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AN ANALYSIS OF THE DEMOCRATIC REPUBLIC OF CONGO'S OBLIGATIONS TO  
PROTECT AND PROMOTE THE INHERITANCE RIGHTS OF CHILDREN LIVING  
WITH AND AFFECTED BY HIV

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## Declaration

I hereby declare that this mini dissertation which I submit for the Masters in International Human Rights Law and HIV in Africa is my own work and has not previously been submitted by me for a degree at another university. Both Primary and secondary sources have been acknowledged.

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Tshoma Numbe

.....

Date

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To all of you I say: *Losaka Efula*.<sup>1</sup>

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<sup>1</sup> This means 'Thank you so much' in Tetela language, which is a local language in the province of Kasai Oriental, district of Sankuru in the Democratic Republic of Congo.

## **Dedication**

To my beloved children Marc-Andy Mubinda Ngampey and Hugues-Henry Rene Mubinda Numbe Omasombo; in so many ways, you have been my constant source of encouragement and inspiration in this programme.

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## Acronyms and abbreviations

ACHPR: The African Charter on Human and Peoples' Rights

ACRWC: The African Charter on the Rights and Welfare of the Child

AIDS: Acquired Immunodeficiency Syndrome

CRC: Convention on the Rights of the Children

DRC: Democratic Republic of Congo

GC: General Comment

HIV: Human Immunodeficiency Virus

HIV/ AIDS: Human Immunodeficiency Virus / Acquired Immunodeficiency Syndrome

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ILO: International Labour Organisation

NGO: Non Governmental Organisation

PLHIV: People Living with HIV

PNLS: *Programme National de Lutte Contre le Sida* (National Programme of the Fight Against AIDS)

PNML: *Programme National Multisectoriel de Lutte contre le Sida* ( Multisectorial National programme of the Fight against AIDS)

UDHR : The Universal Declaration of Human Rights

UN: United Nations

UNDRC: UN Declaration of the Rights of the Child

US: United States

## Table of contents

Declaration.....	2
Acknowledgements.....	3
Dedication.....	4
Acronyms and abbreviations.....	5
Table of contents.....	6
<b>CHAPTER 1 INTRODUCTION .....</b>	<b>8</b>
1.1. Definition of terms .....	8
1.1.1 Child.....	8
1.1.2 Child living with HIV .....	8
1.1.3 Child affected by HIV .....	8
1.1.4 Inheritance.....	8
1.2. Background and problem statements .....	9
1.3 Research questions .....	13
1.4 Assumptions of the study.....	14
1.5 Research methodology.....	15
1.6 Literature review .....	15
1.7 Limitations of the study .....	16
1.8 Overview of Chapters .....	16
<b>CHAPTER 2 THE PROTECTION OF THE INHERITANCE RIGHTS OF CHILDREN LIVING WITH OR AFFECTED BY HIV AT THE INTERNATIONAL AND REGIONAL LEVEL.....</b>	<b>18</b>
2.1 Introduction.....	18
2.2 At the International level.....	19
2.2.1 Convention on the Rights of the Child (CRC).....	20
2.2.2 The Declaration of Commitments on HIV/AIDS .....	24
2.3 At the regional level.....	25
2.3.1 The African Charter on the Rights and Welfare of Children (ACRWC .....	26
2.3.2 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (The African Women’s Rights Protocol).....	26
<b>CHAPTER 3 PROTECTION OF THE INHERITANCE RIGHTS OF CHILDREN LIVING WITH OR AFFECTED BY HIV AT THE NATIONAL LEVEL.....</b>	<b>29</b>
3.1. The DRC’s national law.....	29
3.1.1 Introduction.....	29
3.1.2 The Constitution of the DRC, of 18 February 2006.....	29
3.1.3 The Law n° 09/001 of 10 January 2009 on the protection of children.....	30

3.1.4 The Law n° 87 – 010 of 01 August 1987 on Congolese Family Code .....	32
3.1.5 The Law 08/001 of 14 July 2008 on the protection of the rights of people living with HIV / AIDS and those affected. ....	34
3.2. DRC’s social and practical consideration of children living with HIV and those affected .....	36
Conclusion .....	38
CHAPTER 4 CONCLUSIONS AND RECOMMENDATIONS .....	39
4.1 Conclusions.....	39
4.2 Recommendations.....	41
BIBLIOGRAPHY.....	43

## CHAPTER 1 INTRODUCTION

### 1.1. Definition of terms

#### 1.1.1 Child

The United Nation Convention on the Rights of the Child (CRC),<sup>2</sup> the African Charter on the Rights and Welfare of the Child (ACRWC),<sup>3</sup> and the Democratic Republic of Congo (DRC)'s law on the protection of the child<sup>4</sup> define child as any human being under the age of 18. Consequently, in this study, we will consider the child as any human being under the age of 18.

#### 1.1.2 Child living with HIV

In this study, we define a child living with HIV as a child who is infected with HIV and who is thereby susceptible to other diseases or other opportunistic infections related to HIV.

#### 1.1.3 Child affected by HIV

The affected child is defined as one who suffers from the collateral effects of a person living with HIV;<sup>5</sup> or when a single parent, both of the parents or family member is living with HIV. This child will be considered as affected by HIV. The child who has been orphaned by the HIV/AIDS is also considered as an affected child.

#### 1.1.4 Inheritance

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<sup>2</sup> Article 2 of the United Nations Convention on the Rights of the Child.

<sup>3</sup> Article 2 of the African Charter on the Rights and the Welfare of the Child.

<sup>4</sup> Article 2 of the DRC's law on the protection of the child, law n° 09 – 010 of 10 January 2010.

<sup>5</sup> Article 2 of the DRC's law on the protection of people living with HIV and those affected of 14 July 2008.



The word refers to the transfer of estate assets left by a deceased person to their heir or heirs with a defined legal system.<sup>6</sup>

## 1.2. Background and problem statements

HIV/AIDS was first recognised as a condition with potentially serious social and economic consequences in the early 1980s.<sup>7</sup> Concerns were raised about some particularities in comparison to other diseases, at the same time because of its modes of transmission and its incurability. As a social issue, HIV is also of great interest for legislators in various countries. They have tried to find ways and means to effectively fight against this pandemic but the enormity of the challenges has made it a public health issue.

The United Nations (UN)<sup>8</sup> and the African Union (AU)<sup>9</sup> have taken initiatives reflecting the dynamics of the fight against HIV and they have passed several resolutions, established special mechanisms and adopted international conventions to address this pandemic. On its side, the Congolese legislator has promulgated Act No. 08/011 of 14 July 2008 on the protection of the rights of people living with HIV / AIDS and those affected. Today the vulnerability of children living with HIV in Sub-Saharan Africa is increasing; almost 90% of orphaned children live in Sub-Saharan Africa.<sup>10</sup>

It is estimated that 66.000 (55.000 – 82.000) people died of AIDS in 2013 in the Democratic Republic of Congo (DRC). It is also estimated that there are 30.000 (24.000 – 38.000)

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<sup>6</sup> FM Azema *le droit des successions* (Inheritance rights) (2003) MB édition Droit mode d'emploi 16.

<sup>7</sup> Concern Worldwide, HIV/AIDS policy (2003) in [www.concern.net/sites/default/files/ressource/2010/07/4689-hiv-aidspolicy.pdf](http://www.concern.net/sites/default/files/ressource/2010/07/4689-hiv-aidspolicy.pdf) (accessed on 4 September 2014).

<sup>8</sup> The United Nations has made the fight against HIV and other diseases as one of the Millennium Development Goals. This aims to stop the spread of HIV / AIDS and to assure, for all those who need, access to treatment.

<sup>9</sup> In Addis Abeba on 3 October 2013, the African Union (AU) Commission with support from the joint United Nation Programme on HIV/AIDS and the International Labour Organisation (ILO) developing a protocol to deal with peacekeeping deployment from the AU specifically addresses the impact of the spread of HIV in peacekeeping operation. in <http://dcpauc.au.int/en/content/african-union-developing-protocol-supporting-health-peacekeeping-operations> (accessed on 11 September 2014).

