



The Raoul Wallenberg Institute of Human
Rights and Humanitarian Law

Faculty of Law

Lund University

Master of International Human Rights Law

Master thesis

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The Effect of HIV/AIDS on the
Right to Education: South Africa in
Focus

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International Human Rights Law

Autumn 2002

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Abstract

The connection between HIV/AIDS and human rights is increasingly recognised as a way in which prevention of an increase in cases can be achieved. With this in mind, the writer has established such a basic bond, and then continues to develop it in association with the right to education specifically.

The basis for the paper is derived from the idea that HIV/AIDS and education can form a never-ending circle of erosion, either of life in general or education capabilities specifically.

The term 'prevention' is highlighted as it is *this* mechanism, that education purports to create, and descriptions of how such a method is enabled is included in the text.

HIV/AIDS is then discussed using the paradigm that it erodes the very entity that can prevent it. For the general reader there is a concise illustration of the global impacts of the disease followed by a deeper look at the African region itself. A brief look at case law is included, however the concentrate is upon the different groups of people who can be affected by HIV/AIDS who are relatory to the education sphere. These groups are collated from the global environment rather than a specific country focus, so that it is to be considered a *general* impact upon those affected by HIV/AIDS.

Following this, South Africa comes into focus. The achievements and concerns previously highlighted are addressed in the South African context. Once again, for the general reader an informal description of the recent historical events of the country are described and the relevant constitutional and legal constraints, either from international agreements, legislation itself or case law. Description of how South Africa is implementing strategies and policies to fight against HIV/AIDS is made, which in then compared to actual destruction that HIV/AIDS is causing to the education system in the country. In illustrating the major problems involving HIV/AIDS and the education field currently recognised in South Africa, reference is made to the same global problems previously demonstrated, with greater emphasis put upon areas that are currently of greater consequence to South Africa: Young girls for example.

In conclusion, the reader will see that the affects HIV/AIDS has on the education sphere greatly influences the ability of a state to fulfil her international human rights obligations of the right to education. Using the now common areas of availability, accessibility, acceptability and adaptability the final contrast is made: South Africa has somewhat ignored the unquestioned consequences of HIV/AIDS from its time of transition from the apartheid state. This has caused any gains that have been made in the area of education to be severely strained, limited and in some cases battered. It is through this view of South Africa that we can see the necessity for continuous acknowledgement of the severities of HIV/AIDS and the consequences if ignored long enough.

Preface

This paper was completed as the final part of an LL.M qualification through the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden. The decision to concentrate on the human right of education has been influenced by the possibility of working with Katarina Tomasevski, the UN Special Rapporteur for the Right to Education, whom I have been lucky enough to have a professor at the Institute itself during my studies.

In a time where world discussions are dominated by terrorism, a point was made after the presentations of the Nobel Prizes in 2001, during a discussion with previous receivers of the awards, that other situations must not, and could not be ignored: one of these is the impact of HIV/AIDS. It was this particular televised question time that encouraged me to discuss such a topic.

The initial draft of this paper was completed October 2002, and after revising it through November, it is due for defence on December 13th 2002. During the review of the paper, the annual UNAIDS epidemic update has been released for the year 2002, and it is here I acknowledge that they have not been referred to in this paper, mainly due to time constraints for completion, but a separate section is reported in Appendix 2.

Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
EFA	Education For All
HIV	Human Immunodeficiency Virus
ILO	International Labour Organisation
NGO	Non Governmental Organisation
PLWHA	People living with HIV/AIDS
SAHRC	South African Human Rights Commission
SSA	Sub-Saharan Africa
UN	United Nations
UNAIDS	United Nations Programme on HIV/AIDS
UNDCP	United Nations Office for Drug Control and Crime Prevention
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGASS	United Nations General Assembly Special Session
UNICEF	United Nations Children's Fund
UNPFA	United Nations Population Fund
UNSR	United Nations Special Rapporteur
WB	World Bank
WHO	World Health Organisation

1 Introduction

1.1 Erosion of Human Rights

It has predominantly been understood that to fight against HIV/AIDS different strategies should be used, one of these being education. The ambition of prevention is the key, up until a cure is found, and it is to this that the world must commit.

Education is seen to be the key to first implement prevention programmes. Teaching children from a young age how to be careful and how to help them prevent catching the disease will obviously make them more aware for their future life, and consequently, in theory, reduce infection rates. The problem is that if these education facilities, which are supposed to deliver such programmes, are not there, or up to standard, then how can prevention through education be achieved to its full potential?

Good quality education is in itself a powerful weapon against HIV/AIDS. HIV/AIDS is a powerful weapon against the very infrastructure of education. To fulfill obligations of the right to education, States must be aware of this bond.

The Right to Education is one of the few rights which is accepted by nearly every State on earth through the United Nations Convention on the Rights of the Child. It is established that primary education is compulsory and in accepting this, each State is binding themselves to the treaty and the duty that they must provide it to their population¹. The problem that some states are facing however, is the problem of HIV/AIDS. In the most severely affected countries, it can be said that due to HIV/AIDS, reversal of hard-won educational gains is occurring.

¹ With some form of flexibility depending on resources. This is discussed specifically further on in the paper.

Typical examples are Botswana and South Africa. Such effects include the minimum compounds of education itself: attendance and quality. In general, the youth of Africa are lacking basic information on the subject of HIV and AIDS, be this due to their non-attendance in education, or through the lack of ability in delivering such education by educators themselves. The biggest argument though, is that it is the lack of school enrollment that is compounding this problem of erosion throughout the education system. This unraveling of hard won gains in the area is depleting the ability of the countries to provide the necessary education to the children in the first place, and consequently reducing the resources to educate on the effects and possibilities of HIV/AIDS.

HIV diminishes or destroys quality of life before it takes away life itself.

HIV/AIDS is having the greatest impact upon countries that have achieved the most impressive reductions in under five child mortality rates. By 2005-2010, 61 out of every 1,000 infants born in South Africa are expected to die before they reach the age of twelve months old. It is thought that without AIDS the figure would be as low as 38 per every 1,000².

Traditional monitoring practices of international agencies and NGO's focus on the compliance by states of civil and political rights, however, the denial of economic, social and cultural rights such as the right to education, health, or shelter, often impedes individuals from enjoying effectively their civil and political rights. This in itself stresses the importance of economic, social and cultural rights and specifically education.

It is this problem of erosion of education systems (the different levels from primary through to tertiary, together with HIV/AIDS specific education) that this

paper is focusing on in its attempt to illustrate, that although it is understood education is a key to prevention, (which in itself is currently the key to stopping the spread of HIV/AIDS), it is HIV/AIDS that is enveloping and eroding the possible impacts of education through immobilising those who have the right to it, and therefore a dual resolution must be made in the fight to stop this perpetuating circle.

1.2 Outline

In chapter 2, illustration of how such a medical topic can be connected with human rights and the benefits of such will be described so that the connection between HIV/AIDS and human rights can be understood. Descriptions will follow in chapter 3, of the right to education, together with illustration of a ‘conceptual norm’. The reader will be made aware of the most recent international commitments and meetings on the subject of HIV/AIDS and the human rights field so that an underlying base can be achieved before discussing how education can be used as a preventative tool in the fight against the spread of HIV/AIDS.

This base will then be built upon in chapter four, as we look at HIV/AIDS more in detail and the destructive impact it has on the world of education. A brief look at international case law intends to show how discrimination can be used against those affected by HIV/AIDS in the educatory world. Acknowledgement of the lack of litigation within the economic, social field of human rights in the African region, and how the inherent human right of non-discrimination is the key to possible legal action concerning such rights is made. Subsequently, a breakdown of different groups of people is discussed as to how they are alternatively affected by HIV/AIDS , with the aim of establishing a description of the full effects that HIV/AIDS has on the community in the education field using information from throughout the world.

² Save the Children, Knowledge Working Paper 23, *Children Affected by HIV/AIDS: Rights and Responses in the developing world*, (2001) Grainger, C. Webb, D. and Elliott, L. Page 17

South Africa has been chosen as a focus due to its status of HIV cases at the present time. She is the country that has the fastest growing number of HIV cases in the world and is in a period of HIV crisis that is still evolving and has by no means reached its peak. It can therefore be compared to other African countries such as Uganda, which has a more developed HIV/AIDS influence. South Africa's recent history from the fall of apartheid up until today is exemplified and linked to the HIV/AIDS epidemic within the country. It is in the fifth part of this paper that concentrates on South Africa. The South African Constitution says that obligations facing the government, including obligations to deliver on socio-economic rights, "must be performed diligently and without delay"³.

Therefore this would suggest that such a response should be seen when looking at the implementation of such rights.

Illustration of its education policy development is touched upon, together with how international law and obligations have been incorporated in South African law, and description of South Africa's policy on HIV/AIDS. With this established backdrop, an application will be demonstrated of the conclusions in chapter 4, to show if there are specific problems South Africa must face, in having such a high infection rate of HIV/AIDS, more so than other countries. The reputable problems will then be compared to the 'conceptual norm' of the right to education and the full circle of erosion will be established.

1.3 Methodology and Limitations

As far as an investigation and research goes for this paper, all time spent on such has been at a desk. No field studies have been able to be performed, merely facts and figures collated from other on-line and organisation sources. This obviously is hindered by web sites that do not contain the correct contact information purporting the researcher to find other ways to collect the required information. If the study were to be performed ideally, the information collated would be with the

writer's own studies and investigation in South Africa herself. What you will see before you is a paper created on secondary sources. In terms of the right to education, I am grateful to Prof. Katarina Tomasevski who has increased my interest in the area to new heights, and having discussions with her on the topic has helped my understanding and application of research a great deal.

This study is focusing on the conceptual link between HIV/AIDS and the human right of the right to education. There will be no mention on the economic necessities to provide the right to education in South Africa itself, as the effect would be to dilute the focus itself. This of course means, that although the component of not charging for education within the right to education boundaries is recognized, it is not felt necessary to include an analysis of such in this paper. Together with this, is the lack of in depth critical analysis of South Africa's achievement in protecting and fulfilling her duty to provide the right to education. Such interests must be left for another paper.

³ Section 237 SA Constitution

2 HIV/AIDS and Human Rights

Before the connection of HIV/AIDS and human rights⁴ is described, illustrations of the reasons why such a bond should be made are of primary importance. The paper, as titled, is concentrating on the right to education, however, it is to be understood that other rights are not so distinguishable as to not be referred to. The right to health for example is one such right. In a recent report put before the Director General of the WHO⁵, it was stated that “unparalleled improvement” in population health of developing countries in the latter half of the last century couldn’t just be attributed to the “natural fallout of economic development”⁶. The achievement should echo the power of improved health care and other investments, among which education belongs. Child survival strategies and immunization campaigns have increased by millions the number of children protected from common childhood infections. Similarly, mortality has also fallen among non-smoking adults. What this information shows us is that when rights such as education and health are fulfilled by the state in her obligations, the benefits to the population improve vastly, and this is why the structures of human rights protection can be used so effectively in the fight to combat HIV/AIDS.

2.1 The Connection

In the 1980’s, the relationship of HIV/AIDS to human rights was predominantly only understood as involving people with HIV/AIDS and the discrimination to which they were subjected. The 1980’s were extremely important in defining

⁴ Gruskin S, Tarantola D, HIV/AIDS and Human Rights Revisited, Canadian HIV/AIDS Legal Network – *Canadian HIV/AIDS Policy and Law Review*, Volume 6, Number 1/2, 2001, or www.aidslaw.ca/Maincontent/otherdocs/Newsletter/vol6nos1-22001/discrimination.htm, accessed 17/07/02

⁵ Report of the Commission on Macroeconomics and Health, Macroeconomics and Health: Investing in Health for Economic Development, presented by Sachs, J D. to Gro Harlem Brundtland, Director General of the World Health Organisation on 20 December 2001

⁶ Ibid, page 40

some of the connections between HIV/AIDS and human rights. As the decade ended, the call for human rights and for compassion and solidarity with people living with HIV/AIDS had been explicitly embodied in the first WHO global response to AIDS⁷. By casing this public health strategy in human rights terms, it became anchored in international law, thereby making governments and intergovernmental organizations publicly accountable for their actions toward people living with HIV/AIDS. The groundbreaking contribution of this era lies in the recognition of the applicability of international law to HIV/AIDS – and therefore to the ultimate responsibility and accountability of the state under international law for issues relating to health [education] and well-being⁸. It can now be said that HIV/AIDS has burrowed down deeply into the social and economic fault lines of communities and societies, but governments are still dutified to act on their responsibilities, consequently they must address such duties in the context of HIV/AIDS.

Almost 20 years into the epidemic, these issues remain serious and predominantly unresolved. Using the push from the mid 1980's, the 1990's continued to see an increased understanding of the importance of human rights as a factor in determining people's vulnerability to HIV infection, their consequent risk of acquiring HIV infection, and their chances of accessing appropriate care and support. A consortium of UN agencies came together to form UNAIDS⁹ in 1996, with each of the members bringing their own expertise to the initiative and subsequently increasing their action in the area. This group pushed for a collective response towards HIV/AIDS, to catalyse the breadth of expertise so that working together through UNAIDS, and they expand their outreach. Working

⁷ World Health Organisation, World Health Assembly, Resolution WHA 40.26. *Global Strategy for the Prevention and Control of AIDS*. Geneva, WHO, 5 May 1987

⁸ Mann J, Goctin L, Gruskin S et al. Health and human rights. *Health and Human Rights* 1994; 1(1): 7-24

⁹ UNAIDS is made up of UNICEF, UNDP, UNPFA, UNDCP, ILO, UNESCO, WHO, WORLD BANK. It is guided by a Co-ordinating Programme Board, which has representatives from 22 governments from around the world, 7 from the cosponsors, and uniquely, 5 from non-governmental organisations.

through the consortium, strategic alliances can be formed with other agencies, governments, corporations, religious organisations, NGO's, to name a few of the increased possibilities. As a member of UNAIDS, the WHO in close partnership with the other members, and together with national governments and experts, implemented a country-by-country reporting system in 1997 for tracking HIV/AIDS¹⁰. UNAIDS can therefore be seen to work with human rights principles in the fight against the disease.

Most recently, human rights have also come to be understood to be directly relevant to every element of the national risk/vulnerability paradigm of HIV/AIDS in as much as:

Policymakers, program managers and service providers must become more comfortable using human rights standards and norms to guide and limit government action in all matters affecting response to HIV/AIDS

Those involved in HIV/AIDS advocacy must become more familiar with the practicabilities of using international human rights law when they strive to hold governments accountable.

Gruskin and Tarantola¹¹

The interaction between HIV/AIDS and human rights is most often illustrated through the impact on the lives of individuals through neglect, denial, and violation of their rights in the context of the HIV/AIDS epidemics. This is equally the case, albeit in different ways, for women, men, and children infected with, affected by, and vulnerable to HIV.

Lack of respect for human rights fuels the spread and intensifies the impact of HIV/AIDS, concurrently; HIV/AIDS undermines progress in the realization of human rights.

¹⁰ For more information about UNAIDS see: www.unaids.org

Violations of many of the rights of people affected by HIV may involve restricted or denied access to health services, education, and social programs¹². People affected with HIV may progress toward the realization of their rights and better health if the personal, societal, and other impacts of the HIV epidemics of their lives are alleviated. This requires policies and programs designed to extend support and services to affected families and communities. Children orphaned by HIV/AIDS illustrate this need, an image that will be discussed below when the focus concentrates more on the context of Africa and South Africa.

The principle of 'progressive realisation' is fundamental to achieving the category of economic, social and cultural human rights, especially for those resource-poor countries, so they continue to strive towards achieving their human rights goal. Also important, is the obligation it imposes upon wealthier countries to engage in international assistance and cooperation. The idea of progression in achieving rights is embodied in the provision of Article 2 of the ICESCR. It places a stronger obligation than the moral one agreed to by UDHR signatories, in as much as states have agreed to fulfil their obligations to the best of their abilities using the maximum of their available resources. The UN Committee of Economic, Social and Cultural Rights has qualified the term progressive realisation as "consist[ing] of] a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time."¹³ It is seen as a 'flexibility device' so that the disparities in the world, can be accommodated¹⁴.

¹¹ Gruskin S, Tarantola D. op cit.

¹² Gruskin S, Wakhweya A. A human rights perspective on HIV/AIDS in sub-Saharan Africa. In Laga M, De Cock K, Kaleeba N, Mboup, Tarantola D (eds). *AIDS in Africa*, 2nd edition. London: Rapid Science Publisher, 1997: S159-S167.

¹³ Contained in document E/1991/23 CESCR General Comment 3, 14 December 1990, Para. 9

¹⁴ Ibid. paras 10 & 13: [A] State party in which any significant number of individuals is deprived of essential foodstuffs,[...] or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. ...[and] "to the maximum of its available resources" was intended by the

In contrast to the ICESCR, the CRC, even though in containing some similar rights, does not include the obligation of progressive realisation provision. Consequently, rights arise immediately, however, the qualification provision of ‘within their means’ is apparent and therefore visualises the only stipulation attributed to economic, social and cultural rights. Without this, obligations regarding such rights should be no different to those of civil and political rights: referring to the discussions below concerning distinguishing between generations of human rights.

2.1.1 Accountability in relation to HIV

None of the human rights treaties specifically mention HIV or the rights of individuals in the context of HIV/AIDS; however, all the international human rights mechanisms responsible for monitoring government action towards such treaties have expressed their commitment to exploring the implications of HIV/AIDS for government obligations. In addition to this, governments have made political commitments at international conferences such as the Cairo International Conference on Population and Development, and the UN Fourth World Conference on Women. Resolutions of the UN Commission on Human Rights and the 1998 International Guidelines on HIV/AIDS and Human Rights provide both advocates and policy makers with useful tools for helping to ensure increased attention to both HIV/AIDS and human rights¹⁵.

Since the 1980’s there have been an increased global push to combat the ever-increasing HIV/AIDS epidemic. Realisation of projected impacts of the disease on the world’s states pushed for further action. With the interest of education in

drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.

mind, it has often been acknowledged that good health means good education learning potential¹⁶, obviously not considering environmental influences. With the UN under the auspices of their Secretary General Kofi Annan, a greater effort was made to include human rights across the spectrum of the international disquiet. His belief was not a new one. Early advocates such as Jonathan Mann recognized that infections thrived in the conditions of inequality¹⁷, and ‘crystallisation’ of such is seen in the International Guidelines on HIV/AIDS and Human Rights¹⁸ that were developed at the Second International Consultation in 1996 convened by UNAIDS and the Office of the High Commissioner for Human Rights¹⁹.

