars might point to the fact that states' obligations under international law with respect to economic, social, and cultural rights are qualified based on available resources.²⁰²

by AIDS. See, e.g., Ellen A. Callegary, *The IDEA's Promise Unfulfilled: A Second Look at Special Education & Related Services for Children with Mental Health Needs After Garret F.*, 5 J. HEALTH CARE L. & POL'Y 164, 174 (2002) (noting that meeting educational requirements of students with mental health needs obligates governments to provide health care services that will enable children to continue their education).

¹⁹⁹ While it is true that economic and social rights are subject to progressive realization, at some point there must be an expectation that a state will meet its obligation, or otherwise human rights law would never account for the most marginalized individuals. For more, see *supra* note 121; *infra* note 206.

²⁰⁰ "Accessibility" includes non-discrimination, physical accessibility, and economic accessibility. See HODGKIN & NEWELL, *supra* note 39, at 418.

²⁰¹ States must be attentive to "hidden" obstacles that prevent children from attending school (such as the cost of books and school uniforms). These seemingly incidental costs can be enough to keep the poorest, and most marginalized, children from attending school. To make education available to all, states must meet these costs for students in need.

²⁰² See, e.g., CRC, *supra* note 1, art. 4 ("With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."); ICESCR, *supra* note 87, art. 2(1) ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

Others may go further, arguing that economic, social, and cultural rights are distinguishable from civil and political rights because the former are not justiciable.²⁰³

The question of justiciability of economic, social, and cultural rights has been examined closely by a number of other scholars.²⁰⁴ I do not intend to reexamine the arguments of that debate. For these purposes, it is sufficient to note that international law has long distinguished between declarations and conventions (or covenants); the former are largely aspirational, whereas the latter impose legally binding obligations on states that ratify, or accede to, them.²⁰⁵ It would be folly to suggest that the numerous countries that played a part in drafting conventions containing economic, social, and cultural rights, such as the ICESCR and CRC, were unaware of these basic tenets of international law. Conventions create legally-binding obligations.²⁰⁶ Given that an obligation exists, the task then is to delineate exactly what that obligation entails, and, I submit, a more specific understanding of the relationship among rights is an important step in that process.

Therefore, the issue for scholars is not whether economic, social, and cultural rights impose any legal obligation but rather what the contours of those obligations are. Determinations of state obligations

²⁰³ See also James Nickel, *Human Rights*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2003 ed.), available at <http://plato.stanford.edu/archives/sum2003/entries/rights-human/> (“Economic and social rights are often alleged to be statements of desirable goals but not really rights.”).

²⁰⁴ For more on the issue of justiciability, see, for example, Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT’L L. 462 (2004); David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT’L L. 53 (2006).

²⁰⁵ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 12-15 (6th ed. 2003).

²⁰⁶ See Alston & Quinn, *supra* note 121, at 160 (stating that “[n]otwithstanding the tendency among some commentators to dismiss the legal significance of the [ICESCR], it is a treaty that gives rise to formal obligations on the part of ratifying or acceding states”); Dennis & Stewart, *supra* note 204, at 514 (“This is not to say that economic, social, and cultural rights are not human rights, or that they are devoid of content, or that their continued articulation in international discourse would be meaningless. Clearly they *are* rights, and they *are* binding on states that have ratified the ICESCR. We agree that states parties *do* have legal obligations under the Covenant”); see also *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at 739-40 (S. Afr.); *South Africa v. Grootboom* 2001 (1) SA 46 (CC) at 65-66. The constitutional court confirmed that the economic and social rights at issue are binding and judicially enforceable, but held that its review extended only to the reasonableness of the government’s steps toward progressive realization of such rights. See *Treatment Action Campaign*, 2002 (5) SA at 739-40; *Grootboom*, 2001 (1) SA at 68-69.

are, to some extent, fact-specific inquiries. That said, I suggest that there are four areas that require further exploration by human rights scholars and advocates, and that pursuing these issues can foster a better understanding of rights and corresponding states' obligations.