<sup>10</sup> A Grant 'Children and HIV: Using an evidence-based approach to identify legal strategies that protect and promote the rights of children infected and affected by HIV and AIDS' (2011) *Global Commission on HIV and Law*, Heard 'Child Caregiving and HIV in southern Africa, University of Kwazulu Natal (2013) 1 in <http://www.heard.org.za/downloads/caregiver-thematic-brief-013.pdf> (accessed on 11 September 2014).

orphans in the DRC who have been orphaned as a result of HIV aged between 0 to 17 years old.<sup>11</sup>

These children are extremely vulnerable in the DRC as many of them are not able to inherit their parents' property and most of the property has been grabbed by their relatives.<sup>12</sup> The HIV epidemic also leaves many relatively young widows with children. These women as widows are also subjected to unjust practices such as property grabbing because they are women in the first place and secondly, because their husbands died of HIV related illnesses. They often have limited resources left to resist outside pressure exerted by neighbours and members of the extended family thus resulting in them making decisions and choices that might not be in the best interests of their children.<sup>13</sup>

Moreover, the number of children living on the street in DRC is rising, most likely driven by HIV/AIDS.<sup>14</sup> Being on the street results in these children being even more exposed to contracting HIV as in trying to fight for survival and fighting to get something to eat, they might engage in dangerous sexual behaviour. Many children, including girls and boys, who are deprived of means for survival, particularly orphaned children, become subject to sexual and economic exploitation in different ways, including commercial sex work to support their sick or younger siblings, or to pay for school fees.<sup>15</sup> This places them at greater risk of contracting HIV if they are not already infected or of spreading HIV if they are already infected.

In many countries, freedom of testamentary disposition does not exist or it is limited to a small part of the estate. Furthermore, different countries have different procedures to deal with the administration of estates with some requiring personal representatives and others

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<sup>11</sup> UNAIDS Democratic Republic of Congo HIV and AIDS estimates (2013) in <http://www.unaids.org/en/regionscountries/countries/democraticrepublicofthecongo/> (accessed on 11 September 2014).

<sup>12</sup> Foresta & Williamson *A review of current literature of the impact of HIV/AIDS on children in sub-Saharan Africa* (2000) s278 – s279.

<sup>13</sup> Richard S. Strickland, Ph.D. Consultant 'Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa' (2004) 15 - 17 <http://www.icrw.org/files/publications/To-Have-and-To-Hold-Womens-Property-and-Inheritance-Rights-in-the-Context-of-HIV-AIDS-in-Sub-Saharan-Africa.pdf> (accessed on 15 August 2014).

<sup>14</sup> Human Rights Watch 'What future? Street children in the DRC' (2006) <http://www.hrw.org/reports/2006/drc0406/1.htm> (accessed on 14 August 2014).

<sup>15</sup> WFP, R. Landis, Widening the 'Window of Hope' Using Food Aid to Improve Access to Education for Orphans and Other Vulnerable Children in Sub-Saharan Africa, Occasional papers N15, Nov 2003, [http://unscn.org/layout/modules/resources/files/Widening\\_the\\_Window\\_of\\_Hope\\_EN\\_1.pdf](http://unscn.org/layout/modules/resources/files/Widening_the_Window_of_Hope_EN_1.pdf), (accessed on 17 October 2013).

which do not, thereby resulting in beneficiaries inheriting directly.<sup>16</sup> Widows are inherited through remarriage to a brother of the deceased husband in some African countries.<sup>17</sup> In customary practices, property is inherited by patriarchal relatives. Thus, the inheritance of children in patriarchal societies was to paternal relatives with the result that in many societies the marital status of the parents has a significant impact on inheritance.<sup>18</sup> In the case of the DRC, widows are being deprived of their legal rights to inherit property from their late husbands.<sup>19</sup>

Inheritance in the DRC is generally a complicated issue. It becomes even more complicated when children and HIV are involved. One reason for this is the many harmful cultural practices associated with inheritance such as widow inheritance and property grabbing by unscrupulous relatives. Furthermore, the law is often not applied as it should be. The fourth book of the first chapter of the DRC family law deals with the inheritance in general and the children's rights to inherit their parents' property. Despite this, many children in the DRC are not able to inherit their parents' property. Some people suggest that children whose parents died of HIV related illnesses do not need their parents' property<sup>20</sup> as those children will die soon so they should not need to inherit and they do not need property.<sup>21</sup>

Poverty also contributes to the extent to which children are able to inherit property in the DRC. The DRC is one of the poorest countries in the world with more than 70 % of its population living below the poverty line.<sup>22</sup> The majority of the population lives on less than two dollars a day.<sup>23</sup> This poverty manifests in many ways: very low income, malnutrition and hunger, lack of access to health care and formal education, lack of decent accommodation or access to adequate housing and so forth. This kind of situation often results in a fight over the scarce resources that are available and hence does not provide the space needed for to a

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<sup>16</sup> Rooks Rider Solicitor LLP, Briefing note (2011) in [www.rooksriver.co.uk/wp-content/uploads/2013/06/Cross-Border-Inheritance-Issues-October-2011.pdf](http://www.rooksriver.co.uk/wp-content/uploads/2013/06/Cross-Border-Inheritance-Issues-October-2011.pdf) (accessed on 4 September 2014).

<sup>17</sup> Foster & Williamson (n 12 above) s278 – s279.

<sup>18</sup> Foresta & Williamson (n 12 above) s 278.

<sup>19</sup> Institute for war and peace reporting (IWPR), Report News: Congolese Widows Stripped of inheritance in [iwpr.net/report-news/Congolese-widows-stripped-inheritance](http://iwpr.net/report-news/Congolese-widows-stripped-inheritance) (accessed on 4 September 2014).

<sup>20</sup> Interview done on 13 April 2013 with Madam Kasongo, a care giver.

<sup>21</sup> Interview of 15 May 2013 with M Lucien the executive director of the Projet Asemir which is a local NGO in Lubumbashi city which deals with scholarship and reintegration of children, in particularly those who are orphaned by HIV or who are HIV positive.

<sup>22</sup> Ramel Realizing Children's Rights in Democratic Republic of the Congo' <http://childrensrightsportal.org/democratic-republic-congo/> (accessed on 10 November 2012).

<sup>23</sup> Medecin Sans Frontière (MSF) 'Democratic Republic Of Congo: HIV treatment out of reach for majority' (2012) in [www.msf.org.za/download/file/ffd.3800](http://www.msf.org.za/download/file/ffd.3800) (accessed on 04 September 2014).

peaceful atmosphere within which to address the inheritance processes. At times parents die with very little or nothing for the child to inherit while at other times relatives and the nearby adults expect to get their share of the little that might be left for the child. In such situations children suffer even more.

Another big problem is culture or custom. In the DRC people have views on inheritance matters that are based very deeply on culture or custom. Despite the clarity of the family law<sup>24</sup> and the clarity of the law on children's rights,<sup>25</sup> if custom is against these laws, children are obliged to respect what custom prescribes. Custom often results in their relatives such as their uncles and aunts managing the family property while the orphaned child ends up on the street or in care centres in urban towns and cities.<sup>26</sup>

In rural communities, extended family safety nets are better preserved where uncles, aunts and grandparents play a significant role in the upbringing and up keep of children and they often step in when the parents die. However, at times due to the roles played by aunts and uncles in the development of their nieces and nephews with respect to material and even moral support, these relatives sometimes believe that they have a right to the inheritance.

Over and above custom, tradition and culture, superstition and fear also play a role in the inability of surviving spouses and children from inheriting property. Veiled threats couched in words such as "since you want inheritance, take it and we will see" from family members results in panic and fear within children and surviving spouses of being bewitched. In such circumstances, children and surviving spouses are often reluctant to claim their inheritance thus leaving the space open to other family members to seize or take away all the property.<sup>27</sup> In this circumstance, it is not the actual violence that is highlighted but the fear of suffering the misfortune of some curse that could come from other family members.

Moreover, when a country is more modernized, extended family safety nets are weakened. Therefore, the positive traditional practice of orphan inheritance by uncles and aunts has lessened. It has been replaced by alternate safety nets with care provided by grandparents or

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<sup>24</sup> Law 87/010 of 01 August 1989 on the family code in the DRC.

<sup>25</sup> Law 09/001 of 10 January 2013 on the protection children.

<sup>26</sup> Department for community Development and the Department of justice and Attorney General 'An assessment of the inheritance rights of children affected by HIV and AIDS and other vulnerable Children (2008) in [http://www.unicef.org/png/UNICEF\\_Inheritance\\_Rights\\_Children.pdf](http://www.unicef.org/png/UNICEF_Inheritance_Rights_Children.pdf) ' (accessed on 4 September 2014).

<sup>27</sup> Y Katshung *Inheritance law in Congo (case of children heirs)* (2008) New publishing services 82.

other relatives.<sup>28</sup> Where all of these safety nets fail, these children end up having to fend for themselves.