In September 2000, the UN member states reaffirmed their commitment to working ‘towards a world in which sustaining development and eliminating poverty would have the highest priority’²⁰ at the Millennium Summit. The Millennium Development Goals²¹ were formed on the agreements and resolutions from UN organized world conferences in the past decade and used to act as a

¹⁵ Office of the United Nations High Commissioner for Human Rights and the Joint United Programme in HIV/AIDS. *HIV/AIDS and Human Rights: International Guidelines*. UN Doc HR/PUB/98/1 (1998)

¹⁶ Report of the Commission on Macroeconomics and Health, Macroeconomics and Health: Investing in Health for Economic Development, presented by Sachs, J D. to Gro Harlem Brundtland, Director General of the World Health Organisation on 20 December 2001, page 35

¹⁷ Mann J, Tarantola D. Responding to HIV/AIDS: a historical perspective. *Health and Human Rights* 1998; 2: 5.

¹⁸ These Guidelines cover three main areas: improving governmental responses in terms of multisectoral responsibility and accountability; widespread law reform and legal support services; and supporting increased private sector and community participation in effective responses to the epidemic. See Watchers H. Measuring Legal Implementation of the International Guidelines on HIV/AIDS and Human Rights, Canadian HIV/AIDS Legal Network – *Canadian HIV/AIDS Policy and Law Review*, Volume 6, Number 1/2, 2001, or www.aidslaw.ca/Maincontent/otherdocs/Newsletter/vol6nos1-22001/discrimination.htm, accessed 17/07/02

¹⁹ Office of the UN High Commissioner for Human Rights and UNAIDS. *HIV/AIDS and Human Rights: International Guidelines*. Second International Consultation on HIV/AIDS and Human Rights, Geneva, 23-25 September 1996, HR/PUB/98/1

²⁰ www.developmentgoals.org/About_the_goals.htm, accessed 10/04/02

²¹ For more information see www.developmentgoals.org

framework for measuring progress. Education and HIV/AIDS (and other diseases) are recognised as goals 2 and 6 respectively²².

2.1.2 Rights affected by HIV/AIDS in general

As was mentioned in the introduction to this paper, a vicious cycle of where HIV/AIDS cases increase, a decrease in educational services transpires later, but correspondingly. This has been most recently recognised by the UNAIDS Interagency Task Team on Education as it released a new action plan: 'HIV/AIDS and Education, A Strategic Approach'²³. It has the ambition to help fight against the spread of HIV infection through the increase in national efforts to achieve 'Education For All' goals. Without further explanation, i.e. with the information we have before us, we can comprehend the possibility of how the ambit of HIV/AIDS is wider than the naively expected connection as to the effect of bad health on the person who has the virus.

It is only going to be written that HIV/AIDS can affect many human rights, from the right to privacy²⁴ and the right to life, to prisoner's rights, the right to marry and the right to adequate housing. The majority of these human rights influenced and affected by HIV/AIDS, are also on this list for one other reason: they are being breached because of discrimination. The right to not be discriminated against is one of the most fundamental rights found in the major human rights documents and treaties. As will be explained below, any case law concerning the subject of HIV/AIDS is based around this principle of non-discrimination and the connected right, for example the right to health, which the case situation affects.

²² Goal 2: Achieve universal primary education; Goal 6: Combat HIV/AIDS, malaria and other diseases

²³ www.unesco.org/education/just_published_en.pdf/hiv_approach_english.pdf, *HIV/AIDS and Education. An Interagency Strategic Approach*, IATT, October 2002, accessed 02/11/02

²⁴ Through disclosure of HIV status by doctors or anyone else without permission

3 Education as a form of HIV/AIDS prevention

3.1 The Right to Education

Education forms an essential part of current human rights law. It is a prerequisite for the exercise of human rights, in unison with a fortification or multiplier of human rights²⁵ through promotion and respect. It is recognised, protected and promoted through all stages of the spectrum: local through to global.

The common picture of education is a child receiving instruction provided by the state. It must therefore be established that this is not the only illustration the right to education umbrellas. Different actors should be distinguished for us to comprehend the extent that such a right exists. The diversity includes those who provide education, such as teachers, parents and owners of educational establishments; those who receive education; and the one who is legally responsible for those receiving education such as parents, guardians, society and ultimately the state²⁶. From this it can be seen that education reaches far beyond the act of 'instruction' itself. Without education, many other individual rights can be inaccessible such as employment and social security. The purpose of education is therefore broad, however Akkermans²⁷ believes that two functions of education are of particular significance:

²⁵ Article 13(1) CESCR, “[State Parties] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.” Similarly Article 26(2) UDHR; Article 5(1)(a) of the UNESCO Convention against Discrimination in Education; Article 29(1)(b) CRC

²⁶ Nowak M. The Right to Education. In Eide A, Krause C, Rosas A (eds). *Economic, Social and Cultural Rights: A Textbook*. Dordrecht: Martinus Nijhoff, 1995, at 245-271, page 246

²⁷ In De Groof (ed.) *Subsidiarity and Education. Aspects of comparative educational law* (1994) 3-4

The socialisation function that refers to education as a vehicle for cultural transfer from certain groups to the individual to enable the individual to function adequately in the social groups that are relevant to him, and
The qualifications function of education that refers to the acquiring of skills and knowledge and, consequently, qualifications that facilitate access to the employment market.

To this latter point should be added:

The acquisition of knowledge and skills that *facilitate protection for health* so that access to the employment market can be fully realised and achieved long term.

This is something that will be clarified as the paper progresses.

As is written in International Law, where there are rights, duties also exist concurrently, and the right to education is no exception. With human rights, the conceptual counterpart is therefore governmental obligations. Governments are responsible consequently for their own populations. In reference to the right to education, an obligation is imposed upon the state to create and maintain an education system, which includes educational programmes available in all its forms, at all levels²⁸. The state therefore, must ensure that educational institutions are functioning, which includes programmes and having educators, throughout its territory. Curricula must be set, new schools built, teachers employed. These, combined with conceptual structures of availability, accessibility, acceptability and adaptability for all, are the core obligations²⁹. It is understood that, for every human right, governments have responsibilities at three levels: they must respect the right; they must protect the right; and they must fulfil the right³⁰.

²⁸ E/C.12/1999/10 CESCR, General Comment 13 (8 December, 1999) Para 6

²⁹ Op cit, E/C.12/1999/10, CESCR Committee, General Comment 13

³⁰ Eide A. Economic, Social and Cultural Rights as Human Rights. In Eide A, Krause C, Rosas A (eds). *Economic, Social and Cultural Rights: A Textbook*. Dordrecht: Martinus Nijhoff, 1995, at 21-40

In the context of the right to education:

- To respect the right means that states cannot violate the right directly. This means that the right to education is violated if children are excluded from attending school on the basis of their HIV status.
- To protect the right means that a state has to prevent violations of rights by non-state actors and offer some sort of redress that people have knowledge of, and have access to, if a violation occurs. Consequently, a state has to ensure for example, that groups motivated by extremist ideologies do not achieve their aim in trying to stop adolescents from accessing reproductive-health education.
- To fulfil the right means that states have to take all appropriate measures – legislative, administrative, budgetary, judicial and otherwise – towards fulfilling the right. If a state fails to provide essential HIV/AIDS prevention education in enough languages and mediums to be accessible to everyone in the population, this in and of itself could be understood to be a violation of the right to education.

3.1.1 Generational Interpretation

Each human right can usually be assigned to a specific category or generation.

Classification of the right to education has predominantly been included with economic, social and cultural rights. This can be considered unfortunate in some circumstances due to the dominant misconceived perception that such rights are non-justiciable i.e. lacking in remedies, and therefore deemed weak. As a ‘second generation’ right, the right to education is based on the socialist philosophy that human rights can only be guaranteed by a positive state action: the insurance to the state population that education will be provided without

discrimination³¹ and by combating existing inequalities in the access to, and enjoyment of education by legislative and other means. However, all human rights are considered interdependent, indivisible and interrelated³², consequently disqualifying the theory that the generations³³ are a hierarchy within the system. The terms however are still used and therefore must be mentioned here. The right to education however is one of the few rights straddling the economic social and cultural field, the civil and political rights field and the third generation³⁴, so-called solidarity rights³⁵, together with embodying individual and collective rights. A typical example of education being considered a civil and political right is when discussing the free establishment of schools, or parental choice of educational establishment for their child's attendance. This exemplifies the concept of freedom 'in', and 'of' education.

Law itself has the purpose of setting instructions so that security and certainty can be achieved. It defines entitlements, obligations, and possibilities if such things are not successfully fulfilled. For the right to education (along with the other human rights), written and agreed law initiates from the international stage, for states to agree to, declare their commitment to, and accept the necessary action to be taken if the commitments are not fulfilled.

3.1.2 International and Regional Instruments

International human rights law is not directly applicable in most countries. Standards are usually transposed and interpreted into domestic law, and applied in this manner. An example of this dualistic approach is with English Law, which

³¹ See UNESCO Convention against Discrimination in Education (1960), contains relevant obligations of states to promote equality of opportunity and treatment in education.

³² The Vienna Declaration 1993, para.5

³³ For a clear explanation on generations of human rights see Steiner, P. & Alston, *International Human Rights in Context*, and *Akehurst's Modern Introduction to International Law* 7th Edition.

³⁴ See Article 15(4) CESCR and A28 (3) CRC

is based on the common law system, the alternative is the monistic approach³⁶. This, together with the wording of the international treaties concerning economic, social and cultural rights (with the exclusion of the ILO documents which is imprecise over government obligations), are so closely linked: “domestic legal enforcement of a right is the essential prerequisite for [...] international enforcement.”³⁷

At the international level, the right to education has been recognised through a diverse range of universal and regional instruments adopted after World War II in a way that reflects both the liberal and the socialist human rights concepts³⁸. Article 26 of the Universal Declaration of Human Rights (UDHR) declares the right of everyone to free and compulsory primary education, and to equal access to higher education together with the rights of parents to choose the type of education their children receive. Similarly, Article 13 of the ICESCR holds the composite requiring non-interference and positive state action. In comparison are regional examples: Article 2 of Protocol No.1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) lays the emphasis on the rights of parents to choose the education for their children. In the African context, Article 17(3) of the 1981 African Charter on Human and People’s Rights only focuses in this context on the duty of the state to promote and protect ‘morals and traditional values recognised by the community’. The most detailed provision of the aims and objectives on the right to education however, are held in the UN Convention on the Rights of the Child³⁹ (CRC). This convention is regarded as the most universal standard in the field due to there

³⁵See General Comment No.11, reference E/C.12/1999/4, CESCR, (10 May 1999), Para 2: on plans of action for primary education: “In this respect, the right to education epitomises the indivisibility and interdependence of all human rights”.

³⁶ See Wallace, R, *International Law*, Sweet and Maxwell Publishing, 3rd Edition, (1997), page 35 for more detail on these approaches

³⁷ Right to Education Primers No. 3, page 11, available at: www.right-to-education.org

³⁸ Nowak M, The Right To Education, *Economic, Social and Cultural Rights*, Eide et al (eds) page 248

³⁹ Adopted November 1989.

being 191 state ratifications⁴⁰. Those who ratify the treaty agree that the education of the child shall be directed to:

- The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
- The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- The development of respect for the natural environment.

From this it can be concluded that there exists a broad consensus on the major aims and objectives of the right to education⁴¹: to development in full of the human personality with the sense of dignity, and to achieve this, there must exist substantial governmental obligations, or without such, the right to education could not exist. These obligations are broken down into: availability, accessibility, acceptability, and adaptability.

**Conceptual structures for the Right to Education include:
Availability, Accessibility, Acceptability, and Adaptability.**

⁴⁰ The only two independent states not to have ratified, as of 14 October 2002, are Somalia and the United States.

⁴¹ Not including all the controversy surrounding universality of human rights.

This conceptual framework is established in General Comment 13 of the Economic, Social and Cultural Rights Committee and has been illustrated through publications from the UN Special Rapporteur for the Right to Education⁴². With these in mind, the conceptual framework stands as follows:

3.1.2.1 Availability

A sufficient quantity of educational institutions should be found within the jurisdiction of the state. All institutions and programmes should have buildings or other protection from elements, sanitation facilities for girls and boys; safe drinking water; trained teachers; teaching materials; libraries laboratories and computers⁴³.

3.1.2.2 Accessibility

Three dimensions of accessibility exist: non-discrimination, physical accessibility, and economic accessibility⁴⁴. Non-discrimination must occur in law and in fact, helping the most vulnerable groups achieve access⁴⁵. A basic mechanism to create and uphold equal opportunities is to make basic education compulsory and free, and remove differential treatment of learners, with the exception being unless it serves the public interest or purpose⁴⁶. This sort of differential treatment would be acceptable if it benefited a certain group of learners who require special protection so that they may enjoy the right themselves⁴⁷. Physical accessibility is somewhat self-explanatory in the sense that access to learning must be within safe reach, either relating to geographical location or modern technology with distance learning.

⁴² www.right-to-education.org Look at the education 'Primers'

⁴³ E/C.12/1999/10, CESCR General Comment 13, 8 December 1999, Para. 6 (a)

⁴⁴ General Comment 13 (1999) para. 6 (b)

⁴⁵ The prohibited ground are specified in paras 31-37 on non-discrimination in General Comment 13, op.cit

⁴⁶ Article 4, Convention Against Discrimination in Education (1960)

Specifically, accessibility is defined differently depending on what stage of education is being discussed. Governments are obliged to secure access to education for those children who are eligible, i.e. in the compulsory age range for education, and such education should be free of charge. The two major international instruments then differ on the final age that free education should continue. The ICESCR purports to have free education to the highest levels (progressively of course), however the CRC unreservedly approves of the charging of fees in the secondary and tertiary stages while reiterating free primary education endorsements.

3.1.2.3 Acceptability

Education provided should be of relevance, culturally acceptable and of good quality.

3.1.2.4 Adaptability

There should be flexibility to education in the way that it adapts to societies needs and how it moulds to the needs of learners: supported by domestic courts. An increased conceptual dissociation between ‘school’ and ‘education’ is occurring in developing countries, as the increasing numbers of children who are unable to attend schools have to be addressed. Education must be taken to them, whether they are in confinement, working during school hours, or there are just no educational establishments in the geographical vicinity of their homes.

For an illustrated breakdown of this conceptual framework, attention should be paid to Appendix 1.

⁴⁷ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), para 39

3.2 A Preventative Tool

The introduction to this paper highlighted that good quality education is a powerful weapon against HIV/AIDS, while HIV/AIDS is itself a powerful weapon against the infrastructure of education. This endless circle is one that must be addressed further here as we discuss how education can be used as a preventative tool against future infections and discriminatory thoughts and actions on the basis of HIV/AIDS.

Nonetheless, how does education achieve such a high status in the role of prevention? A home or community environment is not necessarily the easiest forum to talk about AIDS or risk behaviours that can lead to HIV infection. However, in theory, most young people, if not all, will attend school at some point, and it is therefore through schools that the topic may be addressed. The children will be in an environment with a curriculum, teachers and importantly, a peer group. A classroom environment can teach information, together with skills and also help to mould and form attitudes.

Education faces challenges throughout the world, in as much as the concept itself can operate without any interference from another capability/influence. According to a 2002 World Bank report⁴⁸ there are still at least 113 million children aged between 6 and 12 who are out of school in developing countries: two thirds of them girls. Advancement to achieve the Education For All (EFA)⁴⁹ agreed goals and therefore those confirmed in the Millennium Development Goals,⁵⁰ has been

⁴⁸ *Education and HIV/AIDS: A Window of Hope*, 2002, World Bank

⁴⁹ This is a commitment given new vitality by the international community in April 2000 at the World Education Forum in Dakar, Senegal, building on the 1990 World Conference on Education For All in Thailand. The aim is to achieve education for “every citizen in every society”. Specifically its ambition is to get every child, especially girls, those in minorities, and any other child with special circumstances into education by 2015: an education which is completely free and compulsory and of a good standard. 164 countries have endorsed the programme by adopting the Dakar Framework for Action.

⁵⁰ In September of 2000, the Millennium Summit was held which produced the Millennium Goals: established yardsticks built upon UN conferences and meetings over the last decade for developing countries, and also for developed countries regarding funding. In relation to

somewhat potholed and ridiculed. At least 55 of the poorest countries in the world are known to be unable to achieve universal primary enrolment by 2015, and it is reported that between 28 and 31 of these affected countries are also among the 45 worst affected by HIV/AIDS⁵¹. However it must be reminded that although the ambitions of EFA will be hard to achieve, no matter what the result will be in 2015, progress will be made.

Education can be seen to be pivotal in the achievement of the Millennium Development Goals⁵². International institutions such as The World Bank and UNAIDS in their recognition of the effects that HIV/AIDS is having on education systems around the world, argue that general basic education – and not merely instruction on prevention – is among the strongest weapons against HIV/AIDS: skills based on health education must also be linked to the development of decision making facilities in each child and other inter personal skills. This general basic education must be ensured together with equal opportunities for girls, especially among secondary education. In an annual report, UNAIDS described a study from Uganda where infection rates among young women of all educational backgrounds decreased, but the decline was most apparent in the group of girls with a secondary education⁵³. Other studies focusing on 15-19 year olds have

the subject of this paper, three of the goals stand out (and six of the eight are promoted through education itself):

- Goal 2 - universal primary education by 2015;
- Goal 3 – promotion of gender equality and empowerment of women;
- Goal 6 – combatment of HIV/AIDS [and other diseases]. The aim to halt HIV/AIDS and to reverse the spread by 2015.

With reference to the goals now in more detail: the first two, are two of the most important EFA goals. The non-discrimination goal on gender is another salient objective, which, if placed in the context of HIV/AIDS, is an area that requires an immediate response. . In reference to goal 6 regarding HIV/AIDS specifically, the major impact of HIV/AIDS worldwide is the infection of the young. As stated above, at least half of all new infections are among 15-24 year olds, and with their deaths, development is truly undermined.

⁵¹

www.unaids.org/whatsnew/press/eng/pressarc02/EducationandHIVAIDS_181002_en.html , In *Turning the Tide Against HIV/AIDS, Education is Key*, 18 October 2002. This document uses the figures of 28 and 45, compared to the World Bank publication: *Education and HIV/AIDS: A Window of Hope*, op cit, which uses figures of 31 of the 55 countries not expected to reach EFA targets being among the 36 most affected by HIV/AIDS

⁵² Op cit, supra note 28

⁵³ UNAIDS, *Report on the Global HIV/AIDS Epidemic*, 2000, Geneva

found teenagers with more education, are more likely to use condoms and less likely to engage in casual sex compared to their less educated peers⁵⁴.

Consequently this purports the theory that access and quality are interlinked in providing a basis for adequate prevention within education against HIV/AIDS and other similar diseases, and subsequently pushes for AIDS responses to be fully integrated in the pursuance of national education goals.

