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Abstract

This Note proposes two alternatives to the standard use of progressive realization assessments under international human rights law. The first is to identify "key rights"-immediately enforceable civil and political rights that are so deeply intertwine with related social, economic, and political rights that enforcing the first unlocks access to the second. This strategy relies on the deep interconnection of all human rights a connection that is heightened among vulnerable populations such as Cambodian AIDS-related orphans. The second solution offered is an alternative method of conducting analysis under the progressive realization standard. Economic, social, and cultural rights can be examined and defined broadly, incorporating all the dimensions implied by the treaties that define them-for example, the formulation of the right to education includes nondiscriminatory language. This Note proposes that under the progressive realization standard, each step taken should be required to include the full breadth of that right. Using the example of education, if a step taken towards school access disproportionately leaves out a particular group, it would fail to encompass the nondiscriminatory aspect of the right to education, and violate the progressive realization standard. This Note argues that if the progressive steps a state takes to ensure and protect a right do not include the full breadth of that right-in this example, if a step taken towards educational access disproportionately leaves out a particular group-it does not meet the requirements of progressive realization. Part I of this Note will look at the law governing the rights of Cambodian AIDS-related orphans. Part II will examine the theoretical and factual context of those rights. In an attempt to provide sufficient context for progressive realization arguments, Section A will explore Cambodia's history in relation to human rights, and Section B will look at the progression of the AIDS epidemic within the country. Section C will examine the rights of AIDS-related orphans and vulnerable children in modern Cambodia. Part III will present solutions to the problem of progressive realization arguments regarding human rights in today's Cambodia.

NEW STRATEGIES FOR PROGRESSIVE REALIZATION ASSESSMENTS OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: CAMBODIAN AIDS-RELATED ORPHANS AND VULNERABLE CHILDREN AS THE HARD CASE

*Elizabeth Shura**

INTRODUCTION

Under international law, human rights are divided into civil and political rights, which place immediate obligations of result upon state parties and economic, social, and cultural rights, which are assessed by the standard known as progressive realization.[1] Progressive realization essentially contextualizes rights, allowing developing countries to work towards implementation in accordance with their resources, so long as progress continues to be made.[2]

Cambodia presents a dilemma in relation to the progressive realization standard. The human rights record of the country includes the short but murderous regime of the Khmer Rouge, during which nearly every human right was repressed, followed by thirty years of political turmoil and poverty.[3] Under the current government, although the Constitution incorporates human rights, such rights remain largely unenforceable.[4] In the

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1. *See* Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 159 (1987) (explaining categorization of rights into civil and political and economic, social, and cultural); Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 476 (2004) (describing conceptual differences and differences in obligation of civil and political rights and economic, social, and cultural rights).

2. *See infra* Part I.B (explaining the obligations of states in realizing rights that fall into each of these categories).

3. *See infra* Part II.A (summarizing political history of Cambodia, including Khmer Rouge human rights abuses, followed by failure to receive international aid).

4. *See infra* Part II.A.2 (describing adoption of Constitution, limits on effect of rights provisions).

Cambodian context, the baseline against which improvements in human rights are measured has been lowered so far that nearly any functional effort to improve realization of human rights can meet the requirements of progressive realization.[5]

Cambodia's substantial population of AIDS-related orphans and vulnerable children[6] presents a useful case study for looking at how progressive realization works against a drastically lowered human rights baseline. Cambodia has gone from having one of the highest Acquired Immune Deficiency Syndrome ("AIDS") prevalence rates in Southeast Asia to one comparable to its neighbors over the last ten years.[7] While Cambodia has achieved this success through a variety of domestic measures,[8] it also re-

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5. *See infra* Part II.A (summarizing political and human rights history of Cambodia).

6. Estimates of the number of affected Cambodian children vary widely, and are calculated using different criteria for "orphan." *Compare* NAT'L MULTI-SECTORAL ORPHANS AND VULNERABLE CHILDREN TASK FORCE, ORPHANS, CHILDREN AFFECTED BY HIV AND OTHER VULNERABLE CHILDREN IN CAMBODIA: A SITUATION AND RESPONSE ASSESSMENT 13, 15 (2007) (estimating a total of 553,000 orphans in Cambodia in 2005, defining "orphan" as child having lost one or both parents; "[n]o estimates are currently available for the number of children affected by HIV"), *with* NAT'L AIDS AUTHORITY OF CAMBODIA, MONITORING THE DECLARATION OF COMMITMENT: JANUARY 2004—DECEMBER 2005, at 11 (2005) ("There may be as many as 77,000 orphans and vulnerable children (OVC) in Cambodia, and thousands of families whose main providers are either ill or dead.").

7. *See* JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS AND WORLD HEALTH ORGANIZATION, ASIA: AIDS EPIDEMIC UPDATE: REGIONAL SUMMARY 14 (2007) [hereinafter REGIONAL SUMMARY 14] ("Nationally, HIV prevalence has fallen to an estimated 0.9% among the adult (15-49 years) population in 2006, down from the revised estimates of 1.2% in 2003 and the peak of 2% in 1998."); U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, CAMBODIA HIV/AIDS STRATEGIC PLAN 2002-2005, at 9 (2004), *available at* http://www.usaid.gov/kh/health/documents/USAID_Cambodia_HIV_strategy_2002_2005.pdf [hereinafter USAID STRATEGIC PLAN] ("Cambodia has the highest measured national prevalence of HIV in Asia."). The adult HIV prevalence rate for neighboring countries in 1998: Cambodia 2.0%; Myanmar 0.9%; Thailand 2.0%; Vietnam 0.2%. In 2007: Cambodia 0.8%; Myanmar 0.7%; Thailand 1.4%; Vietnam 0.5%. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS AND WORLD HEALTH ORGANIZATION, 2008 REPORT ON THE GLOBAL AIDS EPIDEMIC, Annex 1, *available at* http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2008/2008_Global_report.asp (listing HIV and AIDS estimates and data).

8. Catherine Hankins et al., *Responding Effectively to the HIV Pandemic*, *in* THE HIV PANDEMIC: LOCAL AND GLOBAL IMPLICATIONS 737, 737 (Eduard J. Beck et al. eds., 2006) (crediting the government of Cambodia with reducing HIV transmission through "[f]orthright national leadership, widespread public awareness and comprehensive prevention efforts . . ."); MARKUS BÜHLER ET AL., TURNING THE TIDE: CAMBODIA'S RESPONSE TO HIV & AIDS 1991-2005, at 17-18 (2006), *available at* http://data.unaids.org/pub/Report/2006/20060801_cambodia_turning_tide_en.pdf (noting quick, effective prevention policies).

flects a high mortality rate among the already infected.[9] This high death rate has left behind a population of children who are among the most vulnerable populations in the world, with nearly all of their basic human rights in some degree of jeopardy.[10] There is considerable evidence that many of their human rights are not being fully realized.[11]

Assessing the human rights of Cambodia's AIDS-related orphans and vulnerable children[12] runs into the aforementioned conceptual problem. Many of the rights at risk for AIDS-related orphans fall into the category of rights assessed under progressive realization. In a situation where the past is a nightmare and credible attempts are being made to improve human rights despite serious structural and economic hurdles, does *any* small effort towards realization of a right meet the necessary standard? In light of the enormous vulnerability of Cambodian AIDS-related orphans to human rights violations, this Note suggests analytical alternatives to allowing progressive realization arguments to entirely end discussion of violations of a vulnerable population's economic, social, and cultural rights.

This Note proposes two alternatives to the standard use of progressive realization assessments under international human rights law. The first is to identify "key rights"—immediately enforceable civil and political rights that are so deeply intertwined with related social, economic, and political rights that enforcing

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9. *See* REGIONAL SUMMARY 14, *supra* note 7, at 14 ("The fall in HIV prevalence is a long-term consequence of mortality combined with a substantial drop in the number of new HIV infections . . . ."); USAID STRATEGIC PLAN, *supra* note 7, at 3 (attributing reduction in prevalence rate to combination of effective policies and high AIDS-related death rate).

10. *See* John D. Bessler, *In the Spirit of Ubuntu: Enforcing the Rights of Orphans and Vulnerable Children Affected by HIV/AIDS in South Africa*, 31 HASTINGS INT'L & COMP. L. REV. 33, 82 (2008) (describing wide range of rights at risk because of serostatus for AIDS-related orphans in South Africa); Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 U.C. DAVIS L. REV. 417, 447 (2007) ("Children orphaned by AIDS present human rights law with one of its biggest challenges in recent years, as nearly every right of theirs is in jeopardy.").

11. *See infra* Part II.C.1 (describing problems facing AIDS-related orphans in Cambodia in gaining access to healthcare, education).

12. For brevity, and because it best matches how data is collected in statistical studies, this Note will use "AIDS-related orphans" as a broad term for children made vulnerable by HIV or AIDS, including children who have a guardian with HIV or AIDS; children who have HIV or AIDS themselves; and children who do not, but who have lost one or both parents to the disease. "Children" will refer to those under eighteen years of age except where noted.

the first unlocks access to the second. This strategy relies on the deep interconnection of all human rights,[13] a connection that is heightened among vulnerable populations such as Cambodian AIDS-related orphans.[14]

The second solution offered is an alternative method of conducting analysis under the progressive realization standard. Economic, social, and cultural rights can be examined and defined broadly, incorporating all the dimensions implied by the treaties that define them—for example, the formulation of the right to education includes nondiscriminatory language. This Note proposes that under the progressive realization standard, each step taken should be required to include the full breadth of that right. Using the example of education, if a step taken towards school access disproportionately leaves out a particular group, it would fail to encompass the nondiscriminatory aspect of the right to education, and violate the progressive realization standard.

This Note argues that if the progressive steps a state takes to ensure and protect a right do not include the full breadth of that right—in this example, if a step taken towards educational access disproportionately leaves out a particular group—it does not meet the requirements of progressive realization.

Part I of this Note will look at the law governing the rights of Cambodian AIDS-related orphans. Part II will examine the theoretical and factual context of those rights. In an attempt to provide sufficient context for progressive realization arguments, Section A will explore Cambodia's history in relation to human rights, and Section B will look at the progression of the AIDS epidemic within the country. Section C will examine the rights of AIDS-related orphans and vulnerable children in modern Cambodia. Part III will present solutions to the problem of progressive realization arguments regarding human rights in today's Cambodia.

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13. *See infra* note 137 and accompanying text (describing interconnection of rights).

14. *See infra* note 138 and accompanying text (describing heightened interconnection of rights among vulnerable populations).

I. *INTERNATIONAL LAW GOVERNING THE RIGHTS OF CAMBODIAN AIDS-RELATED ORPHANS*

Cambodian AIDS-related orphans share in those human rights which belong to all people. Their particularly vulnerable position—as young, orphaned, seriously ill, and from a developing country—puts many of those rights in jeopardy. Part A of this Section will examine the international instruments that contain these rights. Part B will explore what constitutes a violation under those instruments.

A. *International Human Rights Instruments*

In 1948, the United Nations ("U.N.") codified human rights in the Universal Declaration of Human Rights ("UDHR").[15] As a nonbinding resolution, the UDHR sets standards of what rights accrue to persons simply by the virtue of their being persons.[16] In 1966, the U.N. introduced two treaties that defined those human rights as legally binding upon ratifying states: the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[17] Civil and political rights are typically rights held by individuals against the government;[18] a traditional example is the right to free speech, which the state can respect through inaction—by allowing the individual to speak. Economic, social and cultural rights are typically rights that must be ensured by government action:[19] a state may realize the right to education, for example, by providing a public school system.