There is no policy dealing clearly with this category of children in a very specific way. There is a law dealing with the rights of people living with HIV (PLHIV) and those affected.<sup>29</sup> This law talks about all people, which means children also, but not children in a more specific way.

The big question is if most of the children in the DRC are disinherited what happens to those who are HIV positive? Often they are discriminated against and nothing is done to resolve that problem.

The DRC has ratified the CRC by the law n° 90-048 of 1990 August 21, and the African Charter on Human and Peoples' Rights (ACHPR) on 20 July 1987 by the OL n° 87-027 of 20 July 1987. It has signed the African Charter on the Rights and Welfare of the Child (ACRWC) on 02 February 2010, but has not ratified it yet.<sup>30</sup> Some observers argue that lawmakers of these countries, who have ratified the CRC and the Children's Rights, did not translate into practice their legal obligation to protect and promote children's rights. This includes the right to inherit property, according to the standards established by the CRC, Children's Rights and the ACHPR.<sup>31</sup>

### 1.3 Research questions

Against the background above, the research broadly addresses the following questions:

What are the DRC's obligations at the international and domestic levels regarding inheritance rights of children?

What is the practice regarding inheritance rights for children living with HIV in the DRC?

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<sup>28</sup> Foster & Williamson (n 12 above) s277.

<sup>29</sup> The Law 08/011 of 14 July 2008 on the protection of the rights of PLHIV and those affected.

<sup>30</sup> List of countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child in [http://au.int/en/sites/default/files/Welfare%20of%20the%20Child\\_0.pdf](http://au.int/en/sites/default/files/Welfare%20of%20the%20Child_0.pdf) (accessed on 11 September 2014).

<sup>31</sup> LL Rose *Children's property an inheritance rights and their livelihoods: The context of HIV in Southern and East Africa* Livelihoods support program (2006) 9.

Is the practice on the ground in conformity with the DRC international obligations? If not, why and what needs to be done?

#### 1.4 Assumptions of the study

The study will be supported by the law on the rights of children and the rules, treaties and regulations related to the people living with HIV and those who have acquired Immunodeficiency Syndrome (AIDS). At the international level, the UN Declaration on the Rights of the Child (UNDRC) declares in the Preamble that children need “special safeguards and care, including appropriate legal protection, before as well as after birth.” It calls upon voluntary organizations and local authorities to strive for the observance of children’s rights.<sup>32</sup> Following this declaration, the CRC as the most comprehensive document on the rights of children, clarified children’s right to property, which was adopted in November 1989 and it entered into force in September 1990.

At the regional level, the ACRWC is the first regional treaty on children’s rights. It was adopted by the Organisation of African Unity in 1990. It has most of its provisions modelled after the provisions of the CRC. The main difference is on the existence of provisions concerning children’s duties (article 31), which is in line with the ACHPR.<sup>33</sup> The Preamble of the ACRWC says that “the child occupies a unique and privileged position in the African society” and requires legal protection as well as “particular care with regard to health, physical, mental, moral and social development.” And also as article 21 of the ACRWC prescribes, children should also be protected against all forms of harmful social and cultural practices.

At the national level, the DRC had the law of 1950 on the juvenile delinquency.<sup>34</sup> Today it is not applicable anymore because of the non-conformity of some of its provisions with the international and regional standards of protection of the minors and with the constitution of the DRC. The DRC has now a law on the protection of children<sup>35</sup> which entered into force on

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<sup>32</sup> W Zeldin *International Laws: Children’s Right* The Law Library of Congress (2007) 2.

<sup>33</sup> Zeldin (n 32 above) 5.

<sup>34</sup> Law on the juvenile delinquency of 6 December 1950.

<sup>35</sup> Law on protection of the child.

10 December 2009. As part of the global effort to combat the HIV/AIDS pandemic, the DRC passed the law 08/011 of 14 July 2008 which protects rights of people living with HIV.

## **1.5 Research methodology**

This study will use a literature screening on inheritance rights of children living with HIV/AIDS. Literature screening will be done on published documents on inheritance rights at the international, regional and domestic level. This study will review some key international instruments, the domestic laws, the doctrine (books, journals, articles, etc.), some jurisprudence, etc. An overview will be carried out on what the law says in terms of the State's obligations and the way they have been implemented in line with international and national laws on the inheritance right of children living with and affected by HIV/AIDS.

## **1.6 Literature review**

Literature on the obligation to protect and promote the inheritance rights of children living with and affected by HIV is scarce. In the context of the DRC people write on inheritance right, but not especially on DRC's inheritance right of children living with and affected by HIV. However, at the international level there are some authors who examined this issue precisely in Southern and Eastern Africa. For instance Foster and William stressed that in some societies the relatives who have a right to claim a child through purposive fostering have an obligation at times of crisis to accept the role of foster parents. Fostering by non-relatives is uncommon; the prevalence of such fostering, the reasons for it and hindrances to it has received limited study.<sup>36</sup> Moreover, it is important to mention that succession planning involves the extended family and traditional leaders to ensure that they will comply with the parents' wishes. Wills might need to be written to protect land and possessions for children. Legal action might need to be taken through external agencies to protect children whose assets and inheritance are forcibly removed by extended family. This is simply because when

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<sup>36</sup> Foster & Williamson (n 12 above) s279.

a father dies, he leaves the mother and the children without a home; and especially when marriage rites have not been completed and when the next of kin are not close.<sup>37</sup>

According to Sloth-Nielsen, inheritance has been an arena of legislative activity in Southern and Eastern African countries since the late 1990s. This has come about because of the increasing dispossession of women and children of land and homes, often resulting from the death of the male relative due to HIV/AIDS. Customary inheritance laws generally operate to disallow inheritance by widows and children, it is generally only the eldest male relative who takes over the estate (who may or may not be a child). In practice, property grabbing was a frequent occurrence, leaving children landless and destitute.<sup>38</sup>

## 1.7 Limitations of the study

This study will cover the issue of inheritance of children especially those who are HIV positive and are affected by HIV in the areas of DRC and precisely in the city of Lubumbashi in the province of Katanga. However data can also be collected from other studies in the whole of DRC. Even though the main focus area is in the province of Katanga, this study will provide a good understanding of inheritance rights in this area and at the same time it will reflect what is going on in the whole of DRC. The study will analyse the international, regional and national laws regarding inheritance rights and the HIV law.

## 1.8 Overview of Chapters

This study will be divided into four chapters. The chapter one will be the introduction, chapter two will deal with The Protection of the inheritance right of children living with HIV at the international and regional level, Chapter 3 will present the DRC's Protection of the

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<sup>37</sup> L Richta et al 'Family and community interventions for children Affected Aids', HSRC (2004) 41.

<sup>38</sup> JN Sloth *A developing Dialogue – children's rights, children's law and economics: surveying experiences from southern and eastern African law reform processes*, vol. 12.3 Electronic Journal of Comparative Law, (December 2008), <http://www.ejcl.org/123/art123-5.pdf>.



inheritance right of children living with HIV at the national level and the last chapter which is chapter four will conclude and give recommendations.

## CHAPTER 2 THE PROTECTION OF THE INHERITANCE RIGHTS OF CHILDREN LIVING WITH OR AFFECTED BY HIV AT THE INTERNATIONAL AND REGIONAL LEVEL

### 2.1 Introduction

DRC is a monist country and international law therefore automatically forms part of the Congolese law. In terms the constitution of the DRC it is in fact considered higher than domestic law in the hierarchy of laws. Consequently, a study of the international norms and principles relating to the protection of the inheritance rights of children living with or affected by HIV is very important.

HIV /AIDS require national governments to reconsider property and inheritance laws in relation to families, individuals, and communities to cope with economic instability related to epidemic related mortality and morbidity. Additionally, where property and inheritance laws are discriminatory, they may perpetuate exposure to HIV and limit the ability of people living with HIV to seek care, support, and treatment.<sup>39</sup> States have three obligations regarding human rights: the obligation to respect, protect and implement human rights. These three levels of obligations apply indiscriminately to all the rights and require of states a combination of negative and positive duties. In this regards, the government has<sup>40</sup>: (1) the obligation to respect human rights which places upon the State the constant duty to refrain from any action that would prevent the peaceful enjoyment of human rights. (2) The obligation to protect the rights which requires the state to take all necessary measures to prevent human rights violations both by itself and by third parties by establishing monitoring mechanisms. (3) The obligation to implement human rights requires the State to take positive measures to facilitate the exercise and enjoyment of human rights in times intervening on behalf of vulnerable groups in case of a crisis.