The first issue relates to the question of boundaries between rights. If, for example, the right to education cannot be assured to all children without addressing health and other rights, does this mean other rights are subsumed under the rubric of the right to education?²⁰⁷ Given the indivisible nature of rights, proceeding down this road could easily overwhelm the meaning of any particular right. Clearly the right to education cannot mean that a state must ensure every other right. Somewhere the line must be drawn. My contention is that the interrelated nature of rights makes it more difficult to assess the boundaries of rights, but that the needs of the most marginalized populations, such as children orphaned by AIDS, makes it imperative that we map the contours of individual rights with greater specificity.

In education, eliminating school fees would help numerous children and certainly seems to address states' duty under the CRC to make primary education free for all. As discussed above, however, the most marginalized children might still be unable to access education. Thus, if education rights are to be meaningful for the most marginalized children, the obligation to make primary education "compulsory and available free to all" and secondary education "available and accessible to every child" must require more than the elimination of school fees. Somewhere between the elimination of fees and fully ensuring all other rights lies the answer. The challenge for human rights scholars and advocates is to delineate the meaning of the right to education and all other rights, in light of their interdependent nature.

A key step in more clearly articulating the requirements under specific rights provisions is addressing the resource qualifiers found in economic and social rights law, which raises the second issue requiring attention. With respect to economic, social, and cultural rights, human rights instruments typically qualify state obligations by requiring states to ensure such rights "to the maximum extent of their available resources."²⁰⁸ Determining state obligations in light of these

²⁰⁷ On the question of whether certain rights are subsumed under others, see, for example, Scott, *supra* note 6, at 850-78; Ida Elisabeth Koch, *Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective*, 10 INT'L J. HUM. RTS. 405 (2006).

²⁰⁸ See, e.g., CRC, *supra* note 1, art. 4 ("With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-

resource qualifiers is essential to attributing meaning to these rights, because without a clear definition of what a particular right requires of a certain state, we cannot reach questions regarding state compliance with any precision.

Education rights provide an instructive example. These rights are subject to resource qualifiers with one exception: the principle of non-discrimination is not subject to any resource-qualifying language.²⁰⁹ Therefore we know that, to comply with human rights law's principle of non-discrimination, states must stop schools from turning children away based on presumed, or actual, HIV-status.²¹⁰ Thus, although poorer countries may take time to progressively implement education rights, they may not tolerate discrimination at any stage in the implementation of these or other economic, social, and cultural rights.

Beyond the issue of discrimination, a state's obligation under the CRC's provisions on the right to education (or with respect to other economic, social, or cultural rights) is more difficult to assess, given the resource-qualifying language. Previous scholars have probed the issue of state obligations with respect to economic, social, and cultural rights.²¹¹ They have delineated what states must consider as

operation."); ICESCR, *supra* note 87, art. 2(1) ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.").

²⁰⁹ The principle of non-discrimination applies across all rights. In addition, CRC Article 28(1) qualifies states' obligations to ensure education rights by requiring that they "achiev[e] this right progressively and on the basis of equal opportunity." CRC, *supra* note 1, art. 28(1).

²¹⁰ Numerous courts have held that schools cannot deprive children of the right to education based on their HIV status. See, e.g., *Doe v. Dolton Elementary Sch. Dist.*, 694 F. Supp. 440, 447 (N.D. Ill. 1988) (stating that "if AIDS-infected children are segregated, they will suffer that same feelings of inferiority the Supreme Court sought to eradicate in *Brown v. Board of Education* 34 years ago."); *Ray v. Sch. Dist. of Desoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987) (same); *Thomas v. Atascadero*, 662 F. Supp. 376 (C.D. Cal. 1986) (same).

