

Background Paper for Global Partners' Forum on Children Affected by HIV/AIDS 9-10 February 2006

Legal Protection for Children Affected by HIV/AIDS¹

Introduction

The *Global Framework for the Protection, Care and Support of Orphans and Vulnerable Children Living in a World with HIV and AIDS* identifies five operational strategies to respond to the needs of orphans and vulnerable children. The focus of this paper is the protection of legal rights and issues related to stigma. Protecting legal rights and addressing stigma are fundamentally inter-linked, and cut across all five key strategies outlined by the Global Framework. However, strengthening these areas will especially contribute to strategies five and four: *Ensure that governments protect the most vulnerable children through improved policy and legislation and by channelling resources to families and communities; Raise awareness at all levels through advocacy and social mobilisation to create a supportive environment for children and families affected by HIV/AIDS.*²

Children are made more vulnerable by the social exclusion and discrimination that is associated with HIV/AIDS. This is true whether a child is living with an infected relative or care taker, in which case the child is often assumed to be HIV positive, or if the child is indeed infected him or herself. This stigma frequently translates into denial of access to education, health care and inheritance rights. Existing gender inequities experienced by women and girls further amplify this stigma and discrimination. Because HIV/AIDS so often impoverishes and stigmatises the children it affects, they are often malnourished, vulnerable to disease and at high risk of having to eke out livelihoods in potentially dangerous situations. Children who face multiple vulnerabilities – including emotional trauma, gender discrimination, social exclusion and poverty – are likely to engage in high-risk behaviours, which, in turn, increases the chances that the child will become exposed to, and infected with, HIV. This cycle of vulnerability and infection leaves children powerless and deprives them of their rights.³ By addressing legal protection gaps and reducing the stigma associated with the virus, community groups, governments, and NGOs can effectively address the needs of children affected by HIV/AIDS.

The UN Convention on the Rights of the Child (CRC) is a key international instrument which defines children's rights.⁴ CRC affirms the State responsibility to protect and support the child-family relationship with the family having primary responsibility to protect and care for the child. However, progress in translating CRC, and the obligations it entails, into national law, policy and practice has been slow. Similarly, the African Charter on the Rights of the Child (ACC) is an international human rights instrument that was written by the member States of the Organisation of African Unity. The ACC embodies the principles and rights set out in the CRC, and reflects African cultural contexts. Some CRC and ACC signatory countries have laws and policies that relate to the rights, protection, care and support of children. However little has been done to ensure that national level laws and policies protecting the rights of children adequately address the myriad challenges posed by HIV/AIDS. In addition, more effort is required to implement and enforce new legislation where needed and to concomitantly raise awareness and understanding about children's rights at all levels, including in communities and families.

¹ by Mandeep Dhaliwal

²UN (2004) *The Global Framework for the Protection, Care and Support of Orphans and Vulnerable Children Living in a World with HIV and AIDS*. July 2004.

³Johari, Veena. *Lawyers Collective HIV/AIDS Unit (2003) Legislating an Epidemic: HIV/AIDS in India*. 2003.

⁴International HIV/AIDS Alliance, Family Health International (2005) *OVC e-Toolkit, Children's Rights* found at www.aidsalliance.org/sw492.asp

Based on the principles embodied in the CRC, the *Global Framework for the Protection, Care and Support of Orphans and Vulnerable Children Living in a World with HIV and AIDS* proposes the following comprehensive legislative framework as key to the creation of a supportive environment for children and families affected by HIV/AIDS⁵:

- Prohibiting discrimination in health care, schools, employment or other areas based on actual or presumed HIV status
- Providing appropriate community-based placement and guardianship for children who lack adequate adult care
- Ensuring women's rights to own property and hold jobs
- Protecting the inheritance rights of orphans and widows
- Protecting children against abuse, neglect and sexual contact with adults
- Eliminating the worst forms of child labour
- Eliminating barriers that keep the poorest children from attending school or accessing health care
- Protecting children who live on the streets
- Developing policies that encourage and support family-based placements for children without adequate family care
- Establishing specific standards for alternative care of children without family support, including steps to prevent separation of siblings; first preference for family-based placements; use of institutional placements as a last resort and temporary measure; and the involvement of children in decisions regarding their placement

This paper will focus on several of elements of the aforementioned legislative framework which represent critical barriers to scaling up to universal access to HIV prevention, treatment and care by 2010. The paper assumes the following:

- The term "*vulnerable children*" is understood to include children affected by HIV/AIDS, children living with HIV/AIDS as well as single and double orphans.
- International conventions such CRC codify internationally agreed upon standards that provide for rights or protections for the citizens of States and these should be incorporated into a country's domestic legal system. This is usually done through enacting legislation and/or repealing/reforming existing legislation.
- While the law is an important instrument for effecting social change, legislative measures alone are insufficient and must necessarily be backed up with the regulations and resources needed to ensure enforcement, as well as concrete interventions to reduce stigma.