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<sup>39</sup> A Ahmed *Property and Inheritance Laws: The Impact on Women and OVC in the Context of HIV*. Working Paper prepared for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, 7-9 July 2011.

<sup>40</sup> African Commission on Human and Peoples' Rights (2008), in *recueils africains des décisions des droits humains* 2001, Pretoria University Law Press 70.

In response to HIV, the international community established a global framework for the protection, care and support of orphans and vulnerable children living in the world with HIV.<sup>41</sup> The focus of this framework is on the social protection of children which included protection of their property and inheritance rights. It invited every society to take on the responsibility of ensuring children's property and inheritance rights for the sake of their livelihood.<sup>42</sup>

The protection of the rights of children at the international and regional level are better described by the UN Convention on the Rights of the Child (CRC),<sup>43</sup> the African Charter on the Rights and Welfare of the Child (ACRWC),<sup>44</sup> where the best interest of the child is illustrated. In addition, there are other laws, treaties and conventions that are very useful in this matter, such as the Declaration of the Rights of the Child. In the preamble of this declaration, it is stipulated that children need special safeguards and care, including an appropriate legal protection before as well as after birth.<sup>45</sup> Included among the international and regional instruments are the Declaration of Commitment on HIV/AIDS, the International Guideline on HIV/AIDS, the General Comment n° 3 on HIV/AIDS and the Rights of the Child and the African Women's Rights Protocol.

This study will not examine all the instruments listed above but rather it will examine a few more deeply.

## **2.2 At the International level**

At the international level, this study will look at the CRC which talks about the best interest of the child, the Declaration of Commitment on HIV/AIDS and the CRC's General Comment n°3 of 2003 on HIV/AIDS and the rights of the child with specific explanations on HIV/AIDS and the child's rights.

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<sup>41</sup> The framework for the protection, care and support of orphans and vulnerable children living in the world with HIV/AIDS (2004). Available at [http://www.unicef.org/ceecis/Framework\\_English.pdf](http://www.unicef.org/ceecis/Framework_English.pdf).

<sup>42</sup> Rose (n 31 above) 4.

<sup>43</sup> Article 3(1) of CRC.

<sup>44</sup> Article 4 of the ACRWC.

<sup>45</sup> The preamble of the UN Declaration of the Rights of the Child.

### 2.2.1 Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child is the first international legally binding instrument to incorporate the full range of human rights-civil, cultural, economic, political and social. By agreeing to honour the obligations under the CRC (by ratifying or acceding to it), governments pledged to defend and guarantee the rights of children, and to meet these commitments before the international community.

The CRC is an important international convention on the rights of the child. It does not mention the inheritance rights of children nor does it have specific provisions on children living with HIV; however in its article 3(1) it is stated that :

in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>46</sup>

The best interest of the child is a very important provision and principle since if a person holds this principle at the centre of his/her involvement with a child, it is very difficult to harm that child. However, the CRC neither offers a precise definition nor clearly outlines common factors related to the best interest of the child. This Committee made its General Comment on the best interest of the Child to clarify the normative contents of specific rights provided for under the CRC or particular themes of relevance to the Convention, as well as offers guidance about practical measures of implementation.<sup>47</sup>

Preliminary works of the CRC provide reasons why the best interest of the child is important and how it has to be “a” primary consideration and not “the” primary consideration.<sup>48</sup> This wording reflects the fact that there may be conflicting rights and interests in decision-making regarding children so their best interests may not necessarily always be “the” primary consideration. Statements from the CRC article 3(1) may also be construed to refer to proceedings that concern the child but within which the child is not and should not be the

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<sup>46</sup> Article 3(1) of the CRC.

<sup>47</sup> CRC General Comment on the best interest of the Child in <https://www.crin.org/en/library/publications/crc-general-comment-best-interests-child> (accessed on 05 September 2014).

<sup>48</sup> Para graph 24 of the CRD Travaux Préparatoires and paragraph 121 of the said travaux préparatoires.

primary actor.<sup>49</sup> For example divorce proceedings which concern the child but where in certain aspects the two adults are the centre of the proceedings but when it relates to the decisions that affect the child, the best interest of the child principle should be applied. This means that the use and application of the *best interest* depends of the circumstances and context. But, the CRC requires that in all situations that concern decisions relating to children, the best interest of the child must be a primary consideration.

The general comment on the best interest of the child is a dynamic concept which encompasses various issues continuously.<sup>50</sup> The main objective is to strengthen the understanding and application of the rights of children where their best interests are assessed and taken as a primary consideration. The overall objective is to promote a real change in attitudes leading to the full respect of children as rights holders.<sup>51</sup>

The CRC committee stated that this principle applies to all actions concerning children and requires active measures to protect and promote children's rights and their survival, growth and well-being.<sup>52</sup>

The preamble of the CRC takes into account the importance of the traditions and cultural values of each people for the protection and harmonious development of the child. Furthermore, it considered that the best interest of the child should be a primary consideration.<sup>53</sup>

Principles of equality and non-discrimination are set out in article 2 of the CRC says that:

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

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

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<sup>49</sup> T Collin, L Pearson *What does the "Best Interest of the Child" mean on* [http://www3.carleton.ca/landonpearson/htmlfiles/hill/17\\_hm\\_files/Committee-e/Tara-ABestInterests.pdf](http://www3.carleton.ca/landonpearson/htmlfiles/hill/17_hm_files/Committee-e/Tara-ABestInterests.pdf) (accessed on 18 August 2014).

<sup>50</sup> CRC general Comment on the Best Interest of the Child (n 51 above).

<sup>51</sup> See n 51 above.

<sup>52</sup> General Comment n° 7 of the CRC committee.

<sup>53</sup> CRC preamble.

While the CRC does not specifically refer to children living with or affected by HIV, this article suggests that specific measures should be taken to ensure that these children are protected against all forms of discrimination, arguably including discrimination and stigma on the basis of their HIV status.

States parties to the Convention are required to design and implement policies and measures that take into account the best interests of the child.<sup>54</sup> National child protection systems usually include strict procedural safeguards to identify the best interests of the child before taking certain major decisions. Such decisions can normally only be taken by competent national authorities, such as the judiciary, and are subject to procedural safeguards foreseen by law.<sup>55</sup>

As stated earlier, the DRC ratified and is therefore a party to the CRC since September 1990.<sup>56</sup> One of the key principles in the DRC is that a ‘child has to enjoy special protection as well as opportunities and facilities, by law and by other means. The paramount consideration in enacting laws is the best interest of the child as a standard echoed throughout legal instruments on children’s right’.<sup>57</sup> Among DRC principles, every child has a right to inherit his or her parents’ property.<sup>58</sup> Article 7 of the DRC’s law on the protection of people living with HIV and those affected states that individuals living with HIV/AIDS and those infected have the entire legal power and rights recognised by the Constitution, Law and rules of the Republic.<sup>59</sup> The best interest principle cannot be used in proceedings to advance limited, paternalistic approaches as in the past. As described in this paper, it requires a rights-based approach to children to counteract the promotion for needs-based or child-serving perspective.<sup>60</sup>

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<sup>54</sup> <http://www.unicef.fr/contenu/info-humanitaire-unicef/la-convention-internationale-des-droits-de-lenfant> (accessed on 20 August 2014).

<sup>55</sup> <http://www.unhcr.org/4566b16b2.pdf> UNHCR guide line on Best Interest of the Child.

<sup>56</sup> UN collection of treaties on [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=fr](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=fr) (accessed on 18 August 2014).

<sup>57</sup> Z Wendy *International laws children’s right* The law library of congress (2007) 2.

<sup>58</sup> Article 758 (a) of the DRC family code.

<sup>59</sup> Article 7 of the law n° 08/011 of 14 July 2008 on the protection of people living with HIV and those affected.

<sup>60</sup> Collins, Pearson ( n 53 above).

### 2.2.1.1 CRC General Comment n° 3: HIV/AIDS and the Rights of the child

General Comment 3 of the CRC highlights that the HIV/AIDS epidemic has considerably changed the world in which children live. This epidemic impacts on the daily life of children, and increases the victimization and marginalization of children, especially those living in particularly difficult circumstances.<sup>61</sup> Initially children were considered to be only marginally affected by the epidemic. In most regions of the world, the vast majority of infected women do not know that they are infected and may unknowingly infect their children.<sup>62</sup> All children can be rendered vulnerable by the particular circumstances of their lives, especially children who are themselves HIV-infected or children who are affected by the epidemic. Because of the loss of a parental caregiver, their families or communities are severely strained by its consequences.<sup>63</sup>

It also suggests that special attention must be given to children orphaned by AIDS, including those affected and their families, as this impacts on vulnerability to HIV infection.<sup>64</sup> For children from families affected by HIV/AIDS, the stigmatization and social isolation experienced, may be accentuated by the neglect or violation of their rights, in particular discrimination resulting in a decrease or loss of access to education, health and social services.