Although there is a strong advocacy for education metamorphosing into the best form of prevention, a recent study by researchers at the University of Sussex in the UK⁵⁵, says there 'is little evidence to show that school-based HIV/AIDS education has had a major impact on sexual behaviour in SSA'. However, it is also noted in the study that it is the limitations in deliverance of such education that appears as a problem⁵⁶. Such a view is not greatly recognised in an international perspective. Such prominent figures such as UNAIDS and UNICEF strive to improve education methods so that HIV/AIDS education may be integrated into the every day curriculum and life. Early prevention has been seen to benefit countries such as Uganda and Senegal with the possibility of Zambia following a similar course to Uganda⁵⁷. It is with all this in mind that we return to Akkermans two significant functions described previously. The acquisition of knowledge to 'facilitate access to the employment market' is no longer the primary goal. The primary emphasis is to be able to gain the knowledge to protect yourself, and combine them with the necessary skills so that you may reach the possibility of long-term employment, one which will hopefully be lived on the morals and principles gained through the education received.

⁵⁴ Found at www.avert.org/aafrica.htm, *HIV and AIDS in Africa*. As a side note, this was not the case at the start of the epidemic, as education tended to go hand in hand with a more disposable income and higher mobility, both of which increase casual sex and HIV risk. Education has switched from LIABILITY to SHIELD. Accessed 15/11/02

⁵⁵ www.sussex.ac.uk, also mentioned at www.avert.org in the 'Recent News' section; 'East African Standard' Article, 02/11/02 *Aids education fails to change behaviour*.

⁵⁶ E.g. Teachers are too shy to teach sex education, or lack a commitment in an already overcrowded and examination driven curriculum

⁵⁷ Uganda has brought its estimated prevalence rate down to around 8% from a peak close to 14% in the early 1990's with strong prevention campaigns.

4 The Destruction of Education

Having established what the right to education entails and how education itself helps prevent HIV/AIDS, we must now turn to HIV/AIDS expressly and how it contributes to the destruction of education systems. In this section, the global impact of HIV/AIDS will be clarified and then broken down into the effects throughout the African continent. This illustration can then be used as a basis to establish a brief intangible picture of the devastation HIV/AIDS is causing to the region.

Illustrations will then follow to show how discrimination is related to HIV/AIDS and similar issues. Discrimination can be argued to exist through fear of things unknown, historic prejudice passed through generations, or through lack of education. It is with this in mind, that the act of discrimination is viewed in a legal context through some international case law associated with HIV/AIDS or similar.

Following this establishment of how discrimination is viewed in a legal context, assessment will be made as to *how* HIV/AIDS has a direct impact on the education systems and its possible outreach. This will include establishing the effects of illness and the death toll itself on those infected, and affected by the disease.

First however, we must return to our basic picture on the global stage of the effects that HIV/AIDS is causing.

4.1 General

I do not claim to be a medical expert, nor do I try to explain the complex medical terms of HIV/AIDS. What will be discussed however is the impact of the virus in terms of effect on the society and the educational system.

The AIDS epidemic, since being identified, has spread over all regions of the world, and where it is not seen, there is still no guarantee it does not exist. It is regarded no longer as a viral disease, but a pandemic in some areas: a widespread epidemic that affects a whole people. Recognition must be made of the fact that the pandemic consists of multiple and overlapping epidemics, each having distinct characters, varying between regions and countries. What once was described and held as a homosexual disease has now to be termed as one that affects any member of the general population. No other disease in history has had such an effect on the world's residents, and specifically the youngest and most vulnerable of such. Prevalence is high among the young generation and is rising rapidly. Inaction against the threat has proved to be a deadly mistake, as acknowledged by Peter Piot, the Executive Director of the joint UN Programme on HIV/AIDS (UNAIDS)⁵⁸. It is in the last two years that the intensity of common purpose to combat against HIV/AIDS has increased to its highest level. Through the media, non-governmental organisations, activists, doctors, economists and dissimilar, communities and nations have been animated to act as political will has self-styled itself to a new height.

However, it is the previously mentioned inaction that still erodes the paths made by those who do act. It is these governments who do not acknowledge the danger that should be faced by the world as one, who repudiate the possibility of success against the prevention and hopefully one day, the eradication of HIV/AIDS.

It has become recognised that there exists three stages of the epidemic in a society: a silent, unseen epidemic of HIV infection; the epidemic of AIDS itself when the HIV sets off life threatening infections; and the third being the epidemic of stigma, discrimination, blame, denial: all of which increase the difficulty in

⁵⁸ *UN Report on the Global HIV/AIDS epidemic 2002*, UNAIDS

attacking the first two phases⁵⁹ by pushing the disease out of the public eye underground through the possibility of shame.

Worldwide

21.8 million people have died since the epidemic began
5.3 million people were newly infected with HIV in 2000
36.1 million people now live with HIV/AIDS

61

4.1.1 Global

In the year 2000, three million people died of AIDS worldwide. Of this three million, 2.4 million deaths were in sub-Saharan Africa. Another 36.1 million men, women and children were living with HIV or AIDS, with 25.3 million in sub-Saharan Africa alone⁶². By the end of 2001, UNAIDS estimated that a further 5 million new infections existed. Social and economic impacts of AIDS threaten the well-being and security of millions of children. The Human Rights Watch World report 2002 on Children's rights highlights Thailand as having an estimated 300,000 deaths from AIDS since the start of the epidemic, resulting in a large quantity of orphans having to be cared for by other family members. Eastern Europe and the former Soviet States have experienced a rapid growth in cases which is being put down to the increased use of injected drugs: affecting children as they are drawn into drug usage at an early age, and through the loss of their parents.

In a recent report by the National Intelligence Council⁶³, it is highlighted that there will be a dramatic growth in HIV infection rates in Russia, China, India, Nigeria

⁵⁹ UNAIDS, *World AIDS Campaign 2002-2003 A conceptual framework and basis for action: HIV/AIDS stigma and discrimination*, June 2002, page 7, also see: Mann, J. Statement at an informal briefing on AIDS to the 42nd Session of the United Nations General Assembly, New York, 20 October 1987

⁶⁰ http://www.caa.org.au/horizons/february_2001/aids.html, accessed 27/05/02

⁶¹ Look at UNAIDS reports

⁶² http://www.unaids.org/epidemic_update/report/Epi_report.pdf and http://unaids.org/fact_sheets/ungass/word/FSoverview_en.doc, accessed 18/03/02

⁶³ www.odci.gov/nic

and Ethiopia over the next decade. In consequence, regional stability is at question, specifically when talking about the last two. The pandemic in Central and Southern Africa is likely to peak and even possibly decline in some areas: although projected infection rates are still estimated at between 30 and 35 million by 2010.

The picture stands at the developing world holding around 95% of the global total of more than 36.1 million people living with HIV/AIDS. The devastation and impact such a virus can cause is only just now starting to be fully realised. As increasing numbers of people become sick with HIV and later die from AIDS, so too do the family units and communities around them as poverty becomes the, due to fewer adults being healthy enough to support the growing number of dependents, especially the orphaned children⁶⁴. Thirty percent of people currently infected with the virus are under 24 years of age, and this pattern is highlighted further by the fact that of the new infections in the developing countries, the majority of HIV cases belong to the age range of 15 – 24⁶⁵. When it comes to education specifically more than 113 million children, aged 6 –12, are out of school in developing countries, two thirds of them girls, and of those who actually enter school, one in four drops out before literacy is attained.

4.1.2 Africa

The population of Africa is 0.7 billion including 28.5 million living with HIV/AIDS⁶⁶. The HIV/AIDS epidemic is estimated to have started in the late 70's, early 80's, with AIDS being now deadlier than war itself: in 1998, 200,000 Africans died in war, but more than 2 million died from AIDS⁶⁷. There are now sixteen countries across Africa in which more than one-tenth of the adult

⁶⁴ Briefing Paper, *HIV/AIDS and the Education Sector: Impacts and Responses*, March 2000, Compiled by Elsey, H. for ActionAid Education Department, page 5

⁶⁵ UNAIDS (1998) *AIDS Epidemic Update*, www.unaids.org/epidemic_update/index.html

⁶⁶ World Bank Annual Report 2002, www.worldbank.org/annualreport/2002/chap0502.htm

⁶⁷ www.avert.org/aafrica.htm, accessed 28/11/02

population (15-49) is HIV positive. The percentage in Botswana is 35.8%, and South Africa 20%⁶⁸. Southern and Eastern Africa is facing infection rates of unprecedented levels for any disease so consistently fatal.

Obviously the importance of teachers in education is unquestioned, however in 1999, an estimated 860,000 children lost their teachers to AIDS in Sub-Saharan Africa, specifically: in Zambia, deaths of teachers caused by AIDS are equivalent to about half the total newly trained in a year⁶⁹.

The traditional family unit and system is the backbone of African society, however, this is been corrosively eroded by HIV/AIDS and more and more weight is put upon the family system itself due to the necessity to care for orphans of extended family members for example⁷⁰.

Uganda represents hope for the other African countries. The estimated prevalence rate was brought down by 6% in the early 1990's. Senegal is another example where infection rates have been stabilized, and it has been suggested that signs of decline are starting to be recognised in Zambia⁷¹.

With such high levels of HIV prevalence in the region, the topic of discrimination must be acknowledged due to the possibilities that so many people could be affected by it. This would have to be done even without us knowing ourselves the severity of the problem, which will be explained further below.

⁶⁸ <http://www.caa.org.au/world/health/hiv/study/index.html#demographic>, accessed 01/08/02

⁶⁹ http://unaids.org/worldaidsday/2001/Epiupdate2001/EPIupdate2001_en.doc

⁷⁰ There has not been much study gone into this area, however a study in the Cote d'Ivoire showed that extended families find it harder to assign substitute parents to children orphaned by AIDS than to children orphaned by other causes.

⁷¹ UNAIDS, June and December 2000

4.2 Discrimination

Discrimination thrives in a society that is uneducated in the area of HIV/AIDS.

This lack of knowledge breeds unnecessary fears about ways the disease spreads for example, and in itself pushes the disease further into the field of shame.

The right to freedom from discrimination for children stems from provisions in the CRC, and in general also from: ICCPR; ICESCR; CEDAW; CERD. Moreover it is explicitly guaranteed in the Convention against Discrimination in Education⁷², which as of July 2001 had 90 states party to it. In terms of the right to education, non-discrimination is being mentioned due to the fact that it is through this human right that the cases relating to HIV/AIDS have been brought before courts.

Litigation involving economic and social rights specifically is rare compared to that of civil and political rights. The civil and political side of the right to education – in the sense of parental freedom discussed above – only really exists in Europe and westward. The African continent has no real examples of such. Nonetheless, cases that have involved concern for economic and social rights have been brought interdependently with the right of non-discrimination. Consequently, when a case with the geographical theme (in terms of human rights) of education is being fought, it is most undoubtedly brought by using discrimination due to HIV/AIDS as the basis. The UN Commission on Human Rights has recently unequivocally stated in its resolutions⁷³, that the term ‘or other status’ in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS. Also confirmed is that ‘discrimination on the basis of HIV/AIDS status, actual or presumed, is prohibited by existing human rights standards’. Consequently, discrimination against people living with HIV/AIDS, or those believed to be infected, on whatever grounds, is a clear violation of their human rights.

⁷² www.unhchr.ch/html/menu3/b/d_c_educ.htm. Adopted by UNESCO on 14 December 1960

⁷³ Resolutions 1999/49 and 2001/51

Internationally there have been few cases specifically referring to HIV/AIDS and the right to education: they predominantly relate to health and disability.

Education should be provided without discrimination and by combating existing inequalities in the access to, and enjoyment of, education by legislative and other means

4.2.1 Case Law

Case law, whether it is international, regional or national does not regularly discuss breach of the right to education. One way to work round this lack of information however, is through the process of cases concerning discrimination and economic and social rights in general. This will illustrate the possibilities when HIV/AIDS is a major element of a case. Internationally, and also a clear illustration of the above perception that economic and social rights are litigated more so in Europe, three cases will be mentioned. The first two are Irish cases concerning children/young adults with disabilities having their access to education limited but they will be discussed through only one of them. The third will be used more as a highlight as to the comparison between recent and current debate in South African and other countries case law on the term ‘disability’.

The two Irish cases are explicitly linked as both concern the disability of autism. O’Donoghue v Ministry for Health et al⁷⁴ came first in 1996, followed by Sinnott v Ministry for Education⁷⁵ in 2001. The second case is the one to be most referred to for our benefit.

“The reality is that the constitutional obligations to provide primary education, training and health care for the plaintiff and others like him is that of the State per se.”

Autism is not to be directly compared to a child infected with HIV, this must be made abundantly clear, nonetheless, the principles in this case show how South Africa could face similar problems if such cases are litigated. In Sinnott, Ireland successfully argued that the High Court ruling in favour of the autistic⁷⁷ man had breached the principle of the separation of powers between the judiciary and the political body by actually telling the Government what education service to provide. The Chief Justice was alone in his agreement with the High Court that the State was obliged “to provide free primary education for the plaintiff appropriate to his needs for as long as he is capable of benefiting from same”.⁷⁸ This is of particular relevance to South Africa due to the ruling over separation of powers. No court has the ability to rule that the Government must enforce its obligations in a specific manner. It is therefore argued that for a case to come to court concerning the right to education, a secondary human right must be included in the claim, and this idea will take us to the final case.

The third case to be mentioned is Bragdon v Abbott (1998) US Supreme Court⁷⁹. This is relevant due to its comparative nature with possible South African case law. In general, over the past few years there has been dispute whether HIV/AIDS can be classified as a disability; a separate ground for non-discrimination clauses; or included in the ‘other status’ category on non-discrimination grounds. Bragdon and Abbott clarified that in the USA, people

⁷⁶ Trial Judges comment in Sinnott case, op cit

⁷⁷ Classed for the purpose of this case as a ‘severe disability’

⁷⁸ In fact, the compensation was still paid to the plaintiff even though the result was overturned in the Appeal Court. The dispute over separation of powers was centred on the fact that as soon as the child became an adult in the eyes of the law, the state was not obliged to provide free primary education. It was on this principle that the appeal to the Supreme Court was made.

⁷⁹ Bragdon v Abbott et al, 524 U.S. 624 (1998), June 25 1998

with HIV have the right to anti-discrimination protection under the Americans with Disabilities Act 1990.

Although it may be considered the paper is getting ahead of itself in discussing South Africa specifically, it is necessary to do so in as much as in the reasoning behind, and case law precedent itself is valuable. It is to the South African Equality Act⁸⁰ that views must now be had. Arguments have been abundantly clear in South African circles over whether HIV should be classed as a disability, or brought into the ‘other grounds’ category. Foreign law has supported this: symptomatic HIV and AIDS should be protected as a disability. It is not just the USA who holds such an opinion; countries such as Canada and Australia have similar outlooks. It is evident therefore that International laws supports HIV divergently as:

- A disability
- A separate ground for non-discrimination
- An ‘other status’ ground for non-discrimination (when not listed specifically)

This final point can be seen through the UN Commission on Human Rights confirmation that ‘other status’ should include health status, including HIV/AIDS.

In South African case law specifically, the inclusion of HIV/AIDS in ‘other grounds’ has been clearly employed in Harksen v Lane et al (1997)⁸¹. Here the Constitutional Court of South Africa developed a test for deciding whether a person had been unfairly discriminated against on any ground, including a ground that was not specifically mentioned in one of the 17 named in the Equality Clause.

⁸⁰ Full title is the ‘Promotion of Equality and Prevention of Unfair Discrimination Act (2000)’. It contains 17 listed grounds for discrimination: race, gender, sex, pregnancy, marital status, ethnic origin, social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. It also state you can not discriminate against a person for grounds other than those listed, where HIV infection could be included. www.workinfo.com/free/Sub_for_legres/data/act4.pdf, accessed 05/08/02

⁸¹ Harksen v Lane NO and others 1997, CCT 9/97, (7 October 1997), www.concourt.gov.za/appl1997.html, accessed 28/11/02

The court said: ‘The right to equality is violated whenever a person is treated differently in a way that is unfair discrimination.’⁸² Harksen developed the idea given in Prinsloo v. Van Der Linde and Another (1996)⁸³ where the Constitutional Court said that not all cases of differential treatment are unfair discrimination. The differential treatment must also hurt a person’s dignity. These principles of ‘unfair discrimination’ and ‘affecting the human dignity’ were engaged in the more recent – albeit employment case – of Hoffman v. South African Airways (2000)⁸⁴, where it was established by the Constitutional Court, that refusing employment to a person simply because he was living with HIV affected his dignity and was unfair discrimination.

As has already been established, the aim of education in general is the development in full of the human personality with the sense of dignity⁸⁵. If the requirements highlighted in the above cases are to be applied to an education case where a child or adult were refused access because of their HIV status, the outcome would more than likely be that the act was discriminatory. Such a statement is not entirely unfounded in as much as laws of the South African constitution and inclusions in documents to be discussed more below such as the Tirisano Document, South Africa’s Strategic Plan to Fight against HIV/AIDS 2001-2005 and more, include the view that discrimination on account of HIV/AIDS in the education sector is wrong.

⁸² The Harksen case sets a test structure to establish whether has been unfairly discriminated against: 1. The person discriminated against must show that they were treated in a way that was different from others; 2. If it is shown that treatment was different for the reason of one of the ones given on the list then it is immediately believed that there was discrimination and that it was unfair. The onus is therefore on the person using discrimination to prove otherwise; 3. If the treatment was not on the list of 17, for example with HIV/AIDS, then it must be shown that the basis for differential treatment may seriously harm the sense of dignity of the claimant, or another such serious way; 4. Proof must then be established that the discrimination is unfair due to the way it affects you or others.

⁸³ Prinsloo v Van der Linde 1997 (6) BCLR 759 (CC)

⁸⁴ Hoffman v South African Airways 2000 CCT 17/00 (28 September 2000) 2001 (1) SA 1 (CC); 2000 (11)BCLR 1235 (CC)

⁸⁵ Look back to the CRC references in Chapter 3

In June 2002, the High Court in Johannesburg ordered a private nursery school to take steps that could lead to the child's enrollment when the child was HIV-positive⁸⁶. Although this appears to be one of the illusive case law in South Africa referring to education and HIV/AIDS, the principles from other areas of case law must be carried over. As can be seen from this case concerning the HIV-positive toddler's access to a private nursery, dignity is affected and consequently in objecting to the child being admitted on grounds of HIV, the group has not followed the expected conduct supplied by such acts of state legislation described above.

In the South African Strategic Plan to fight against HIV/AIDS, discussed below, part of selected strategies includes the setting up of a database to collect information on the nature and extent of discrimination against people affected with HIV/AIDS, to review existing legislation and to ensure the protection of rights of people living with HIV/AIDS, and improve access to justice for people infected/affected by HIV/AIDS. All this is included in Goal 14: Create an Appropriate Social Environment⁸⁷, which also includes objectives to implement measures to facilitate adoption of AIDS orphans.

What this case law and constitutional obligations show, is that wherever HIV/AIDS is involved in a legal action, it dominantly includes the act of discrimination. International instruments constantly highlight the objective of a non-discriminate world society, which is why the term is such a core objective of international human rights law.

