
**The national implementation of international human rights law pertaining to
children with disabilities in selected jurisdictions in Africa**

By

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UNIVERSITY of the
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**Submitted in fulfilment of the requirements for the Doctor of Laws Degree (LL D) in the
Faculty of Law, University of the Western Cape, Republic of South Africa**

Supervisor:

Prof. Helene Combrinck

September 2014

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Declarations

'I declare that the work: "The national implementation of international human rights law pertaining to children with disabilities in selected jurisdictions in Africa" is mine, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references'.

Signed Enoch MacDonnell Chilemba (candidate)

Signed Prof. Helene Combrinck (supervisor)



Dated this 1st day of September 2014

Dedication

Dedicated to children with disabilities in Africa, especially in Malawi and South Africa, who currently face obstacles to enjoy human rights on an equal basis with other children; but could see the light at the end of the tunnel as the governments of their countries continue to take the appropriate extra steps to realise their rights contained in international human rights treaties at national level.

And to all persons who are actively involved in human rights advocacy, especially in promoting the rights of persons with disabilities, for acknowledging that children with disabilities, just like all human beings, should have full human rights enjoyment on an equal basis with others.



Acknowledgments

I express my sincere gratitude to Yahweh Almighty for being the architect of the success behind this work.

I sincerely appreciate the supervisor for this thesis, Prof. Helene Combrinck of the Centre for Disability Law and Policy at the University of the Western Cape, for the supervision, including the meticulous observations and comments on the draft chapters- You have played a huge and significant part in my being able to complete this work.

I also extend my earnest gratitude to the following:

The Centre for Disability Law and Policy for not only taking me on board as doctoral researcher but also ensuring that my thesis writing goes on smoothly and for funding the second year of study;

The Community Law Centre (CLC) at the University of the Western Cape, Prof. Jaap de Visser, Prof. Nico Steytler, Debbie Gordon and all CLC members of staff for making 'feel at home' during this period;

The Faculty of Law and the Community Law Centre for organising doctoral colloquia every year-the colloquia played an important part in keeping me focused on the work and getting feedback from independent experts;

The Dean of Law and all members of staff at the Faculty of Law of the University of Malawi for being supportive throughout my studies;

The Open Society Initiative for Southern Africa (OSISA) for funding the first and third years of study; and

All friends and relatives,

I sincerely appreciate.

Key words

Human rights

Children's rights

Children with disabilities

Persons with disabilities

Human rights approach to disability

International human rights law

National implementation of human rights

Fundamental attributes of implementation framework

Malawi

South Africa



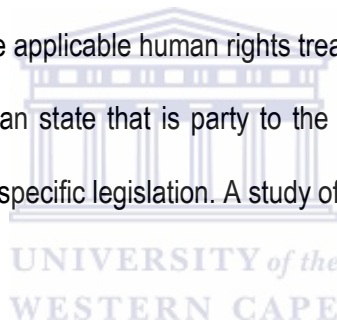
Abstract

Many African states are party to various international human rights treaties that contain international human rights law pertaining to children with disabilities. The treaties include the Convention on the Rights of Persons with Disabilities; Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child. The applicable treaties demonstrate that the law takes a particular approach in providing for the rights of children with disabilities. The study refers to the approach as the 'human rights based approach' to disability which is explained by a number of fundamental attributes that are reflected in the obligations that the law requires states to comply with in implementing the rights of children with disabilities. These attributes include: adherence to the human rights model of disability in conceptualising disability; explicit mention and recognition of disability and the rights of children with disabilities; respect for non-discrimination which ensures substantive equality for children with disabilities; respect for the principle of inclusion of children with disabilities in the society; recognition of the principle of the best interests of the child as the paramount consideration in all matters affecting children, including children with disabilities; and protection of survival and developmental rights for children, including children with disabilities. Through this approach, the treaties provide guarantees for the full enjoyment of human rights by children with disabilities in Africa. Accordingly, the attributes reflect the international standards for ensuring the appropriate national implementation of the rights of children with disabilities in Africa

However, the study observes that despite these guarantees, most children with disabilities in Africa do not enjoy human rights on an equal basis with other children. This thesis considers two jurisdictions, namely Malawi and South Africa, and attributes the problem to the lack of appropriate national implementation of the applicable human rights law by these states. Consequently, the study is based on the underlying assumption that one of the main ways of addressing this problem is for African states to undertake

measures that comply with international standards for ensuring the appropriate national implementation of the applicable international human rights law. Accordingly, in terms of its central research question, the study investigates with reference to two selected jurisdictions, how African states should take appropriate measures that comply with international standards in order to ensure the enjoyment of human rights by children with disabilities in their jurisdictions.

In terms of its methodology, the study utilises desk research and focuses on legal and policy measures. In achieving its objectives, it analyses the issue under two scenarios, which are illustrated by comparative study of two African states. First, it looks into an African state which has disability specific and child protection legislation and is party to the applicable human rights treaties. A study of Malawi is utilised in this regard. Secondly, it analyses an African state that is party to the same treaties and has child protection legislation but does not have disability specific legislation. A study of South Africa serves this purpose.

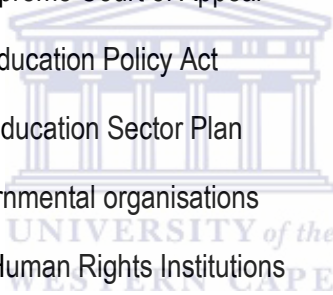


The study concludes that the domestic implementation frameworks in both jurisdictions have gaps that prevent the achievement of compliance with the international standards. This demonstrates that the failure by the two countries to take national implementation measures that comply with international standards significantly contributes to the lack of full human rights enjoyment by children with disabilities in Malawi and South Africa. Accordingly, it proposes a number of measures that could be taken by the two jurisdictions to modify the frameworks in order to comply with the international standards. It further draws out broader lessons pertaining to the domestic implementation which have implications for other African states parties to the applicable treaties.

List of abbreviations

ACDEG	African Charter on Democracy, Elections and Governance
ACERWC.....	African Committee of Experts on the Rights and Welfare of the Child
ACHPR.....	African Charter on Human and Peoples' Rights
ACPF.....	African Child Policy Forum
ARI.....	African Rehabilitation Institute
AU.....	African Union
AYC.....	African Youth Charter
CAT.....	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC.....	Constitutional Court of South Africa
CCPJA.....	Child Care, Protection and Justice Act
CCPR.....	International Covenant on Civil and political Rights
CEDAW.....	Convention on the Elimination of all forms of Discrimination against Women
CERD.....	International Convention on the Elimination of all forms of Racial Discrimination
CESCR.....	International Covenant on Economic, Social and Cultural Rights
CPAIDP.....	Convention for the Protection and Assistance of Internally Displaced Persons
CPR.....	Civil and Political Right
CPRs.....	Civil and Political Rights
CRC.....	Convention on the Rights of the Child
CRPD.....	Convention on the Rights of Persons with Disabilities
CSOs.....	Civil Society Organisations
DPOs.....	Disabled persons' organisations
DRDP.....	Declaration on the Rights of Disabled Persons
DSD.....	Department of Social Development

ECD.....	Early childhood development
EEA.....	Employment Equity Act
ESCR.....	Economic, social and cultural rights
FPE.....	Free primary education
HPA.....	Handicapped Persons Act
HRC.....	Human Rights Committee
IBR.....	International Bill of Rights
ICT.....	Information communication and technology
INDS.....	South African Integrated National Disability Strategy
INSSSCD.....	Integrated National Strategy on Support Services to Children with Disabilities
MSCA.....	Malawi Supreme Court of Appeal
NEPA.....	National Education Policy Act
NESP.....	National Education Sector Plan
NGOs	Non-governmental organisations
NHRIs.....	National Human Rights Institutions
OAU.....	Organisation of African Unity
PEPUDA.....	Promotion of Equality and Prevention of Unfair Discrimination Act
RSA.....	Republic of South Africa
SAA.....	Social Assistance Act
SAHRC.....	South African Human Rights Commission
SASA.....	South Africa's Schools Act
SEN.....	Special Educational Needs
SER.....	Social and Economic Right
SERs.....	Social and Economic Rights
SNE.....	Special Needs Education
UDHR.....	Universal Declaration of Human Rights



UN.....	United Nations
UNDRMRP.....	United Nations Declaration on the Rights of Mentally Retarded Persons
WHO.....	World Health Organisation
WPA.....	World Programme of Action Concerning Persons with Disabilities



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Chapter 1

General introduction and background

1.1 Background to the study

1.1.1 Obstacles to human rights enjoyment by children with disabilities in Africa

Children with disabilities in Africa face many challenges that impede them from enjoying human rights on an equal basis with other children.¹ A number of studies have established that children with disabilities in Africa often live in conditions of abject poverty; are victims of violence, exploitation, abuse and harmful traditional practices; lack access to health, rehabilitation and welfare services; are neglected by parents; and little action is taken to meet their needs.² For example, in certain African societies, children with disabilities are killed, neglected or not sent to school to attain an education due to negative stereotypes,³ which include being locked up by parents or guardians who seek to hide them from the society as it is considered a taboo to have a child with disability.⁴ In addition, children with disabilities in Africa and their families are frequently prevented from enjoying their fundamental human rights due to, among others, the fact that their capabilities, 'needs' and abilities are not given high priority.⁵ Consequently, children with

¹ See generally African Child Policy Forum (ACFP) *Children with disabilities in Africa: Challenges and opportunities* (2011). It is noteworthy that the thesis uses the phrase 'persons with disabilities' and 'children with disabilities' in reference to the people and children who have disabilities respectively in accordance with contemporary practice. Indeed, the Convention on the Rights of Persons with Disabilities (CRPD) utilises the two phrases in this regard.

² See ACPF *The lives of children with disabilities in Africa: A glimpse into a hidden world* (2011); Ransom B *Missing voices: Children with disabilities in Africa* (2008).

³ See e.g. Filmer D 'Disability, poverty, and schooling in developing countries: Results from 14 household surveys' (2008) 22 *World Bank World Economic Review* 141; Marongwe N & Mate R 'Children with disability: Their households' livelihoods and experience in accessing key services' (2007) 25; Choruma T *The forgotten tribe: People with disabilities in Zimbabwe* (2006) 7 & 16.

⁴ See e.g. Lang R & Charowa G *DFID scoping study: Disability issues in Zimbabwe* (2007) 19.

⁵ Combrinck H *The Children's Act and disability* (2011) 8; ACPF *The lives of children with disabilities in Africa* (2011) 1.

disabilities in Africa are subjected to various forms of exclusion, marginalisation and discrimination that prevent them from enjoying, on an equal basis with other children, the human rights guaranteed to all children by various human rights treaties. It can be observed that these obstacles impede children with disabilities from enjoying rights such as education, freedom from abuse and violence; freedom from discrimination; survival and development; and inclusion in the societal as individuals with equal rights and autonomy. It is thus relevant to explore such violations, amongst others, in greater detail in order to appreciate the deplorable situation facing a large majority of children with disabilities in Africa.

First, with regard to education, almost 98 per cent of children with disabilities in Malawi do not obtain an education.⁶ Similarly, various obstacles, including legal and cultural challenges, impede access to education by children with disabilities in Cameroon- a situation that is compounded by the lack of facilities that could ensure inclusive primary education.⁷ Likewise, it has been found that the majority of children with disabilities in Zimbabwe do not access education due to,⁸ amongst others, cultural factors such as the belief that children with disabilities are incapable of learning and that sending them to school is a 'waste of time'.⁹ Above all, a study by the UN has observed that 98 percent of children with disabilities in developing countries, which include a majority of African countries, do not attend school.¹⁰

Secondly, in respect of freedom from abuse, violence and harmful practices, studies have found that a number of children with disabilities in Zimbabwe are killed immediately after birth;¹¹ and are

⁶ See Malawi Government *National Policy on the Equalisation of Opportunities for Persons with Disabilities* (Equalisation Policy) (2005) 5.

⁷ See e.g. Kamga SAD 'Forgotten or included? Disabled children's access to primary education in Cameroon' (2013) *African Disability Rights Yearbook* 27, 45-47.

⁸ See e.g. Mandipa E 'A critical analysis of the legal and institutional frameworks for the realisation of the rights of persons with disabilities in Zimbabwe' (2013) *African Disability Rights Yearbook* 73, 75; Lang & Charowa (2007) 6;

⁹ Choruma (2006) 16;

¹⁰ United Nations (UN) *From exclusion to equality: Realising the rights of persons with disabilities- a handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) 1.

¹¹ Mandipa (2013) 74; *Chronicle*: 'Woman drowns disabled toddler' 22 August 2013.

abandoned by their fathers by deserting them together with their mothers because disability is perceived as a curse on the family.¹² Likewise, persons/children with albinism in certain African societies, including Tanzania, Kenya and Uganda, are often killed on the basis that their body parts could be used for certain traditional rituals.¹³ In addition, studies have found that children with disabilities in South Africa suffer from harmful practices such as violence, including sexual assault, in addition to abuse and neglect by the family and the community.¹⁴ In this regard, it has been established that children without disabilities are more likely to be beaten or bullied than other children without disabilities¹⁵ and are also at a greater risk of experiencing sexual abuse.¹⁶ Similarly, children with disabilities in various African societies/countries are hidden or prevented from engaging with the rest of the community as they are perceived as 'a "disgrace" to their families' and are regarded as symbolising a 'punishment from the gods on the family'.¹⁷ Above all, harmful practices against children with disabilities such as hiding them or locking them up also result in their exclusion from society, which further perpetuates the violations of their human rights.¹⁸

Indeed, persons/children with disabilities in Africa are often excluded from society and, moreover, such exclusion is one of the major causes for the lack of their human rights enjoyment.¹⁹ In this regard, it

¹² Marongwe & Mate (2007) 25; Choruma (2006) 7.

¹³ See generally *The Telegraph*: 'Albinos hunted for body parts in Africa' 10 April 2011; *All Africa*: 'East Africa: Albinos still targeted for body parts' 11 February 2011 '<http://allafrica.com/stories/201102111011.html>' (accessed 5 June 2014).

¹⁴ See generally ACPF *Children with disabilities in South Africa: The hidden reality* (2011) 36-37.

¹⁵ See generally World Health Organisation (WHO) & World Bank *World report on disability* (2011) 3; ACPF *Breaking the silence: Violence against children with disabilities in Africa* (2010) 1-2.

¹⁶ See generally ACPF *Breaking the silence* (2010) 2; Handicap International & Save the Children *Out from the shadows: Sexual violence against children with disabilities* (2011).

¹⁷ See Kamga (2013) 46. See also Combrinck in Sloth-Nielsen (ed) (2008) 302; Biegon J 'The promotion and protection of disability rights in the Africa human rights system' in Grobbelaar-du Plessis I & Van Reenen T (eds) *Aspects of disability law in Africa* (2011) 53-83, 83.

¹⁸ See e.g. Grobbelaar-du Plessis I & Van Reenen T 'Introduction to aspects of disability law in Africa' in Grobbelaar-du Plessis & Van Reenen (eds) (2011) xv- xxvii, xvi.

¹⁹ See generally Kalaluka L 'Towards an effective litigation strategy of disability rights: The Zambian experience' (2013) *African Disability Rights Yearbook* 165-189, 166; Grobbelaar-du Plessis & Van Reenen in Grobbelaar-du Plessis & Van Reenen (eds) (2011) xv; ACPF *Children with disabilities in Africa: Challenges and opportunities* (2011) v.

has been found that persons with disabilities, including children with disabilities, in Africa are excluded from 'equal access to, and participation in community life', principally because 'public facilities, transport, training, working opportunities, communication and even access to information, to mention but a few, are unavailable and inaccessible' to a large majority of persons/children with disabilities.²⁰

Lastly, in respect of the right to freedom from discrimination, children with disabilities in Malawi experience discrimination from birth.²¹ Similarly, children with disabilities in South Africa are acknowledged as constituting one of the specific categories (of persons with disabilities) that are victims of past and existing inequalities.²² Above all, a number of works have highlighted the fact that various perceptions based on cultural and religious beliefs, which are also reflected in behaviour and legislation, result in discrimination against persons/children with disabilities in many jurisdictions in Africa and the rest of the world.²³ It is also noteworthy that a UN study has found that disability leads to poverty among persons/children with disabilities because they suffer various forms of discrimination and marginalisation. Accordingly, discrimination against persons/children with disabilities is not only a violation of their human rights, but it also accounts for the conditions of abject poverty that they often live in.

Therefore, it can be observed in the light of the forgoing discussion that children with disabilities in Africa face various obstacles, including discrimination, exclusion and marginalisation, which prevent them from enjoying human rights on an equal basis with other children.

²⁰ Grobbelaar-du Plessis & Van Reenen in Grobbelaar-du Plessis & Van Reenen (eds) (2011) xvi.

²¹ See Equalisation Policy (2005) 4.

²² See e.g. Government of the Republic of South Africa *Integrated National Disability Strategy (INDS)* (1997) 12.

²³ See e.g. Grobbelaar-du Plessis & Van Reenen in Grobbelaar-du Plessis & Van Reenen (eds) (2011) xvi; Jones M & Marks LA 'Law and the social construction of disability' in Jones M & AB Marks AB (eds) *Disability, divers-ability and legal change* (1999) 3.

1.1.2 Opportunities for human rights enjoyment for children with disabilities in Africa

It is noteworthy that despite the appalling situation facing children with disabilities in Africa, many African states are party to a number of international human rights treaties which provide for their rights. The treaties include the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD);²⁴ the UN Convention on the Rights of the Child (CRC);²⁵ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).²⁶ Indeed, by May 2014, at least 37 of the 54 African states had ratified the CRPD, which is the only global treaty that specifically provides for the rights of persons with disabilities, including children with disabilities, and has been in force for just about six years.²⁷ In addition, all African countries, except Somalia and South Sudan, are party to the CRC; while 47 countries had ratified the African Children's Charter by May 2014.²⁸ Furthermore, there are proposals for the adoption of an African disability treaty.²⁹ This demonstrates an intention on the part of many African states to improve the human rights situation of children with disabilities at the international and regional level. Thus there are a number of opportunities which African states could seize in order to realise the rights of children with disabilities at national level.³⁰ However, this available opportunity stands in sharp contrast to the actual situation of many children with disabilities in Africa who enjoy human rights to a limited extent- or not at all, as discussed above.

²⁴ Adopted on 13 December 2006, entered into force on 3 May 2008.

²⁵ Adopted on 20 November 1989, entered into force on 2 September 1990.

²⁶ Adopted on 11 July 1990, entered into force on 29 November 1999.

²⁷ 'Convention and Optional Protocol signatures and ratifications' <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (accessed 10 June 2014).

²⁸ Ratification Table: African Charter on the Rights and Welfare of the Child' <http://www.achpr.org/instruments/child/ratification/> (accessed 10 June 2014).

²⁹ See African Commission on Human and Peoples' Rights, Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa (2009).

³⁰ Further discussion of how these treaties make provision for the rights of children with disabilities in Africa is contained in Chapter 2 & Chapter 3 of this study.

1.2 Problem statement and underlying assumption

1.2.1 Problem statement

In light of the above background, the study investigates the problem of the limited enjoyment of human rights by children with disabilities in two selected African jurisdictions, namely Malawi and South Africa,³¹ which provide the basis for a comparative study;³² considering the fact that these states have ratified the pertinent treaties.³³ The study considers that the situation could be attributed to the lack of 'appropriate' national implementation of the rights by the states.³⁴ Hence, the thesis seeks to determine how the two selected African jurisdictions (in addition to the other pertinent African states) should implement the rights of children with disabilities at national level.

Accordingly, the study sets out to answer the central research question, namely: How should the African state parties to the international human rights treaties which provide for the rights of children with disabilities implement the applicable international human rights law at national level in order to ensure the enjoyment of the guaranteed rights by children with disabilities in their jurisdictions?

³¹ A discussion relating to the choice of the two jurisdictions is contained in 4 below.

³² Further discussion and explanation relating to the comparative perspective is contained in 1.4 below.

³³ See 1.1.2 above for a discussion on the relevant treaties.

³⁴ See e.g. Amanda L 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights law Journal* 11-32, 29, where it is observed that the lack of 'domestic incorporation' of the treaties is one of the major causes for the failure by states to implement the rights contained in human rights treaties at national level.

1.2.1 Underlying assumption

As discussed above, there are a number of international human rights treaties that provide for the rights of children with disabilities in Africa.³⁵ It is noteworthy that although human rights treaties exist at the international level, states carry 'the primary responsibility for [implementing] human rights'.³⁶ In this regard, state parties to international human rights treaties have an obligation to take appropriate implementation measures to ensure the enjoyment of the rights guaranteed by the treaties at national level.³⁷ In addition, such measures must comply with the international standards in order to realise the rights. The obligation equally applies to Malawi and South Africa in addition to all African states parties to the applicable treaties. Therefore, the thesis is premised on the 'argument' that children with disabilities in Malawi and South Africa, and the rest of Africa, will be able to enjoy their rights if the states undertake the appropriate national implementation measures.

The underlying assumption of the thesis can thus be reduced to the following: Children with disabilities in Malawi and South Africa, in addition to the rest of Africa, will be able to enjoy human rights guaranteed by applicable human right treaties if the states undertake domestic implementation measures that comply with international standards for ensuring the appropriate national implementation of the guaranteed rights.³⁸

³⁵ Thus these treaties contain the pertinent international human rights law See e.g. Viljoen F *International human rights law in Africa* 2 ed (2012) 5. See also Dugard J *International law: A South African perspective* 3 ed (2011) 24-25.

³⁶ Viljoen (2012) 9. See also Joseph S 'Scope of application' in Moeckli D; Shah S & Sivakumaran S (eds) *International human rights law* (2010) 151.

³⁷ See Viljoen (2012) 5-6; 8-9 & 21; *Purohit & Moore v The Gambia* (2003) AHLR 96 (ACHPR 2003) paras 42 & 43; *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), paras 44 & 48.

³⁸ A discussion on the applicable international standards is contained in Chapter 2 & Chapter 3 of this thesis.

1.3 Objectives, scope and methodology

1.3.1 Objectives of the study

This thesis sets out to determine how African states parties to the international human rights treaties which provide for the rights of children with disabilities should discharge their obligation to ensure the national implementation of the guaranteed rights.³⁹ It does this by investigating how the two selected African jurisdictions (Malawi and South Africa), which provide the subjects of a comparative study, should implement the rights of children with disabilities at national level. In investigating the central research question, the study explores the prevailing international standards regarding the national implementation of the rights of children with disabilities in Africa; the measures that must be undertaken at national level in order to satisfy the international standards; and the fundamental attributes that the national implementation measures must reflect or conform to in order to ensure the appropriate implementation of the rights at national level. The study identifies the international standards and attributes by exploring the operative provisions of the treaties. It also analyses the findings, recommendations, concluding observations and general comments or resolutions made by the relevant treaty monitoring bodies in the examination of state party reports, and the consideration of individual communications since these embody interpretative norms,⁴⁰ which might give insights pertaining to the standards.⁴¹

³⁹ This is generally referred as the obligation to give effect to international law at domestic level. See CRC Committee, General Comment No 5 'General measures of implementation of the Convention on the Rights of the Child' (2003) para 1.

⁴⁰ See Steiner H; Alston P & Goodman R *International human rights in context: Law, politics, morals* 3 ed (2007) 878; Alston P 'The historical origins of the concept of "general comments" in human rights 'law' in Boisson de Chazornes L & Gowland-Debbas V (eds) *The international legal system in quest of equity and universality: Liber Amicorum Georges Abi –Saab* (2001) 726; Kalantry S; Getgen JE & Koh SA 'Enhancing enforcement of economic, social, and cultural rights using indicators: A focus on the right to education in the ICESCR' (2010) 32 *Human Rights Law Quarterly* 253, 267.

⁴¹ In this regard, the study analyses the pertinent 'documents' that have been adopted or issued by the treaty monitoring bodies until April 2014. With regard to the concluding observations, general comments and decisions on individual communications adopted by the CRPD Committee, for example, this thesis only looks at the 'documents' adopted and issued in the sessions held in the period between the Committee's Fifth session- held from 11 April 2011 to 15 April 2011; and the 11th Session- held from 31 March 2014 to 11 April 2014. (The Committee did not consider any country reports or individual communication in its first four sessions. In addition, it did not adopt any general comments until the 11th Session).

As discussed above, states have the primary duty for implementing the rights contained in the treaties at national level.⁴² This responsibility is always discharged when states ratify the treaties and take appropriate measures to give effect to them and the rights which they contain at national level.⁴³ The act of giving effect to the treaties (and hence the rights they provide for) at national level can be referred to as national implementation of international human rights law. The obligation to ensure national implementation arises in two ways. First, when states ratify any international treaty they become bound to give effect to it at national level as a common obligation under international law.⁴⁴ However, for this to be achieved, the ratified treaty needs to be made applicable and enforceable at domestic level like any national law.⁴⁵ Making a ratified treaty or its provisions domestically applicable and enforceable is referred to as 'domestic incorporation' and the way in which it is achieved depends on the legal system of a particular country.⁴⁶ In case of a dualist legal system, there is a requirement to take further governmental action after ratification in order to 'domestically incorporate' the treaty.⁴⁷ This is done, among other means, through the adoption of the treaty by the national courts or its transformation into local law by legislation.⁴⁸ In the case of monist states, the mere ratification of the treaty confers on it domestic enforceability and hence suffices for domestic incorporation.⁴⁹

⁴² Viljoen (2012) 9. See also Joseph in Moeckli; Shah & Sivakumaran (eds) (2010) 151.

⁴³ See Viljoen (2012) 9.

⁴⁴ See Vienna Convention on the Law of Treaties (VCLT), done at Vienna on 23 May 1969, entered into force on 27 January 1980, art 26.

⁴⁵ Adjami ME 'African Court, international law and comparative case law: Chimera or emerging human rights jurisprudence' (2002-2003) 24 *Michigan Journal of International Law* 108-109.

⁴⁶ See Dugard (2011) 42; Viljoen (2012) 21; Adjami (2002) 109.

⁴⁷ Dugard (2011) 42.

⁴⁸ Dugard (2011) 42. See also ACPF *In the best interest of the child: Harmonising laws in Eastern and Southern Africa* (2007) 18.

⁴⁹ Dugard (2011) 42. For further discussion of the concepts of dualism and monism, see Dugard (2011); Adjami (2002); Killander M & Adjolohoun H 'International law and domestic human rights litigation in Africa: An introduction' in Killander M (ed) *International law and domestic human rights litigation in Africa* (2010) 4-14.

Secondly, international human rights treaties contain 'operative' provisions which impose obligations upon state parties to implement the guaranteed rights at national level by taking specific measures as prescribed by the treaties.⁵⁰ These measures are often referred to as national implementation measures. Among others, they take the form of constitutional, legislative, policy and other administrative measures that states undertake at national level to give effect to the rights contained in the ratified treaties.

In view of the explanation above, the thesis defines the national implementation of international human rights law as the state's undertaking of the national implementation measures prescribed by the applicable human rights treaties and the domestic incorporation of the treaties.⁵¹ It is noteworthy that the phrase 'implementation of human rights' is used to include both the measures taken for the implementation (as the first level of implementation) and the real situation and impact of the 'implementation measures' on the ground (as the second level of implementation). Hence, the term might be complex to the extent that it could include the legal, policy and institutional framework; and the practical 'implementation'. Thus its analysis might require some 'measurement' of the actual impact and/or situation of the execution of the 'measures' on the ground. However, this study is not concerned with the second level, namely, the 'practical implementation' of the rights on the ground. Instead, it limits its analysis to the first level, namely, the taking of constitutional, legislative and policy measures,⁵² because it seeks to explore how states should take measures that conform to the international standards and fundamental attributes for ensuring

⁵⁰ See e.g. CRPD, arts 4 & 33.

⁵¹ See generally Viljoen (2012) 34, where it is stated that "Implementation" is used to refer to all other means of "giving effect" to treaty provisions and pronouncements by treaty bodies in domestic policies and legislation'.

⁵² As will be explained in 3.2 in Chapter 3, constitutional and legislative measures constitute legal implementation measures. Further discussion in this regard is contained in 3.2 in Chapter 3.

the appropriate national implementation of the rights of children with disabilities.⁵³ This objective can be achieved by analysing these measures.⁵⁴

1.3.2 Scope of the study

In terms of its scope, the thesis focuses on the human rights treaties that contain explicit provision on the rights of children with disabilities; and are applicable within the entire African regional human rights system;⁵⁵ and have been ratified by both Malawi and South Africa.⁵⁶ Thus the treaties that fit this description are the 'applicable human rights treaties' for purposes of this study. In addition, the study does not focus on the legal content of the substantive rights of children with disabilities individually. Instead, it explores the obligations which embody the fundamental attributes that the applicable treaties emphasise for states parties to discharge in implementing the rights of children with disabilities in general at national level. Thus it looks into the national implementation of international human rights law in general and not into particular substantive rights. Nevertheless, it analyses in greater detail obligations relating to a few substantive rights such as equality and non-discrimination and inclusive education for purposes of

⁵³ Accordingly, the study uses the term 'international human rights law' synonymously with 'the rights contained in international human rights treaties' and the term 'national implementation' to include the taking of the prescribed implementation measures and the domestic incorporation of the treaties. ('Domestic incorporation' is also referred to as 'domestication'. See Viljoen (2012) 21.)

⁵⁴ In view of this, the study also discusses the issue relating to the domestic incorporation of the applicable treaties and justiciability of the rights of children with disabilities in the two jurisdictions since (as will be demonstrated in Chapter 4); the process of 'domestication' in the two jurisdictions involves the taking of legal measures. Similarly, justiciability entails the recognition of the applicable rights in a country's legal framework as rights that can be enforced through the courts. However, it is not within the scope of the thesis to analyse administrative and institutional measures such as the mechanisms for coordinating and monitoring of the domestic although such measures are equally important. Indeed, as will be demonstrated in Chapter 3, the thesis addresses the question of ensuring conformity to conceptual attributes that the applicable treaty law requires the implementation measures adopted by states to reflect. Thus the study achieves its objectives by evaluating the extent to which the applicable domestic legal and policy measures demonstrate conformity to these attributes.

⁵⁵ These include the UN Charter based human rights treaties adopted by the UN General Assembly and the African regional treaties adopted by the African Union (AU) or the Organisation of African Unity (OAU) but exclude African sub-regional treaties adopted by sub-regional bodies such as the Southern Africa Development Community (SADC).

⁵⁶ In view of this, it does not focus on non-binding instruments. It also does not discuss treaties adopted by other regional systems such as the European system.

illustrating how the attributes and other specific 'sub-categories' of the attributes should be complied with in the domestic implementation. Hence, these rights are only analysed in illustrating how conformity to broader standards and fundamental attributes for ensuring the appropriate national implementation of the rights in general should be achieved.

1.3.1 Research methodology

In respect of its approach, the study is comparative. This is the case since it critically investigates and highlights the differences and similarities that exist in the two jurisdictions, namely Malawi and South Africa.⁵⁷ These similarities and differences relate to the legal and policy tools that the two states have adopted for implementing the rights of children with disabilities at national level. In addition, there are similarities in terms of both the national legal systems and the applicable treaties ratified by the two jurisdictions. Thus the study addresses the central research question by analysing two scenarios in a comparative perspective: First, the national implementation of the rights of in respect of an African state that has child protection laws and disability specific legislation and is party to the human rights treaties, which include the CRC, the African Children's Charter and the CRPD. Secondly, the national implementation of the rights in respect of an African state which does not have disability specific legislation but has child protection legislation and is party to the same human rights treaties, including the CRPD. In view of this, the study focuses on Malawi and South Africa since they fit the ambit of the comparative investigation. The study of Malawi is utilised to represent an African state which fits the first scenario.⁵⁸ Indeed, Malawi has ratified the CRPD,⁵⁹ the CRC,⁶⁰ and the Africa Children's Charter.⁶¹ On its part, the

⁵⁷ The differences and similarities are explained immediately below.

⁵⁸ Malawi has disability specific legislation (the Disability Act) and child protection legislation (the Child Care, Protection and Justice Act).

⁵⁹ Signed on 27 September 2007, ratified on 27 August 2009.

⁶⁰ Ratified on 2 January 1991.

study of South Africa serves the purpose of examining an African state that represents the second situation.⁶² Lastly, as will be highlighted in Chapter 4, the two jurisdictions have a dualist legal system.⁶³

The study proceeds according to a number of questions that have been formulated in gathering information about the applicable international law and the two African countries pertaining to children with disabilities and the international standards, including their fundamental attributes, for the national implementation of the rights. The questions have been similarly posed in respect of the states. The questions are based on the fundamental attributes of the international standards for the domestic implementation of the rights of children with disabilities, which the thesis determines. The answers obtained have been collated to form the findings. Thus the study proceeds on the basis that there are similarities and differences among the two national systems, as observed above. The study seeks to explore these similarities and differences and to make conclusions with critical comments and observations therefrom. Based on these, it will propose reforms and developments in and of the laws, where necessary, in the two states under investigation. In addition, it will draw lessons on the basis of the observations and conclusions from the comparison with respect to laws, policies, and good practices pertaining to the domestic implementation of the rights which could have implications for other African states parties to the pertinent treaties.

Accordingly, the study seeks to answer the following five sub-questions: Which approach does international human rights law take in providing for the rights of children with disabilities in Africa? What are the fundamental attributes relating to this approach that reflect the international standards for ensuring the appropriate national implementation of the rights of children with disabilities in Africa? Which measures do

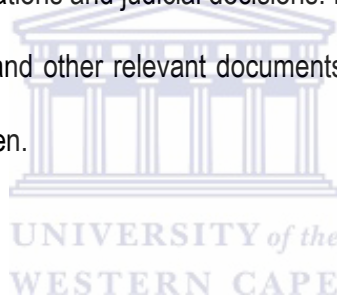
⁶¹ Signed on 13 July 1999, ratified 16 September 1999.

⁶² South Africa does not have all-encompassing disability legislation but has child protection legislation (the Children's Act). It signed the African Children's Charter on 10 October 1999 and ratified on 7 January 2000; signed the CRC 29 January 1993 and ratified on 16 June 1995; signed the CRPD on 30 March 2007 and ratified on 30 November 2007.

⁶³ See 3.2.1 in Chapter 3 for a discussion of the dualism concept and 4.2.4 for further discussion of the two national legal systems.

Malawi and South Africa undertake to ensure the implementation of the rights of children with disabilities at national level? Do these measures comply with the identified international standards and their fundamental attributes? If not, what measures must be taken by the two states to achieve the compliance and ensure the realisation of the rights at national level?

The research is literature-based and hence, relies on desk and internet research with a particular focus on different writings on the implementation of human rights, the rights of persons/children with disabilities; and children's rights. It consults a number of primary sources such as the constitutions, national laws, and policies or strategic plans of Malawi and South Africa; the international human rights treaties, especially the CRPD, the CRC, the African Children's Charter; case authorities; treaty body decisions, general comments, concluding observations and judicial decisions. It also consults secondary sources such as books, articles, published reports and other relevant documents. In view of the study's objectives and scope, no field research was undertaken.



1.4 Literature review

The review is an overview of the existing literature on the topic and it brings out the gaps in the literature by making a number of observations in respect of these writings.⁶⁴ The structure of the review is based on the approaches taken by the different writings on the topic, namely, the broad approach at regional level and the narrower approach at national level; and the general approach that presents an overview of the rights and the specific approach that evaluates the particular rights of children with disabilities.

The research into the rights of persons/children with disabilities in Africa and beyond has taken several approaches. First, certain studies have taken a broad approach by discussing the rights of persons/children with disabilities in the African human rights system at the regional level - without focusing

⁶⁴ The review is not exhaustive of the relevant existing literature and it focuses on the works published until May 2014.

on their implementation at the domestic level.⁶⁵ For example, Biegon observes that the regional legal framework pertaining to the rights of persons with disabilities in Africa is fragmented as it is contained in various instruments.⁶⁶ Although he recommends the refocusing of resources and ratification and domestication of the CRPD, he does not take the issue of national implementation any further.

Other studies have taken this broad approach a bit further by evaluating the rights of children with disabilities in a number of countries in order to paint a bigger picture at regional level.⁶⁷ For example, Van Reenen and Combrinck have looked at the incorporation of the CRPD in four selected African states, namely South Africa, Uganda, Ethiopia and Tanzania in assessing the impact that the CRPD has had in African since its adoption.⁶⁸ The study limits the discussion to disability laws and the provisions of the constitutions without looking at policies and other laws.

On the other hand, other studies take a narrower approach by examining the situation of persons/children with disabilities at national level in specific African countries.⁶⁹ For example, Boezaart and Skelton have focused on children with debilitating conduct disorder in South Africa by considering two specific children as case studies.⁷⁰ They observe that engagement and legal reforms should be prioritized over litigation in the quest to promote their human rights situation.

⁶⁵ See e.g. Biegon in Grobbelaar-du Plessis & Van Reenen (eds) (2011) 53-83; Dube AB *The protection of the rights of persons living with disabilities in the African human rights system* (unpublished LLM thesis, University of Pretoria, 2007).

⁶⁶ Biegon in Grobbelaar-du Plessis & Van Reenen (2011).

⁶⁷ See e.g. ACPF *The lives of children with disabilities in Africa* (2011); Ransom (2008).

⁶⁸ Van Reenen & Combrinck (2011).

⁶⁹ See e.g. Choruma (2007); Marongwe & Mate (2007); Lang & Charowa (2007).

⁷⁰ Boezaart T & Skelton A 'From pillar to post: Legal solutions for children with debilitating conduct disorder' in Grobbelaar-du Plessis & Van Reenen (eds) (2011) 107-131.

Another version of the narrower approach is to evaluate the laws and policies that are relevant to the specific rights of persons/children with disabilities in specific countries.⁷¹ For example, Jere and Chilemba, in their different studies have observed that the legal and policy framework on the rights of persons with disabilities and children with disabilities in Malawi is not conducive to ensuring that persons with disabilities enjoy their right to equality in the workplace and that children with disabilities enjoy their right to primary education respectively.⁷² On his part, Kamga investigates the issue relating to inclusion in education and access to primary education for children with disabilities in Cameroon.⁷³ The author observes, amongst others, that the country needs to undertake legal and policy reforms in order to conform to the inclusive education standards under the CRPD.⁷⁴

In contrast, other studies constitute a 'general dimension' of the narrow approach that discusses the whole body of the rights of persons/children with disabilities by looking at national laws of specific countries. On the one hand, certain studies evaluate the disability perspectives that inform the constitutional provisions, laws and institutions in specific countries. For example, Mandipa analyses the extent to which the legal provisions and institutional arrangements on disability in Zimbabwe comply with the modern definitions and models of disability.⁷⁵ On the other hand, other writings contain information on how specific national laws provide mechanisms for the enjoyment of the rights of children with disabilities. For example, Combrinck highlights the rights of children with disabilities in South Africa in a booklet which

⁷¹ See e.g. Kamga (2013) 27-48; Wakefield L & Murungi N 'Domesticating international standards of education for children with intellectual disabilities: A case study of Kenya and South Africa' in Grobbelaar-du Plessis & Van Reenen (eds) (2011)133-156; Kamundia E 'Choice, support and inclusion: Implementing article 19 of the CRPD in Kenya' (2013) *African Disability Rights Yearbook* 49-71.

⁷² See Jere V 'The right to equality in the workplace for persons with physical disabilities in Malawi: Does the Convention on the Rights of Persons with Disabilities offer any hope?' in Grobbelaar-du Plessis & Van Reenen (eds) (2011) 159-180; Chilemba EM 'The right to primary education for children with disabilities in Malawi: A diagnosis of the conceptual approach and implementation' (2013) *African Disability Rights Yearbook* 3-26.

⁷³ Kamga (2013) 27-48.

⁷⁴ See e.g. Kamga (2013) 47, where the author also suggests the need for Cameroon to restructure and modify the education system in addition to addressing harmful cultural beliefs that are 'demonise' children with disabilities.

⁷⁵ Mandipa (2013) 73-96.

is aimed at serving as a guide for parents of children with disabilities and other service providers.⁷⁶ The booklet, however, is specifically focused on South Africa's Children's Act.⁷⁷ Lastly, other studies, which can be termed the 'specific dimension' of the narrow approach, examine the enjoyment of specific rights of children with disabilities such as the right to education without focusing on a specific country.⁷⁸ For example, Combrinck observes that children with disabilities in the African context do not generally enjoy the right to education.⁷⁹ She makes reference to a few countries by way of illustration.⁸⁰

On its part, this study takes a different approach with different focus from existing writings, including those briefly discussed above. It investigates how African states, particularly Malawi and South Africa, should take measures that comply with international standards and their fundamental attributes in order to ensure the appropriate national implementation of the rights of children with disabilities in general. The existing literature does not address with much focus and specificity the issues relating to the rights of children with disabilities in Africa from the stand-point of the approach to be taken in implementing the rights broadly at national level as this study aims to do. Accordingly, it sets out to provide unique insights and new approaches into the topic of the realisation of human rights of children with disabilities in Africa.

⁷⁶ Combrinck *The Children's Act and disability* (2011) 8.

⁷⁷ Act 38 of 2005.

⁷⁸ Filmer (2008) 141; Combrinck in Sloth-Nielsen (ed) (2008); Boezaart T 'The Children's Act: A valuable tool in realising the rights of children with disabilities' (2011) 74(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)/Journal of Contemporary Roman Dutch Law* 264-279.

⁷⁹ Combrinck in Sloth-Nielsen (ed) (2008).

⁸⁰ The study mentions South Africa, Kenya and Uganda as examples. See Combrinck in Sloth-Nielsen (ed) (2008) 314.

1.5 Significance of the study

The study underscores the fact that the equal enjoyment of human rights confirms the dignity and equality of human beings.⁸¹ On that basis, it seeks to emphasise the entitlement of children with disabilities in Africa to enjoy all human rights on an equal basis with other children. Accordingly, the study is significant for various reasons. First, it focuses on the national implementation standards and implementation measures for the rights of children with disabilities in Africa in general rather than the substantive rights. This makes the study unique as most studies focus on substantive rights such as education, 'community living', equality and employment, as demonstrated by the review of the existing literature above.⁸² In addition, by focusing on national implementation measures, the study offers a cross-cutting approach to the implementation of all rights of children with disabilities which will inform how the substantive rights should be implemented.

Secondly, the CRPD is relatively a new Convention and it seeks to complement and strengthen the otherwise inadequate 'joint' framework established by the CRC and the African Children's Charter in providing for the rights of children with disabilities in Africa. The two treaties do not comprehensively regard children with disabilities as full and equal rights holders as other children, as the study will demonstrate. The CRPD plays the complementary role by bringing to the fore the focus on perceiving children with disabilities as rights holders by taking a human rights based approach, which had been missing under the CRC/African Children's Charter 'joint' framework.⁸³ This approach, which also requires the domestic implementation of the rights of children with disabilities to take a 'human rights focused' as opposed to a 'welfare based approach', is unique and new and it is not known how African states are responding to their treaty obligations relating to national implementation in this regard. This study will give a comparative

⁸¹ See e.g. Universal Declaration of Human Rights (UDHR), adopted on 10 December 1948, preamble para 1.

⁸² See 1.5 above. (See e.g. Kamga (2013); Kamundia (2013); Chilemba (2013); Jere in Grobbelaar-du Plessis & Van Reenen (eds) (2011); Wakefield & Murungi in Grobbelaar-du Plessis & Van Reenen (eds) (2011); Combrinck in Sloth-Nielsen (ed) (2008).)

⁸³ Further discussion in this regard is contained in Chapter 2.

indication of how the states are taking, or should take, the 'human rights based' approach to disability in the implementation of the rights.

Thirdly, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), which monitors the implementation of the African Children's Charter, and hence the rights of children in Africa, handed out its first findings in 2011 after a long period of inactivity.⁸⁴ This suggests that the Committee is taking a more pro-active role in enforcing the rights of children in Africa. The study might bring insights which would inform the Committee on the implementation of the rights of children with disabilities in Africa. It is noteworthy that the Committee had dedicated the Day of the African Child for 2012, which commemorates the rights of children in Africa, to specifically focus on children with disabilities in Africa.⁸⁵ This emphasises the growing interest in the region in the rights of children with disabilities.

Fourthly, in the last three years, the CRPD Committee has issued a number of concluding observations after considering reports submitted by states parties and has also handed out its decisions/views after examining/considering individual communications brought before it.⁸⁶ This study analyses the recommendations that the Committee has made regarding the implementation of the rights of children with disabilities contained in the CRPD. Hence, it might provide insights on the implementation standards that African states parties to the CRPD should comply with in implementing the rights of children with disabilities.

Furthermore, the two countries under investigation are parties to the African Charter on Human and Peoples' Rights,⁸⁷ which is the main human rights instrument in the African human rights system.⁸⁸

⁸⁴ *Institute for Human Rights and Development in Africa (IHRDA) & Open Society Justice Initiative on behalf of children of Nubia descent in Kenya v the Government of Kenya* Communication 002 /2009 (ACERWC 2011).