The aim of the CRC is to underline the principle of prevention, care, treatment and provide it continuum within an effective response to HIV/AIDS. In this regard, the committee works for the legal, economic and social protection of affected children for their access to education, inheritance, shelter and health and social services.<sup>65</sup> The Committee emphasizes the critical implications of proof of identity for children affected by HIV/AIDS. This is related to securing recognition as a person before the law, safeguarding the protection of rights, in particular to inheritance, education, health and other social services. It makes children less vulnerable to abuse and exploitation, particularly if separated from their families due to illness or death.<sup>66</sup>

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<sup>61</sup> Committee on the Rights of the Child, General Comment n° 3, HIV/AIDS and the rights of the child, U.N.DOC.CRC/GC/2003/3 (2003) see <http://www1.umn.edu/humanrts/crc/comment3.htm>, Para 1.

<sup>62</sup> See n 61 above Para 2.

<sup>63</sup> See n 61 above Para 3.

<sup>64</sup> See n 61 above Para 31.

<sup>65</sup> See n 61 above Para 1.

<sup>66</sup> See n 61 above, Para 32.

Furthermore, States parties are reminded to ensure that not only the law but also the practice supports the inheritance and property rights of orphans, with particular attention to the underlying gender-based discrimination which may interfere with the fulfilment of these rights.<sup>67</sup>

In its 17<sup>th</sup> Session (1998), the Committee on the Rights of the Child held a day of general discussion on the theme of HIV/AIDS and children's rights in which it recommended a number of actions to be taken including facilitating the engagement of States parties on HIV/AIDS, issues in relation to the rights of the child.<sup>68</sup>

### **2.2.2 The Declaration of Commitments on HIV/AIDS**

The Declaration of Commitment on HIV/AIDS describes in its preamble (paragraphs 1–36), the extent of the HIV/AIDS epidemic, the effects it has and the ways to combat it.<sup>69</sup> This Declaration then states what governments have pledged to do - themselves, with others through international and regional partnerships, and with the support of civil society - to reverse the epidemic.<sup>70</sup> The declaration is not a legally binding document. However, it is a clear statement signed by governments concerning an agreement on the way the HIV/AIDS epidemic should be addressed and what they have committed to do, often with specific deadlines. As such, the Declaration is a powerful tool to guide and secure action, commitment, support and resources for all those fighting the epidemic, both within and outside government.<sup>71</sup> Paragraph 58 of the Declaration of Commitment on HIV/AIDS requires governments to enact, strengthen or enforce regulations and other measures, by 2003, such as appropriate legislation, to eliminate all forms of discrimination. It seeks to ensure the full enjoyment of all human rights and fundamental freedoms by people living

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<sup>67</sup> See n 61 above, Para 33.

<sup>68</sup> Committee on the rights of the child general comment n° 3 (2003) 1.

<sup>69</sup> The preamble of the Declaration of Commitment on HIV/AIDS, in its paragraphs 1–36.

<sup>70</sup> Keeping the promise, summary of the Declaration of commitment see [http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/report/2002/jc668-keepingpromise\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/report/2002/jc668-keepingpromise_en.pdf), (accessed on 21 August 2014).

<sup>71</sup> See n 69 above.



with HIV/AIDS and emphasised that human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS.<sup>72</sup>

For any members of vulnerable groups, it suggests that states should ensure that they have access to; *inter alia*, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection. It is respecting their privacy and confidentiality; and it develops strategies to combat stigma and social exclusion connected with the epidemic.<sup>73</sup> All these documents insist on the respect of human rights.

The Declaration of Commitment on HIV/AIDS developed a national target to achieve by 2005 in terms of which national policies and strategies need to be implemented to build and strengthen governmental, family and community capacities to provide a supportive environment for orphans and girls and boys infected and affected by HIV/AIDS. The Declaration also aims to protect orphans and vulnerable children from all forms of abuse, violence, exploitation, discrimination, trafficking and loss of inheritance.<sup>74</sup> Moreover, it aims to develop and accelerate implementation of national strategies for women's empowerment, promotion, protection and full enjoyment of all human rights and reduction of their vulnerability to HIV/AIDS. Lastly, this declaration protects women through the elimination of all forms of discrimination, including harmful traditional and customary practices and suggests that children orphaned and affected by HIV/AIDS need special assistance.<sup>75</sup>

### 2.3 At the regional level

At the regional level, the African Charter on the Rights and Welfare of the Child has been discussed based on the best interest on the child. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol) has also been examined particularly regarding the right to inherit property for women and girls.

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<sup>72</sup> Declaration of the Commitment of HIV/AIDS see <http://www.un.org/ga/aids/docs/aress262.pdf> (accessed on 21 August 2014).

<sup>73</sup> See n 71 above Para 58.

<sup>74</sup> See n 71 above Para 65.

<sup>75</sup> See n 71 above Para 61.

### **2.3.1 The African Charter on the Rights and Welfare of Children (ACRWC)**

The African Charter on the Rights and Welfare of the Child is the first and the only regional treaty on the rights of the child. It is also the most important instrument for children's rights within the AU human rights system<sup>76</sup> being the only treaty body dealing with the rights of the child and it has a complaints procedure. Like the CRC, the ACRWC is a comprehensive instrument that sets out rights and defines universal principles and norms for the status of children.<sup>77</sup>

This document does not make provision for inheritance rights of children as mentioned before. But as the CRC, it mentions the principle of the best interest of the child. In the article 4(1) of the ACRWC, it is said that

'in all action concerning the child undertaken by any person or authority, the best interest of the child shall be the primary consideration.'<sup>78</sup>

Furthermore, it requires that any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the ACRWC shall, to the extent of such inconsistency, be discouraged.<sup>79</sup> Every child shall be entitled to the enjoyment of the rights and freedom recognized and guaranteed in this Charter, irrespective of the child's or his/her parents' or legal guardians', race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.<sup>80</sup>

### **2.3.2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The African Women's Rights Protocol)**

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa also referred to as the Maputo Protocol, is a legally binding multilateral supplement to the African Charter on Human and Peoples' Rights. It was adopted in July 2003 by the

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<sup>76</sup> Advancing children's rights, A guide for civil society organisation on how to engage with the African committee of expert on the rights on welfare of the child.

<http://www.actogether.mu/photo%5Cinfoutiles%5Cpdf%5C88.pdf> (accessed on 20 August 2014)

<sup>77</sup> ACRWC [http://en.wikipedia.org/wiki/African\\_Charter\\_on\\_the\\_Rights\\_and\\_Welfare\\_of\\_the\\_Child](http://en.wikipedia.org/wiki/African_Charter_on_the_Rights_and_Welfare_of_the_Child) (accessed on 18 August 2014).

<sup>78</sup> Article 4(1) of the ACRWC.

<sup>79</sup> Article 1(3) of the ACRWC.

<sup>80</sup> Article 3 of the ACRWC.

African Union Assembly of heads of state and government and entered into force on November 2005.<sup>81</sup> The DRC has ratified this protocol on 9 June 2008 by the law n° 06/015. In Article 1(K) of the Maputo Protocol, it is stated that:

Women” mean persons of female gender, including girls.

Therefore, female children have been taken into account in this protocol.

In the Maputo Protocol the inheritance rights of women are mentioned in article 21 which states that

(1) a widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

(2) Women and men shall have the right to inherit, in equitable shares, their parents' properties.<sup>82</sup>

This article clearly aims to ensure that state parties take steps to protect the rights of women and particularly the girl-child to inherit their parents' property.

The United Nations Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child of the Organisations for African Unity (1999) both identified the role of the state in protecting children. Legally recognised national child protection systems are a starting point and states should be encouraged to establish mechanisms to ensure the protection of children. In practice, effective child protection requires compulsory training and clarity of responsibility for personnel involved in organisations working with children, complemented by a set of policies and guidelines relevant to their work. However, the interpretation of the concept “the best interests of the child” may be strongly affected by culture, such issues as child custody, female circumcision, child marriage, arranged marriage, work, and education. This cannot trump other CRC articles and allow for damaging traditional practices or violent punishments.