Discussion will now move to the people who are discriminated against. The variety of people affected will become evident to the reader, and hopefully, will encourage further discussion on the subject, and a broader understanding of just

⁸⁶ Found at www.aegis.com/news/re/2002/RE020924.html, accessed 10/12/02, *S.Africa Lawyer Slams School Rejecting HIV Child*, Reuters Sept 19, 2002

⁸⁷ South African Strategic Plan to fight against HIV/AIDS, page 25

how much such an illness can affect a whole society, and act as a background for the South African cases study.

4.3 Effects of Illness and Death Toll

For the purpose of this paper, identification will now be made of those who are affected by HIV/AIDS. As will be seen, the list is not solely inclusive of those who are HIV positive in educational establishments. External influences exist that must also be recognized. Without acknowledging such parts of society, this paper would be inaccurate in its full content. As has already been distinguished, it is not only those carrying the virus or who die from AIDS that are affected, the people who surround those infected through family units, work environments, learning environments, all are impacted upon. In recognition of those affected by HIV/AIDS, divisions have been made into the following categories:

- Education staff
- Learners
- Families living with HIV/AIDS
- Orphans of AIDS
- Street Children
- School-age girls

Each category will then be broken down so the main points are recognized before a full description is given. This global description will then be related to the situation South Africa is facing in chapter 5. It will aide recognition of whether certain effects are worse than others in the country. Reason for choosing these categories stem from the area of education itself. The first two groups, the reader will realise, are obvious to the sphere of education, while those following are predominantly the groups that, through my research, have been found to be severely influenced by HIV/AIDS, and are inclusive of an age group of those

youths who should be in the education environment, but through the necessity to survive are not able to achieve this luxury.

4.3.1 Education Staff

- Mortality
- Absenteeism
- Reduced Productivity
- Stigma
- Rural Drain
- Education Strategy
- Community Resource Saturation

HIV/AIDS impacts on the supply of education as much as on the predictable demand. Teachers may actually be more vulnerable to infection due to the nature of their job: often being separated from their families and mobile. A study in Tanzania projected that 14,460 teachers would die from AIDS by 2010 costing \$21 million in training for replacements⁸⁸, and Swaziland estimates that it will have to train more than twice as many teachers over the next 17 years just to keep the services at the 1997 levels⁸⁹. One teacher death deprives an entire class of pupils of their education. It is estimated that 860,000 children lost their teachers to AIDS in 1999⁹⁰, or an alternative breakdown concerning primary children is illustrated in the table below. It is not only teachers who are affected however, administration staff, managers, inspectors, financial staff are also involved. Losing people from any of these areas represents a loss of sector knowledge and could even result in the transfer of in-service teachers to these positions to cover, consequently increasing the loss the teachers from the teaching staff of adding

⁸⁸ World Bank, *AIDS Prevention and Mitigation in sub-Saharan Africa: An Updated World Bank Strategy*, 20 April 1996

⁸⁹ www.avert.org/africa.htm *Aids in Africa*, 8 March 2002, accessed 03/12/02

⁹⁰ Kelly, M, J. *HIV/AIDS and Education in Eastern and Southern Africa. The Leadership Challenge and the Way Forward*. Report for the African Development Forum, (2000)

extra responsibilities to their already hectic schedules. A World Bank analysis claims an infected teacher is likely to lose up to 6 months of professional time before developing full-blown AIDS, and another 12 months after this⁹¹. Funds available for replacement teachers are tied up in sickness benefits.

Teacherless Children because of AIDS, 1999	
	Number of Primary School Children Who Lost a Teacher to AIDS in 1999
Democratic Republic of Congo	27,000
Ethiopia	51,000
Kenya	95,000
Malawi	52,000
Nigeria	85,000
South Africa	100,000
Tanzania	49,000
Uganda	81,000
Zambia	56,000
Zimbabwe	86,000
Total for ten countries	682,000

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Teachers and other educational establishment staff are not just affected through dying from AIDS, the period of HIV infection must be considered where increased time off is required to combat HIV-related illnesses forcing other teachers to cover classes: again adding to workload. Alternatively, sick days may have to be taken to care for family members who are sick, if the teachers are not sick themselves, or even to attend funerals of family and colleagues. Teachers and other staff may also be absent due to the emotional strain of caring for sick relatives, or due to the loss of a family member. Emotional build-up due to uncertainty about their own HIV status is also to be considered. What must also be realised in relation to this is the fact that as more and more teachers become infected at school, stigma may drive divisions between the teachers and students, and the surrounding community may blame the teachers themselves as they are

⁹¹ World Bank, *Confronting AIDS: Public Priorities in a Global Epidemic*, A World Bank Policy Research Report. New York. Oxford University Press, (1999)

viewed as outsiders who have brought disease to the community. Patterns have been reported that female teachers are more likely to be affected in this manner than male teachers⁹³.

Urban/rural bias is starting to emerge as a possible threat to a states implementation of the right to education. As the number of teachers and other educational staff who become infected increase, those carrying the virus prefer to be closer to hospitals for example so they can reach medication. Amenities such as these are not necessarily plentiful in the rural landscape of the country⁹⁴. Losses of teachers may also be evident through the attraction to better paid areas of employment, so they would leave the education sector altogether.

In terms of educational strategy, it has been reported that attempts to help children affected by HIV/AIDS have backfired in the sense that introduction of free primary education overstretches the education system and dramatically reduces the quality of education available to all children⁹⁵. An increase in teachers being trained could be eroded away, as the possibilities of these very same new teachers having HIV infection is high, considering the mean age group that goes to universities for tertiary education is the same age group most likely to be infected. Resources available for education will most likely be reducing due to the imbalance of what funds are available from the government compared to the dramatically increasing cost of HIV/AIDS, and as communities suffer through illness and death, adults become less able to contribute their own resources of building and maintaining schools, which would have been a common occurrence previously.

⁹² UNICEF, *The Progress of the Nations*, 2000, p. 8

⁹³ World Bank, *Education and HIV/AIDS: A Window of Hope*, (2002), page 13

⁹⁴ Ibid.

⁹⁵ Op cit. *Children Affected by HIV/AIDS: Rights and responses in the developing world*, page 25

Teacher attrition can be high in HIV/AIDS infected areas as the stress of workloads and family worries wears the educators down. It has even been suggested that programmes for HIV/AIDS education themselves increase this erosion of morale as teachers feel they are not experts on this area and training is not good enough for them to then go and educate the children about it.

4.3.2 Learners

- Increasing infant mortality rates
- Class sizes increasing

As stated in a US Census Bureau report⁹⁶, the effect on this area of education is less clear. Although the numbers totaled for a school age population would be smaller, this same total will continue to grow in 20 of the 26 worst affected countries of HIV/AIDS in the world by 2015. This growth would be despite the fact, that in the countries which are most affected by HIV/AIDS, and where the spread of HIV is not contained, AIDS may increase infant mortality by as much as 75% and mortality in children under 5 by more than 100%. These figures are however, from the same source⁹⁷, which tends to make the situation unclear.

What is evident is that HIV is reducing the number of HIV positive women having babies partly because they will die before they reach the end of their child-bearing years. What must be considered however, is in the countries where demand for education is decreasing due to HIV/AIDS (from fewer children being born and reaching education age) this is inclusive of a decrease in the number of children who can afford to go to school, or even want to stay in school if the stigma factor is to be considered here. The rollover effects of this would create a situation which would take a lot of work to change back: one where fewer educational establishments would be required so closure of many would not be unexpected, and in this closure, many more children (or adults in need of education) would be

⁹⁶ Op cit, *World Bank, Education and HIV/AIDS: A Window of Hope*, April 2002, page 15

⁹⁷ Op cit, Elsey, H. *Briefing Paper*, page 3, UN Census Bureau reference

excluded from accessing tutorship, even those who can afford and want to have an education.

Despite the high mortality rates of teachers, in all but six of the developing countries most affected by HIV/AIDS, student populations are still increasing. In relation to supply of education as well as demand, class sizes increase due to the reduced number of available teachers from among other reasons, the previously described absenteeism. Demand has not necessarily increased, although the demand that exists cannot necessarily be fulfilled by the supply available.

The impact of HIV being in the family environment is explained below, however what must be recognised in this case of demand, is that as more family members get sick from HIV or similar, children may be forced to drop out of school to start earning money, or simply because fees have become unaffordable.

4.3.3 Families living with AIDS

- Number of dependents
- Adult illness and mortality
- Children withdrawn from school
- Loss of vertical knowledge

Each HIV/AIDS case goes beyond the ambit of the family unit: conceptual spillover. It escapes from the boundaries of the family unit and osmosis's through to the wider community and eventually impacts up on region development. A tangible example of such a phenomenon is the number of orphans caused by HIV/AIDS⁹⁸.

⁹⁸ Elsey, H. 'Briefing Paper – HIV/AIDS and the Education Sector: Impacts and Responses'. Action Aid Education Department, March 2000.

Large numbers of children in a family, whether they are descendants of the parents or have been taken in as their own, reduce the ability of poor families to invest heavily in the education and health of each child. This cause and effect has been described as the 'quality-quantity tradeoff'⁹⁹. Similarly, a high burden of disease in the same family translates once more into an increased low investment per child in education and health. A study in Thailand¹⁰⁰ found that rural households experiencing HIV/AIDS related illness and death were mainly the lowest income group in the community. The average income of these households was only 66% of those households experiencing non-HIV/AIDS illness and death, and equaled 55% of the income of those households experiencing no death in recent years. This study shows that HIV/AIDS affected households appear to be worse off than those who experience illness and death unrelated to HIV/AIDS¹⁰¹.

Adult illness causes two main problems within the family unit. The first is that many of the children may have to be withdrawn from schooling prematurely, if they were permitted to go at all, in order to help support the family. The second sees the illness reduce the transfer of knowledge from parent to child, for example African AIDS-impacted communities are now reporting that orphaned children are growing up without the knowledge of local farming¹⁰². A typical pattern described most aptly in a HRW report¹⁰³ is: a parent becomes ill; the family becomes impoverished through the loss of the income from that family members labour earnings and the cost of medicine needed to treat the member him/herself; school fees become unaffordable and the child is required to bring in that extra

⁹⁹ Report of the Commission on Macroeconomics and Health, *Macroeconomics and Health: Investing in Health for Economic Development*, presented by Sachs, J.D. to Gro Harlem Brundtland, Director General of the World Health Organisation on 20 December 2001, page 30

¹⁰⁰ Pitayanon, S. Rerks-Ngarm, S. Kongsin & Wattana, Janjareon, S. (1994) relating to the Chiangmai Province in the upper northern region of Thailand. Found in Elsey, H. 'Briefing Paper...', op cit

¹⁰¹ Accounted for in the study was income lost through illness and subsequent death: 83% of household income.

¹⁰² Op cit, Report of the Commission on Macroeconomics and Health, page 35

income or care for the family member while others work; child labour increases especially for those children who are unskilled. This lack of information being passed from parent to child is going against one of the two previously mentioned significant functions of education purported by Akermans¹⁰⁴. It must be noted that although problems experienced by children affected by HIV/AIDS are often the same as those felt by poor children everywhere, the disease exacerbates them.

Other reports highlight this situation: a UNICEF report¹⁰⁵ tells of AIDS pushing large numbers of children into hazardous conditions of labour in Kenya, Uganda, Mozambique, Ethiopia, Lesotho and South Africa. A further investigation summarized in a report by the Nelson Mandela Children's Fund¹⁰⁶ found widespread hunger and other deprivation among the 100 children orphaned¹⁰⁷ by AIDS in South Africa, and a number of girls as young as 8 being forced to engage in prostitution to survive.

4.3.4 Orphans of AIDS

- Traditional family networks unraveling
- Increased vulnerability to HIV infection
- Psychological trauma
- Stigma, isolation
- Loss of inheritance rights

More children have been orphaned in Africa due to AIDS than anywhere else in the world currently. The continent as a whole has evolved around a deep-rooted

¹⁰³ Human Rights Watch World report 2002: Children's Rights, page 13

¹⁰⁴ Op cit, footnote 3

¹⁰⁵ July 2001 referred to in HRW World Report 2002: Children's Rights, page 14

¹⁰⁶ June 2001 referred to in HRW World Report 2002: Children's Rights, page 14

¹⁰⁷ An 'orphan' is described by UNAIDS as a child under 15 years of age who has lost her or his mother (maternal orphan) or both parents (double orphan), so consequently figures form

kinship system: extended family networks that have proved resilient to previous substantial social changes. This system however, seems to have met its match in HIV/AIDS. The strain that the disease is putting upon these networks is causing them to unravel rapidly as the numbers of orphans in the most affected countries continue to soar. The elderly, who would at one time come to have been dependent on their sons or daughters, must now care for grandchildren as the middle generation: the most productive generation, dies. The already impoverished carers must now once again support more mouths, and in many cases, this is near impossible as capacity and resources are stretched to breaking point. A study was performed in South Africa in the mid-1990's when the pandemic was less severe than it is now. It exemplified that 74% of close relatives would be prepared to look after a child orphaned through AIDS, but when it came to a child who was a stranger, only 42% were willing¹⁰⁸. It is through this problem that increasing numbers of child headed households are appearing. If orphans go to live with grandparents it is likely that they will face similar patterns of loss in the following few years as their grandparents then die.

To continue the cycle of HIV/AIDS, it is these very orphans of the disease that are the most vulnerable to eventually becoming infected with HIV compared to their peers. In sub-Saharan Africa, few social support systems exist outside of families and so when one or both parents die the children are exposed. There are increased cases of malnourishment, anti-social behaviour, experimentation with unprotected sex, and they are also likely to be the first to be denied education when the extended families cannot afford to educate all the children in the

UNIADS are an underestimate of the problem as they exclude: paternal orphans, orphans ages 15-17 and children orphaned due to other causes other than AIDS

¹⁰⁸ McKerrow, N. and Verbeek, A. *Models of Care for Children in Distress: The Current Status of Children in the KwaZulu-Natal Midlands and the Nature of the Community Response*, (1995)

household. A study in Zambia showed that 32% of orphans compared to 25% of non-orphaned children in urban areas were not enrolled in school¹⁰⁹.

The affects on a child before they are orphaned are just as traumatic. Experiences of loss, sorrow and suffering will forever be embedded in an orphans memory. As HIV can be spread sexually between parents, it is likely that once one of the parents has died from AIDS, the second will follow. As HIV progresses from the initial infection, through mild HIV-related illnesses, to full-blown AIDS itself, uncertainty and intermittent crises are inflicted upon the children. These children must take on the role of the parents as their ability worsens, or ends with death itself. Caring for siblings, the ill and dying, finding food and necessities to live take childhood away: comfort and security is lost. Child-headed households are increasing, and these are the most likely to be unable to afford school expenses as there is a greater need for having the children at home to help with expenses. This in turn will influence the children as they mature into adulthood, in terms of their values of themselves and their siblings and future families.

During this time when children's parents are dying or have died, they are most in need of support from society; however, this time may be the worst they will have to face. Their social isolation from society is all too often exacerbated through stigmatism, shame, rejection and fear that encompass those affected by HIV/AIDS. This can go so far as to affect access to schooling and health¹¹⁰. Stigma and discrimination are usually directed at grounds of HIV/AIDS plus another or more, for example, if a black woman is HIV positive, grounds for

¹⁰⁹ UNICEF and UNAIDS, Children Orphaned by AIDS: Front-line responses from eastern and southern Africa, December 1999, page 5, available through pubdoc@unicef.org, and www.unicef.org

¹¹⁰ Rajkumar, V. *HIV and AIDS and Children: Vulnerability and Impact*. SC UK, India, (2000)

triple discrimination exist: black, woman, HIV status¹¹¹: this shows that the intolerance often faced is usually complex and multiple¹¹².

Another common problem for children orphaned by AIDS through the stigma predicament is the loss of inheritance rights. In a HRW report on Kenya, a substantial number of children interviewed by HRW experienced unlawful appropriation of property they were entitled to inherit. Distant relatives were usually to blame for this. NGO reports have supported this comment, especially when looking at Kenya and attributing it to the increase in the number of AIDS cases and the breakdown of the traditional extended family support system so believed to be the moral fiber of African society. Girls are particularly susceptible to this problem¹¹³.

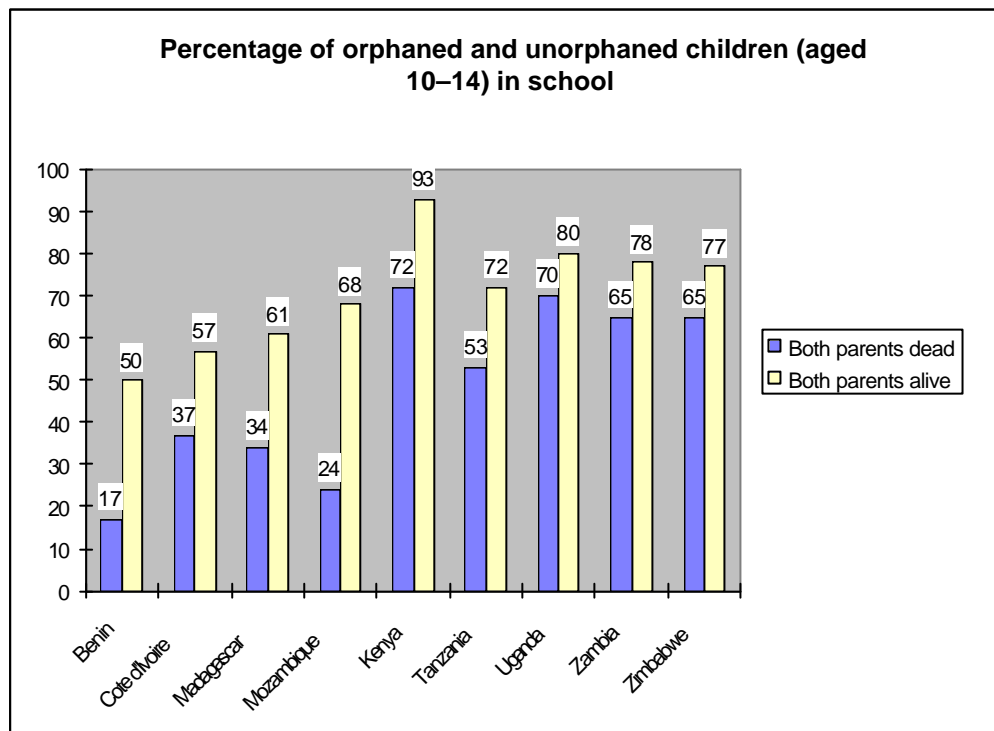
How does this relate back to the right to education? School enrolments in badly affected countries fall into three categories: orphans, children from AIDS-affected families, and children from families that have not been touched directly by the epidemic. The high proportion of children who are orphaned means that in addition to those who never enter school, or drop out early, many of those attending school are orphans.¹¹⁴ Orphans are susceptible to illness, they cannot afford to attend school everyday due to the demands at home of labour or care. Their physical presentation may only be good enough to pick up attacks by peers in the educational environment so they prefer to stay away. Consequently,

¹¹¹ <http://www.unaids.org/publications/documents/human/law/ugandaindiabb.pdf> Recent UNAIDS sponsored research in India and Uganda shows that women with HIV/AIDS may be doubly stigmatised both as 'women' and as 'people living with HIV/AIDS' when their identity becomes known.¹¹¹ Likewise, Black people with HIV/AIDS find themselves stigmatised as both 'infected' and 'Black' (and by extension, Black women with HIV/AIDS as 'infected', 'women' and 'Black').