In 1989, the U.N. created an additional covenant of particular relevance to a discussion of the rights of AIDS-related or-

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15. *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 275 (1999).

16. *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pmbl., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR] ("[T]he inherent dignity and of the equal and inalienable rights of all members of the human family" as "foundation of freedom, justice and peace in the world.").

17. *See* HENKIN, *supra* note 15, at 279.

18. *See id.* at 324 ("Civil and political rights are often described as negative rights: they are freedoms, immunities, which a state can respect by abstention, by leaving the individual alone."); Alston, *supra* note 1, at 159 ("[C]ivil and political rights are characterized as negative in that they require only that governments should abstain from activities that would violate them.").

19. *See* Alston, *supra* note 1, at 159 (noting that it is a common view that "[e]conomic, social, and cultural rights require active intervention on the part of governments and cannot be realized without such intervention").

phans: The Covenant on the Rights of the Child ("CRC").[20] Although the CRC includes rights already mentioned in the ICCPR and the ICESCR, it elaborates the content of those rights as they apply to children.[21] It also establishes the rights of children independently from the rights of their families and caretakers.[22]

Cambodia's AIDS-related orphans face potential obstacles in a number of areas regarding their human rights, including the right to special assistance from the state, the right to life, the right to health, the right to education, and the right to be free of discrimination. These obligations are set forth in the ICESCR,[23] the ICCPR,[24] and the CRC.[25] Cambodia has acceded to these instruments.[26]

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20. *See* HENKIN, *supra* note 15, at 331 (noting United Nations ("U.N.") General Assembly adoption of the Convention on the Rights of the Child in 1989).

21. *See generally* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

22. *See id.* art. 2 (noting that all enumerated rights apply to "each child").

23. *See* International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICESCR] ("The [s]tate[ ] [p]arties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); *id.* art. 10(3) ("Special measures of protection and assistance should be taken on behalf of all children and young persons. . . ."); *id.* art. 12(1) ("The [s]tate[ ] [p]arties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."); *id.* art. 13(1) ("The [s]tate[ ] [p]arties to the present Covenant recognize the right of everyone to education.").

24. *See* International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 933 U.N.T.S. 3 [hereinafter ICCPR] ("Every human being has the inherent right to life."); *id.* art. 24(1) ("Every child shall have . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the [s]tate."); *id.* art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

25. *See* CRC, *supra* note 21, art. 6(1) ("State[ ] [p]arties recognize that every child has the inherent right to life."); *id.* art. 20(1) ("A child temporarily or permanently deprived of his or her family environment . . . shall be entitled to special protection and assistance provided by the State."); *id.* art. 24(1) ("State[ ] [p]arties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."); *id.* art. 28(1) ("State[ ] [p]arties recognize the right of the child to education . . . .").

26. University of Minnesota Human Rights Library, Ratification of International Human Rights Treaties—Cambodia, http://www.umn.edu/humanrts/research/ratifi-

International human rights covenants obligate state parties to realize rights for individuals, but they remain agreements between states rather than between the government and individual citizens; other signatory states have the power to file complaints.[27] Cambodia has not signed or ratified the optional protocol to the ICCPR[28] that would allow individuals experiencing rights violations to make individual complaints.[29] Actual state party complaints against other states under international human rights conventions are rare.[30]

The mechanism for encouraging compliance among ratifying states under each of these treaties is the treaty body, a panel of independent and international experts responsible for monitoring implementation within the signing states.[31] State parties undertake an obligation to present regular periodic reports on their progress to the relevant treaty bodies,[32] and the treaty bod-

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cation-cambodia.html (last visited Jan. 24, 2009) (listing dates Cambodia ratified international human rights treaties).

27. *See* HENKIN, *supra* note 15, at 305 ("[I]nternational human rights agreements create legal obligations between the states parties, although the agreements are for the benefit of individuals."); OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: FACT SHEET NO. 30 at 36 [hereinafter OHCHR FACTSHEET 30] (noting state-to-state complaint system).

28. *See* University of Minnesota Human Rights Library, *supra* note 26 (noting that Cambodia has not signed the first optional protocol to the International Covenant on Civil and Political Rights ("ICCPR")).

29. *See* Optional Protocol to the International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) ("A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.").

30. *See* OHCHR FACTSHEET 30, *supra* note 27, at 36 (noting that the state complaint procedure has never been used for any instrument that allows it); HENKIN, *supra* note 15, at 499 (noting that as of January 1999, no state party had utilized the state-party complaint procedure of the ICCPR).

31. *See* CRC, *supra* note 21, art. 43(1) ("For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided."); ICCPR, *supra* note 24, art. 28 (stating that there shall be a treaty body made up of "persons of high moral character and recognized competence in the field of human rights); OHCHR FACTSHEET 30, *supra* note 27, at 23 ("The Committee on Economic, Social and Cultural Rights (CESCR) was created in 1987 to carry out the monitoring mandate of the Economic and Social Council (ECOSOC) under the International Covenant on Economic, Social and Cultural Rights." ("ICESCR")).

32. *See* CRC, *supra* note 21, art. 44(1) ("State[ ] Parties undertake to submit to the Committee . . . reports on the measures they have adopted which give effect to the

ies respond by adopting official "concluding observations."[33] Cambodia has yet to submit its ICCPR report for 2002; its initial report under the ICESCR, due in 1994; or its second periodic report under the CRC, due in 1999.[34]

The following Sections examine the content of individual rights recognized by international human rights instruments that are particularly relevant to Cambodian AIDS-related orphans.

1. The Right of Special Care and Assistance for Children

International human rights agreements repeatedly set forth the principle that states owe a special degree of care to children. The UDHR states that children are "entitled to special care and assistance."[35] The ICESCR's language regarding children's rights echoes this principle when it requires that "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons."[36] The ICCPR notes that the state must provide children, without discrimination, with "such measures of protection as are required by [their] status as [minors]."[37] The CRC restates it specifically in reference to children without family caretakers, which would include AIDS-related orphans: "A child temporarily or permanently deprived of his or her family environment . . . shall be entitled to special protection and assistance provided by the State."[38]

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rights recognized herein and on the progress made on the enjoyment of those rights."); ICESCR, *supra* note 23, art. 16(1) ("The State[ ] Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein."); ICCPR, *supra* note 24, art. 40(1) ("The State[ ] Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights . . . .").

33. *See* OHCHR FACTSHEET 30, *supra* note 27, at 31 (noting that the treaty bodies respond to country reports by adopting concluding observations).

34. *See* Office of the High Commissioner for Human Rights/Cambodia, http://cambodia.ohchr.org/report_subject.aspx?mg_id=11 (last visited Apr. 1, 2009) (listing due date, status of all reports due to treaty bodies).

35. UDHR, *supra* note 16, art. 25(2).

36. ICESCR, *supra* note 23, art. 10(3).

37. ICCPR, *supra* note 24, art. 24(1).

38. CRC, *supra* note 21, art. 20(1).

2. The Right to Life

The right to life is one of the most basic rights addressed by the UDHR. Article 3 connects that right to other fundamental rights: "Everyone has the right to life, liberty and security of person."[39] That obligation, under the CRC, includes ensuring "to the maximum extent possible the survival and development of the child."[40] At a minimum, ensuring survival must include meeting basic needs: the right to food, to shelter, and to health. A broader reading might include the right to education, aimed at future livelihood; a right to healthcare and medicine; and a right to a reasonable standard of living.[41] CRC General Comment 3 further suggests that the right to life should be one of the guiding principles in formation of policies on AIDS.[42]

On its face, the ICCPR provides for the right to life in a civil and political context, relating it to limitations on the death penalty.[43] However, the Human Rights Committee and scholars have interpreted the ICCPR's right to life broadly enough to require states to take affirmative measures to improve the health of vulnerable populations, to increase life expectancy, and to prevent epidemics.[44]

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39. UDHR, *supra* note 16, art. 3.

40. CRC, *supra* note 21, art. 6(2).

41. Todres notes:

> With respect to children orphaned by AIDS, the right to survival and development would require states not only to ensure their access to health care, education, and basic means for survival, but also to ensure their right to birth registration, protect their inheritance rights in order to prevent "property grabbing," and shield them from harmful practices, including forced labor, prostitution, and use in armed conflict . . . [a] broader reading might implicate still other economic, social and cultural rights.

See Todres, *supra* note 10, at 448.

42. *See* Comm. on the Rights of the Child, Convention on the Rights of the Child, General Comment No. 3: *HIV/AIDS and the Rights of the Child*, ¶ 5, U.N. Doc. CRC/GC/2003/3 (2003) [hereinafter CRC Comment 3] (declaring that the right to life is among rights that should "be the guiding themes in the consideration of HIV/AIDS at all levels of prevention, treatment, care and support"). Each major international human rights treaty provides for creation of a human rights treaty body to monitor the terms of that treaty. OHCHR FACTSHEET 30, *supra* note 27, at 23. These bodies publish interpretations of the content of the human rights provisions in the form of general comments. *Id.* at 37.

43. *See* ICCPR, *supra* note 24, art. 6(2) ("In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes . . . .").

44. *See* Human Rights Comm., Int'l Covenant on Civil and Political Rights, General Comment No. 6: *The Right to Life*, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (1994) ("The

3. The Right to Health

The ICESCR defines a right to health of persons, and the CRC elaborates that right as it applies to children. The UDHR does not declare a right to health, but it suggests that states have related obligations to the social services necessary to achieve health: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . ."[45]

The ICESCR sets out the general right to "enjoyment of the highest attainable standard of physical and mental health."[46] This right does not equate to a right to be healthy; the state is not required to ensure good health and freedom from disease.[47] Rather, the state must provide the conditions that make health possible: potable water, sanitation, sufficient food, and a healthy environment.[48] It must also provide a functioning healthcare system.[49]

The right to health in the ICESCR encompasses elements of other rights, including "the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the

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Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."); *see also* Dina Bogecho, *Putting it to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health*, 13 S. CAL. REV. L. & WOMEN'S STUD. 229, 245-46 (2004) (discussing high female mortality rates, unduly restrictive abortion laws, female genital mutilation customs as violations of right to life); Patricia C. Kuszler, *Global Health and the Human Rights Imperative*, 2 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 99, 108-09 (2007) (stating right to life is "increasingly construed broadly").

45. UDHR, *supra* note 16, art. 25(1).

46. ICESCR, *supra* note 23, art. 12(1).

47. *See* Comm. on Econ., Soc. and Cultural Rights, Int'l Covenant on Econ., Soc. and Cultural Rights, General Comment 14: *The Right to the Highest Attainable Standard of Health*, ¶ 9, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter ICESCR Comment 14] ("[G]ood health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health.").

48. *See id.* ¶ 11 (finding right to health to extend "to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health").

49. *See id.* ¶ 12 ("Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party.").

freedoms of association, assembly and movement."[50] Additionally, both the ICESCR and the CRC require that the right to health to be applied without discrimination.[51]

Among the steps the ICESCR requires of ratifying states, several are especially relevant to Cambodia's AIDS-related orphans. States must take steps to reduce "infant mortality" and promote "the healthy development of the child;" to treat and control epidemics and diseases; and to "assure to all medical service and medical attention in the event of sickness."[52]

The CRC uses similar language, requiring that states "recognize the right of the child to the enjoyment of the highest attainable standard of health."[53] The CRC implies that the right to health must be ensured equally to all children: The state must "strive to ensure that no child is deprived of his or her right of access to such health care services," and the right must be ensured to "all segments of society."[54] Additionally, the CRC requires states to provide healthcare facilities and to ensure children's access to those facilities.[55]

4. The Right to an Education

A universal human right to an education is broadly stated in the UDHR and ICESCR, and more clearly defined in relation to the rights of children in the CRC.[56] Similarly to the right to health, the right to education includes a nondiscrimination provision: both the ICESCR and the CRC apply the right to education "to all,"[57] and the CRC applies it to "every child."[58]

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50. *Id.* ¶ 3.