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<sup>81</sup> F Viljoen ‘An introduction to the Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa see on <http://law.wlu.edu/deptimages/Journal%20of%20Civil%20Rights%20and%20Social%20Justice/Frans%20Viljoen.pdf> (accessed on 20 August 2014).

<sup>82</sup> Article 21 of the African Women Protocol (the Maputo Charter).

It is clear from the above that at an international and regional level, through binding legal instruments and through soft law, there is recognition of the importance of protecting the inheritance rights of children infected with and affected by HIV and that states have binding legal obligations to respect, protect and implement these rights.

## CHAPTER 3 PROTECTION OF THE INHERITANCE RIGHTS OF CHILDREN LIVING WITH OR AFFECTED BY HIV AT THE NATIONAL LEVEL

### 3.1. The DRC's national law

#### 3.1.1 Introduction

This chapter will discuss the law and practice relating to the inheritance rights of children living or affected by HIV in the DRC. At first, this chapter will analyze the laws on the protection of inheritance rights of children living with HIV and those affected nationally. It will examine the Constitution, the Law on Child Protection,<sup>83</sup> the Family Code,<sup>84</sup> and the law on people living with HIV and those affected.<sup>85</sup> It will also examine both social and practical considerations of children living with HIV and those affected. The discussion will also focus on what happens in practice regarding children.

It is important to note that in the DRC, there is no difference between children living with HIV and those affected and children who are not HIV positive and not affected with respect to the constitution, the law of succession and the law on child protection. These laws are applicable to any child without discrimination.<sup>86</sup>

The DRC Constitution<sup>87</sup> aims to reaffirm the commitment of the country to human rights and fundamental freedoms as proclaimed by international legal instruments to which it is a party. The country has incorporated these rights and freedoms in the body of the Constitution.<sup>88</sup> As stated above, it must be emphasised that in the hierarchy of laws in the DRC, international law takes precedence over all national laws; thereafter the constitution is the supreme law then comes other national laws at the end.

#### 3.1.2 The Constitution of the DRC, of 18 February 2006

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<sup>83</sup> The Law n° 09/001 of 10 January 2009 on the protection of children.

<sup>84</sup> The law n° 87 – 010 of 01 August 1987 on family code.

<sup>85</sup> The Law 08/001 of 14 July 2008 on the protection of the rights of people living with HIV / AIDS and those affected.

<sup>86</sup> See the definition of the child (n 2, 3, 4, above).

<sup>87</sup> The Constitution of the DRC, of 18 February 2006.

<sup>88</sup> Exposé des motifs of the DRC's constitution.

The Constitution of the DRC recognises the importance of children in Article 41. It begins by resolving a doctrinal controversy regarding the definition of a child by clearly stating in Article 41 (1) that “A minor child is a person of one or the other gender, who has not yet reached 18 years of age.<sup>89</sup>” Moreover, Article 41(3) states that the child has a right to enjoy the protection of his family, of the society and of the state. Abandonment and mistreatment of children is punishable by law in terms of article 41(4). Importantly, article 41(6) imposes an obligation on the state to ensure the protection of children in difficult situations. In addition, article 41(7) makes any form of exploitation of minor children punishable by law.

Finally, Article 122 (5) confirms that existing law regulates to among things succession and inheritance rights while 123(16) requires the government to promulgate new laws to protect specific vulnerable groups.

### **3.1.3 The Law n° 09/001 of 10 January 2009 on the protection of children.**

In the preamble to the law on the protection of the child reference is made to Article 123(16) of the Constitution of the DRC as the basis upon which this law on child protection is founded. The preamble further highlights that children in the DRC have a central place in society and represent in a sense the renewal of the human being and life itself. It goes on to emphasise that the DRC has chosen to make child protection an important priority that demands proactive action to particularly address the minimum age of work and prohibition of the worst forms of work under the ILO conventions 138 and 182 respectively.

The preamble further recognises that despite many efforts many children are still being mistreated, discriminated against, accused of witchcraft, infected or affected by HIV or trafficked.

More relevant to this study, it also highlights that many children are also deprived of their inheritance rights, health care and education and that even worse, many children live on the street, are victims of social exclusion, economic and sexual exploitation and some are also

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<sup>89</sup> Article 41 of the DRC’s Constitution.

recruited into armed groups. Within that context, this law is meant to protect the child in a comprehensive manner.<sup>90</sup>

The law begins in Article 2 with a definition of the child in general and then goes on to define more specifically seven other categories of children. “Article 2(1) states that a child is any person under the age of eighteen years.”<sup>91</sup> Relevant to this study, the law also defines children in difficult circumstances under Article 2(4), children in exceptional circumstances under Article 2(5) and separated children under Article 2(7).

Chapter 2 of the law addresses social protection and strives to provide a legal framework in order to safeguard the child’s interests.

In accordance with the CRC and Children’s Rights this Law on child protection advocates for the best interests of the child in Article 6(1), which states that: The best interests of the child shall be a primary concern in all decisions and actions taken against him. This article goes on to give a definition to the best interests of the child in the sense that, by the child’s best interest, it means to safeguard and to focus on the child’s rights at any cost.<sup>92</sup>

The child’s moral, emotional and physical needs, the family environment and the various aspects of the child’s situation are considered together.<sup>93</sup>

Article 62 lists specific categories of children that need special protection and mentions orphans in Article 62(12).

Furthermore and very relevant to this study, Articles 163 to 168 of the Law on Child Protection protects the property of the child by punishing anyone who steals (Article 163), destroys (Article 165), sells (Article 166), or embezzles (168) property that is known to belong to a child with terms of imprisonment and/or fines.<sup>94</sup> It also protects the child from people who try to scam or mislead children generally and particularly with respect to their property (Article 167)

It is clear from the above that the law has very strong intentions to protect children as can be seen from the preamble and certain specific provisions listed above. However in Article 62, while it suggests that certain children need special protection it does not state specifically

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<sup>90</sup> Preamble of the law on the DRC’s child protection.

<sup>92</sup> Article 6 ( 2) of the Law on the child protection.

<sup>93</sup> Article 6 (3) of the Law on the Child protection.

<sup>94</sup> Article 103 of the Law on the child protection.

who bears the obligation to protect children. Furthermore, the law does not address the specific issue of the inheritance rights of children although it does regulate aspects relating to the child's property and did mention it in the preamble.

### 3.1.4 The Law n° 87 – 010 of 01 August 1987 on Congolese Family Code

Under the first book of the Civil Code, which was later repealed by the Family Code, the acquisition of legal personality, which is the ability to be a subject of rights and obligations, requires the satisfaction of two conditions: to be born alive as the first condition and to be viable as the second condition. Kifwabala adds and says that being alive at birth for a human being will not produce effect unless the born baby is not affected by a malformation that would condemn it to not survive or live at its birth.<sup>95</sup> So, some would have thought that being born viable meant therefore to be born with all the necessary organs and be built enough to live that is to say physiologically capable of surviving.<sup>96</sup> The consequence is that a child who has contracted HIV at birth and who has lost his/her mother after birth is considered non-viable. He/She would thus be deprived of his/her share of the inheritance, arguing that it is useless for him/her to inherit since his/her death would be inevitable. Fortunately, this way of understanding the situation has been abandoned by the Family Code.

The legislator no longer considers viability as one of the conditions for obtaining legal personality. There is only just the need to be born alive and that is it. From this point of view, a child living with HIV has the right not only to inherit, but also to get a share equal to the share of all other co-heirs. This child should not suffer from any discrimination. As mentioned earlier, the protection of the inheritance of the child excludes the viability as a condition for a child to inherit.

In the DRC there are two ways to inherit: the inheritance by testament or will of the deceased person (made by him or her) and the legal inheritance where there is no testament or will (made by the law).<sup>97</sup> If the deceased did not leave a will, one is subject to the principles stipulated in the Family Code when determining who the heirs are and how the property

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<sup>95</sup> K Tekilazaya *Congolese Civil Law, people, disabilities, family* (2008) Lubumbashi University Press 37.

<sup>96</sup> T Bernard *people civil Law* (2005) 9th edition, Litec, Paris 4.

<sup>97</sup> Article 757 of the Family Code.



should be shared among them. Moreover, even if the deceased did leave a will, the Family Code provides certain rules regarding what can and cannot be contained in the will. For example a parent may not disinherit a child<sup>98</sup> and neither can that parent provide more for one child than another as will be seen more fully below.<sup>99</sup> The Family Code includes the categorization of heirs and the reserved share for children.