¹¹² WHO and UNAIDS, Fighting HIV-related intolerance: Exposing the links between racism, stigma and discrimination,

¹¹³ For a detailed example of this problem in regard to Southern Africa and South African case law specifically concerning disparities between international law and customary law see, Thimonga, C., *Implementing the rights of the child in African legal systems: The Mthembu journey in search of justice*, The International Journal of Children's Rights 9, 2001, pp 89-122

orphans run an increased risk of not being able to be enrolled in school in the normal ways. Compared with children who have parents to look after them, they have greater insecurities. This can be seen in the diagram below. Consideration must also be given to families with children who are affected by HIV/AIDS who will likely become orphans themselves. A similar pattern could be said to be occurring in this situation as the one illustrated.



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Orphans constitute one of the most detectable and heart-rending results of the disease, but other children also find undesirable effects. Such children may themselves be orphans, the groups are unreservedly linked that distinction can not always be clear, or they may be susceptible to influences, or indirectly affected by HIV/AIDS only to affected directly later on.

¹¹⁴Kelly, M.J. *The Impact of HIV/AIDS on the Rights of the Child to Education*, University of Zambia, 15th October 2000

¹¹⁵ UNICEF, *The Progress of Nations 2000*, p.30

4.3.5 Street Children

Poverty and family disintegration due to death and divorce are the major factors leading to children being on the street. The previously mentioned collapse of family structures leave children with no other possibility once it becomes clear that they have no choice but to resort to the streets for their own survival, and possibly that of their siblings. The same is true for child victims of poverty or divorced parents/family disintegration, and rural counterparts, children from HIV/AIDS infected families who cannot attend school because AIDS care has absorbed the meagre family resources, leaving nothing for school fees.

The growing number of street children is inextricably linked to that of orphans: street children are two or three times more likely to be orphans than children with a living parent. Correspondingly, in as much as HIV/AIDS has contributed to the children living on the street, once they are there, their possibility of contracting the disease themselves significantly increases: through income-generating prostitution of both sexes and through the undisciplined lifestyle.

4.3.6 School-Age Girls

- Rape
- Prostitution: Economic Survival
- Girls likely to be withdrawn first from education

October 2002 saw the UNSR on the sale of children; child prostitution and child pornography make an initial report¹¹⁶ concerning his trip to South Africa the month before, stemming from the increasing number of reported rape cases involving young children. This report will be dealt with in more detail below when concentrating on South Africa specifically. It does however highlight as

¹¹⁶ United Nations Press Release, United Nations rights expert calls for measures aimed at child victims of sexual violence in South Africa, 4 October 2002

increasingly worrying aspect of the possibilities of what young girls who are, or should be, in school are going through: particular note should be had for Articles 32 and 34 of the CRC¹¹⁷ in this relation. According to the United Nation's Children's Fund (1998) estimates¹¹⁸, girls constituted nearly two-thirds of the 130 million children out of school in the developing world.

We will consider both these girls and those in education when we speak of rape. This is becoming an increasing problem in HIV/AIDS infected areas of the world. This has been reported due to all different sorts of reasons: myths that having sex with virgins will cure you of HIV; treatment of children as commodities; high levels of alcoholism; and generally high incidence of violence. Rape is occurring inside educational establishments as well as outside.

In reference to children being withdrawn from school to take the place of earner or carer for the sick and young, it is usually the girls who are pulled out of school first due to the perception that they will not be needing a high education due to them being married off soon, or purely coming down to the traditional roles within the family of carers being female. It is possible that in the situations of economic necessity due to family requirements, girls will resort to prostitution. As noted above, the treatment of children as a commodity can be too ordinary. On occasions, sexual encounters with external nuclear family members in exchange for school fee paying are being recognised.

Impacts of HIV/AIDS: Who is affected?

*Teachers, Administration and Management Staff, Children, Families:
Communities, Nations*

¹¹⁷ Inclusive of protection from economic exploitation and the performance of any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development; protection from all forms of sexual exploitation and sexual abuse.

¹¹⁸ Human Rights Watch World Report 2002: Children's Rights, www.hrw.org/wr2k2/children.html page 10

4.4 Conclusion

The impact of HIV/AIDS will flow through generations still to come in society.

This only has to be illustrated by the next generation of teachers now being trained: the majority being in the age bracket of the highest infection rates.

Until discrimination, including gender bias and inequality, is eradicated, the AIDS epidemic will not weaken. Considering the principle of non-discrimination is such a highly recognised international standard, ways to prevent such associate acts should be included in every countries strategies and policies. Teenage girls are appearing particularly vulnerable to HIV/AIDS and consequently the protection of the rights of girls and women is critical, especially relating to the right in setting their own terms of sexual activity, including its safety and the possibility of refusal altogether. Correspondingly, the responsibility of men and boys to respect these rights is vital.

In particular in reference to education, common problems for those affected by HIV/AIDS are:

- Children withdrawn from school to care for siblings, for the sick, or for economic reasons (loss of property, inheritance, food security, increased labour demands), particularly girls (forced early marriage, prostitution – increased sexual abuse is not protected)
- Reduced parental or adult responsibility and care of the children
- Increased truancy among children
- Fewer vocational opportunities
- Traditional knowledge and practices not passed down through generations
- Abandonment of children
- In schools, discrimination against affected children and staff by pupils and teachers.

- Reduced ability of families to pay for school fees, shoes, uniforms, books etc
- Increased demand for children's labour at home or in the workplace
- Need for children, particularly older ones, to care for sick relatives
- Lower expected return on the investment in children's schooling
- Rising mortality among teachers and trainers¹¹⁹
- Fewer children able to go to school because of costs, discrimination and sickness
- Fewer children wanting to go to school because of workloads, sickness, stigma and reduced quality of education

It is these common problems that will now be taken and looked at through the eyes of South Africa. Together with the assessment of her recent history and how such a past may have an effect on these problems specifically.

¹¹⁹ Op cit. *Children Affected by HIV/AIDS*, page 23

5 What is the Status of HIV/AIDS in South Africa?

“Aids threat to South African education”¹²⁰

“AIDS will shatter education system in South Africa: Up to one-fifth of teachers test positive”¹²¹

These two headlines are by no means unique in their content. They are a representation of the many that have been internationally published over the past three years. With these headlines in front of us, it can be surmised that HIV/AIDS is having a devastating effect on South Africa. In fact, South Africa has a population that includes a minimum reported total of 4.2 million infected people: the largest number of people living with HIV/AIDS per population in the world¹²². From what has been previously discussed in this paper, we can now have some idea of how such a number would affect the country.

“Every society shapes its own AIDS epidemic.”

Barnett and Blaikie 1992

The above quote from Barnett and Blaikie is illustrated well by Bayer and Sussex¹²³ who accentuate that the reach of HIV/AIDS in South Africa follows ‘a pattern deeply affected by apartheid’. For example, traditionally, African men

¹²⁰ www.news.bbc.co.uk/1/hi/world/africa/1110121.stm, Barrow, G. Wednesday January 10, 2001, accessed 12/02/02

¹²¹ www.medicalpost.com/mdlink/english/members/medpost/data/3704/36A.HTM, Pela, M. Volume 37, No. 04. January 30, 2001, accessed 12/02/02

¹²² www.avert.org/aafrica.htm ‘AIDS in Africa’ Friday March 8, 2002

¹²³ Bayer, R. and Sussex, M. *South Africa, AIDS and a Dangerous Denial*, The Washington Post, 20 April 2000, Commentary

were denied the right to settle with their families in their supporting role as principle earner. This caused a sex imbalance between the urban and rural communities, with an excess of females in the latter. Fetid conditions proved both sexes susceptible to HIV infection. Intra and inter country migration has continued this vulnerability, something which will be explained more below. The impact of the apartheid era is closely entwined with poverty, and therefore HIV: which in itself will be proven to increase poverty and cause another never-ending circle of problems.

What will follow is a description of the recent history of South Africa as she came through the years of apartheid and how she has developed the inherited system of education together with how South Africa is trying to use education as a preventative tool. A comparison of South Africa's major obstacles in fighting HIV/AIDS in the education environment using the established problems HIV/AIDS causes in relation to education from above will then be illustrated. Subsequently a conclusive statement will be made about how HIV/AIDS is affecting the right to education specifically in South Africa.

5.1 Historical

The total population of South Africa in 1975 was 25.8 million¹²⁴. It grew to 43.3 million by 2000, but only has a future estimate of 44.6 million in 2015 with a population growth rate of 0.2%. This pattern is similar to those of other countries hit hard by HIV/AIDS in the past twenty years. Similarly, the population under 15 was recorded at 34% of the total in the year 2000¹²⁵, with an estimated decrease to 30.5% in 2015 compared to the predicted increase in the percentage of population over 65: 3.6 to 5.4 % respectively. South Africa's GNP per capita is a mask for the increasing disparities within it. Only around 13% of the total

¹²⁴ www.undp.org, Refers to the de facto population, which includes all people actually present in a given area at a given time.

¹²⁵ Ibid.

population actually lives to a first world standard compared to 53% living in third world conditions. These latter conditions are representative of households that have little or no access to sanitation, electricity, and half have primary education access¹²⁶.

5.1.1 The Status of the Education System

“Our vision is of a South Africa in which all people have equal access to lifelong education and training opportunities which will contribute towards improving the quality of life and build a peaceful, prosperous and democratic society.” (DoE 1996)

South Africa today has 12 million learners and around 28,000 schools, which in itself appears to be a well-established education system. School life covers 13 years, albeit the first and final three are not compulsory. To move on to study at university level a student must have a ‘matric’ endorsement i.e. a minimum of three subjects passed at a higher rather than standard grade¹²⁷.

Of the budgetary expenditure, education received at least 20% of the total¹²⁸. Although this appears to be a substantial amount, it is still held to be lacking for what is required. The budget is always required to address the backlogs caused by the apartheid education regime of 40 years. This system saw money pumped into the white education at the expense of black schools in the townships and rural areas. Even following the Soweto uprising of 1976¹²⁹, and the fall of apartheid, the government of today is struggling against similar circumstances. The greatest challenges are still the same as they were: the areas that are poorer, and rural

¹²⁶ World Bank Country Brief on South Africa

¹²⁷ www.safrika.info/ess_info/sa, South Africa.info – The Official Gateway, *Education in South Africa*, Garson, P.

¹²⁸ For more information look at the HDI information at www.undp.org

provinces such as the Eastern Cape and the KwaZulu-Natal, compared to the more affluent Gauteng and the Western Cape provinces. Current areas of concern among the system include early childhood development, adult basic education and training, and for our purpose, HIV/AIDS awareness programmes in schools.

The central government provides the main framework for school policy, however, administrative responsibility lies within the nine provinces that decide how to spend the education budgets. At the grassroots level, elected school governing bodies have a significant say in the running of the schools.

Due to backlogs of apartheid education system illiteracy rates are high at around 30% of all adults over 15 years old (6-8 million adults are not functionally literate), teachers in township schools are poorly trained, and the 'matric' pass rate, at 61.7% in 2001, remains unacceptably low¹³⁰. The "Liberation now, Education later" idea used during apartheid by the anti apartheid groups has severely damaged the culture of learning in South Africa. Instead of places of learning, schools and universities became sites of protest, and although breakthrough has been made to combat this, it must still be recognized as a difficult process.

5.1.2 How international/regional law and human rights have been incorporated into the South African Legal System

It is well known that South Africa was under an apartheid regime up until 1994. This regime established a violent discrimination against the black majority under the rule of a white minority. In 1993, evidence suggested that up to 50% of South Africa's population could be considered poor and this gap specifically in

¹²⁹ Thousands of scholars protested against conditions of their schools, initiating the popular resistance movement that ultimately contributed to the downfall of the apartheid regime.

¹³⁰ www.safrika.info/ess_info/sa_at_a_glance/education

South Africa was one of the largest differences in the world¹³¹. Consequently, when the first democratic government under Nelson Mandela was elected in 1994, and following two years of intense negotiations, the Constitution was adopted in 1996. They inherited apartheid state machinery, which had been built to provide quality services for the privileged minority while continually ensuring deliberate underdevelopment of the majority of the population. The new government had to therefore originate a state structure that would address poverty and inequality, as well as advance economic development. South Africa is characterized by extremes of wealth and poverty. Although it is classified as a middle-income developing country, the vast majority of the people are extremely poor. The Gini coefficient¹³² (0.68) is one of the two highest in the world. Ninety-five per cent of the poor are African and 75 per cent of the poor live in the rural areas¹³³. To try and take in hand this problem, the 1996 constitution recognises that civil and political rights are related to social and economic rights, and consequently includes some of the latter in the text itself. There is no assumption of equality in South Africa through the Constitution; instructions are included so the state may introduce new laws that will enforce equality. In terms of the innate education system, it was inefficient and duplicated through multiple education authorities employing unqualified teachers for the majority of the learners. Opportunity for higher education was limited to those who could pay for it¹³⁴.

Before the end of apartheid, the world was not oblivious to human rights breaches that were occurring in South Africa. On the contrary, in 1990 the World Summit for Children convened UNICEF and another 200 NGO's to address the worsening of such conditions for women and children in South Africa. This summit in Botswana developed the National Children's Rights Committee: an

¹³¹ May, J (ed). *Poverty and Inequality in South Africa: Meeting the Challenge*, Zed Books, 2000. Foreword, page viii

¹³² It is a measurement of inequality between the top and the bottom quintiles

¹³³ HRI/CORE/1/Add.92, Core document forming part of the reports of States Parties: South Africa, 23 September 1998, section 27

¹³⁴ Chapter 3 The Right to Education, 3rd *Economic and Social Rights Report*, South Africa's Human Rights Commission, 2000

umbrella organization advocating the rights of children. This was to be the framework that Nelson Mandela committed South Africa to after the first democratic elections on June 16, 1994.

Mandela was to become a publicly political staunch supporter of similar commitments to engage his country in obligations protecting human rights. A year after those first elections, South Africa ratified the UN Convention on the Rights of the Child, and in 1997 submitted the initial country report to the UN Committee on the Rights of the Child. In 2000, following the submission of a supplementary report, the country's delegation made an oral presentation to the UN Committee and discoursed issues relating to children's rights in South Africa¹³⁵.

In concern of other international treaties, the situation is somewhat different. Our biggest concern is the International Covenant on Economic, Social and Cultural Rights, which South Africa has not ratified. The CRC recommended in 2000 that it "should reinforce its efforts to finalize the ratification of [the ICESCR...as it] would strengthen the efforts of the state party to meet its obligations in guaranteeing the rights of all children under its jurisdiction."¹³⁶

In terms of HIV/AIDS specifically, it was the African National Congress (ANC) who developed national policies on the subject, even while it was still banned to act. It was the ANC who drafted the Maputo Statement on HIV and AIDS which had the worthy acknowledgement of making HIV and AIDS prevention a priority¹³⁷. The ANC worked with the existing government through the ministry of health before the elections for the new government of Mandela were set.

¹³⁵ http://www.unicef.org/specialsession/how_country/edr_south_africa_en.PDF , accessed 10/07/02

¹³⁶ CRC/C/15/Add.122, *Concluding Observations of the Committee on the Rights of the Child: South Africa*, 23 February 2000, section 11

¹³⁷ Occurred at a conference in Mozambique in 1990

July 1994 saw a national AIDS strategy adopted, however, obstacles appeared through its weaknesses and delays in implementation which may be attributed to delays in governmental experience of such a plan. There was a review in 1997, which included strengthening support from public and private leaders. This review increased the success of the strategy.

Former President Nelson Mandela, in 1998, continued with his mobilization of efforts against HIV/AIDS by creating a multi-sectored ministerial task force chaired by the deputy president¹³⁸. In 1999, the national Department of Education developed a strategy, *Tirisano*¹³⁹, addressing both the health of learners and educators, and the impact of HIV/AIDS on the system. *Tirisano* focuses on (1) raising awareness about HIV/AIDS among educators and learners; (2) integrating HIV/AIDS into the curriculum; and (3) developing models for analyzing the impact of HIV/AIDS on the system.

The National AIDS Council (NAC) was also formed in February 2000. This Council brought together government and civil society¹⁴⁰. It is the highest body that advises government on all matters relating to HIV/AIDS. A national education campaign on the use of condoms and practice of safer sex was also launched¹⁴¹.

¹³⁸ The current President: Thabo Mbeki

¹³⁹ Department of Education (1999), *Call to Action: Tirisano*. Department of Education (1999), *Corporate Plan, January 2000-December 2004*. Department of Education (1999), *Implementation Plan for Tirisano, January 2000-December 2004*.

¹⁴⁰ The Council is made up of representatives from government, business, civil society and the medical sector. Further to this specialist technical task teams were established to advise the NAC on specific policy issues. The NAC is chaired by the Deputy President Mr. Jacob Zuma.

¹⁴¹ HIV/AIDS: Current Issues, *South African Health Review 2000*, Health Systems Trust, March 1, 2001

Continuing on this basis, 20 specialised ‘rape courts’¹⁴² have been established across South Africa, (something never before heard of across the globe) and other initiatives and attempts such as the South African Medical Association’s ‘rape protocol’¹⁴³. The relevance of such progression will be come clearer below, as it will become increasingly understood how much sexual abuse is related to HIV/AIDS in the South African context especially.

5.1.3 Current Governmental Position

A prominent problem in South Africa has been the political push behind the fight against HIV and AIDS, a previously recognized necessity in combating against the disease. The successor to Nelson Mandela, who himself is seen to have saved the country through his idealism of reconciliation and non-discrimination, is Thabo Mbeki, Mandela’s previous deputy. Mbeki was supposed to be the able manager compared to Mandela’s visionary role but he was a bad administrator. However, it only took the first twelve months of his presidency for this theory to be proved wrong, and the biggest influence on this somewhat international decision is AIDS.

Shortly before he became president, “Mbeki described to parliament how South Africa was two nations - one white, the other black; one rich with every opportunity laid before it, the other poor with only a theoretical equality in the constitution, but in practice denied the opportunity for advancement. Four years later, Mbeki still oversees two nations in South Africa but now they are divided by class.”¹⁴⁴

Mbeki has been criticized for sending out incorrect health messages about how he was unconvinced that it was a viral disease and that it could be caused by

¹⁴² The courts are modeled on a trial court that has been in Cape Town since 1993 where the conviction rates are four times higher than the national average conviction rate of 15%. The new courts are funded by Canada.