51. *See* CRC, *supra* note 21, art. 24(1) ("no child" shall be deprived of requisite access to healthcare); ICESCR, *supra* note 23, art. 12 (noting that right to health is "of everyone," state must ensure medical care "to all").

52. ICESCR, *supra* note 23, art. 12(2).

53. CRC, *supra* note 21, art. 24.

54. *Id.*

55. *See id.* ("State[ ] Parties recognize the right of the child to the enjoyment of . . . facilities for the treatment of illness and rehabilitation of health. State[ ] Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.").

56. *Compare* UDHR, *supra* note 16, art. 26 ("Everyone has the right to education."); ICESCR, *supra* note 23, art. 13 ("The State[ ] Parties to the present Covenant recognize the right of everyone to education."); *with* CRC, *supra* note 21, art. 28(1)(b) ("State[ ] Parties recognize the right of the child to education. . . .").

57. CRC *supra* note 21, art. 28(1)(a); ICESCR, *supra* note 23, art. 13(2)(a).

58. CRC *supra* note 21, art. 28.

In a nod to the lesser resources available to developing nations, the obligations of states to provide education diminish as the level of education increases. All three instruments recognize a general right to compulsory and free basic education, although the CRC is concerned with the right only with regard to children.[59] The ICESCR and the CRC require states to make secondary education "available and accessible," but limit required actions to "every appropriate means."[60] States are required to offer higher education only to the limits of an individual's capacity.[61]

5. The Right to Non-Discrimination

In addition to the nondiscriminatory wording included in the individual rights to health and to education, international human rights law requires that all rights be applied without discrimination. The UDHR does so in both a positive assurance of equal protection under the law for the individual,[62] and in a negative prohibition against a state's discriminatory enforcement on the basis of "any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[63] Both the ICESCR and the ICCPR reiterate this list.[64] The serostatus (the presence or absence of

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59. *See* UDHR, *supra* note 16, art. 26 ("Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory."); CRC, *supra* note 21, art. 28 (requiring that "primary education [be] compulsory and available free to all."); ICESCR, *supra* note 23, art. 13 ("Primary education shall be compulsory and available free to all."); *see also* Comm. on Econ., Soc. and Cultural Rights, Int'l Covenant on Econ., Soc. and Cultural Rights, General Comment 11: *Plans of Action for Primary Education (Article 14 of the International Covenant on Economic, Social and Cultural Rights)* ¶¶ 6-7, U.N. Doc. E/C.12/1999/4 (May 10, 1999) (noting that "compulsory" and "free" are unequivocal requirements).

60. CRC, *supra* note 21, art. 28(1)(b); ICESCR, *supra* note 23, art. 13(2)(b).

61. *See* CRC, *supra* note 21, art. 28(1)(c) (requiring state parties to "[m]ake higher education accessible to all on the basis of capacity by every appropriate means"); ICESCR, *supra* note 23, art. 13(2)(c) ("Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means."); *see also* Comm. on Econ., Soc. and Cultural Rights, Int'l Covenant on Econ., Soc. and Cultural Rights, General Comment 13: *The Right to Education, art. 13*, ¶ 19, U.N. Doc. E/C.12/1999/10 (1999) ("The 'capacity' of individuals should be assessed by reference to all their relevant expertise and experience.").

62. UDHR, *supra* note 16, art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.").

63. *Id.* art. 2.

64. ICESCR, *supra* note 23, art. 2(2); ICCPR, *supra* note 24, art. 26.

particular particles in the blood stream) of Cambodia's AIDS-related orphans falls under the words "other status"[65] in both the ICESCR and the CRC.

The CRC uses the same list of protected statuses,[66] but takes the right of nondiscrimination a step further as it applies to children. The state is obligated to protect children against discrimination based on not only their own status, but also against discrimination based on the status of their "parents, legal guardians, or family members."[67] This additional protection is particularly important to a child who has lost a parent to a potentially stigmatizing disease such as AIDS, whether or not that child's HIV-status is known.[68]

B. *State Obligations Under International Law*

The manner in which violations of human rights are assessed varies according to the instrument in which the right is located. This Section will contrast the implementation requirements of the ICESCR, the CRC, and the ICCPR.

The ICESCR allows states to work towards full realization of most of the rights it enumerates over time. Ratifying states must "take steps" towards full implementation of the rights to the maximum extent of their "available resources."[69] Often termed the "progressive realization standard," this formulation recognizes that developing countries like Cambodia have economic restraints on their ability to immediately fully implement

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65. *See* Human Rights Comm., Int'l Covenant on Civil and Political Rights, General Comment 18: *Non-discrimination*, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1989) (noting broad interpretation of statuses protected); Office of the U.N. High Comm'r for Human Rights and the Joint U.N. Program on HIV/AIDS, INT'L GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS (2006 consolidated version) ¶ 108, U.N. Doc. HR/Pub/06/9 (2006) (confirming inclusion of health status as a protected status).

66. CRC, *supra* note 21, art. 2(1) (listing "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status" as protected statuses).

67. *Id.* art. 2(2).

68. *See* SARAH ALKENBRACK ET AL., THE SOCIAL AND ECONOMIC IMPACT OF HIV/AIDS ON FAMILIES WITH ADOLESCENTS AND CHILDREN IN CAMBODIA 33 (2004) ("When people in the community know a guardian is living with HIV, children and adolescents of that individual often experience discrimination."); Todres, *supra* note 10, at 427 ("Children perceived to be living with HIV, such as when a parent is known to have died of AIDS, are stigmatized and isolated by their communities.").

69. ICESCR, *supra* note 23, art. 2(1).

rights.[70]

The progressive realization standard does not allow an impoverished country to meet its obligations without taking any action. The words "take steps" require that actions must be taken "within a reasonably short time" of the ratification of the covenant.[71] Nor does the flexibility offered by the progressive realization standard allow a state to justify backsliding on its rights obligations.[72]

A state can often meet its obligations under the progressive realization standard by passing legislation to ensure the right at issue.[73] Examples of rights that are difficult to ensure without a legislative foundation are the prohibition on discrimination and the right to education.[74] Legislation alone does not necessarily satisfy the obligation; if appropriate, the state must also create a legal remedy for violations.[75]

In contrast, the rights contained in the ICCPR must be implemented immediately.[76] The ratifying country agrees to take steps "to adopt such laws or other measures as may be necessary

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70. *See* Comm. on Econ., Soc. and Cultural Rights, Covenant on Econ., Soc. and Cultural Rights, General Comment 3: *The Nature of States Parties' Obligations*, ¶ 1 (1990), U.N. Doc. E/1991/23, ("[T]he Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources . . . .").

71. *Id.* ¶ 2.

72. General Comment 3 states:

> [The concept of progressive realization] imposes an obligation to move as expeditiously and effectively as possible towards [the rights in question] . . . any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

See id. ¶ 9.

73. *See id.* ¶ 3 ("[I]n many instances legislation is highly desirable and in some cases may even be indispensable.").

74. *See id.* (noting that nondiscrimination, education are difficult to ensure without legislation).

75. *See id.* ¶ 5 ("Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable.").

76. The ICCPR provides that:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

See ICCPR, *supra* note 24, art. 2(2).

to give effect" to the rights enumerated in the covenant.[77] This obligation includes providing effective legal remedies before competent courts.[78] Unlike the rights covered in the ICESCR, state parties cannot justify failure to immediately and completely implement civil and political rights on the grounds that they have limited resources.[79]

The CRC elaborates on the application of both kinds of rights, but limits its focus to children. Its language acknowledges a split in implementation standards between the two kinds of rights; although ratifying states are required to implement all rights immediately, economic, social, and cultural rights can be progressively realized.[80] Under the CRC, the state is required to pursue progressive realization of economic, social, and cultural rights in light of not only its own maximum available resources, but also with an eye to what international aid and assistance is available.[81]

II. *THE SITUATION OF AIDS-RELATED ORPHANS IN CAMBODIA*

Under progressive realization, a country must take steps to improve implementation of human rights over time in accordance with its resources.[82] Assessing violations requires a contextual judgment of current efforts set against a backdrop of the country's situation and history. Cambodia's history, and—more specifically—history of human rights abuses, sets a low baseline from which to improve. This lowered baseline allows Cambodia

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77. *Id.*

78. *See id.* art. 2(3) (noting that state parties undertake to ensure effective remedies before competent authority).

79. *See* Human Rights Comm., Int'l Covenant on Civil and Political Rights, General Comment 31: *Nature of the General Legal Obligation on States Parties to the Covenant*, ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) ("The requirement . . . to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.").

80. *See* CRC, *supra* note 21, art. 4 (noting that distinct from civil and political rights, state parties can address economic, social and cultural rights by "undertak[ing] such measures to the maximum extent of their available resources. . .").

81. *See id.* ("With regard to economic, social and cultural rights, State[ ] Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.").

82. *See supra* notes 73-76 and accompanying text (describing the progressive realization standard, its requirements).

to excuse what might otherwise appear to be obvious human rights violations so long as it is also taking real steps towards the realization of rights over time. Using the rights of Cambodia's AIDS-related orphans as the case in point, Part II of this Note will provide context and an assessment of whether Cambodia is meeting its human rights obligations.

Section A will examine the political history of the country in relation to human rights, culminating in the adoption of the current Constitution in 1992. Section B will look at the history of the AIDS epidemic in Cambodia, and the legislative and administrative responses. Section C will consider how the rights of AIDS-related orphans actually play out on the ground, and whether current human rights problems rise to the level of violations.

A. *Political History*

Even before the better-known atrocities of the Khmer Rouge regime, Cambodia had seen large-scale attacks on basic human rights. General Lon Nol's government, in power from 1970 to 1975,[83] rounded up thousands of ethnic Vietnamese on a theory of ethnicity as presumptive treason, and massacred them, eventually forcing the rest into detention camps.[84] The resulting border war with Vietnam was one of the destabilizing factors that made Cambodia vulnerable to the Khmer Rouge.[85]

1. Human Rights Abuses Under the Khmer Rouge

The Khmer Rouge had full control of the nation for four years, from 1975 to 1978.[86] Led by Pol Pot, the group estab-

83. *See* PHILIP SHORT, POL POT: THE HISTORY OF A NIGHTMARE 454 (2005) (summarizing Lon Nol's rule from 1970 to 1975); Jennifer S. Berman, Comment, *No Place Like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia*, 84 CAL. L. REV. 817, 830 (1996) (noting Lon Nol's *coup d'état* in 1970 and loss of power in 1975).

84. *See* SHORT, *supra* note 83, at 206-08 (describing Lon Nol government's pogroms); Berman, *supra* note 83, at 831 (describing pattern of large-scale attacks on ethnic Vietnamese).

85. *See* SHORT, *supra* note 83, at 209 (describing reaction of Vietnamese forces in response to Cambodian pogroms); Berman, *supra* note 83, at 835 (noting slaughter of Vietnamese-Cambodians as a factor in the Vietnamese invasion).