Addressing stigma and discrimination

Stigma and discrimination continue to be one of the biggest barriers preventing the scale up of HIV/AIDS responses. Without significantly redressing social exclusion, stigma, discrimination and inequality, universal access to HIV treatment, care and prevention for adults and children will not become a reality. Children face stigma due to their parents'/caregivers' or their own HIV status, poverty, orphan status or some combination of these. Children orphaned by AIDS are often presumed to be HIV positive and receive sub-standard care and support. Stigma and discrimination experienced by women viz. denial of their rights to own property and employment also impacts negatively on children. Evidence has shown that ensuring women's equality in law and practice is an important way of reducing the stigma and discrimination experienced by women and children. In many developing

⁵UN (2004) *The Global Framework for the Protection, Care and Support of Orphans and Vulnerable Children Living in a World with HIV and AIDS*. July 2004

countries, even where antiretroviral treatment is available, people are afraid to know or reveal their HIV status – showing that the fear of stigma and discrimination is also a powerful force. Stigma leads to the exclusion of children from community life and prevents them from accessing essential services. Improving awareness, understanding and acceptance of HIV/AIDS through social mobilisation and the increased participation of children along with ensuring that women are treated equally in law are critical for addressing stigma and discrimination.

Birth registration⁶ (see paper on birth registration)

Birth registration, and the proof of identity it provides, is essential for establishing the legal identity of a child and promoting and protecting rights to education, healthcare, inheritance and other social services. Birth registration is also important for establishing a protective environment for children. For children affected by HIV/AIDS, legislation requiring birth registration and appropriate and effective national systems for birth registration which include retrospective registration are critical for promoting and protecting children's rights to education, healthcare, inheritance and other social services, as well for protecting them from economic and sexual exploitation. Without birth registration, it is not possible to enforce age-specific legal frameworks in areas such as juvenile justice, child marriage, economic and sexual exploitation. By international law, all children, including those born out of wedlock, have the right to be registered. Many countries still have not enacted legislation requiring birth registration; many have also not developed appropriate and practical systems for birth registration. In countries where specific legislation does exist, it is often discriminatory, unnecessarily complex, inflexible and inconsistent with other laws in the country.

Inheritance rights of children and widows⁷

One of the major problems children affected by HIV/AIDS encounter is that their right to inheritance may not be legally protected. In many countries, by traditions and customary law, widows and children have limited or no inheritance rights upon the death of the husband or father and the family of the deceased assume responsibility for the widow and children. Due to the high burden of HIV/AIDS and poverty, many families and communities are nearing or have reached their capacity to support more children and widows. In many cases, extended families claim the inheritance without assuming responsibility for the children and widows. By international law, States must protect the right of inheritance and of property rights of children and widows, in legislation as well as in practice. By international law, discrimination against children and women on grounds of property is prohibited, and property is understood to include property obtained by inheritance. Legal protection of inheritance through the enactment of specific legislation and the repeal/reform of existing legislation which discriminates against children and women on the grounds of property is seen to be a more effective way of supporting children and widows than solely relying on financial support from the State. Proof of marriage and birth are critical for asserting inheritance rights as is repealing/reforming customary laws which discriminate against women and children on the grounds of property.

Appropriate placement of vulnerable children⁸

In many developing countries, increasing numbers of orphans and the spread of HIV/AIDS amongst caregivers are straining traditional practices of caring for vulnerable children within extended family structures. This can lead to the inappropriate placement of children in institutions. Research shows that placement of children in orphanages or institutional settings fails to meet the basic needs of children and often results in children being stigmatised, neglected, or abused. And studies suggest that the

⁶Technical Paper on Birth Registration (DRAFT)

⁷World Bank (2005) Legal Protection for Children Orphaned or Made Vulnerable by HIV/AIDS: International and Selected Domestic Law, Discussion Draft. April 30, 2005.

⁸World Bank (2005) Legal Protection for Children Orphaned or Made Vulnerable by HIV/AIDS: International and Selected Domestic Law, Discussion Draft. April 30, 2005.

majority of children in institutional care do not necessarily lack family-based options. In Uganda, for example, the Ministry of Labour and Social Affairs (with assistance from Save the Children UK) demonstrated that 85% of children in orphanages had identifiable and traceable relatives. Children without adequate care also end up living on the streets, where vulnerability for abuse and exploitation is especially high.