⁸⁵ See African Committee of Experts on the Rights and Welfare of the Child (ACERWC) *17th Ordinary Session Activity Report 22-25 March 2011* (ACERWC/Rpt. (XVII) para 61.

⁸⁶ See Chapter 2 & Chapter 3 for further discussion in this regard.

⁸⁷ Malawi signed on 23 February 1990, ratified on 17 November 1989; South Africa signed on 9 July 1996, ratified on 9 July 1996.

Moreover, they are member states of the Southern African Development Community (SADC),⁸⁹ which is a sub-regional economic community (REC). The study is thus significant as it will bring insights into the developments in the African regional human rights system, including the SADC sub-region, as regards the implementation of the rights of children with disabilities.⁹⁰ Moreover, Malawi and South Africa are dualist states, to the effect that with the exception of customary international law, there is need for domestic incorporation of the treaties which the states ratify for them to apply domestically.⁹¹ Hence, the study will examine the obligations to implement international human rights law pertaining to children with disabilities in respect of common law African dualist states. Therefore, the study may serve as a reference point for other countries in the African regional human rights system, especially dualist states which are also parties to the CRPD, in the development of their laws and policies pertaining to the implementation of rights of children with disabilities.



1.6 Structure of the study

This study is divided into four parts representing four themes and it has six chapters. The first part comprises Chapter 1, which provides the background and introduction to the central question that the thesis addresses in addition to the study's underlying assumption, objectives, scope and methodology, amongst others. The second part is made up of Chapter 2 and Chapter 3 whereby Chapter 2 analyses the pertinent international human rights law in order to establish the approach that the law takes in providing for

⁸⁸ Van Reenen TP & Combrinck H 'The UN Convention on the Rights of persons with Disabilities in Africa: Progress after 5 years' (2011) 8 *SUR International Journal on Human Rights* 133-165, 136.

⁸⁹ See preamble to the Consolidated text of SADC Treaty (as amended) done at Windhoek on 17 August 1992, which lists the member States.

⁹⁰ However, since the study looks into international human rights law applicable to children with disabilities in Africa and not in the SADC sub-region specifically, it does not discuss the SADC sub-regional treaties.

⁹¹ See generally South Africa's Constitution, 1996, sec 231(2) & (4); Malawi Constitution 1995, sec 211(1). Further discussion in this regard is contained in 4.2.4 in Chapter 4 of this thesis.

the rights of children with disabilities in Africa; whilst Chapter 3 extrapolates and determines the international standards and fundamental attributes for (ensuring) the appropriate national implementation of the rights of children with disabilities in Africa. The third part consists of Chapter 4 and Chapter 5. On its part, Chapter 4 discusses the applicable implementation measures being undertaken by Malawi and South Africa; whilst Chapter 5 broadly assesses how the two countries' domestic implementation frameworks comply with the international standard and fundamental attributes identified in Chapter 3. The last part comprises Chapter 6, which discusses the findings of the study and suggests the pertinent recommendations in addition to drawing out lessons that could have implications on the rest of African countries with regard to the domestic implementation of the rights of children with disabilities.



Chapter 2

Surveying international human rights law applicable to children with disabilities in Africa

2.1 Introductory observations

2.1.1 Purpose and outline of chapter

The previous chapter has given the study's general background and introduction, including the problem it seeks to address; research question; underlying assumption; methodology; and the objectives and scope. It has also highlighted that children with disabilities in Africa face a number of obstacles that prevent them from enjoying human rights on an equal basis with others.¹ The chapter highlighted that these children face such obstacles despite the fact that many African countries, which include Malawi and South Africa, have ratified human rights treaties which provide for their rights.²

This chapter surveys the international human rights law that is applicable to children with disabilities in Africa with a view to determine the approach it takes in providing for the rights. In achieving its purpose, the chapter traces the chronological developments under international law in order to establish how the differences in the conceptualisation of disability have influenced that manner in which the applicable human rights treaties have made provision for the rights of children with disabilities.³ It looks at how the approach taken by international law has developed through various instruments culminating in the adoption of the CRPD. Ultimately, it identifies the main obligations and the conceptual attributes that the

¹ See 1.1.1 in Chapter 1 for a discussion of the common human rights challenges faced by children with disabilities in Africa.

² The treaties and their applicable provisions are discussed in 2.3, 2.4 & 2.5.2 below.

³ In accordance with its scope and purpose, the thesis focuses on human rights treaties as opposed to non-binding instruments.

approach taken by the law emphasises in guaranteeing the rights. The chapter first analyses a number of UN general human rights treaties which do not make express reference to disability before exploring the provisions of the CRC and the CRPD, which contain explicit provisions on disability. It further analyses applicable African regional human rights treaties. Thereafter it makes a number of observations relating to the approach taken by the applicable international human rights law.

2.1.2 Explaining international human rights law pertaining to children with disabilities

For purposes of this study, international human rights law pertaining to children with disabilities in Africa refers to the body of all UN human rights treaties and African regional human rights treaties which contain provisions on the rights of children with disabilities or provisions that are applicable to children with disabilities. The treaties include the CRPD, the CRC and the African Children's Charter.⁴ There are also a number of disability specific non-binding instruments that have played a part in the development of the rights of children with disabilities under international law.⁵ These instruments include the World Programme of Action concerning Disabled Persons (WPA)⁶ and the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Standards Rules).⁷ Although the soft law instruments are significant for contributing to the 'evolution' of the rights of persons with disabilities under international law, the applicable human rights law is contained in the binding instruments, on which the chapter focuses.

⁴ For a discussion on the scope of this thesis, including the treaties that fall within the scope, see 1.4 in Chapter 1.

⁵ These non-binding instruments refer to the soft law instruments that were adopted in the form of 'declarations' as opposed to conventions or treaties with the effect that they do not impose binding obligations on states although it is considered that states have the 'moral' duty not to act in such a way that defeats the purpose and effect of such documents. See e.g. Quinn G & Degener T *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 34; Stein MA & Lord JE 'Future prospects for the United Nations Convention on the Rights of Persons with Disabilities' in in Amardóttir OM & Quinn G (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 22.

⁶ Adopted by UN General Assembly resolution 37/52 on 3 December 1982. The WPA puts emphasis on prevention of disabilities, rehabilitation, and equalisation of opportunities. See WPA, para 9.

⁷ Adopted by UN General Assembly resolution 48/96 on 18 December 1992. The Standard Rules put emphasis on prevention (of disabilities/impairments), rehabilitation and equalisation of opportunities. See Standard Rules, paras 22, 23 & 24.

The significance of the non-binding instruments hinges on the fact that formal attention to disability and the rights of persons with disabilities under international law was through a number of non-binding instruments before treaties followed and began to make reference to disability. It is noteworthy that most of the non-binding instruments do not specifically refer to children with disabilities although they are important for providing for the welfare of all persons, including persons with disabilities.⁸ Nonetheless, instruments such as the WPA contain provisions on children with disabilities.⁹ Accordingly, under international law, issues pertaining to the welfare and rights of person with disabilities were initially (explicitly) contained in non-binding instruments and they continued to develop until human rights treaties began to expressly recognise the rights. This coincided with the time at which the approach to disability was shifting from the welfare to the social model and human rights based perspectives.¹⁰

It is noteworthy that disability was initially not regarded as a human rights issue but as a subject of pity and charity which required welfare and social policy based interventions.¹¹ This conceptualisation was based on the medical and welfare approach to disability which attributed the challenges faced by persons

⁸ In addition to the WPA & the Standard Rules, these other disability specific non-binding instruments include the Declaration on the Rights of Mentally Retarded Persons (UNDRMRP), proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971; the Declaration on the Rights of Disabled Persons (DRDP), proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975; & the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, adopted by the UN General Assembly on 17 December 1991 (A/RES/46/119). There are also a number of 'general' soft-law instruments that make reference to disability. These include the Vienna Declaration and Programme of Action (Vienna Declaration), adopted by the World Conference on Human Rights held in Vienna in and endorsed by the UN on 12 July 1993 (A/CONF.157/23) which is renowned for its reaffirmation that all human rights are universal, indivisible and interdependent and interrelated; and that 'all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities'. See Vienna Declaration, Part 1, para 5 & Part 2, sub-part 6, paras 63, 64, 65.

⁹ See e.g. WPA, para 46, which recognises children with disabilities as one of the 'special groups' that face serious challenges (such as isolation) to enjoy human rights. The Standard Rules laid the foundation of the CRPD and they also remain applicable despite the existence of the Convention since there is an office of the UN Special Rapporteur on Disability which monitors the implementation of the Standard Rules in addition to certain aspects of the CRPD. See Standard Rules, sec IV, para 2. See also UN Economic and Social Council (ECOSOC) Resolution 2011/27, 'Further promotion of equalisation of opportunities by, for and with persons with disabilities and mainstreaming disability in the development agenda', para 6, which extended the mandate of the Special Rapporteur on Disability for a further three years (2012-2014).

¹⁰ See generally Flovenz BG 'The implementation of the UN Convention and the development of economic and social rights as human rights' in Amardóttir & Quinn (eds) (2009) 259.

¹¹ See generally Flovenz in Amardóttir & Quinn (eds) (2009) 258.

with disabilities to their impairments and hence focused on clinical, medicalised, and welfare based interventions.¹² Since disability was regarded as a social welfare issue, the earlier UN human rights treaties did not contain provisions on the rights of persons with disabilities.¹³ Instead, disability issues were relegated to the non-binding soft law instruments.¹⁴ However, the shift that occurred in the approach to disability from the medical to the social and human rights models resulted in disability being regarded as a human rights issue.¹⁵ Unlike the medical model, the social and human rights models attribute the challenges faced by persons with disabilities to the barriers that exist in the environment which impede persons/children with disabilities from participating in the society on an equal basis with others.¹⁶ The human rights model goes a step beyond the social model by recognising that the state has the duty to eliminate the barriers and create accommodating environments in order to ensure the participation in society and full enjoyment of human rights by persons/children with disabilities on an equal basis with others.¹⁷

Following this shift in the conceptualisation of disability (from the medical to the social and human rights models), human rights treaties replicated the soft law initiatives and began making provision for the rights of persons with disabilities.¹⁸ For example, the WPA was adopted in 1983 immediately after the

¹² See generally Quinn & Degener *Human rights and disability* (2002) 14; Traustadottir R 'Disability studies, the social model and legal developments' in Arnardóttir & Quinn (eds) (2009) 5 & 8; Kanter AS 'The globalization of disability rights law' (2003) 30 *Syracuse Journal of International Law and Commerce*, 241-269, 246.

¹³ See generally Byrne B 'Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities' in Freeman M *Law and childhood studies*(2012) 437.

¹⁴ See generally Flovenz in Arnardóttir & Quinn (eds) (2009) 258.

¹⁵ See generally Quinn & Degener (2002) 14 & 29.

¹⁶ See generally Kanter (2003) 247; Combrinck in Sloth-Nielsen (ed) (2008) 302; Quinn & Degener (2002) 14.

¹⁷ See generally Quinn & Degener (2002) 14. Further discussion of the models of disability, including the similarities and differences between the social model and the human rights model is contained in 3.3.1 in Chapter 3.

¹⁸ See generally Quinn & Degener (2002) 29, where it is observed that:

irreversible shift from the welfare based approaches to disability to the human rights based approach had occurred.¹⁹ The development of the human rights approach to disability culminated in the adoption of the CRPD.²⁰ In view of this, the soft law instruments were significant in the development of the formal recognition of the rights of persons/children with disabilities by international human rights law- they set the stage and tone for the 'human rights approach to disability' which the applicable international human rights treaties/law subsequently took.

However, the soft-law instruments do not impose binding obligations on states and hence they do not have immediate legal effect on the realisation of the rights of persons/children with disabilities.²¹ Accordingly, instruments such as the Standard Rules merely 'imply a strong moral and political commitment on behalf of States to take action for the equalization of opportunities for persons with disabilities'.²² In addition, although the soft-law instruments are hailed for shaping the development of the human rights approach to disability, they still contain a number of provisions that embody the medical and welfare based approach.²³ As a result, the soft-law instruments did not create a framework that could result in the respect for the rights of persons/children with disabilities. It was on account of this recognition of the 'failed' impact

'[The developments in the soft-law instruments] have gradually and inexorably moved disability issues away from areas of welfare and medicine and towards that of human rights. They have reflected and helped to engineer the shift towards the human rights perspective on disability.'

¹⁹ See generally Quinn & Degener (2002) 30, where it is stated that '[t]he 1980s marked an irreversible shift from the "caring" to the "rights" model'. It is also stated that the 'first signs of a shift from a "caring" to a "rights-based" approach' occurred in 1970s when the UN General Assembly adopted the UNDRMRP & DRDP. See Quinn & Degener (2002) 30.

²⁰ See 2.4.5 below for further discussion.

²¹ See e.g. Quinn & Degener (2002) 34; Stein MA & Lord JE 'Future prospects for the United Nations Convention on the Rights of Persons with Disabilities' in Arnardottir & Quinn (eds) (2009) 22. Nonetheless, it is expected that the Standard Rules could become 'international customary rules when they are applied by a great number of States with the intention of respecting a rule in international law'. See Standard Rules, para 14; Quinn & Degener (2002) 35.

²² Standard Rules, para 14; Quinn & Degener (2002) 35.

²³ See e.g. WPA, para 6, which conceptualises disability as a restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered 'normal' for a human being – This attributes the 'challenges' pertaining to disability to the individuals' impairments, thereby reflecting the medical model of disability. Nevertheless, the WPA provides for a number of rights that go beyond reflecting the medical model. See e.g. WPA, paras 64 & 65 on education, where it is observed that children with disabilities have the same right to education as other children.

of the soft-law instruments that in December 2001 the UN General Assembly adopted a resolution which called for establishment of an ad hoc committee to consider proposals relating to the adoption of a disability specific human rights treaty.²⁴

2.2 Rights of children with disabilities in general international human rights treaties

There are a number of international human rights treaties that contain provisions which are applicable to persons/children with disabilities although the treaties were not specifically adopted to address disability. These treaties include the International Covenant on Civil and Political Rights (CCPR)²⁵ and the International Covenant on Economic Social and Cultural Rights (CESCR).²⁶ The general treaties such as the CCPR and the CESCR were adopted to cater for all persons; whilst other general treaties such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) were adopted to address the rights of particular broad categories of people.²⁷ Accordingly, the treaties that address the rights that apply to all persons are also applicable to children with disabilities. Similarly, the general treaties that apply to specific categories of people are applicable to children with disabilities who fall within the categories.

It is noteworthy that the general treaties and all applicable human rights treaties provide for the right to equality (on the one hand) and other specific rights (on the other hand) that are relevant to children with disabilities. Hence, they take what could be regarded as a 'twin-track' approach by guaranteeing the

²⁴ See General Assembly resolution 56/168 of 19 December 2001, preamble & first operative para. See also Quinn & Degener (2002) 45; Arnardottir OM 'A future of multidimensional disadvantage equality?' in Arnardottir & Quinn (eds) (2009) 45.

²⁵ Adopted on 16 December 1966, entered into force on 23 March 1976.

²⁶ Adopted on 16 December 1966, entered into force on 3 January 1976. The two treaties are discussed in section 2.2.1 below.

²⁷ The general group specific treaties are discussed in section 2.2.2 below.

right to freedom from discrimination on the one hand;²⁸ and also guaranteeing the enjoyment of other specific rights, on the other hand. Accordingly, it is relevant to analyse both the non-discrimination provisions and the other broad provisions in order to appreciate the 'twin-track' approach taken by the applicable treaties.

2.2.1 The international Bill of Rights

The International Bill of Rights (IBR) comprises the UDHR; the CCPR; and the CESC.²⁹ The UN first adopted the UDHR,³⁰ which provides for both civil-political rights (CPRs) and socio-economic rights (SERs).³¹ It later adopted the CCPR alongside the CESC, which provide for CPRs and SERs respectively.³² The IBR guarantees equality and non-discrimination in addition to other specific rights that are applicable to all persons, including children with disabilities.

²⁸ As will be highlighted in the next chapter, there are a number of theoretical aspects relating to equality and non-discrimination which have implications on the rights of children with disabilities. These include the concepts of substantive equality, reasonable accommodation and affirmative action. These conceptual/theoretical issues are discussed in 3.3.3 in Chapter 3, which extrapolates the fundamental legal and conceptual attributes that shape the international standards pertaining to the right to equality and non-discrimination for children with disabilities. Chapter 3 (especially section 3.3) also discusses a number of applicable theories (such as those pertaining to disability and inclusion) in the course of extrapolating the relevant fundamental attributes. Since this chapter seeks to mainly provide a description of the applicable international human rights law and the approach it takes, it will not look into the theoretical aspects to avoid repetitions.

²⁹ The term 'International Bill of Rights' (IBR) has gained prominence in international human rights law although it was not officially adopted by the UN as a single treaty since it is made up of three separate instruments. A number of authors have used the IBR terminology. See e.g. Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* (2010) 13; Degener T 'Disability and freedom: The International Covenant on Civil and Political Rights (ICCPR)' in Quinn & Degener (2002) 53-77, 53; Chinkin C 'sources' in Moeckli D; Shah S & Sivakumaran S (eds) *International human rights law* (2010) 106.

³⁰ (It is the first human rights instrument to be adopted by the UN).

³¹ The CCPR and the CESC are regarded as the two core human rights treaties. See Quinn & Degener (2002) 48. The discussion in this part focuses on the CCPR and the CESC since the UDHR is not a binding instrument although there is a debate whether some or all of its provisions have attained the status of customary international law to impose binding obligations on states. See e.g. Sohn LB 'The human rights law of the Charter' (1977) 12 *Texas International Law Journal* 129-140, 133.

³² The perceived distinction between CPRs and SERs can be appreciated from the stand point of the state party obligations which they impose pertaining to their implementation. CPRs are considered to be subject to immediate realisation while SERs are generally expected to be realised progressively. See generally Committee on ESCR, General Comment No 3 'The nature of states parties' obligations' (1990) para 9; HRC, General Comment No 31 'The nature of the general legal obligation imposed on states parties to the Covenant' (2004) para 14.

Guarantees for non-discrimination

The CCPR and the CDESCR guarantee human rights to all people without discrimination.³³ However, their provisions do not recognise disability as an expressly prohibited ground of discrimination.³⁴ Nevertheless, they prohibit discrimination based on 'other status'. It is considered that the 'other status' clause affords persons with disabilities the necessary protection from discrimination as it could include disability.³⁵ Indeed, the Committee on Economic, Social and Cultural Rights (Committee on ESCR), which monitors the implementation of the CDESCR, has expressly stated that the ESCR equally applies to persons with disabilities who are entitled to enjoy the rights it guarantees, including the right to freedom from discrimination.³⁶ It has further stated that disability is an analogous prohibited ground of discrimination covered in the 'other status' clause under article 2(2) of the Covenant.³⁷ Furthermore, the Committee recognises the need to take 'special and affirmative action measures, aimed at achieving substantive equality of persons with disabilities.³⁸ Above all, the Committee requires states to make provision for 'reasonable accommodation' in realising non-discrimination.³⁹

The Human Rights Committee (HRC), which monitors the implementation of the CCPR, has elaborated on the right to non-discrimination under the CCPR in General Comment No 18 although it did not make express mention of disability based discrimination.⁴⁰ The HRC has reiterated that the right to

³³ See common arts 2.

³⁴ (In addition, the two treaties do not provide for any other specific substantive rights of persons with disabilities.)

³⁵ See Schulze (2010) 15; Degener in Quinn & Degener (2002) 54.

³⁶ General Comment No 5 'Persons with disabilities' (1994) para 5. The Committee has further elaborated on the broad right to freedom from discrimination under article 2(2) of the Covenant in General Comment No 20. See Committee on ESCR, General Comment No 20 'Non-discrimination in economic, social and cultural rights' (2009).

³⁷ See General Comment No 20, paras 27 & 28; General Comment No 5 (1994) paras 5 & 15.

³⁸ See General Comment No 20, paras 8 & 9. Further discussion of affirmative action is contained in 3.3.3 in Chapter 3 of the thesis.

³⁹ See General Comment No 5 (1994) para 15; General Comment No 20, para 28. Further discussion of the concept of 'reasonable accommodation' is contained in 3.3.3 in Chapter 3 of the thesis.

⁴⁰ HRC, General Comment No 18 'Non-discrimination' (1989), para 7.

freedom from discrimination applies to all persons within the territory of the state.⁴¹ Therefore, it follows that children with disabilities have the right to equality and freedom from discrimination under the CCPR despite not being explicitly mentioned.⁴² The CCPR also allows for the taking of temporary special (or affirmative action) measures aimed at eliminating inequalities and with a view to achieving *de facto* equality.⁴³

Guarantees for other substantive rights

The texts of the CESCER and CCPR do not explicitly mention persons/children with disabilities.⁴⁴ Nevertheless, as noted above, the treaty monitoring bodies such as the Committee on CESCER have confirmed that the treaties apply to all persons with disabilities, which would include children with disabilities.⁴⁵ In addition, the two treaties contain rights that are applicable to all children, and hence are also applicable to children with disabilities by virtue of the non-discrimination clauses under the two treaties. In terms of the CESCER, the SERs that are applicable to children with disabilities include: education;⁴⁶ social security, including social insurance;⁴⁷ and 'the enjoyment of the highest attainable standard of physical and mental health',⁴⁸ which also includes the right to access rehabilitation services.⁴⁹ The Committee on CESCER has further explained the rights of persons with disabilities under the Convention in General Comment No 5.⁵⁰ For example, in respect of the right to education, the Committee has highlighted the need

⁴¹ General Comment No 18, para 1.

⁴² The CCPR prescribes the enactment of laws that prohibit discrimination. See CCPR art 26; General Comment No 18, para 12.

⁴³ See General Comment No 18, paras 10 & 13.

⁴⁴ On its part, the UDHR in art 25(1) provides for the right of everyone with a disability to social security.

⁴⁵ General Comment No 5 (1994) para 5.

⁴⁶ CESCER, art 13 as read with art 14.

⁴⁷ CESCER, art 9; General Comment No 5, para 29.

⁴⁸ CESCER, art 12.

⁴⁹ See General Comment No 5 (1994) para 34.

⁵⁰ See General Comment No 5 (1994). The General Comment is thus significant in understanding the substantive rights of persons/children with disabilities under the CESCER.

to educate persons/children with disabilities in the general education system, thereby recognising inclusive education.⁵¹

On its part, the CCPR, unlike the CESCR, makes provision for the rights of children in article 24 although children with disabilities are not expressly mentioned.⁵² The article sets out three specific rights, namely, birth registration;⁵³ nationality;⁵⁴ and special measures of protection.⁵⁵

2.2.2 Other general international human rights treaties

The UN has also adopted other treaties which contain a number of rights applicable to particular categories of people or situations, which can be enjoyed by the children with disabilities who fall within the particular categories. In addition, the general treaties such as the CEDAW (discussed below) have been interpreted as being applicable to women and girls with disabilities. Hence, they are formally recognised as making provision for persons with disabilities (women and girls with disabilities in the case of CEDAW). On their part, treaties such as the Migrant Workers Convention (discussed below) are applicable to children with disabilities by the mere fact that they were adopted to cater for all persons who fall within the protection that the treaties provide.

Treaties formally recognised to be applicable in the context of disability

First, the UN adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which protects all persons from torture, cruel, inhuman and degrading treatment.⁵⁶

⁵¹ See General Comment No 5 (1994) para 35. Further discussion on inclusive education is contained in 3.3.4 in Chapter 3.

⁵² The HRC has elaborated this provision and all rights of the child in General Comment No 17. See HRC, General Comment No 17 'Rights of the child' (1989).

⁵³ Art 24(2).

⁵⁴ Art 24(3).

⁵⁵ Art 24(1).

The CAT does not have specific provisions on persons/children with disabilities although it applies to all persons. Nonetheless, the UN Special Rapporteur on Torture has explicitly acknowledged the applicability of the CAT in the context of disability. Indeed, the Special Rapporteur has observed that persons with disabilities, especially those detained in mental health care institutions and other institutions, are potential torture victims that must be protected by the CAT since some of the measures that are used to restrain them or to 'alleviate disabilities' cause severe pain or suffering, which might amount to torture.⁵⁷

Secondly, the UN adopted the CEDAW,⁵⁸ which guarantees the right of all women to freedom from discrimination on the basis of sex or gender although it does not make reference to women and girls with disabilities.⁵⁹ Nonetheless, the CEDAW Committee has expressly acknowledged the applicability of the CEDAW in the context of disability. Indeed, the Committee has adopted General Recommendation No 18 on women with disabilities, which makes up for the CEDAW's failure to expressly mention disability.⁶⁰ Amongst others, the Committee through the General Recommendation urges States parties to provide information on the situation of women with disabilities in their reports, which should include information on the special measures taken to ensure access by girls and women with disabilities to education, health services and 'to ensure that they can participate in all areas of social and cultural life'.⁶¹ Furthermore, in its General Recommendation on health, the Committee specifically requests states parties to address the

⁵⁶ Adopted by the UN General Assembly resolution 39/46/ of 10 December 1984, entered into force on 26 June 1987. The CERD offers protection from all forms of racial discrimination as opposed to disability based discrimination. See CERD, art 1.

⁵⁷ See generally UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Méndez JE)* (2012) para 3; Méndez JE *Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment: Report transmitted by note of the Secretary-General* (2011) para 78; Nowak M *Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment: Report transmitted by note of the Secretary-General* (2008). See also Rosenthal E & Laurie A 'When treatment is torture: Protecting people with disabilities detained in institutions' (2012) 19 (2) *Human Rights Brief* 13-17, 16.

⁵⁸ Adopted by UN General Assembly resolution 34/180 of 18 December 1989, entered into force on 3 September 1981.

⁵⁹ CEDAW, arts 1 & 2. The CEDAW is applicable to both women and girls. See e.g. art 10(f). See Quinn & Degener (2002) 103, where it is stated that 'CEDAW deals exclusively with the human rights of women and girls.'

⁶⁰ CEDAW Committee, General Recommendation No 18 'Disabled women' (1991).

⁶¹ See General Recommendation No 18, para 6.

health 'needs' and rights of women and girls with disabilities by giving special attention in this regard.⁶² The Committee further acknowledges that cultural or traditional practices such as female genital mutilation pose a high risk of causing disabilities in women and girls.⁶³

Therefore, although the CEDAW does not contain any specific provisions on disability, the CEDAW Committee has elaborated in its general recommendations that the CEDAW has a significant role in protecting the rights of women and girls with disabilities by emphasising the duty of states parties to take 'special measures' and 'give special attention' in respect of the rights of women and girls with disabilities.

Treaties not formally recognised to be applicable in the context of disability

First, the UN adopted the International Convention on the Elimination of all forms of Racial Discrimination (CERD),⁶⁴ which principally seeks to provide protection for all forms of discrimination on the basis of race, colour, descent, or national or ethnic origin.⁶⁵ Secondly, it adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention), which seeks to protect the rights of all migrant workers and members of their families without discrimination.⁶⁶ The UN further adopted the International Convention for the Protection of All Persons from Enforced Disappearance, which seeks to protect all persons from enforced disappearances.⁶⁷ Although these three treaties do not expressly mention disability or persons/children with disabilities; they are applicable in the context of disability as they seek to protect all persons, including children with disabilities, who fall within the protection that the treaties provide. For example, the protection provided by the Migrant

⁶² See CEDAW Committee General Recommendation No 24 on article 12 'Women and health' (1999) para 6.

⁶³ See General Recommendation No 24, para 12(b).

⁶⁴ Adopted by UN General Assembly resolution 206 (xx) of 21 December 1965, entered into force on 4 January 1969. See art 1(1).

⁶⁵ See generally art 1(1).

⁶⁶ Adopted by UN General Assembly resolution 45/158 of 18 December 1990, entered into force on 1 July 2003. See arts 1 & 7.

⁶⁷ Adopted on 20 December 2006, entered into force on 3 December 2010.

Workers Convention covers children with disabilities who are migrant workers or family members of the migrant workers.

2.2.3 Observations on framework under the general international human rights treaties

It can be observed from the discussion above that the general UN human rights treaties, including the CCPR and the CESCR, are relevant to the enjoyment of the rights of children with disabilities in Africa since they contain rights that are supposed to be enjoyed by all persons or categories of persons falling within the realm of the protection provided by the treaties. In addition, the treaty monitoring bodies such as the Committee on ESCR and the CEDAW Committee have elaborated how the provisions in the treaties should be applied in the context of disability.⁶⁸ Furthermore, the general treaties such as the CCPR and ECSR are applicable to children with disabilities since they provide for CPRs and SERs that are guaranteed to all persons.⁶⁹ On their part, the group-based treaties such CEDAW complement the CCPR and the CESCR by adding 'specificity to the general ICCPR and ICESCR rights, tailoring them more directly to the circumstances of the groups covered'.⁷⁰ Therefore, the treaties are significant in that they could be utilised to extract the maximum protection for the persons/children with disabilities belonging to the pertinent groups.⁷¹ Indeed, the CEDAW has been hailed as having 'tremendous potential for women with disabilities who experience double discrimination'.⁷² In addition, the CEDAW Committee has

⁶⁸ See e.g. Bruce A; Quinn G & Kenna P 'Disability and social justice: The International Covenant on Economic, Social and Cultural Rights' in Quinn & Degener (2002) 79-131, 131.

⁶⁹ See e.g. Degener in Quinn & Degener (2002) 53, where it is also observed that the CCPR is not group-based.

⁷⁰ Quinn & Degener (2002) 48.

⁷¹ Quinn & Degener (2002) 48-49.

⁷² See Bruce A; Quinlivan S & Degener T 'Gender and disability: the Convention on the Elimination of all Forms of Discrimination against Women' in Quinn & Degener (2002) 165 – 189, 188.

demonstrated that it views the provisions in the CEDAW as 'important tools for enhancing levels of participation by women with disabilities.'⁷³

However, the general treaties do not make express reference to disability or the rights of persons/children with disabilities with the effect that they do not provide a sufficient framework to ensure full human rights enjoyment by children with disabilities.⁷⁴ Indeed, Stein and Lord have highlighted that a person/child with disability would be required to either 'fall under a universal provision that by inference includes her as a person, or possess a separately protected characteristic in addition to her disability' in order to be covered by the protection that the general treaties offer.⁷⁵ The two authors acknowledge that this approach has an inherent difficulty because the 'existing human rights obligations are not tailored to address the specific barriers faced by persons with disabilities'.⁷⁶ As a result, reliance would have to be placed on the general comments that have been adopted by the monitoring bodies. However, general comments do not impose binding obligations on states parties and they do not guarantee human rights but only provide 'useful guidance on how to interpret' the various treaty provisions.⁷⁷ This position suggests that the 'drafters' merely assumed that the treaties could address disability issues and that they could be applicable to persons/children with disabilities but, in fact, they are not necessarily 'disability focused'.⁷⁸

Indeed, in passing the verdict on the IBR framework, Byrne has stated that the CESCR and the CCPR were 'clearly not designed with children or people with disabilities in mind and subsequently had little

⁷³ See Bruce; Quinlivan & Degener in Quinn & Degener (2002) 188.

⁷⁴ See e.g. Byrne in Freeman (2012) 422, where it is acknowledged that 'With limited exceptions, the core UN human rights treaties have not expressly addressed the human rights of children with disabilities'.

⁷⁵ See Stein & Lord in Arnardottir & Quinn (eds) (2009) 19.

⁷⁶ See Stein & Lord in Arnardottir & Quinn (eds) (2009)19.

⁷⁷ See generally Steiner; Alston & Goodman (2007) 878; Degener in Quinn & Degener (2002) 60; Bruce; Quinn & Kenna 'Disability and social justice' in Quinn & Degener (2002) 82; Kalantry; Getgen & Koh (2010) 267.

⁷⁸ See 2.4.5 & 2.6.1 below for further discussion.

impact in addressing issues particular to either children or people with disabilities'.⁷⁹ Hence, although children with disabilities are entitled to enjoy the rights applicable to children under the provisions in the general treaties, the applicability of the rights would predominantly depend on the pertinent general comments and the interpretations to be given by the monitoring bodies of the treaties. Accordingly, it can be observed that to the extent that the regime under the general treaties relies on 'non-binding' general comments to extend the application of the rights they contain to persons/children with disabilities, the treaties do not provide a robust framework that could foster the full enjoyment of human rights by children with disabilities.

2.3 Convention on the Rights of the Child and rights of children with disabilities

The Convention on the Rights of the Child (CRC) is the only global treaty that specifically provides for the rights of all children. It provides for the law relating to the rights of children with disabilities in four ways: it expressly guarantees children with disabilities the right to freedom from disability based discrimination; it has specific provisions on the rights of children with disabilities; it has four cardinal principles that are crucial for the enjoyment of the rights of all children, including children with disabilities; and it provides for general substantive rights for all children. The CRC Committee, which monitors the implementation of the CRC,⁸⁰ has further elaborated the rights of children with disabilities in General Comment No 9.⁸¹

⁷⁹ See Byrne in Freeman (2012) 423. See also Committee on ESCR, General Comment No 5 (1994) para 6, where the Committee suggests that the failure to expressly include disability in the CESCR might have been influenced by the lack of awareness at the time that disability was as a human rights issue.

⁸⁰ See CRC, art 43, which establishes the CRC Committee.

⁸¹ CRC Committee, General Comment No 9 'Children with disabilities' (2006).

2.3.1 Guarantees for non-discrimination

The CRC expressly recognises the right to freedom from disability based discrimination by listing disability among the prohibited grounds of discrimination.⁸² The right affords protection from discrimination on the basis of the child's disability or the disability of the child's parent or legal guardian.⁸³ However, the CRC does not make reference to the need to adopt special measures to foster *de facto* equality. Nonetheless, the right to non-discrimination under the CRC is recognised to also entail the taking of these measures.⁸⁴ The CRC Committee has also elaborated on the obligations relating to the right in General Comment No 9.⁸⁵ Amongst others, the Committee expects states parties to implement the right by, amongst others, including disability as a prohibited ground of discrimination in constitutions and legislation; providing effective and accessible remedies; and taking extra measures to protect girls with disabilities and ensure their access to services and full inclusion in society.⁸⁶



⁸² See CRC, art 2(1). (The CRC is the first global human rights treaty to explicitly list disability in its general anti-discrimination provision. See CRC Committee, General Comment No 9, para 2.).

⁸³ See CRC, art 2(1); Detrick S *A commentary on the United Nations Convention on the Rights of the Child* (1999) 73. Abrahamson has argued that the right to equality in the CRC is absolute in that it cannot be limited. See Abramson B *A commentary on the United Nations Convention on the Rights of the Child: Article 2: The right of non-discrimination* (2008) 40. However, Chirwa has observed that the illimitability or absoluteness of rights relates to the negative obligations of the state, namely, not to deny or obstruct the exercise of the right and that effective absoluteness of rights might not be attained if they also impose positive duties which would require progressive realisation of the rights. See Chirwa *Human rights under the Malawian Constitution* (2011) 41. Hence, non-discrimination could be considered as an absolute right to the extent that no negative obligations that result in its denial could be excusable.

⁸⁴ See generally CRC Committee, General Comment No 5 'General measures of implementation of the Convention on the Rights of the Child' (2003) para 12; UNICEF *Implementation handbook for the Convention on the Rights of the Child* (2007) 17.

⁸⁵ General Comment No 9, paras 8-10.

⁸⁶ General Comment No 9, paras 9 & 10. It is noteworthy that the CRC Committee has identified non-discrimination as one of the four cardinal principles for the implementation of the CRC alongside three other principles. See 2.3.3 below for a discussion of the principles.

2.3.2 Express guarantees for other specific substantive rights of children with disabilities

The CRC makes specific provision for other rights of children with disabilities in article 23 in four separate paragraphs.⁸⁷ It is noteworthy that this article is one of the few provisions in the CRC to which no reservations or declarations have been entered by a state party.⁸⁸ Thus there is wide acceptance by states parties of the obligations imposed by this provision in guaranteeing the specific rights of children with disabilities. The CRC Committee has elaborated on the contents of the article and on the rights of children with disabilities broadly in General Comment No 9. It has stated that the leading principle relating to the rights of children with disabilities is found in the first paragraph of article 23 since it guarantees the right to inclusion and active participation in society.⁸⁹

The second paragraph provides for the right to special care which requires the extension of assistance to children with disabilities who are eligible to benefit and to those who are responsible for their care.⁹⁰ In terms of the second and third paragraphs of article 23, the special care and assistance must be provided free of charge subject to (the maximum extent of) available resources although states are required to regard the implementation of the right as a matter of high priority in ensuring the maximum inclusion of children with disabilities in society.⁹¹ Furthermore, the special care to be provided must be designed to achieve effective access by children with disabilities to crucial rights and services, including education and

⁸⁷ Paras 1 & 2 of art 23 provide that:

‘1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child’.

⁸⁸ General Comment No 9, para 4.

⁸⁹ See General Comment No 9, para 11, where the Committee has highlighted that states must take measures aimed at realising the goal of including children with disabilities in society.

⁹⁰ General Comment No 9, para 12. See also See Quinn & Degener (2002) 120.

⁹¹ See General Comment No 9, para 14(a). See also Detrick (1999) 386.

training; and health care and recovery services.⁹² Lastly, the CRC Committee has explained that article 23(4) guarantees all children the 'right to benefit from prevention and treatment of disabilities'.⁹³

2.3.3 Guarantees of rights through the cardinal principles of the Convention

The CRC Committee has identified the best interest of the child; child's survival and development; and child participation, in addition to non-discrimination, as the four cardinal principles for the implementation of the CRC.⁹⁴ Firstly, the best interest of the child principle, which is derived from article 3 of the CRC, expects the best interest of children, as individuals or a group, to be one of the primary considerations in any undertaking concerning children with a view to maximise the enjoyment of their rights and interests.⁹⁵ This entails that if measures to be taken have an effect on particular children, including particular children with disabilities, their best interests should be a primary consideration. It is noteworthy that the CRC does not make the best interest principle 'the' primary consideration,⁹⁶ which implies that it is in effect not an overriding or paramount consideration.⁹⁷ This implies that under the CRC, the principle is merely one of the

⁹² General Comment No 9, para 14(b). See also CRC, art 23 (3).

⁹³ General Comment No 9, para 15. See also para 1, where the Committee urges states parties to explore effective strategies for preventing disabilities.

⁹⁴ CRC Committee, General Comment No 5 (2003) para 12; CRC Committee, General Comment No 13 'The right of the child to have his or her best interests taken as a primary consideration' (2013) paras 17-24; CRC Committee, 'Guidelines for initial reports' (1991) para 13; Kilkelly U 'Disability and children: The Convention on the Rights of the Child (CRC)' in Quinn & Degener (2002) 193.

⁹⁵ CRC Committee, General Comment No 5, para 12; Karp J 'Concepts underlying the Convention on the Rights of the Child' (1998) 4 *Loyola Poverty Law Journal* 113, 117; Mezmur BD 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Publikereg / Public Law* 1-28, 18. See also Kilkelly in Quinn & Degener (2002) 194.

⁹⁶ See CRC, art 3, which provides in part that: 'In all actions concerning children... the best interests of the child shall be a primary consideration'.

⁹⁷ CRC Committee, General Comment No 5, para 12; CRC Committee, General Comment No 13 (2013) paras 36-40. See also Amanda L 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 11-32, 17, where it is highlighted that 'The difference in using the definite article instead of the indefinite may seem a pedantic assertion, yet it has significant practical ramifications'. See also Todres J 'Emerging limitations on the rights of the child: The United Nations Convention on the Rights and Welfare of the Child and its early case law' (1998) 30 *Columbia Human Rights Law Review* 159-200, 176, where it is observed that the best interests standard in the CRC is lower (compared with the standard under the African Children's Charter discussed in 2.5.2 below).

key and determining factors to be taken into account in all actions affecting children.⁹⁸ Nonetheless, the principle is vital in the enjoyment of the rights of children with disabilities to the extent that the CRC Committee has stated that in respect of children with disabilities, it should override all other considerations especially in matters pertaining to budgeting and service provision.⁹⁹ Therefore, although the CRC makes the best interests 'a' primary consideration in respect of all children; the CRC Committee has clarified that in respect of children with disabilities, it should be the paramount consideration especially in matters relating to budgeting and service provision. Consequently, it can be observed that the best interests principle has an overriding effect in respect of all decisions and actions affecting service provision for children with disabilities.¹⁰⁰

Secondly, the concept of child's life, survival and development recognises that the child is entitled to live, survive and develop.¹⁰¹ It is related to the right to life and to other rights such as education and health which ensure the survival and development of children to self-sustenance and independent living.¹⁰² The principle requires states to identify and address all challenges that threaten the life, survival and development of children.¹⁰³ The CRC Committee has observed that this principle 'warrants particular attention where children with disabilities are concerned'.¹⁰⁴ This is the case because children with

⁹⁸ It is noteworthy that the CRC recognises that the best interests principle should be the paramount consideration in matters relating to the adoption of children. See CRC, art 21.

⁹⁹ General Comment No 9, para 30.

¹⁰⁰ For a detailed discussion in respect of the best interests principle under the CRC, see generally CRC Committee, General Comment No 13 (2013); Freeman M A *commentary on the United Nations Convention on the Rights of the Child: Article 3: The best interests of the child* (2007). See also Todres (1998) 159-200; Van Bueren, G 'Children's rights: Balancing traditional values and cultural plurality' in Douglas G & Sebba L (eds) *Children's rights and traditional values* (1998) 15-30.

¹⁰¹ The principle is derived from CRC, art 6. Art 6(2) provides that: 'States Parties shall ensure to the maximum extent possible the survival and development of the child.'

¹⁰² WHO & World Bank *World report on disability* (2011)10.

¹⁰³ Carp (1998) 123.

¹⁰⁴ General Comment No 9, para 31.

disabilities often suffer considerable obstacles to their rights enjoyment from their birth such as being hidden, killed, abandoned or neglected which also threaten their survival and development.¹⁰⁵

Thirdly, the principle of child participation recognises that children are not docile or 'lesser human beings' but partners and participants, whose views must be heard and given due weight, in taking actions that affect them.¹⁰⁶ The principle also entails meaningful participation through effective engagement and consultation. Hence, it expects the state to involve the children with disabilities themselves or organisations for persons with disabilities (DPOs) in developing child related policies, laws, or other related measures.¹⁰⁷ The CRC Committee has highlighted that the principle is vital in respect of the rights of children with disabilities and it expects states parties to take into account the evolving capacities of children with disabilities in respecting their views.¹⁰⁸ The CRC Committee has stated that the evolving capacities concept entails 'processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realised'.¹⁰⁹ Furthermore, the concept is significant as it implies that children's development towards independent adulthood must be respected and promoted throughout childhood and that age limits

¹⁰⁵ See e.g. General Comment No 9, para 31. See e.g. Kilkelly in Quinn & Degener (2002) 194; Lansdown G *It's our World too! A report on the lives of disabled children: Disability awareness in action* (2001) 24-26. For further discussion on the principle of child's life, survival and development, see Nowak M *A commentary on the United Nations Convention on the Rights of the Child: Article 6: The right to life, survival and development* (2005).

¹⁰⁶ CRC Committee, General Comment No 5, para 12; Karp (1998) 118. The principle is derived from CRC, art 12. For further discussion in respect of the child's right to participation and to be heard, see Lucker-Babel MF 'The role of the child to express views and to be heard/held: An attempt to interpret article 12 of the Convention on the Rights of the Child' (1995) 3 *International Journal on Children's Rights* 391-404; Lundy L "'Voice" is not enough: Conceptualising Article 12 of the UNCRC' (2007) 33 *British Educational Research Journal* 927-942.

¹⁰⁷ Sloth-Nielsen J & Mezmur BD 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 347.

¹⁰⁸ See General Comment No 9, para 32. See also Kilkelly in Quinn & Degener (2002) 195. The CRC makes provision for the evolving capacities concept in arts 5 & 14. (It is noteworthy that the concept of evolving capacities of the child is not regarded as a cardinal principle under the CRC).

¹⁰⁹ See CRC Committee, General Comment No 7 'Implementing child rights in early childhood' (2005) para 17.

or maturity must not be set arbitrarily.¹¹⁰ The CRC restricts the application of the concept to two contexts. First, in terms of article 5, the evolving capacities of the child must be respected in matters relating to parental directions and guidance in exercise by the child of the rights contained in the CRC. Secondly, in terms of article 14, the principle must be respected in matters relating to parental direction and guidance on the child's rights to thought, conscience and religion. The evolving capacities concept is significant in facilitating the participation of children with disabilities as it prevents arbitrary setting of the capacity of children with disabilities who are often regarded as lacking capacity to make decisions.