#### **3.1.4.1 The categorization of heirs in the legal inheritance**

Under the Congolese law, children<sup>100</sup> of the deceased born in wedlock and those born out of wedlock but in his or her lifetime, and the children he or she adopted, form the first category of heirs of the estate.<sup>101</sup> It should be noted that in the specific context of succession, the term child does not necessarily mean a minor child but refers to a person who is a biological or adoptive child of a parent. The surviving spouse, fathers and mothers, full or half siblings form the second category of heirs of the estate.<sup>102</sup> Paternal uncles and aunts form the third category of heirs of the estate.<sup>103</sup> This categorization of heirs aims at providing greater protection for the children who belong to the first category because they are the primary beneficiaries of the estate.

#### **3.1.4.2 The reserved share**

Article 759 stipulates that three quarters of the whole estate subject to succession is reserved for the first category being the children of the deceased. Article 759 of the Family Code goes further and lays down the rule that "sharing is done by equal portions between them (co-heirs) and by representation between their descendants.

It is true that everyone has the right to decide in his/her will on his/her acquired estates; but it is equally true that this provision cannot change the share that the legislator imposes to leave to heirs. In the Congolese Law, Article 779 of the Family Code provides that: "The proportionate share to the heirs of the first category cannot be changed by the text of the will

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<sup>98</sup> It should be noted that legal doctrine in the DRC does suggest that a parent may disinherit a child who has or has attempted to cause grave harm to the parent/s or the parents property.

<sup>99</sup> The family Code book IV on succession and liberality, the chapter II on the general rules of the legal succession.

<sup>100</sup> It should be noted that in the specific context of succession, the term child does not necessarily mean minor but everyone caught in its relationship with its parent or adopter.

<sup>101</sup> Article 758(1) of the Family code.

<sup>102</sup> Article 758(2) of the Family code.

<sup>103</sup> Article 758(3) of the Family code.

of the deceased established in favour of the heirs of the other categories or other universal or particular legatees." The reserved share is a fundamental element of the succession and inheritance right and it is an instrument of equality between the heirs and ensures equality between co-heirs.<sup>104</sup> So, legally the heirs of the first category<sup>105</sup> receive the three quarters of the whole estate subject to succession.<sup>106</sup>

In summary, according to the Family Code, a child who has just been conceived, or a child who is infected by HIV is entitled to the same share of inheritance as the eldest heir, even if the latter is married and has therefore more responsibility and perhaps more people to take care off. Moreover, children who belong to the first category of heirs and have a reserved share of three quarters of the estate which cannot be adjusted even in a will. It can therefore be concluded that the Family Code offers strong protection to children in general, and while not specifically mentioned, to children living with or affected by HIV as well.

### **3.1.5 The Law 08/001 of 14 July 2008 on the protection of the rights of people living with HIV / AIDS and those affected.**

The Law 08/001 of 14 July 2008 on the protection of the rights of people living with HIV/AIDS (HIV Law) and those affected aims to set fundamental principles on the protection of the rights of people living with HIV and those affected.<sup>107</sup> In Article 2(4) this law defines a child in exactly the same terms as the law on child protection analysed above. Moreover, in Article 2(6) of the HIV Law, street children are mentioned as a particular vulnerable group. Apart from this, there is no specific mention of children and further there is no specific discussion in this HIV Law on the inheritance rights of children living with or affected by HIV.

However, children living with or affected by HIV are also covered by the general and specific protections offered under this law because of their HIV status. This protection has three

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<sup>104</sup> Katshung (see n 27 above) 69.

<sup>105</sup> Which is the category of the children.

<sup>106</sup> Article 759 of the Family Code.

<sup>107</sup> Article 1 of the Law on the protection of the rights of people living with HIV/AIDS and those affected.

major principles: the fight against all forms of stigmatization,<sup>108</sup> the fight against all forms of discrimination and the rule of confidentiality.

### **3.1.5.1 The fight against all forms of stigmatization**

Stigmatization is an act or any behaviour that intend to discredit, scorn or ridicule a person living with HIV / AIDS, his sexual partners, relatives, children or parents because of his/her proven or suspected HIV status.<sup>109</sup> The DRC's law on the protection of the rights of people living with HIV/AIDS and those affected repeats over and over again the principle of non-stigmatization of people living with HIV/AIDS and those affected in health care settings,<sup>110</sup> in educational environment,<sup>111</sup> in the workplace,<sup>112</sup> in religious circles,<sup>113</sup> etc. It can be argued that this principle includes non-stigmatisation of children living with or affected by HIV in the family context and particularly labelling them and suggesting that they will die anyway and so they should not be entitled to inherit their parent's property.

### **3.1.5.2 The fight against all forms of discrimination**

The law on the protection of the rights of people living with HIV/AIDS defines discrimination as any distinction, any restriction or any exclusion of a person living with HIV/AIDS, his sexual partners, his children or any of his parents because of his/her real or perceived HIV status.<sup>114</sup> Consequently, children living with or affected by HIV should not be discriminated in law or in practice due to their real or perceived HIV status and the state has an obligation to protect the child from such discrimination under this law and the other laws discussed above, particularly with respect to enforcing their right to inherit equal shares of their parent's estate based on them falling within the first category of heirs.

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<sup>108</sup> Article 4 of the law on the protection of the rights of people living with HIV and those affected.

<sup>109</sup> Article 3 of the Law on the protection of the rights of people living with HIV and those affected.

<sup>110</sup> Article 10 of the Law on the protection of the rights of people living with HIV and those affected.

<sup>111</sup> Article 15 for cases where the child could be HIV positive.

<sup>112</sup> Article 20 of the Law on the protection of the rights of people living with HIV and those affected.

<sup>113</sup> Article 31 of the Law on the protection of the rights of people living with HIV and those affected.

<sup>114</sup> See n 108 above.

### 3.1.5.3 The privacy rule

People living with HIV / AIDS including children have the right to have the confidentiality of their status preserved. This is clear from Articles 17 and 39 of the HIV Law. It should be noted that the need for confidentiality is also governed by Article 43 which provides for criminal sanctions for unlawful breach of confidentiality. The state's obligation to enforce this provision will deter people from breaching the provision and it could thereby protect children living with or affected by HIV from stigma, discrimination and the consequent property grabbing.

### 3.2. DRC's social and practical consideration of children living with HIV and those affected

The reality on the ground differs a great deal from the legal framework described above. It should be noted that many laws are imported and do not necessarily derive from the practices and customs of the people they claim to govern.<sup>115</sup> The consequence of this rupture or the distance between the practices and the law is that, in practice there seems to be two parallel rights in perpetual competition and this can cause family quarrels. There is a contradiction between practice and law.

On the ground, the rights of children, especially those of the surviving spouse, are contested by the family members of the deceased. The aunts and uncle justify their attitudes by their big role in the education, the marriage, the development of their nieces and nephews, but these sacrifices do not give them all the rights that they claim, particularly the right to the child's share of the inheritance. However, in practice many of them consider themselves entitled to the share of inheritance of their nieces and nephews.<sup>116</sup> However, this material and even moral support from uncles and aunts should not be considered as an investment, so that they, in the due time, can claim a right to benefit from an inheritance. The wish of the legislator is to protect children and the surviving spouse from this type of practice.

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<sup>115</sup> MJ Sefu *the trial. For a lucid and careful reading of a court case* (2011) the Baobab 1.

<sup>116</sup> VD Weile *Customary law and its evolution in the Negro-African societies*, (1969) edition ENDA 59.

According to some point of views, AIDS is a disease from sexual permissiveness.<sup>117</sup> Taking into consideration this point of view, it completely rules out the possibility of contracting the virus through other means such as blood transfusion and the mother to child transmission at birth. People living with HIV and those affected are considered as promiscuous going from women to women or from men to men and they end up paying the heavy price for their immoral trade. Children born to parents who are HIV positive are consequently considered the result of an immoral union. Relatives who stigmatise the HIV positive parents in this manner are also likely to stigmatise the children born of such parents and therefore they might not be willing to protect the child's property from grabbing by other relatives and in fact decide to themselves grab the child's inheritance.