²¹¹ See, e.g., Alston & Quinn, *supra* note 121, at 157-64 (discussing states parties' obligations under ICESCR); Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights*, 16 HUM. RTS. Q. 693, 695-703 (1994) (discussing states' obligations with respect to economic, social, and cultural rights and resources that must be allocated to ensure such rights). For an examination of economic and social rights as applied in South Africa, see Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163 (2006).

“resources”²¹² and proffered proposals for measuring state compliance.²¹³ The Limberg Principles, developed by a group of international law experts, suggest that compliance with these obligations requires states parties “regardless of the level of economic development, to ensure respect for minimum subsistence rights for all” and that full implementation beyond this minimum core may be achieved progressively.²¹⁴ The minimum core approach, however, does not answer the question of how to ascertain whether a state is using maximum available resources.

Professors Philip Alston and Gerard Quinn have written that “[i]n ascertaining the quantum of resources to be set aside to promote realization of the rights, the state is of course entitled to a wide measure of discretion. Nevertheless such discretion cannot be entirely open-ended or it would have the *de facto* effect of nullifying the existence of any real obligation.”²¹⁵ Accordingly, Alston and Quinn suggest that progressive realization implies a “process requirement” whereby states must demonstrate that they have given “adequate consideration . . . to the possible resources available to satisfy each of the [ICESCR’s] requirements.”²¹⁶ This approach strikes a balance by requiring accountability while still leaving states as the ultimate arbiter of resource allocation within their own borders. The work by Alston, Quinn, Robertson, and others on delineating states parties’ obligations with respect to economic, social, and cultural rights establishes a foundation for a clearer articulation of the meaning of these rights. What is needed now, I submit, is for others to build on that work to develop an agreed-upon approach to measuring state compliance. The inquiry into whether a state has utilized its “maximum available resources” is fact-specific, but models must be developed to analyze systematically state decision-making vis-à-vis economic, social, and cultural rights.²¹⁷

²¹² For a comprehensive articulation of what constitutes a state’s “resources,” see Robertson, *supra* note 211, at 695-97.

²¹³ See Alston & Quinn, *supra* note 121, at 165-81.

²¹⁴ U.N. Comm’n on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ¶ 25, U.N. Doc. No. E/CN.4/1987/17 (Jan. 8, 1987).

²¹⁵ Alston & Quinn, *supra* note 121, at 177.

²¹⁶ *Id.* at 180.

²¹⁷ Such analysis of state decision making might raise concerns among some regarding state sovereignty issues. A state party to the ICESCR or CRC is only subjected to review because it has *voluntarily* undertaken to be bound by such international law. A.H. Robertson, *The Implementation System: International Measures*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*

Recent research on budget analysis may offer one means of measuring the contours of a state's obligations.²¹⁸ Let us start, for the sake of clarity, with the example of a particularly wealthy nation, such as a G-8 country. The GDP of a G-8 country should be sufficient to provide education to all children.²¹⁹ Countries with such resources should be able to fulfill human rights obligations qualified by available resources.²²⁰ In fact, the travaux préparatoires of the CRC make clear that the "available resources" qualifier was intended only for developing countries.²²¹ For industrialized countries, the state's obligation with respect to economic and social rights is full implementation of these rights.²²²

For countries with more limited resources, the obligation remains progressive implementation of those rights, and budget analysis has much to offer human rights monitoring. It can measure a government's commitment (or lack thereof) to specific policy areas, identify trends in spending for purposes of determining whether programs aimed at meeting human rights obligations are receiving

332, 333 (Louis Henkin ed., 1981). "Opponents of enforcement systems have sometimes argued that international systems intervene in the internal affairs of sovereign states. The argument is unfounded, if not disingenuous. Matters as to which states have accepted international obligations are, by hypothesis, of international concern and no longer a matter of their domestic jurisdiction. A state that has assumed obligations cannot object to measures to implement them. Surely, it is appropriate to seek such measures by agreement of the parties." *Id.*

²¹⁸ See International Budget Projects, Applied Budget Analysis and Economic Social and Cultural Rights, <http://www.internationalbudget.org/themes/ESC/index.htm> (last visited Oct. 16, 2007); see also UNIFEM et al., Gender Responsive Budgeting, <http://www.gender-budgets.org/content/view/13/27/> (last visited Nov. 1, 2007) (describing collaborative endeavor that aims to work with various states to ensure that "governments decide how policies need to be adjusted, and where resources need to be reallocated to address poverty and gender inequalities").