Lastly, the principle of non-discrimination,¹¹¹ amongst others, entails the recognition of children's equality and their protection from discrimination in law and in practice.¹¹² The principle is derived from article 2 of the CRC, which provides for the right to equality and freedom from discrimination.¹¹³

The four cardinal principles have been hailed for emphasising the equal dignity of all children.¹¹⁴ Accordingly, they have a significant role to play in protecting the human rights of children with disabilities whose dignity is often not respected due to the various obstacles they face that impede their human rights enjoyment. In addition, the principles are particularly significant in the realisation of the rights of all children, including children with disabilities, as they are not only directly derived from the CRC but they are also expected to guide the implementation of all the rights contained in the CRC.¹¹⁵

¹¹⁰ UNICEF *Implementation Handbook* (2007) 77.

¹¹¹ See CRC Committee, General Comment No 5, para 12.

¹¹² See generally Carp (1998) 116.

¹¹³ For further discussion on non-discrimination under the CRC, see 2.3.1 above.

¹¹⁴ Carp (1998) 125, where it is observed that: '...the four general principles of the Convention are the cornerstones of the human dignity of the child'.

¹¹⁵ See e.g. Kilkelly in Quinn & Degener (2002) 193. Nevertheless, authors such as Abrahamson have cautioned against regarding the principles more highly than rights since principles are supposed to merely guide acceptable conduct regarded as being right; while rights are concrete commands that impose binding obligations to be complied with. See Abramson (2008) 53-54; Nowak (2005) 16-17.

2.3.4 Guarantees for other general substantive rights

The CRC guarantees general substantive rights to all children contained in its various provisions.¹¹⁶ The rights include both CPRs and SERs.¹¹⁷ As mentioned above, the CRC Committee has elaborated on education and other rights of children with disabilities in General Comment 9.¹¹⁸ Amongst others, the Committee requires states to ensure inclusive primary education, which 'should be the goal of educating children with disabilities' that is flexible enough to accommodate the learning of children with disabilities.¹¹⁹ Furthermore, it has observed that all children with disabilities should enjoy, amongst others, the right to a name and nationality, including registration after birth so that they are recognised by law.¹²⁰ It also urges states parties to ensure that children with disabilities should have access in respect of public transportation and facilities, including buildings, and schools.¹²¹ Above all, the CRC Committee requires states to focus on all provisions of the CRC in the protection and promotion of the rights of children with disabilities.¹²²



¹¹⁶ It is noteworthy that the CRC in art 1 generally recognises a child as a person below the age of 18 years and also acknowledges that in certain societies majority age can be reached earlier than 18 years.

¹¹⁷ For the CPRs see e.g. art 6(1)- life ; art 13(1)- freedom of expression; art 14(1)- freedom of thought, conscience and religion; art 15(1)- freedom of association and peaceful assembly ; art 16(1)- privacy; & art 17(1)- access to information. For the SERs see e.g. art 24(1)- enjoyment of the highest attainable standard of health; art 26(1)- social security, including social insurance; art 27(1)- adequate standard of living ; art 28(1)- education; & art 31(1)- rest, leisure, engagement in play and recreational activities and free participation in cultural life and the arts.

¹¹⁸ The CRC Committee has also explained how these rights should be enjoyed by children with disabilities. See General Comment No 9, paras 30-79. It is not within the scope of this study to provide a detailed analysis of the broad substantive rights or General Comment No 9.

¹¹⁹ General Comment 9, paras 65 & 66.

¹²⁰ CRC, art 7; General Comment No 9, paras 34, 35 & 36.

¹²¹ General Comment No 9, paras 39 & 40.

¹²² General Comment No 9, para 5. There are two Optional protocols that supplement the CRC, namely, the Optional Protocol on the involvement of children in armed conflict, adopted by the UN General Assembly on 25 May 2000, entered into force on 12 February 2002 (it raises the minimum age for involvement in armed conflict to 18); and the Optional Protocol on the sale of children, child prostitution and child pornography, adopted by the UN General Assembly on 25 May 2000, entered into force on 18 January 2002. The Optional Protocols apply to all children, including children with disabilities. It is not within the scope of the study to discuss these protocols.

2.3.5 Observations on the framework under the Convention on the Rights of the Child

In light of the above analysis, it can be observed that the CRC constitutes a laudable framework for the enjoyment of the rights of children with disabilities for a number of reasons. These include: expressly guaranteeing the right to freedom from disability based discrimination in the enjoyment of all human rights contained in the CRC (in article 2); and setting out disability specific obligations (in article 23) that seek to facilitate the inclusion of children with disabilities in society. The fact that, as discussed above,¹²³ article 23 of the CRC is one of the few provisions without any reservations implies that there is a wide acceptance of the obligations that the article imposes. The emphasis the CRC places on the obligation to ensure the inclusion of children with disabilities in society is significant since (as discussed in 2.1 in the previous chapter) the exclusion of children with disabilities from society is one of the major causes for the lack of their human rights enjoyment. Therefore, by advocating for inclusion, the CRC could play a crucial role in facilitating the participation of children with disabilities in society and the consequent enjoyment of human rights which are violated by their segregation from society. Above all, by making express provision for the rights of children with disabilities, the CRC confirms that it recognises the entitlement of children with disabilities to enjoy human rights. Thus the CRC takes a step towards recognising children with disabilities as rights holders unlike the other UN treaties (discussed in 2.2 above), which are in any case adult oriented and not child focused.¹²⁴ Indeed, the fact that the CRC moves towards positioning children with disabilities as rights holders has been acknowledged as a 'major achievement'.¹²⁵

However, the framework under the CRC also has a number of drawbacks. First, the approach taken by the disability specific provision in article 23 has cast doubts on its potential to ensure full human

¹²³ See 2.3.2 above.

¹²⁴ This comes against the background that the other core UN treaties are regarded as being adult-focused with the effect that they could be considered as being applicable to adults with disabilities as opposed to children with disabilities. See generally Byrne in Freeman (2012) 425.

¹²⁵ See e.g. Byrne in Freeman (2012) 425.

rights enjoyment by children with disabilities.¹²⁶ For example, although article 23(2) guarantees children with disabilities the right to 'special care', it does not indicate how the 'care' should be achieved.¹²⁷ Above all, the language and terminology used in the provision's text (in addition to General Comment No 9) is considered to be 'heavily grounded in a welfarist and medicalised approach to disability'.¹²⁸ This is because, as observed above, the provisions put emphasis on the entitlement of children with disabilities to 'special care', 'treatment' and 'rehabilitation', which suggests the perception that children with disabilities are individuals who require predominantly 'protective measures' as opposed to being generally regarded as rights holders.¹²⁹

Therefore, the CRC still retains the welfare based approach to conceptualising disability and the rights of children with disabilities. This drawback implies that the CRC only manages to address the challenges faced by children with disabilities on account of their status as children but does not adequately address the challenges that they face on account of their status as children with disabilities, thereby 'coincidentally' causing children with disabilities to face the same conundrum that the other core UN treaties failed to address.¹³⁰ Accordingly, the framework under the CRC retains a number of drawbacks that could derail the human rights based approach to disability in the realisation of the rights of children with disabilities.

¹²⁶ See generally Byrne in Freeman (2012) 424 & 425; Kilkelly in Quinn & Degener (2002) 194; Singh V & Ghai A 'Notions of self: Lived realities of children with disabilities' (2009) 24 *Disability and Society* 131.

¹²⁷ See Kilkelly in Quinn & Degener (2002) 194; Byrne in Freeman (2012) 424.

¹²⁸ Byrne in Freeman (2012) 424.

¹²⁹ Byrne in Freeman (2012) 424.

¹³⁰ See Byrne in Freeman (2012) 424.

2.4 Rights of children with disabilities under the Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD) is the only global treaty that specially guarantees the rights of all persons with disabilities. It provides for the rights of children with disabilities in three ways: guaranteeing non-discrimination; containing a dedicated provision that sets out the rights of children with disabilities; and setting out general substantive rights which also apply to children with disabilities.

2.4.1 Guarantees for non-discrimination

The CRPD recognises non-discrimination in three ways. First, non-discrimination is one of the general principles of the CRPD under article 3.¹³¹ Secondly, the CRPD guarantees equality and non-discrimination as a specific right under article 5 in four separate paragraphs.¹³² Lastly, it contains a number of substantive rights which the CRPD expressly requires that they should be enjoyed without discrimination on the basis of disability¹³³ and 'on an equal basis with others'.¹³⁴

The CRPD defines discrimination on the basis of disability as follows:

¹³¹ CRPD, art 3(b). The other seven general principles listed in CRPD art 3 are: respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities. Schulze has observed that the principles provide the foundation of the provisions in the CRPD and also link the various rights with one another so that the CRPD's provisions achieve the common main purpose of facilitating the meaningful participation of persons with disabilities in the mainstream society. See Schulze (2010) 44. For further discussion of the general principles of the CRPD, see Schulze (2010) 44-49.

¹³² The provision is discussed below.

¹³³ See e.g. art 24(1)-education; art 25(1) - health; art 18(1)(a)- right to acquire nationality; & art 28(1)- adequate standard of living and social protection.

¹³⁴ See e.g. art 9 (accessibility) & 10 (life).

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.¹³⁵

It can be observed the CRPD recognises ‘discrimination on the basis of disability’ as including denial of reasonable accommodation, which it defines as:

...necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.¹³⁶

The definition implies that the duty bearer will be excused from providing reasonable accommodation if it is demonstrated that its provision would cause disproportionate or undue burden/hardship on the responsible party or the state.¹³⁷

A number of observations can be made in respect of article 5 of the CRPD, which guarantees the right to equality and non-discrimination.¹³⁸ The first paragraph obliges states parties to ensure both equality

¹³⁵ CRPD, art 2.

¹³⁶ CRPD, art 2. The inclusion of reasonable accommodation in the definition of discrimination implies that the CRPD provides a higher standard of non-discrimination for persons/children with disabilities.

¹³⁷ For further discussion on the concept of reasonable accommodation, including the notion of undue burden or hardship, see 3.3.3 in Chapter 3.

¹³⁸ See CRPD, art 5, which provides as follows:

‘1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention’.

under the law, which is achieved through strict respect for non-discrimination, and equality as a social goal, which is achieved by ensuring equal opportunities.¹³⁹ The second paragraph requires states parties to provide for the justiciable right of non-discrimination in legal provisions such as in legislation (the 'effective' legal protection of the right to non-discrimination).¹⁴⁰ The third paragraph obliges states to ensure the provision of reasonable accommodation to all persons with disabilities in order to protect them from disability based discrimination and achieve substantive equality.¹⁴¹ On its part, the last paragraph allows states to take specific measures, which include 'temporary (affirmative action) special measures', to foster *de facto* equality.¹⁴² The content of article 5 implies that the CRPD recognises both formal and substantive equality although it takes the approach that emphasises substantive equality.¹⁴³

The CRPD Committee has dealt with matters that have raised issues pertaining to non-discrimination when considering individual communications brought under the CRPD's Optional Protocol.¹⁴⁴ First, the matter in *H.M. v Sweden* related to the refusal to grant building permission for the construction of a hydrotherapy pool for the rehabilitation of a person with a physical disability on grounds of incompatibility of the extension in question with the development plan of the City. The complainant alleged a violation of

¹³⁹ Schulze (2010) 61; Waddington L 'Breaking new ground: The implication of ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community' in Arnardottir & Quinn (eds) (2009) 116.

¹⁴⁰ Accordingly, legal measures are the prescribed and recommended means for implementing non-discrimination. See e.g. CRPD Committee, Concluding Observations on Australia (2013) para 15.

¹⁴¹ See e.g. Kayess R & French P 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1, 9.

¹⁴² Schulze (2010) 63. See also CRPD Committee, Concluding Observations on El Salvador (8 October 2013), paras 15 & 16.

¹⁴³ See generally Waddington in Arnardottir & Quinn (2009) 116. The concept of substantive equality is discussed in 3.3.3 in Chapter 3

¹⁴⁴ See e.g. CRPD Committee, Communication No 3/2011, *H.M. v Sweden* (2011); Communication No 1/2010, *Szilvia Nyusti, Péter Takács & Tamás Fazekas v Hungary* (2013); Communication No 2/2010 *Liliane Gröninger v Germany* (2014). (Although the communications were not brought by children with disabilities and they did not deal specifically with the rights of children with disabilities, they raised issues relating to non-discrimination and reasonable accommodation in addition to other rights which are applicable to all persons with disabilities). The CRPD Optional Protocol (Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, entered into force on 3 May 2008, art 1) allows the Committee to consider state, group and individual communications relating to violations of the CRPD. (The CRPD Committee (Committee on the Rights of Persons with Disabilities) is established under art 43 of the CRPD to monitor the implementation of the Convention).

the right to freedom from disability based discrimination, including the denial of reasonable accommodation, amongst other rights. In its determination, the CRPD Committee found a violation of the equality and non-discrimination provisions under article 5 due to the fact that the failure to provide reasonable accommodation, when it would not impose undue burden, had resulted in the failure by the complainant to enjoy human rights on an equal basis with others.¹⁴⁵

On its part, the matter in *Gröninger v Germany* related to the failure on the part of Germany to promote the right to work for persons with disabilities by not facilitating their inclusion in the labour market. The allegation in case was attributed to the exclusion of the author's son from having effective access to general technical and vocational training, programmes and placement services principally because in terms of the domestic legislative framework (section 219 of the country's Social Law), the author's son was not eligible for an integration subsidy (an affirmative action measure) since his full working capacity could not be restored within three years.¹⁴⁶ The CRPD Committee faulted the state and found, amongst others, that the state had failed to fulfill its obligations under article 5(1) of the CRPD to ensure equality and non-discrimination in the enjoyment of the right to employment for persons with disabilities contained in article 27 of the CRPD.¹⁴⁷ Hence, the Committee highlighted that states parties have the obligation to ensure that the rights under the CRPD are exercised without discrimination on the basis of disability.

Lastly, the matter in *Nyusti & Others v Hungary* arose out of the failure by state authorities in Hungary to eliminate discrimination on the ground of disability by a private credit institution (OTP) and to ensure that persons with visual impairments have an unimpeded access to the services provided by ATMs on an equal basis with other clients. The complaint before the Committee focused on the broader claim

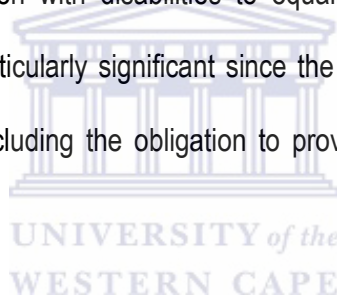
¹⁴⁵ See *H.M. v Sweden*, para 8.5.

¹⁴⁶ See e.g. *Liliane Gröninger v Germany*, para 2.4.

¹⁴⁷ See *Liliane Gröninger v Germany*, para 7.

relating to accessibility under article 9 of the CRPD.¹⁴⁸ Accordingly, the Committee did not deal with the State party's obligations under article 5, paragraphs 2 and 3 (on non-discrimination and reasonable accommodation).¹⁴⁹ Nonetheless, the Committee invoked the provisions CRPD's article 4, paragraph 1(e), which requires States Parties to undertake 'to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise', in making a finding that States Parties are required pursuant to article 9 of the Convention to take appropriate measures to ensure accessibility by persons with disabilities on an equal basis with others by identifying and eliminating obstacles and barriers to accessibility.¹⁵⁰ Hence, the Committee found that states have a duty to respect the right to freedom from discrimination in ensuring accessibility.

Therefore, the right of children with disabilities to equality and freedom from disability based discrimination under the CRPD is particularly significant since the CRPD provides the highest normative standard of the right by expressly including the obligation to provide reasonable accommodation as an element of the right.¹⁵¹



2.4.2 Guarantees for other specific substantive rights of children with disabilities

The CRPD makes specific provision for children with disabilities in four ways: its preamble expressly makes reference to children with disabilities; it explicitly contains a general principle that addresses children with disabilities; it has a particular article that sets out the rights of children with disabilities; and it provides for

¹⁴⁸ *Nyusti v Hungary*, para 9.2.

¹⁴⁹ *Nyusti v Hungary*, para 9.2.

¹⁵⁰ *Nyusti v Hungary*, para 9.4.

¹⁵¹ The CRPD Committee has also recommended other measures that states parties must take in the implementation of non-discrimination. These include the duty by states to make explicit recognition of the right to freedom from 'multidimensional' disability based discrimination in legislation such as anti-discrimination laws that must cover all categories of children with disabilities. See e.g. CRPD Committee, Concluding Observations on Australia (2013) para 15.

particular rights of children with disabilities that are contained in general provisions of the Convention. First, the CRPD preamble expressly recognises the entitlement of all children with disabilities to enjoy all human rights on an equal basis with other children; and acknowledges the obligations undertaken by states parties to the CRC in respect of the rights of children with disabilities.¹⁵² Secondly, it recognises the respect for the evolving capacities of children with disabilities; and respect for the right of children with disabilities to preserve their identities among its eight general principles.¹⁵³

The concept of 'evolving capacities of children with disabilities' seeks to protect children with disabilities from being excluded from the recognition that they have legal capacity and hence, autonomy until a certain age.¹⁵⁴ Unlike under the CRC, the CRPD does not restrict the principle of respect of evolving capacities to the issues relating to parental autonomy, but the CRPD requires the principle to guide the interpretation of all rights contained in the CRPD.¹⁵⁵ The higher standard attached to the principle under the CRPD is significant since children with disabilities are often regarded as 'incapable of demonstrating any meaningful capacity or competence'.¹⁵⁶ The evolving capacities concept is also relevant in the context of the child's right to participation under the CRPD as it is regarded as strengthening the potential of the right of the child with disability to participation under CRPD's article 7 (discussed below) in bringing out the voice

¹⁵² CRPD preamble, para (r).

¹⁵³ CRPD art 3(h).

¹⁵⁴ Schulze (2010) 49. See also CRPD Committee General Comment No 1 'Article 12: Equal recognition before the law' (2014) para 32, where the Committee highlights that since the CRPD in art 12 provides for equal legal capacity and protects equality before the law for all persons regardless of age, states parties to the CRPD 'must examine their laws to ensure that the will and preferences of children with disabilities are respected on an equal basis with other children'. As discussed in 2.3.3 above, the CRC in arts 4 & 5 also recognises the concept. Unlike in the CRC, the general principles that underlie the CRPD are not specifically attached to articles of the CRPD but apply across the whole Convention. See Schulze (2010) 44. Above all, the CRPD's general principles are expressly set out in the CRPD as its general principles unlike in the CRC where the Committee on CRC had to develop the cardinal principles through its reporting guidelines and general comments.

¹⁵⁵ See Byrne in Freeman (2012) 427.

¹⁵⁶ See Byrne in Freeman (2012) 427.

and views of children with disabilities to the stage where they are required to be recognised and given weight.¹⁵⁷

Thirdly, the CRPD has a specific article that sets out the rights of children with disabilities in three separate paragraphs.¹⁵⁸ The provision recognises the entitlement by children with disabilities to the full enjoyment all human rights on an equal basis with other children;¹⁵⁹ requires the best interests of a child to be respected in all matters affecting children with disabilities;¹⁶⁰ and guarantees the right of children with disabilities to participate in the decision making processes affecting them.¹⁶¹ It can be observed that the provisions also reiterate the two of the four cardinal principles of the CRC, namely: the best interests of the child principle and child participation.¹⁶² However, the outstanding similarity is that both the CRC and the CRPD requires the best interest of a child to be 'a' (as opposed to 'the') primary consideration thereby not

¹⁵⁷ See e.g. Byrne in Freeman (2012) 431.

¹⁵⁸ See CRPD, art 7, which provides that:

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right'.

The CRPD Committee is yet to interpret the provisions through a general comment although it has adopted two general comments in respect of art 12-Equal recognition before the law, & art 9-Accessibility. See General Comment No 1 (2014); CRPD Committee, General Comment No 2 'Article 9: Accessibility' (2014). In General Comment No 1, para 32, the Committee has highlighted that states parties must implement art 7 in a manner that complies with art 12 of the CRPD by respecting the will and preferences of children with disabilities. Nonetheless, the Committee has issued concluding observations in respect of a number of states party reports, which have also made reference to children with disabilities. Amongst others, it has stated that the rights contained in art 7 include 'early identification, family interventions and informed support of, children with disabilities' (CRPD Committee, Concluding observations on Spain (2011) para 23) in addition to and taking of steps 'to replace institutional care for boys and girls with disabilities with community-based care' (CRPD Committee, Concluding observations on Tunisia (2011) para 17(d)).

¹⁵⁹ Art 7(1)

¹⁶⁰ Art 7(2).

¹⁶¹ Art 7(3).

¹⁶² See 2.3.3 above for a discussion on the relevance and applicability of the cardinal principles.

making it the ultimate overriding or paramount consideration.¹⁶³ Furthermore, the CRPD, just like the CRC, recognises the best interests principle as the overriding consideration in matters relating to guardianship, trusteeship, wardship or adoption of children with disabilities.¹⁶⁴

On its part, the right to participation is provided for in article 7(3). The provision recognises the rights of children with disabilities to express their views freely on any matters that affect them and the right to have their views given due weight in accordance with their age and maturity. It also includes the entitlement to be given disability and age-appropriate assistance to enable them to exercise the right. It is noteworthy that the CRPD provides for a higher standard of the right as compared to the CRC by not restricting the exercise of the right to ‘a child who is capable of forming own views’ in contrast to the position taken by the CRC.¹⁶⁵ In addition, the CRPD in article 4(3) expressly obliges states to ensure that persons with disabilities, including children with disabilities, actively and meaningfully participate in the development of policies and legislation for the implementation of the CRPD and in decision-making processes concerning persons with disabilities.¹⁶⁶ However, the provision in article 33(3) which requires persons with disabilities and civil society, including DPOs, to be actively involved in the monitoring of the national implementation of the CRPD does not make any reference any role to be played by children with disabilities.¹⁶⁷ Nonetheless, the CRPD Committee has reiterated the need for states parties to establish the appropriate mechanisms that ensure meaningful participation of persons with disabilities, including children

¹⁶³ See Byrne in Freeman (2012) 428. In this regard, Byrne acknowledges that this development constitutes a ‘reduction’ and ‘considerable weakening of the standard since the earlier draft text during the drafting process of the CRPD had proposed ‘that the best interests should in fact be “the paramount” consideration in all actions concerning children with disabilities’. See Byrne in Freeman (2012) 429.

¹⁶⁴ CRPD art 23(2), which provides for the right to respect of the home and family. See Byrne in Freeman (2012) 429.

¹⁶⁵ See CRPD, art 7(3), which does not contain such restriction; while CRC, art 12 contains the restriction. See also Byrne in Freeman (2012) 430.

¹⁶⁶ See CRPD, art 4(3); CRPD Committee, Concluding Observations on Peru (2012) para 9; Concluding Observations on Australia (2013) para 11; Concluding Observations on Austria (2013) para 11.

¹⁶⁷ See generally Byrne in Freeman (2012) 435.

with disabilities, 'in the development and implementation of legislation and policies to implement the Convention'.¹⁶⁸

Fourthly, the CRPD accords all children with disabilities other specific substantive rights, including what could be regarded as survival and developmental rights in terms of the CRC's cardinal principles, within its general provisions. For example, it guarantees children with disabilities the right to a name, nationality and to know and be cared for by parents, including the right to be registered upon birth.¹⁶⁹ Similarly, it sets out rights of children with disabilities pertaining to alternative care and adoption under article 23, which includes the right to family-type alternative care that should prioritise alternative care within the immediate family.¹⁷⁰ Furthermore, article 16 of the CRPD guarantees the right to freedom from all forms of exploitation, violence and abuse. In addition, the CRPD requires states to take into consideration the 'age specific needs' of persons with disabilities in 'supporting the recovery rehabilitation, and social integration of persons with disabilities who become victims of any form of exploitation, violence or abuse'.¹⁷¹ This implies that states must take measures that consider the childhood and age of children with disabilities implementing the right and also facilitating their inclusion in society.¹⁷²

The CRPD further obliges states to 'identify, investigate and prosecute instances of exploitation, violence and abuse' through implementing legislation and policies, which must include child-focused laws and policies.¹⁷³ Furthermore, article 25(b) of the CRPD imposes an obligation on states parties to provide health services that persons/children with disabilities would need specifically because of their disabilities,

¹⁶⁸ See e.g. CRD Committee, Concluding Observations on Australia (2013) para 11; Concluding Observations on Peru (2012) para 9.

¹⁶⁹ CRPD, art 18(2). In respect of the right to birth registration, see also CRPD Committee, Concluding Observations on Paraguay (2013) para 46.

¹⁷⁰ See CRPD, art 23(2), (3) & (5).

¹⁷¹ See CRPD, art 16(4); Byrne in Freeman (2012) 431.

¹⁷² See e.g. CRPD Committee, Concluding Observations on El Salvador (2013) para 36(e).

¹⁷³ See CRPD art 16(5). See also CRPD Committee, Concluding Observations on Australia (2013) para 38; Concluding Observations on El Salvador (2013) para 36(a).

including early identification and intervention, and to provide services designed to prevent further disabilities. Lastly, the CRPD in article 30(3)(d) imposes obligations on the state to ensure access by children with disabilities to participate 'in play, recreation, leisure and sporting activities, including those activities in the school system'.¹⁷⁴

Therefore, it can be observed that the CRPD takes an approach that sets out in explicit terms the rights that should be exercised by children with disabilities by dedicating a specific provision to children with disabilities and also expressly mentioning children with disabilities in other provisions that set out rights guaranteed to persons with disabilities in general.

2.4.3 Guarantees for general substantive rights applicable to children with disabilities

The CRPD also sets out general substantive rights that are contained in its various broad provisions. A number of these rights are guaranteed to all persons with disabilities, including children with disabilities. These rights include both CPRs and SERs. The CPRs include life;¹⁷⁵ freedom of expression, opinion and access to information;¹⁷⁶ and respect for privacy.¹⁷⁷ The SERs include health;¹⁷⁸ adequate standards of living and social protection;¹⁷⁹ and employment.¹⁸⁰

¹⁷⁴ See CRPD, art 30(3)(d); Byrne in Freeman (2012) 435.

¹⁷⁵ Art 10.

¹⁷⁶ Art 21.

¹⁷⁷ Art 22.

¹⁷⁸ Art 25.

¹⁷⁹ Art 28.

¹⁸⁰ Art 27. The CRPD further requires states to take measures that protect the rights of children with disabilities such as ensuring habilitation and rehabilitation of children with disabilities, which are vital for the enjoyment of other rights. See CRPD, art 26; Coleridge P; Simonnot C & Steverlynck D *Study of disability in EC development cooperation* (2010) 48.

In addition, the CRPD sets out a number of rights that are not explicitly provided for under the other human rights treaties although they are not necessarily 'new rights'.¹⁸¹ These include the right to 'community living' under article 19; the right to family-type alternative care under article 23(5) as already discussed above;¹⁸² and the right to inclusive education under article 24.¹⁸³ Although the right to education is recognised by most of the other treaties such as the CRC and the CESC, inclusive education is not explicitly set out under the treaties. On its part, the right to 'community living' is not recognised as a substantive right under the other treaties although the CRC Committee has identified the obligation to ensure the inclusion of children with disabilities in the community as the guiding principle in implementing the rights of children with disabilities under the CRC. Similarly, although the right to alternative care is recognised by the CRC as discussed above, the treaty does not expressly prescribe such care to be provided in a family or community setting. And again, although the CRC Committee recommends family-type or community-type alternative care, the CRPD expressly recognises it as a substantive right.

Furthermore, apart from these rights being expressly set out in the CRPD, it can be observed that they reflect a common conceptual underlying objective, namely, emphasising the inclusion of persons/children with disabilities in society. Hence, they can be regarded as 'inclusion focused rights'. For

¹⁸¹ See e.g. CRPD Committee, general Comment No 2, para 14, where the Committee observes with regard to accessibility to ICT that the CRPD:

'[I]s the first human right treaty of the 21st century to address access to the ICT in this regard it does not create new rights for persons with disability only. Furthermore the notion of equality in international law has changed during the last decades. The conceptual shift from formal equality to substantive equality has an impact on state parties' duties. The obligation to provide accessibility is an essential part of this new duty to respect, protect and fulfil equality rights'.

For further discussion pertaining to the viewpoint that the CRPD could be considered as setting out a number of 'new rights' although it does not in fact do so, see Lawson A 'The UN Convention on the Rights of Persons with Disabilities and European disability law: A catalyst for cohesion?' in Arnardóttir & Quinn (2009) 107, where it is stated that the purpose of the CRPD 'was not the creation of new rights but the disability-sensitive articulation and clarification of existing ones'; but that, nonetheless 'the effect of the clarification it provides has the potential to be at least as powerful as many instruments which purport to be creating new rights'. See also Arnardóttir & Quinn (eds) (2009) 44.

¹⁸² See 2.4.4 above.

¹⁸³ CRPD, art 24(1).

example, in terms of the right to 'community living' under article 19,¹⁸⁴ persons/children with disabilities have the freedom to choose their residence; the right not to be forced to live in institutions or a particular living arrangement but to live in the community freely and independently; and the right to be provided with measures, services and facilities for support to enable them to live independently in the community on an equal basis with others.¹⁸⁵ Indeed, the CRPD in article 19 expressly requires that persons/children with disabilities must enjoy or have '*full inclusion and participation in the community*'.¹⁸⁶ On its part, the right to family-type alternative care requires the alternative care for children with disabilities in need of protection to be provided in a family setting within the community, as discussed above.¹⁸⁷ Similarly, the right to inclusive education in terms of article 24 of the CRPD entails that children/persons with disabilities must attain an education in the general/mainstream education system together with other children/persons in the communities in which they live.¹⁸⁸ In this regard, the CRPD obliges states parties to 'ensure an inclusive

¹⁸⁴ CRPD, art 19 provides that:

'States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs'.

¹⁸⁵ See generally CRPD Committee, Concluding Observations on Hungary (2012) para 34.

See also Kamundia (2013) 56; Parker C & Clements L 'The UN Convention on the Rights of Persons with Disabilities: A new right to independent living? (2008) 4 *European Human Rights Law Review* 508-523, 510; Kayess & French (2008) 29.

¹⁸⁶ See CRPD, art 19 (emphasis added by candidate).

¹⁸⁷ See CRPD, art 23(5), which provides that:

'States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting'.

¹⁸⁸ See e.g. CRPD art 24(2) (a) & (b) which requires states to realise the right to education by ensuring that 'Persons with disabilities are not excluded from the general education system on the basis of disability'; in addition to ensuring that 'Persons with disabilities can

education system at all levels and lifelong learning'.¹⁸⁹ Accordingly, it can be observed that the CRPD also sets out rights that by implication seek to foster the inclusion of children with disabilities in society.¹⁹⁰

2.4.5 Observations on the framework under the Convention on the Rights of Persons with Disabilities

It can be observed from the discussion relating to the CRPD that the Convention expressly regards children with disabilities as subjects or holders of rights.¹⁹¹ Hence, it takes what can be referred to as the 'human rights based approach' to disability in conceptualising the human rights guarantees for children/persons with disabilities since it regards disability as a human rights issue and perceives persons/children with disabilities as rights holders. In this way, it fills the gap that existed in international human rights law in respect of this approach. For this reason, the other UN general treaties, including the CRC, are still significant as they, together with the CRPD, constitute the international human rights law pertaining to children with disabilities. Indeed, it was highlighted by Quinn and Degener in 2002 before the CRPD was drafted that 'even if a convention is adopted at some point in the future, it will still be necessary to obtain maximum advantage from the existing human rights instruments'.¹⁹²

However, it is noteworthy that the 'complementarity role' played by the CRPD in filling the gap with respect to the approach to disability does not imply that the CRPD is at par with the other earlier treaties.

access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.'

¹⁸⁹ Art 24(1) provides in part that:

'States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning'.

¹⁹⁰ Further discussion on the 'inclusion focused' rights and the concept of inclusion is contained in 3.3.4 in Chapter 3.

¹⁹¹ See e.g. CRPD, art 7(1), which explicitly recognises the entitlement by children with disabilities to the full enjoyment all human rights on an equal basis with other children'

¹⁹² See Quinn G & Degener T 'Expanding the system: The debate about a disability-specific convention' in Quinn & Degener (2002) 293-297, 294.

Indeed, the Vienna Convention on the Law of Treaties (VCLT) clarifies the relationship that exists as regards successive treaties entered into that apply to the same subject matter.¹⁹³ In terms of the VCLT, with the exception of the UN Charter, which prevails over all inconsistent provisions in any other treaty;¹⁹⁴ and customary international law, especially that which has attained the status of a norm of jus cogens;¹⁹⁵ the latest treaty to be adopted prevails over all incompatible provisions in the earlier treaties unless the contrary is expressly stated.¹⁹⁶ Since, as discussed in the previous two sections above, all UN human rights treaties are applicable to children with disabilities and since the CRPD is the latest UN treaty to be adopted in respect of the rights of persons/children with disabilities; the provisions in the CRPD should generally prevail over all other inconsistent provisions in the other treaties. However, in cases where the inconsistent provisions in the other treaties provide higher levels or standards of protection in respect of the rights of children with disabilities, the CRPD requires states parties to adhere to the standards set by the other treaties.¹⁹⁷ Accordingly, the CRPD provides the prevailing standards in respect of the human rights guarantees for children with disabilities.

Nonetheless, in addition to the 'complementarity' function, the CRPD plays a number of roles in facilitating the 'human rights based approach' to disability in conceptualising the guarantees for the rights of children/persons with disabilities. First, as highlighted above, persons with disabilities used to be generally 'invisible' in binding human rights instruments before the adoption of the CRPD.¹⁹⁸ Indeed, it was observed as early as 2002 during the debate on the need to adopt a disability specific convention that 'The most

¹⁹³ Done at Vienna on 23 May 1969, entered into force on 27 January 1980, art 30.

¹⁹⁴ UN Charter, art 103.

¹⁹⁵ VCLT, art 53.

¹⁹⁶ VCLT, art 30(2) & (3).

¹⁹⁷ See CRPD, art 4(4).

¹⁹⁸ See e.g. Byrne in Freeman (2012) 419.

important argument for a convention is perhaps that of "visibility".¹⁹⁹ Hence, the visibility question suggested that a disability specific treaty would result in a sustained focus on the rights of persons with disabilities which was necessary to ensure consistency in the way their rights were treated.²⁰⁰ This implies that there was need for the explicit recognition of disability and the rights of children/persons with disabilities in international human rights law to address the invisibility conundrum.²⁰¹ The CRPD addresses this gap under international human rights law by making explicit provision for the rights of persons/children with disabilities. It could be argued that the CRC filled this gap with regard to children with disabilities as it also contains explicit provision for their rights. However, as observed above, although the CRC provides a framework for addressing the obstacles that children with disabilities face on account of their childhood; it sets up a 'weak' framework that could not address the barriers children with disabilities face on account of their disability, especially due to its failure to significantly take the human rights based approach to disability in providing for their rights.²⁰² Accordingly, it could also be considered that the approach taken by the CRPD to ensure the 'explicit applicability of the CRPD's rights across' the lives of children with disabilities²⁰³ is significant and is a sign of the appreciation of the 'intersection between disability and childhood'.²⁰⁴ Thus the CRPD (which Byrne has suggested could have been named Convention on the Rights of Children and Adults with Disabilities'²⁰⁵) provides the 'remedy' to the 'double jeopardy'

¹⁹⁹ See Quinn & Degener 'The debate about a disability-specific convention' in Quinn & Degener (2002) 294.

²⁰⁰ See Quinn & Degener 'The debate about a disability-specific convention' in Quinn & Degener (2002) 295.

²⁰¹ See e.g. Byrne in Freeman (2012) 419. See also Quinn & Degener 'The debate about a disability-specific convention' in Quinn & Degener (2002) 297, where it is stated that by explicitly making provision for disability in human rights documents, the stereotypes associated with the difference of disability are addressed and disability is mainstreamed in the human rights discourse.

²⁰² See Byrne in Freeman (2012) 424. See 2.3.5 above for the discussion in this regard.

²⁰³ This is the case since the CRPD, as discussed in 2.4.1, 2.4.2 & 2.4.3 above, provides for rights that address a number of aspects relating to children with disabilities.

²⁰⁴ Byrne in Freeman (2012) 436 - 437.

²⁰⁵ Byrne in Freeman (2012) 437.

disadvantaged position that children with disabilities used to face under international law.²⁰⁶ Therefore, it can be observed that the 'disability explication' approach taken by the CRPD ultimately plays a significant role in facilitating the full human rights enjoyment by children with disabilities as it entrenches their 'visibility' and presence under international human rights law, thereby giving states parties a clear obligation to take measures that address the barriers children with disabilities face on account of their disability and childhood.²⁰⁷

Secondly, it was highlighted during the debate regarding the necessity of a disability treaty that the respect for equal dignity of all people entails that they should be protected both from violations of equality and non-discrimination, on the one hand; and from violations of all human rights, on the other hand.²⁰⁸ Hence, the existing general human rights treaties in addition to the CRC could provide protections of the right to equality through their progressive interpretations and application as they contain general anti-discrimination provisions. However, the mainstream human rights treaties could not protect children with disabilities from violations of all human rights, amongst others, due to the failure by their provisions to address disability or to embrace the human rights model of disability.²⁰⁹ Accordingly, it was considered that it would be necessary to 'tailor the relevant norms of the existing human rights treaties to the circumstances

²⁰⁶ This was due to the combined effect of the fact that international human rights law has generally taken both an adult focused and an approach not attuned to disability. Indeed, children with disabilities had suffered 'double jeopardy' in respect of their rights violations both on the basis of their age as children and on the basis of their disability. See generally Byrne in Freeman (2012) 421 & 422; Bamforth N; Malik M; O'Conneide (eds) *Discrimination law: Theory and context* (2008) 528; Lansdown G *The evolving capacities of the child* (2005).

²⁰⁷ See also Byrne in Freeman (2012) 437.

²⁰⁸ See e.g. Quinn & Degener 'The debate about a disability-specific convention' in Quinn & Degener (2002) 296.

²⁰⁹ See Stein & Lord in Arnardóttir & Quinn (eds) (2009) 18 & 20. Hence, the adoption of the CRPD could be regarded as acknowledging the argument that 'group-specific treaties are needed at least in part to take into account the irreducible experience of these groups in terms of rights'. See Megret F 'The Disabilities Convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Human Rights Quarterly* 494-516, 498. The UN Secretary General had noted as early as 2003 that one of the 'major obstacles to the implementation of existing human rights standards for persons with mental disabilities is the lack of specific guidelines on their application'. See UN High Commissioner for Human Rights 'Progress of efforts to ensure full recognition and enjoyment of the human rights of persons with disabilities: Report of the Secretary General (2003) para 43.

of disability' through the adoption of a disability treaty.²¹⁰ Thus the disability treaty had to be adopted to provide this 'tailoring' framework thereby ensuring that the application of international human rights law would address the rights of all persons, including persons/children with disabilities.²¹¹ Indeed, the CRPD is acknowledged as representing 'the emergence of an international rights regime tailored to persons of disabilities'.²¹²

Above all, the CRPD plays a significant role in entrenching the human rights model of disability thereby making the applicable international law take a 'human rights based approach' to disability in providing for the rights of children with disabilities. For example, in contrast to the CRC, the CRPD does not make any reference to 'special needs' or 'care'.²¹³ This is considered as an indication that the CRPD takes a positive approach,²¹⁴ which regards children with disabilities as rights holders and not 'objects of pity' in 'need of special care and assistance'. In this regard, authors such as Quinn highlight that the CRPD contains a 'profound message that emphasises that 'persons with disabilities are not "objects" to be managed or cared for, but human "subjects" enjoying human rights on an equal basis with others'.²¹⁵ Therefore the CRPD provides the 'paradigm' platform for international human rights law to move away from

²¹⁰ See e.g. Quinn & Degener 'The debate about a disability-specific convention' in Quinn & Degener (2002) 296. See also Stein & Lord in Amardóttir & Quinn (eds) (2009) 29, where it is considered that as a comprehensive human rights convention, the CRPD 'clarifies, within the context of disability, the human rights that all persons are entitled to under existing international human rights law instruments as well as under customary international law'.

²¹¹ See also Lawson in Arnardottir & Quinn (eds) (2009) 107; Jones M 'Inclusion, social inclusion and participation' in Rioux MH; Basser LA & Jones M (eds) *Critical perspectives on human rights and disability law* (2011) 7.

²¹² See Megret (2008) 30 *Human Rights Quarterly* 494-516, 495. In this regard, Megret has observed that the CRPD achieves four things in ensuring full human rights enjoyment by persons with disabilities, namely: affirming the rights of persons with disabilities ('disability rights') as human rights; reformulating 'disability rights' as human rights with a difference; extending 'disability rights' as human rights 'plus'; and being innovative in recognising 'disability rights' as human rights (inherent) to persons with disabilities. See Megret (2008) 499-514.

²¹³ See Byrne in Freeman (2012) 426.

²¹⁴ See Byrne in Freeman (2012) 426.

²¹⁵ See Quinn G 'Resisting the "temptation of elegance": Can the Convention on the Rights of persons with Disabilities socialise states to right behavior?' in Amardóttir & Quinn (eds) (2009) 215-256, 216; Mackay D 'The Convention on the Rights of Persons with Disabilities: A benchmark for action' (2007) 65 *International Rehabilitation Review* 2-4, 2. See also Byrne in Freeman (2012) 426.

the welfare based perspective to the human rights based approach to disability, thereby providing the conducive human rights framework for children/persons with disabilities to claim and exercise their rights on an equal basis with others.

In view of the foregoing observations, it can be acknowledged that the CRPD plays a significant role in providing the missing 'human rights based' link in the conceptualisation of disability under international law. Indeed, it is noteworthy that the CRPD was adopted to fill the gap which existed in international law in respect of providing full human rights guarantees for persons with disabilities. Prior to its adoption, divergent views emerged. One was to the effect that if the existing instruments were broadly and properly interpreted to include special focus on disability, they were capable of addressing the rights of persons with disabilities to the extent that the CRPD would not be needed.²¹⁶ The other view was to the effect that the interpretation of the other treaties could only be effectively made to address the challenges facing persons with disabilities if a new convention (the CRPD) was adopted to fill that gap.²¹⁷ Such a thematic convention (the CRPD) would make persons with disabilities visible; and it would articulate specified rights and the mechanisms for their implementation.²¹⁸ Accordingly, the CRPD came in to solve the puzzle by acting as a mirror to reflect how the rights of persons with disabilities should be addressed.²¹⁹ Hence, the CRPD provides the guide relating to provision of full human rights guarantees for persons with disabilities by, amongst others, guaranteeing protection from all forms of discrimination on the basis of disability and also guaranteeing full enjoyment of all other human rights.²²⁰ Indeed, the purpose of the CRPD is to ensure effective enjoyment of all human rights by persons/children with disabilities by

²¹⁶ Quinn G 'The United Nations Convention on the Rights of Persons with Disabilities: Toward a new international politics of disability' (2009) 15 *Texas Journal on Justice Civil Liberties & Civil Rights* 33, 38.

²¹⁷ Quinn (2009) 38.

²¹⁸ Dhir AA 'Human rights treaty drafting through the lens of mental disability: The proposed international convention on protection and promotion of the rights and dignity of persons with disabilities' (2005) 41 *Stanford Journal of International Law* 181, 191.

²¹⁹ Quinn (2009) 39.

²²⁰ See generally, Quinn (2009) 42; Waddington in Amardottir & Quinn (eds) (2009) 111.

entrenching the 'human rights based approach' to disability and, consequently, the human rights guarantees for persons/children with disabilities.

2.5 Rights of children with disabilities under African regional treaties

There are a number of human rights treaties within the African regional human rights system such as the African Children's Charter, which is a child-rights specific treaty, and other general human rights treaties which have provisions that are relevant to persons/children with disabilities.²²¹ It is noteworthy that (as will be demonstrated below), the applicable treaties make specific reference to disability, although most of the treaties do not expressly mention disability as a prohibited ground of discrimination. This part first discusses the provisions of the 'general treaties' that were not adopted to specifically provide for the rights of children before discussing the African Children's Charter, which was adopted to specifically provide for the rights of children. The last section discusses the general observations that can be made regarding the framework created by the regional treaties. As has been the case with the discussion of the UN human rights treaties, the discussion of the regional treaties explores the guarantees for non-discrimination before analysing the provisions that set out other substantive rights.

²²¹ Unlike at the global level, the treatment of 'disability rights' in the African system did not progress from non-binding to binding instruments as disability has all along been included in soft law instruments and in treaties. Nonetheless, the first formal recognition of disability was done through 'the Africa Regional Conference on the International Year of the Disabled Persons' that was held in 1980. See Biegon in Grobbelaar-du Plessis & Van Reenen (eds) (2011) 56. It is not within the scope of the thesis to discuss these non-binding African regional instruments, which include the Kigali Declaration, adopted by the First AU Ministerial Conference on Human Rights in Africa on 8 May 2003; & Continental Plan of Action for the African Decade of People with Disabilities (CPOA), adopted by the AU in 2002. As explained in 1.4 in Chapter 1, the thesis does also not discuss African sub-regional treaties that apply within a sub-regional economic community (REC) such as SADC. These treaties adopted with SADC include: Treaty for the Southern African Development Community (as amended) done at Windhoek on 17 August 1992; SADC Protocol on Gender and Development, adopted during the Heads of State Summit held at Johannesburg, South Africa on 16-17 August 2008; Charter of Fundamental Social Rights in SADC, adopted on 26 August 2003 in Dar-Es-Salaam, entered into force on the same day; & Protocol on Health in the Southern African Development Community, done at Maputo on 18 August 1999.