Many agree with Segatagara who stresses that extreme poverty is both a cause and consequence of AIDS in Africa. Poverty leads particularly many people to high vulnerability. Indeed, because of their social and financial situations, some poor people are often pushed to engage in sexual behaviours that have a high risk of contracting HIV. This is the case of sex work. Some women would even state that they would prefer to live with AIDS rather than to live with hunger.<sup>118</sup> It obviously follows from this conception that the rights of people living with HIV and those affected by may be threatened. The impact of this poverty affects many dimensions, including the levels of education of people living with HIV and the succession planning for their children. It is found in practice that more wealthy and educated people in the DRC have wills and plan for the succession of their property. In addition children from wealthy families can afford the services of lawyers to protect their rights to inherit under the law. However poor people often do not leave wills and do not plan for their children. Children born within a poor family cannot afford lawyers to assist them to enforce their right to inherit under the Family Code as discussed earlier.

Furthermore, although the Family Code specifies certain categories of heirs and even reserves three quarters of the estate for the children of the deceased, in practice it is often observed that the older people in families, principally the men, attempt to automatically replace the deceased father and take over the estate thus depriving the children of their inheritance

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<sup>117</sup> J Caldwell & P Quiggin 'The Social Context of AIDS in Sub-Saharan Africa' (Le contexte social du Sida en Afrique subsaharienne) (1989) 15(2), *Population and Development Review* 185 – 234.

<sup>118</sup> Segatagara 'The economic and social impact of the AIDS epidemic in Africa. A call for solidarity' (2007) 420 *Congo-Africa* 755.

Although the HIV law offers protection from stigmatisation, discrimination and breach of confidentiality, in practice, this law is often violated and instead people living with HIV in general and children in particular are often subject to isolation, degrading insults and discrimination.

## **Conclusion**

In this chapter, the Constitution of the DRC, the law on the protection of the child, the Family Code and the law on the protection of people living with HIV and those affected were examined. The chapter also compared the practice on the ground in DRC with the legal framework.

While the principles outlined in the Constitution provide protection to vulnerable groups and the law on the protection of the child and the HIV law arise from these principles of the Constitution, certain improvements are needed. For example, while the law on the protection of the child has very strong intentions to protect children and while Article 62 suggests that certain children need special protection it does not state specifically who bears the obligation to protect children. Furthermore, the law does not address the specific issue of the inheritance rights of children although it does regulate aspects relating to the child's property and did mention it in the preamble.

The Family Code provides very strong rules for the protection of children in general and consequently also for children living with or affected by HIV when it comes to their right to inheritance. However, while the law is strong and robust, it does not match the practice and concrete steps need to be taken to bridge the gap between the law and the reality on the ground.

## CHAPTER 4 CONCLUSIONS AND RECOMMENDATIONS

### 4.1 Conclusions

The present study aimed to look at the situation of the DRC's obligation to protect, promote and implement the inheritance rights of children living with or affected by HIV in the light of the international, regional and national law. This exercise was undertaken with a theoretical and practical approach and has led to practical proposals at the international, regional and the national levels for greater protection of children living with HIV.

Under international law, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child must be "a" primary consideration. As was stated earlier, this contrasts with the original preparatory works and with the standard within the African system which requires the best interests of the child to be "the" primary consideration.

Treaties and declaration considered women and children as well as those infected with HIV/AIDS vulnerable. By this status, they are subjected to stigmatization and social isolation, violation of their rights and discrimination, lack of access to education, health and social services. From this understanding, the human rights at international level made an appeal for the necessity of providing legal, economic and social protection to affected children to ensure their access to education, inheritance, shelter and health and social services, as well as to make them feel secure in disclosing their HIV status and that of their family members. This appeal implies the critical implications of proof of identity for children affected by HIV/AIDS, as it relates to securing recognition as a person before the law, safeguarding the protection of rights, in particular to inheritance.

Furthermore, under international law, DRC has the obligation to respect, protect and implement the inheritance rights of children living or affected by HIV. This requires the DRC to promulgate laws, ensure that there are remedies available to these children, ensure that it does not interfere in the child's enjoyment of these rights and to offer the child effective protection if his/her rights to inheritance have been violated.

This study concludes that the DRC has promulgated several laws. However some of the laws need to be amended to ensure that they fulfil the aim that they state in the preamble. For example the law on the protection of the child needs to stipulate more clearly who bears the obligation to provide special protection to the children in need of that special protection.”

If elsewhere people do not, generally speaking, care about the property of the deceased, it is not the same in DRC where problems related to succession and inheritance when properties and buildings are involved clutter courts and tribunals. Family members such as uncles get involved under the umbrella of a customary law that is disregarded and finally the widows are found in the streets and the orphans find themselves without any resources, wandering in cities running after loaves of bread.

At the regional level, from article 21(1) (2) of the Maputo Protocol, the rights to inheritance are provided. Women and men shall have the right to inherit, in equitable shares, their parents' properties. In addition, the African Charter on the Rights and Welfare of the Child provides that in all action concerning the child undertaken by any person or authority, the best interest of the child shall be the primary consideration. Every child shall be entitled to the enjoyment of the rights and freedom irrespective of the child's or his/her parents' or legal guardians, race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status, which arguably includes real or perceived HIV status.

At the national level, all the discussed laws dealt with the rights of the protection of children. There were the Constitution, the Law on Child Protection, the Family Code, and the law for the protection of people living with HIV and those affected. From the Constitution, the child is considered, with the moral, emotional and physical needs of the child, the family environment and the various aspects of his situation. De facto, the child is entitled to succession and inheritance. From the point of view of the categorization of heirs, children from wedlock or out of wedlock are entitled to succession or inheritance. The share among the co-heirs is equal according to Family Code. Generally, according to the Congolese legislator, a child who has just been conceived, or the child who is infected by HIV, is entitled to the same share of inheritance as the eldest heir, even if the latter is married and has therefore more responsibility and perhaps more people to take care off.

The reality on the ground differs. There is parity in terms of different laws to be adopted. Two points arose from the discussion: (1) contradiction between practice and law, (2) HIV



which is viewed as a disease of sexual permissiveness. The consequence is in the sense that in practice there seems to be two parallel rights in perpetual competition and this can cause family quarrels that ultimately lead to the violation of the right of inheritance of a child who is living with or affected by HIV.

## **4.2 Recommendations**

The present work intended to review documents on DRC's obligations to protect and promote inheritance rights of children living with HIV at the international, regional and national level. However, practices regarding inheritance rights demonstrated to be very far from respecting those international instruments and laws in DRC. This section of the final chapter is devoted entirely to provide ways out or useful recommendations that will lead to a fruitful debate and that may be of interest to the legislature for *lege ferenda* solutions. Since there is rupture or distance between the practices and the law which could justify parallel rights in perpetual competition and family quarrels, this study presents the following recommendations:

### **International Level**

NGO's, academics and other role players should advocate for a general comment that specifically provides guidance to state parties on both the law and practice regarding inheritance rights of children living with or affected by HIV. NGO's, government, medical personnel and advocates or lawyers need to work in consortium so that the existing norms and standards adopted at the international level under the CRC's General Comment 3 regarding the rights of these children are known and applied regarding inheritance and succession.

### **Regional Level**

Advocacy by academics, non-governmental organisations and other role players should be undertaken to encourage the Committee of Experts on the Rights and Welfare of the Child to undertake a mission to DRC to among other things make recommendations to the government of the DRC on how it can improve its response regarding the inheritance rights

of children in general, and particularly the inheritance rights of children living with or affected by HIV.

### **Domestic Level**

As practices regarding inheritance rights demonstrate to be very far from respecting those international instruments and laws in DRC, international instruments and laws in DRC, Government needs to make several recommendations. There must be the enforcement of existing laws for cases of the right to the property and inheritance, child welfare agencies and children's courts need to be established for equal protection of children under the law.

The DRC Government needs to undertake a programme of sensitisation against discrimination and stigmatization; counselling and support of these children by: Providing paralegal support and/or legal aid to children who are at risk of having their inheritance rights denied. A programme of supporting communities to identify and support children who are not connected with their land, who are not passed on customary knowledge and of educating caregivers of vulnerable children about these children's right to inheritance, and their obligations as caregivers. Supporting communities to identify and support children who are not able to identify the property that they are entitled to under the inheritance laws and to claim it. Supporting communities to identify and support children who are not aware of the relevant customary law and practice and the relevant civil law relating to their inheritance rights; educating caregivers of vulnerable children about these children's right to inheritance, and their obligations as caregivers; enforcing the existing laws by creating effective mechanisms to ensure that the Family Code relating to inheritance is respected.

Non-governmental organisations, the bar associations and lawyers need to provide legal advice and support to children in general and particularly children living with or affected by HIV on a pro bono basis. There is also a need to conduct further research on the links between children affected by HIV and AIDS and inheritance rights.

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