²¹⁹ For example, the 2006 GDP of the United Kingdom exceeded £1.2 trillion. See U.K. NATIONAL ACCOUNTS, THE BLUE BOOK 2007, at 23 (John Dye et al. eds., Palgrave Macmillan 2007), available at http://www.statistics.gov.uk/downloads/theme_economy/Blue_Book_2007_web.pdf. As 99% of primary school age children in the United Kingdom already are enrolled, achieving full enrollment given the country's resources should not be unachievable. Moreover, resource qualifying language in the CRC was intended to apply only to developing countries. See *supra* note 114.

²²⁰ Recall that a country's decision to be bound by an international treaty is voluntary. See Robertson, *supra* note 217, at 333.

²²¹ See CRC, *supra* note 1, art. 4; see also *supra* note 112.

²²² Industrialized countries are still required only to achieve this right *progressively*, but this only "imposes an obligation to move as expeditiously and effectively as possible towards that goal." U.N. Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 3: The Nature of States Parties Obligations*, ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990).

increasing funding, and assess the adequacy of budgets vis-à-vis the requirements under human rights conventions.²²³

For example, if the GDP of a particular state party obligated to ensure education rights is increasing each year but the education budget is not, or if a country's defense spending increases by a much greater percentage than its health care budget, it might suggest that the state is not using its "maximum available resources"²²⁴ to achieve the progressive realization of these rights for its people and thus is failing to comply with international human rights law.²²⁵ Whether a particular state in fact is not fulfilling its obligations requires a more detailed analysis. The point here is that budget analysis can contribute to evaluating actions of states purporting to have met their obligations under economic, social, and cultural rights law. Budget analysis can also uncover incidences of discrimination in the provision of health care, education, and other services, and it can highlight where government has failed to spend allocated funds.²²⁶

For these reasons, models for budget analysis should be developed further, as they can be an important tool in assessing state performance with respect to economic, social, and cultural rights. It is important to recognize, however, that budget analysis has limitations. It does not reveal whether resources are used effectively or efficiently.²²⁷ It can provide useful information, however, to help determine whether a country is using its "maximum available resources." Combining budget analysis with the content of specific provisions, such as the right to health or education, can enable human rights scholars and advocates to determine with greater precision whether states are complying with human rights law.²²⁸

Budget analysis illustrates one means of probing the meaning of "available resources"; additional tools must be developed, at least in part because financial resources are only one component of "resources."²²⁹ Not only should we explore additional means of

²²³ FUNDAR, INT'L HUMAN RIGHTS INTERNSHIP PROGRAM & INT'L BUDGET PROJECT, DIGNITY COUNTS: A GUIDE TO USING BUDGET ANALYSIS TO ADVANCE HUMAN RIGHTS 30 (2004).

²²⁴ Budget analysis, of course, is very much fact specific, but it remains an important tool.

²²⁵ *Id.* at 29-41.

²²⁶ *Id.* at 68-69. Fundar's work in Mexico offers a model for determining what a country is required to do to secure economic and social rights for its population.

²²⁷ *Id.* at 36.

²²⁸ In addition, the Committee on the Rights of the Child and other treaty bodies monitoring compliance with human rights law can utilize budget analysis to review states' progress in ensuring all aspects of children's economic and social rights.

²²⁹ See Robertson, *supra* note 211, at 695-97.

measuring available financial resources, we also need to develop tools to assess whether states are maximizing availability of other resources ranging from human resources to material, technological, and informational resources.