2.5.1 General African regional human rights treaties

Guarantees for non-discrimination

The Organisation of African Unity (OAU),²²² now African Union (AU),²²³ adopted the African Charter on Human and Peoples' Rights (ACHPR) as the main human rights treaty in the African human rights system.²²⁴ Article 2 of the ACHPR prohibits discrimination in the enjoyment of the Charter's rights. The provision does not expressly list disability as a prohibited ground of discrimination. Nevertheless, in the case of *Purohit and Moore v The Gambia*,²²⁵ the African Commission on Human and People's Rights, which monitors the implementation of the ACHPR, has indicated that disability could fit as a prohibited ground of discrimination under article 2.²²⁶ Accordingly, the ACHPR can be regarded as guaranteeing persons/children with disabilities the right of freedom from disability based discrimination.

The AU also adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),²²⁷ which provides for the rights of women and girls in Africa.²²⁸ The Protocol prohibits discrimination against women and girls on the basis of sex or gender,

²²² Established by the Charter of the Organisation of African Unity (OAU Charter), done in the City of Addis Ababa, Ethiopia, on 25 May 1963, entered into force on 13 September 1963.

²²³ Established by the Constitutive Act of the African Union (AU Constitutive Act) adopted on 11 July 2000 in Lomé, Togo and entered into force on 26 May 2001. See also the Protocol on the amendment of the Constitutive Act of the African Union, adopted by the 1st Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia on 3 February 2003, and by the 2nd Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July 2003, which amends the AU Constitutive Act of 2000.

²²⁴ Adopted on 26 June 1981, entered into force on 21 October 1986. Art 3(h) of the AU Constitutive Act provides that the AU's main objectives include to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. This demonstrates the high recognition accorded to the ACHPR.

²²⁵ (2003) AHRLR 96 (ACHPR 2003). (The case concerned, among others, the complaint that the automatic and indefinite institutionalisation of persons with mental disabilities under the Gambian Lunatics Detention Act constituted disability based discrimination).

²²⁶ See *Purohit* case, paras 49 & 57.

²²⁷ Adopted by the African Union on 11 July 2003, entered into force on 25 November 2005.

²²⁸ Indeed, the Protocol was adopted to address the rights of women below and over the age of 18 years, including girls. See African Women's Protocol, art 1, which expressly states that the term 'women' means persons of female gender, including girls. See also Viljoen (2012) 407.

amongst others.²²⁹ However, it does not list any prohibited grounds of discrimination. Nonetheless, unlike the African Charter, the Protocol expressly prohibits disability based discrimination in a provision that contains the rights of women and girls with disabilities.²³⁰

The AU further adopted the African Youth Charter (AYC), which provides for the rights of the youth in Africa.²³¹ The AYC guarantees the right to non-discrimination in the enjoyment of rights.²³² Although disability is not listed as an express prohibited ground of discrimination, it could be included as one of the analogous prohibited grounds since the Charter guarantees rights to all youth irrespective of (any) other status.²³³ The AYC also dedicates a specific provision on the rights of girls and young women, which emphasise their right to freedom from gender or sex based discrimination in the enjoyment of their rights.²³⁴

Furthermore, the AU also adopted the African Charter on Democracy, Elections and Governance (ACDEG).²³⁵ The Charter has an anti-discrimination provision which imposes an obligation on the state to eliminate all forms of discrimination.²³⁶ Although the article does not list disability based discrimination among the forms of discrimination to be eradicated, the Charter urges states to eliminate 'all forms of

²²⁹ See AWP, art 1, which defines 'discrimination against women' as any distinction, exclusion or restriction or any differential treatment based on sex.

²³⁰ African Women's Protocol, art 23. The provision obliges states to ensure that girls with disabilities have the freedom from '...discrimination based on disability and the right to be treated with dignity'.

²³¹ Adopted on 2 July 2006, entered into force on 8 August 2009. The AYC defines the youth as persons between the ages of 15 and 35 and hence it applies to all children, including children with disabilities, aged between 15 and 18. See the AYC provision on definitions which states that: 'For the purposes of this Charter, *youth or young people* shall refer to every person between the ages of 15 and 35 years.'

²³² AYC, art 2.

²³³ In any case, the AYC offers protection from all forms of discrimination on the basis of (any) status, activities, expressed opinions or beliefs'. See AYC, art 2(1).

²³⁴ AYC, art 23.

²³⁵ Adopted in Addis Ababa, Ethiopia on 30 January 2007, entered into force on 15 February 2012. The ACDEG is not a human rights treaty per se as it was adopted for different purposes that focus on governance but it contains human rights provisions as it also seeks to promote the respect for human rights. See ACDEG, art 2.

²³⁶ ACDEG, art 8.

discrimination', which should include discrimination on the basis of disability.²³⁷ Above all, since the second paragraph of article 8 obliges states parties to take measures that guarantee the rights of vulnerable groups such as persons with disabilities (who are expressly mentioned), it could be considered that freedom from disability based discrimination is on one of the rights of persons with disabilities that should be guaranteed.²³⁸

Lastly the AU adopted the Convention for the Protection and Assistance of Internally Displaced Persons (CPAIDP),²³⁹ which specifically addresses issues relating to persons displaced from their homes (but who remain within the borders of their country of residence) by armed conflicts, natural disasters and large scale development projects in Africa.²⁴⁰ Hence, the Convention applies to children with disabilities who fit the description of internally displaced persons. The Convention recognises the duty to ensure non-discrimination among its general principles set out in article 3.²⁴¹ It also provides a general prohibition of discrimination against internally displaced persons in the enjoyment of human rights in article 9, which equally applies to all internally displaced persons, including children with disabilities.²⁴²

Guarantees for other substantive rights of children with disabilities

The ACHPR has a specific provision on the rights of persons with disabilities, which guarantees the right to special measures of protection.²⁴³ However, the Charter does not spell out what the right entails. Furthermore, the Charter has a child specific provision which requires states to ensure the protection of the

²³⁷ See art 8(1).

²³⁸ See ACDEG, art 8(2).

²³⁹ Adopted on 22 October 2009, entered into force on 6 December 2012, 30 days after its ratification by 15 states.

²⁴⁰ See CPAIDP, art 1(k).

²⁴¹ See CPAIDP, art 3(1)(d).

²⁴² See CPAIDP, art 9(1)(a).

²⁴³ See ACHPR, art 18 (4), which provides that 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.

rights of the child as stipulated in international declarations and conventions.²⁴⁴ Above all, the ACHPR contains a number of general substantive rights which are relevant to children.²⁴⁵

On its part, the African Women's Protocol has a specific provision on the rights of girls and women with disabilities.²⁴⁶ Amongst others, the provision guarantees women and girls with disabilities the right to be treated with dignity and the right to be provided with specific measures (which take into account their physical, economic and social needs), that are aimed at facilitating their access to enjoy substantive rights, services or facilities such as vocational training.²⁴⁷ Similarly, the AYC has a specific provision on the rights of youth with disabilities.²⁴⁸ A number of observations can be made in respect of this provision. First, it requires states to take special measures aimed at protecting the rights of youth with disabilities, including children with disabilities.²⁴⁹ Secondly, states are obliged to ensure that youth with disabilities have equal and effective access to the enjoyment of other rights, especially SERs, and services, which include education.²⁵⁰ Thirdly, states are given an express obligation to eliminate obstacles that prevent the inclusion and participation of youth with disabilities in society by among other things, providing appropriate infrastructure and services to facilitate mobility.²⁵¹ The AYC further provides for a number of general

²⁴⁴ ACHPR, art 18(3).

²⁴⁵ See e.g. art 17(1)-education; art 16-health; art 4-life; art 5- dignity and freedom from all forms of exploitation. It is noteworthy that the ACHPR is the first treaty to recognise the right to development. See Art 22; Viljoen (2012) 226.

²⁴⁶ See African Women's Protocol, art 23

²⁴⁷ African Women's Protocol, art 23(a). For further discussion of the rights of women with disabilities in Africa with regard to the Protocol, see Kanga SAD 'The rights of women with disabilities: Does the protocol on the rights of women in Africa offer any hope?' (2011) *Barbara Faye Waxman Fiducia Papers on Women and Girls with Disabilities* 1-12

²⁴⁸ AYC, art 24.

²⁴⁹ AYC, art 24(1).

²⁵⁰ AYC, art 24(1).

²⁵¹ AYC, art 24(2).

substantive rights which apply to all youth, including youth/children with disabilities.²⁵² It also guarantees every young person ‘the right to participate in all spheres of society’.²⁵³

On its part, the ACDEG contains provisions on the rights of persons with disabilities in Africa.²⁵⁴ Among others, it requires state parties to take measures that guarantee the rights of persons with disabilities and other marginalised and vulnerable groups.²⁵⁵ It also guarantees all persons crucial rights such as education, including compulsory and free basic education and literacy.²⁵⁶ Similarly, the CPAIDP obliges states parties to provide special protection for and assistance to internally displaced ‘persons with special needs’.²⁵⁷ These include separated and unaccompanied children and persons with disabilities.²⁵⁸ Hence, it recognises the ‘right to provision for special protection’ for children with disabilities who could fall under the broad category of persons with disabilities and also in the category of separated or unaccompanied children.²⁵⁹



²⁵² See e.g. AYC, art 10- development; art 13- education, at 16-health; & art 25- protection from harmful practices.

²⁵³ See AYC, art 11(1). The right is significant as it reflects the CRC cardinal principle of participation and the right of a child with disability to participation under CRPD’s art 7(3).

²⁵⁴ See e.g. ACDEG, arts 8 & 43.

²⁵⁵ ACDEG, art 8(2).

²⁵⁶ ACDEG, art 43.

²⁵⁷ CPAIDP, art 9(2)(c).

²⁵⁸ See CPAIDP, art 9(2)(c).

²⁵⁹ African states as member states of the OAU also adopted the *Agreement for the Establishment of the African Rehabilitation Institute* (ARI Agreement), enacted on 17 July 1985, entered into force 2 December 1991, which provided for the founding of the African Rehabilitation Institute (ARI). The ARI aims at assisting African states to achieve a number of objectives that pertain to rehabilitation and prevention of disabilities. See ARI Agreement, art 1. Although the Agreement does not contain provisions on children with disabilities, it still covers children with disabilities since it addresses rehabilitation in the context of disability broadly and hence is applicable to all persons with disabilities, including children with disabilities, in Africa.

2.5.2 The African Charter on the Rights and Welfare of the Child

The OAU adopted the African Children's Charter as the child specific human rights treaty in the African system.²⁶⁰ The African Children's Charter provides for the rights of children with disabilities in three aspects: by guaranteeing all children freedom from discrimination; by containing specific provisions on the rights of children with disabilities; and by providing for general substantive rights for all children, which also apply to children with disabilities.

Guarantees for non-discrimination

The African Children's Charter provides for the right to equality in its general anti-discrimination provision.²⁶¹ However, the provision does not expressly recognise disability as a prohibited ground of discrimination.²⁶² This is surprising because the Charter was adopted as a response to the need to complement or supplement the CRC,²⁶³ which expressly recognises disability as a prohibited ground of discrimination. Nevertheless, the Charter does not sanction disability based discrimination since the provision requires 'every child' to enjoy the Charter's rights without discrimination.²⁶⁴ In addition, it has been stated that the African Children's Charter does not replace the existing standards but merely adds to

²⁶⁰ Adopted on 11 July 1990, entered into force on 29 November 1999. It is noteworthy that the African Children's Charter in art 2 defines a child as a person below the age of 18 years in contrast to CRC' art 2, which regards a child as 'every human being below the age of 18 years unless, under the laws applicable to the child, majority is attained earlier'. This unequivocal recognition of a child as a person under the age of 18 years is considered to imply that the Charter 'offers wider protection of young people than the global standard established in the CRC'. See e.g. Amanda 'A theoretical analysis of the reality of children's rights in Africa' (2002) 20.

²⁶¹ See African Children's Charter, art 3.

²⁶² See art 3; Chirwa D 'The merits and demerits of the African Charter on the Rights and Welfare' (2002) 10 *International Journal of Children's Rights* 157-177, 159.

²⁶³ See e.g. Mezmur BD 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6(2) *African Human Rights Law Journal* 549, 550; Mezmur (2008) 6; Mezmur BD 'From Angelina (to Madonna) to Zoe's Ark: What are the "A-Z" lessons for intercountry adoptions in Africa?' (2009) 23 *International Journal of Law, Policy and Family* 145-173, 150; Olowu D 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127-135, 127 & 128; Amanda 'A theoretical analysis of the reality of children's rights in Africa' (2002) 14; Viljoen F 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 199, 205.

²⁶⁴ See Gose M *The African Charter on the Rights and Welfare of the Child* (2002), 48. See also Chirwa (2002) 158.

them.²⁶⁵ Accordingly, since the CRC already expressly prohibits disability based discrimination, states parties to both the CRC and the African Children's Charter should regard disability as an 'analogous' prohibited ground of discrimination under the African Children's Charter.²⁶⁶ In addition, it can be observed that as is the case with the CRC, the African Children's Charter prohibits discrimination against children on account of the status of the children themselves and the status of their parents or legal guardians.²⁶⁷ Furthermore, the anti-discrimination provision in the African Children's Charter, unlike the CRC provision, does not make reference to the state, which implies that state and non-state actors are bound by the obligation to ensure non-discrimination.²⁶⁸

Guarantees for specific substantive rights of children with disabilities

The African Children's Charter makes specific provision for the rights of children with disabilities in article 13 in three separate paragraphs.²⁶⁹ Among other things, the first paragraph of article 13 requires state parties to ensure that children with disabilities have special measures of protection.²⁷⁰ The provision emphasises the autonomy of children with disabilities and their inclusion and active participation in society

²⁶⁵ See e.g. African Children's Charter, art 1(2); Chirwa (2002) 158, where it is highlighted that 'the African Childress Charter sets minimum standards'; Amanda L 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' 2002 (10) 2 *International Journal of Children's Rights* 185; Amanda 'A theoretical analysis of the reality of children's rights in Africa' (2002) 21.

²⁶⁶ The pertinent African states parties are expected to comply with the higher non-discrimination standards set by the CRC by expressly recognising disability as a prohibited ground of discrimination. Thus the African Children's Charter should be regarded as the *lex specialis*. See generally Arts KCJM 'The international protection of children's rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child' (1993) 5 *African Journal of International and Comparative Law* 139- 162 & ii, 154. See also Amanda 'A theoretical analysis of the reality of children's rights in Africa' (2002) 21.

²⁶⁷ See African Children's Charter, sec 3. See also Chirwa (2002) 159, where it is observed that the African Children's Charter is the second 'international' treaty and first regional treaty to do this.

²⁶⁸ Chirwa (2002) 159.

²⁶⁹ The article has a number of similarities with the corresponding provision in art 23 of the CRC (discussed in 2.3.2 above). It is noteworthy that the ACERWC, which is established under art 42(c) to monitor the African Children's Charter's implementation, is yet to give a comprehensive interpretation of the provision. The Committee has since decided one individual communication which did not address issues relating to the rights of children with disabilities. See *Institute for Human Rights and Another v Kenya* (ACERWC 2011).

²⁷⁰ See art 13(1).

by requiring the state to ensure their 'self-reliance and active participation in the community'.²⁷¹ The second paragraph obliges the state to make provision for special assistance to children with disabilities and those responsible for their care as long as they apply for the assistance.²⁷² It further binds states to ensure effective access to training and preparation for employment, among others.²⁷³ Gose has commended the provision for recognising the requirement to provide special assistance as a specific right of children with disabilities but has also regretted the omission of education as an area that requires special assistance to be provided;²⁷⁴ while Chirwa has observed that the provision recognises the right of children with disabilities 'to participate in community life'.²⁷⁵

Lastly, the third paragraph expects states to ensure that children with disabilities have the right to movement and access to public places, including buildings provided the rationale for seeking such access is legitimate.²⁷⁶ Gose has queried the qualification of the right by the ambiguous concept of 'legitimate accessibility' which allows children with disabilities to access public places if they 'legitimately want to have [such] access'.²⁷⁷ In the absence of a definite interpretation of the disability specific provisions in article 13 of the African Children's Charter by the ACERWC, it is submitted by the candidate that article 13(1)

²⁷¹ See art 13(1).

²⁷² See art 13(2).

²⁷³ Art 13(1) & (2).

²⁷⁴ See Gose (2002), 89 & 90.

²⁷⁵ See Chirwa (2002) 160.

²⁷⁶ See art 13(3).

²⁷⁷ Gose (2002) 92-93. The ambiguous concept is regrettable and could pose extra barriers to children with disabilities since it only applies to them.

provides the leading principle in respect of the rights of children with disabilities under the African Children's Charter as it guarantees children with disabilities the right to inclusion and participation in society.²⁷⁸

Guarantees for other general substantive rights

The African Children's Charter further guarantees general substantive human rights to all children, which rights are contained in various general provisions. Although there are slight differences in addition to merits and demerits between the CRC and the African Children's Charter,²⁷⁹ most of the rights in the African Children's Charter are similar to the rights contained in the CRC.²⁸⁰ Therefore, it could be considered that the general provisions contained in the African Children's Charter, just like the CRC, provide a framework that significantly contributes to the enjoyment of the rights of children with disabilities. For example, Chirwa has observed that the Charter joins the CRC in recognising children not only as people in need of protection but also as autonomous individuals.²⁸¹

In addition, the Charter reflects the cardinal principles of the CRC in that it provides for the four rights that make up the CRC's cardinal principles.²⁸² Indeed, the African Children's Charter provides for non-discrimination,²⁸³ as discussed above; best interests of the child;²⁸⁴ life, survival and development;²⁸⁵

²⁷⁸ As discussed in 2.3.2 above, the CRC Committee has given the same view in respect of a similar provision in the CRC. See also Olowu (2002) 28, where it is observed that the Charter does not stand in opposition to the CRC but the two treaties are complementary and they both provide the framework for realising the rights of children in Africa.

²⁷⁹ For a discussion on the differences and similarities between the Charter and the CRC, see generally Mezmur (2008) 7-14; Chirwa (2002); Olowu (2002).

²⁸⁰ See e.g. art 5- life, survival and development; art 11- education; art 14- enjoyment of the best attainable state of physical, mental and spiritual health; art 19- enjoyment of parental care and protection; & art 25- provision for alternative family care if there is deprivation of the family environment;. The African Children's Charter also provides for duties and responsibilities of the child. See art 31. See 2.3.4 of this Chapter for a discussion of the rights contained in the 'general' provisions of the CRC.

²⁸¹ Chirwa (2002) 160;

²⁸² See generally Olowu (2002) 129, where it is acknowledged that 'Like the Convention, the Charter is predicated on four cardinal principles which are meant to help with the interpretation of the Charter as a whole and thereby guide national programmes of implementation'.

²⁸³ Art 3.

²⁸⁴ Art 4 (1).

and also contains a number of participation rights,²⁸⁶ which include the right to be given an opportunity for the child's views to be heard;²⁸⁷ and the right of the children with disabilities to participate in community life.²⁸⁸ It is noteworthy that the Charter recognises the best interests of the child principle as the primary consideration in all action concerning the child.²⁸⁹ Hence, it provides for the highest standard of the principle over the CRC and the CRPD as it recognises the principle as 'the' as opposed to 'a' primary consideration.²⁹⁰ This entails that under the Charter, the best interests principle is the overriding or paramount consideration that prevails over all other factors in all actions affecting a child.²⁹¹

Furthermore, the African Children's Charter contains provisions on rights that could be regarded as survival and developmental rights, which are acknowledged as addressing the unique plight of African children, including children with disabilities.²⁹² For example, it guarantees the right to protection from harmful cultural practices, including harmful religious or traditional customs and beliefs.²⁹³

²⁸⁵ Art 5.

²⁸⁶ See Chirwa (2002) 160; Sloth-Nielsen J 'The ratification of the Convention on the Rights of the Child: Some implications on South African law' (1995) *South African Journal on Human Rights* 401, 403.

²⁸⁷ Arts 4(2) & 7; Chirwa (2002) 160; Olowu (2002) 129.

²⁸⁸ Art 13; Chirwa (2002) 160.

²⁸⁹ See art 4(1), which provides that: 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.

²⁹⁰ See e.g. Chirwa (2002) 160 where it is observed 'the Charter goes a step ahead of the CRC by stating that the best interests of the child must be "the primary consideration"'. See also Van Bueren G *The international law on the rights of the child* (1995) 46; Mower AG *The Convention on the rights of the Child: International supporting for children* (1997) 24; Viljoen F 'The African Charter on the Rights and Welfare of the Child' in Davel CJ (ed) *Introduction to child law in South Africa* (2000) 219; Sloth-Nielsen 'The ratification of the Convention on the Rights of the Child' (1995) 408; Kamchedzera GS 'Child rights, duties and African Child Charter' in Verhellen E (ed) *Understanding children's rights* (1999) 519, 520-521 for further discussion in this regard.

²⁹¹ See e.g. Chirwa (2002) 160, where it is observed this offers better protection for children since under the Charter the best interests is the overriding consideration; Olowu (2002) 129; Amanda 'A theoretical analysis of the reality of children's rights in Africa' (2002) 17; Amanda 'Evolution of the African Charter on the Rights and Welfare of the Child' (2002) 183.

²⁹² See e.g. art 1(3); Chirwa (2002) 158, where it is observed that: 'The strength of the Charter, however, lies in the fact that it expressly proclaims its supremacy over any inconsistent custom, traditional, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter'.

²⁹³ Art 21. See also art 16.

2.5.3 Observations on the framework under African regional human rights treaties

In view of the discussion on the rights of children with disabilities under African regional treaties, it can be observed that the treaties such as the ACHPR, African Women's Protocol, African Children's Charter and the African Youth Charter take an approach that in certain aspects regards disability as a human rights issue by containing explicit provisions on the rights of persons with disabilities, including children with disabilities, in contrast to the position taken by a majority of the UN human rights treaties. The provisions also provide a framework that plays a significant role in fostering the enjoyment of human rights by children with disabilities in Africa. For example, article 13(1) of the African Children's Charter emphasises the autonomy of children with disabilities and their inclusion and active participation in society by requiring the state to ensure their 'self-reliance and active participation in the community'. Similarly, the first and second paragraphs of article 13 of the African Children's Charter are acknowledged as guaranteeing children with disabilities the right 'to participate in community life'.²⁹⁴ On its part, the disability specific provisions in the African Youth Charter, amongst others, expressly oblige states parties to eliminate obstacles that prevent the inclusion and participation of youth with disabilities in society by among other things, providing appropriate infrastructure and services to facilitate mobility.²⁹⁵ These rights would foster the inclusion of children with disabilities in society thereby reflecting the main obligation emphasised by the CRC Committee that the implementation of the rights of children with disabilities under the CRC must ensure their inclusion in society.

Furthermore, the African Children's has a number of provisions that set higher standards for protecting the rights of children, including children with disabilities, than most of the UN treaties. These

²⁹⁴ See Chirwa (2002) 160.

²⁹⁵ AYC, art 24(2).

include recognising the best interests of the child as of paramount or overriding effect;²⁹⁶ recognising a child as a person below the age of 18 years;²⁹⁷ and prohibiting any 'custom, traditional, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter'.²⁹⁸ Therefore, the African Children's Charter and the other applicable African regional treaties demonstrate a level of potential to facilitate the enjoyment of human rights of children with disabilities in Africa.

However, the approach taken by the disability specific provisions in the regional treaties still retain elements of the welfare approach to disability in their focus and terminology. This constitutes the major drawback facing the regional framework that is 'created' by the applicable treaties. Indeed, the provisions require states parties to take 'measures of protection' in addressing the obstacles that persons/children with disabilities in Africa face.²⁹⁹ On its part, the African Children's Charter obliges states parties to make provision for 'special care and assistance';³⁰⁰ while the CPAIDP requires provision for 'special protection and assistance' to persons/children with disabilities.³⁰¹ Although the African Women's Protocol provides a mixed approach by also requiring states to treat women and girls with disabilities with dignity, it also repeats the 'measures of protection' approach.³⁰²

²⁹⁶ Art 4(1).

²⁹⁷ Art 2.

²⁹⁸ See African Children's Charter, art 1(3); Chirwa (2002) 158

²⁹⁹ See e.g. ACHPR, art 18(4); African Children's Charter, art 13(1) & (2); AYC, arts 24(1); African Women's Protocol, art 23(1); CPAIDP, art 9(2)(c). However, see Biegon in Grobbelaar-du Plessis & van Reenen (2011) 63, where the obligation under ACHPR, art 18(4) to take measures of protection in keeping with the physical and moral needs of persons with disabilities is regarded as implying a break from formal to substantive equality.

³⁰⁰ See African Children's Charter, art 13(2).

³⁰¹ CPAIDP, art 9(2)(c).

³⁰² See African Women's Protocol, art 23(1).

Consequently, it can be observed that the approach, focus and terminology that the treaties employ in addressing disability issues reflect the welfare based approach to disability.³⁰³ The treaties do not take a positive approach that regards children/persons with disabilities as rights holders who are entitled to full and equal human rights enjoyment. Accordingly, the regional framework has a major downside which could impede its potential to ensure full human rights enjoyment by children with disabilities. This position is mainly attributable to the failure by the treaties to emphasise the 'human rights based approach' to disability in conceptualising the guarantees for the rights of persons/children with disabilities.

It is noteworthy that the African regional human rights system is in the process of 'considering' adopting a regional disability specific treaty.³⁰⁴ However, the potential of the disability treaty, if adopted, will be influenced by the extent to which it fills the major drawback that the existing regional framework faces and the extent to which it brings an 'African specific touch' but an improved version of the CRPD, if possible.³⁰⁵ Nonetheless, in the light of the gaps in the framework under the African human rights treaties, it can be observed that the existing regional treaties also need to benefit from the complementarity role provided by the CRPD as is the case with the core UN treaties. Indeed, the CRPD does not seek to replace existing international or regional treaties but plays a complementarity role where its provisions prevail over inconsistent provisions in the other treaties, as discussed above.³⁰⁶ In addition, the CRPD expressly

³⁰³ See e.g. Biegon in Grobbelaar-du Plessis & van Reenen (2011) 82, where it is acknowledged that although there movement towards grasping the human rights approach in the African human rights system, 'traces of mischaracterisation of disability as a medical or charity issue still subsist' under the applicable regional human rights treaties.

³⁰⁴ See generally African Commission, Resolution on the Working Group on the Rights of Older Persons and People with Disabilities in Africa (2009); Van Reenen & Combrinck (2011) 141. The issue of adopting the disability treaty can be traced to 2003 when the Conference of Member States of the African Union Kigali through the Kigali Declaration called for the adoption of a Protocol (to the ACHPR) to protect the rights of persons with disabilities and the elderly. See Kigali Declaration, adopted by the First AU Ministerial Conference on Human Rights in Africa on 8 May 2003, para 20.

³⁰⁵ By May 2014, a draft version of the protocol had been produced for purposes of obtaining views and comments. It is not within the scope of the thesis to provide a discussion of the proposed disability treaty. For further discussion of the African disability treaty/protocol, see generally Kamga SAD 'A call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2013) 21(2) *African Journal of International and Comparative Law* 219-249; Biegon in Grobbelaar-du Plessis & van Reenen (2011) 72-82.

³⁰⁶ See 2.4.5 above for the discussion in this regard.

provides that states parties should utilise the provisions in other treaties or domestic human rights documents which provide higher standards of protection than the CRPD's framework.³⁰⁷ Therefore, African states parties to the applicable regional treaties and to the CRPD are expected to apply the regional treaties alongside the CRPD whereby the CRPD should guide the way in which the treaties' provisions should be applied to children with disabilities with a view to ensuring higher levels of protection.³⁰⁸

2.6 Observations on international law approach in providing for the rights of children with disabilities

2.6.1 International legal conception of the 'human rights based approach' to disability

The survey of the applicable human rights law above demonstrates that prior to the adoption of the CRC; all UN human rights treaties did not make express provision for the rights of children/persons with disabilities. It is noteworthy that the failure to expressly include disability in the treaties was a consequence of the 'circumstances' that prevailed at that time whereby disability was not perceived as a human rights issue.³⁰⁹ Indeed, at the time, disability was conceptualised in terms of the medical or welfare model as opposed to the social and human rights models. As the approach to disability changed from the welfare to the social and human rights models, the treaties began to contain provisions on disability. For example, the CRC and the African regional treaties discussed above contain explicit provision on disability. However, the treaties still retained certain aspects that embody the welfare based approach to disability since they did not take the positive human rights based approach to disability which requires regarding persons/children

³⁰⁷ See CRPD, art 4(4).

³⁰⁸ See e.g. Biegon in Grobbelaar-du Plessis & van Reenen (2011) 79.

³⁰⁹ See generally Committee on ESCR, General Comment No 5 (1994) para 6.

with disabilities as human rights holders. Instead, they advocated for welfare based interventions in addressing issues relating to persons/children with disabilities.

Indeed, the international law survey has highlighted that whilst most of the applicable African regional treaties, the CRC and the other 'non-disability specific' international treaties emphasise the provision for measures of protection and assistance to children/persons with disabilities; the CRPD unequivocally regards children with disabilities as rights holders who are entitled to full human rights enjoyment on an equal basis with other children. Whilst the CRC and the applicable African regional treaties put emphasis on providing 'special care' or 'special assistance' and 'special measures of protection' to children with disabilities as a response to their 'individual needs'; the CRPD takes the approach of making provision for measures of support to facilitate their participation and enjoyment of human rights. For example, the CRPD obliges states parties to make provision for measures of support in a number of instances. These include: provision of access to support to enable the exercise of 'equal' legal capacity;³¹⁰ provision of measures and services of support to facilitate independent living in the community;³¹¹ provision of support, including individualised support, to facilitate active participation in education;³¹² and promotion of appropriate forms of assistance and support to ensure access to information.³¹³ In this regard, the CRPD is hailed for providing a 'distinctive vision' for persons with disabilities in that its provisions impose a number of positive duties to be undertaken by states parties 'to ensure that persons with disabilities are provided with the minimum level of state support and assistance that will enable them to maintain a dignified existence'.³¹⁴

³¹⁰ See CRPD, art 12(3).

³¹¹ See CRPD, art 19(b).

³¹² See CRPD, art 24(2)(d) & (e).

³¹³ See CRPD, art 9(2)(f).

³¹⁴ See O'Conneide C 'Extracting protection for the rights of persons with disabilities from human rights frameworks: Established limits and new possibilities' in Arnardóttir & Quinn (eds) (2009) 164,

It can thus be observed that the treaties that were adopted before the CRPD did not make provision for measures rooted in the human rights based approach to disability which could facilitate the full human rights enjoyment by children with disabilities on an equal basis with other children. Therefore, it can be concluded that prior to the adoption of the CRPD, the existing international and African regional human rights treaties did not take the human rights based perspective to disability in providing for the rights of children with disabilities. Instead they took the welfare based approach to disability that emphasised the provision for charity and welfare measures as the appropriate response to disability.

In contrast, as demonstrated above, the CRPD follows the human rights based approach to disability, which, unlike the welfare based approach, emphasises the need to ensure the full human rights enjoyment by children with disabilities as the appropriate response to disability. Consequently, when applied alongside the other human rights treaties whereby the provisions and standards of the CRPD generally prevail over any inconsistent provisions and standards in the other treaties;³¹⁵ the CRPD ensures that international human rights law takes the 'human rights based approach' to disability in providing for the rights of children with disabilities thereby facilitating their full enjoyment of human rights on an equal basis with other children.³¹⁶

2.6.2 Deciphering conceptual attributes of the 'human rights based approach'

It can be observed from the survey of the applicable treaties above that in setting out the rights of children with disabilities, the applicable human rights law takes an approach that emphasises a number of requirements that must be met by states. These requirements can be regarded as forming the fundamental attributes that are embedded in the obligations that international human rights law requires to be adhered to

³¹⁵ However, as discussed above, the standards in the other treaties should prevail over the CRPD's standards in case of inconsistency if the provisions in the other treaties provide higher levels of protection than the CRPD's provisions.

³¹⁶ According to Quinn, the CRPD 'provides both a moral compass for change as well as legal benchmarks against which to measure that change.' See Quinn 'The United Nations Convention on the Rights of Persons with Disabilities' (2009) 34.

in order to ensure the full enjoyment of human rights by children with disabilities. As discussed above, the applicable international human rights law takes a 'human rights based approach' to disability in making provision for the rights. Thus the approach can be explained by a number of fundamental attributes that are reflected in the obligations which the applicable human rights treaties require states to discharge in providing for the rights of children with disabilities.

First, the international law survey has established that the measures and interventions taken by states in ensuring human rights enjoyment by children with disabilities must not embody elements of the outmoded medical or welfare approach but they must be grounded in the social and human rights models of disability. Hence, the requirement to adhere to the social and human rights models of disability is one of the fundamental attributes reflected in the crucial obligations that the approach taken by international law imposes on states. Secondly, the survey has established that states must take appropriate measures that facilitate the inclusion of children with disabilities in society and eliminate all practices that perpetuate their exclusion and segregation from society. Thus inclusion in society is another core attribute reflected in the obligations that the approach taken by the applicable international human rights law emphasises. Thirdly, the survey has demonstrated that states are specifically required to protect children with disabilities from all forms of discrimination on the basis of disability in ensuring substantive equality for children with disabilities. Hence, ensuring non-discrimination which results in substantive equality is one of the core attributes embedded in the obligations emphasised in terms of the approach taken by the applicable international law.

Furthermore, the analysis of the applicable treaties has established that the explicit mention of disability and the rights of children with disabilities plays a crucial role in ensuring the human rights enjoyment by children with disabilities. The explication of disability and the rights of children with disabilities makes children with disabilities 'visible' in human rights documents and also guides the implementation of the rights, including prescribing/explaining how the rights contained in the documents should be 'tailored' to

be able to address the obstacles that children with disabilities face. It was also highlighted that the explicit reference to disability in the treaties is one of the signals that the documents perceive disability as a human rights issue. Therefore, the explication of disability and the rights of children with disabilities in human rights documents constitutes one of the attributes that are reflected in the obligations imposed in terms of the approach taken by the pertinent international human rights law. In addition, the discussion of the applicable treaties has established that states are required to ensure that the best interests of the child must be the paramount consideration in all matters affecting children with disabilities. It is noteworthy that the applicable law does not appear to elevate any other principle in this way.³¹⁷ Thus the best interest principle is significant as it is supposed to override any other consideration whenever action affecting children with disabilities is being taken with the effect that it constitutes one of the fundamental attributes of the approach taken by the applicable law.

Lastly, the applicable treaties provide for a number of rights which protect the survival and development of children with disabilities; while the CRC recognises survival and development as one of its cardinal principles. It was highlighted in the previous chapter and it was also acknowledged in the course of the discussion above that children with disabilities often suffer human rights violations and face obstacles that threaten their survival and development. These include various forms of violence and abuse, harmful practices, and denial of access to education and other crucial services. Thus the guarantee of rights such as protection from violence, abuse and harmful practices which the applicable treaties provide for is significant for protecting the survival and development of children with disabilities. Accordingly, the protection of survival and developmental rights of children with disabilities constitutes one of the significant attributes reflected in the obligations emphasised by the approach taken by the applicable international law.

³¹⁷ Indeed, the African Children's Charter expressly recognises the best interests of the child paramountcy principle; while the CRC Committee recommends that the principle must be the overriding factor in all matters pertaining to budgeting and service provision affecting children with disabilities.

Therefore, the fundamental attributes (that could be identified from the international human rights law survey), which represent the 'key ingredients' of the obligations that the approach taken by the applicable international human rights law imposes on the pertinent states, can be listed as including: adherence to the human rights model in conceptualising disability; inclusion of children with disabilities in the society; non-discrimination which ensures substantive equality for children with disabilities; explicit mention and recognition of disability and the rights of children with disabilities; recognition of the principle of the best interests of the child (as the paramount consideration in all matters affecting children with disabilities); and protection of survival and developmental rights for children, including children with disabilities.³¹⁸

It is noteworthy, as highlighted above, that the essence of the 'human rights based approach' to disability that the applicable law takes in providing for the rights of children with disabilities is to ensure their full human rights enjoyment on an equal basis with others children. Therefore, since the approach places the emphasis on these attributes, it follows that adherence to the fundamental attributes could ensure full human rights enjoyment by children with disabilities on an equal basis with other children.³¹⁹

2.7 Concluding observations

This chapter has traced the chronological developments in international law in establishing how the different approaches to disability that have existed at various periods in time have influenced the manner in

³¹⁸ There could be other fundamental attributes which might be identified from the survey. Nonetheless these six attributes stand out as their significance is consistent with the human rights based approach to disability taken by the applicable law as discussed above. See the next chapter for further discussion of how the obligations emphasised by the applicable treaties revolve around these attributes.

³¹⁹ It is noteworthy that the welfare based approach to disability stands in direct contrast to the six attributes of the human rights based approach. Indeed, the welfare based approach was characterised by adherence to the medical model of disability; exclusion of children with disabilities from society; various forms of discrimination against children with disabilities; omission to expressly mention disability in human rights documents; lack of respect for the (best) interests of children with disabilities; and various forms of violence against children with disabilities that threatened their survival and development. This position was attributed to the fact that in terms of the welfare based approach, disability was not acknowledged as a human rights topic.

which the applicable human rights treaties have made provision for the rights of children with disabilities. The chapter has observed that these different approaches to disability have resulted in differences in the approaches that human rights treaties have taken in making provision for the rights of persons with disabilities, including children with disabilities. Initially, disability issues used to be expressly set out in non-binding instruments only. At that time, disability used to be conceptualised in terms of the medical or welfare model. Eventually, as the approach to disability changed from the medical to the social and human rights models, human rights treaties began to expressly make provision for disability related issues and rights of persons/children with disabilities. This culminated in the adoption of the CRPD. Hence, the rights of children with disabilities are contained in the CRPD and other human rights treaties that are applicable to persons with disabilities and those that are applicable to children.

This chapter has established that the applicable international human rights law currently follows the 'human rights based approach' to disability in providing for the rights of children with disabilities in accordance with the prevailing standards under the CRPD. This approach seeks to ensure the full human rights enjoyment by children/persons with disabilities on an equal basis with others. The chapter has ultimately established that in following this approach to disability, the applicable human rights law sets out a number of obligations that embody specific fundamental attributes which aim at ensuring the full human rights enjoyment by children with disabilities. For example, the law emphasises, amongst others, the guarantees of protection from all forms of discrimination on the basis of disability; advocates for adherence to the human rights model in conceptualising disability; and highlights the significance of appreciating the role that the explicit recognition of disability and the rights of children with disabilities plays in ensuring the visibility of disability and the rights of children with disabilities in human rights documents. Consequently, these attributes can be regarded as the fundamental attributes of the 'human rights based approach' to disability taken by the applicable human rights law in providing for the rights of children with disabilities.

It is noteworthy that states parties to the applicable treaties are supposed to take appropriate measures to implement the applicable international human rights law at national level in order to ensure the enjoyment of human rights by children with disabilities. This study argues that the domestic implementation measures are thus expected to take into account and reflect these fundamental attributes in order to realise the rights at national level. Accordingly, conformity to these attributes in the national implementation of the rights of children with disabilities could entail adherence to international standards for ensuring the appropriate national implementation of the rights of children with disabilities. Therefore, it is relevant to analyse the fundamental attributes in detail in order to determine how they shape the international standards for the domestic implementation and how African states should achieve compliance with the standards and the fundamental attributes.

The standards can be deduced by exploring how the applicable human rights law puts emphasis on the specific obligations which states must discharge in implementing the rights at national level. The obligations, as discussed above, reflect the fundamental attributes. Thus the next chapter analyses the 'salient elements' of these specific obligations that the applicable treaties emphasise and the specific 'sub-categories' of the conceptual attributes that the obligations reflect. In this way, the chapter extrapolates and establishes the precise nature of international standards and their fundamental attributes for ensuring the appropriate national implementation of the rights of children with disabilities in Africa.

Chapter 3

Extrapolating international standards pertaining to national implementation of the rights of children with disabilities in Africa

3.1 Introduction

Purpose and outline of chapter

The previous chapter has surveyed the international and African regional human rights treaties that contain the rights of children with disabilities in Africa in exploring the approach that the applicable human rights law takes in providing for the rights. It has established that the applicable law takes a 'human rights based approach' to disability in guaranteeing the rights. The approach seeks to ensure the full human rights enjoyment by children with disabilities on an equal basis with other children. The chapter has established that in following the approach, the law sets out a number of obligations that states must discharge. These obligations reflect certain conceptual principles which can be regarded as constituting the fundamental attributes of the approach taken by the applicable human rights law. The chapter has identified six such attributes in this regard.¹

It was further highlighted that the pertinent African states parties are supposed to take appropriate domestic implementation measures which are expected to take into account and reflect the fundamental attributes of the 'human rights based approach' in order to realise full human rights enjoyment for children with disabilities at national level. Accordingly, this chapter analyses these conceptual attributes in detail in

¹ The six fundamental attributes are identified in 2.6.2 in the previous chapter.

order to determine how they shape the international standards for domestic implementation.² It also explores the measures that the applicable human rights law expects the pertinent African states parties to take at national level in order to achieve compliance with the standards and the fundamental attributes. Thus, the chapter explores and establishes the 'salient elements' and the 'sub-categories' of the fundamental attributes that a 'domestic implementation framework' must conform to in order to be in a position to achieve the appropriate implementation of the rights of children with disabilities. Thus conformity to the attributes by the domestic frameworks could also entail compliance with the international standards for the appropriate domestic implementation. The chapter establishes the international standards by 'extrapolating' the various aspects or 'sub-categories' of the fundamental attributes from the main obligations that the applicable treaties and their monitoring bodies emphasise for states to discharge in implementing the rights.

In achieving its objectives, the chapter first discusses the concepts pertaining to domestic implementation of the rights of children with disabilities before exploring the measures that the treaties require states to take in implementing the rights at national level. Thereafter, it draws out and analyses the 'salient elements' and 'sub-categories' of the fundamental conceptual attributes that the applicable human rights law emphasises for states to conform to in implementing the rights. Ultimately, it explains how the fundamental attributes are expected to be reflected in the national implementation measures adopted by the pertinent states parties in order to comply with the international standards. The last part discusses the general conclusions that can be drawn from the entire chapter.

² In view of this, the chapter in 3.3 below also discusses a number of applicable theories that explain the conceptual or thematic aspects that these fundamental attributes embody.

3.2 National implementation measures

3.2.1 Conceptualising national implementation of applicable international human rights law

States parties to international human rights treaties have the obligation to take measures to implement the rights contained in the treaties at national level, as discussed in Chapter 1.³ These measures act as tools for realising the rights at national level. They include the taking of constitutional, legislative and policy initiatives for the purposes of transposing what is contained in the human rights treaties into the domestic legal system in addition to putting in place administration and institutional mechanisms for the coordination and monitoring of the national implementation process. In addition, states parties are required to ensure the justiciability of the rights contained in the treaties and also to ensure the 'domestic incorporation' or 'domestication' of the applicable treaties. Justiciability entails putting in place judicial mechanisms to enable redress, including provision of remedies, in cases where the enjoyment of human rights is violated or threatened. This is achieved when the legal framework confers jurisdiction upon courts to deal with cases involving the violations of the human rights that are contained in a country's constitution and various laws.⁴

On its part, domestic incorporation entails making the applicable treaties to be directly applicable and enforceable at the domestic level as an integral part of the domestic legal system to the effect that they could be enforced before the domestic courts.⁵ However, as explained in Chapter 1, domestication depends on the legal system in a particular state.⁶ Under a dualist legal system, there is need for further

³ See e.g. Viljoen (2012) 517, where it is stated that 'the main obligation of a state party is to *recognize* the rights in the treaty and to *give effect* to them by adopting *legislative and other measures*'. A discussion in this regard is contained in 1.3 & 1.4 in Chapter 1.

⁴ Hence, domestic laws, including constitutions, should make all human rights of children with disabilities justiciable. See CCPR, art 2(3); CRC Committee, General Comment No 5, paras 24 & 25; UNICEF (2007) 55; General Comment No 3, para 4.

⁵ See Helgadottir R 'The UN Convention in Nordic domestic law- Lessons learned from other treaties' in Amardóttir & Quinn (eds) (2009) 279-280.