¹⁴³ <http://www.health-e.org.za/view.php3?id=20021007>, accessed 25/10/02

poverty. There have also been some national advertisements that give out information saying that it's all right to have HIV/AIDS and that it is not fatal, which is obviously untrue at this moment in time. Included in the barrage of voiced discontent of his handling of the HIV/AIDS epidemic since he took office is condemnation for his uncommitted stance against HIV and AIDS being so closely linked. "Desmond Tutu has compared the social devastation of Aids to apartheid. His successor as Anglican archbishop of Cape Town, Njongonkulu Ndungane, went further and described the government's Aids policies as "as serious a crime against humanity as apartheid".¹⁴⁵

What has been previously recognized is the necessity for a strong political stance so that the epidemic can be fought, and this can be argued that it does not appear to have happened in South Africa during Mbeki's presidency.

Mbeki has been accused of falsifying figures to Parliament and foreign broadcasting associations, and his recent actions have even forced Mandela to return somewhat to the political arena to support action that is fighting for prevention against HIV/AIDS and the speak out against poverty¹⁴⁶.

However, this can be argued to be changing. On 17 April 2002, the South African government issued one of many statements of its position on HIV/AIDS, stating, "[in] intensifying the campaign...the starting point is the premise that HIV causes AIDS". In theory, this is the acknowledgement that the international, regional, and national critics had been waiting for. Such recognitions are now

¹⁴⁴ McGreal, C., *The shame of the new South Africa*, The Guardian Newspaper, Friday November 1, 2002

¹⁴⁵ McGreal, C., *The shame of the new South Africa*, The Guardian Newspaper, Friday November 1, 2002, Chris McGreal covered South Africa from 1990 to 2002. This is his final dispatch

¹⁴⁶ The ANC distributed a fat document that claimed anti-HIV drugs are an attempt to commit genocide against black people and another that compared anti-retrovirals to "the biological warfare of the apartheid era". White researchers were singled out and vilified as racists and little short of murderers. Mbeki even told his party that the CIA was scheming with American drug companies to discredit him over Aids because he is challenging the world economic order.

occurring periodically, however whether any real action is being taken to act on these newly found convictions is questionable.¹⁴⁷

The World Bank has estimated that by 2010, Aids and its consequences will consume 19% of South Africa's GDP. Consequently it will make it even more difficult for the government to afford the drugs to contain the pandemic for example.

The policy framework is set out in the 'HIV/AIDS and STI (Sexually Transmitted Infections) Strategic Plan for South Africa 2000-2005', fulfilling their commitments to the UN General Assembly Special Session on HIV/AIDS¹⁴⁸. The primary goals of the plan are to: reduce the number of new HIV infections (especially among the youth); and, to reduce the impact of HIV/AIDS on individuals, families and communities.

It must be acknowledged that the entire community (global or national) does not feel such a harsh view of Mbeki. Proponents of Mbeki argue his case accusing such suggestions of 'window dressing' the countries' actions with words on the international stage – referring to the governmental positions towards HIV/AIDS – using support of the actual published figures of an increase in the AIDS budget, such an argument is supported by international agencies such as UNDP.

5.1.4 Constitutional Obligations

Apart from the right to equality everyone has inherent dignity and the right to have their dignity respected and protected.

¹⁴⁷ It has been suggested by the press, that the Governmental representatives have been negligent in their response to supplying pregnant women with the necessary drugs to prevent their babies being born with HIV. This goes against the July Constitutional Court ruling ordering the government to make nevirapine freely available to HIV-positive pregnant women. MoH v ToA, op cit

¹⁴⁸ www.gov.za/documents/2000/aidsplan2000.pdf

The Constitution contains a Bill of Rights that sets a standard for all laws. When interpreting the common law and customary law, this list of human rights must always be considered, together with the possibility to challenge any laws that go against the rule in the constitution. In interpreting the Bill of Rights, the Constitution also states that courts must look to international law and also foreign law for guidance, and most notably it defines human rights in terms of the country's own historical experiences, value systems, political and economic realities. When examining the Constitution and subsequent Acts of Law, the following areas will be looked at:

- Section 29: Education Rights
- Section 237: Performance
- Section 28: Children's Rights, together with
- South African Schools Act (1996)
- The National Education Policy Act (The Policy Act) (1996)
- Equality Act (2000)
- Child Care Act (1983)¹⁵⁰
- The National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions (1999)¹⁵¹

¹⁴⁹ Sec 10 The South African Constitution 1996

¹⁵⁰ Child Care Act, 1983 The Child Care Act, 1983 which provides for the establishment of children's courts and the appointment of commissioners of child welfare, for the protection and welfare of certain children, for the adoption of children and for the establishment of certain institutions for the reception of children and for the treatment of children after such reception, was amended in 1996 to provide for legal representation for children and for the registration of shelters. The 1998 amendment provided for the rights of certain natural fathers where the adoption of their children born out of wedlock has been proposed and for certain notice to be given. The 1999 amendment provided for the establishment of secure care facilities and for the prohibition against the commercial sexual exploitation of children. The Department and the South African Law Commission is currently preparing new comprehensive children's legislation.

¹⁵¹ http://education.pwv.gov.za/HIVAIDS_Folder/AidsPolicy.htm

Section 29 of the Constitution contains education rights. Section 29(1) enshrines and protects the right to basic education and further education for everyone¹⁵² including basic education for adults. Availability and accessibility is the key to this section with the goal of removing barriers including discrimination so education can be gained. Section 29 also has the purpose of expecting a student to receive such education in the language of their choice¹⁵³: the states obligation to ‘fulfill’. Independent institutions that may be subsidised by the state can also provide the right to education¹⁵⁴. The right to education in section 29 of the Constitution is to be understood together with the aim of education in general: the full development of the human personality with the sense of dignity¹⁵⁵. This goes hand in hand with the aim of enabling all persons to participate in a free society¹⁵⁶.

The South Africa Schools Act (1996) promotes access, quality and democratic governance in the schooling system. It complies with the provisions of international instruments in so far as education between grades R and 9 is compulsory; provides that Provinces have to provide public schools for the education of learners¹⁵⁷; and it provides educational opportunities for

¹⁵² Section 29 (1) of the Constitution of the Republic of South Africa Act 108 (1996) provides that “everyone has the right – (a) to basic education, including adult basic education. (b) to further education, which the state through reasonable measures, must make progressively available and accessible.”

¹⁵³ Section 29 (2): “everyone has the right to receive education in the official language of languages of their choice in public institutions where the education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –

- (a) equity
- (b) practicability
- (c) the need to redress the results of past racially discriminatory laws and practices.”

¹⁵⁴ Section 29 (3) provides “Everyone has the right to establish and maintain, at their own expense, independent private educational institution that –

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standard at comparable public educational institutions.”

¹⁵⁵ Look back to the CRC references in Chapter 1

¹⁵⁶ Article 13 of the International Covenant on Economic, Social and Cultural Rights (1966)

¹⁵⁷ Section 3 (3), sec 12 (1) and sec 34

disadvantaged children through a uniform system for the organization, governance and funding for schools¹⁵⁸, however it does have its shortfalls as the compulsory compliance is not stated the required ‘free’. Denying children and adults because they or their parents cannot afford to pay for educational provisions detracts from the objectives of the right to education. Section 5 (3) however stipulates that public schools may not refuse a learner admission on the grounds that his or her parent is unable to pay or has not paid school fees. The Act also confirms the constitutional prohibition of unfair discrimination. The National Education Policy Act¹⁵⁹ also enhances the ‘carrier’ or ‘suspected carrier’ of HIV, attendance at school on this ground only. No learner who applies to an education facility may be required to undergo a HIV test and therefore HIV testing cannot be seen a prerequisite for admission, and if in any event that such a test were required, it would most likely be considered unfair discrimination in the terms of what has already been, and will be discussed below¹⁶⁰. The Act also stipulates that special educational needs of learners must be fulfilled. It is down to the Principle of the establishment as to what the needs of the child are with consideration of the parents and learners wishes, and if in the best interests of the learner, he/she may be exempted from compulsory education totally or partially¹⁶¹. For learning to be achieved at home, parents have to possibility to apply to the Head of an Education Department who must again consider the interests of the learner and make sure that the minimum requirements of the curriculum at public schools are to be met by such study.

Clarification by the Committee on Economic, Social and Cultural Rights on the meaning of compulsory primary education sees: “neither parents, guardians nor the state [...] entitled to treat as optional the decision of whether the child should

¹⁵⁸ US State Department Report 2000, page 14. Found at www.state.gov/g/drl/rls/hrrpt/2000/af/788.htm See also Sections 12 (1) and (2), sections 20 (1)(g) and 21 (1)(a)

¹⁵⁹ Act 27 of 1996, operative 24 April 1996

¹⁶⁰ The law is a little different with independent schools however

¹⁶¹ See sections 5(6) and 4(1) respectively

have access to primary education”¹⁶². In the same general comment, the Committee stated primary education should be free¹⁶³. Concern over this has been strongly expressed by the Committee for the Rights of the Child¹⁶⁴ together with concern over inequality in access to education, particularly among “black children, girls and children from economically disadvantaged families, many of whom still do not attend school.”

The Constitution itself in section 237 recognises that constitutional obligations facing the government, including the obligations to deliver on socio-economic rights, “must be performed diligently and without delay”. This goes hand in hand with the aforementioned qualification recognized by the CRC Committee and to some extent the ESCR Committee, of ‘within their means’.

In recognition of children having rights, section 28 is relevant. Specific protection of such members of society is compulsory, and the important standard of “the best interests of the child” both within the Constitution¹⁶⁵ and from international law is clearly visible. Section 28 encapsulates special rights for children including: Every child has the right to basic social services; the right to be protected from abuse of bad treatment that ignores his or her needs; the right to be protected from child labour. The Child Care Act (1983) recognizes children in need of care: this does not include necessarily those children who are living with HIV/AIDS; it depends upon the circumstances of the case¹⁶⁶.

¹⁶² General Comment 11, Para 6

¹⁶³ Ibid, Para 10

¹⁶⁴ Op cit, CRC/C/15/Add.122, 23 February 2000, *Concluding Observations of the Committee on the Rights of the Child: South Africa*, Para 34

¹⁶⁵ See also the Child Care Act, No.74 of 1983

¹⁶⁶ Children’s Court Case in 1999 where a mother was living with HIV had her twin children removed from her care by a social worker on the premise that the mother was living with HIV, wasn’t looking after the children properly and was a bad mother. The AIDS Law project, which was representing the mother showed that she was healthy, earning money and that, the children were well cared for. The department of Welfare made it clear that removing a child should be the last resort. The case shows that, when decisions are made

The National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions sets out some important policy issues on children and teachers with HIV/AIDS in schools: opportunity to receive education should not be denied as they should live as full a life as possible; no-one should be forced to disclose their HIV status, and if the status of a student or educator is known, it must be kept confidential; discrimination is not allowed in reference to educators or learners, i.e. no-one can be refused a position at a school because of his/her HIV status; if a learner becomes incapacitated through illness, the school must take appropriate steps to arrange home study for the learner.

The National Policy also promotes the teaching of sex education and the prevention of HIV/AIDS through sex, accordingly moving towards a place of satisfying that part of the right to education: to fulfill this part of the criteria fully, a compulsory measure for sex education in schools must be implemented, and that includes teacher training on the matter with a standard way of passing on the information. Currently it is up to the regions and maybe even the schools and teachers themselves, which obviously has an effect of wide variation in the lessons, as it is dependent on how comfortable the teachers themselves are with it all for example.

To further delve into South Africa's law in relation to rights and duties in the school environment, it must be first noted that the Constitution provides that neither the state, nor any person, may unfairly discriminate directly or indirectly against anyone. This has the effect¹⁶⁷ of prohibiting discrimination both vertically¹⁶⁸ and horizontally¹⁶⁹. The Constitution therefore attaches horizontal application to the right to equality. Specific grounds mentioned include 'disability'

concerning the removal of children, HIV/AIDS should not be a deciding factor or else discrimination and prejudice could be called into effect.

¹⁶⁷ Sections 9 (3) and (4), and section 8 (2)

¹⁶⁸ Between the state and its subjects

¹⁶⁹ Between individuals and the juristic persons

which has been discussed above, however increased stress should be put upon the Prinsloo¹⁷⁰ case: the Court foresaw future extension on the possibilities of unfair discrimination seriously affecting a persons dignity, and where it does not bear upon human dignity¹⁷¹.

5.1.4.1 Subsequent Acts of Law

In the case law from the South African Constitutional Court, there have been three distinct opportunities for the Court to consider economic, social and cultural rights in general¹⁷². On these occasions the court has recognised that the state is “under a constitutional duty to comply with the positive obligations imposed on it by sections 26 and 27 of the Constitution”¹⁷³. The socio-economic rights and the corresponding obligations of the state were interpreted in their social and historical context: the difficulty confronting the state in light of her history in addressing issues concerned with the basic needs of people was stressed.

The third case addressed the issue of whether the state, in adopting measures for health, had fallen short in these obligations put upon her under the Constitution. Each right has a ‘minimum core’ obligation that a state must fulfil¹⁷⁴ “This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity”¹⁷⁵. This case highlights the different opinions over the powers of the courts in as much as the doctrine for the separation of powers allows. It is argued the court can only make a declaration of rights to the

¹⁷⁰ Supra note 107

¹⁷¹ “Where discrimination results in treating persons differently in a way which impairs their fundamental dignity a human beings, it will clearly be breach of section 8 (2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8 (2) as well.” para 774

¹⁷² Soobramoney v Minister of Health, Kwa-Zulu Natal 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); Minister of Health and others v Treatment Action Campaign and others 2002 CCT8/02

¹⁷³ Soobramoney ibid. para 36; Grootboom ibid. para 24 and 38; MoH v ToA ibid. para 23 and 25

¹⁷⁴ CESCR General Comment 3, The nature of States parties obligations, Art.2, para 1 14/12/90

effect of the finding, something that the government is free in paying heed to and adapting policies accordingly, but on the other hand, the issue of such a declaration together with a duty to ensure effective relief is granted¹⁷⁶. This is supported by looking at foreign courts' decisions and remedies¹⁷⁷. The outcome of the case included an order of action to the government to remove any restrictions preventing the availability of the drug nevirapine for the purpose of reducing mother to child transmission of HIV. Such a decision is one that will have consequential effects for some time to come in the sense that such an act dilutes the divide between the courts and the legislature, even though in this specific case discussion to the fact is taken very seriously, and a decision of responsibility falling upon the courts to use their powers widely is made. Such a decision is regarded as possible due to the flexible nature of policies, and where governmental policies are inconsistent with the democratic constitutional framework and the law, such an order may be made but not so as to preclude the executive from making such legitimate choices as they are required to be able to¹⁷⁸.

The South African Constitution also outlines other institutions that will help the executive in fulfilling their duties delivered in the Constitution itself, and under international law. For our purposes, section 184 highlights the functions of the Human Rights Commission, which will now be discussed further.

5.1.5 The South Africa Human Rights Commission

The Commission was formed in 1994¹⁷⁹ with the mandate of respecting, protecting and promoting the rights in accordance with the provisions of the Bill of Rights (the corner stone of democracy in the South African Constitution), the

¹⁷⁵ Op cit. MoH v ToA, para 28

¹⁷⁶ Hoffman v South African Airways 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC), para 45; the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case.

¹⁷⁷ Op cit. MoH v ToA, paras 107 to 112

¹⁷⁸ Op cit. MoH v ToA, para 113 & 114

Human Rights Commission Act and all applicable international human rights law obligations of South Africa: to promote the observance of fundamental human rights at all levels of society. Its ambit covers the following:

- Develop an awareness of human rights among the people of South Africa;
- Make recommendations to organs of state in order to enhance the implementation of human rights;
- Undertake studies and report to Parliament on matters relating to human rights; and
- Investigate complaints of violations of human rights and to seek appropriate redress.¹⁸⁰

Conclusively, it attempts to create a “national culture of human rights through its advocacy, research and legal functions,¹⁸¹: lobbying of fulfillment and promotion.

Today, it includes five policy papers, two of which are of interest to us: Children’s Rights¹⁸² and The Right to Education¹⁸³. The second acknowledges that enforcing the right to education will be ‘instrumental in addressing existing inequalities in South Africa. It established that the role of the Commission in this area is to monitor, scrutinize, develop guidelines, and lobby for fulfillment of the right by the State.

Criticism has however been made against the Commission, or rather the governments establishment of such. The Committee on the Rights of the Child notes that although the Commission has powers to conduct investigations, issue subpoenas and hear testimony under oath, it is concerned, that insufficient resources have been allocated to allow the Commission to carry out its mandate effectively. Additionally, concern is apparent over the appearance that the work of the Commission continues to be hampered by, inter alia, red tape and the need

¹⁷⁹ Through the Human Rights Commission Act (1994)

¹⁸⁰ www.sahrc.org.za/

¹⁸¹ Ibid.

¹⁸² SAHRC Policy Paper 1997 number 1

¹⁸³ SAHRC Policy Paper 1997 number 2

for additional legislative reform, together with an absence of a clear procedure to register and address complaints from children concerning violations of their rights under the Convention¹⁸⁴.

What appears to be the case here, is that South Africa recognises the importance of tackling HIV/AIDS, and has with such knowledge, acted in setting up institutions to investigate further and alleviate problems that are currently being felt. However, adaptation is required in as much as simplification of the Commission for example is necessary to improve the problem further. What has been established, and previously mentioned in this paper is a Strategic Plan to fight against HIV/AIDS, and it is to this we now turn.

5.1.6 South Africa's Strategic Plan to Fight Against HIV/AIDS

The Declaration of Commitment on HIV/AIDS¹⁸⁵ established for the first time, time-bound targets to which governments and the UN may be held accountable. Progress reports are to start in March 2003, but the national strategies developed by SSA countries together with the increasing number of National AIDS Councils are helping accede to the possibility of achieving the targets.

South Africa has no comprehensive national policy on HIV/AIDS but is in the process of developing one, and does have a national strategic plan. The plan is designed to set goals and objectives for an expanded response, to describe the strategy to achieve the goals, and to estimate the funding required. Multi-sectoralism is encouraged in all SSA countries policies, and South Africa is no exception: HIV/AIDS interventions require collaboration of a range of stakeholders including Governmental agencies, NGO's, CSO's, and businesses. The South African Strategic Plan gives detailed guidance as to how she will

¹⁸⁴ Op cit, CRC/C/15/Add.122, Para 13

¹⁸⁵ Adopted at UNGASS on HIV/AIDS, June 2001: a potential watershed in the history of the HIV/AIDS epidemic. UNAIDS and its co-sponsors have established a set of yardsticks to track progression to achieve the targets agreed upon.

achieve this¹⁸⁶. Different governmental ministries are developing HIV/AIDS policies in alignment with the overarching national policy.

Once more the South Africa Strategic Plan conforms to the others in the region in clarifying the support of human rights of PLWHA. Stigmatism is condemned together with discrimination on the grounds of HIV/AIDS status¹⁸⁷. South Africa promotes safe and healthy sexual behaviour broadly by seeking to make the environment more conducive to making safer choices¹⁸⁸ with an example of promoting 'youth friendly' health services. 'Life-Skills' education is planned to be disseminated throughout primary and secondary education establishments together with a broadening of the responsibility of civil society and government sectors for the prevention of HIV.