Third, the limited resources of poorer nations, and thus their more limited capacity to facilitate realization of economic, social, and cultural rights, raise questions about the obligations of other states to assist. The language of the major human rights treaties covering economic, social, and cultural rights appears to anticipate limits to the resources of certain countries. Under the ICESCR, each state party “undertakes to take steps, individually *and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR] by all appropriate means, including particularly the adoption of legislative measures.”²³⁰ Under international law, states parties’ obligations historically have been limited to those individuals subject to their jurisdiction.²³¹ However, international cooperation and assistance is contemplated in human rights law, and explicitly so in the context of poorer nations’ available resources.²³² The issue for scholars is to determine what obligation is imposed in light of this language. Recently, some scholars have suggested that economic and social rights “can be extraterritorially applied using the obligation of international cooperation, particularly with regard to the duties to respect and protect social and economic rights.”²³³ This issue merits further exploration to give full meaning to human rights and to provide states with an unambiguous understanding of their obligations under human rights law.

²³⁰ ICESCR, *supra* note 87, art. 2(1) (emphasis added); *see also* CRC, *supra* note 1, art. 4 (“With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”); *see also* Alston & Quinn, *supra* note 121, at 179-80 (finding that drafters of ICESCR intended “resources” to include those obtained through international cooperation).

²³¹ *See* Buergethal, *supra* note 103, at 74; *see also* Smita Narula, *The Right to Food: Holding Global Actors Accountable under International Law*, 44 COLUM. J. TRANSNAT’L L. 691, 725 (2006).

²³² *See, e.g.*, CRC, *supra* note 1, art. 4 (“With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”); ICESCR, *supra* note 87, art. 11(2) (requiring states parties to “take, individually and through international co-operation, the measures, including specific programmes, which are needed” to ensure each individual’s right to be free from hunger).

²³³ Narula, *supra* note 231, at 798.

Fourth, the issue of AIDS raises important questions vis-à-vis economic, social, and cultural rights and states' available resources and obligations. As discussed in Part I, AIDS has had a devastating impact on economic growth in the hardest hit countries, reducing GDP by as much as 2% to 4% annually.²³⁴ As a result, the hardest hit countries have even less in the way of "available resources."²³⁵ Yet it cannot be that the very issue that puts the rights of children orphaned by AIDS at risk of abuse and exploitation reduces governments' obligations under human rights law to protect these children. Accepting this would be to permit a double hit to these children, heightening their risk of exploitation on the one hand and reducing protections and assistance for them on the other. Resource qualifiers are intended to provide flexibility but not permit government to fail to take needed action.²³⁶ This issue suggests that further work is needed on determining the intent of "available resources" and may return the debate to the question of whether the language in human rights treaties regarding "international cooperation" would impose a duty on wealthier nations and/or international institutions to ensure that developing countries have sufficient available resources.

All of these issues related to available resources are particularly important for the most vulnerable and marginalized populations. These are the groups that suffer most when government resources to ensure rights are limited. These individuals are also the ones for whom the interrelated nature of rights has the most meaning. For them, rights cannot be implemented in isolation. All of these issues raise questions about the meaning of particular rights and the boundaries between rights. It is incumbent upon scholars and advocates to delineate more precisely what each right means and requires of states. Achieving that step will enable more accurate assessments of states' compliance and provide new possibilities of enforcement of human rights norms.

2. Human Rights Programming

At the programmatic level, the discussion herein suggests the need to develop a better understanding of not only the extent to which rights are interrelated but precisely how they are interrelated.

²³⁴ See *supra* note 83 and accompanying text.

²³⁵ Not including resources that might be "available" through international cooperation.

²³⁶ Progressive realization of rights still imposes obligations on states. See *supra* notes 214-16 and accompanying text.