⁶ See generally Dugard (2011) 42; Viljoen (2012) 21 & 518. See also Starke JG 'Monism and dualism in the theory of international law' (1936) 17 *British Year Book of International Law* 66-81, 66. A discussion in this regard is contained in 1.4 in Chapter 1.

governmental or court action to make the ratified treaty applicable and enforceable at national level.⁷ In the case of a monist legal system, the mere ratification of the treaty confers on it domestic application.⁸ There could also be what can be regarded as a 'hybrid legal system'- a jurisdiction that has a combination of monism and dualism elements.⁹

Accordingly, the concept of national implementation (of international human rights law) as employed by this thesis entails taking domestic constitutional, legislative, policy or other measures for the purposes of realising the rights contained in the treaties at national level, on the one hand; and the 'domestic incorporation' ('domestication') of the human rights treaties at national level and the justiciability of the rights guaranteed in the treaties, on the other hand.¹⁰



3.2.2 Understanding domestic implementation measures

Explaining the different national implementation measures

A cursory overview of the treaties that provide for the rights of children with disabilities in Africa shows that the treaties require the taking of a number of prescribed domestic implementation measures.¹¹ These measures include constitutional, legislative, policy, administrative and institutional, judicial, and other

⁷ Dugard (2011) 42. If the incorporation needs an Act of Parliament, there is need to enact a domestic version of the treaty which incorporates the treaty in order for it to have national application. See generally Viljoen (2012) 522-524; Dugard (2012) 42; ACPF 'In the best interest of the child' (2007) 18.

⁸ Viljoen (2012) 518; ACPF 'In the best interest of the child' (2007) 18.

⁹ The legal systems of Malawi and South Africa, which provide the subjects of the comparative study, are discussed in 4.2.4 in Chapter 4.

¹⁰ In accordance with its scope and purpose explained in 1.4 in Chapter 1, the thesis does not look into the practical aspect of national implementation but focus on legal and policy implementation frameworks.

¹¹ The treaty monitoring bodies and other eminent scholars have also elaborated on the measures. See 3.2.3 below for further discussion of the specific implementation measures prescribed by the different applicable treaties and their pertinent monitoring bodies. The discussion in this section seeks to provide a general explanation and clarification of the specific measures.

measures, in addition to domestic incorporation, that ensure the implementation of the rights of children with disabilities at national level.

It is noteworthy that the term 'legislative measures' as used by most of the treaties (discussed in 3.2.3 below) implies legal measures or laws which comprise stipulations/mechanisms in a constitution and stipulations/mechanisms in an ordinary statute (Act of Parliament). Indeed, both a constitution and a statute ordinarily involve a legislative process (which includes the enactment, review or repeal of laws) with the effect that the implementation measures that are grounded in a constitution or statute could be regarded as 'legislative' measures. In addition, these sets of measures are 'justiciable'. However, this study makes a distinction between provisions in a constitution (constitutional measures) and those in an ordinary statute (legislative measures), as explained below.

Constitutional measures

The thesis uses the term 'constitutional measures' to refer to the stipulations/mechanisms in a country's constitution that could facilitate the implementation of human rights. Firstly, in respect of constitutional measures, states are expected to ensure that the constitution contains a justiciable Bill of Rights that could contain provisions on the rights of children, including children with disabilities, which are guaranteed in the applicable treaties.¹² In addition, the constitution and the constitutional position in general, including the legal system that it creates, are expected to provide an environment that enables the treaties to be given effect to at national level.¹³

¹² See e.g. CRC Committee, General Comment No 5, para 21; Sloth-Nielsen J 'Strengthening the promotion, protection and fulfillment of children's rights in African context' in Alen A; Bosly H; De Bie M et al (eds) *The UN Children's Rights Convention: Theory meets practice* (2007) 188, where it is stated that 'the constitutionalisation of children's rights in African constitutions represents a meaningful attempt to implement and comply with the CRC and ACRWC'.

¹³ This entails, among others, that the constitution must not contain provisions that contradict the obligations imposed by international human rights law. In case of conflict, international human rights law must prevail. See VCLT, art 27.

Legislative measures

The thesis uses the term 'legislative measures' to refer to the provisions/mechanisms in an 'ordinary' statute or Act of Parliament (as opposed to a constitution) that could facilitate the implementation of human rights. There are at least three aspects that are noteworthy in respect of the appropriate legislative measures to be adopted. Firstly, if there is no legislation that gives effect to the applicable treaties or their provisions, the state is expected to enact legislation that implements the treaties or their provisions. Secondly, if legislation that gives effect to the applicable treaties already exists, the state is expected to undertake a continuous process of law review to ensure consistency between the applicable legislation and the relevant treaties. For example, if a child specific or disability specific legislation exists, it should be reviewed to be consistent with the CRC, African Children's Charter and the CRPD. Furthermore, the review of legislation entails modifying sectoral laws such as education laws that impact on the rights of children with disabilities to be consistent with the applicable treaties.¹⁴ Thirdly, legislative measures also require the repeal of any legislation that is so inconsistent with the applicable treaties to the extent that no comprehensive review would ensure compatibility.¹⁵ Therefore, the taking of appropriate legislative measure implies the adoption, modification or repeal of laws, as the case may be, in order to ensure that the legislative framework gives effect to the rights of children with disabilities.¹⁶

Policy measures

The thesis uses the term 'policy measures' to refer to the provisions/mechanisms (aimed at facilitating or 'actualising' the implementation of human rights) that are grounded in 'policy documents' such as a national or departmental policy or strategy or plan of action. Thus the major difference between policy measures

¹⁴ CRC Committee, General Comment No 5, para 22; Rishmawi M A *commentary on the United Nations Convention on the Rights of the Child: Article 4: The nature of states parties' obligations* (2006) 25.

¹⁵ See e.g. CRPD, art 4(1)(b); African Children's Charter, art 1(3).

¹⁶ See generally Kallehauge in Arnardóttir & Quinn (eds) (2009) 203.

and legal measures (constitutional and legislative measures) is that a policy is often made or adopted by the executive branch of government with the effect that policy measures do not ordinarily involve the legislative process as is the case with a statute or a constitution. In addition, policy measures might be 'justiciable' in certain jurisdictions but 'non-justiciable' in other jurisdictions; whilst, as explained above, legislative measures are 'justiciable'.

As will be demonstrated below (in 3.2.3), the relevant human rights law requires states to adopt policies that will guide the action that a government should take in discharging the treaty obligations.¹⁷ The policies must relate to the course of action that the government will take in each and every applicable sector to ensure that the rights of children with disabilities are enjoyed in such sectors. Hence, the policies would also set specific goals and targets.¹⁸ Furthermore, states are expected to adopt and implement policies in the sectors pertaining to children, youth, disability, education, health, and other applicable sectors.¹⁹ For example, states might have to adopt a disability policy, a youth policy, a child policy, an education policy (especially inclusive education policy) and other relevant policies that include a clear state position on issues, welfare and rights relating to children with disabilities.²⁰ In certain cases, the policies might also inform the adoption or implementation of laws applicable to children with disabilities since in such cases the policies might be expected to actualise/operationalise what the laws contain or will contain.

Other measures: domestication, justiciability and administrative/institutional measures

The obligation to ensure domestic incorporation of the applicable human rights treaties entails that states parties must make ratified treaties directly applicable and enforceable at the domestic level, as discussed

¹⁷ See generally AYC, art 12; CRPD Committee 'Reporting Guidelines' (2009), para A3.2; General Comment No 9, para 18.

¹⁸ The policies will be particularly significant in the implementation of SERs as they will indicate how the SERs of children with disabilities should be realised progressively within a reasonable time. See generally CRC Committee, General Comment No 9 (2006), para 18.

¹⁹ See e.g. AYC, art 12, which requires states parties to 'develop a comprehensive and coherent national youth policy'.

²⁰ See e.g. CRPD Committee, Concluding Observations on Spain (2011), paras 22, 24 (b) & (c).

above.²¹ It is noteworthy that domestic incorporation will require the states to take further appropriate legislative measures, such as a comprehensive review of all relevant domestic legislation, to ensure the harmonisation of all applicable laws and the incorporated treaties.²² It is for this reason that legislative implementation measures are preferred to 'domestication'.²³ In addition, international human rights law requires states to ensure the justiciability of the rights of children with disabilities by putting in place judicial mechanisms to enable redress in cases where the enjoyment of the is violated or threatened, as discussed above.²⁴

Furthermore, the applicable human rights law expects the state to establish and operate institutional and administrative mechanisms for the execution, including coordinating and monitoring, of the different implementation measures. For example, the CRC and the CRPD expect the establishment of administrative/institutional mechanisms within government to coordinate all issues relating to the rights of children with disabilities; and establishment of institutions and administrative arrangements for the independent monitoring of the implementation.²⁵ Lastly, the CRPD requires the active participation of persons with disabilities, children with disabilities, DPOs and civil society organisations in the entire implementation process.²⁶

²¹ The pertinent discussion on the concept of 'domestication' is contained in 3.2.1 above.

²² See CRC Committee, General Comment No 5, para 18; Sloth-Nielsen J & Mezmur BD 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 33; ACPF 'In the best interest of the child' (2007) 16-17.

²³ See e.g. Kallehauge in Arnardóttir & Quinn (eds) (2009) 208, where it is argued with regard to national implementation of the CRPD that the incorporation of the CRPD 'is a possibility but might not be as effective as implementation by means of national legislation.'

²⁴ The pertinent discussion on the concept of 'justiciability' is contained in 3.2.1 above.

²⁵ See e.g. CRPD, art 33; CRC Committee, General Comment No 9, para 21; CRC Committee, General Comment No 5, paras 26-27 & 37-39; CRC Committee, General Comment No 2 'The role of independent national human rights institutions in the promotion and protection of the rights of the child'(2002); Gatjens LFA 'Analysis of article 33 of UN Convention: The critical importance of national implementation and monitoring' (2011) 8 *SUR International Journal on Human Rights* 71-83; UNICEF (2007) 59, 66-68.

²⁶ See e.g. CRPD, arts 33(3) & 4 (3).

3.2.3 Implementation measures under the applicable human rights treaties

It is noteworthy that the operative provisions of the applicable human rights treaties show that the treaties require states parties to take the measures identified above (in 3.2.2) in implementing the rights of children with disabilities at national level. For example, the CRPD provides a detailed outline of such measures. It makes provision for this in article 4 in five subsections with the first subsection covering nine paragraphs.²⁷

In respect of the general measures of implementation, the CRPD provides in part that:

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes ...²⁸

It can be observed that the CRPD requires the use of legislation, policies and programmes in addition to administrative and other specific measures for the implementation of the rights which it contains.²⁹ The legislative measures must involve adoption of laws, modification of laws and abolishing of laws and regulations that perpetrate discrimination. In addition, all discriminatory customs and practices must similarly be modified or abolished. It further requires the mainstreaming of disability in all policies and

²⁷ Art 4(1) has nine paras (a-h).

²⁸ Art 4 (1) paras (a), (b) & (c).

²⁹ See CRPD, art 4(1) paras a & b, which requires legislative measure; art 4 (3), which expressly mentions legislation and policies; art 4(1) para c, which expressly mentions policies and programmes; art 4(1) paras d, e, f, g, h, & i, which mention specific measures, namely research and development of universally designed tool, services, equipment and facilities (paras d & e), development of (new) disability sensitive technology (para g), provision of accessible information (para h), and training of professional and staff working with persons/ children with disabilities to be equipped with knowledge , skills and competence in disability related issues including 'disability rights' in the CRPD (para h).

programmes. It also prescribes the taking of specific administrative or institutional measures such as the establishment of mechanisms that ensure coordination, independent monitoring and active participation of pertinent stakeholders, including DPOs in the implementation.³⁰

The CRPD Committee has developed reporting guidelines which shed more light on the implementation measures to be taken to realise the rights in the CRPD, including the rights of children with disabilities.³¹ Consequently, the Committee has also prescribed certain implementation measures in the concluding observations after examining state party reports and in its findings after consideration of individual communications.³² Among others, the Committee requires the adoption of policies, strategies, comprehensive disability anti-discrimination legislation, provision of judicial and appropriate remedies and the domestic incorporation of the CRPD.³³ Therefore, it can be observed that the CRPD, among others, requires state parties to take implementation measures which include legislative, policy and administrative measures.³⁴

Similarly, states parties to the CRC are required to take implementation measures that comprise domestic incorporation and justiciability in addition to taking constitutional, legislative, judicial,

³⁰ See CRPD, art 33. See also Gatjens (2011) 71-82; De Beco G *Study on the implementation of article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe* (2011).

³¹ See CRPD Committee, 'Guidelines on the treaty-specific document to be submitted by States Parties under article 35 of the Convention on the Rights of Persons with Disabilities' (2009).

³² The individual communications are discussed in 2.4.1 in Chapter 2. The concluding observations such the Concluding Observations on Spain (2011) & Concluding Observations on Tunisia (2011) are discussed in various sections of this chapter and the previous chapter.

³³ See CRPD Committee "Guidelines for states party reports' (2009), para A3.2.

³⁴ See generally CRPD art 4, especially art 4(1). For further discussion on national implementation of the CRPD, see Human Rights Council, *Thematic study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities* (2009), especially paras 21-58; United Nations *From exclusion to equality: Realising the rights of persons with disabilities- a handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) 51-76; Disability Rights Promotional International Law, *policy and programme monitoring template: Monitoring systems* (2011); International Disability Alliance *Guidance document: Effective use of international human rights monitoring mechanisms to protect the rights of persons with disabilities* (2010).

administrative, educative and other measures in implementing the rights.³⁵ In respect of the CESC and CCPR, states parties are also required to take implementation measures in the form of incorporating the treaties in addition to taking constitutional, legislative, judicial, administrative, educative and other measures in implementing the rights.³⁶ Similarly, states parties to the applicable African regional human rights treaties are required to take legislative, policy, and administrative measures, amongst others, for the domestic implementation of the rights of children with disabilities in Africa.³⁷

It is noteworthy that these implementation measures together form a country's domestic implementation framework. Accordingly, such a framework is expected to conform to the attributes of the 'human rights based approach' to disability taken by the applicable law which have been identified in the previous chapter. It is thus relevant to analyse how these attributes constitute the international standards for ensuring the appropriate national implementation of the rights of children with disabilities in Africa.³⁸

³⁵ See generally CRC, art 4; General Comment No 5 (2003); CRC Committee, 'General guidelines regarding the form and content of initial reports to be submitted by states parties under Article 44, paragraph 1(a) of the Convention' (1991); CRC Committee, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (2010) UNICEF *Implementation handbook for the Convention on the Rights of the Child* (2007) 47-74; Rishmawi (2006). The CRC Committee has outlined the implementation measures in specific reference to the rights of children with disabilities in General Comment No 9. See e.g. General Comment No 9, paras 17 & 18.

³⁶ See generally, CESC, art 2(1); CCPR, arts 2(3) & Committee on ESCR, General Comment No 3 'The nature of states parties obligations' (1990); Committee on ESCR, General Comment No 9 'The domestic application of the Covenant' (1998) para 4; Committee on ESCR, 'Guidelines on treaty-specific documents to be submitted by States parties under articles 16 and 17 of the International Covenant on Social and Cultural Rights' (2008), Annex, para 3(d); Committee on CESC, General Comment No 5 (1994); HRC, General Comment No 3 'Implementation at national level' (1981); HRC, General Comment No 31 'Nature of general legal obligations imposed on state parties to the Covenant' (2004); HRC, 'Consolidated guidelines for State reports under the International Covenant on Civil and Political Rights' (1999) CCPR/C/66/GUI).

³⁷ See e.g. ACHPR, arts 2 & 62; AYC, arts 1(2) & 12; African Women's Protocol art 1(1); African Children's Charter, art 1 (1). For the implementation measures recommended by the ACERWC, see ACERWC, 'Guidelines for initial reports of states parties' (2003); ACERWC, 'Procedure for the consideration of state party reports' (2008).

³⁸ It is noteworthy that human rights are traditionally classified into SERs and CPRs, as explained in 2.2.1 in Chapter 2. See generally Steiner; Alston & Goodman (2007) 133, 136, 275. This categorisation will have an implication on the domestic implementation of the rights of children with disabilities since SERs are considered to be subject to progressive realisation while CPRs are subject to immediate realisation. See generally Committee on ESCR, General Comment No 3 (1990) para 9; HRC, General Comment No 31 (2004) para 14. The CRC in art 4 and the CRPD in art 4(2) also recognise this distinction. Despite this, the CRPD under art 4(2) recognises that other obligations pertaining to SERs such as free primary education and non-discrimination in the CRPD and other treaties are immediately applicable in terms of international law. See e.g. CRPD Committee, Concluding Observations on Spain (2011) para 44; Lawson in Arnardottir & Quinn (eds) (2009) 103; Committee on ESCR General Comment No 3, para 1; Beiter (2006) 516; Kalanry Getgen & Koh (2010) 269-270; Rishmawi (2006) 34. It is not within the scope of the thesis to provide a detailed discussion of the distinction since the thesis focuses on assessing the conformity of the domestic implementation frameworks in the two selected African jurisdictions to the fundamental attributes (the assessment does not take into account the distinction).

3.3 Analysing the fundamental attributes of domestic implementation standards

This section seeks to draw out the ‘salient elements’ of the main obligations which the applicable human rights law emphasises for states to discharge in ensuring full human rights enjoyment by children with disabilities. These represent the fundamental conceptual attributes of the ‘human rights based’ approach to disability taken by the applicable treaty law identified in the previous chapter.³⁹ Therefore, the section extrapolates the ‘salient elements’ of these attributes in explaining how they shape and constitute the international standards that the domestic implementation measures must satisfy.

3.3.1 Adherence to the social and human rights models in conceptualising disability

The role of the social and human rights models in fostering human rights enjoyment

As discussed in the previous chapter, the differences in the perception of disability have a significant influence on the extent to which persons/children with disabilities will be guaranteed the enjoyment of human rights.⁴⁰ On the one hand, the medical model (which attributes the obstacles that children with disabilities face in their human rights enjoyment to the impairments of the children with disabilities and not to the society or environment) promotes the segregation and exclusion of persons/children with disabilities from society.⁴¹ This results in various violations of their rights. Above all, under the medical model, disability is not perceived as a human rights issue but as a personal ‘tragedy’ which requires pity, charity or clinical

³⁹ The six fundamental attributes are identified in 2.6.2 in Chapter 2 of the thesis.

⁴⁰ See 2.1.2, 2.4.5 & 2.6.1 in Chapter 2 for the discussion in this regard. It is noteworthy that the different perspectives to disability are also influenced by the fact that disability is a complex, dynamic and contested concept which does not have an agreed definition. See generally WHO & World Bank (2011) 3. See also Traustadóttir in Arnardóttir & Quinn (eds) (2009) 8; Harris A (with Enfield S) *Disability, equality, and human rights: A training manual for development and humanitarian organisations* (2003) 11.

⁴¹ Indeed, the resultant exclusion, marginalisation and discrimination significantly contribute to the lack of full human rights enjoyment by children/persons with disabilities. See generally Kanter (2003) 246; Coleridge (1993) 211.

interventions.⁴² On the other hand, as explained in the previous chapter,⁴³ the social model focuses on the social context and the environment, thereby emphasising the social barriers as the problem with the effect that it considers that the answer to the obstacles that prevent the equal and active participation by persons/children with disabilities rests in the removal of environmental and societal barriers in addition to ending discrimination and segregation.⁴⁴ Under the human rights model, as highlighted in the previous chapter,⁴⁵ the challenges faced by persons/children with disabilities are perceived as raising human rights matters that need to be addressed to ensure that children with disabilities enjoy opportunities and rights on an equal basis with other children.⁴⁶ In terms of the model, the main obstacle to human rights enjoyment by children/persons with disabilities is attributable to the 'fault' on the part of the society for excluding/segregating persons/children with disabilities.⁴⁷ Hence, the model advocates for the removal of barriers to inclusion, on the one hand, and the creation of accommodating environments, on the other hand, to enable children/persons with disabilities to enjoy human rights on an equal basis with others.⁴⁸

It can be observed that there are similarities between the social model and the human rights model in that they both advocate for the elimination of barriers that lead to the exclusion of persons/children with disabilities and call for the creation of accommodating environments for persons/children with disabilities to participate in society on an equal basis with others. Indeed, theorists such as Heyer regard the social

⁴² See Traustadottir in Arnardóttir & Quinn (eds) (2009) 5 & 8; Feldblum CR 'Definition of disability under Federal anti-discrimination law: What happened? Why? And what can we do about it?' (2000) *Berkeley Journal of Employment and Labor Law* 91-165, 94; Ngwena C 'Deconstructing the definition of 'disability' under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal on Human Rights* 613-646, 620; Kanter (2003) 246.

⁴³ See 2.1.2.

⁴⁴ See generally Traustadottir in Arnardóttir & Quinn (eds) (2009) 8; Oliver in Barnes & Mercer (eds) (2004) 18-31. Thus, the model considers the disability 'problem' to be the 'fault' of the environment (and its barriers). See Oliver M *Social work with disabled people* (1983) 23; Oliver M *Understanding disability: From theory to practice* (1996) 33.

⁴⁵ See 2.1.2, 2.4.5 & 2.6.1.

⁴⁶ See generally Kanter (2003) 247; Combrinck in Sloth-Nielsen (2008) 302; Quinn & Degener (2002) 15.

⁴⁷ See generally Kanter (2003) 247; Combrinck in Sloth-Nielsen (ed) (2008) 302; Quinn & Degener (2002) 15.

⁴⁸ See e.g. Quinn & Degener (2002) 15.

model and the human rights model as one.⁴⁹ Nonetheless there are slight differences between the two models although they both foster human rights enjoyment of persons/children with disabilities. For example, the social model does not look favourably at medical or clinical based interventions with regard to disability due to its strict opposition to the medical model as it 'mistakenly' holds that any considerations relating to the medical or clinical 'needs' for persons with disabilities implies adherence to the medical model.⁵⁰ Consequently, clinical or medical initiatives that would facilitate human rights enjoyment by children with disabilities are discounted under the social model. On its part, the human rights model recognises the medical 'needs' of persons/children with disabilities and the role of health/medical based interventions by perceiving such interventions from the stand point of the entitlement of persons/children with disabilities to enjoy human rights,⁵¹ thereby reflecting the essence of the 'human rights based approach' to disability taken by the applicable human rights law.⁵²

Indeed, in terms of the 'human rights based approach' taken by the applicable law, the conceptualisation of disability based on either the social or human rights models should recognise that measures which seek to facilitate the enjoyment of human rights by children with disabilities should not be discounted for the mere fact that they take the form of medical, clinical, or protection based interventions.⁵³ Similarly, measures that seek to foster the human rights enjoyment of children with disabilities by providing care, assistance or protection should not be discounted for the mere fact that they use terminology that

⁴⁹ See e.g. Heyer KC 'The ADA on the road: Disability rights in Germany' (2002) 27 *Law and Social Inquiry* 723, 726-727; Kanter (2003) 247.

⁵⁰ This could be based on the fact that medical model 'tends to view [persons with disabilities] first and foremost as having physical problems to be cured... because of its excessive focus on the desirability of fixing the...impairment'. See Harris (with Enfield) (2003) 15.

⁵¹ See generally Quinn & Degener (2002) 14, where it is stated that: 'The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics.'

⁵² As discussed in the previous chapter, the main goal of the human rights based approach is to ensure full human rights enjoyment by children/persons with disabilities. See 2.6.1 in Chapter 2 for the discussion in this regard.

⁵³ See e.g. WHO & World Bank (2011) 4, where it is observed that 'disability should be viewed neither as purely medical nor as purely social: persons with disabilities can often experience problems arising from their health condition'.

could reflect the welfare approach. However, it is the putting of emphasis on medical, clinical or welfare based measures in a manner that suggests that disability issues should be addressed by taking predominantly welfare or protection based measures with the effect that children with disabilities are not regarded as rights holders that the human rights based approach discourages. Thus in terms of the approach, measures taken in addressing disability issues should be informed by the perception that children with disabilities are full rights holders who are entitled to enjoy human rights on an equal basis with others children.

Adherence to the human rights model of disability as a fundamental attribute

The applicable human rights law survey in the previous chapter and the discussion above have demonstrated that the social and human rights models of disability facilitate the equal and full human rights enjoyment by persons with disabilities, including children with disabilities. Thus it was necessary for the approach taken by the applicable international law to shift from perceiving disability in terms of the medical model to the social and human rights models.⁵⁴ Indeed, the CRPD acknowledges that the conceptualisation of disability and 'persons with disabilities' should be based on the recognition that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.⁵⁵ The Convention further gives a non-exhaustive indication of how 'persons with disabilities' should be understood. In this regard, the CRPD states that:

⁵⁴ Indeed, the medical model fell out of favour at the time when there was a change in the disability approach from the medical to the social model culminating in the human rights model and the adoption of the CRPD. See Schulze (2010) 16.

⁵⁵ CRPD, preamble para e.

'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.⁵⁶

It can be observed in light of the discussion above that the conceptualisation of disability and 'persons with disabilities' by the CRPD is grounded in the social and human rights models of disability.⁵⁷

In this regard, the CRPD Committee has acknowledged that the CRPD is based on, and also establishes, the human rights model of disability.⁵⁸ Accordingly, the interventions and measures that are adopted by applicable policies or legislation that seek to address the human rights related issues of children with disabilities are expected to be based on the social and human rights models of disability.⁵⁹ Indeed, the CRPD Committee has explicitly reiterated the obligation to ensure adherence to the human rights model of disability and the need to define disability concepts and terms as is consistent with the CRPD and the human rights model.⁶⁰ Thus, the Committee expects states parties to embrace the

⁵⁶ CRPD, art 1. The CRPD does not define a 'person with disability' but only provides its understanding because the definition remains debatable. See Combrinck in Sloth-Nielsen (ed) (2008) 303; Lawrence J 'The right to education for persons with disabilities: Towards Inclusion' conceptual paper prepared for the World Bank (2004) 11-12; Filmer D *Disability, poverty and schooling in developing countries: Results from eleven household surveys* (2005) 1.

⁵⁷ See also Ngwenya C 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education' (2013) *African Disability Rights Yearbook* 139-164, 145, where it is observed that the CRPD 'sees disability through the lens of the "human rights model"'.

⁵⁸ See generally Concluding Observations on China (2012) paras 9 & 16.

⁵⁹ It is noteworthy that there are no definite pointers that will show compliance with the human rights model. At the very least, the obligations imposed by the provision(s) and the conceptualisation of the rights therein should be consistent with the model. See e.g. CRPD Committee, Concluding Observations on Hungary (2012) paras 10 & 12 where the Committee shows concern 'that definitions of disability and persons with disabilities in the State party's legislation focus on the impairments of an individual rather than on the barriers he/she faces', and hence it urged Hungary:

'[T]o ensure that it is in full compliance with the Convention and reflects the human rights-based approach to disability as embodied in the Convention; and to incorporate an inclusive definition of disability and persons with disabilities that is firmly rooted in the human rights-based approach to disability'.

See also Concluding Observations on Austria (2013) paras 29 & 30; Concluding Observations on El Salvador (2013) para 10.

⁶⁰ See e.g. Concluding Observations on Austria (2013) para 8, where the Committee expresses its concern at the fact that in the Austrian legislative framework 'some of the definitions are based on the medical model of disability'; Concluding Observations on China (2012) para 9, where the Committee expresses concern upon noting 'the prevalence of the medical model of disability in both the definition of disability and the enduring terminology and language of the discourse on the status of persons with disabilities'.

'paradigm shift' that the CRPD has brought in taking the human rights approach to disability.⁶¹ For example, the Committee recommends that states must move away from charity and welfare approaches by not focusing on protection centred measures but to take the human rights approach that promotes the positive perceptions of persons/children with disabilities as rights holders.⁶² Above all, the Committee expressly urges states parties to ensure that their domestic frameworks should comply with the human rights model of disability.⁶³ Therefore, the requirement that a national implementation framework must conceptualise disability in terms of the human rights model of disability is one of the fundamental attributes for ensuring the appropriate national implementation of the rights of children with disabilities.⁶⁴ Accordingly, the pertinent national implementation frameworks are expected to conceptualise disability in terms of the human rights model of disability in order to conform to this fundamental attribute.

3.3.2 Disability explication: Explicit recognition of the rights of children with disabilities

It has been highlighted (in Chapter 2)⁶⁵ that issues relating to disability used to be invisible in human rights treaties until after the adoption of the CRC.⁶⁶ In this regard, Quinn and Degener have observed that 'The

⁶¹ See e.g. Concluding Observations on Austria (2013) para 21.

⁶² See e.g. Concluding Observations on Austria (2013) para 22; Concluding Observations on Paraguay (2013) paras 21 & 22.

⁶³ See e.g. Concluding Observations on Azerbaijan (2014) para 9, where the Committee recommends that the state 'review and harmonize its legislation, as well as ensure that the new draft law on the rights of persons with disabilities strictly complies with the provisions of the Convention, by adopting the human rights-based model of disability'; Concluding Observations on Argentina (2012) paras 8 & 24, where the Committee advises Argentina 'to pursue a broad and comprehensive strategy to realize all the rights set out in the Convention, taking due account of the human rights model of disability', and further urges the state 'to develop and implement mental health plans based on the human rights model of disability'.

⁶⁴ Due to the close similarities that exist between the social model and the human rights model, adherence to the social model or adherence to both the social and human rights models in conceptualising disability would also suffice as a fundamental attribute. Therefore, the fundamental attribute that requires disability to be conceptualised in terms of the human rights model is equally complied with if states conceptualise disability in terms of the social model or in terms of both the social and the human rights models.

⁶⁵ See 2.4.5 in Chapter 2 for the discussion in this regard.

⁶⁶ See generally Quinn G 'Resisting the "temptation of elegance": Can the Convention on the Rights of persons with Disabilities socialise states to right behavior?' in Arnardóttir & Quinn (eds) (2009) 215-256, 217, where it is observed that:

'[P]ersons with disabilities were absent on the face of existing international human rights instruments ...and this needed to be rectified from a formal point of view. And this textual invisibility ...needed a response'.

answer to invisibility is an insistence on the equal application of all human rights to persons with disabilities'.⁶⁷ Accordingly, the human rights based approach to disability taken by the applicable human rights law acknowledges the crucial role that the 'explication' of disability and the rights of persons/children with disabilities in human rights documents plays in ensuring full human rights enjoyment by persons/children with disabilities.

It is noteworthy that there are two aspects to the disability explication concept. First, there should be explicit recognition of disability and the rights of children with disabilities in the international and domestic human rights systems. This first aspect is the literal meaning of disability explication. Secondly, there should be explicit provisions that set out the rights of children with disabilities in a manner that should guide the approach to be taken in implementing the rights. The approach to implementation must be consistent with the human rights model of disability by regarding children with disabilities as rights holders. This second aspect represents the real essence of disability explication, namely, to guide the approach to implementing the rights of children with disabilities in accordance with the human rights model of disability.

On the one hand, the adoption of the CRPD and the CRC ensured that international human rights law has treaties that expressly make provision for the rights of persons/children with disabilities. Thus the rights of children with disabilities were explicitly set out under international human rights law as a result of these two treaties. This reflected the first and literal aspect of disability explication. On the other hand, the CRC and the CRPD contain specific provisions that set out the rights of children with disabilities.⁶⁸ The disability specific provision in the CRC provides a guide relating to the approach that should be taken in implementing the rights of children with disabilities, namely, that the implementation must be aimed at ensuring their inclusion in society.⁶⁹ This approach is consistent with the human rights model of disability by

⁶⁷ Quinn & Degener (2002) 27.

⁶⁸ See e.g. CRC, art 23; CRPD, art 7.

⁶⁹ See CRC Committee, General Comment No 9, para 11.

putting emphasis on inclusion. On its part, the specific provision on the rights of children with disabilities in the CRPD also guides the approach to be taken in implementing the rights of children with disabilities. In terms of the provision, the implementation must be aimed at ensuring the full human rights enjoyment by children with disabilities on an equal basis with other children,⁷⁰ thereby demonstrating consistency with the human rights model of disability.

Above all, it can be observed that the CRPD and the CRC also provide an unequivocal example of both the literal meaning and the essence of the disability explication concept. This is because the two treaties expressly set out the rights of children with disabilities, on the one hand; and they further outline the obligations/measures and the approach that states must take in realising/implementing the rights, on the other hand. Therefore, it can be observed that the disability 'explication' concept is reflected under the CRPD and CRC regimes.

Disability explication as a fundamental 'human rights based' conceptual attribute

It is noteworthy that the significance of ensuring disability explication hinges on the fact that past experience had demonstrated that the 'assumed' or 'implied' recognition of disability issues or rights of children with disabilities resulted in their continued marginalisation. Thus the explicit recognition of disability and the rights of children with disabilities addresses such a mistaken 'presumption' and brings into the open the fact that children with disabilities have equal entitlement to exercise human rights.⁷¹ Hence, it is now expected that states parties to the CRPD will have to make express reference to disability and the rights of

⁷⁰ See CRPD, art 7(1).

⁷¹ In this regard, Byrne has hailed the 'explication principle' taken by the CRPD by observing, with regard to the concept of reasonable accommodation, that the explicit inclusion and definition of concepts is a crucial component of the CRPD in appreciation of the practice whereby persons/children with disabilities 'have been disadvantaged by the immanent rules of a "game" designed by and for a non-disabled and adult majority'. See Byrne in Freeman (2013) 433; Young IM 'Equality of whom? Social groups and judgments of injustice' (2001) 9 *The Journal of Political Philosophy* 1-18, 1.

children with disabilities in the documents they adopt to implement the rights with a view to guide the implementation of the rights in manner that complies with the human rights model of disability.⁷²

On the one hand, with regard to the literal meaning of the disability explication concept, CRPD Committee, for example, advises states parties to expressly include disability related definitions and concepts which are contained in the CRPD.⁷³ On the other hand, with regard to the essence of the disability explication concept, the CRPD Committee has taken the position that (as a way of implementing the - specific provisions on the rights of children with disabilities in CRPD's article 7,) states parties must ensure that child protection laws should contain explicit provisions on the rights of children with disabilities, which should spell out the action that will be taken to ensure their rights enjoyment.⁷⁴

Therefore, the principal purpose of the 'disability explication' attribute is to ensure that states parties to the CRPD should expressly include provisions on the rights of children with disabilities in their domestic frameworks, which provisions should guide the approach to be taken when implementing the rights; and that the approach must be consistent with, and not contrary to, the human rights model of disability, and the human rights based approach taken by the applicable treaty law broadly. Accordingly, it is expected that the pertinent domestic implementation frameworks will explicitly recognise disability and the rights of children with disabilities.

⁷² See e.g. Concluding Observations on Tunisia (2011) paras 9 & 13; See CRC Committee, General Comment No 9, para 9(a),

⁷³ See e.g. Concluding Observations on China (2012) para 12; Concluding Observations on Peru (2012) para 7(a), where the Committee requests Peru to '[a]mend Law 27050 to include a comprehensive definition of a person with disability'; Concluding Observations on Paraguay (2013) para 14, where the Committee urges the state party to adopt anti-discrimination legislative measures which 'should explicitly refer to the denial of reasonable accommodation as a form of discrimination on grounds of disability'; Concluding Observations on Hungary (2012) para 16.

⁷⁴ See e.g. Concluding Observations on El Salvador (2013) para 19, where the Committee expressed its concern that 'the Child and Adolescent Protection Act does not include specific actions to ensure the protection of children with disabilities, aside from a few regarding health care'; Concluding Observations on Argentina (2012) paras 15 & 16, where the Committee 'notes with concern that Act No. 26.061 on the comprehensive protection of the rights of children and adolescents contains no provisions specifically on children with disabilities'; whereupon the Committee recommends that Argentina 'should, as a priority, incorporate a disability perspective into Act No. 26.061 and the system for the comprehensive protection of children's and adolescents' rights'.

3.3.3 Ensuring non-discrimination and substantive equality

Understanding the concept of substantive equality and the role of non-discrimination

There are at least two conceptualisations of equality, namely, formal equality and substantive equality.⁷⁵ First, formal equality expects all persons to be treated equally or in the same way and that differentiation should be based on merit.⁷⁶ By its nature, formal equality will often result in indirect discrimination against persons/children with disabilities.⁷⁷ On its part, substantive equality expects the same treatment for equal situations and different treatment for different situations.⁷⁸ This theory of equality requires an examination of inequality and difference or disadvantage since it aims at achieving *de facto* or 'real' equality by addressing the causes of inequalities.⁷⁹ Thus if equal treatment will perpetrate inequalities, substantive equality will allow for different treatment of persons facing different situations.⁸⁰ Accordingly, human rights based approach will seek to promote substantive equality over formal equality.

Substantive equality will also recognise that persons/children with disabilities are discriminated against due to multifaceted disadvantages and vulnerabilities.⁸¹ Hence, it will be consistent with the concept of 'multidimensional disadvantage equality', which is grounded in the perception that the disadvantages and

⁷⁵ See e.g. Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 213; Fredman S 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 (2) *South African Journal of Human Rights* 163-190, 163 & 164; Ngwena C & Pretorius L 'Substantive equality for disabled learners in state provision of basic education: A commentary on *Western Cape Forum for Intellectual Disability vs Government of the Republic of South Africa* (2012) 28 *South African Journal of Human Rights* 81-115, 82 & 83.

⁷⁶ See Currie & De Waal (2013) 213; Fredman 'Providing equality' (2005) 165 & 166; Ngwena (2013) 159; Fredman S 'Disability equality and the existing anti-discrimination paradigm – European discrimination law', in Lawson and Gooding (eds) *Disability rights in Europe: From theory to practice* (2005) 199- 218, 211.

⁷⁷ See Albertyn C & Goldblatt B 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal of Human Rights* 248-276, 250; Quinn & Degener (2002) 16; Ngwena (2013) 159; Kayess & French (2008) 8; Arnardóttir in Arnardóttir & Quinn (eds) (2009) 48.

⁷⁸ See e.g. Ngwena & Pretorius (2012) 8; Ngwena (2013) 157; Arnardottir in Arnardottir & Quinn (2009) 43.

⁷⁹ See Albertyn & Goldblatt (1998) 250; Arnardottir in Arnardottir & Quinn (2009) 43; Kayess & French (2008). For this reasons, substantive equality is considered a component of justice. See e.g. Boezaart T 'A constitutional perspective on the rights of children with disabilities in an educational context' (2012) 27 *SA Publiekreg / Public Law* 454-471, 458.

⁸⁰ See e.g. Boezaart (2012) 459.

⁸¹ See e.g. Committee on ESCR General Comment No 5 (1994) para 15.

vulnerabilities that cause discrimination against persons with disabilities are multidimensional.⁸² For example, discrimination can be caused by social, structural, environmental, attitudinal or legal barriers that bring different levels and types of disadvantage(s) upon a person with disability. Hence, the principle of multidimensional disadvantage equality will require the taking of various measures that are tailored to address the different barriers that put persons with disabilities at a disadvantage or that perpetuate their marginalisation.⁸³ Consequently, the removal of barriers should be done side by side with the eradication of the associated disadvantages which put persons/children with disabilities in the margins.⁸⁴ This entails the need to take positive measures that address both the inequalities against persons/children with disabilities and the root causes of such inequalities.⁸⁵

On its part, the concept of non-discrimination implies the equal dignity of all human beings since discrimination 'undermines people's human dignity in that it implies that the person discriminated against is inferior or unworthy of respect as a human being.'⁸⁶ Non-discrimination directly protects human dignity by protecting the right to equality.⁸⁷ Hence, non-discrimination is regarded as constituting 'a negative protection of the right to equality'.⁸⁸ However, although the concept of equality is acknowledged as facilitating the respect for dignity,⁸⁹ Albertyn and Goldblatt have argued that substantive equality should be understood independent of the value of dignity whereby its meaning should primarily be informed by the

⁸² See generally Arnardóttir in Arnardóttir & Quinn (eds) (2009) 54.

⁸³ See e.g. Arnardóttir in Arnardóttir & Quinn (eds) (2009) 54 & 64.

⁸⁴ See Rioux & Ridle in Rioux; Basser & Jones (eds) (2011) 51.

⁸⁵ See generally Fredman 'Providing equality' (2005) 167; Rioux & Ridle Rioux; Basser & Jones (eds) (2011) 51; Ngwenya & Pretorius (2012) 83.

⁸⁶ Chirwa (2011) 141.

⁸⁷ Abramson (2008) 32. See

⁸⁸ Chirwa (2011) 142. See also Arnardottir in Arnardottir & Quinn (eds) (2009) 41-66, 43, where it is stated that 'Conceptually, equality and non-discrimination connote the same idea and can be seen simply as the positive and negative statement of the same principle'.

⁸⁹ See e.g. Abramson (2008) 32; Chirwa (2011) 141.

value of equality.⁹⁰ The authors base their argument of the fact that, as demonstrated above, 'disadvantage and difference are core characteristics of substantive equality,' and hence, the right to equality should be defined 'in terms of these central elements of the concept, rather than in terms of dignity'.⁹¹

Nonetheless, although substantive equality seeks to eliminate inequalities by focusing on addressing the adverse impact of disadvantage and difference, the fact that its end goal is the achievement of 'equality in fact', it cannot be divorced from the concept of dignity. This is because the essence of dignity is the recognition of the equal worth and value of every person which entails the entitlement to equal and full human rights enjoyment.⁹² Above all, the CRPD preamble expressly recognises that 'discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person'.⁹³ Therefore, conceptualising substantive equality from the standpoint of human dignity would be consistent with the human rights based approach as long as the role played by disadvantage and difference in the equality analysis is still recognised.

Understanding the measures for ensuring non-discrimination and substantive equality

Providing reasonable accommodation

The provision of reasonable accommodation constitutes one of the positive measures for achieving substantive equality as discussed in the previous chapter.⁹⁴ In this regard, the CRPD Committee

⁹⁰ See Albertyn & Goldblatt (1998) 254, where the authors particularly do not agree with the approach taken by the Constitutional Court of South Africa 'to define equality by placing the value of dignity at the centre of the equality right'. For further discussion on South Africa's framework for the implementation of the right to equality, see Chapters 4 & 5 of the thesis.

⁹¹ Albertyn & Goldblatt (1998) 257.

⁹² See e.g. Megret (2008) 500, where it is highlighted that 'The inherent dignity of all human beings is, after all, the fundamental premise from which rights traditionally flow'.

⁹³ See CRPD preamble para (h). See also CRPD Committee, General Comment No 1 'Article 12: Equal recognition before the law' (2014) para 29, where it is stated that 'Freedom from discrimination in the recognition of legal capacity restores autonomy and respects the human dignity of the person in accordance with the principles enshrined in article 3 (a) of the Convention'.

⁹⁴ See 2.4.1 in Chapter 2 for further discussion in this regard. See also Ngwena (2013) 157 & 156.

emphasises that states parties must explicitly include the concept in national laws, which must precisely recognise the failure to provide reasonable accommodation as constituting disability based discrimination.⁹⁵

The CRPD defines reasonable accommodation in article 2 as:

[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

The UN Office of the High Commissioner for Human Rights has explained the concept of reasonable accommodation as follows:

“Reasonable accommodation” is also known as duty to accommodate; reasonable adjustment, adaptation or measures; or effective or suitable modifications. To afford a person “reasonable accommodation” means, for example, making adaptations to...an educational establishment, a health-care facility or transport service in order to remove the barriers that prevent a person with a disability from participating in an activity or receiving services on an equal basis with others.⁹⁶

Accordingly, authors such as Martel have observed that reasonable accommodation should be understood as ‘...using all available mechanisms to adjust practices, materials, environments, general rules, etc. to the differences between people in order to assure them equal opportunities.’⁹⁷ As discussed in the previous

⁹⁵ See e.g. Concluding Observations on Argentina (2012) para 12, where the Committee calls upon Argentina ‘to incorporate the concept of reasonable accommodation into its anti-discrimination legislation and to ensure that the relevant laws and regulations define the denial of reasonable accommodation as a form of discrimination on grounds of disability’. See also Concluding Observations on El Salvador (2013) para 14; *H.M. v Sweden*. It is noteworthy that the Committee on ESCR has also indicated that disability based discrimination under the CDESCR includes denial of reasonable accommodation. See General Comment No 5, (1994) para 14.

⁹⁶ See United Nations *From exclusion to equality* (2007) 60.

⁹⁷ Martel LV ‘Reasonable accommodation: The new concept from an inclusive constitutional perspective’ (2011) 8 *SUR International Journal on Human Rights* 85-111, 88. Martel has further explained that ‘accommodation consists of modifications, adjustments, adaptations and even flexibilities in the material and normative environment in which it is claimed through the employment of a wide variety of mechanisms.’ See Martel (2011) 105. See also Lawson in Amardottir & Quinn (eds) (2009) 93, where it is highlighted that the concept of reasonable accommodation requires the duty-bearer ‘to take reasonable steps to adjust their policies, practices and services and premises in order to remove the disabling barriers which lie in the path of a relevant individual’; and that the obligations might also require ‘duty-bearers to provide specific equipment, aids or services to enable disabled individuals to access workplaces, schools, transport systems or other facilities’.

chapter,⁹⁸ the CRPD's definition of reasonable accommodation highlights that the concept is individualistic.⁹⁹

Furthermore, the definition or understanding of reasonable accommodation implies that the only valid 'excuse' for the failure to provide reasonable accommodation is that its provision would cause undue burden/hardship.¹⁰⁰ In clarifying further on the undue burden concept, Martel has stated that the burden will be undue if the modification involved in providing reasonable accommodation excessively undermines the general measure and pose risk to health and well-being, amongst others, or if the accommodation proves to be too expensive when costs and benefits are balanced.¹⁰¹ Accordingly, it can be observed that the concept of reasonable accommodation should be understood in terms of a right of individual person/child with disability (or any other person/child) to benefit from adjustment and modifications of any nature for the purposes of being protected from discrimination and ensuring full enjoyment of human rights on an equal

⁹⁸ See 2.4.1 in Chapter 2.