The Plan recognises the vulnerability of women and the necessary radical approaches required in addressing the youth of the country. The Strategy also acknowledges the binding connection HIV has with poverty and undertakes to establish poverty alleviation/income-generation projects. In terms of orphans, the country aims to introduce measures that will facilitate in the adoption of AIDS orphans, and investigate the use of welfare benefits to assist families living with HIV/AIDS and subsidising the adoption benefits. In alignment with the Plan, there has been recent movement in legislation to make compulsory the testing of victims and assailants of HIV when rape has been committed.

¹⁸⁶ *HIV/AIDS & STD Strategic Plan for South Africa*. Ministry of Health, South Africa, (2000) page 8

¹⁸⁷ Although it must be noted that throughout the SSA region there is a dual concern as tension exists between the acceptance of PLWHA's rights and the spread of the infection itself through reckless behaviour

¹⁸⁸ The Policy Project, National and Sector HIV/AIDS Policies in the member States of the Southern Africa Development Community, September 2002, page 18

5.2 Education as a Preventative Tool in South Africa

As can be seen from the basic description of the Plan for 2000-2005, South Africa has a basis for addressing HIV/AIDS. As far as addressing it in education goes we must return to the Tirisano document discussed previously. The 1999 document focuses on (1) raising awareness about HIV/AIDS among educators and learners; (2) integrating HIV/AIDS into the curriculum; and (3) developing models for analyzing the impact of HIV/AIDS on the system.

It is 'Programme One' of the aforementioned document that predominantly deals with HIV/AIDS in the education improvement strategy. The priority is that the department "must deal urgently and purposefully with the HIV/AIDS emergency in and through the education and training system"¹⁸⁹, with the strategic objectives including "to ensure comprehensive and integrated planning regarding HIV/AIDS across all levels of the system, [and] to strengthen capacity to implement the HIV/AIDS strategy and all related policies"¹⁹⁰. The breadth of the strategy can be seen in the document itself as it covers among other things, the setup of provincial HIV/AIDS units, gender issues, vulnerable children, effects on management, Life-Skills education, and the insurance of a multi-partner Education Sector response to the pandemic.

Although such aims are on the agenda of the South African authorities, there are still no guarantees that such objectives will be achieved. International concern is still evident: In terms of achieving the EFA goals by 2015, South Africa (according to the World Bank) is not a worry in this regard, even though it is one of the worst affected by HIV/AIDS. EFA goals are commonly referred to in the Education sector. However, she is at risk according to the World Bank report of

¹⁸⁹ Tirisano Document, page 14

¹⁹⁰ Ibid.

gender disparity in primary completion or enrollment¹⁹¹. Such a remark highlights the possibility of the underachievement of the Tirisano document, and the South African Schools Act (1996) together with international obligations and other national legislation discussed above.

What will now be discussed are the actual effects hampering citizens of South Africa, and for what reasons the human rights thread must be attached further to the fight for prevention of HIV/AIDS in the education context and elsewhere.

5.3 Contrasting South Africa with effects of illness and death concerning those affected by HIV/AIDS

5.3.1 Brief Overview of South Africa in the context of HIV/AIDS

South Africa
One in five South African's now live with HIV
Quarter of a million South African's died of AIDS in 1999
32.5% of pregnant women in urban Natal have tested HIV positive
It is estimated that by 2010 life expectancy will drop from 60 to 40
South Africa is estimated to lose US\$ 22 billion due to AIDS by 2010

¹⁹²

The period of 1982 to 1997 is described as including 79 percent of HIV transmission heterosexually, 13 percent vertically¹⁹³, 7 percent through men having sex with men, and 1 percent through infected blood¹⁹⁴. 1998 saw a published study describe two concurrent epidemics in South Africa: a pattern I

¹⁹¹ Op cit, World Bank, *Education and HIV/AIDS: A Window Of Hope*, Appendix, page 65

¹⁹² http://www.caa.org/horizons/february_2001/aids.html , accessed 10/07/02

¹⁹³ Parent to child transmission

epidemic involving primarily white, homosexual or bisexual men, and a pattern II epidemic involving primarily black, heterosexual people of both sexes¹⁹⁵.

In the last ten years, HIV prevalence has increased dramatically in South Africa: from less than 1% up to 20% in 2001¹⁹⁶. With more than 4.2 million people infected with HIV, South Africa has the fastest growing HIV/AIDS epidemic in the world¹⁹⁷. The full impact on communities is yet to be realised, for example in the case of orphans (which will be discussed more below), even if prevalence declined as rapidly as it did in Uganda¹⁹⁸, orphan burden for the following decade would still increase. This example shows that even when a country is able to control the disease, effects from it still continue to occur a long time afterwards.

As stated, South Africa has the highest HIV infection rates in the world. The epicentre of this epidemic is the KwaZulu-Natal province¹⁹⁹. The population of this province is predominantly African and poor, and data collated for the National Strategic Plan to fight against HIV/AIDS ‘clearly indicates that the HIV epidemic is severely affecting the young, black, and economically poor populations of South Africa’²⁰⁰. In many respects this supports the WHO report relating the interrelation of poverty and bad health.

¹⁹⁴ <http://hivinsite.ucsf.edu/InSite?page=cr-02-01&doc=2098.410f> *South Africa: Context of the Epidemic*, page 2, accessed 10/07/02

¹⁹⁵ Kanter A, Spencer DC, Steinberg MH. Incidence and characteristics of HIV –related conditions in distinct South Africa patient populations. *Int Conf AIDS* 1998;12:163. See also *ibid*, page 2

¹⁹⁶ *Children on the Brink 2002: A joint report on Orphan Estimates and Program Strategies*, UNAIDS, UNICEF, USAID, July 2002, page 8

¹⁹⁷ UNAIDS, 2000 *Report on the global HIV/AIDS epidemic*, June 2000. Geneva: UNAIDS

¹⁹⁸ www.undp.or.ug/hivaids.htm HIV prevalence rates have been reversed in Uganda, which has been largely attributed to “the governments openness about the epidemic and the aggressive anti-HIV/AIDS campaign involving virtually all sections of society.”

¹⁹⁹ 32.5% of pregnant women attending public anti-natal clinics in KwaZulu-Natal in 1999 were HIV-positive, compared to an average of 20% across the nine Provinces. Page 8 of HIV/AIDS/STD Strategic Plan for South Africa 2000-2005,

www.gov.za/documents/2000/aidsplan2000.pdf

²⁰⁰ *Ibid*.

March 2001 saw the South African government release its annual AIDS report. This report indicated that 500,000 South Africans had become infected with the HIV virus during the year 2000, which brought the total close to 5 million. Through investigative studies it has been found that half of those infected with HIV are between ages 20 and 30. A separate investigation found that over 60 percent of new HIV infections occur among those ages 15 to 25, with adolescent girls and young women of childbearing age most affected²⁰¹. This second report also projected that half would die before the age of 35.

With this in mind, 1990 saw the first of a series of annual, unlinked and anonymous surveys among women attending antenatal clinics of the Public Health Services. The figure from 1996 was 14.17 percent of women attending such clinics were infected with HIV: a percentage that grew to 22.40 in 1999²⁰². The worst affected province in the country is somewhat unsurprisingly, KwaZulu Natal where one in three women attending clinics (in this report) were infected. There was a continued rise despite a previous claim of stabilization²⁰³ in 2001, where the rate of infection rose once more to 24.5 percent. This was attributed by health officials to the increase of the HIV rate among young women: aged 20 to 24, from 25.6 to 29 percent in 1999 and 2000 respectively; aged 25 to 30, from 26.4 to 30.6 percent.

5.3.2 The Comparison

“Dramatic spread of HIV/AIDS in South Africa can be attributed to the legacy of apartheid and the migrant labour system; the disruption of family and communal life; a good transport infrastructure and high mobility; high levels of poverty and income inequality; very high levels of other STD’s; low status of women; social norms which accept or encourage high numbers of sexual partners; and resistance to use condoms”

Impending Catastrophe’ by Abt Associates of South Africa, May 2000, respectively.

²⁰² Op cit, Ministry of Health Report 2000

²⁰³ South African Health Minister Manto Tshabalala-Msimang in April 2000 suggested this when there was a small decrease in HIV prevalence among pregnant women by 0.2 percent. It was heavily contested

The human right environment has now been established within South Africa, together with how education has improved since the end of apartheid. We have also seen how the education system itself is being geared to fulfil its international commitments (ignoring the fact that primary education is still not free), and so now referral to the possibilities that HIV/AIDS can have on education (established above) will be made. South Africa, as has been described, is a country facing the need for immediate action in the fight against HIV/AIDS. The reasons for such are not necessarily exactly the same as those described previously, but it is to this that we are comparing internationally recognized problems facing the South African people and government. The format for evaluation will be the same as above.

5.3.2.1 Education Staff

The CRC recognized in the year 2000 that there was overcrowding of classes in some areas of South Africa due to insufficient numbers of trained teachers²⁰⁵. This deficit was especially apparent in black communities. Criticism was also made of the illiteracy and repetition rates, the high dropout rates, the poorly maintained infrastructure and equipment, together with general equipment shortages. What is most worthy of mention is the low morale of teachers. This comes after six years of being as an established non-apartheid state.

²⁰⁴ Coombe, C. *Keeping Education Healthy: managing the Impact of HIV/AIDS on Education in South Africa*, Current Issues in Comparative Education (December 2000), page 3

²⁰⁵ CRC/C/15/Add.122, 23 February 2000

At least 12% of South Africa's administrative personnel are estimated to be HIV-positive²⁰⁶, and 12% of teachers. In a study performed between June 2000 and May 2001 by the largest teacher trade union in South Africa: the South African Democratic Teacher's Union. In the twelve-month period, 1,011 teachers died at an average age of 39, an increase of more than 40% on the previous year²⁰⁷. The study itself reveals that most of the deaths were recorded as 'natural' because doctors are legally prevented from listing AIDS as a cause of death. Most of the teachers had died of opportunistic infections like tuberculosis or pneumonia, which are AIDS-related. There was also realisation that young teachers are dying while the government is spending large amounts of money to subsidise universities and tertiary institutions, however even before the students can share their skills and knowledge they are dying. Twenty teachers in the KwaZulu-Natal region had declared their HIV-positive status in a period of 4 months to the regional secretary of Sadtu. If related back to the statistics above of how many learners that would affect, the number would be expected to be over 500, and this would include the number of sick days the teachers will require.

5.3.2.2 Learners

South Africa is thought to be one of the six worst out of the 26 most affected countries that will show a decrease in actual school age population by the year 2015. The others in a similar position are Zimbabwe and Botswana²⁰⁸. The

²⁰⁶ Coombe, C. *Keeping the Education System Healthy: Managing the Impact of HIV/AIDS on Education in South Africa*, Current /issues in Comparative Education 3 (1). Available at www.csa.za.org/filemanager/list/6

²⁰⁷ <http://careers.iafrica.com/careerjunction/aidsimpact/849890.htm>, Govender, P. *Wiping out SA's Teachers*, 8 March 2002, The Sunday Times newspaper. The figures are based on claims submitted to the Union's funeral scheme between the dates concerned. The Union represents more than 216,000 teachers. The statistics were published in the union's newspaper, the Educator's Voice. Reference can also be found to the report at www.aegis.com/news/afp/2001/AF011111.html, Agence France-Presse, *Safrica-education-AIDS: AIDS deaths amongst S.African teachers rocket by 40 percent: report*, 4 November 2001, accessed 23/06/02

²⁰⁸ Together with Rwanda, Ghana and Kenya

World Bank report²⁰⁹ takes figures from the US Census Bureau, which highlights that the influence of HIV/AIDS in a country does not automatically mean that school age population will decrease, although, for a country that is holding a population with high HIV prevalence, those like South Africa face such a calamitous prospect.

5.3.2.3 Families living with HIV/AIDS

The international stage recognizes South Africa has come a long way from its apartheid state pre 1994. It is also acknowledged that she still has a distance to go to eradicate the long-term effects of the apartheid system. The HRC has recognized that women or even children head some of the poorest households in the country²¹⁰. The relevance of this is that if such patterns are acknowledged, then this has the logical effect of presuming that the children have lost a father through illness or working away, or they are orphans, surviving without parents. This poverty can have the effects of some, or all, of the children not being able to receive education.

When discussing families living with HIV/AIDS, it should be recalled that many children are withdrawn from school to be put into work, and consequently an 'earning' situation. Over 200,000 10-14 year olds were engaged in work in the year 2000, of predominantly commercial agriculture or domestic service variety: once again to the CRC's concern²¹¹.

5.3.2.4 Orphans of AIDS

Throughout South Africa there are local projects that are caring for orphans of AIDS, for example one such organization is Ingwavuma Orphan Care²¹². This

²⁰⁹ The World Bank, Education and HIV/AIDS: A Window of Hope, 2002

²¹⁰ HRI/CORE/1/Add.92, section 21

²¹¹ CRC/C/15/Add.122, 23 February 2000, The Committee on the Rights of the Child "urged [South Africa] to reinforce efforts to ratify the 'Worst Forms of Child Labour'," 1999, No.182 of ILO, Para 37

²¹² www.orphancare.org.za/files/aids.htm

particular organization is situated in the KwaZulu-Natal region and it includes monthly statistics of numbers of orphans, children living with dying parent(s) and abandoned children. For the month of September 2002, the figures stood at 865, 228 and 107 respectively. The 1999 POLICY project cites studies finding over 100,000 orphans in South Africa, with a possible figure of between 759,700 and

Year	Number of Children 0-14 (1,000's)	Total Orphans as a Percentage of All Children %	Total Number of Orphans (1,000's)	Total Number of AIDS Orphans (Absolute #)	AIDS Orphans as a Percentage of Total Orphans %
1990	13,939	7.8	1,089	1,000	0.1
1995	14,405	7.5	1,087	61,000	5.6
2001	14,773	10.3	1,528	662,000	43.3
2005	14,817	14	2,069	1,328,000	64.2
2010	14,542	15.8	2,303	1,700,000	73.8

833,520 maternal orphans in the KwaZulu-Natal region by 2010 alone.

The most recent collaboration on orphan statistics is enclosed in the publication 'Children on the Brink'²¹³, and the statistics for South Africa are enclosed.

South Africa Orphans Estimates by Year

South Africa Orphan Estimates by Type and Cause

Year	ORPHANS								
	Maternal			Paternal			Double ²¹⁴		
	<i>AIDS</i>	<i>Non-AIDS</i>	<i>Total</i>	<i>AIDS</i>	<i>Non-AIDS</i>	<i>Total</i>	<i>AIDS</i>	<i>Non-AIDS</i>	<i>Total</i>
1990	<100	406,000	406,000	1,000	797,000	798,000	<100	115,000	115,000
1995	18,000	364,000	382,000	52,000	761,000	813,000	11,000	97,000	108,000
2001	331,000	291,000	622,000	506,000	667,000	1,173,000	200,000	67,000	267,000
2005	878,000	247,000	1,125,000	1,035,000	598,000	1,633,000	638,000	51,000	688,000
2010	1,405,000	199,000	1,604,000	1,399,000	507,000	1,906,000	1,172,000	35,000	1,207,000

²¹³ *Children on the Brink*, 2002

²¹⁴ Maternal: Mother has died, Paternal: Father has died, Double: Both Parents have died

What is highlighted is the fact that among the number of total orphans projected, the percentage of which are orphans from AIDS causes increases: to an estimated 73.8% in 2010. In a period of 15 years it has amplified over 13 times. This is an illustration of how many children will be affected by HIV/AIDS in the years to come, how many children will need care, help and education so that they may protect themselves from vulnerability to the disease.

5.3.2.5 Street Children

An increase in the number of children on South African streets can be heavily correlated with the number of orphans in the country. The major cities see the majority of cases, and although HIV/AIDS plays a significant part in the cause for distribution, poverty and other reasons should not be ignored. The significance of street children is twofold: the first is the reason they are there, be it because their parents have died and there is no family community to care for them, or if there is, they are treated as badly there as they are on the streets; but the second is the probability that the children themselves succumb to a way of living which is a breeding ground for the virus and early death, a more worrying prospect. Early sexual activity is common and over the past few years there has been an increase in drug addiction, something that can turn into another circle of dependence, prostitution for money to pay for addiction²¹⁵.

5.3.2.6 School Age Girls

As has already been mentioned, cause for concern over rape of young girls in South Africa is currently hitting the international scene through the report of the Special Rapporteur. Previously²¹⁶, Human Rights Watch investigated gender-

²¹⁵ Jeter, J. *Influx of Crack Cocaine Brings Another Affliction to South Africa*, International Herald Tribune, 14 August 2000, Reuters, 17 February 2000

²¹⁶ In 2000, also reported in HRW World Report 2002: Children's Rights, page 10

based violence in South Africa's schools. Daily attacks were occurring with the aggressors being teachers or peers. The interviews uncovered that there was no distinction due to race or economic group. All encountered sexual violence and harassment. Rape was occurring in school bathrooms, empty classrooms and hallways, and in hostels and dormitories. Girls were also fondled, subjected to aggressive sexual advances, and verbally degraded at school. Amnesty International recognises high levels of violence in the country, especially sexual violence. In keeping with other reports, Amnesty reports of police statistics from January to September showing that 40% of the 38,000 reported rapes and attempted rapes involved victims younger than 18 years of age²¹⁷.

The report made by the Special Rapporteur on the sale of children; child prostitution and child pornography²¹⁸ again isolates the growing atrocities in South Africa as an example of what can happen. Rape in South Africa is not a new phenomenon at all, however, prior to the end of apartheid very few cases were reported, and so now that numbers of known cases are increasing, it can obviously be brought to the attention of international arena. Juan Miguel Petit details that there are cases being reported where young children are being targeted as sexual partners in order to reduce the risk of contracting HIV/AIDS, and instances of child rape are being committed by individuals who believe that sex with a virgin will cure them from HIV/AIDS. He acknowledges that there exists no substantial evidence on this specific matter, however they "can't be discounted". A similar charge is made through the 2001 US State department report²¹⁹ and so it is with little doubt that the possibility it justified. Petit acknowledges that the cause of the cases can not be attributed to one reason, so

²¹⁷ <http://web.amnesty.org/web/ar2002.nsf/afr/south+africa!Open>, Amnesty International Report: South Africa 2002

²¹⁸ United Nations Press Release, United Nations rights expert calls for measures aimed at child victims of sexual violence in South Africa, 4 October 2002

²¹⁹ <http://www.state.gov/g/drl/rs1/hrrpt/2000/af/788.htm>, page 14, Para 6. The 1999 Child Care Amendment Bill, which was implemented in January 2000, prohibits the commercial sexual exploitation of children. NGO's estimate that there were 10,000 children working as prostitutes in Johannesburg in 2000, page 18 of the same report

the HIV/AIDS reference above had been made as one suggestion why, together with the treatment of children as commodities among the six total suggestions in total.