Understanding the relationship between particular rights with greater specificity is essential. Correlations and causal relationships between rights need to be better understood. By achieving a more specified understanding of the relationship between particular rights, the international community will be better positioned to develop programs that effectively account for and address interdependent rights. This point is vital to developing more holistic human rights programming that has a better chance of ensuring the rights of the most vulnerable populations in a sustainable manner.²³⁷

Programs that address rights in a more integrated manner already exist in certain areas. For example, as the health and nutritional status of children affects their ability to realize their right to education, a number of programs that aim to support education rights for children orphaned by AIDS have begun providing free midday meals to children at school.²³⁸ This seemingly small step helps reduce malnutrition and the adverse impact of poor health on educational attainment.²³⁹ It also uses a health measure to provide additional incentives for attending school. These relatively simple programs account for and address health and education rights simultaneously. Other programs can, and must, be developed to address these and other rights in a similarly integrated fashion.

Therefore, not only should organizations and agencies that focus on particular rights issues take account of the interrelated character of rights in their own programming, but they should ensure that their programs are integrated effectively with the work of government agencies, international organizations, and other NGOs working on related rights. Governments and international organizations, too, should ensure that their rights-related work accounts for the dynamic relationship among various rights.²⁴⁰ All entities need to recognize

²³⁷ See, e.g., Chinua Akukwe, *H.I.V./AIDS in Africa, 2007-2010: Major Challenges Ahead*, WORLDPRESS.ORG, Dec. 13, 2006, <http://www.worldpress.org/Africa/2602.cfm> (articulating multisectoral approach to combating AIDS).

²³⁸ See, e.g., Association François-Xavier Bagnoud, Programs for AIDS Orphans and Vulnerable Children, at 14, available at http://www.afxb.org/_library/docs/FXBBrochureEng.pdf (noting that programs in South Africa that provide meals for children orphaned by AIDS during school also have after-school component “where the children receive information on the prevention of HIV/AIDS, prevention of violent behavior, promotion of self-respect, respect for others and the Rights of the Child”).

²³⁹ See *supra* note 153 and accompanying text.

²⁴⁰ *General Comment 14*, *supra* note 110, ¶ 4(d) (asserting that “promoting and protecting one category of rights should therefore never exempt or excuse States from the promotion and protection of other rights”); see also World Conference on Human Rights, *supra* note 8, ¶ 5 (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair

that the interrelationship among rights is particularly relevant to the most marginalized populations, such as children orphaned by AIDS, and thus resources must be dedicated to identifying and assisting those individuals in a comprehensive manner.²⁴¹

More recently, there has been some movement in the direction of more integrated rights programming. In conjunction with other reforms to the U.N. human rights system, there are ongoing discussions exploring greater collaboration among the various U.N. human rights treaty bodies, recognizing the interconnectedness of their work.²⁴² This recognition is an important step, but further action is needed to ensure that human rights programming in the field properly accounts for the interrelated nature of rights. Accounting for the interrelated nature of rights will improve the effectiveness of programming for all marginalized populations.²⁴³

In summary, at the programmatic level, two important steps must be undertaken by governments, international organizations, and civil society. First, further research is needed to determine precisely how

and equal manner, on the same footing, and with the same emphasis.”).

²⁴¹ Intersectionality discourse offers one means of identifying those individuals that may be at higher risk of multiple rights violations. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (developing intersectionality idea in examining disempowerment of, and violence against, women of color), Johanna Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L.J. 71, 124-25 (2003) (noting that traffickers target women from particular racial or ethnic groups); Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE HUM. RTS. & DEV. L.J. 1 (2005) (employing intersectional analysis in examining experience of women migrants); see also U.N. Comm. on the Elimination of Racial Discrimination, *General Comment No. 25: Gender Related Dimensions of Racial Discrimination*, ¶ 4, Annex 5, U.N. Doc. A/55/18 (Mar. 20, 2000).