⁹⁹ See generally CRPD's definition of reasonable accommodation in art 2. See also CRPD, art 24(2) (c), which requires reasonable accommodation of the individual learner to be provided in education; Concluding Observations on Spain (2011) paras 43 & 44(a); Concluding Observations on Hungary (2012) para 41, where the CRPD Committee advises Hungary 'to provide reasonable accommodation to children with disabilities based on the student's individual requirements'; Lawson in Arnardóttir & Quinn (eds) (2009) 103. The CRPD Committee is yet to provide a guiding interpretation of the concept of reasonable accommodation, particularly the notion of disproportionate or undue burden. Nonetheless, in its recently adopted general comment on art 9-accessibility, the Committee has acknowledged the individualistic nature of the concept by observing that:

'Accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an *ex ante* duty...The duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation (workplace, school, etc.) in order to enjoy her or his rights on an equal basis in a particular context. Here, accessibility standards can be an indicator, but may not be taken as prescriptive. Reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation'.

See CRPD Committee, General Comment No 2 'Article 9: Accessibility' (2014) paras 25 & 26. See also Lawson in Arnardóttir & Quinn (2009) 103, where it is observed that:

'[A] duty to provide reasonable accommodation imposes positive obligations to identify barriers in the way of disabled person's enjoyment of their human rights and to take appropriate steps to remove them. The emphasis is on the barriers which operate in a particular case and thus on the need to respond to the specific circumstances of the individual disabled person in question. The solutions required must be appropriate to that person'.

¹⁰⁰ See CRPD, art 2. See also Kallehauge in Arnardóttir & Quinn (eds) (2009) 210-211.

¹⁰¹ See Martel (2011) 106, where it is also highlighted that the cost-benefit analysis is not limited to financial aspects and it does not only take into account the parties who are directly involved. On its part, the CRPD Committee has indicated that the concept must be approached in a manner that is consistent with the respect for the dignity of the concerned persons with disabilities who might require accommodations with cost implications beyond the scope of accessibility standards. See General Comment No 2 (2014) para 26.

basis with others as long as such modifications do not impose an undue hardship or burden on the part of the duty bearer or the state.¹⁰²

However Byrne has leveled a number of criticisms against the CRPD's approach to the concept of reasonable accommodation.¹⁰³ The hub of the criticisms is based on the fact that the CRPD's approach implies that the concept of undue hardship in conceptualising reasonable accommodation is an accepted justification for discrimination against children with disabilities.¹⁰⁴ However, the drawback with this approach is that it entails that the CRPD is still riddled with misconceptions that 'children with disabilities and their needs are both burdensome and expensive' with the effect that it is reasonable to deny them equal human rights enjoyment to avoid burdening the state or duty bearers.¹⁰⁵ Nonetheless, despite its conceptual drawbacks, the notion of reasonable accommodation under international human rights law is significant for the role it plays in facilitating substantive equality for children/persons with disabilities.¹⁰⁶

Taking special or 'affirmative action' measures

The taking of special or affirmative action measures which aim at addressing inequalities is one of the positive mechanisms for achieving substantive equality.¹⁰⁷ The measures can take three forms. First, they may comprise law reform interventions that serve the purpose of extending existing benefits or rights to particular categories of people which were previously denied the enjoyment of these benefits/rights on the basis of any prohibited grounds (of discrimination).¹⁰⁸ Secondly, 'affirmative action' measures might make

¹⁰² See e.g. Martel (2011) 88, where reasonable accommodation is defined as '... using all available mechanisms to adjust ...to the differences between people in order to assure them equal opportunities'.

¹⁰³ See generally Byrne in Freeman (2012) 433-434.

¹⁰⁴ See generally Byrne in Freeman ((2012) 433 & 434.

¹⁰⁵ See Byrne in Freeman (2012) 433 & 434. Byrne considers that the approach embodies elements of the welfare approach taken by the other UN treaties. See Byrne in Freeman (2012) 433.

¹⁰⁶ See e.g. Ngwena (2013) 157 & 156.

¹⁰⁷ See Chirwa (2011) 153 & 154.

¹⁰⁸ Chirwa (2011) 153.

provision for rights, privileges and benefits to a particular class of individuals as a way of acknowledging their peculiar characteristics and life experiences.¹⁰⁹ Thirdly, the special measures might give preferential treatment to members of a particular class of people on account of its past experience which made such a group a victim of (past) systematic discrimination.¹¹⁰ This last form is the one that is often and commonly regarded as 'affirmative action'.¹¹¹ Accordingly, the taking of special measures, including affirmative action measures, is one of the significant means for fostering substantive equality for persons/children with disabilities since they remain victims of past discrimination and continue to face a number of barriers that perpetuate inequalities against them.¹¹²

Ensuring non-discrimination and substantive equality as a fundamental attribute

It can be observed from the international law survey in Chapter 2 and the discussion above that the applicable international human rights law put emphasis on the obligation to ensure non-discrimination and equality for children with disabilities. For example, it was established (in Chapter 2) that almost all applicable human rights treaties, including the CRPD, contain a general non-discrimination provision.¹¹³ This underscores the crucial role that non-discrimination plays in ensuring the full human rights enjoyment by children/persons with disabilities. Indeed, prior to the CRPD, it was acknowledged that disability based discrimination was the major obstacle that prevented persons/children with disabilities from benefitting from

¹⁰⁹ See Chirwa (2011) 153.

¹¹⁰ Chirwa (2011) 153. (The difference between the first and the third form is that the third type comprises a particular class of people who were victims of (past) systematic discrimination while the first type applies to people who were merely denied human rights enjoyment due to 'ordinary' discrimination).

¹¹¹ Chirwa (2011) 153. (This form of special measures raises controversies which border on the argument that it in fact constitutes some form of 'legalised' discrimination. See Cohen C & Sterba JP *Affirmative action and racial preference: A debate* (2003) 33-37; Cahn SM (ed) *The affirmative action debate* (1995); Rabe J *Equality, affirmative action, and justice* (2000); Chirwa (2011) 153.)

¹¹² There could be other measures for achieving substantive equality. However, for purposes of this thesis, this chapter focuses on reasonable accommodation and affirmative action measures.

¹¹³ See e.g. CRPD, art 5; CRC art 2; African Children's Charter, art 3.

the rights contained in the 'general' human rights treaties with the effect that futile attempts were made to adopt a convention prohibiting all forms of discrimination against persons with disabilities.¹¹⁴

Furthermore, the CRPD highlights the role of equality and non-discrimination by requiring children with disabilities to enjoy human rights 'on an equal basis with other children'.¹¹⁵ It is noteworthy that it is the measures which foster substantive equality that will result in persons/children with disabilities enjoying human rights 'on an equal basis with others'. For example, the CRPD Committee has reiterated the obligation of states parties to take affirmative action measures in order to achieve substantive equality for persons with disabilities.¹¹⁶ In addition, the Committee expects states to implement equality and non-discrimination by, amongst others, ensuring that their domestic laws explicitly recognise that the denial of reasonable accommodation constitutes discrimination on the basis of disability.¹¹⁷ Accordingly, the implementation of non-discrimination is required to ensure substantive equality for children with disabilities. This entails that the right to equality and non-discrimination for children with disabilities must recognise the fundamental elements set out under article 5 of the CRPD, which include a general prohibition of discrimination (where there is protection from all forms of discrimination); the provision of special measures, including affirmative action measures, for achieving *de facto* equality; the provision of reasonable

¹¹⁴ The anti-disability based discrimination treaty was not adopted as it failed to attract the requisite number of votes. See Quinn G 'Disability and human rights: A new field in the United Nations' in C Krause & M Scheinin (eds) *International protection of human rights: A textbook* (2009) 247, 252

¹¹⁵ Indeed, the CRPD includes reference to the 'on an equal basis with others' phrase in a number of its provisions. See e.g. CRPD preamble paras (e) & (r); CRPD arts 1, 2, 7(1) & (2); 9(1), 10, 12(2), 13(1), 14(1) & (2), 15(2), 17, 18(1), 21, 22(2), 23(1), 24(2)(b), 27(1), 29, & 30(1). In this regard, it could be highlighted that ensuring equality and non-discrimination is one of the principal goals of the CRPD. See e.g.; Lawson in Arnardottir & Quinn (eds) (2009) 88, where it is stated that '[looking at the purpose of the CRPD in art 1] [t]he principle of equality is thus given a central place'; Waddington in Arnardottir & Quinn (eds) (2009) 115, where it is observed that 'The principles of equality and non-discrimination run through the Convention like a red thread'. See also Flovenz in Arnardóttir & Quinn (Eds) (2009) 259; Arnardottir in Arnardottir & Quinn (Eds) (2009) 44.

¹¹⁶ See e.g. CRPD Committee, Concluding Observations on Argentina (2012) para 7.

¹¹⁷ See e.g. CRPD Committee, Concluding Observations on Azerbaijan (2014) para 14, where the Committee requested the state:

[T]o incorporate the concept of reasonable accommodation into its new draft law on the rights of persons with disabilities and to ensure that this piece of legislation and all other relevant laws clearly affirm the denial of reasonable accommodation as a form of discrimination on the grounds of disability'.

accommodation; and the legal protection of non-discrimination, where non-discrimination is recognised by the law as a justiciable right.¹¹⁸ Therefore, the pertinent domestic implementation frameworks will be required to ensure non-discrimination and substantive equality for children with disabilities in order to conform to the fundamental attribute.

3.3.4 Respect for the principle of inclusion of children with disabilities in society

Conceptualising inclusion

The principle of inclusion, which should be understood as the opposite of exclusion and alienation,¹¹⁹ entails the right of all people to full membership of the human family, which recognises their entitlement to participate fully in all aspects of society and to have the same rights and responsibilities.¹²⁰ Inclusion cannot be achieved if persons/children with disabilities face obstacles that prevent them from, amongst others, full participation in the society.¹²¹ Hence, inclusion requires the eradication of the barriers and social structures that obstruct persons/children with disabilities from participation.¹²²

A number of theorists and authors such as Jones have discussed the concept of inclusion in respect of persons with disabilities.¹²³ For example, Jones observes that there are at least three crucial factors or 'dimensions of inclusion' that together facilitate the inclusion of persons with disabilities in society.

These are: a non-discriminatory attitude towards persons with disabilities; the guarantee of access and

¹¹⁸ See 2.4.1 in Chapter 2 for a discussion on the obligations imposed on states parties to the CRPD in the implementation of equality and non-discrimination under CRPD's art 5.

¹¹⁹ Jones 'Inclusion, social inclusion and participation' in Rioux; Basser & Jones (eds) (2011) 57.

¹²⁰ Jones in Rioux; Basser & Jones (eds) (2011) 57.

¹²¹ It is noteworthy that exclusion from society and obstacles that prevent participation in society by children with disabilities constitute one of the major challenges facing children with disabilities in Africa, as explained in 1.1.1 in Chapter 1 of the study.

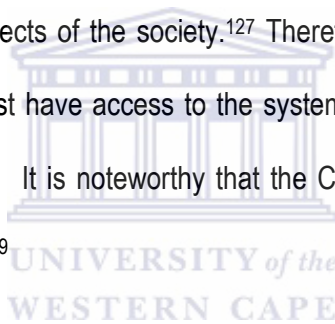
¹²² Jones in Rioux; Basser & Jones (eds) (2011) 57.

¹²³ See e.g. Jones in Rioux; Basser & Jones (eds) (2011); Lawson in Amardóttir & Quinn (eds) (2009) 89-93.

participation in every area of life; and the provision of support to persons with disabilities to facilitate their inclusion in the community.¹²⁴

Inclusion through accessibility and participation

The dimension of access and participation in ensuring inclusion builds on the social model of disability which seeks to identify and eliminate restrictions which prevent inclusion.¹²⁵ There is a nexus between access and participation within the context of ensuring inclusion. First, it is accessibility that makes participation possible since without access, persons/children with disabilities are excluded from most aspects of life.¹²⁶ Secondly, accessibility to places and services fosters inclusion because where children/persons with disabilities do not have access to services and places; they would be excluded from the life, activities and many other aspects of the society.¹²⁷ Therefore, in order to ensure the attribute of inclusion, children with disabilities must have access to the systems of society and they must be able to participate in all aspects of society.¹²⁸ It is noteworthy that the CRPD recognises both accessibility and participation as its general principles.¹²⁹



¹²⁴ Jones in Rioux; Basser & Jones (eds) (2011) 58. (Access and participation can be regarded as factors that influence inclusion separately or jointly. See below for further discussion. They can also be regarded as crucial stand-alone 'human rights based' concepts-The CRPD regards accessibility and participation as separate general principles in art 3, with participation and inclusion recognised as a single general principle).

¹²⁵ Jones in Rioux; Basser & Jones (eds) (2011) 59.

¹²⁶ See generally CRPD Committee, General Comment No 2 (2014) para 1; Yeatman A 'What can disability tell us about participation?' in Jones M & Basser Marks LA (eds) *Explorations on law & disability in Australia* (2000) 181-202. See also Jones in Rioux; Basser & Jones (eds) (2011) 60; Young IM *Justice and the politics of difference* (1990).

¹²⁷ See e.g. General Comment No 9, para 39, where the CRC Committee observes that: '...inaccessibility...is a major factor in the marginalization and exclusion of children with disabilities...'

¹²⁸ It is noteworthy that while inclusion broadly connotes a passive concept in that persons/children with disabilities must be included by others in the society; participation broadly enunciates active conceptualisation in that it requires the agency of persons/children with disabilities to participate. This entails that children with disabilities must also take the initiative to be included by actively participating in all aspects of the society.

¹²⁹ See CRPD, art 3(c) & (f). The general principles of the CRPD are significant as they are supposed to 'serve as a filter through which discrete pieces of existing law should be run to assess conformity with the object and purpose of the CRPD'. See Lord JE 'Accessibility and human rights fusion in the CRPD: Assessing the scope and content of the accessibility principle and duty under the CRPD' (2010) 6. The other nexus between accessibility and participation can be appreciated by the fact that persons/children with disabilities have the right to be accorded access to participation and they will utilise their agency to claim that access and ensure their

Indeed, the CRPD appreciates the role that accessibility plays by recognises that it enables 'persons with disabilities to live independently and participate fully in all aspects of life.'¹³⁰ Similarly, in its general comment on article 9 of the CRPD, the CRPD Committee has acknowledged the crucial role that accessibility plays in facilitating the inclusion and participation in addition to the independent living of persons/children with disabilities in society.¹³¹ Accordingly, accessibility will enable persons/children with disabilities to participate fully in all aspects of life of the community, thereby being included in society. Above all, in highlighting its significance, the CRPD recognises accessibility as a general principle and a 'substantive right'.¹³²

On its part, participation further fosters inclusion because persons/children with disabilities will have a voice and they will be regarded as active participants in the community as individuals with autonomy.¹³³ Hence, it also entails that whenever decisions or actions are being taken affecting the community, persons/children with disabilities will take part in the decision making processes. Similarly, whenever rights of persons/children with disabilities are being implemented, persons/children with disabilities will be actively involved. Thus, participation will result in the inclusion of persons/children with

participation. See CRPD, art 4(3) & 33(3). This entails that there must be mechanisms that accord persons/children with disabilities access to participation. This will require all mechanisms that facilitate participation to be made accessible to children with disabilities.

¹³⁰ See CRPD, art 9(1), which provides in part that:

'To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment...and to other facilities and services open or provided to the public, both in urban and in rural areas.'

See also Lord (2010) 9-10.

¹³¹ See General Comment No 2 (2014) paras 1, 13, 14 & 23. (See e.g. para 1, where the Committee highlights that: 'Accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society'.)

¹³² See CRPD, arts 3(f) & 9. Although it could be said that art 9 of the CRPD merely imposes an obligation on the state to ensure accessibility but it does not guarantee accessibility as a right, Lord has acknowledged that accessibility could be considered a right or a state duty under art 9 of the CRPD. See Lord (2010) 18.

¹³³ See e.g. CRC Committee, General Comment No 5, para 12; Carp (1998) 118, where it is acknowledged that participation entails a recognition that the participating parties are partners and participants in taking actions that affect them.

disabilities in society.¹³⁴ Thus, inclusion cannot be achieved if persons/children with disabilities do not participate by being heard and acknowledged. The principle of participation is particularly relevant to children with disabilities because they are often perceived 'as a justifiable exception to participative processes'.¹³⁵ Participation is also significant for children with disabilities since the CRPD in article 7(3) guarantees children with disabilities the right to participate in all decision making processes that affect them. Furthermore, in article 4(3) the CRPD imposes the obligation to ensure that person with disabilities, including adults and children with disabilities, in addition to civil society organisations and should actively participate in the implementation of the CRPD and in all decision making processes regarding matters that concern persons with disabilities.¹³⁶

On its part (as discussed in Chapter 2), the CRC guarantees all children, including children with disabilities, the right to participation;¹³⁷ while the CRC Committee recognises participation as one of the four cardinal principles of the CRC and that the principle is vital with regard to the right of children with disabilities to be heard.¹³⁸ In its comment on the right of the child to participation under CRC's article 12, the CRC Committee has further indicated that children with disabilities have to exercise this right as a group and as individuals.¹³⁹ Furthermore, participation entails that there must be mechanisms for feedback from policy makers on the steps they have taken in ensuring that they attach due weight to the views

¹³⁴ See e.g. Jones in Rioux; Basser & Jones (eds) (2011) 57, where it is highlighted that: '[T]he right to inclusion requires that people with disabilities are not only seen, but are heard and acknowledged...Inclusion requires the removal of barriers and social structures which impede participation'.

¹³⁵ See Byrne in Freeman (2012) 430.

¹³⁶ The principle of participation is also significant in the 'disability rights field' through the concept reflected in the slogan 'Nothing about us without us' ('nothing for persons with disabilities without the persons with disabilities'), which stood out during the drafting of the CRPD and which inspired the participation of DPOs in the drafting process. See Kayess & French (2008) 4; De Beco (2011) 16.

¹³⁷ See CRC, art 12.

¹³⁸ See CRC, art 12; CRC Committee, General Comment No 5, paras 12; General Comment No 9, para 32. See 2.3.3 in Chapter 2 for the discussion in this regard.

¹³⁹ See CRC Committee, General Comment No 12 'The right of the child to be heard' (2009) para 9.

obtained from children with disabilities in executing action affecting the children.¹⁴⁰ Hence, the children must be informed about the outcome of the views that they presented and they must be entitled to agree with the outcome or to present another 'point of view' or to appeal against the decision if the matter involves administrative or judicial processes.¹⁴¹

Inclusion through non-discrimination and 'facilitation'

Non-discrimination will ensure the inclusion of persons/children with disabilities by facilitating their enjoyment of human rights on an equal basis with others.¹⁴² As discussed above, disability based discrimination is the major cause of the marginalisation and exclusion of children/persons with disabilities in society by preventing, amongst others, their access and participation on an equal basis with others. Hence, it is significant to protect persons/children with disabilities from all forms of discrimination, including discriminatory attitudes which portray disability in terms of the medical model of disability in addition to promoting stereotypes and negative attitudes against them.¹⁴³ Indeed, it is said that attitude to persons/children with disabilities 'which conflates impairment with personhood is itself a barrier to inclusion'.¹⁴⁴ This is the case because it will lead to the society perceiving disability as a personal tragedy that requires persons/children with disabilities to become 'heroes' who should overcome disability and fit into the society.¹⁴⁵ Therefore, such wrong images regarding disability will promote discriminatory attitudes

¹⁴⁰ See generally CRC Committee, General Comment No 12, para 45.

¹⁴¹ CRC Committee, General Comment No 12, para 45.

¹⁴² See generally Jones in Rioux; Basser & Jones (eds) (2011) 58.

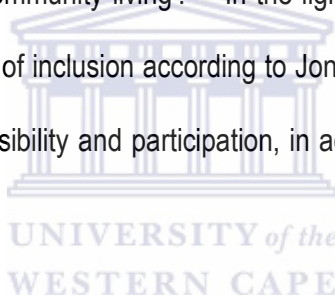
¹⁴³ See generally Jones in Rioux; Basser & Jones (eds) (2011) 58-59.

¹⁴⁴ See generally Jones in Rioux; Basser & Jones (eds) (2011) 59; Rioux M 'On second thought: Constructing knowledge, law, disability and inequality' in Herr S; Gostin L & Koh H (eds) *The human rights of persons with disabilities: Different but equal* (2003) 287-318.

¹⁴⁵ See Jones in Rioux; Basser & Jones (eds) (2011) 59. See also Crow L 'Hellen Keller: Rethinking the problematic icon' (2000) 15(6) *Disability & Society* 845-859, 857- 859, where it is observed that persons with disabilities must be portrayed the way they are since if they are depicted as 'superheroes' who should overcome disability, they will be forced to live up the expectations that the 'perfectionist'

against children with disabilities by requiring them to adjust to the society thereby leading to their exclusion.¹⁴⁶

Furthermore, Jones states that it is necessary to 'facilitate' the inclusion of person with disabilities in order to ensure their meaningful engagement with the society's systems.¹⁴⁷ It is noteworthy that Jones uses the concept of 'facilitation' to imply the provision of measures of support designed to meet the 'individual needs' of persons/children with disabilities in addition to the provision of reasonable accommodation, although facilitation is not *per se* the provision of reasonable accommodation.¹⁴⁸ Indeed, the CRPD in article 19 requires states parties to provide support measures and services to children/persons with disabilities that support/foster their active participation and independent living in society in implementing the right to 'community living'.¹⁴⁹ In the light of the foregoing discussion, it can be appreciated that the conceptualisation of inclusion according to Jones implies respect for the roles that the principles of non-discrimination, accessibility and participation, in addition to the provision of support play, in ensuring inclusion.



Inclusion of children with disabilities in society as a significant attribute

As discussed in Chapter 2, the inclusion of children with disabilities in all aspects of society is one of the crucial attributes of the 'human rights based approach' to disability taken by the applicable human rights

image of an 'icon' imposes on them, thereby forcing them to adjust to the society instead of the society adjusting to accommodate them.

¹⁴⁶ See Jones in Rioux; Basser & Jones (eds) (2011) 58-59, where it is observed that the way person with disabilities are portrayed in society shape reflect the values of the society and may stand in the way of true inclusion. See also Morris J *Pride against prejudice: Transforming attitudes to disability* (1991); Goggin C & Newell C *Disability in Australia: Exposing a social apartheid* (2005).

¹⁴⁷ Jones in Rioux; Basser & Jones (eds) (2011) 60 & 61.

¹⁴⁸ See e.g. Jones in Rioux; Basser & Jones (eds) (2011) 60, where the author gives examples of how facilitation might be achieved, which include: providing medicine or equipment if necessary in a particular situation; providing a support person to a particular individual to enable him or her to participate; or providing an alternative strategy to an existing one in order to achieve an end. For further discussion on the concept of reasonable accommodation, see 3.3.3 above.

¹⁴⁹ See CRPD, art 19(b). However, it is noteworthy that the notion of 'facilitation' according to Jones appears to go beyond art 19 of the CRPD in its conceptualisation of inclusion.

law in providing for the rights of children with disabilities. Indeed, it has been highlighted (in the previous chapter) that the CRPD and the CRC, amongst other treaties, have a number of provisions that embody the principle of inclusion.¹⁵⁰ For example, article 19 of the CRPD guarantees the right to ‘community living’, which requires persons/children with disabilities to live in the community and to be provided with support services and programmes that facilitate their free and independent living in the community.¹⁵¹ Amongst others, the right requires that children with disabilities, including children with mental and psychosocial disabilities, must not be placed in institutions but must live in the community.¹⁵² In this regard, the CRPD Committee has taken a firm and clear stand that states parties must ensure that in implementing the right to independent and ‘community living’, persons/children with disabilities must not be placed in institutions but they must live in the community.¹⁵³

Similarly, through the concept of inclusive education, the CRPD expects measures to be taken which ensure that, as a priority, children with disabilities should attain an education in the general/mainstream education system together with other children.¹⁵⁴ Thus the CRPD requires the provision of education to be consistent with what could be described as the ‘inclusive schools approach’, which refers to the provision of education in the general or mainstream school system where all children,

¹⁵⁰ See e.g. CRPD’s art 9- accessibility; art 19-independent and ‘community living’; art 20- personal mobility; art 24- inclusive education; & art- 30 on participation in cultural life, recreation, leisure and sport. See also Jones in Rioux; Basser & Jones (eds) (2011) 77-78.

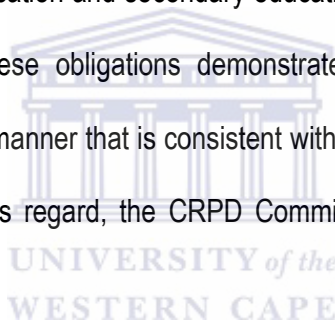
¹⁵¹ See also CRPD Committee, Concluding Observations on Australia (2013) paras 41 & 42, where the Committee further requested Australia to ‘develop and implement a national framework for the closure of residential institutions and to allocate the resources necessary for support services that would enable persons with disabilities to live in their communities’.

¹⁵² See e.g. CRPD Committee, Concluding Observations on Austria (2013) paras 36 & 37, where the Committee highlighted that placing persons/children with disabilities in institutions ‘is contrary to article 19 of the Convention’ whereupon it recommended that Austria should ‘step up efforts towards de-institutionalization and allowing persons with disabilities to choose where they live’. See also Kamundia (2013), 67; Parker & Clements (2008) 511 & 512; Kayess & French (2008) 29.

¹⁵³ See e.g. Concluding Observations on El Salvador (2013) para 42; Concluding Observations on China (2012) para 31 & 32; Concluding Observations on China (Macao, China) (2012) para 93.

¹⁵⁴ See CRPD, art 24(2)(a); Schulze (2010) 135; CRPD Committee, Concluding Observations on Sweden (2014) para 48, where the Committee urged Sweden ‘to guarantee the inclusion of all children with disabilities in the mainstream education system and ensure that they have the required support’; Concluding observation on Azerbaijan (2014) para 40, where the Committee show concern that ‘children with disabilities continue to be placed in special boarding and other specialized schools’; Concluding Observations on Australia (2013) para 45; Concluding Observations on Austria (2013) para 40.

including children with disabilities, learn together.¹⁵⁵ Indeed, a number of the core elements of the right to inclusive education under article 24 reinforce the need for children with disabilities to attend mainstream schools in their communities together with other children.¹⁵⁶ First, article 24(2)(a) requires states parties to ensure that 'persons with disabilities are not excluded from mainstream education'.¹⁵⁷ Similarly, article 24(2)(d) recognises the obligation to ensure the provision of the support required by learners with disabilities within the general education system to facilitate their effective education. In addition, art 24(3) requires measures to be taken to enable persons with disabilities to learn social and development skills to facilitate their full and equal participation in education 'and as members of the community'. Above all, article 24(2)(b) obliges states parties to take measures that ensure that '[p]ersons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live'. These obligations demonstrate that the education of children with disabilities must be implemented in a manner that is consistent with the principle of ensuring their inclusion in the community or society.¹⁵⁸ In this regard, the CRPD Committee has expressly recommended that



¹⁵⁵ Three approaches to the education of children with disabilities can be distinguished, namely, the special schools approach, integrated schools approach and inclusive schools approach. See generally WHO & World Bank (2011) 210. The special schools concept entails the provision of education to children with disabilities in separate/segregated settings where they attend their own schools. Integrated education refers to the education approach where children with disabilities are expected to attend same schools with other children in the same class or in a different class provided they manage to cope or adjust to fit in the set up. In terms of the integrated approach, no adjustments are made to the education/school system but it is the learners with disabilities who are required to get 'fixed' or 'adjusted' to fit the system. On its part, the inclusive schools approach involves adjusting the school/education system through removal of barriers and provision of necessary facilities so that the system should accommodate all children, including children with disabilities. Under the inclusive schools approach, it is the system that gets 'fixed' or 'adjusted' to fit the learners with disabilities. States parties to the CRPD need to appreciate the differences in these approaches to avoid confusing inclusive education with integrated education. Indeed, the CRPD Committee had expressed its concern with regard to Austria that "there is some confusion between "inclusive" education and "integrated" education" in the provision of education to children with disabilities in Austria. See Concluding Observations on Austria (2013) para 40. For further discussion on inclusive education and other approaches to education of children with disabilities, see WHO & World Bank (2011) 210 & 211; Kamga (2013) 27, 30-36; Chilemba (2013) 8-11; Mittler M 'Special needs education: An international perspective' (1995) 22 *British Journal of Special Education* 105; Byrne B 'Hidden contradictions and conditionality: Conceptualisations of inclusive education in international human rights law' (2013) 28 *Disability & Society* 232-244; Ngwenya (2013) 141-146.

¹⁵⁶ See CRPD art 24(2).

¹⁵⁷ Schulze (2010) 135.

¹⁵⁸ Indeed, if children with disabilities fully participate in the mainstream education, it could be said that they have equal participation in education unlike if they are educated in special or integrated settings. In addition, the double goal of ensuring access by children with

states parties should move away from the special schools approach to the inclusive schools approach by providing the education of all children with disabilities in inclusive mainstream schools.¹⁵⁹ It is noteworthy that CRC Committee also recommends the 'inclusive schools approach' to be the main way of providing the education of children with disabilities.¹⁶⁰

In addition, the CRPD and the CRC recognises the right of children with disabilities to family-type alternative care, which facilitates their inclusion and participation in society.¹⁶¹ In elaborating this right in respect of children with disabilities, the CRC Committee has stated that children with disabilities have the right to family-type alternative care, which should promote de-institutionalisation (discouraging the placement of children with disabilities in child care institutions), and which requires extended families and foster families to receive necessary training and encouragement to take care of children with disabilities.¹⁶² Likewise, the CRPD requires the provision of alternative care within the immediate family or the community.¹⁶³ Indeed, in its concluding observations to Tunisia, the CRPD Committee urged the State Party to '[t]ake steps to replace institutional care for boys and girls with disabilities with community-based care.'¹⁶⁴ This implies that the right to alternative care of children with disabilities under the CRC and the

disabilities to 'inclusive primary education' and their access to primary schools 'in the communities in which they live' (CRPD, art 24(2)(b)) can more likely be achieved if children with disabilities attend inclusive mainstream schools.

¹⁵⁹ See e.g. Concluding Observations on Argentina (2012) paras 37 & 38, where the Committee advised Argentina to , amongst others, 'take the necessary steps to ensure that pupils with disabilities who attend special schools are enrolled in inclusive schools and to offer reasonable adjustments for students with disabilities within the general education system'; Concluding Observations on China (2012) paras 35 & 36, where the Committee recommended that China must, amongst others, 'reallocate resources from the special education system to promote the inclusive education in mainstream schools, so as to ensure that more children with disabilities can attend mainstream education'.

¹⁶⁰ See generally CRC Committee, General Comment No 9, para 66.

¹⁶¹ CRPD, art 23(5); CRC, art 20; CRC Committee, General Comment No 9, paras 45-47.

¹⁶² CRC, art 20; General Comment No 9, paras 45, 46, 47.

¹⁶³ CRPD, art 23(5), which provides that: 'States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.'

¹⁶⁴ CRPD Committee, Concluding Observations on Tunisia (2011) para 17(d).

CRPD must be consistent with the principle of ensuring the inclusion of children with disabilities in society.¹⁶⁵

In view of these 'inclusion focused' rights under the CRPD and the CRC, it can be observed that the two treaties demonstrate their resolve to promote and ensure the inclusion of children with disabilities in society. It is thus not surprising that the CRPD has been hailed as the first human rights treaty to expressly mention the concept of inclusion in its provisions.¹⁶⁶ As discussed above, the Convention recognises full inclusion in society (together with full participation) as one of its eight general principles.¹⁶⁷ Similarly, the CRPD Committee explicitly recognises inclusion as a key notion that states parties must strictly adhere to.¹⁶⁸ Above all, in terms of the standards under the CRC, the duty to ensure the inclusion of children with disabilities in society is regarded as the guiding principle in the implementation of the rights of children with disabilities.¹⁶⁹ On its part, the Committee on CESCR has also highlighted the obligation to ensure the inclusion of all children/persons with disabilities in society.¹⁷⁰ Therefore, the pertinent domestic

¹⁶⁵ It is noteworthy that although the UN Guidelines on Alternative Care appear to appreciate the role that 'residential' or 'institutional' based care might play in complementing family-based care, the Guidelines still emphasise that such forms of care must be resorted to as a necessary exception to family-type and community based alternative care and that such arrangements must be on temporary basis, in the best interests of the child and they should be developed in the context of an overall deinstitutionalisation strategy which aims at progressive elimination of institutional based care strategy. With regard to the establishment of new residential based care, the Guidelines states are specifically expect states to take full account of the deinstitutionalization objective and strategy. See generally UN Guidelines for Alternative Care of Children (2010) para 23.

¹⁶⁶ See e.g. Byrne (2013) 242, where it is highlighted that 'It is the first time in binding international law that any reference has been made to "inclusion" in a treaty text, and for this reason alone is to be welcomed'.

¹⁶⁷ See CRPD, art 3 (c).

¹⁶⁸ See generally Concluding Observations on China (2012) para 36, where the Committee highlights that 'the concept of inclusion is one of the key notions of the Convention...'

¹⁶⁹ See generally General Comment No 9, para 11 (emphasis added by candidate), where, in emphasising the obligation to ensure inclusion, the CRC Committee has observed that:

'Paragraph 1 of article 23 should be considered as the leading principle for the implementation of the Convention with respect to children with disabilities... *The core message of this paragraph is that children with disabilities should be included in the society. Measures taken for the implementation of the rights contained in the Convention regarding children with disabilities, for example in the areas of education and health, should explicitly aim at the maximum inclusion of those children in society*'.

¹⁷⁰ See General Comment No 5 (1994) para 9.

implementation frameworks are expected to foster the inclusion of children with disabilities in society in order to conform to the fundamental attribute.

3.3.5 Incorporation of the paramountcy principle of the best interests of the child

The international law survey in Chapter 2 has established that states are required to recognise the best interests of the child principle as the paramount consideration in all matters affecting children with disabilities.¹⁷¹ The principle expects the best interests of children, as individuals or a group, to be the primary consideration in any undertaking concerning children with disabilities with a view to maximise the enjoyment of their rights and interests. Although the CRC and the CRPD do not make the best interest principle the overriding or paramount consideration,¹⁷² the CRC Committee has stated that in respect of children with disabilities, it should override all other considerations especially in matters concerning budgeting and service provision.¹⁷³ Thus the CRC Committee appreciates the significance of the principle in the enjoyment of the rights of children with disabilities.

Above all, the African Children's Charter (as discussed in Chapter 2) explicitly provides a high standard by elevating the best interest principle to be the paramount consideration in all matters affecting the child.¹⁷⁴ Hence, the principle is required to be an overriding consideration in all matters concerning children with disabilities in terms of the African Children's Charter.¹⁷⁵ Thus the Charter mirrors the position taken by the CRC Committee in respect of children with disabilities. It is noteworthy that since the African

¹⁷¹ See 2.3.3, 2.4. & 2.5.2 in Chapter 2 for the discussion in this regard.

¹⁷² The discussion in this regard is contained in 2.3.3 & 2.4.2 in Chapter 2.

¹⁷³ General Comment No 9, para 30. Hence, the Committee distinguishes the 'normative' standard of the best interests principle by explicitly making it the overriding or paramount consideration in matters affecting children with disabilities (in the context of budgeting and service provision) while not expressly doing the same in respect of other children.

¹⁷⁴ See 2.5.2 in Chapter 2 for the discussion in this regard.

¹⁷⁵ See generally Mezmur (2008) 9.

Children's Charter makes the best interest of the child to be the overriding consideration, the standard it sets should prevail as it provides higher levels of protection than the CRPD's or CRC's standard.¹⁷⁶ This is because the CRPD and the CRC expressly provide that states parties should utilise the provisions in other treaties or domestic human rights documents which provide higher standards of protection than the CRPD's or CRC's frameworks.¹⁷⁷ Therefore, African states parties to the African Children's Charter, the CRC and the CRPD are required to recognise the best interests principle as the overriding consideration in all matters affecting children with disabilities. They are expected to do this by expressly incorporating the principle in their domestic legal frameworks.¹⁷⁸

In view of this, it can be concluded that the principle which requires the best interests of the child to be the paramount consideration in all matters affecting children with disabilities is significant under international human rights law since the law requires the principle to override any other consideration whenever decisions or matters affecting children with disabilities are taken. Accordingly, the pertinent African states parties are expected to expressly incorporate the best interests of the child paramountcy principle in the domestic legal frameworks for implementing the rights of children with disabilities in order for the frameworks to conform to this fundamental attribute.

¹⁷⁶ See generally Amanda 'Evolution of the African Charter on the Rights and Welfare of the Child' (2002) 185.

¹⁷⁷ See CRPD, art 4(4); CRC, art 41.

¹⁷⁸ The CRC Committee has reiterated that states parties to the CRC must incorporate the principle in their domestic laws and make it justiciable before courts. See CRC Committee, General Comment No 5, para 18. It is noteworthy that the best interests principle also informs the application of other general rights to children. For example, the right to primary education includes the right to free and compulsory (primary) education of all children since it is considered to be in the best interest of the child not to be excluded from basic education or to be given the freedom to refuse basic education. See Van Bueren G *The international law on the rights of the child* (1995) 237; Sloth-Nielsen J & Mezmur BD *Free education is a right for me: A report on free and compulsory primary education* (2007) 15.

3.3.6 Protection of survival and developmental rights

The survey of the applicable treaties in Chapter 2 has established that the applicable human rights law provide for rights which protect the life, survival and development of children, including children with disabilities.¹⁷⁹ On its part, the CRC Committee regards the concept of child's life, survival and development as one of the cardinal principles of the CRC. The concept (as discussed in Chapter 2)¹⁸⁰ expects states to identify and address all challenges that threaten the life, survival and development of children;¹⁸¹ which might include poverty, malnutrition, diseases, lack of access to education, harmful practices and negative prejudices. The CRC Committee has observed that this principle 'warrants particular attention where children with disabilities are concerned'.¹⁸² Indeed, the principle is particularly significant in respect of the human rights based approach since children with disabilities, including children with disabilities in Africa, often suffer considerable challenges right from their birth, such as being hidden, killed, abandoned or neglected, which pose a threat to their life, survival and development, as highlighted in Chapter 1.¹⁸³

In addition, it can be observed that the applicable human rights treaties provide for a number of rights which facilitate the survival and development of children with disabilities.¹⁸⁴ These rights include: protection from harmful practices;¹⁸⁵ protection from violence and abuse;¹⁸⁶ protection from neglect and abandonment;¹⁸⁷ family-type alternative care;¹⁸⁸ health;¹⁸⁹ social protection;¹⁹⁰ and education.¹⁹¹ For

¹⁷⁹ See e.g. 2.3.3, 2.3.4, 2.4.3 & 2.5.2 in Chapter 2.

¹⁸⁰ See 2.3.3 in Chapter 2 for the discussion in this regard.

¹⁸¹ See e.g. Carp (1998) 123.

¹⁸² General Comment No 9, para 31.

¹⁸³ See 1.1.1 in Chapter 1 for a discussion in this regard. See also General Comment No 9, paras 3 & 31.

¹⁸⁴ See generally African Children's Charter, art 5(2).

¹⁸⁵ See e.g. African Children's Charter, art 21(1); CRC Committee, General Comment No 9, para 31. See also CRPD, art 8(1)(b), which requires states parties to take effective and immediate measures to combat harmful practices against persons with disabilities.

¹⁸⁶ See e.g. CRC, art 19(1); CRPD, art 16(1); African Children's Charter, art 16(1).

¹⁸⁷ See e.g. CRC, art 19(1); CRPD, art 23(3); African Children's Charter, art 16(1).

example, article 16 of the CRPD guarantees the right to freedom from all forms of exploitation, violence and abuse. This right is significant as it appreciates that persons/children with disabilities are more likely to experience 'abuse and exploitation both inside and outside the home through placement in care and educational, social or medical institutions'.¹⁹²

In view of this, it can be concluded that the right of children with disabilities to survival and development is significant under international human rights law. In this regard, the CRPD Committee requires states parties to take effective measures that protect children with disabilities from all forms of violence, exploitation and abuse, which must including carrying out investigations, awareness-raising campaigns and training; prosecuting perpetrators; undertaking research and collecting data; and enacting legislation.¹⁹³ Above all (as discussed in Chapter 2),¹⁹⁴ the African Children's Charter is regarded as providing for higher standards of protection for survival and developmental rights for children.¹⁹⁵ Therefore, African states parties to the African Children's Charter, the CRPD and the other applicable treaties have the obligation to ensure the realisation of survival and developmental rights for children with disabilities. Accordingly, the recognition of survival and developmental rights for children, including children with

¹⁸⁸ See e.g. CRC, art 20; CRPD, art 23(5); African Children's Charter, art 25(2).

¹⁸⁹ See e.g. CRC, art 24(1); CRPD, art 25; African Children's Charter, art 14(1).

¹⁹⁰ See e.g. CRC, art 26(1); CRPD, art 28(2).

¹⁹¹ See e.g. CRC, art 28(1); CRPD, art 24; African Children's Charter, art 11(1).

¹⁹² See Byrne in Freeman (2012) 431.

¹⁹³ See e.g. CRPD Committee, Concluding observations on El Salvador (2013) para 36(a), (b) & (e), where the Committee requested El Salvador to 'adopt legislation to prevent, investigate and punish exploitation, violence and abuse involving persons with disabilities, with a particular focus on women and children'; 'set up protocols for and training in the investigation of cases of violence against persons with disabilities'; 'adopt measures to prevent the exploitation of children with disabilities for the purpose of begging'. See also Concluding Observations on China (2012) paras 29 & 30; Concluding Observations on Tunisia (2011) para 17(a); Concluding Observations on Spain (2011) paras 24(a) & 52; Concluding Observations on Argentina (2012) para 30.

¹⁹⁴ See 2.5.3 in Chapter 2 for the discussion in this regard.

¹⁹⁵ See African Children's Charter, art 1(3); Chirwa (2002) 158.

disabilities, is one of the pertinent fundamental attributes and it should be reflected in the measures that states adopt for implementing the rights of children with disabilities at national level.

3.4 Extrapolating the fundamental attributes of an ‘appropriate’ domestic implementation framework

As discussed above, African states parties to the applicable treaties are expected to ensure that the pertinent domestic implementation measures they undertaken should comply with the fundamental attributes discussed in 3.3 above. In the following sections, the study explains how each implementation measure should be expected to reflect the fundamental attributes in order to comply with the international standards for ensuring the appropriate domestic implementation of the rights of children with disabilities.¹⁹⁶



3.4.1 Constitutional implementation framework

The applicable international human rights law acknowledges that the constitution of a state, as the supreme law of the land, could contain a justiciable Bill of Rights that includes the rights of the child, the rights of persons/children with disabilities and general substantive rights.¹⁹⁷ The Bill of Rights could also contain a general equality and non-discrimination clause which provides for the right to freedom from all forms of discrimination.¹⁹⁸ Such non-discrimination clauses are expected to expressly include disability among the prohibited grounds of discrimination.¹⁹⁹ The non-discrimination and equality provisions are further expected

¹⁹⁶ In this regard, the study seeks to conceptualise the fundamental attributes as analytical tools that could be utilised in assessing or demonstrating compliance by the domestic implementation mechanisms with the international standards for ensuring the appropriate national implementation of the rights of children with disabilities.

¹⁹⁷ See e.g. CRC Committee, General Comment No 5, para 21; Sloth-Nielsen in Alen; Bosly; De Bie et al (eds) (2007) 188; Van Reenen & Combrinck (2011) 144.

¹⁹⁸ See Abramson (2008) 40.

¹⁹⁹ See CRC Committee, General Comment No 9 (2006) para 9.

to recognise the duty to take special measures, including affirmative action measures, to eradicate factors that cause inequalities against marginalised groups/categories of people such as persons/children with disabilities.²⁰⁰ The relevant law further expects the constitutional provisions on the rights of the child to, amongst others, clearly recognise the best interests of child principle as the primary consideration in all matters affecting children; facilitate the inclusion of children with disabilities in society, including by fostering accessibility and participation by persons/children with disabilities; protect survival and developmental rights of children; and to generally guarantee them the entitlement to full enjoyment of human rights.²⁰¹ The provisions could also specifically oblige the government to implement laws and policies that ensure this.