86. *See* SHORT, *supra* note 83, at 3-4 (describing Khmer Rouge takeover in 1975); *id.* at 397-401 (describing end of regime in January 1979); Berman, *supra* note 83, at 832 (noting 1975 to 1978 as the period of Khmer Rouge control).

lished Democratic Kampuchea,[87] a communist nation-state that has the distinction of being known primarily for massive human rights abuses. These abuses can be loosely categorized into three groups: (1) the abuses involved in mandating an immediate reorganization of society by force; (2) the abuses involved in restricting human relationships to those between an individual and the state; and (3) the abuses involved in suppression of perceived threats to the state. Taken together, the human rights policies of the Khmer Rouge read as though the UDHR was a laundry list of rights to be abolished.

Almost immediately upon taking power, Pol Pot's government attempted an aggressive transformation of Cambodia's social structure, based on a socialist agrarian ideal in which all people would be farmers.[88] The cities and towns were evacuated, and the urban population relocated to forced labor farms.[89] The "new people" from the cities were made a sub-class under the control of the "old people" of the rural peasantry, with particularly restricted human rights.[90]

A mass, forced relocation to labor camps affects a substantial number of human rights. The right to the security of the person; the prohibition on slavery; the prohibition on torture, or cruel and inhuman treatment; the prohibition on arbitrary arrest or detention; the freedom of movement within the state and the freedom to leave the country; the prohibition on arbitrary deprivation of property; the right to participation in government; the right to free choice of employment; and the right to an adequate standard of living, were deeply compromised by the conversion of a country into a slave state.[91]

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87. *See* John A. Hall, *Human Rights and the Garment Industry in Contemporary Cambodia*, 36 STAN. J. INT'L L. 119, 119 (2000) (noting that Khmer Rouge renamed country Democratic Kampuchea); Berman, *supra* note 83, at 832 ("The Khmer Rouge established the Republic of Democratic Kampuchea. . . .").

88. *See* Berman, *supra* note 83, at 832 (noting Khmer Rouge "sought to transform Cambodia instantaneously. . ."); Hall, *supra* note 87, at 119 (noting intent to create "a Marxist agrarian society").

89. *See* SHORT, *supra* note 83, at 256-57, 271-78 (describing development of Khmer Rouge policy of evacuating towns); Berman, *supra* note 83, at 832-33 (noting evacuations of cities and towns, including hospitals).

90. *See* SHORT, *supra* note 83, at 292 (describing reclassification of all people into groups with different rights); MICHAEL VICKERY, CAMBODIA: 1975-1982, at 81-82 (1984) (describing new social strata with varying rights).

91. *See* SHORT, *supra* note 83, at 291 (defining new "slave state"); *see also* May Ebihara, *A Cambodian Village Under the Khmer Rouge, 1975-1979*, *in* GENOCIDE AND DE-

A second grouping of human rights abuses came about as the Khmer Rouge sought ideological transformation on a more intimate level: the elimination of relationships outside of those between a given individual and the state.[92] Marriage became involuntary,[93] and children were encouraged to inform on their parents, or removed from their parents' custody altogether.[94] The educational system ended, and books and educational infrastructure were destroyed.[95] Categories of words considered incompatible with Khmer Rouge ideology were banned.[96] Currency was forbidden and bartering outlawed.[97]

These policies effectively suppressed the familial, educational, and economic rights of large portions of the population. The human rights affected included the right to dignity; the right to recognition as a person before the law; the prohibition on arbitrary interference with privacy, family, and home; the right to family; the right to freedom of thought; the right to freedom of association; the right to education; the right to partici-

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MOCRACY IN CAMBODIA: THE KHMER ROUGE, THE UNITED NATIONS AND THE INTERNATIONAL COMMUNITY 51, 54-57 (Ben Kiernan ed., 1993) (describing segregation of labor teams; "totally unrealistic" workloads in combination with insufficient food resulting in starvation).

92. *See* Ebihara, *supra* note 91, at 55 (highlighting that "[p]ersonal loyalties were now supposed to be directed toward the revolutionary regime" rather than to family); SHORT, *supra* note 83, at 316-19 (describing ideological dictate to destroy "mental private property"); Berman, *supra* note 83, at 832 ("The Khmer Rouge forced people to transfer family and religious loyalties to the state . . . .").

93. *See* SHORT, *supra* note 83, at 291 ("Like true slaves, the inhabitants of Pol's Cambodia were deprived of all control over their own destinies—unable to decide what to eat, when to sleep, where to live or even whom to marry."); Suzy Khimm, *Saying "I do"—Willingly, This Time*, CHRISTIAN SCI. MONITOR, Jan. 16, 2007, at 20 ("Regime-arranged weddings made up nearly a quarter of all marriages of that era, according to a study by Patrick Heuveline, a University of Chicago sociologist.").

94. *See* ELIZABETH BECKER, WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION 229 (1986) ("Children were encouraged to spy on their parents."); SHORT, *supra* note 83, at 347 (noting policy of separating children); Berman, *supra* note 83, at 833 (noting that children were taught to inform on parents); *see also* Ebihara, *supra* note 91, at 55 (noting dispersal of kin, separation of children from parents).

95. *See* SHORT, *supra* note 83, at 283, 349-50 (describing destruction of books, libraries, and research facilities; absence of Khmer Rouge educational system); Berman, *supra* note 83, at 832 (stating that formal education was abolished).

96. *See* BECKER, *supra* note 94, at 182 (discussing elimination of honorifics, militarization of common vocabulary); SHORT, *supra* note 83, at 324-25 (discussing banned words; "language was stripped bare of incorrect allusions").

97. *See* SHORT, *supra* note 83, at 306-08 (describing Khmer Rouge leadership decision to forgo currency); Berman, *supra* note 83, at 832 (noting Khmer Rouge "eradicated money").

pate freely in cultural life; and the right to development of the personality.

The Khmer Rouge is perhaps best known for the third category of human rights abuses it perpetrated: the torture and execution of those seen as potential threats to the regime.[98] The categories of people this applied to varied over the course of the regime: employees of the previous government;[99] minorities and those of mixed ethnic heritage;[100] students, teachers, those perceived as educated, foreign language speakers, and those who wore glasses;[101] doctors, nurses, and lawyers;[102] and eventually substantial numbers of Khmer Rouge cadres who were suspected of impure ideology.[103] The legal system and any recourse it might have provided was effectively dismantled.[104] State-sanc-

98. *See* SHORT, *supra* note 83, at 364-72 (describing growing suspicion of traitors, resulting purges); Berman, *supra* note 83, at 833 (describing torture, death of 20,000 at Tuol Sleng—a Phnom Penh high school converted into a prison).

99. *See* SHORT, *supra* note 83, at 273-74 (describing initial roundup, murder of members of the army, police, government functionaries during Phnom Penh); Paul Bellamy, *Cambodia: Remembering the Killing Fields*, N.Z. INT'L REV., Mar. 1, 2005, ¶ 9 ("Those linked with the Lon Nol administration were summarily executed.").

100. *See* BECKER, *supra* note 94, at 252-53 (describing the suppression and persecution of ethnic Chams—Cambodian Muslims—under the Khmer Rouge); Berman, *supra* note 83, at 833 (noting targeting of "all minorities").

101. *See* BECKER, *supra* note 94, at 167 ("[T]eachers, engineers, and doctors were executed in the first wave because they too were classified as dangerous counterrevolutionaries."); SHORT, *supra* note 83, at 253, 326-27 (reporting murder of "anyone who had an education" in one village; discussing killings of persons who wore glasses); Claire Duffett, *Still in the Killing Fields: Justice Delayed in Cambodia*, AMERICAN LAWYER, May 2008, at 29 (discussing Khmer Rouge murder of professionals and "anyone who wore glasses"); Hall, *supra* note 87, at 120 ("The regime put to death the majority of the nation's educated elite, including teachers, professors, . . . and even people whose only crime was being able to speak a foreign language.").

102. *See* Hall, *supra* note 87, at 120 (noting regime's execution of majority of doctors, nurses, eighty percent of lawyers); *see also* Adhoc et al., *Impunity in Cambodia: How Human Rights Offenders Escape Justice*, *in* HUMAN RIGHTS WATCH 12 (1999) ("Only a handful of judges and lawyers survived."); BECKER, *supra* note 94, at 167 ("Teachers, engineers, and doctors were executed in the first wave because they too were classified as dangerous counterrevolutionaries."); Chanthou Boua, *Development Aid and Democracy in Cambodia*, *in* GENOCIDE AND DEMOCRACY IN CAMBODIA: THE KHMER ROUGE, THE UNITED NATIONS AND THE INTERNATIONAL COMMUNITY 273, 274 (Ben Kiernan ed., 1993) ("Teachers and nurses . . . had been decimated during the Pol Pot era.").

103. *See* SHORT, *supra* note 83, at 367-72, 383-88 (detailing escalation of purges within Khmer Rouge).

104. *See* Hall, *supra* note 87, at 120 (describing dismantling of legal system); Stephen P. Marks, *The New Cambodian Constitution: From Civil War to a Fragile Democracy*, 26 COLUM. HUM. RTS. L. REV. 45, 54 (1994) ("No judges were appointed and in fact there was no legal system in Cambodia."). The official judicial body met once, and issued a single press release. *Id.*

tioned mass murder, in combination with disease and starvation in the labor camps, killed between one and three million people in four years.[105] The human rights affected were the right to life, the right to nondiscrimination, the prohibition on torture, the right to an effective remedy for violations of human rights, the prohibition of arbitrary arrest, and the right to a fair trial.

The excesses of the Khmer Rouge led to invasion by Vietnam in 1978, and the installation of The People's Republic of Kampuchea ("PRK"), made up largely of former Khmer Rouge cadres sympathetic to Vietnamese interests.[106] Due to Cold War political considerations, the U.N. did not recognize the PRK; instead, it recognized the guerilla government of the Khmer Rouge, still led by Pol Pot and in control of parts of the north and west of Cambodia, under the name of the Coalition Government of Democratic Kampuchea.[107] Without international recognition for the central government, little international assistance in rebuilding was available.[108]

2. Establishment of a Constitution Incorporating Human Rights

After three years of U.N. transitional governance, the 1991 Paris Peace Accords ("Paris Accords") set out the terms of a transition back to Cambodian rule,[109] including a requirement that

105. There is no definitive estimate for deaths under the Khmer Rouge. *See* SHORT, *supra* note 83, at 418 ("1.5 million"); Hall, *supra* note 87, at 119-20 ("well over one million"); Berman, *supra* note 83, at 832 ("one to three million").

106. *See* SHORT, *supra* note 83, at 379 (describing make-up of new government, including former Khmer Rouge military commander Hun Sen); Berman, *supra* note 83, at 835-36 (describing formation of the PRK and its allegiances to Hanoi). Hun Sen remains Prime Minister of Cambodia at the time of writing of this Note. Premier's Biography, Cambodia's Government Home Page, http://www.cambodia.gov.kh/unisql1/egov/english/premier.biography.html (last visited Apr. 2, 2009).

107. *See* Berman, *supra* note 83, at 837-38 (noting the U.N. recognized coalition made up of Prince Sihanouk, living in exile; a resistance faction led by Son Sann; and the Khmer Rouge); SHORT, *supra* note 83, at 412 ("In November 1979 the U.N. General Assembly voted to seat the delegation of Democratic Kampuchea and exclude the Vietnamese-backed regime in Phnom Penh.").