²⁴² Each of the major human rights treaties has a committee that monitors states parties’ compliance. See, e.g., U.N. Secretariat, *Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body*, ¶ 22, delivered to the Fifth Inter-Committee Meeting of the Human Rights Bodies, U.N. Doc. HRI/MC/2006/2 (Mar. 22, 2006) (recognizing that fact that different emphases of various treaty bodies means that system has not addressed human rights violations in integrated manner, thereby weakening its overall impact); U.N. Int’l Human Rights Instruments, *Report of the Working Group on the Harmonization of Working Methods of Treaty Bodies*, ¶ 22, U.N. Doc. HRI/MC/2007/2 (Nov. 27, 2006) (recognizing “value” in “strengthen[ing] the coordination and harmonization of the working methods of the [various] treaty bodies”).

²⁴³ See, e.g., HUMAN RIGHTS WATCH, *supra* note 180, at 2 (“Some of the educational barriers associated with HIV/AIDS, such as difficulties paying school fees or having to provide household labor, also afflict children affected by diseases other than HIV/AIDS, as well as children living in extreme poverty or otherwise prone to discrimination or social exclusion.”).

rights are related to each other, and the nature and existence of correlations and causality among rights. Second, human rights programming must be developed to address the dynamic relationship among rights in an effective manner.

CONCLUSION

HIV/AIDS has had a devastating impact on the lives of children. Children orphaned by AIDS have suffered tremendously, not only in losing their parents but also by being subjected to human rights abuses and exploitation. At the U.N. General Assembly's Special Session on Children in 2002, the international community fully acknowledged that HIV/AIDS is one of the most pressing issues in the struggle to ensure the rights and well-being of all children.²⁴⁴

At the Special Session, governments adopted a final outcome document which included a "Plan of Action" for the next decade.²⁴⁵ As part of the Plan of Action, countries agreed to:

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 counseling and psychological support; ensuring their enrollment 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 abuse, violence, exploitation, discrimination, trafficking, and loss of inheritance.²⁴⁶

Countries also committed to a number of other specific steps to reduce the devastating impact of HIV/AIDS on children, including "[b]y 2003, ensur[ing] the development and implementation of multisectoral national strategies and financing plans for combating HIV/AIDS" that

²⁴⁴ This event marked the first time in history that a full session of the U.N. General Assembly was dedicated to children. The outcome document listed "combating HIV/AIDS" as one of the four goals for governments in the coming decade in programs to address the needs of children. The other three goals include: promoting healthy lives, providing quality education, and protecting against abuse, exploitation and violence. See *A World Fit for Children*, G.A. Res. S 27/2, Annex, U.N. Doc. A/Res/S-27/2/Annex (Oct. 11, 2002).

²⁴⁵ *Id.*

²⁴⁶ *Id.* ¶ 46(c).

address all forms of discrimination and stigma and other human rights violations.²⁴⁷

To date, the response of governments to the needs of children orphaned by AIDS has been inadequate. In 2004, UNAIDS reported that “[o]f the countries with generalized HIV epidemics, 39% have no national policy in place to provide essential support to children made vulnerable by AIDS. In low- and middle-income countries, less than 3% of all orphans and vulnerable children receive publicly supported services.”²⁴⁸ Despite the suffering of millions of children, most governments are still in the early stages of developing and implementing an adequate response to HIV/AIDS to provide for these children.

The plight of children orphaned by AIDS demands urgent action. Their experience also sheds light on the interrelated nature of rights and calls for a better understanding of the dynamic relationship among specific rights. This Article aims to take rights discourse in that direction. By clarifying the content of specific rights and the interrelationship among individual rights, the international community will be positioned to assess compliance more effectively and hold states accountable for human rights violations. Ultimately, these steps will help maximize the utility of human rights law and enhance our capacity to ensure the rights and well-being of children orphaned by AIDS and other marginalized individuals.

²⁴⁷ *Id.* ¶ 47(1).

²⁴⁸ UNAIDS, *supra* note 47, at 42.