3.4.2 Legislative implementation framework

It is noteworthy that legislative measures are the preferred means for implementing the rights of children, including children with disabilities.²⁰² Hence, states are expected to enact specific or general laws that facilitate the implementation by complying with the fundamental attributes discussed above. The states are expected to achieve this through disability specific laws, child specific laws, anti-discrimination statutes and other general or sectoral laws.²⁰³ In addition, legal measures are the recommended and prescribed means for implementing the right to freedom from discrimination in terms of the international standards.²⁰⁴

Disability specific legislation

²⁰⁰ See HRC, General Comment No 18, para 10; CRC Committee, General Comment No 5, para 12.

²⁰¹ This will be consistent with the purpose of the CRPD. See CRPD, art 1.

²⁰² CRC, art 4(1); General Comment No 9, paras 17 & 18.

²⁰³ CRC Committee, General Comment No 5, paras 18-22; CRC Committee, General Comment No 9, para 17.

²⁰⁴ See e.g. CRPD, art 5(2); CRPD Committee, Concluding Observations on Australia (2013) para 15; CRC Committee, General Comment No 9, para 9(a) & (b); Committee on ESCR, General Comment No 5 (1994) para 16.

Firstly, the applicable human rights law recognises that states have the option of adopting disability specific legislation that provides for the rights and welfare of all persons and children with disabilities.²⁰⁵ The legislation is supposed to have an inclusive definition of disability and other definitions that are based on the CRPD and the social and human rights models.²⁰⁶ The legislation is thus expected to recognise that disability has many faces, including visual, hearing, mental, and intellectual disabilities; and to provide for the entitlement of all children with disabilities to enjoy human rights regardless of the face of disability.²⁰⁷ Among others, it should explicitly provide for inclusive education; accessibility, participation and inclusion in the community; and freedom from disability based discrimination, including the obligation to provide reasonable accommodation. Furthermore, the disability law is required to contain, reflect and be founded on the eight principles that animate the CRPD.²⁰⁸ In addition, the disability law is expected to contain a provision detailing the particular substantive rights of children with disabilities and how they ought to be implemented.



Child rights specific legislation

Due to the importance of protecting the rights of the child, states parties are urged to enact child protection legislation.²⁰⁹ As a starting point, the legislation is expected to expressly indicate that it applies to all children, including children with disabilities. Hence, states are encouraged to ensure that the non-discrimination clause in child protection laws should expressly include disability among the prohibited

²⁰⁵ See CRPD Committee 'Reporting Guidelines' (2009), para A3.2(b).

²⁰⁶ See Concluding Observations on Tunisia (2011) para 9.

²⁰⁷ See CRPD Committee, Concluding Observation on Spain (2011), paras 11 & 20; Combrinck in Sloth-Nielsen (ed) (2008) 303.

²⁰⁸ CRPD, art 3; Schulze (2010) 44-45.

²⁰⁹ See e.g. CRC Committee, Concluding observations on Colombia (2006) paras 9 & 10; CRC Committee, General Comment No 5, paras 18, 20, 22.

grounds of discrimination.²¹⁰ The child protection legislation is also expected to be 'comprehensive' by capturing all possible aspects of the life of the child, including juvenile justice, family-type alternative care, inclusive education, adoption, health, protection from violence, abuse and harmful practices; and other survival and developmental rights.²¹¹ For example, the statute could promote de-institutionalisation in providing alternative care for children with disabilities, including children with mental, psychosocial and intellectual disabilities.²¹² Similarly, in view of the obstacles faced by children with disabilities in Africa, such as violence, the child protection statute is expected to prohibit and criminalise all forms of violence against children, including parental neglect, harmful practices, traditions, and cultural or religious customs.²¹³

The legislation is also expected to expressly address the rights of children with disabilities (by containing explicit provisions on children with disabilities). Amongst others, it could contain provisions that foster the inclusion of children with disabilities in society, which is a strict obligation imposed by the CRC Committee in terms of article 23(1) of the CRC. It should further entrench the best interests of the child as the paramount consideration whenever action pertaining to a child is taken. Furthermore, such legislation is expected to have provisions that ensure that all children, including children with disabilities, should enjoy the rights guaranteed to children in the CRC, African Children's Charter and the CRPD. Hence, the child protection legislation could contain provisions that comprehensively capture the pertinent provisions in the CRPD, CRC and African Children's Charter. Moreover, such law is expected to define a child as a person

²¹⁰ See e.g. CRC Committee, Concluding observations on Libyan Arab Jamahiriya (2003) paras 7 & 8. See also CRC Committee, General Comment No 9 (2006), paras 9(a) & 17.

²¹¹ The child specific legislation could only make general provision for all aspects of the life of child and recognise that the specific and salient issues would be dealt with under sector specific legislation, where applicable.

²¹² See e.g. CRC Committee, General Comment No 9, para 47; CRPD Committee, Concluding Observations on Spain (2011) para 36.

²¹³ See CRC Committee, General Comment No 9, para 31.

under the age of 18.²¹⁴ In addition, the child protection statute is expected to have a provision that outlines the principles on which it is based, which must reflect the four cardinal principles of the CRC.²¹⁵

Anti-discrimination legislation

It is further acknowledged that states have the option of adopting generic anti-discrimination legislation that protects the right to freedom from all forms of discrimination and facilitates the achievement of substantive equality. Amongst others, the legislation is required to expressly recognise disability as a prohibited ground of discrimination; oblige the state to take special and affirmative action measures to foster *de facto* equality; impose the duty to provide reasonable accommodation; and provide for judicial remedies in cases where the right to equality and non-discrimination is threatened or violated.²¹⁶

Other applicable general and sectoral laws

The relevant human rights law further expects states to take legislative measures that ensure that children with disabilities are able to enjoy rights in every child sector in addition to all relevant sectors of the society. Hence all general and sector specific laws that impact on children with disabilities must facilitate the enjoyment of the pertinent rights by children with disabilities.²¹⁷ This could be achieved by harmonisation of all applicable sectoral and general laws.²¹⁸ Such sectors include those relating to health, education, transport and infrastructure (including construction), access to information and information communication

²¹⁴ See e.g. African Children's Charter, art 2. See also Committee, General Comment No 7 'Implementing child rights in early childhood' (2005), para 4; UNICEF (2007) 3-5.

²¹⁵ See CRC Committee 'Guidelines for initial reports' (1991) para 13; CRC Committee, General Comment No 5 (2003), para 22.

²¹⁶ See e.g. CRPD Committee, Concluding Observations on Australia (2013) para 15, where the Committee recommends the explicit protection of non-discrimination in anti-discrimination laws; CRC Committee, General Comment No 9, para 9(a), where the Committee recommends that states parties to the CRC must 'include specific prohibition of discrimination on the ground of disability in specific anti-discrimination laws'.

²¹⁷ See generally CRC Committee, General Comment No 5, para 22; General Comment No 9, para 17. This entails that all applicable laws must be consistent with disability specific legislation, if any; child protection legislation; and the applicable human rights treaties.

²¹⁸ See CRC Committee, 'Initial reporting guidelines' (1991) para 9(a).

and technology (ICT). For example, building and construction laws would contain guidelines on how accessibility should be ensured.²¹⁹ This would facilitate the respect for the principle of inclusion through accessibility and participation by children with disabilities.²²⁰ Similarly, legislation on ICT could provide for the measures to be taken to ensure that children with disabilities should be able to access and use ICT.²²¹ In respect of the education sector, for example, states could have a specific legislation that provides for all matters relating to education, which should conceptualise the education of children with disabilities in terms of inclusive education. In view of this, the education statute is expected to dedicate a specific provision on the education of persons/children with disabilities which should, among others, recognise the right to inclusive education at all levels which prioritises the inclusive schools approach.²²²

In addition, the sectoral laws are expected to provide for non-discrimination in the enjoyment of the sector specific rights that such laws seek to protect. Hence, the laws must contain general anti-discrimination clauses that expressly prohibit disability based discrimination. Ultimately, the relevant human rights law requires all general and sectoral laws that impact on children to cater for children with disabilities and ensure their enjoyment of human rights on an equal basis with others.²²³

²¹⁹ CRPD Committee, Concluding Observations on Tunisia (2011) paras 20 & 21.

²²⁰ See CRPD, art 9; Lord (2010).

²²¹ See CRPD, art 9; CRC Committee, General Comment No 9, para 37

²²² See generally, CRPD art 24.

²²³ It can be observed that a legislative framework containing the features explained above will ensure conformity to a number of fundamental attributes by making explicit recognition of disability and the rights of children with disabilities; recognising the principle of inclusion; entrenching the principle of the best interests of the child; protecting survival and developmental rights; and recognising the right to equality and non-discrimination.

3.4.3 Policy implementation framework

As discussed above, the applicable human rights law expects states to adopt specific or general policies that cater for all aspects of life of children with disabilities. Hence, states could adopt a disability specific policy, a policy on the rights and affairs of the child (child policy) or the youth (youth policy), amongst others.²²⁴ Each policy is expected to guide the implementation of the rights of children with disabilities in the relevant areas of focus. Accordingly, there could be, amongst others, a policy approach to outline measures that aim at eradicating barriers to the inclusion of children with disabilities in mainstream society while also ensuring equal opportunities for children with disabilities to exercise human rights on an equal basis as other children; to raise public awareness on the rights of children with disabilities and the understanding of disability for the purposes of eradicating all negative attitudes and prejudices against children with disabilities; to prioritise the provision of inclusive education in mainstream schools; to quell all forms of violence against children with disabilities; and to ensure the mainstreaming of disability. It is noteworthy that in accordance with the international standards, the policies should conceptualise disability in terms of the social and human rights models of disability.²²⁵

3.4.4 Fundamental attributes of an 'appropriate' domestic implementation framework

As established by the discussion above, the applicable international human rights law expects a domestic implementation framework to conform to the fundamental attributes discussed in 3.3 above in order to be in a position to satisfy the international standards for ensuring the appropriate national implementation of the rights of children with disabilities (in general). The six fundamental attributes, as identified by the thesis, are: adherence to the social and human rights models in conceptualising disability; explicit mention and

²²⁴ See e.g. AYC, art 12, which provides in part that 'Every State Parties [sic] shall develop a comprehensive and coherent national youth policy'.

²²⁵ As discussed in 3.2 above, states are also expected to 'domesticate' the applicable treaties and ensure the justiciability of the rights they contain. If they have child protection or disability specific legislation, the same statute could incorporate the applicable treaties.

recognition of disability and the rights of children with disabilities; respect for non-discrimination which ensures substantive equality for children with disabilities; respect for the principle of inclusion of children with disabilities in the society; recognition/incorporation of the principle of the best interests of the child as the paramount consideration in all matter affecting children with disabilities; and recognition/protection of survival and developmental rights for children, including children with disabilities.

It should further be highlighted that a particular attribute could also contain a number of 'sub-categories' that constitute salient aspects of the respective attribute which should be complied with in order to conform to the broad attribute. This is because conformity to a specific attribute might entail discharging particular obligations in realising the rights that the broad attribute seeks to protect. For example, as demonstrated above, the implementation of non-discrimination that ensures substantive equality requires states to discharge specific obligations, which include: expressly recognising disability as prohibited ground of discrimination; providing reasonable accommodation; prohibiting all forms of discrimination; and taking special and affirmative action measures to facilitate *de facto* equality. In addition, adherence to the principle of inclusion entails taking measures that facilitate inclusion, accessibility, and participation in society by children with disabilities, in addition to implementing 'inclusion focused' rights such as inclusive education and 'community living'. Therefore, states are required to comply with the relevant 'sub-categories' in conforming to the broader attribute in implementing the rights of children with disabilities at national level.

It is noteworthy that the attributes have the potential to foster the full human rights enjoyment since they also reflect both the cardinal principles of the CRC and a number of general principles of the CRPD. Indeed, the CRC Committee has recognised four of the six fundamental attributes as the four cardinal principles that should guide the implementation of the rights contained in the CRC. These are non-discrimination; survival and development; best interests of the child; and participation which is included in the inclusion attribute. The other two attributes, namely, disability explication and adherence to the human rights model of disability are crucial principles in respect of the rights of persons/children with disabilities as

highlighted above.²²⁶ Furthermore, the attributes also comprise inclusion, participation, accessibility and non-discrimination, which are recognised among the general principles of the CRPD in article 3. Above all, the CRC Committee has emphasised that achieving inclusion should be the main goal in implementing the rights of children with disabilities. Therefore, to the extent that these six fundamental attributes embrace the four cardinal principles of the CRC; reflect three of the eighth principles of the CRPD; and comprise crucial disability specific principles; they have the potential to address the 'double jeopardy' disadvantaged position of children with disabilities that is attributed to the challenges that they face on account of their childhood (addressed through the attributes that mirror the four CRC cardinal principles) and the obstacles they face on account of their disability (addressed through the other disability specific attributes). Accordingly, conformity to the attributes could foster the full human rights enjoyment by children with disabilities.

In view of this, it is argued that any measures adopted by states to implement the rights of children with disabilities must conform to these fundamental attributes in order to comply with international standards for ensuring the appropriate national implementation of the rights of children with disabilities.²²⁷ Accordingly, the domestic implementation frameworks of Malawi and South Africa will be assessed against these fundamental attributes in a separate chapter of the thesis in order to comparatively appraise the national implementation of the rights of children with disabilities in the two jurisdictions.²²⁸

²²⁶ The detailed discussion in this regard is contained in in 3.3.1 & 3.3.2 above.

²²⁷ It is acknowledged by the candidate that there could be other fundamental attributes which might also be recognised as constituting the standards for implementing the rights of children with disabilities. These could include the need to recognise and respect the eight general principles of the CRPD in addition to the four cardinal principles of the CRC. Indeed, the general principles of the CRPD are supposed to be respected and reflected in the implementation measures taken by states parties to the CRPD. See e.g. CRPD Committee, Reporting guidelines (2009) para 7; Byrne in Freeman (2012) 428. Nonetheless, since the six fundamental attributes have captured a number of the CRPD's general principles and all the four cardinal principles of the CRC, the attributes are in a better position to shape the standards for implementing the rights of children with disabilities.

²²⁸ In view of this, the thesis utilises these attributes as 'analytical tools' for assessing the extent to which implementation measures adopted by states (Malawi and South Africa) comply with international standards for ensuring the appropriate domestic implementation of the rights of children with disabilities. The assessment is contained in Chapter 5.

3.5 Concluding observations

This chapter has analysed the fundamental attributes that reflect the international standards for ensuring the appropriate national implementation of the rights of children with disabilities in Africa. It has extrapolated the attributes and international standards by picking out the main thematic requirements that the law emphasises for states to adhere to in ensuring full human rights enjoyment by children with disabilities. It has been highlighted that these attributes reflect the 'human rights based' approach to disability that the applicable international law takes in guaranteeing the rights of children with disabilities. Accordingly, it has been argued that conformity to these attributes could entail compliance with the international standards for ensuring the appropriate national implementation of the rights.

The chapter has further observed that the applicable human rights law requires states to put in place a domestic implementation framework, which comprises constitutional, legislative, policy and other measures, for the implementation of the rights of children with disabilities at national level. It has been highlighted that the framework must conform to the fundamental attributes in order to comply with international standards. The attributes must be complied with in the domestic implementation of the rights of children with disabilities in general. In addition, it has been established certain attributes have a number of 'sub-categories' that constitute salient aspects of the respective attribute. For example, the broad attribute of inclusion includes a 'sub-category' that expects states to promote and respect 'inclusion focused rights' such as 'community living'. Hence, the implementation measures must be designed in such a way that they must reflect and recognise the fundamental attributes, including their specific 'sub-categories'.

In view of this, the domestic implementation frameworks of Malawi and South Africa will be assessed against the six fundamental attributes, including their pertinent 'sub-categories', which this chapter has extrapolated, in order to comparatively appraise the implementation of the rights of children with disabilities in the two jurisdictions. However, it is relevant to first provide a description of the two

countries' domestic implementation frameworks in order to have a clear understanding of the measures that the two states are taking in implementing the rights of children with disabilities at national level. In view of this, the next chapter provides a descriptive and comparative discussion of the applicable domestic implementation frameworks in the two states. The subsequent chapter will provide an assessment of how the frameworks conform to the fundamental attributes.



Chapter 4

Surveying the general domestic frameworks for implementing the rights of children with disabilities in Malawi and South Africa

4.1 Introduction

Purpose and outline of chapter

The previous chapter has determined the international standards for ensuring the appropriate national implementation of international human rights law applicable to children with disabilities in Africa. It has done this by determining the six fundamental attributes that the measures taken by pertinent African states parties, which include Malawi and South Africa, for implementing the rights of children with disabilities at national level should conform to in order to satisfy the international standards.¹ The chapter observed that the pertinent states parties are required to take national implementation measures which comprise constitutional, legislative, policy and institutional/administrative measures; in addition to ensuring the domestic incorporation (domestication) of the relevant treaties and the justiciability of the rights contained in the treaties for implementing the rights at national level. The implementation measures together form a country's domestic implementation framework.

This chapter provides a descriptive and comparative discussion of the domestic implementation frameworks pertaining to the rights of children with disabilities in Malawi and South Africa. (The frameworks will then be assessed against the six fundamental attributes in the subsequent chapter.) In achieving its objectives, the chapter first looks into the constitutional measures followed by the legislative mechanisms

¹ The six fundamental attributes are discussed in 3.3 and outlined in 3.4.4 in Chapter 3.

before exploring the policy frameworks.² The chapter further discusses the issue relating to the domestic incorporation of the applicable treaties and the justiciability of the rights of children with disabilities in the two jurisdictions before providing the immediate broad concluding observations.

In respect of its approach, this chapter provides a description, as opposed to a critical analysis, of the main features and contents of the domestic implementation frameworks of Malawi and South Africa. The discussion takes the approach of describing what each implementation measure contains and also pointing out the aspects that are missing from the frameworks in terms of the major features that the applicable international law expects a domestic implementation framework to contain. In accordance with the scope and objectives of the thesis, this chapter focuses on the two countries' Constitutions and the major applicable laws and policies. The applicable laws include the principal child protection statutes; and disability or anti-discrimination legislation. The applicable policies include disability specific policies or strategies. With regard to general or sectoral laws and policies, the chapter looks into education laws and policies that are applicable in the context of the right to education of children with disabilities since the thesis utilises the right to inclusive education in illustrating how 'inclusion focused' rights should be implemented in order to conform to the 'sub-categories' of the fundamental attribute of inclusion. Hence, it limits the discussion to education related documents.

Furthermore, in keeping with the approach taken by the discussion of the applicable treaties in Chapter 2, the discussion of the two countries' domestic frameworks in this chapter first looks into the provisions relating to non-discrimination and then at the provisions that relate to children with disabilities broadly including those pertaining to other substantive rights such as the right to education. The chapter follows the simultaneous descriptive comparison style, which entails that Malawi's and South Africa's frameworks will be discussed together with one following the other in the same discussion.

² The policy framework includes policies, strategies and national action plans.

4.2 Analysis of Malawi's and South Africa's domestic implementation frameworks

4.2.1 Constitutional frameworks

Malawi's 1995 Constitution

The Constitution of the Republic of Malawi (Malawi Constitution) contains a justiciable Bill of Rights in Chapter 4,³ which, amongst others, provides for the right to equality and non-discrimination that is contained in section 20.⁴ The non-discrimination provision prohibits all forms of discrimination; including disability based discrimination by listing disability among the prohibited grounds of discrimination. It is noteworthy that the Constitution regards equality as a 'non-derogable' right, which cannot be derogated from during a declaration of a state of emergency.⁵ However, the right to equality and non-discrimination can be restricted if the limitation complies with the general limitation clause in section 44 of the Constitution.⁶ The Constitution also recognises that special measures in the form of legislation might be taken to achieve *de facto* equality and it also recognises that legislation could be enacted to prohibit and criminalise the perpetration of discriminatory practices.⁷ In addition, section 24(2) of the Constitution, which

³ See Malawi Constitution, sec 15, which provides that Chapter 4 of the Constitution contains justiciable provisions.

⁴ See sec 20(1), which provides that:

'Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition'.

⁵ Sec 45(2)(g). In terms of the Constitution, a violation of such non-derogable rights attracts criminal sanctions. See sec 46(5).

⁶ In terms of the limitation clause in sec 44(1) & (2), disability based discrimination can be excused if the discrimination, amongst others, qualifies as limitation that is implemented through a law of general application; is consistent with international human rights standards; and is reasonable and justifiable in an open and democratic society.

is contained in the Bill of Rights, prohibits all forms of discrimination against women, including on the basis of sex or gender; and requires legislation to be enacted to ensure non-discrimination in favour of women. Hence, the provision also guarantees the right to non-discrimination for girls and young women with disabilities. Above all, the Constitution recognises equality and non-discrimination as one of its fundamental principles.⁸ In this regard, Chirwa has observed that the ‘Constitution has entrenched equality as a central tenet of the Malawi constitutional and political framework.’⁹

The Bill of Rights also has a specific provision that sets out the rights of the child in section 23.¹⁰

The rights contained in the provision are equally applicable to children with disabilities by virtue of the non-

⁷ See Malawi Constitution, sec 20(2), which provides that: ‘Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts’. Although the drafting does not expressly mention affirmative action or special measures, the provision is broad enough to include the taking of such measures which are backed by legislation and are aimed at achieving *de facto* equality for children with disabilities.

⁸ See sec 12(v) & (vi). Sec 12(v) provides that: ‘all persons have equal status before the law’; while sec 12(vi) recognises that no person or institution is above the law. Chirwa regards this position as an elevation of the right to equality and non-discrimination by the Constitution in appreciation of its significance. See Chirwa (2011) 141.

⁹ Chirwa (2011) 157. It is noteworthy that the Malawi Constitution, sec 12(2) also provides that every individual has the duty to ensure non-discrimination by respecting other human beings without discrimination.

¹⁰ Sec 23 provides as follows:

‘(1) All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them.

(2) All children shall have the right to a given name and a family name and the right to a nationality.

(3) Children have the right to know, and to be raised by, their parents.

(4) All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and, in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance.

(5) Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to—

(a) be hazardous;

(b) interfere with their education; or

(c) be harmful to their health or to their physical, mental or spiritual or social development.

(6) For purposes of this section, children shall be persons under the age of sixteen years’.

discrimination provision in section 21 of the Constitution. A number of observations can be made regarding the child-specific provision in section 23. First, it guarantees all children the right to equal treatment before the law thereby recognising that children with disabilities, including those born out of wedlock, are entitled to enjoy the right to equality and non-discrimination.¹¹ Above all, the provision requires the best interests of the child to be a primary consideration in all actions affecting the child.¹² It can be observed that the Constitution regards the best interests principle to be ‘a’ as opposed to ‘the’ primary consideration. On the face of it, this entails that the principle does not have the paramount or overriding effect in the manner envisaged by the African Children’s Charter. Nonetheless, the constitutional entrenchment of the principle implies that any action that does not respect the best interests of the child could be invalidated for being unconstitutional.

Secondly, the child-specific provision guarantees all children the right to a given name, a family name and nationality.¹³ The right to a name is crucial for the identity and dignity of the child.¹⁴ On its part, the right to nationality is significant in preventing a situation where children become stateless.¹⁵ Thirdly, the child-specific constitutional provision also guarantees the right of a child to know and be raised by his or her parents.¹⁶ This provision appreciates that children should be brought up by parents, and hence, implicitly recognises the right of a child to be brought up within a family setting.¹⁷ Fourthly, the provision on the rights

¹¹ See sec 23(1). See also Chirwa (2011) 199.

¹² See sec 23(1).

¹³ Sec 23(2).

¹⁴ See Chirwa (2011) 209. The right to a name is different from the right to ‘birth registration’. Currently birth registration is not recognised as a right under the Constitution. Nevertheless, the Child Care Protection and Justice Act (CCPJA) (discussed below) makes the registration of the birth of a child compulsory on the parent or guardian. See sec 3(2). Issues relating to birth registration are provided for in the Births and Deaths Registration Act, Chapter 24:01 of the Laws of Malawi.

¹⁵ See Chirwa (2011) 211. It is noteworthy that nationality/citizenship in Malawi can be acquired by birth, descent, marriage, registration, naturalisation or as provided for under applicable legislation. See Chirwa (2011) 211.

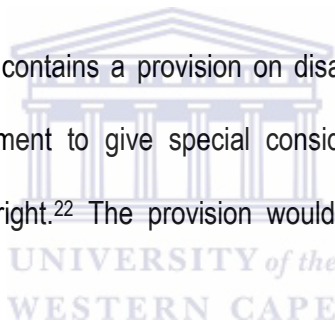
¹⁶ Sec 23(3). See also Chirwa (2011) 211-217 for further discussion on this sub-section.

¹⁷ See generally *In re Adoption of David Banda*, Adoption Cause No 2 of 2006 (High Court of Malawi, unreported). See also Chirwa (2011) 212-213.

of the child contains a sub-section that guarantees all children the right to be protected from economic exploitation, treatment or work or punishment that could be hazardous or have negative impact on their education or development in general.¹⁸

Furthermore, the child-specific provision contains a clause that guarantees the right of a child to be provided with reasonable maintenance by his or her guardians or parents, regardless of whether the parents are married or unmarried.¹⁹ Above all, this sub-section also explicitly guarantees children with disabilities the right to live in safety and security and to be provided with assistance by the state.²⁰ However, the child-specific provision in the Constitution (section 23) defines a child, for purpose of this section, as a person under the age of 16 years, contrary to the applicable international standards.²¹

In addition, the Bill of Rights contains a provision on disability within the context of the right to development, which requires government to give special consideration to children and persons with disabilities in the application of the right.²² The provision would promote the developmental rights of children with disabilities.²³



¹⁸ Sec 23(5). See also sec 22(2), which guarantees the right of every family member to legal protection from neglect, cruelty or exploration. For the minimum age in employment, see Employment Act, 6 of 2000, secs 21(1) & 22. For further discussion on this constitutional sub-sec (sec 23(5)), see generally Chirwa (2011) 217-221.

¹⁹ Sec 23(4).

²⁰ See sec 23(4). See also ACPF *In the best interest of the child: Harmonising laws in Eastern and Southern Africa- Country briefs* (2012) 102.

²¹ See sec 23(6). See also Chirwa (2011) 202; *Chikhwaza v Chikhwaza & Others* [1997] 1 MLR 246, 251 (High Court of Malawi). (It is noteworthy that Malawi's child protection legislation also defines a child as a person below the age of 16 years. See 4.2.2 below for further discussion of the implication of this age definition of the child).

²² See sec 30. Sub-sec 30(1) states that:

'All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and persons with disabilities in particular shall be given special consideration in the application of this right'.

²³ The Constitution also sets out the rights of children who are in conflict with the law under section 42(g). These include the rights to be separated from adults when imprisoned; to be imprisoned only as a last resort and for the shortest period of time; and to be treated in

The Constitution also outlines Principles of National Policy (state directives) in section 13 that are not justiciable, but directory. Nevertheless, courts are expected to have regard to them in applying the Constitution and the laws or reviewing executive decisions.²⁴ Indeed, the courts have hinted that they might adjudicate matters that raise the state directives in section 13 by invoking the provisions under sections 9 and 14.²⁵ The Principles have provisions relating to the rights of children that are contained in section 13(h). The provisions expect the state to adopt child related laws and policies that seek to 'encourage and promote conditions conducive to the full development of healthy, productive and responsible members of society'.²⁶

The state directives also contain disability related provisions,²⁷ which, amongst others, aim to secure the accessibility of persons with disabilities to public places. The provision seems to suggest that the state is not expected to take measures that promote accessibility by persons/children with disabilities to private places, which is regrettable and inconsistent with international standards.²⁸ The other drawback

a manner that envisages their later reintegration in society. The Constitution further guarantees rights such as education which apply to all children. See sec 25.

²⁴ See sec 14.

²⁵ See generally *Gable Masangano (Suing on his own behalf and on behalf of all prisoners in Malawi) v the Attorney General & Others* Constitutional Cause No 7 of 2007; *Chimwemwe Mphembedzu v The Republic* [2011] MWHC 12; *The State and Secretary to the President and Cabinet, Ex Parte Dr Bakili Muluzi* Miscellaneous Civil Application No 3 of 2011.

²⁶ See sec 13(h).

²⁷ Sec 13(g). The relevant principles provide that:

'The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals-

(g) Persons with Disabilities

To enhance the dignity and quality of life of persons with disabilities by providing—

(i) adequate and suitable access to public places;

(ii) fair opportunities in employment; and

(iii) the fullest possible participation in all spheres of Malawian society'.

²⁸ See e.g. CRPD, art 9 (1), which requires states to ensure accessibility to 'facilities and services open or provided to the public, both in urban and in rural areas'. See also Lord (2010) 8.

could be that the disability related provisions, among others, do not expressly recognise the need for government to take measures aimed at equalising opportunities for persons/children with disabilities in other sectors such as education apart from employment. On a positive note, the provisions expect the government to ensure 'the fullest possible participation in all spheres of Malawian society' by persons with disabilities. This provision is commendable as it is all encompassing and hence, it might address the gaps highlighted above.²⁹

Therefore, in the light of the foregoing discussion, it can be observed that, on the whole, the Constitution lays a solid basis for the legal and other measures that would be taken to implement the rights of children with disabilities although certain gaps could be highlighted.

South Africa's 1996 Constitution

The Constitution of the Republic of South Africa (South Africa's Constitution) contains a justiciable Bill of Rights,³⁰ which must to be interpreted in accordance with applicable international law.³¹ The Bill of Rights contains, amongst others, a provision that recognises the right to equality and non-discrimination.³² The

²⁹ Indeed, the full participation of persons/children with disabilities in the Malawian society can only be achieved if the government takes measures which ensure their enjoyment of human rights on an equal basis with others.

³⁰ See South Africa's Constitution Act 108 of 1996. See also sec 38, which gives competence to the courts to adjudicate matters relating to infringements of any right in the Bill of Rights.

³¹ See sec 39(1)(b); *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa* 1996 (4) SA 671 para 26. See also South Africa's Constitution, sec 233, which requires the court to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

³² See South Africa's Constitution, sec 9, which provides that:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

section expressly prohibits unfair discrimination on the basis of disability, amongst other grounds.³³ It further prohibits direct and indirect discrimination perpetrated by both state and non-state actors.³⁴ In addition, the provision prescribes the adoption of national legislation that protects all persons from unfair discrimination.³⁵ Furthermore, it recognises that special measures may be taken to achieve *de facto* equality.³⁶ Above all, the Constitution recognises the achievement of equality as one of its founding principles.³⁷ This could be regarded as a demonstration that the Constitution appreciates the significance of ensuring equality and non-discrimination for all persons, including children with disabilities.

It is noteworthy that the right to freedom from disability based discrimination under South Africa's Constitution is derogable during a state of emergency.³⁸ In addition, equality is not an absolute right as long as the restriction complies with the Constitution's limitation test set out in section 36.³⁹ The jurisprudence

* (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'.

For further discussion on the right to equality in the Bill of Rights under South Africa's Constitution, see Currie & De Waal (2013) 209-249.

³³ South Africa's Constitution, sec 9 (3).

³⁴ Section 9(3) prohibits state induced discrimination while section 9(4) prohibits discrimination by any person.

³⁵ See sec 9(4), which contains the prescription that 'National legislation must be enacted to prevent or prohibit unfair discrimination'.

³⁶ See sec 9(2) which provides in part that: 'To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.

³⁷ See sec 1(a), which provides in part that: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: ...the achievement of equality...'

³⁸ See Table on non-derogable rights under sec 37 of the Constitution which only recognises freedom from unfair discrimination on the bases of sex, religion, language, social origin, race, and colour as non-derogable. Hence, unfair disability based discrimination may be excused during a state of emergency. Under the Malawi Constitution, non-discrimination is non-derogable.

³⁹ See generally sec 36, which provides that rights may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Amongst others, the limitation must be done taking into account relevant factors as developed by the Constitutional Court in the case of *The State v T Makwanyane and M Mchunu* (1995 (3) SA 391(CC), para 104), which include: the nature of the right; the importance of the limitation; the relationship between the limitation and its purpose; and less restrictive means to achieve the purpose. See also Devenish GE *A commentary on the South African Constitution* (1998) 90.

from South Africa's courts demonstrates that the restriction must ensure that human dignity is not impaired.⁴⁰ Moreover, since the limitation can only be done by a law of general application, the jurisprudence has demonstrated that it is more difficult for the limitation clause to 'rescue' a law that unfairly discriminates on prohibited grounds as compared to laws that restrict other rights.⁴¹

In addition, the Bill of Rights contains a number of provisions that set out the rights of children and provisions that contain rights that are applicable to children. Firstly, the Constitution dedicates a specific provision to the rights of the child in section 28.⁴² The rights contained in the section are equally applicable

⁴⁰ See e.g. *President of South Africa v Hugo* 1997 6 BCLR 708 (CC) par 41; *Harksen v Lane NO* 1998 (1) SA 300 (CC); *New National Party of SA v Government of RSA* 1999 (3) SA 19. The Court has further developed the test for unfair discrimination, first set out in the *Harksen* case. The test can be reduced to three questions, namely: 1. Does the differentiation amount to discrimination? 2. If so, was it unfair? 3. If so, can it be justified in terms of the limitation clause (sec 36)? For further discussion of the approach taken by the courts in matters relating to equality and non-discrimination in general, see *Albertyn & Goldblatt* (1998) 248-276.

⁴¹ Most (if not all) of the cases involving unfair discrimination that reached the stage of invoking the constitutional limitation clause resulted in a finding of unconstitutionality. See e.g. *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC). See also Iles K 'A fresh look at limitations: Unpacking section 36' 2007 (23) *South African Journal of Human Rights* 68-92, 90-91; Currie & De Waal (2013) 218, where it is stated that: 'The limitations analysis [involving equality and non-discrimination] has, however, never resulted in the impugned law being upheld.'

⁴² Sec 28 states as follows:

'(1) Every child has the right-

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f), not to be required or permitted to perform work or provide services that-

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the, shortest appropriate period of time, and has the right to be -

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

to children with disabilities by virtue of the non-discrimination provision in section 9 of the Constitution. A number of observations can be made regarding the child-specific provision. Amongst others, the section guarantees a child the right to a name and nationality from birth.⁴³ The provision has been interpreted as including the right of a child to birth registration.⁴⁴ In addition the child-specific section contains a stipulation that recognises the right of a child to family care or parental care, and to appropriate alternative care when removed from the family environment.⁴⁵ In terms of the stipulation, the Constitution places the duty on the parents and the family of a child to care for the child, which is considered to imply that the state has the duty to support the family institution.⁴⁶ This provision is also regarded as recognising the right to family life,⁴⁷ which further entails that family life should be promoted by ensuring that children should not be separated from their parents or their care unless it is in the best interests of the child to do so.⁴⁸ In addition, there must be a procedure for automatic review of a decision to remove a child from the care of parents.⁴⁹



(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years'.

⁴³ Sec 28(1)(a).

⁴⁴ See Skelton A 'Children' in Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 603. In terms of Births and Deaths Registration Act 51 of 1992, a child is required to be registered in a birth register immediately after birth. See sec 9(6).

⁴⁵ Se 28(1)(b).

⁴⁶ See Skelton in Currie & De Waal (2013) 604.

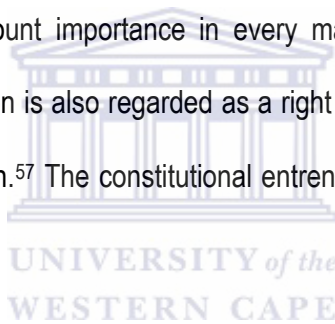
⁴⁷ See e.g. *Du Toit v Minister of Welfare and Population Development* 2001 (12) BCLR 125 (T) para 18; *S v M* 2008 (3) 232 (CC) para 38; Skelton in Currie & De Waal (2013) 604.

⁴⁸ See e.g. *Patel v Minister of Home Affairs* 2000 (2) SA 343 (D); Skelton in Currie & De Waal (2013) 605.

⁴⁹ See e.g. *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC); Skelton in Currie & De Waal (2013) 605. The right to 'family care' is also considered to include the right of the child to be cared for by the extended family.

The child-specific section further guarantees the child the right to basic nutrition, shelter, basic health care services and social services;⁵⁰ and not to be required or permitted to perform work or provide services that place at risk the child's, education or social development.⁵¹ In addition, it recognises rights that protect children from various forms of 'violence', including protection from 'maltreatment, neglect, abuse or degradation';⁵² and the right not to be used directly in armed conflict, and to be protected in times of armed conflict.⁵³ Furthermore, it recognises the right of the child not to be detained except as a measure of last resort and only for the shortest appropriate period of time;⁵⁴ and the right of the child to legal proceedings in civil proceedings.⁵⁵

Above all, the child-specific section in the Constitution contains a sub-section that requires the best interest of the child to be of paramount importance in every matter concerning the child.⁵⁶ The best interests concept under the Constitution is also regarded as a right in itself and as a principle that aids the interpretation of other rights of children.⁵⁷ The constitutional entrenchment of the principle entails that any



⁵⁰ Sec 28(1)(c). The Constitutional Court has interpreted the provisions in sec 28(1)(c) in *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR1169 (CC). The Court, among others, ruled that parents have the primary duty to realise the rights, especially SERs, if such children are in the care of the parents; while the state's obligations are discharged by taking 'reasonable' legal and policy measures for the realisation of such rights. See also Sloth-Nielsen in Alen; Bosly; De Bie M et al (eds) (2007) 95. Sec 28(1)(f)(ii). For further discussion on the provision see Sloth-Nielsen J 'The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 *South African Journal of Human Rights* 210-231; Skelton in Currie & De Waal (2013) 610-612.

⁵¹ Sec 28(1)(f)(ii).

⁵² Sec 28(1)(d). It is also considered that SERS or SERs entitlements of children can also be generated from this provision. See e.g. Sloth-Nielsen (2001) 230-231. For a detailed discussion on sec 28 of the Constitution and the rights of children broadly in the Bill of Rights and under the Constitution see Skelton in Currie & De Waal (2013) 598-623; see Sloth-Nielsen J 'Children' in Cheadle H; Davis D & Haysom N (eds) *Constitutional Law and the Bill of Rights* 2ed (2005) 23-1 –23-32.

⁵³ Sec 28(1)(g).

⁵⁴ Sec 28(1)(g).

⁵⁵ Sec 28(1)(h).

⁵⁶ Sec 28(2).

⁵⁷ See Skelton in Currie & De Waal (2013) 619 & 620.

action that does not respect the principle could be invalidated for being unconstitutional.⁵⁸ However, it also implies that the principle could be limited in accordance with the Constitution's limitation clause in section 36 like other rights contained in the Constitution with the effect that although the principle is 'paramount', it is not absolute.⁵⁹

Furthermore, it is noteworthy that, in contrast to Malawi's position, South Africa's Constitution does not have specific substantive provisions on disability apart from recognising disability as a prohibited ground of discrimination. In light of the foregoing analysis, it can be observed that although a few gaps that remain could be highlighted, the constitutional framework, on the whole, lays a solid framework for the implementation of the rights of children with disabilities in South Africa.



4.2.2 Legislative frameworks

Malawi has a number of laws that affect the implementation of the rights of children with disabilities.⁶⁰ The legislation includes the 2012 Disability Act⁶¹ and the 2010 Child Care, Protection and Justice Act (CCPJA)⁶² in addition to the Education Act.⁶³ Similarly, South Africa has adopted a number of laws that have relevance

⁵⁸ A discussion of the way the courts of South Africa have applied the best interests principle is contained in 5.3.5 in the next chapter.

⁵⁹ See e.g. *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC) para 188; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) para 55; in *Currie & De Waal* (2013) 621- 624. It is noteworthy that the Constitution defines a child as a person under the age of 18. See sec 28(6). This age definition is consistent with the international standards, especially the standards under the African Children's Charter. The Constitution also guarantees rights such as education which apply to all children. See sec 29.

⁶⁰ As explained in 4.1 above, the discussion focuses on the major statutes such as child protection legislation and disability or anti-discrimination laws in addition to education sectoral laws.

⁶¹ Act 8 of 2012.

⁶² Act 22 of 2010, published on 30 July 2010.

⁶³ Chapter 30:01 of the Laws of Malawi.

to the implementation of the rights. The legislation includes the Children's Act,⁶⁴ the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),⁶⁵ and education legislation such as South African Schools Act (SASA)⁶⁶ and the National Educational Policy Act (NEPA)⁶⁷.

Malawi: Child rights protection and disability legislation

Child Care, Protection and Justice Act

The Child Care, Protection and Justice Act (CCPJA) is fundamentally relevant to all children, including children with disabilities, in Malawi since it is the country's principal child protection legislation. Firstly, the CCPJA domesticates the CRC and African Children's Charter.⁶⁸ However, it is noteworthy that the CCPJA does not contain a general equality and non-discrimination clause that recognises the state as the duty bearer of the right to freedom from discrimination. Instead, it refers to non-discrimination in the provision that sets out parental duties and responsibilities towards children.⁶⁹ Among others, the section obliges parents or guardians to 'protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards' in complementing the parental

⁶⁴ 38 of 2005 as amended by the Children's Amendment Act 41 of 2007.

⁶⁵ Act 4 of 2000.

⁶⁶ Act 84 of 1996.

⁶⁷ Act 27 of 1996.

⁶⁸ Sec 4(c) of Third Schedule. See 4.2.4 below for further discussion on domestication.

⁶⁹ See CCPJA sec 3, which seeks to complement sec 23(3) & (4) of the Constitution that sets out the duty of parents to raise and provide reasonable maintenance to their children. The relevant provision (Sec 3(1)(b)) of the CCPJA states that:

'1) In addition to the duties and responsibilities imposed by section 23 of the Constitution, a parent or guardian-...

b) has responsibilities whether imposed by law or otherwise towards the child which include the responsibility to-

i) protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards...

except where the parent or guardian has forfeited or surrendered his or her rights and responsibilities in accordance with the law'.

duties imposed by section 23 of the Constitution.⁷⁰ Accordingly, this provision in the Act recognises the parent or guardian, and not the state, as the primary duty bearer in ensuring that all children are protected from discrimination.⁷¹ In addition, the Act does not contain any provision relating to the taking of special measures, including affirmative action, in favour of any marginalised categories of children such as children with disabilities, in order to foster *de facto* equality.⁷²

Furthermore, the Act contains two particular provisions relating to children with disabilities.⁷³ The first provision expects district assemblies or local government authorities to register all children with disabilities within their areas of jurisdiction and give them assistance, whenever possible, to enable them 'grow up with dignity among other children and to develop their potential and self-reliance'.⁷⁴ The section, however, does not explain the nature of assistance to be given. On its part, the second provision requires the proceedings in a child justice court to ensure that '[c]hildren with disabilities are accorded assistance to meet their special needs where necessary'.⁷⁵

However, the Act does not dedicate a special section which sets out the substantive rights of children with disabilities (apart from the two provisions discussed above).⁷⁶ Nevertheless, it sets out a number of rights of children which also apply to children with disabilities by virtue of the non-discrimination

⁷⁰ See Sec 3(1)(b).

⁷¹ The courts in Malawi are yet to interpret the provision. Nonetheless, it could be understood as setting out parental duties and responsibilities towards their children since it expressly requires parents and guardians to protect children from discrimination.

⁷² This could be attributed to the failure by the Act to make express provision for the right to equality and non-discrimination enforceable by the state.

⁷³ Secs 72 & 145(d).

⁷⁴ Sec 72.

⁷⁵ Sec 145(d).

⁷⁶ Secs 72 & 145(d).

clause in section 20 of the Constitution. These include rights that protect the survival and development of the child.⁷⁷

Furthermore, it is noteworthy that the Act does not have a specific provision that highlights the principle of best interests of the child to be of paramount consideration in all matters relating to children.⁷⁸ In addition, it takes after the Constitution in defining a child as person below the age of 16 (as highlighted in 4.2.1 above), thereby contradicting the pertinent international standards.⁷⁹ This implies that the child-specific rights in the Constitution and the rights of children contained in the CCPJA are only guaranteed to children, including children with disabilities, who are below the age of 16. This position is regrettable as it is not only inconsistent with the standards under the African Children's Charter and the CRC, which recognise a child as a persons under the age of 18, but also fails to provide protection to children with disabilities between the ages of 16 and 18 years.

Ultimately, it can be observed from the foregoing discussion that the omission to include a stand-alone provision setting out the rights of children with disabilities makes the Act fail to provide explicit and dedicated guidelines on how the rights should be implemented aside from the general provisions that set out the rights applicable to all children. Therefore, the CCPJA could serve as the main enabling legislation in implementing the rights of children with disabilities if it is applied alongside the domesticated provisions of the CRC and African Children's Charter since the Act itself does not contain a substantive provision that sets out the measures to be taken in implementing their rights.