The report continues to highlight the fact that the age of the aggressors in rape cases is decreasing, to the extent where the inference is that young boys and teenagers are involved, and correspondingly, the numbers of gang rapes are increasing. Relating to this somewhat is the concern by the CRC as to the young and discriminatory legal minimum age for sexual consent in South Africa: 14 for boys and 12 girls. Prostitution is being forced onto young boys and girls, but the reports affect predominantly the young girls due to the high levels of poverty coupled with domestic abuse²²⁰. It has also been reported that as children drop out of school due to the unaffordable cost for the family, on occasions the fees will be paid for by a family friend or relative in return for sex from the child. As has been shown, there are many orphans due to AIDS, and it is too common for the remaining child headed households to resort to the girls prostituting themselves to feed their siblings. This is once more substantiated by the US report²²¹ where it was found that child prostitution had increased considerably in the major South African cities correlating with the number of children living on the streets.

Trucking routes were highlighted as to be a main resource for prostitution and children are sought after because “of the belief that they are more likely to be disease free, or that, if they are virgins, sex with them cures diseases such as HIV/AIDS.” This takes us back to Bayer and Sussex and their recognition of internal migration being a hereditary problem from the apartheid years. Truck routes in the KwaZulu-Natal region are a good example as the major routes come from the surrounding countries²²², so any prostitution that occurs in this area

²²⁰ For more information on this area look at www.globalmarch.org/virtuallibrary/sexualexploitation/southern-africa.pdf, accessed 10/12/02

²²¹ Ibid. page 18

²²² Another example of apartheid patterns of gender dispersal can be seen through the mining industry where the men worked away from home and in conditions that

is not purely confining the disease to country borders, but helping spread it across them.

The touched upon ‘Virgin Cure Myth’ or ‘Virgin Cleansing Myth’²²³ is highlighted by a recent survey in finding that 1 in 4 young South Africans does not know that it is a myth²²⁴. Such a finding is worrying in itself, however something that is considered worse and unique to South Africa is the rape of infant girls. Such rape does not conform to the traditional sexual and power motives of rape itself and so the ‘myth’ can be brought into the equation of explanation of the increase in cases, also a detailed study is obviously required on the fact²²⁵.

A further problem in relation to young girls is the act of ‘virgin testing’. This is a practice that is common among the Zulu population on the eastern coast. Arguments against such customs are the increased possibility of sexual assault on the virgin girls once they are known to the community as virgins due to previously raised concerns, and also the increased possibility of anal sex so that when examined, the girls are not found as ‘sexually active’ in the eyes of the community. Such acts of sex, once more increases the possibility of HIV infection.

In these assessments of South Africa, we have seen that she faces some problems that are common to the epidemic as a whole, but there are problems such as the infant rapes, which are unique to the country. The influences of such on the education field is heavy and problematic in the sense that it increases demands upon the economic and social structure of the country itself, and for those who

²²³ The belief that that having sex with a virgin will cure and/or prevent a person from developing AIDS

²²⁴ Hot Prospects, Cold Facts: National Survey of South African Youth, found at www.Kff.org/docs/sections/safrica/lovelife.html , Accessed 29/04/02. It is also highlighted that this myth is not confined to South Africa, it is also found in Thailand and India too

²²⁵ Dr G. Pitcher and Dr. D. Bowley suggest that this South African problem could be due to the country’s major socio-economic problems and the virgin sex myth. Dr. G Pitcher is a pediatric surgeon at the Department of Pediatric Surgery at Johannesburg Hospital and the University of Witwatersrand. Found at www.avert.org/childrapesafrica.htm , *HIV/AIDS and Child Rape in South Africa*, accessed 23/11/02

can not achieve a standard of living which is minimum for them and their family to survive, another route must be taken – often to the cost of education, and it is this that will now be discussed below.

5.4 How Does This Then Relate Back To The Right To Education Itself?

Assessment will now be made of the effects of HIV/AIDS on the conceptual framework for the right to education and the fulfillment of South Africa in her duties to respect, protect and fulfil in terms of the right to education.

The action taken by the South African democratically elected government after the fall of apartheid in 1994, was to build up a strategy to attain equality: lesson disparity between the white and black population of the country. By this time, HIV/AIDS was already taking its first lives in the area, but this one threat to long-term existence was put lower on the priority list. Since 1994, increases have been made into budgetary spending in areas of health and education with the ambition to fulfil South Africa's international obligations to treaties such as the CRC, and therefore to her population. What is now being realised is that this one epidemic is eroding any gains made in these areas and the strategy to combat such is having to be adapted to deal with this dual challenge: using education to combat HIV/AIDS, so that increased ground can be attained in the area of learning itself. The money put into education is currently being used to pay sick leave for those who have HIV/AIDS, and consequently in some ways it may be argued that the situation is going backwards and no progress can be achieved: money for progress is being channelled into upkeep.

Action is now being taken within South Africa through the many organisations studying the patterns, working with and for people with HIV/AIDS. Political will in pushing for the recognition of the importance of HIV/AIDS is starting to be felt by the international community, but there is still a very long way to go.

Aside from the fact South Africa does not support the CRC in as much as free primary education is not the norm, in her other duties to fulfill, respect and protect, the machinery is there to implement a substantial support system to fulfill the right to education, which will be discussed below. As has been seen, section 29 of the Constitution sets out the ambition of non-discrimination with the field of education attainment, and legally, any discrimination towards a child or adult with HIV/AIDS is not tolerated by the courts. The breadth of argument about including HIV/AIDS within the context of 'disability' or 'other status' in South African Courts is a big step towards recognition as a discriminatory title in its own right. Something that was expected to happen this year in fact. In summation, legally, South Africa has protection in effect for people with HIV/AIDS. The largest problem is addressing the erosion HIV/AIDS has made into the systems they established after apartheid.

5.4.1 The Conceptual Norm

Returning to the conceptual norm of the right to education: availability, accessibility, acceptability, and adaptability, and evaluation will now be made as to the constraints being put upon the upholding of these different parts of the right itself.

5.4.1.1 Availability

Erosion is being made into the fulfillment of this. As we have seen, the training of teachers appears to be somewhat in vain as the amount of them unable to continue quality teaching once they contract HIV is increasing to the extent that the excellence of education is falling. Labour rights for teaching positions are protected through anti-discrimination legislation, which are similarly purported with those of other human rights in general. Fiscal obligations are allocated to provinces, but not necessarily monitored throughout the process consequently

allowing money to be spent on areas that most need it rather than should get it, i.e. staff sick pay rather than sex education training²²⁶.

5.4.1.2 Accessibility

This appears to be South Africa's biggest downfall in supplying the right to education to her inhabitants. Again, it must be mentioned that 'free' education is not a concept used in the country. However there appears to be possibilities in law to help those poor enough²²⁷, but whether these opportunities are really accessible themselves is questioned just as much. Financial obstacles are abundant in number for those affected by HIV/AIDS. The cost of actually going to school may be low enough, but the cost of 'being' at school is what is important here. The cost of compulsory education, be it through the books, uniform, distance, schedule, or fees themselves, can all be seen as discriminatory in terms of the right to education. South Africa and many other countries that are fighting HIV/AIDS are not fulfilling their international obligations by not having addressed such issues. Lack of physical presence: physical accessibility, is being addressed however, the concept of distance learning is being established and this helps not only those learners who find it geographically impossible to go to a educational establishment, but also those who cannot physically get there due to illness such as HIV/AIDS or similar. An example of such is the 'Brainline (Breinlyn) School on Computer'²²⁸. It provides a school system on computer from grade 0-12 based in Pretoria. The subjects available for study are broad and varied and all based on the South African Curriculum. Of course the problem with such a system is the cost. Access to a computer is obviously a

²²⁶ Although this has been used as an example, there is progress in this area in as much as money is being targeted for sex education specifically in the budget, but no more specification is being given.

²²⁷ The term 'enough' is used because assessments are made before grants can be made, and the assessments are stringent in the forms and paperwork that is needed, together with the likely outcome of a low success rate

²²⁸ www.brainline.com/index.html Brainline boasts an out performance of South African standards by at least 20%

prerequisite and then the cost of the lessons leaves those who could use such a way of learning unable to obtain it due to once more, poverty: economic inaccessibility. A recent proposed revision to the Child Care Act has met a mixed response. Apart from the guaranteeing of rights of all children to access contraception and abortion without parental knowledge, it also recommends a universal childcare grant with the aim of alleviating poverty²²⁹.

In combating discrimination, projects such as Tirisano are pushing for ‘understanding’ rather than dismissal, this works for both those teachers and students affected by HIV/AIDS. Counselling is advised so that understanding can be achieved and the discriminatory thoughts alleviated.

In light of the Prinsloo decision²³⁰ it would probably have to be proved that differentiation on the ground of HIV infection is not only irrational, but also impairs the human dignity of individuals, and is therefore unfair: realised in the recent case concerning the nursery school girl.

5.4.1.3 Acceptability

Relevant education is seen within the curriculum. What is of more concern in this area is the quality of teaching. As has been illustrated in the study performed by the South African Democratic Teacher’s Union, there are increasing numbers of teachers clarifying their HIV-positive status. With such a number growing, more reliance will be put on supply, or not fully trained teachers, and concern has already been established as to the quality of their teaching²³¹.

²²⁹ Christian groups have claimed that such a measure would encourage larger families so they could receive state income, which in essence would not help poverty a great deal.

²³⁰ Supra note 107

²³¹ Obviously a generalisation is being made here, and this is not trying to say that all such teachers are incapable or lacking in quality, purely that concern must be had and monitoring should be performed if believed necessary.

5.4.1.4 Adaptability

As established above, there are education systems in place for distance learning using information technology skills. However, for this to benefit those in need of such, the economic accessibility factor must be addressed first. The Government has made no play to segregate HIV positive children and education staff from those who are HIV-negative. The general policy is to integrate and understand where to be careful. Once again, the Tirisano document must be highlighted as to include advice for staff on the areas on school where people are at most risk, what to do with cuts and grazes or swimming classes for example. Advice is clear and precise, although it is lucid that it is the schools and other education establishments themselves who must develop their own policies to implement the guidelines.

It is to this abstract that the answers must be found. The possibility is there, it just has to be used to full capacity. Like many other things in life, prevention is the key, and helping those already affected is just as great a need and duty of the state.

6 Conclusion

“Without people we cannot steer this country to sustainable development... [and HIV/AIDS] endangers many of the developmental, social and economic gains that ha[ve] been made since 1994”

Nelson Mandela October 2002

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There is obvious recognition of the devastation HIV/AIDS is having on South Africa. No more recognition can be brought to the international stage than from a man so highly regarded in the country itself: Nelson Mandela.

South Africa has helped demonstrate the effects that HIV/AIDS can have on an education system, by looking at the groups of people that are infected and affected by the disease. In initially establishing the context and link between HIV/AIDS and human rights themselves a basis was created so that the connection could be built upon to further heights to include direct analysis of specific rights such as the right to education. This right was explained using the conceptual norm of availability, accessibility, acceptability and adaptability, and how the right is to be respected, protected and fulfilled by the state. The international instrument of the CRC was highlighted as the dominant treaty in the area mainly due to near universal acceptance of its contents and the ICESCR was also mentioned as to its importance.

Education as a preventative tool was established, and although there is a visible but small dissenting opinion as the success of such a technique, the majority feeling on the subject is that this is the best way to attack the effects of HIV/AIDS. The main reason for this being, that if the human right of the right to education is fulfilled to a states best possibility ‘within their means’, the majority of

²³² Addressing traditional leaders as a HIV/AIDS awareness campaign in October 2002, reported in The Daily Mail and The Guardian 22/10/02

youth will spend some time in the education environment, one which has structure, teachers and again, most importantly to some extent, peers. It is during this time that the aim of education can combine with the fight against HIV/AIDS in achieving the development of a learner's own formation of his/her own morals and ideas. This goes hand in hand with accessible information centres on the subject outside the school environment, but still included in the education sphere.

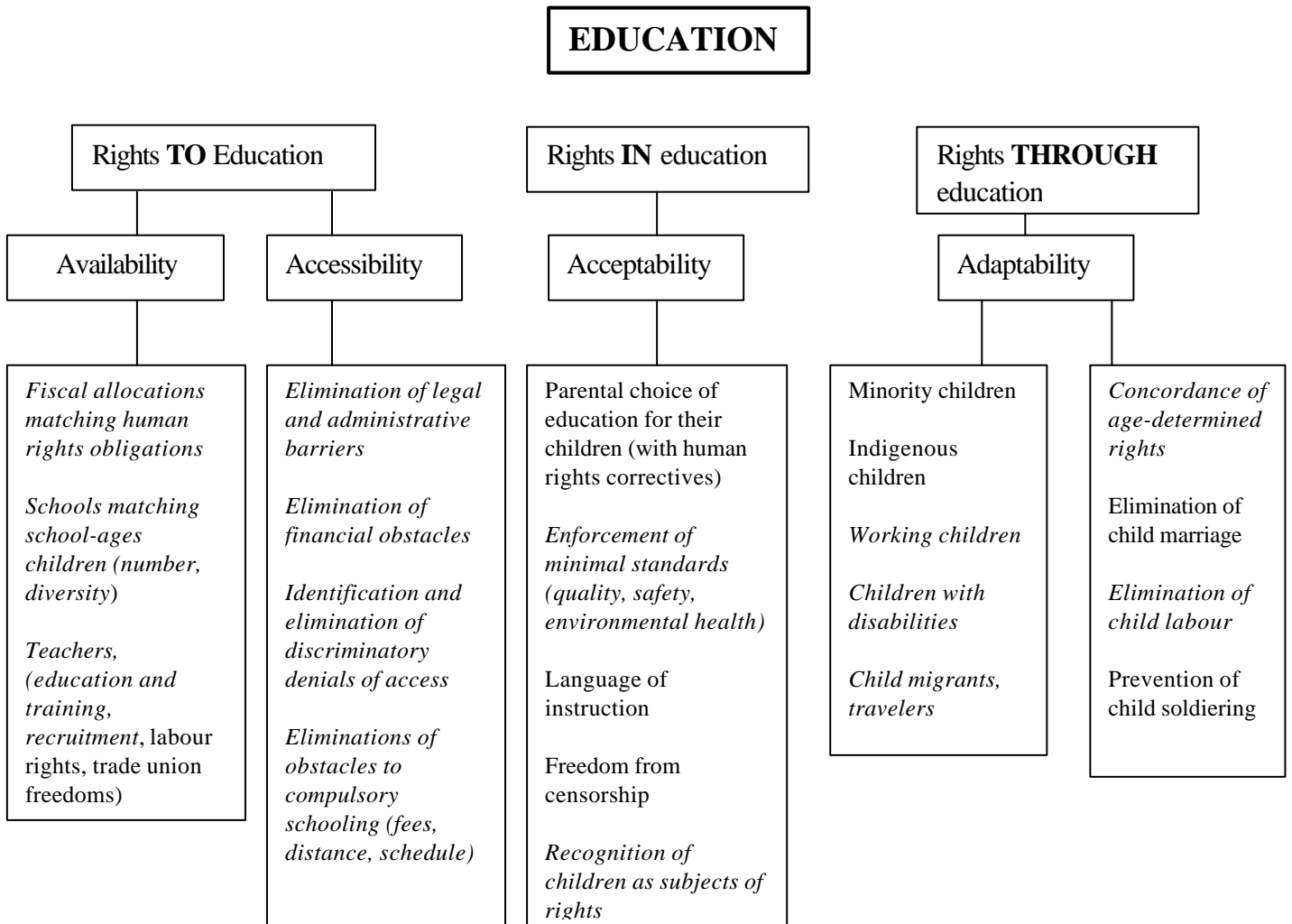
It is then that the effect of HIV/AIDS is described. International case law shows that the way the problem is litigated is through the concept of non-discrimination, and briefly discusses the differences in recognition of HIV/AIDS as a reason for discrimination in its own right or its inclusion in another ground. In addressing the problems of different groupings as to the effects that HIV/AIDS has on them, the author intended to highlight the breadth of possibilities that such a disease can envelop in its path. In addressing the 'typical' education establishment groupings first the intention was to use this to move to the other groups, those that were supposedly in education, but who were unable to grasp such a right due to the now present affects of HIV/AIDS.

In using South Africa as the focus for the case example, we have seen a country that has had to go through dramatic improvements in her political (and therefore inclusive of her educational) system in the past ten years. In many respects it is only recently that the realisation is happening as to the effects of ignorance over the HIV/AIDS pandemic in the country, in as much as the issue was not addressed immediately when the transition from the apartheid regime was occurring. The epidemic arrived late in the country compared to other SSA countries, and manifestations of the epidemic only occur after a large amount of the population are already HIV-positive. Such a picture has already been drawn in countries such as Uganda and Rwanda where a 'missing generation' of people is now lamented.

South Africa is seen as a state that appears to have at least the skeleton of a system that may deal very effectively with an approach to fight HIV/AIDS. The approach of attacking ignorance, denial and sexual behaviour is starting to take effect, although to some extent the epidemic is still 'hidden' within the family environment through ignorance and taboos as can be seen by the traditional practices of 'virgin testing'. The necessary strong words from the leadership are starting to be increasingly significant to the South African community itself and policies in addressing the problem. In reality, there are disparities that cannot be ignored, such as the effectiveness of bodies that were established to monitor the situation – recognised by international stage. However, what seems to be an intrinsic problem, and one that was not discussed in detail for the specific reason of time and page limits, is the funding system of programmes and schools themselves, the way monies are spent, the fact South Africa does not have free education, and the confidence of teachers in addressing necessary issues.

In summation therefore, this illustration of just how effective education can be in combating HIV/AIDS is clear, but equally sharp is the picture that HIV/AIDS can deeply erode such gains in quality and effectiveness of education through removing those who are in need of it. This never-ending circle is made to be broken and in a slowly increasing number of countries, it is being done. However, the possibility of a further explosion of cases in other parts of the world could deeply shadow such achievements. It *must* not be disregarded though! Such achievements should be taken and used in the new struggles, and possibly the predicted effects could be restrained themselves.

Appendix 1



Adapted from The Right to Education Primers Series:
 The Right to Education Project
 Those parts in *italics* are specific to this thesis and are to be considered of stringent importance when discussing the impacts of HIV/AIDS on education systems

Appendix 2

AIDS epidemic update 2002

However, it must be noted that there have been apparent improvements where South Africa is concerned, as figures for the HIV prevalence of pregnant women under 20 have decreased, which suggests that awareness campaigns and prevention programmes are starting to make an inroad into the situation.

The global picture is changing though, in as much as the possibility of act and bring the epidemic under control in Asia is narrowing. The potential for growth in countries such as China and India is astounding and *must* be addressed now. In SSA itself, there have been surprising rises in countries such as Zimbabwe and Botswana where prevalence levels have exceeded the 30% boundary: this can be somewhat attributed to the food crises being faced in the relevant countries.

For further details refer to the report concerned: www.unaids.org

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