108. *See* Boua, *supra* note 102, at 273 (stating that central Cambodian government did not receive U.N. development aid from 1979 to 1992 because it was not recognized by the U.N.); SHORT, *supra* note 83, at 412 (describing inflows of U.N. and Chinese aid to Khmer Rouge guerilla-movement camps).

109. *See* Marks, *supra* note 104, at 45-46 (describing transitional U.N. authority, constitution entering into force as result of Paris Peace Accords); Berman, *supra* note 83, at 838-39 (describing the Paris Peace Conference, the Paris Peace Accords, and the United Nations Transitional Authority in Cambodia).

the new constitution protect the human rights articulated in the UDHR and other relevant treaties.[110] Article 31 of the Cambodian Constitution incorporates international agreements by direct reference: "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights."[111] The exact rights conveyed by this provision are not clear; on its face, Article 31 appears to apply to any human right in any treaty related to human rights, whether or not Cambodia has ratified that instrument.[112] The Constitution does not clarify whether enabling legislation is required before citizens can sue domestically for infringements of human rights recognized in international instruments.[113]

The second part of Article 31 provides equal protection before the law "regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status."[114] As under the international covenants, the "other status" clause could protect AIDS-related orphans from discriminatory enforcement of rights. In addition to incorporating rights directly from international instruments, Cambodia's Constitution addresses a number of relevant rights separately, including the rights of children,[115] the right to health,[116] and the

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110. *See* Paris Conference on Cambodia: Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict, U.N. GADR, 46th Session, U.N. Doc. A/46/608&S/233177, 31 I.L.M. 174, 202 (1992) [hereinafter "Agreement on Settlement"] (requiring the new constitution to provide human rights obligations and protections consistent with international human rights instruments).

111. CONST. OF THE KINGDOM OF CAMBODIA art. 31 (1993).

112. *See* Hall, *supra* note 87, at 124-25 (noting that treaties appear to apply regardless of ratification); Stan Starygin & Johanna Selth, *Cambodia and the Right to be Present: Trials in Absentia in the Draft Criminal Procedure Code*, 2005 SING. J. LEGAL STUD. 170, 179 (2005) (discussing failure of Constitution to specify to which international instruments it refers).

113. *See* Hall, *supra* note 87, at 124 ("Even if Article 31 is interpreted to cover all relevant covenants and conventions regardless of ratification, it is unclear whether this would permit citizens to invoke the right to sue individually in court to enforce the right at issue . . . ."); Marks, *supra* note 104, at 94, 95-96 (suggesting Article 31 would have been more effective if it "made international law justiciable before domestic courts;" explaining trend of including non-justiciable human rights in post-communist constitutions).

114. CONST. OF THE KINGDOM OF CAMBODIA art. 31 (1993).

115. *See id.* art. 48 ("The State shall protect the rights of children as stipulated in the Convention on Children, in particular, the right to life, education, protection during wartime, and from economic or sexual exploitation. The State shall protect chil-

right to nine years of free education.[117]

The degree to which any rights are enforceable under the Constitution is unclear. Article 31 ends with a "clawback" clause with the potential to significantly limit all rights granted: "The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with the law."[118] Because any limitation that is implemented "by law" appears to be permissible, the human rights at issue can be severely limited.[119]

B. *AIDS in Cambodia*

Cambodia's complicated history and devastated condition left it in poor shape to cope with a disease as deadly as AIDS.[120] As in any AIDS epidemic, the outlook was particularly poor for children, who experience the effects of the disease both directly and through those responsible for their care.[121] Cambodia's current ranking in the human poverty index puts it ahead of only Timor-Leste in the region.[122] Approximately seventy-eight

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dren from acts that are injurious to their educational opportunities, health and welfare.").

116. *See id.* art. 72 ("The health of the people shall be guaranteed. The State shall give full consideration to disease prevention and medical treatment. Poor citizens shall receive free medical consultation in public hospitals, infirmaries and maternities. The State shall establish infirmaries and maternities in rural areas.").

117. *See id.* art. 68 ("Citizens shall receive education for at least [nine] years.").

118. *Id.* art. 31.

119. *See* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986-2000, at 141-42 (Malcolm D. Evans & Rachel Murray eds., 2002) (criticizing constitutional clawback provisions that appear "to allow *any* limitation, as long as it is done 'by law'"); MEDIA AND DEMOCRACY IN AFRICA 63 (Goran Hyden & Michael Leslie eds., 2003) (calling constitutional clawback clauses "especially sinister").

120. *See* Doung Chanto Sisowath, *Cambodia, in* FIGHTING A RISING TIDE: THE RESPONSE TO AIDS IN EAST ASIA 53, 60 (Yamamoto Tadashi & Itoh Satoko eds., 2006) ("Cambodia's grim economic situation has contributed to the spread of the virus."); Anupama K. Menon, *Gendered Epidemic: Addressing the Specific Needs of Women Fighting HIV/AIDS in Cambodia*, 18 BERKELEY WOMEN'S L.J. 254, 255 (2003) ("Countries weakened by conflict, poverty, and social upheaval are extremely vulnerable to devastation by HIV/AIDS.").

121. General Comment 3 to the CRC notes that:

> 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. Consequently, many States have recently registered an increase in their infant and child mortality rates.

CRC Comment 3, *supra* note 42, ¶ 2.

122. *See* United Nations Development Programme, 2007/2008 Human Develop-

percent of the population exists on less than two dollars a day; more than thirty-four percent exist less than one dollar a day.[123] Section B of Part II will look at the unfolding of the Cambodian AIDS epidemic and the governmental response.

1. Emergence of the Epidemic

AIDS arrived in Cambodia from multiple sources. The first cases in Southeast Asia were reported in Thailand, and population movement across the Thai-Cambodian border brought Cambodians into contact with the disease.[124] Increasing political stability and safety within Cambodia brought additional exposure with both the influx of approximately 22,000 U.N.-associated personnel and the opening of Cambodian offices for international aid.[125] The first reported case of HIV in Cambodia occurred in 1991.[126] By 1993 there were estimated to be two thousand infected persons in the country.[127] By 1997, Cambodia had the highest adult AIDS prevalence rate in Asia, estimated at three percent.[128] It also had an increasing number of children

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ment Report Human Poverty I Rankings, http://hdrstats.undp.org/indicators/18.html (last visited Apr. 10, 2009) (ranking 177 nations by their human poverty rating ("HPR") which concentrates on the deprivation in the three essential elements of human life: longevity, knowledge and a decent standard of living.)

123. *See* United Nations Development Programme, 2007/2008 Human Development Report, http://hdrstats.undp.org/countries/data_sheets/cty_ds_KHM.html (last visited Dec. 13, 2008) [hereinafter Human Development Report] (listing data related to the Human Development Index for Cambodia).

124. *See* Sisowath, *supra* note 120, at 53-54 (describing initial cases of AIDS in Thailand, spread across border to Cambodia); *see also* POLICY PROJECT, HIV/AIDS IN THE MEKONG REGION 7 (2003) (describing first cases in Thailand, mobility over borders as major factor in spread of disease).

125. *See* DAVID E. BLOOM ET AL., HEALTH, WEALTH, AIDS AND POVERTY—THE CASE OF CAMBODIA 7 (September 2001), *available at* http://www.adb.org/documents/reports/health_wealth/hwap.pdf (stating U.N. Transitional Authority involved "approximately 22,000 military and civilian observers"); THE GLOBAL AIDS POLICY COALITION, AIDS IN THE WORLD II: GLOBAL DIMENSIONS, SOCIAL ROOTS, AND RESPONSES 63 (Jonathan M. Mann & Daniel J.M. Tarantola eds., 1996) [hereinafter GLOBAL AIDS] (connecting foreign influx to Cambodian AIDS epidemic).

126. *See* BLOOM, *supra* note 125, at 7 (noting first AIDS case in 1991); USAID STRATEGIC PLAN, *supra* note 7, at 10 ("The first HIV positive test result was reported to the National Blood Transfusion Center in Phnom Penh in 1991.").

127. *See* GLOBAL AIDS, *supra* note 125, at 63 (estimating two thousand infected Cambodians by 1993).

128. *See* WORLD HEALTH ORGANIZATION, SUMMARY COUNTRY PROFILE FOR HIV/AIDS TREATMENT SCALE-UP: CAMBODIA 1 (2005), *available at* http://www.who.int/ hiv/HIVCP_KHM.pdf (putting peak HIV prevalence rate at three percent in 1997); WORLD HEALTH ORGANIZATION, HIV/AIDS IN ASIA AND THE PACIFIC REGION 2003, 11 (noting

affected by the epidemic.[129]

2. The Government Response

A government has a special responsibility to combat epidemics, grounded in its ability to enact and enforce necessary country-wide public health measures.[130] In 2000, Cambodia responded to AIDS by creating a comprehensive plan, the National Strategic Plan for a Comprehensive and Multisectoral Response to HIV/AIDS 2001-2005" ("NSP").[131] The NSP took a two-pronged approach, both addressing behavior on an individual level and attempting to alter "aspects of the socio-economic, legal and political environment" in order to fight the epidemic.[132]

In 2002, Cambodia passed the Law on the Prevention and Control of HIV/AIDS ("Law on HIV/AIDS").[133] Although the stated objective of the Law on HIV/AIDS is "prevention and control," it includes measures protecting human rights.[134] Chapter VII of the Law on HIV/AIDS explicitly states that rights given in Chapter III of the Constitution—which would include all human

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Cambodia had highest prevalence rate in Asia), *available at* http://www.wpro.who.int/publications/pub_9290611642.htm.

129. *See* Comm. on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child, Cambodia ¶ 37, U.N. Doc. CRC/C/15/Add.128 (June 2, 2000) [hereinafter CRC Concluding Observations] (noting growth of Cambodian orphan population due to HIV and AIDS).

130. *See* JOHN M. LAST, PUBLIC HEALTH AND HUMAN ECOLOGY 314 (McGraw Hill 1998) (1987) (noting government's responsibility for public health, protection from imported disease, and quarantine); Lawrence O. Gostin, *The Global Reach of HIV/AIDS: Science, Politics, Economics, and Research*, 17 EMORY INT'L L. REV. 1, 15 (2003) (pointing to governments as especially well-positioned to create mandates during epidemics);.

131. *See* Guy Morineau et al., *Cambodia in* THE HIV PANDEMIC: LOCAL AND GLOBAL IMPLICATIONS 270, 278 (Eduard J. Beck et al. eds., 2006) ("In 2000, the government . . . reinforced its policy with a Strategic Plan for HIV that included prevention and a continuum of care."); USAID STRATEGIC PLAN, *supra* note 7, at 17 ("The RGC recently completed its National Strategic Plan (NSP) for a Comprehensive and Multisectoral Response to HIV/AIDS 2001-2005.")

132. *See* USAID STRATEGIC PLAN, *supra* note 7, at 17-18 (describing dual approach); Sisowath, *supra* note 120, at 61-62 (describing NSP as putting "into practice two complementary approaches to reduce vulnerabilities to HIV/AIDS at the individual, community, and societal levels[,]" one at the individual level and the second "focused on changing aspects of the socioeconomic, legal, and political environment").

133. *See* Law on the Prevention and Control of HIV/AIDS (2002), Approval number NS/RKM/0702/015 (Cambodia) [hereinafter Law on HIV/AIDS] (announcing promulgation of the law). An unofficial English translation of the July 2002 law is used for this Note. Grammatical discrepancies and typos are maintained.

134. *See id.* art. 1.

rights granted—apply to people living with HIV and AIDS.[135] The Law on HIV/AIDS also provides specific rights that affect AIDS-related orphans, particularly in the areas of health, education, and discrimination.