Often child-headed households, and those headed by single women have poor access to basic services, are at risk to property grabbing and end up in destitution. In international law, States have a primary obligation to assist parents and care givers in providing for the basic needs of the child. This can mean providing material assistance through social protection programmes (discussed further in the Social Policy paper) as well social support programmes such as day care facilities. Where families (including extended families) are unwilling or unable to care for the child despite such support, the State has an obligation to place the child in appropriate alternative care. The aim should be to place the child in family type settings, such as foster homes; however, foster homes, like all alternative care providers, require appropriate support, regulation and oversight to ensure the best interests of the child are upheld. Most developing countries lack laws and policies to provide and support appropriate models of alternate care for vulnerable children where their rights are protected and promoted. Some examples of good practice do exist such as South Africa's recognition in law of child-headed households and Kenya's Children Act which stipulates and regulates alternative care for vulnerable children.

Discrimination against children: access to health care including treatment

Children affected by HIV/AIDS are often discriminated against in terms of their access to health care and education. Policy makers in developing countries often don't prioritise care and treatment for children and ARV treatment for HIV-positive children remains prohibitively expensive. Even when treatment is available and affordable, vulnerable children may not have the authority to consent to testing and treatment. The CRC General Committee recognises that the highest attainable standard of health for children includes *"access to antiretroviral and other medicines, diagnostics and related technologies for the care of HIV/AIDS, related opportunistic infections and other conditions."* In addition, adolescents who may become sexually active in their early teens are particularly vulnerable. The CRC General Committee also recognises that adolescents should have access to appropriate and confidential sexual and reproductive health services. However, in many developing countries research has shown that adolescents are usually excluded from sexual and reproductive health services.

Consent to HIV testing and treatment and confidentiality⁹

One of the underlying principles of the CRC is the right of children to freely express their views in all matters that affect them.¹⁰ However, anecdotal evidence suggests that the practice in many developing countries around children's consent to HIV testing and treatment usually does not respect this principle. Health care workers cannot disclose a child's HIV status or even the fact that s/he came forward for testing without her/his informed consent. In fact, children are often tested and treated without their consent. Laws and policies in several countries such as Kenya and Namibia have recognised that children must be empowered to consent to HIV testing and treatment. Practice regarding the minimum age at which children can consent to HIV testing and treatment varies from 12 to 16 years. The *'mature minor'* rule which allows children who demonstrate an understanding of the attendant risks and benefits to make decisions can also be applied. Furthermore, the *International Guidelines on HIV/AIDS and Human Rights* state that adolescents and children must have access to confidential sexual and reproductive health services, including HIV/AIDS information, counselling, testing and prevention measures such as condoms.

⁹ohari, Veena. Lawyers Collective HIV/AIDS Unit (2003) Legislating an Epidemic: HIV/AIDS in India. 2003.

¹⁰See CRC, Article 12

Discrimination against children: access to education¹¹

It is well established that providing a basic education for children, especially by ensuring equal opportunity for girls is critical to a successful AIDS response. Education plays a pivotal role in a child's health and development. In many developing countries, school fees may prevent children from attending school. Even where countries by law provide free primary education, hidden fees for textbooks and uniforms may prevent children from going to school. In addition, children may not be attending school or have difficulties learning because they are needed to care for their sick parents or work to earn for their family. Discriminatory attitudes about girls and women also contribute to keeping girls out of school. There is a need for national legislation that ensures free (viz. without any direct or indirect costs to parents, guardians and children), access to primary education for all children, especially children infected, orphaned or otherwise affected by HIV/AIDS a concentrated effort to retain girls in school.

Protection from abuse¹²

Children affected by HIV/AIDS are extremely vulnerable to violence, exploitation, and neglect. Violence against children may include sexual, physical, emotional or psychological abuse. These children increasingly have inadequate support and protection as they confront the disappearance of a generation that once fulfilled a protective and nurturing role.