Chapter V of the Law on HIV/AIDS calls on the government to ensure free primary health care to "all persons with HIV/AIDS."[136] The state is called upon to address the needs of people with HIV and AIDS holistically, integrating private healthcare, public healthcare, community outreach, and religious institutions to provide "treatment, care and supports to those who have HIV/AIDS. . . ."[137] In addition, the Law on HIV/AIDS protects persons with HIV/AIDS from discrimination within the healthcare system.[138]

The Law on HIV/AIDS also addresses the right to education for those who have AIDS or HIV. Article 37 restrains all educational institutions from denying services to students on the basis of "actual, perceived or suspected HIV/AIDS status of that student or his/her family members."[139] Further, the law provides penalties for violations of the anti-discriminatory portions of the statute, allowing for fines of between 100 thousand and one million Riel (the currency of Cambodia, equivalent to approximately US$25), and imprisonment of between one and six months.[140] Both are doubled for repeat offenders, and civil servants face additional, unspecified administrative sanctions.[141]

The success of the combination of the NSP and the Law on

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135. *See id.* art. 42 ("The person with HIV/AIDS shall have the same rights as of the normal citizens as stated in the Chapter 3 of the Constitution of the Kingdom Cambodia.").

136. *Id.* art. 26.

137. *Id.* art. 27.

138. The Law on HIV/AIDS provides that:

> Discrimination against person with HIV/AIDS in the hospitals and health institutions is strictly prohibited. No person shall be denied to receive public and private health care services or be charged with higher fee on the basis of the actual, perceived or suspected HIV/AIDS status of the person or his/her family members.

Id. art. 41.

139. *Id.* art. 37.

140. *See id.* art. 52. ("Any person who violates the Article 36, 37, 38, 39, 40 or 41 of this law, shall be punished with a penalty of fine of one hundred thousand (100,000) to one million (1,000,000) Riels, and with a penalty of imprisonment for one (1) month to six (6) months.").

141. *See id.* ("In case of repeated offences, the punishment shall be double. For civil servants, administrative sanctions shall be added.").

HIV/AIDS is particularly striking in view of the country's political history and instability. The AIDS prevalence rate has dropped from 2.0% in 1998 to 0.9% in 2006 for the general population.[142] The government's efforts are widely credited, with particular praise offered for quick acknowledgment of AIDS and plain-spoken prevention programs.[143] The national effort is also admired for encouraging community involvement and a decentralized power structure, which allow the programs to operate effectively in rural settings with only limited connections to the central government.[144]

C. *The Human Rights of AIDS-Related Orphans*

Against a combined backdrop of a country that has been economically and socially devastated, and considering surprisingly successful government efforts to address needs during a deadly epidemic, do the problems facing AIDS-related orphans rise to the level of human rights violations? Section C.1 will demonstrate the actual experiences of orphans in Cambodia today, framing the discussion by looking at access to healthcare and to education. Section C.2 will consider what human rights are implicated by problems of access. Section C.3 will consider whether the problems in realization of rights rise to the level of human rights violations under the current model of progressive realization and the obligation of immediate result.

1. Problems Facing AIDS-Related Orphans in Cambodia

Cambodian AIDS-related orphans exemplify the generally-accepted precept that human rights are not discreet, but rather interconnected.[145] This is particularly true in relation to vulner-

142. THE JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS), 2008 REPORT ON THE GLOBAL AIDS EPIDEMIC 48 (2008) [hereinafter UNAIDS 2008 REPORT].

143. *See supra* note 8 and accompanying text (noting effective government programs).

144. *See* Hankins, *supra* note 8, at 749 (citing the government's decentralized strategy as a model); BÜHLER, *supra* note 8, at 20 (noting effectiveness of cooperative model for treatment programs); *see also* POLICY PROJECT, *supra* note 124, at 21 (noting that computerized statistical model of Cambodian epidemic suggests prevalence would have reached 10% to 15% before stabilizing without strong government program); Sisowath, *supra* note 120, at 57 (noting same computerized model).

145. *See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691, 692, (1998) ("It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity."); David Patterson & Lisa Forman, *Legal and Human Rights Implications*, *in* THE HIV PANDEMIC:

able populations, who have little clout to get them past such obstacles.[146] Among vulnerable groups like AIDS-related orphans, if access to one jeopardized right is improved, violations of other rights are likely to prevent full enjoyment of the improvement. For instance, if school fees are eliminated in order to allow easier access to the right to education, children suffering from violations of the right to health may still find it difficult to attend school. Although this Note discusses Cambodian AIDS-orphans' human rights using a framework of healthcare and educational access, each of these areas implicates multiple, interconnected human rights.

a. Healthcare Access

Providing health services in Cambodia, and ensuring access to those services is a daunting requirement, given that the health system is still being rebuilt.[147] One assessment indicates that the country's AIDS healthcare is actually advancing *faster* than general healthcare infrastructure because of targeted international aid funds.[148] Only slightly more than half the population had access to the healthcare system in 2001,[149] and available healthcare is disproportionately concentrated in the cities.[150] Households with a member suffering from AIDS reported less access to needed healthcare than similar households without a person living with AIDS.[151]

LOCAL AND GLOBAL IMPLICATIONS 134, 134 (Eduard J. Beck et al. eds., 2006) ("[A]ll human rights are universal, indivisible, interdependent and interrelated.").

146. *See* Angela Campbell, *Stretching the Limits of "Rights Talk": Securing Health Care Entitlements for Children*, 27 VT. L. REV. 399, 407-08 (2003) (describing heightened interdependency of rights and lack of political and economic clout of children); Todres, *supra* note 10, at 447-58 (exploring heightened interdependency of rights relationships for AIDS-related orphans).

147. *See* Morineau, *supra* note 131, at 270 (noting that Cambodia is dealing "with a mature AIDS epidemic as the health system is still being built"); POLICY PROJECT, *supra* note 124, at 46 (describing continuing need to repair Cambodia's damaged healthcare system).

148. *See* Morineau, *supra* note 131, at 277 (noting that international funding for AIDS healthcare is disproportionate when compared to that available for other health problems).

149. *See* BLOOM, *supra* note 125, at 5 (noting only fifty-three percent of Cambodians have healthcare access).

150. *See* CRC Concluding Observations, *supra* note 129, ¶ 50 (noting lack of rural facilities); Morineau, *supra* note 131, at 274 (stating eighty-five percent of the population is rural, but only thirteen percent of health professionals are).

151. *See* ALKENBRACK, *supra* note 68, at 18 ("The study found that 35[%] of the case

Children who have been orphaned by AIDS face the same obstacles to healthcare access as the rest of the Cambodian population. However, they experience additional burdens to access caused by economic stresses that are amplified by their own or family-member illnesses, by their loss of a guardian, and by discriminatory practices.

While Cambodia's healthcare system is nominally free,[152] the medical personnel that staffs the system is paid below-subsistence wages.[153] As a result, clinics often charge unofficial fees.[154] Additionally, clinic staff often run their own for-profit clinics in their off hours to make ends meet.[155]

For children who lose a parent to AIDS, the unofficial fee system, coupled with the loss of parental income, often drains their family finances over the course of their parents' illness, leaving them impoverished.[156] One study found that Cambodian households with at least one adult living with HIV or AIDS spent twenty-two percent of their income on medical care, as compared to eight percent for other households[157]—despite access to "free" health services.

Although these practices affect the healthcare of all Cambodians, they have greater effect on parentless children because of their decreased economic means. An example of the heightened effect of economic barriers to access can be seen in the Ling Ching family of rural Battambang Province, made up of

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populations said there were times when they had not received needed healthcare, compared with 22.4[%] of the comparison.").

152. *See* CONST. OF KINGDOM OF CAMBODIA art. 72 (1993) (providing free healthcare for poor); Law on HIV/AIDS, *supra* note 133, art. 26 (assuring free healthcare for persons with HIV and AIDS).

153. *See* BLOOM, *supra* note 125, at 6 ("Cambodian public servants—including health workers—are paid a wage that is below subsistence levels."); Morineau, *supra* note 131, at 272 (noting poor civil servant wages);.

154. *See* BLOOM, *supra* note 125, at 6 (linking unofficial charges throughout healthcare system to below-subsistence wages); Morineau, *supra* note 131, at 272 (linking unofficial healthcare fees to poor civil servant wages).

155. *See* BLOOM, *supra* note 125, at 6 (noting civil servants work full-time at private facilities); Morineau, *supra* note 131, at 272 (noting government workers additionally running private clinics).

156. *See* Todres, *supra* note 10, at 427-29 (noting economic costs to orphans of parental disease); USAID STRATEGIC PLAN, *supra* note 7, at 39 (noting that overpayment for medical care can "often lead to a loss of income, property and other family assets, which ultimately has serious consequences for children who become AIDS orphans").

157. ALKENBRACK, *supra* note 68, at 17-18; *see also* CRC Concluding Observations, *supra* note 129, ¶ 50 (expressing concern at high cost of healthcare).

five siblings who lost both parents to AIDS. In the course of paying for their parents' healthcare, the two oldest of the siblings first dropped out of school to work while their parents were ill and then sold their family home. By the time they had entered the category of AIDS-related orphans, they were homeless as well.[158] For children like the Ling Chings, the unofficial fee system can first thrust them further into poverty and then create a higher hurdle to their own access to care.

AIDS-related orphans' access to healthcare is also negatively affected by AIDS-related discrimination. They can face burdens of discrimination and stigma either because they are themselves HIV-positive or because their community believes them to be after the death of their parents to the disease.[159] Some healthcare workers refuse to treat them out of fear of contamination.[160] Additionally, the fear of such reactions may make it difficult for AIDS-related orphans to seek necessary medical treatment.[161]

Lastly, Cambodian AIDS-related orphans can lack access to appropriate healthcare for children. One source reported that those Cambodian children with HIV and AIDS who received treatment had access only to adult treatments and dosages; no pediatric drug protocols were available.[162]

b. Access to Education

The same economic forces that impede access to the health-

158. Interview with Ling Ching siblings, ages 15, 16, 18, 20, 24, and 25, in Ek Phnom district, Prek Kpob Commune, Battambang Province, Cambodia (July 8, 2008).

159. *See* UNAIDS 2008 REPORT, *supra* note 142, at 77 ("In some cases, family members, caregivers, and the children of people living with HIV are also subject to discrimination and shame."); ALKENBRACK, *supra* note 68, at 33 (noting that children of guardians known to have AIDS may be ostracized).

160. *See* UNAIDS 2008 REPORT, *supra* note 142, at 77 ("Far too often, the healthcare system itself—including doctors, nurses, and staff responsible for the care and treatment of people living with HIV—are prime agents of HIV-related stigma and discrimination."); ALKENBRACK, *supra* note 68, at 18 (noting that discrimination on the part of health providers can limit access).

161. *See* UNAIDS 2008 REPORT, *supra* note 142, at 72 (reporting that women stayed away from clinics fearing violence in response to HIV status); ALKENBRACK, *supra* note 68, at 18 (noting that fear of stigma of being seen seeking HIV and AIDS-related care can keep patients from seeking access).

162. *See* Morineau, *supra* note 131, at 278 (noting that in Cambodia "protocols of paediatric [sic] treatments are not available, and many children have no option but to receive unsuitable adult therapies"); *see also* Howard Libman & Harvey J. Makadon, HIV 380 (2007) (noting international problem in producing pediatric AIDS drugs, expense).

care system can affect AIDS-related orphans' rights to education. The school system of the country is generally weak; Cambodians have a 73.6% adult literacy rate, and only 63% of students complete the fifth grade.[163] Adolescents affected by AIDS are less likely to be enrolled in school.[164]

The economic realities of AIDS in a poor society where school is not mandatory result in disruptions in education for children of families affected by AIDS.[165] Some leave to act as caretakers while their parents are ill;[166] some leave to work once their parents are incapacitated;[167] and some leave to support themselves or their younger siblings after their parents have died.[168]

The two oldest children in the Ling Ching family are typical: they dropped out of school to care for their ill parents. After their parents' deaths, they resisted suggestions that they send their three younger siblings to an orphanage, instead becoming the family breadwinners by cooking for wedding parties and raising fowl for market. They do not expect to resume school.[169]

The same pattern of insufficient wages that complicates the healthcare system has resulted in a system of unofficial payments in the educational system.[170] Hour Kimhan, the executive director of a rural school in Siem Reap province, reported that he

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163. *See* Human Development Report, *supra* note 123 (listing data related to the Human Development Index for Cambodia).

164. *See* ALKENBRACK, *supra* note 68, at 31 (noting "[t]he enrollment rate for these HIV/AIDS-affected adolescents was 68[%], compared to 74[%] in the comparison group;" but that figures do not reflect actual attendance, which is likely lower). The study defines an adolescent as being between thirteen and eighteen years old. *Id.* at viii.

165. *See* CRC Concluding Observations, *supra* note 129, ¶ 54 (expressing concern that school is not compulsory); ALKENBRACK, *supra* note 68, at 31 (noting economic pressures weighing against attendance for AIDS-related orphans).

166. *See* ALKENBRACK, *supra* note 68, at 31 (noting that girls are likely to be removed from school to care for ailing parents); BLOOM, *supra* note 125, at 6 (noting that children of ill parents, particularly girls, leave school to function as parental nurses).

167. *See* ALKENBRACK, *supra* note 68, at 32 (reporting that fifty-three percent of adolescents with a guardian ill from AIDS work to support the household, compared to forty percent of unaffected adolescents); Todres, *supra* note 10, at 426 (describing economic pressure for children of ill parents to generate income).

168. *See* Todres, *supra* note 10, at 428 (describing economic pressure for AIDS-related orphans to support younger siblings); Interview with Ling Ching siblings, *supra* note 158 (relating how brother and sister abandoned school to keep three younger siblings together as a family).

169. Interview with Ling Ching siblings, *supra* note 158.

170. Interview with Pork Sareut, third grade school teacher, in Samraung Takok Village, Sam Ek Phnom district, Roung Knong Commune, Battambang Province, Cam-

made fifty dollars a month, and that it did not cover the costs of fuel to travel from home to the school every day.[171] In many locations, unofficial payments take the form of an "extra course" fee, which students must pay for each hour taught on a given topic.[172] In others, the lessons are free but the test papers, required in order to move on to the next grade, are only available for a fee.[173] For the same reasons that AIDS-related orphans are less likely than their peers to be able to cope with the unofficial fees in the healthcare system, they are in a poor position to face additional fees in an educational setting.

In addition to practical and economic factors that disproportionately affect AIDS-related orphans' attendance rates, the social environment involved in attending class means that peer discrimination may function as a powerful disincentive to go to school.[174]

2. The Rights Implicated

The most obvious human right implicated by problems in access to healthcare is the right to health under the ICESCR and the CRC. The pattern of unofficial fees within the healthcare system acts as an economic barrier to the "enjoyment of the highest attainable standard of physical and mental health." Under the ICCPR, healthcare access can also implicate the right to life if it creates disparities in life expectancy for a group.[175] The disparate impact this barrier has on children affected by

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bodia (July 8, 2008) (reporting that teachers must work additional jobs or live with parents to meet basic needs).

171. Interview with Hour Kimhan, Executive Director, Kvien Primary School, in Kvien Village, Kok Chak Commune, Siem Reap Province, Cambodia (July 15, 2008).

172. Interview with siblings Srey 1, age eleven, and brother Pro, age fourteen, Cambodia (July 8, 2008) (describing fourteen-year-old Pro's inability to pay for English and Korean classes in local public school and that eleven-year-old Srey 1 is concealing her AIDS status; both names have been changed); Interview with Ling Ching siblings, *supra* note 158 (describing fee system for different subjects at their school).

173. Interview with Pork Sareut, *supra* note 170 (describing how some schools charge students for test papers); Interview with Vannetta Theun, Salvation Centre Cambodia grade school teacher, in Phnom Phen, Cambodia (June 26, 2008) (describing how some schools charge for test papers necessary to pass on to the next grade).

174. Interview with Srey 2, age thirteen, Cambodia (July 15, 2008) (relating how children at school will not associate with her because of AIDS status; name has been changed); Interview with Srey 1 and Pro, *supra* note 172 (expressing fear of social stigma if Srey 1's classmates discover she is HIV-positive).

175. *See supra* note 44 and accompanying text (noting that right to life should be read broadly, to include life expectancy).

AIDS implicates their rights to both health and life being realized without discrimination.

In addition to those rights directly implicated by the health-care system, the resulting poor health of Cambodian AIDS-related orphans can secondarily affect their ability to secure a host of other rights: the right to an adequate standard of living, the right to education, and protection from abuse and neglect.

Similarly, the unofficial fees levied in the school system implicate AIDS-related orphans' human right to education under the ICESCR and the CRC. The disproportional impact of the fees on those children affected by AIDS implicates the nondiscriminatory dimension of that right. Because education acts as an enabling right, problems in access can also secondarily affect a host of other rights, including the ability to exercise political rights, the right to an adequate standard of living, the right to a livelihood, and the right to be free of economic exploitation.[176]

While the rights to health and education both encompass nondiscriminatory treatment, the independent prohibition on nondiscrimination in the ICCPR and the CRC is independently implicated by disparities in treatment based on serostatus. Additionally, Cambodian AIDS-related orphans' right to special care and assistance from the state, under all three covenants, are implicated by problems in access to both health and education.

3. Do the Problems in Access Rise to the Level of Rights Violations?

How violations of rights are assessed depends on whether the right at issue is a civil and political right, subject to immediate obligations of result; or an economic, social and cultural right, subject to progressive realization. Because the duty to fulfill economic, social and cultural rights often requires significant economic resources, it is the area of rights realization where different results between analysis using obligations of immediate result and progressive realization are most stark.

This Section will look at whether or not the access problems facing Cambodia's AIDS-related orphans rise to the level of violations of the state's duties to realize their human rights under the standards of progressive realization and immediate result.

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176. *See supra* notes 145-46 and accompanying text (noting interconnectedness of human rights).

a. Is Cambodia in Violation of Human Rights Assessed Under the Progressive Realization Standard?

Of the primary rights at risk for Cambodian AIDS-related orphans, the right to health and the right to education are economic, social, and cultural rights recognized under the ICESCR,[177] and are assessed under the standard of progressive realization.[178] This standard allows Cambodia to fulfill its obligations by taking positive steps to implement the rights over time in accordance with its resources.[179] Although Cambodia is required to use "all appropriate means" to do so,[180] considerable leeway is allowed for the state to determine what is appropriate, so long as no retrogressive steps are taken.[181]

Cambodia has taken some notable steps towards realization of the rights to health and to education as they relate to AIDS-related orphans since the nation was returned to Cambodian rule in 1992. The adoption of a rights-rich Constitution, specifically granting the rights to health and to nine years of free education, is as powerful a legislative fulfillment of those rights as can be made. Constitutional power allows consideration of a guaranteed right to override other inconsistent laws,[182] while removing recognition of a right that has been constitutionally-guaranteed would require special constitutional processes of amendment or repeal.[183]

In enacting the NSP and the Law on HIV/AIDS, Cambodia has taken additional legislative and administrative steps towards

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177. *See supra* notes 46, 57 and accompanying text (locating rights to health and education in the ICESCR).

178. *See supra* note 70 and accompanying text (noting that most rights in ICESCR are assessed by progressive realization).

179. *See supra* notes 71-72 and accompanying text (describing progressive realization).

180. ICESCR, *supra* note 23, art. 2(1).

181. *See supra* note 72 and accompanying text (noting ICESCR's prohibition on retrogressive measures).

182. *See* Dianne Otto & David Wiseman, *In Search of "Effective Remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia* 17 (Faculty of Law, The Univ. of Melbourne, Pub. Law and Legal Theory, Working Paper No. 15, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=270908 ("Constitutionally entrenched human rights are the most powerful because they operate by controlling law-making power and found claim-rights directly on violations of ICESCR rights.").

183. *See id.* (noting that constitutionally-granted rights "cannot be repealed or amended by the ordinary law-making process as this can only be achieved through extra-ordinary constitution-making procedures").

its duty to fulfill the rights to both health and education for people with HIV or AIDS, among them AIDS-related orphans.

These steps have not necessarily translated into enforcement. The circumstances under which the Constitution was written support the notion that it was written as a largely outward-looking document; the included human rights provisions were necessary to satisfy Cambodia's obligations to the international community under the Paris Accords.[184] Internally, the human rights provided are often considered aspirational goals rather than enforceable rights.[185] Cambodia is still a country where the fundamental rule of law is often in question,[186] and it is not surprising that domestic human rights guarantees may be of token value—particularly among groups with little political, economic or military power.

Operational ineffectiveness does not necessarily disqualify the Constitution and Law on HIV/AIDS as a "step taken" within an analysis based on the progressive realization standard. Cambodia has the distinction of being a country where a non-functional guarantee of rights may well qualify as a step towards fulfillment of those rights. In relation to a recent political history in which the rights to education and health were, in practical terms, eliminated, a constitutional acknowledgement can be seen as a necessary step towards eventual enforcement.

Furthermore, there is evidence that the Law on HIV/AIDS, and the accompanying implementation measure of the NSP,

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184. *See* Agreement on Settlement, *supra* note 110, at 202 (listing requirements placed on new constitution); *see also* Ted L. McDorman & Margot Young, *Constitutional Structures and Human Rights in Souteast Asia: Cambodia, Indonesia, Thailand and Vietnam*, 47 U. NEW BRUNSWICK L.J. 85, 101 (1998) (listing international political considerations for including non-operative human rights provisions in constitutions).

185. *See* McDorman & Young, *supra* note 184, at 102-06 (describing Constitution as primarily "organizational" with little operational effect); Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 COLUM. J. ASIAN L. 371, 415 (2004) (explaining that Cambodian constitutional protections against are considered aspirational, not functional).

186. Yash Ghai notes in his capacity as U.N. Special Respresentative of the Secretary General for human rights in Cambodia:

> In a state marked by the absence of the rule of law, it is all too easy to violate the rights of others, with total impunity, if one is powerful . . . Laws may be made under pressures from donors, but there is no intention to enforce laws inconvenient to the ruling group.

Yash Ghai, *Technical Assistance and Capacity-Building: Report of the Special Representative of the Secretary-General for human rights in Cambodia*, ¶ 73, U.N. Doc. A/HRC/7/42 (Feb. 29, 2008); *see also* Schwartz, *supra* note 185, at 424 (calling Cambodia "fundamentally lawless society").

have effectively improved the right to health for AIDS-related orphans. In comparison with the level of such rights in Cambodia's recent history, the improvements in the face of the challenge of an AIDS epidemic are notable.

b. Is Cambodia in Violation of Human Rights Assessed Under the Standard of Obligation of Immediate Result?