The vulnerability of children affected by HIV/AIDS to abuse is heightened by stigma and discrimination associated with their parents' illness and the additional economic stress that children can place on the household. As family and community structures deteriorate and poverty increases, many children orphaned by AIDS are forced to turn to commercial sexual exploitation or hazardous labour in order to survive or to provide for younger siblings. Needless to say, if not already infected, commercial sexual exploitation leaves children extremely vulnerable to contracting HIV/AIDS. Children working in domestic labour, thought to be the most common work for girls, are extremely vulnerable to sexual and physical abuse. There may be an unspoken requirement that sexual availability is part of the terms of employment,

Orphaned and vulnerable children have a greater risk of forced labour given their placement in poor households, their low status in foster-households, and the lack of paternal protection. When children orphaned by HIV/AIDS do go to live with extended family members, there are increased risks of sexual and physical abuse. Girls who are affected by HIV/AIDS may also be more vulnerable to exploitative sexual relationships to meet basic needs. For example, sexual exploitation by teachers has been identified as a major problem.

Ensuring legal protections from abuse is a crucial strategy for strengthening protection systems for children. Laws must punish perpetrators, and at the same time ensure that children are protected. In international law, states have an obligation to enact all appropriate measures, including legislative, administrative and social measures, to protect children from all forms of abuse.

Recommendations

The GPF recognizes the critical role birth registration and the appropriate legal framework are to planning and accessing services and ensuring the rights of the child are met. The GPF calls for at least

¹¹World Bank (2005) Legal Protection for Children Orphaned or Made Vulnerable by HIV/AIDS: International and Selected Domestic Law, Discussion Draft. April 30, 2005.

¹²Miller, C (2005) Child Protection and Children Affected by HIV/AIDS – A Companion Paper to the Framework for the Protection, Care and Support of Orphans and Vulnerable Children Living in a World with HIV and AIDS (Draft). December 27, 2005.

5 countries to pilot approaches with UNSD and other partners to develop innovative means to build demand and capacity for registration of new births and retrospectively. This might include:

- Encourage registration through innovative mechanisms such as health clinics, schools and religious and cultural ceremonies (naming, blessing etc)
- Look at how new technologies may be adapted to assist in this task
- Build demand for registration through associating a conditional cash transfer to mothers when they attend their first ante-natal clinic and for the first vaccination and birth registration of the baby.
- Increase awareness of children's entitlements through expansion of the clinic cards used in many settings to be printed to include basic child rights and government commitments to children and to look at how they might be further expanded to include 'vouchers for immunization and education'.

The GPF calls for the IATT on AIDS and education to consider how to scale up the delivery of education on children's rights and entitlements, along with human rights, gender relations and AIDS awareness at school. This must recognize and clarify the differences between customary and formal rights to clarify entitlements.

The GPF calls for countries to prevent needless separation of children from their families and communities, and to ensure that care alternatives are used appropriately. Steps to achieve this include:

- *Supportive child care and psycho-social services at community level* which encourage child development and provide support to caregivers in order to reduce pressure on families to turn to residential institutions
- *Increased support to the social welfare sector*, both to develop the trained staff needed for a functioning child protection system, and to support services and monitoring.
- *Clear, doable child welfare regulations and standards*. These need to cover to ensure that only children who truly need alternative care enter the system; and that family reunification remains a priority for each child for whom it is an option. Registration and monitoring should be required for all residential care providers.
- *Support family based alternative care placements*, through recruitment, support and monitoring for foster families.
- *Efforts to reduce the proliferation of institutions*; and development of ways to channel external support to efforts aimed at keeping children within the family or community.
- *Fight stigma and discrimination*; which can also lead families and communities to turn their backs on children who need their love and support

Countries should also support the call by the Committee on the Rights of the Child for the development of International Guidelines for the Protection of Children without Parental Care.

The GFP calls for 5 countries to pilot approaches for ensuring legal protection of inheritance through the enactment of specific legislation and/or the repeal/reform of existing legislation which discriminates against children and women on the grounds of property. The pilot approaches must necessarily include concrete legal education and social mobilisation strategies embedded in communities. UNICEF, UNIFEM, the Office of the Commissioner on Human Rights should support appropriate support to rolling out this process.

The GFP calls for free access to appropriate prevention, treatment and care for all children affected by HIV/AIDS, with protection of their right to confidentiality. UNAIDS, WHO and other stakeholders involved in universal access efforts should support this.

The GPF calls for child friendly courts and the provision of free and accessible legal aid to increase children's access to justice, protecting them from disinheritance and providing recourse in cases of abuse.

GPF calls for strengthened legislation and enforcement of laws to protect children from violence and exploitation. GPF calls for strong laws punishing those who abuse or exploit children, and support measures to be put in place to help children recover from abuse. In all situations, victims of abuse, including children in prostitution, must be offered support and protection and not be criminalized.

The GFP calls for UN member states to endorse the UNAIDS and Office of the Commissioner on Human Rights International Guidelines on HIV/AIDS and Human Rights and the Revised Guideline 6 on treatment.