Of the primary rights at risk for Cambodian AIDS-related orphans, the right to life[187] and the prohibition on discrimination[188] are civil and political rights recognized in the ICCPR. As such, they are assessed under the standard of immediate obligation of result.[189] Unlike rights assessed under progressive realization, any abridgement of these rights is a violation.[190] References to Cambodia's human rights history and current economic distress cannot excuse a failure to fully realize these rights.[191]

Cambodia's Constitution incorporates the human rights to life and to nondiscrimination by reference to the international human rights treaties that define them.[192] While the enforceability of these rights at a domestic level may be unclear,[193] Cambodia's accession to the ICCPR creates an obligation under international law to respect, protect and fulfill the right to life of its AIDS-related orphans.

However, unlike under a progressive realization analysis of

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187. *See* ICCPR, *supra* note 24, art. 6(1) ("Every human being has the inherent right to life.").

188. The ICCPR states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id., art. 26.

189. *See supra* notes 70-72 and accompanying text (describing requirements of immediate effect).

190. *See supra* note 79 and accompanying text (noting "unqualified and immediate effect" of obligations under the ICCPR).

191. *See id.* (noting that failures to comply cannot be justified by contextual considerations).

192. *See supra* note 110-11 and accompanying text (noting method of incorporation of international human rights treaties).

193. *See supra* notes 112-13 and accompanying text (noting uncertain enforceability of rights incorporated from international human rights treaties).

constitutionally-granted rights, under the standard of obligation of immediate result the Constitution must be *effective* in fulfilling human rights. Domestic laws that protect human rights in an unclear manner, without immediate effect for individuals, cannot qualify as fulfillment of the state's obligations regarding civil and political rights. Thus, under the ICCPR, Cambodia is in violation of the right to life and the prohibition against discrimination regarding its AIDS-related orphans.

III. *ESCAPING THE PROGRESSIVE REALIZATION STANDARD*

As described in Part II, Cambodian AIDS-related orphans suffer difficulties in access to healthcare and education in ways that suggest their economic, social, and cultural rights are being violated, although under the standard of progressive realization there may technically be no violation. Part III of this Note suggests two analytical solutions. The first solution, discussed in Section A, is to selectively pursue those rights not subject to the progressive realization standard, in the hope and belief that other, inextricably intertwined rights will improve as violations to related rights are remedied. The second solution, discussed in Section B, is to reinterpret rights assessed under the progressive realization standard more broadly, requiring that each incremental step toward fulfillment encompass the full breadth of the right in order to qualify as meeting the standard of progressive realization.

A. *Addressing Economic, Social and Cultural Rights Through Key Civil, and Political Rights*

This Note has discussed, among a host of rights in jeopardy, the right to health, the right to life, the right to education, and the prohibition on discrimination. Of these rights, health and education are subject to the progressive realization standard,[194] while life and nondiscrimination are immediately enforceable under the obligation of immediate result.[195] Cambodian AIDS-related orphans, as a population, exemplify the interconnected-

194. *See supra* notes 46, 56, 69-70 and accompanying text (locating rights to health, education in the ICESCR, subject to progressive realization).

195. *See supra* notes 43-44, 64, 76-77 and accompanying text (locating rights to life, nondiscrimination in the ICCPR, subject to obligation of immediate result).

ness of rights.[196] Because their rights are particularly intertwined, pursuing those rights that are immediately enforceable as "key rights" provides an avenue for addressing other rights that are in jeopardy. Section A will consider the use of the right to life and the prohibition on discrimination as key rights.

1. The Right to Life

The key right of the right to life has an obvious relationship to all other rights, but is especially closely linked to the right to health. Though often interpreted as a restriction on the state's power to wage offensive war and exercise the death penalty, ICCPR General Comment 6 suggests that this reading is too narrow to truly satisfy the right.[197] A broader reading requires that states protect the right to life through addressing epidemics and disparities in life expectancy.[198]

Cambodian children who have HIV or AIDS themselves, or who have a parent with the disease, have a heightened need for health services. The low wages paid to healthcare workers in Cambodia, and the resulting system of unofficial fees that permeate the health system, create an economic barrier to healthcare for these children.[199] Given their special susceptibility to illness, the government policy on wages directly affects AIDS-related orphan's life expectancy. In combination with the ICCPR's requirement of special care for children, the policy becomes an unacceptable violation of AIDS-orphans' right to life.

Cambodia is in violation of the right to life regarding its AIDS-related orphans; because the right to life is an immediately enforceable civil and political right, Cambodia must remedy the situation.[200] Any remedy that addresses the conditions leading to compromised life expectancy for the members of this vulnerable population is also highly likely to improve realization of their

196. *See supra* notes 145-46 and accompanying text (noting heightened interdependency of rights for Cambodian AIDS-related orphans).

197. *See supra* note 44 and accompanying text (noting right to life is to be broadly construed).

198. *Id.* (noting broad interpretation includes reduction of infant mortality, increasing life expectancy, addressing epidemics).

199. *See supra* notes 152-154, 156-158 and accompanying text (noting unofficial but systematic fees in healthcare system creates disproportionate burden to access for AIDS-related orphans).

200. *See supra* notes 43-44, 64, 76-77 and accompanying text (locating right to life in the ICCPR, subject to obligation of immediate result).

right to health. A remedy is also likely to positively affect secondarily affected rights, such as the right to an adequate standard of living, to education, and to protection from abuse and neglect.

2. The Prohibition on Discrimination

The prohibition against discrimination can also be used as a key right, in that remedies to violations to the prohibition, as a right assessed by the obligation of immediate result, can positively affect realization of a number of closely-related rights assessed under progressive realization. In the case of people with HIV and AIDS, discrimination permeates other rights: the rights to health and education, as has been discussed,[201] but also the right to a livelihood, to participation in cultural life, and to family.

Discrimination against AIDS-related orphans is prohibited on the basis of their own real or perceived serostatus or that of their family members. In Cambodia, such prohibited discrimination interferes with AIDS-related orphans' access to both healthcare and to education, resulting in less healthcare access for a population with a heightened need for it, as well as lower school enrollment rates. This violates the prohibition on discrimination.

Because nondiscrimination is an immediately enforceable civil and political right, the state is obligated to take positive action to correct discrimination.[202] In correcting the violation, any remedy the state might enforce would necessarily also address abuse of the economic, social, and cultural rights that are affected by discrimination.

B. *Looking at the Full Breadth of Individual Economic, Social, and Cultural Rights*

A second way of circumventing the dilemma of Cambodia's low rights baseline in relation to the progressive realization standard is to broaden the interpretation of the content of individual economic, social, and cultural rights; and to then argue that

201. *See supra* notes 159-61, 174 and accompanying text (noting negative effects of discrimination on access to healthcare, school).

202. *See supra* notes 64, 76-78 and accompanying text (locating right of nondiscrimination in ICCPR, subject to obligation of immediate result).

progressive steps must fully reflect that broadened scope. A theoretical example might be based on the right to health, which contains within it a prohibition on discriminatory practices in realizing the right. Under a broadened interpretation of the right to health, the embedded prohibition would become a required component of the right. Thus, a first step taken to build a healthcare system that made the system available only to those of Khmer ethnicity, and preventing access by ethnic Vietnamese citizens of Cambodia, would lack a compulsory element of the right to health itself. In this example, while the state would be violating the independent prohibition on discrimination, under progressive realization it would also be failing to take a legitimate step towards realizing the right to health. Although rights could still be realized progressively, each step would be assessed with more particularized attention encompassing all the required elements of each right before that step could qualify under progressive realization.

Section B will apply this concept to the two major progressively-realized rights at risk for AIDS-related orphans identified in Part II: The right to health and the right to education.

1. The Right to Health

The right to health, like all human rights, is indivisible and interconnected to other rights.[203] Alternatively, other basic human rights can be interpreted as "integral components of the right to health."[204] General Comment 14 to the ICESCR interprets the rights that make up the right to health generously: "the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement."[205] The actual wording of the right to health, as expressed in both the ICESCR and the CRC, can also be used to broaden interpretation of the right. Each instrument includes nondiscriminatory language embedded within the right itself: the right is a right "of everyone," and the state must ensure medical care "to all."[206]

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203. *See supra* note 145 and accompanying text (noting interdependency of rights).

204. ICESCR Comment 14, *supra* note 46, ¶ 3.

205. *Id.*

206. *See* CRC, *supra* note 21, art. 24(1) (stating that "no child" shall be deprived of

Under an interpretation of the right to health that has been broadened to include these embedded rights, Cambodia's steps to realize the right to health would fail to meet the progressive realization standard. AIDS-related orphans' access to healthcare is reduced through discrimination,[207] violating the non-discriminatory dimension of the right to health; and the negative impact of reduced and inappropriate healthcare on their life expectancy affects their right to life, an integral component of the full breadth of their right to health.

2. The Right to Education

The human right to education can also be interpreted in a broadened way. As with many economic, social, and cultural rights, it includes both positive and negative obligations. The state must provide the system in which individuals can get an elementary education and permit access; the state is also prohibited from hindering access to that system, and must prevent third parties from hindering access.[208]

Similarly to the right to health, the right to education includes embedded prohibitions on discrimination.[209] In the case of particularly vulnerable groups that experience obstacles to access, states also have a particular obligation to ensure that they are actually fulfilling the right to an education.[210] Other mandatory components of the right include compulsory and free primary schooling.[211]

Under a broadened interpretation of the right to education, Cambodia's steps toward realization of the right fail the progressive realization analysis. The primary education offered is

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requisite access to healthcare); ICESCR, *supra* note 23, art. 12 (noting that right to health is "of everyone," state must ensure medical care "to all").

207. *See supra* notes 159-161 and accompanying text (describing negative impact of discrimination on AIDS-related orphans access to healthcare).

208. *See* Otto & Wiseman, *supra* note 182, at 7 (noting state parties must both refrain from violating human rights themselves and also prevent third parties from doing so).

209. *See supra* note 57-58 and accompanying text (describing nondiscriminatory provisions).

210. *See* Otto & Wiseman, *supra* note 182, at 8 (noting requirement to fulfill rights includes positive actions to do so when a person or group is unable to do so themselves).

211. *See supra* note 59 and accompanying text (noting that education must be free and mandatory under the ICESCR).

neither mandatory[212] nor operationally free.[213] Additionally, the element of nondiscrimination is not met; the economic burden of supplementing teacher salaries on a daily basis disproportionately affects AIDS-related orphans because of their precarious economic position.[214] Under the broadened interpretive model for progressive realization, Cambodia would be in violation of its obligations to AIDS-related orphans regarding both their right to health and to education.

CONCLUSION

In the context of Cambodia, where the baseline against which human rights are measured has been drastically lowered, the progressive realization standard creates a dilemma: apparent human rights abuses can be contextualized away as partial steps along the path to true realization of rights.

The treaty bodies charged with assessing state party's compliance with their obligations under international human rights treaties should use the concept of key rights, based on selecting immediately-enforceable rights that are inextricably bound up with progressively-realizable rights, to circumvent this dilemma. They should also insist that the indivisible nature of rights requires that each step taken towards the progressive realization of a right address the full scope of that right. These two theoretical devices would allow pursuit of full enforcement of the human rights of AIDS-related orphans in Cambodia.

212. *See supra* note 165 and accompanying text (noting school is not mandatory).

213. *See supra* notes 172-73 and accompanying text (noting unofficial fee system in schools).

214. *See id.* (noting economic burden of fee system to AIDS-related orphans).