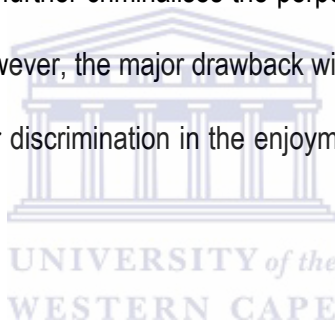
Disability Act

⁷⁷ See e.g. provisions on alternative care in Part II Division 3 of the Act; & on parental care, including birth registration, in sec 3.

⁷⁸ Nonetheless, since the Act domesticates CRC and African Children's Charter, the best interests of the child provisions in the two treaties can be enforced domestically through litigation.

⁷⁹ See CCPJA, sec 2.

The Disability Act is Malawi's new disability specific legislation.⁸⁰ The Act defines and recognises the 'concept' of freedom from disability based discrimination.⁸¹ The definition of discrimination is similar to the one contained in the CRPD.⁸² However, unlike the CRPD's definition, the Act does not recognise the denial of reasonable accommodation as constituting discrimination although it defines the concept.⁸³ As a result, the Act merely defines reasonable accommodation without the concept having any implication for non-discrimination. Furthermore, the Disability Act does not contain a general equality and non-discrimination provision which prohibits discrimination in the enjoyment of all rights that the Act contains. Instead, the Act only prohibits discrimination in the enjoyment of specified substantive rights. Such prohibitions are contained in sections that come immediately after particular sections that make provision for the respective substantive rights.⁸⁴ The Disability Act further criminalises the perpetration of discrimination in the exercise of the named substantive rights.⁸⁵ However, the major drawback with this approach is that in the event that persons/children with disabilities suffer discrimination in the enjoyment of an unspecified substantive right,



⁸⁰ Before the adoption of the Disability Act, issues relating to disability were provided for in the Handicapped Persons Act (HPA), which was enacted in 1971 as Malawi's disability specific legislation.

⁸¹ See sec 2, which provides for the definition of discrimination. The provision also defines other relevant concepts such as disability, accessibility and inclusive education.

⁸² See sec 2 which defines discrimination (on the basis of disability) as:

'[A] distinction, exclusion or restriction on the basis of disability, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, of any human rights or fundamental freedoms, in the political, economic, social, cultural, civil or other field'.

The CRPD's definition goes further to recognise the denial or reasonable accommodation as constituting disability based discrimination.

⁸³ In fact, the interpretative section in the Act (sec 2) provides the definition of reasonable accommodation separately from that of discrimination.

⁸⁴ See e.g. sec 7- healthcare services ; sec 9- accessibility ; sec 11- education and training; sec 15- social protection and services; sec 20- cultural and sporting activities and recreational services; & sec 22- housing.

⁸⁵ See e.g. secs 9(2), 11(2) & 15(2). In fact, the violation of the prohibition of discrimination gives rise to both a justiciable civil action and criminal liability. See also sec 31, which entitles any person with disability to seek judicial redress for violation of the human rights provisions of the Act.

they will have no claim under the Disability Act.⁸⁶ In addition, the Act does not expressly recognise the obligation to take special measures for purposes of achieving *de facto* equality of persons/children with disabilities.⁸⁷

Furthermore, the Disability Act contains a number of rights which are also applicable to children with disabilities.⁸⁸ For example, it sets out the right to education, including quality primary education, in section 10. The education provision further expressly recognises the right to inclusive education.⁸⁹ However, the Act does not have a specific provision that sets out the rights of children with disabilities. This is regrettable in view of the numerous challenges facing children with disabilities in Malawi. Indeed, this had prompted the CRC Committee to advise Malawi to enact a law that addresses the plight of children with disabilities in 2009.⁹⁰ Accordingly, it was expected that the 2012 Disability Act would contain a provision on children with disabilities which would take into account the recommendations by the Committee.⁹¹

In view of the foregoing analysis, it can be observed that although the Disability Act could be a useful tool in implementing the rights of all persons with disabilities, including children with disabilities, it does not address the gap left by the CCPJA relating to the failure to contain a substantive provision setting

⁸⁶ The implication is that children with disabilities will have to invoke the non-discrimination provisions under the Constitution. In contrast, a person can invoke the provisions on gender equality in the recently enacted Gender Equality Act (in addition to the Constitution) in claiming the right to freedom from gender or sex based discrimination since the Act contains a general non-discrimination clause unlike the Disability Act. See Gender Equality Act 3 of 2013, sec 4, which prohibits all forms of discrimination based on sex.

⁸⁷ Although elsewhere the Act requires the state to take measures for equalisation of opportunities, this is not the same as ensuring substantive equality. See sec 3, which obliges the Government to 'adopt policies and legislation on equalization of opportunities for persons with disabilities'.

⁸⁸ The substantive rights are contained in Part 4 which runs from sec 6 through sec 26. See e.g. sec 6- health care; sec 8- accessibility; sec 14- accessibility; sec 21- housing; & sec 25- access to information and communication technologies .

⁸⁹ See sec 10(a), which requires the government to ensure an inclusive education system in which persons/children with disabilities must not be excluded from the general education system at all levels.

⁹⁰ See e.g. CRC Committee, *Concluding Observations on Malawi* (2009) para 50.

⁹¹ See e.g. CRC Committee, *Concluding Observations on Malawi* (2009) para 50(a), where the Committee recommended that Malawi should, amongst others, '[t]ake all necessary measures to ensure the implementation of legislation providing protection for children with disabilities and consider adopting specific legislation on the issue'.

out the rights of children with disabilities which could outline the measures to be taken in implementing the rights.

Malawi: Other legislation

Malawi has a number of sectoral and general laws that impact on the rights of children with disabilities.⁹² On their part, sectoral laws such as the Education Act⁹³ influence the implementation of the right to education for children with disabilities in addition to ensuring non-discrimination in education.⁹⁴ For example, the recently enacted Education Act, which replaces the old Education Act that was drafted almost six decades ago, expressly recognises the right to freedom from discrimination in education on the basis of disability and other grounds.⁹⁵ It also recognises the right to free primary education (FPE) and compulsory education in public schools for all children.⁹⁶ However, the Act does not make reference to inclusive education or the education of children with disabilities. In fact, it only mentions disability in the general anti-discrimination provision in section 4. Nonetheless, as discussed above, the Disability Act recognises the right to inclusive education for persons/children with disabilities. Hence, children with disabilities are expected to rely on the Disability Act in claiming the right to inclusive education. Therefore, Malawi's education legislation discussed for the purposes of this study could play a significant role in providing the

⁹² As explained in 4.1 above, the thesis does not provide a discussion of all general and sectoral legislation that applies to children with disabilities beyond the major education sectoral laws Malawi's other applicable sectoral and general laws include Penal Code, Chapter 7:01 of the Laws of Malawi, which provides for general criminal offences and it criminalises acts of child neglect or desertion by a parent or guardian in sec 164 (this provision could protect children with disabilities from being neglected by parents); Public Health Act, Chapter 34:01 of the Laws of Malawi, which is Malawi's principal health legislation that provides for matters relating to public health; Gender Equality Act³ of 2013, which seeks to promote equality between men/boys and women/girls. It is noteworthy that these statutes do not specifically mention disability. Nonetheless, it is acknowledged that they may have a significant role to play in implementing the rights of children with disabilities.

⁹³ Chapter 30:01 of the Laws of Malawi.

⁹⁴ As discussed in 3.2.2 & 3.4.3 in Chapter 3 of this thesis, sectoral laws refer to legislation that applies to specific sectors such as education specific laws.

⁹⁵ See Education Act 21 of 2013, sec 4(1)(a).

⁹⁶ See sec 13, which states that: 'The provision of primary education in Government schools shall be free of tuition to all and compulsory for every child below eighteen years of age.'

enabling legislative tool alongside the Disability Act for ensuring that children with disabilities enjoy the right to education, including free and compulsory primary education, without discrimination on the basis of disability although a few gaps could be identified.

South Africa: Child rights protection and anti-discrimination legislation

South Africa's Children's Act

The Children's Act is South Africa's child rights specific legislation.⁹⁷ First, the Act appreciates the significance of non-discrimination to the extent that it mentions the need to protect all children from 'unfair' discrimination as one of its objectives.⁹⁸ It further identifies non-discrimination, including the need to ensure protection from disability based discrimination, among the general principles of the Act contained in section 6.⁹⁹ It is noteworthy that the general principles are fundamental as they are supposed to guide the implementation of all legislation applicable to children.¹⁰⁰ They are further expected to guide all decisions and actions by state organs in all matters relating to children.¹⁰¹ Therefore, the Act ensures that it protects the right to equality and non-discrimination and further requires any legislation that applies to children to

⁹⁷ 38 of 2005 as amended by the Children's Amendment Act 41 of 2007.

⁹⁸ Act 38 of 2005 as amended by Act 41 of 2007. The objectives are set out in sec 2. Sec 2(f) provides that the objects of the Act include: 'to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards'.

⁹⁹ See sec 6(2)(d), which provides that:

'(2) All proceedings, actions or decisions in a matter concerning a child must...

protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child'.

It can be observed that the provision prohibits unfair discrimination on the basis of the disability of the child or the disability of the child's family member.

¹⁰⁰ See sec 6(1)(a).

¹⁰¹ See sec 6(1)(b).

protect the right. However, the Act does not expressly provide for the obligation to take special or affirmative action measures in order to achieve *de facto* equality.

In addition, the Act dedicates a specific article (section 11) to children with disabilities.¹⁰² The disability specific section is significant for the enjoyment of the rights by children with disabilities for a number of reasons. First, it provides that their 'special needs' must be recognised.¹⁰³ Secondly, it recognises the right of children with disabilities to parental care or family care, including 'special care' whenever appropriate.¹⁰⁴ Thirdly, the section sets out the obligation to provide individual children with disabilities and their care-giver(s) with the necessary support services.¹⁰⁵ In addition, the section guarantees every child with disability 'the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity.'¹⁰⁶ Furthermore, the section



¹⁰² Children's Act, sec 11(1) & (2). The section provides for the rights of children with disabilities alongside children with chronic illness. The relevant part of the section (sec 11(1)) provides that:

'In any matter concerning a child with a disability due consideration must be given to—

(a) providing the child with parental care, family care or special care as and when appropriate;

(b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;

(c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and

(d) providing the child and the child's care-giver with the necessary support services'.

The other relevant component (sec 11(3)) states that:

'A child with a disability or chronic illness has the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity'.

¹⁰³ See e.g. sec 11(1)(b).

¹⁰⁴ Sec 11(1)(a).

¹⁰⁵ Sec 11(1)(d).

¹⁰⁶ Sec 11(3).

explicitly requires the provision of 'conditions' that 'ensure dignity, promote self-reliance and facilitate active participation in the community' by children with disabilities.¹⁰⁷

The Children's Act further requires the interests of the child to be of 'paramount' importance in all matters affecting the care, protection and well-being of a child.¹⁰⁸ In fact, the Act also expressly recognises the need to take into account the disability that a child may have as one of the factors that must be considered in the application of the best interests principle.¹⁰⁹ Furthermore, the Act sets out a number of 'developmental and survival' rights in addition to the general rights of children.¹¹⁰

In view of the foregoing discussion, it can be observed that the Children's Act has a number of features that could foster the implementation of the rights of children with disabilities.¹¹¹

South Africa's Promotion of Equality and Prohibition of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) is South Africa's generic anti-discrimination and pro-equality legislation.¹¹² It promotes and protects the right to equality and non-discrimination for all persons, including persons/children with disabilities.¹¹³ The Act provides a general

¹⁰⁷ Sec 11(1)(c). The disability specific provision (sec 11) could serve as a reference point which guides the implementation of the rights of children with disabilities that are contained in the Act. It also guides the application of the other provisions of the Act to children with disabilities.

¹⁰⁸ See sec 9.

¹⁰⁹ See sec 7(1)(h).

¹¹⁰ See e.g. sec 12, which provides that 'Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.' The Act also contains rights pertaining to alternative care. See secs 137, 167-179. These include the recognition of child-headed households. These are not strictly recognised as forms of alternative care.

¹¹¹ For further discussion on the Children's Act in the context of children with disabilities in South Africa, see generally Combrinck *The Children's Act and disability* (2011); Boezaart T 'The Children's Act: A valuable tool in realising the rights of children with disabilities' (2011) 74(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)/Journal of Contemporary Roman Dutch Law* 264-279.

¹¹² The Act was adopted as a response to, and in compliance with, sec 9(4) of the Constitution that obliges the state to adopt anti-discrimination legislation. See also sec 2 & long title of the PEPUDA. (The Act goes further to prohibit hate speech.)

¹¹³ South Africa has further adopted the Employment Equity Act (EEA), 55 of 1998, which is designed to cater for equality and equity related matters in the context of employment and thus it might not apply to a majority of children, including children with disabilities who might not have attained the pertinent minimum age for admission into employment or work.

definition of discrimination that covers both direct and indirect discrimination.¹¹⁴ The Act further defines equality as including ‘the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes’.¹¹⁵ Accordingly, the definition recognises substantive equality.¹¹⁶

The Act sets out the general prohibition of unfair discrimination in section 6.¹¹⁷ Above all, it specifically prohibits disability based discrimination under section 9.¹¹⁸ The section (section 9) recognises that disability based discrimination includes the denial or withdrawal/removal of facilities that are necessary for the ‘functioning’ of persons/children with disabilities.¹¹⁹ In addition, it recognises non-discrimination as

¹¹⁴ See sec 1(viii), which defines discrimination as follows:

‘discrimination’ means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantage from,

any person on one or more of the prohibited grounds’.

The PEPUDA also lists disability as a prohibited ground of discrimination under sec 1 which provides for the Act’s relevant definitions. See sub-para (a) of the definition para of ‘prohibited grounds’ in sec 1.

¹¹⁵ Sec 1(ix).

¹¹⁶ The definition of equality also demonstrates the essence of non-discrimination by emphasising ‘the full and equal enjoyment of rights and freedoms’.

¹¹⁷ Sec 6 provides that ‘Neither the State or any person may unfairly discriminate against any person’.

¹¹⁸ See sec 9, which provides that:

‘Subject to section 6, no person may unfairly discriminate against any person on the grounds of disability, including-

(a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

(b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

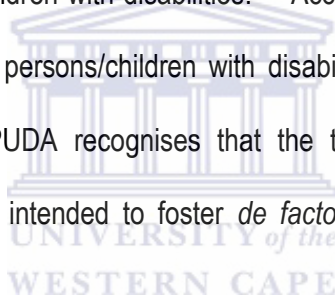
(c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons’.

It can be observed that the provision prohibits unfair discrimination against any person on the basis of disability. This is sufficiently broad to include prohibition of disability based discrimination against children with disabilities.

¹¹⁹ See sec 9(a).

requiring the eradication of all obstacles that restrict the enjoyment of equal opportunities by persons/children with disabilities.¹²⁰ Above all, the section expressly recognises that the failure to provide reasonable accommodation constitutes unfair discrimination on the basis of disability.¹²¹ Furthermore, the Act explicitly obliges the state to adopt codes or regulations that ensure the provision of reasonable accommodation.¹²² It is noteworthy that the Act does not provide definitions of reasonable accommodation and disability.¹²³

The Act further recognises the contravention of the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility as constituting disability based discrimination.¹²⁴ Thus the regulations or practices recognise the role that accessibility plays in ensuring the enjoyment of the rights by persons/children with disabilities.¹²⁵ Accordingly, the provision is commendable as it promotes non-discrimination for persons/children with disabilities in accessing buildings and other environments. Furthermore, the PEPUDA recognises that the taking of special measures, including affirmative action measures, that are intended to foster *de facto* equality or eliminating the causes of



¹²⁰ See sec 9(c).

¹²¹ See sec 9(c).

¹²² See PEPUDA, sec 25(1)(c)(iii), which provides that:

‘The State must, where necessary with the assistance of the relevant constitutional institutions—...

develop codes of practice as contemplated in this Act in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation’.

¹²³ On its part, the EEA in sec 1 defines ‘reasonable accommodation’ in the context of employment as ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access or to participate or advance in employment.’ It is noteworthy that the PEPUDA does not apply to matters to which the EEA applies. Hence, it is doubtful that the EEA’s definitions can be used to interpret the provisions of the PEPUDA. Nevertheless, since the PEPUDA requires to be interpreted in accordance with international law, it is expected that the definitions would be based on the CRPD.

¹²⁴ See sec 6(b). Such regulations include the Building Regulations Part S, in the form of SABS 0400, which provide for building guidelines in order to ensure physical accessibility, including occupancy, by persons with disabilities. See Government Gazette 31084 of May 2008 which publishes the regulations made under the National Buildings Regulations and Building Standards Act 103 Of 1977.

¹²⁵ It is not within the scope of this study to discuss in detail such regulations or practice of the South African Bureau of Standards.

inequalities would not constitute unfair discrimination.¹²⁶ The provision is commendable as it gives the legal basis for taking the special measures.¹²⁷ Above all, it is noteworthy that the Act is superior to any legislation and is only subject to the Constitution.¹²⁸ This elevates the PEPUDA's right to equality and non-discrimination.¹²⁹ In view of this, it is considered that the enactment of the PEPUDA entails that the right to equality and non-discrimination in the Constitution can only be directly relied upon in exceptional cases where a provision of the Act or other legislation or conduct that is beyond the reach of the Act is challenged as infringing on section 9 of the Constitution.¹³⁰

Therefore, in view of the observations made above, it can be appreciated that the PEPUDA could play a significant role in providing an enabling legislative framework for the domestic implementation of the right to equality and non-discrimination for children with disabilities in South Africa.¹³¹



¹²⁶ PEPUDA, sec 14(1), which provides that: 'It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or members of such groups or categories of such persons'.

¹²⁷ (However, the provision does not require such measures to be temporary). Chapter 5 of the Act, which runs from sec 24 through sec 29, provides for other responsibilities for the promotion of equality. See e.g. sec 25, which urges the state to develop action plans, programmes, and codes of practice and take other legislative measures to promote equality.

¹²⁸ See sec 5(2).

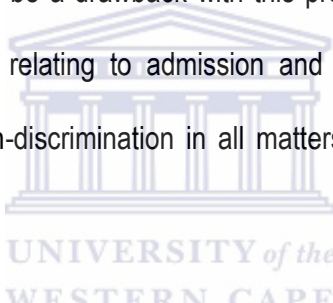
¹²⁹ The Act has a number of provisions that generally relate to equality and non-discrimination. However, it is not within the scope of the study to provide a detailed discussion of the Act. It is noteworthy that the Act mirrors the Constitution in recognising that non-discrimination is a limitable right. See sec 14. The limitation analysis under the Act is similar to the procedure for limiting any right under the Constitution.

¹³⁰ See Currie & De Waal (2013) 245, where it is highlighted that this is consistent with the principle of subsidiarity, which requires exhaustion of legislative remedies before resorting to constitutional remedies.

¹³¹ It is noteworthy that the Equality Court has dealt with cases that raised issues relating to discrimination on the basis of disability under the PEPUDA although majority of the cases were not brought by children with disabilities. These include the case of Muller, which was brought by Esthe Muller, a lawyer with physical disabilities and a wheelchair user, against the Justice Department and the Department of Public Works (see *Esthé Muller v Department of Justice and Constitutional Development & Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03) 'Equality Court victory for people with disabilities' (2004) <<http://www.info.gov.za/speeches/2004/04022415461001.htm>> (accessed 21 March 2013);) case of *Willem H Bosch* which was brought against the South Africa Police Service (2005); & *Lettie Hazel Oortman v St Thomas Aquinas Private School & Bernard Langton* Equality Court Case No 1 of 2010 (Witbank). Further discussion of the cases in addition to the cases that deal with the rights of children with disabilities broadly is contained in 2.4.2 below.

South Africa: Other legislation

There are a number of sectoral and general laws that impact on the implementation of the rights of children with disabilities in South Africa.¹³² For example, education sectoral laws such as the SASA¹³³ provide protection of the right to education and the right to freedom from unfair discrimination for children with disabilities in the context of education. In this regard, the NEPA,¹³⁴ which provides for the policy approach to be taken by government in the education sector,¹³⁵ recognises non-discrimination within the context of education by providing for the right to be protected from unfair discrimination in education 'on any grounds whatsoever'.¹³⁶ On its part, the SASA expressly obliges public schools to ensure that they do not unfairly discriminate against learners in any way in all matters relating to admission or their learning requirements.¹³⁷ However, there could be a drawback with this provision as it only mentions the need to ensure non-discrimination in aspects relating to admission and learning requirements as opposed to imposing the obligation to ensure non-discrimination in all matters relating to the education of children, including children with disabilities.



¹³² South Africa's sectoral and general legislation applicable to children include Social Assistance Act 13 of 2004, which provides for matters relating to social protection and social security and makes provision for disability grant in sec 9 and child dependency grant in sec 7, amongst other grants; Child Justice Act 75 of 2008, which provides for matters relating to the justice system of children who are in conflict with the law; Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which is a penal statute that specifically addresses sex related offences and makes provision all legal aspects pertaining to such offences and it includes sexual offences against children and against persons with 'mental disabilities' in Chapters 3 & 4 respectively; Housing Act 107 of 1997 (as amended by Housing Amendment Act 4 of 2001), which makes provision for matters relating to access to housing and housing development processes and its general principles in sec 2(1)(e)(viii) & (x) include the need to promote and meet the 'special housing needs' of persons with disabilities and marginalised women and other groups disadvantaged by unfair discrimination; National Health Act 61 of 2003, which addresses matters relating to the healthcare system, including healthcare services, in South Africa and its objectives in sec 2(c)(iv) include the need to 'protect, respect, promote and fulfil' the rights of 'vulnerable groups such as women, children, older persons'.

¹³³ Act 84 of 1996.

¹³⁴ Act 27 of 1996.

¹³⁵ See generally secs 2 & 3.

¹³⁶ See sec 4(a)(i). By prohibiting unfair discrimination 'on any grounds whatsoever', which does not mention any protected ground of unfair discrimination but provides a blanket prohibition of unfair discrimination the provision is sufficiently broad to include prohibition of discrimination on the basis of disability.

¹³⁷ See sec 5(1). See also sec 3(2), which entrusts other matters relating to the education of learners with special needs, including learners with disabilities, with the Minister of Education.

In addition, the education laws recognise the right to education. For example, the SASA imposes a duty on every parent who is responsible for a learner to cause them to attend school from the ages of seven to fifteen years or the ninth grade, depending on whichever comes first.¹³⁸ The provision is commendable as it incorporates the principle of compulsory education.¹³⁹ In respect of compulsory education for learners with disabilities specifically, it entrusts the Minister of Education with the duty to determine the period of compulsory education for learners with SEN.¹⁴⁰ It is noteworthy that the Minister is yet to make such determination through subsidiary legislation, proclamation or adoption of guidelines or otherwise. Hence, the express period of compulsory SNE is unknown, which is regrettable. In addition, the Act does not mention the concept of FPE and yet the payment of fees could be an obstacle to inclusive education since fees might bar children, including children with disabilities, from attending school.¹⁴¹

Furthermore, the SASA explicitly obliges the government to, amongst others; provide the education for learners with SEN in ordinary public schools; to provide pertinent educational support services to the learners; and to ensure that physical facilities in public schools are accessible to persons/children with disabilities by taking all reasonable measures.¹⁴² It can be observed that the provision would facilitate the right to inclusive education for children with disabilities as it expects children/persons with disabilities to be

¹³⁸ See sec 3.

¹³⁹ See e.g. Committee on ESCR, General Comment No 11 'Plans of action for primary education' (1999) para 6, where compulsory education is interpreted as including the duty placed upon parents or guardians not to regard the decision to send a child to attend school as optional but to regard it as obligatory.

¹⁴⁰ Sec 3(2).

¹⁴¹ See generally Committee on ESCR, General Comment No 11 (1999) para 7. It is noteworthy that the issue of free education in South Africa is complex as it is dealt with through government policy approach and practice whereby a number of unevenly located schools across South Africa's provinces which relate to the two lowest quintiles are regarded as 'no fee' schools. Nonetheless, free education is not expressly recognised as a right under South Africa's legal framework with the effect that a majority of children, including children with disabilities, in South Africa pay fees to access basic education. For further education in this regard, see generally Veriava F 'The amended legal framework for school fees and school funding: A boon or a barrier?' (2007) 23 *South African Journal of Human Rights* 180-194; Roithmayr D 'Access, adequacy and equality: the constitutionality of school fee financing in public education' (2003) 19 *South African Journal of Human Rights* 382-429; Tomasevski, K *The state of the right to education worldwide: global report 2006; free or for fee?* (2006) 58-61; Murungi LN *The significance of article 24(2) of the UN Convention on the Rights of Persons with Disabilities for the right to primary education of children with disabilities: a comparative study of Kenya and South Africa* (unpublished LL D thesis, University of the Western Cape, 2013) 312-319.

¹⁴² Sec 12(4) & (5).

educated in ordinary/mainstream schools. The Act thus impliedly recognises inclusive education. On its part, the NEPA requires that the policy approach to education must ensure that no person is denied an education opportunity due to a physical disability.¹⁴³ The drawback with this provision is that it only mentions physical disability instead of mentioning disability broadly.¹⁴⁴

Therefore, it can be observed that South Africa's education related laws discussed in this part for the purposes of this thesis have a number of provisions that could provide an enabling legislative framework for ensuring that children with disabilities attain an education without discrimination on the basis of disability although a few gaps could be highlighted.

4.2.3 Policy frameworks

There are a number of policies that are applicable to the implementation of the rights of children with disabilities in Malawi and South Africa. They comprise disability specific policies, 'general' policies and education sectoral policies.¹⁴⁵ In respect of Malawi, they include the Disability Policy and the Special Needs Education Policy. On the part of South Africa, these include the Integrated National Disability Strategy and White Paper 6 on Special Needs Education.

Malawi: Disability policies

National Policy on Equalisation of Opportunities for Persons with Disabilities

The National Policy on Equalisation of Opportunities for Persons with Disabilities (Equalisation Policy) is Malawi's disability specific policy that mainly seeks to ensure equalisation of opportunities for persons with

¹⁴³ See sec 4(d).

¹⁴⁴ It is surprising for the Act to mention physical disability alone when disability has a number of faces such as mental, sensory and intellectual disabilities. Perhaps the courts could interpret the provision as including all faces of disability lest it be discriminatory against the other unnamed disabilities.

¹⁴⁵ As explained in 4.1 above, the discussion focuses on the major policies such as disability policies in addition to education sectoral policies that specifically address the education of persons/children with disabilities.

disabilities in all aspects of society.¹⁴⁶ Its purpose is to promote the rights of persons with disabilities in Malawi and enable them play a full and participatory role in society.¹⁴⁷ Its overall goal is ‘to integrate fully persons with disabilities in all aspects of life thereby equalizing their opportunities in order to enhance their dignity and well-being so that they have essentials of life.’¹⁴⁸ It recognises that persons with disabilities in Malawi face a number of environmental, institutional, attitudinal and economic barriers and discrimination that prevent them from full participation and inclusion in the mainstream society.¹⁴⁹

The Policy has 10 guiding principles and seven main objectives.¹⁵⁰ The guiding principles include: advocacy and support to the human rights approach to disability; and ensuring inclusion and accessibility in respect of people with disabilities.¹⁵¹ The seven main objectives include: to formulate strategies towards equalisation of opportunities for persons with disabilities; and to promote efforts that encourage positive attitudes towards children, youth, women and adults with disabilities.¹⁵²

The Policy further provides for 13 policy statements with their objectives in Chapter Four. It also outlines the strategies for achieving each policy statement and objective.¹⁵³ The policy statements apply to specific areas or sectors such as education, housing, rehabilitation, accessibility, transport, information and communication, and participation.¹⁵⁴ The statements have implications for the rights of children with

¹⁴⁶ See Malawi Government, *National Policy on the Equalisation of Opportunities for Persons with Disabilities* (2006) 9, which provides that: ‘The overriding goal of the Policy is to integrate fully persons with disabilities in all aspects of life thereby equalizing their opportunities in order to enhance their dignity and well-being so that they have essentials of life’.

¹⁴⁷ Equalisation Policy (2005) 1.

¹⁴⁸ Equalisation Policy (2005) 9.

¹⁴⁹ Equalisation Policy (2005) 1 & 4.

¹⁵⁰ Equalisation Policy (2005) 7-9.

¹⁵¹ Equalisation Policy (2005) 7-9.

¹⁵² Equalisation Policy (2005) 9.

¹⁵³ See Equalisation Policy (2005) 11-20.

¹⁵⁴ Equalisation Policy (2005) 11-17.

disabilities. For example, the policy statement on rehabilitation seeks to promote availability of the necessary equipment, skills and services to all persons with disabilities to enable them to achieve and maintain their optimum physical, sensory, intellectual and social functional level.¹⁵⁵

In respect of children with disabilities, the Policy appreciates that they experience discrimination from birth.¹⁵⁶ It also observes that:

'Children and women with disabilities experience greater discrimination and higher levels of exclusion from the mainstream society...children with disabilities are severely disadvantaged by their dependence on the goodwill of their parents and guardians for them to access the very limited early intervention and rehabilitation services that are available in the country.'¹⁵⁷

Hence, the Policy demonstrates clear understanding that children with disabilities suffer various forms of exclusion and marginalisation despite the Constitution's guarantee of non-discrimination. In view of this, the Policy was expected to identify strategies for addressing discrimination. However, it barely mentions any strategies for such redress. In addition, the Policy does not make reference to the concept of reasonable accommodation and the notion of special measures or affirmative action designed to foster substantive equality for persons/children with disabilities.

Above all, it is noteworthy that the Policy does not contain specific substantive strategy, objective or guideline relating to children with disabilities. The omission is surprising since the Policy expressly appreciates that children with disabilities face various forms of exclusion and marginalisation and experience discrimination from birth.¹⁵⁸ In view of this, the Policy was expected to have a specific policy statement or guideline that identifies strategies for addressing these obstacles.

¹⁵⁵ Equalisation Policy (2005) 11.

¹⁵⁶ See Equalisation Policy (2005) 4.

¹⁵⁷ See Equalisation Policy (2005) 6.

¹⁵⁸ See Equalisation Policy (2005) 4.

In respect of education, the Policy contains a number of statements that seek, among others, to promote easy access to schools' physical environment; to provide information and education materials in accessible formats to persons/children with disabilities; and to establish a national sign language.¹⁵⁹ Above all, the policy statement on education aims to promote equal access and inclusion of persons/children with disabilities in education by, among others, designing and developing appropriate technologies, assistive devices and learning materials; providing free appropriate resources to assist persons/children with disabilities with their learning needs; reviewing and reforming the delivery of the national curriculum to cater for persons/children with disabilities; adapting and adopting communication systems appropriate for learners with special educational needs (SEN); training specialist educators; incorporating special need education (SNE) in the teacher-training curriculum; and supporting and encouraging inclusive education.¹⁶⁰ However, although the Policy recognises inclusive education and also outlines measures that could facilitate the education of children with disabilities in mainstream schools, it does not expressly recognise the duty to educate persons/children with disabilities in mainstream schools in conceptualising the principal approach for providing education for persons/children with disabilities.¹⁶¹

Malawi: Other policies

There policies that influence the implementation of the rights of children with disabilities in Malawi in the context of education include the Special Needs Education Policy (Revised) (SNE Policy),¹⁶² which provides for the policy approach to the education of persons with disabilities in Malawi.¹⁶³ In respect of non-

¹⁵⁹ See Equalisation Policy (2005) 12 & 14.

¹⁶⁰ See Equalisation Policy (2005) 14-15.

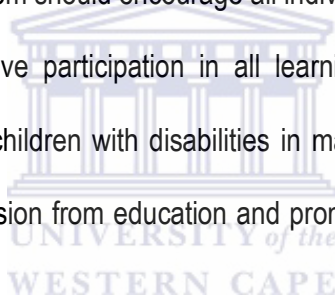
¹⁶¹ It is noteworthy that the Policy, which was adopted before Malawi ratified the CRPD and before Malawi enacted the Disability Act, is meant to be in force for five years. Thereafter, it is supposed to be subjected to reviews taking into account the successes and constraints experienced during its initial period of operation as well as new developments in the internal and external environments. Equalisation Policy (2005) 31. However, by 2014, there was no information regarding the review.

¹⁶² Malawi Government, *National Policy on Special Needs Education (Revised)* (2007) (the SNE Policy (2007)).

¹⁶³ As explained in 4.1 above, the thesis does not provide a discussion of all general and sectoral policies that apply to children with disabilities beyond the major education sectoral policies that specifically address the education of children/persons with disabilities in

discrimination, the SNE Policy expressly recognises the duty to prohibit discrimination on the basis of disability, among other grounds, as one of its ten guiding principles.¹⁶⁴ However, it does not recognise the concept of reasonable accommodation.¹⁶⁵ Furthermore, the Policy does not expressly mention the duty to take special and affirmative action measure for achieving *de facto* equality of persons/children with disabilities in education as a specific policy obligation.¹⁶⁶

With regard to education, the Policy identifies eight major components of SNE, namely, early identification assessment and intervention; advocacy; care and support; management, planning, and financing; access; quality; equity; and relevance.¹⁶⁷ A number of such components are crucial in the implementation of inclusive education. For example, the policy area relating to access is informed by the understanding that 'the education system should encourage all individuals who have special needs to enroll in school and to facilitate the effective participation in all learning activities'.¹⁶⁸ Although it does not specifically require the enrollment of children with disabilities in mainstream inclusive schools, this policy area would broadly reduce their exclusion from education and promote their access to education. Indeed,



Malawi and South Africa. Malawi's applicable sectoral and general policies include: National Youth Policy, which mentions youth with disabilities among the special groups that will be 'given attention' in implementing the Policy's target areas although it does not clarify how this will be done (see Malawi Government (Ministry of Youth Development and Sports), *National Youth Policy 'Youth: The Nation today and tomorrow'* (2010) 16); & National Education Sector Plan (NESP), which sets out the government's goals and objectives of the general education sector to be realised over the 2008-2017 period (see Ministry of Education, Science and Technology, *Malawi The National Education Sector Plan 2008-2017, A statement*, (2008)).

¹⁶⁴ See SNE Policy (2007) 17, where the relevant principle is phrased as follows:

'No learner with SEN shall be discriminated against or segregated in the provision of education services on the basis of age, gender, race, tribe, health status, disability, HIV sero-status, economic status, religion, political affiliation and so on'.

The list of prohibited grounds of discrimination is not exhaustive. (It is noteworthy that learners with disabilities are referred to as learners with special educational needs (SEN)).

¹⁶⁵ Hence, the Policy is similar to the Disability Act in that the Act does not recognise the denial of reasonable accommodation as constituting discrimination against persons/children with disabilities and it does not require reasonable accommodation to be provided in education.

¹⁶⁶ In fact, the Policy does not even mention the concepts of reasonable accommodation and affirmative action.

¹⁶⁷ SNE Policy (2007) 9.

¹⁶⁸ SNE Policy (2007) 21.

among the strategies for implementing the policy area (of access), the government is expected to develop and utilise national sign language; to provide enough and well qualified specialist teachers; and to establish a bursary scheme for learners with SEN.¹⁶⁹ Similarly, the policy area of equity seeks to ensure the elimination of gaps between learners with SEN and those without.¹⁷⁰ The SNE policy further aims at overcoming SNE implementation challenges that include attitudinal barriers.¹⁷¹ The implementation of these policy areas would arguably reduce the exclusion of children with disabilities from education.

The Policy also seeks to achieve particular objectives and the strategies that could facilitate the implementation of inclusive education. The objectives include ensuring equitable access for all learners with SEN; providing educational facilities with needed supportive provisions; and ensuring accommodating learning environments for all learners with SEN.¹⁷² It is argued by the candidate that if such objectives are achieved, the broad goals of inclusive education could also be fostered by implication. For example, if equitable access is to be achieved, then exclusionary practice in the regular education system must be eradicated to achieve inclusion in education. Similarly, if the policy does ensure accommodating environments for all learners with disabilities, then by implication, exclusionary environmental barriers in mainstream schools would have to be eliminated. Therefore, it can be observed that the Policy has a number of positive aspects that could facilitate the realisation of inclusive education.

Nonetheless, the main drawback is the Policy's failure to expressly require the education of children with disabilities to be provided in inclusive schools or to require an inclusive education system at all levels. Instead, it seeks to promote special and integrated education.¹⁷³ Indeed, the Policy does not

¹⁶⁹ SNE Policy (2007) 21-22.

¹⁷⁰ SNE Policy (2007) 24-25.

¹⁷¹ SNE Policy (2007) 11& 12; 14-15.

¹⁷² SNE Policy (2007) 18.

¹⁷³ See e.g. SNE Policy (2007) 22 where the government is expected to 'build more resource centres and special schools to promote enabling environment for all categories of learners with special educational needs'.

mention the need to build inclusive schools or to make mainstream/regular schools inclusive. Hence, it appears that the Policy does not recognise or appreciate the role of inclusive schools in implementing inclusive education.

Therefore, it can be observed that the SNE Policy could play a role in providing the policy tool for the implementation of the right to education for children with disabilities as it seeks to increase access to education for children/persons with disabilities although it emphasises special and integrated education as opposed to inclusive education, which is one of its major gaps.

South Africa: Disability policies

Integrated National Disability Strategy

The Integrated National Disability Strategy (INDS) is South Africa's principal disability specific policy document.¹⁷⁴ It observes that a majority of persons with disabilities in South Africa are excluded from the mainstream society.¹⁷⁵ Thus the broad vision of the INDS is to ensure a society for all in which 'the needs of all citizens constitute the basis for planning and policy, and the general systems and institutions of society are accessible to all'.¹⁷⁶ The policy has objectives, principles and guidelines.¹⁷⁷ It further provides for policy objectives for achieving the guidelines.¹⁷⁸

¹⁷⁴ Government of the Republic of South Africa *Integrated National Disability Strategy* (1997). It is noteworthy that the INDS, which was adopted in 1997, predates the PEPUDA and the Children's Act, amongst others, in addition to the CRPD. South Africa is in the process of replacing the Strategy with a new disability specific policy.

¹⁷⁵ INDS (1997) 10.

¹⁷⁶ INDS (1997) 30.

¹⁷⁷ See e.g. INDS (1997) 30-33.

¹⁷⁸ The policy objectives and guidelines include those relating to prevention; public education and awareness-raising; healthcare; rehabilitation; barrier-free access; transport; communications; data, information and research; education; employment; human resource development; social welfare and community development; social security; housing; and sport and recreation. See INDS (1997) 32-79. It is not within the scope of the study to provide a detailed discussion of these policy guidelines. See e.g. INDS (1997) 38, for the guideline relating to healthcare for persons with disabilities.

With regard to no-discrimination, the Strategy indicates that children with disabilities constitute one of the specific categories (of persons with disabilities) that require 'special targeting and attention' in order to redress past and existing inequalities.¹⁷⁹ Hence, it impliedly recognises that children with disabilities have the substantive right to equality, which should be realised through the taking of measures designed to redress inequalities. However, the provision and the Policy in general do not specifically mention the need to take special measures that are designed to achieve *de facto* equality for children with disabilities and it does not expressly mention the concept of reasonable accommodation.¹⁸⁰

With respect to the broad rights of children with disabilities, the Strategy does not have a specific substantive objective or guideline relating to children with disabilities. This could be the major drawback since such policy objective would guide and inform the policy approach for implementing the rights of children with disabilities. Nevertheless, the Policy's guidelines seek to address and apply to all persons with disabilities, who include children with disabilities. In addition, there are a number of broad policy guidelines that directly impact on children with disabilities.¹⁸¹ For example, the guideline on health care includes an express reference to child healthcare.¹⁸² On its part, the guideline on social security also expressly recognises social grants for children with disabilities (as one of the components of disability related grants).¹⁸³

With regard to education, the Policy contains detailed stipulations that set out a number of objectives for realising the right to education for persons/children with disabilities.¹⁸⁴ These relate to SNE,

¹⁷⁹ INDS (1997) 12.

¹⁸⁰ Nonetheless, the subsequently enacted legislative frameworks have addressed these gaps as they recognise the duty to take such measures.

¹⁸¹ Children with disabilities are also explicitly mentioned in a number of the broad guidelines.

¹⁸² The Guideline states that '[m]easures need to be undertaken to implement comprehensive free health care for all children with disabilities under six, including free access to assistive devices and rehabilitation services'. See INDS (1997) 39.

¹⁸³ It recognises that 'Disability related state grants or pensions are...Special care grants for children with severe physical (including sensory) and/or mental disabilities between the ages of 1 and 18 years'. INDS (1997) 39.

¹⁸⁴ See e.g. INDS (1997) 51-55.

early childhood development (ECD), primary education, general and further education, education support services and lifelong learning. Among others, it recognises the concept of compulsory and free primary education, which it requires to apply to all children equally, including children with disabilities, regardless of their disability.¹⁸⁵ It also requires every learner to have access to education support services, irrespective of age or centre of learning.¹⁸⁶ The Policy concedes that inclusive environments form the 'cornerstone for the development and successful outcome of an integrated society'.¹⁸⁷ In this regard, one of the SNE objectives seeks 'to develop a single education system that will cater for the needs of all learners within an inclusive environment with various placement options'.¹⁸⁸ The main principle that guides the policy area of education (SNE) states that '[a]ll South Africans should have equal access to education opportunities, irrespective of the severity of their disability(ies)'.¹⁸⁹ The other 'auxiliary' principles require all people to 'receive education and training in as normal an environment as possible';¹⁹⁰ and expressly acknowledge that equity for learners with disabilities entails the availability of additional support mechanisms within an inclusive learning environment.¹⁹¹ It can be observed that the education related policy stipulations point towards emphasising that the education of children/persons with disabilities should be provided in inclusive mainstream schools, thereby reflecting the right to inclusive education that the education sectoral laws discussed above impliedly recognised.

¹⁸⁵ See e.g. INDS (1997) 54.

¹⁸⁶ See e.g. INDS (1997) 55.

¹⁸⁷ INDS (1997) 54.

¹⁸⁸ See INDS (1997) 52.

¹⁸⁹ See INDS (1997) 53.

¹⁹⁰ See INDS (1997) 53.

¹⁹¹ See INDS (1997) 53.

Therefore, it can be observed that the Strategy, on the whole, has a number of aspects that could provide a policy tool for the implementation of the rights of children with disabilities although a few gaps could be identified.

South Africa: Other policies

The general and sectoral policies that influence the implementation of the rights of children with disabilities in South Africa in the context of education include the Policy on Special Need Education (White paper 6),¹⁹² which is South Africa's principal policy relating to the education of persons with disabilities, including children with disabilities.¹⁹³ The Policy acknowledges that the non-discrimination provisions in the Constitution of South Africa are crucial in the protection of all learners with or without disabilities.¹⁹⁴ However, the major setback with regard to non-discrimination is that the Policy does not mention the concept of reasonable accommodation or the duty to take special and affirmative action measures for achieving substantive equality.

In respect of the right to education, White Paper 6 seeks to ensure the progressive realisation of 'inclusive education' by facilitating the introduction of 'inclusive schools' or 'full service schools' in phases covering the 20 year period from 2001 to 2021. The Policy uses the concept of 'full service schools' instead of inclusive schools.¹⁹⁵ It apparently indicates the intention to reduce the number of special schools as it

¹⁹² Department of Education *White paper 6: Special need Education: Building an inclusive education and training system* (2001).

¹⁹³ South Africa's applicable sectoral and general policies, which are not education specific, include: the Integrated National Strategy on Support Services to Children with Disabilities (INSSSCD), which was adopted as a departmental policy by the Department of Social Development (DSD) to provide for the Department's policy approach relating to service delivery for children with disabilities (see Department of Social Development, Government of the Republic of South Africa, *Integrated National Strategy on Support Services to Children with Disabilities: The right to belong and participate* (2009)); & the Policy on Disability, which was also adopted by the DSD as a Departmental Policy and it focuses on security, development and welfare of persons with disabilities (see Department of Social Development, *Policy on Disability* (2009)).

¹⁹⁴ See White Paper 6 (2001)11; para 1.1.3.

¹⁹⁵ (In fact, the Policy does not provide the definition of inclusive education but sets out a number of its components. Among others, it acknowledges that inclusive education should focus on maximising the participation and development of individual strengths and capabilities of all learners in the process of learning. See White Paper 6 (2001) 16.)

focuses on increasing inclusive schools with the view of ensuring the non-exclusion of persons/children with disabilities from the regular education system.¹⁹⁶ It also intends to make most schools inclusive and utilise other special schools as resource centres for 'ordinary' neighborhood schools.¹⁹⁷ Hence, the Policy demonstrates a clear intention to promote the provision of education for persons/children with disabilities in inclusive mainstream schools while reducing, as opposed to phasing out, special schools. In addition, although it does not make reference to reasonable accommodation, as discussed above, the Policy recognises the duty to ensure the provision of support to reduce the barriers in education.¹⁹⁸ However, the Policy does not make any reference to compulsory and free primary education.¹⁹⁹

It is noteworthy that White Paper 6 also became an issue before the Court in the *Western Cape Forum for Intellectual Disability* case.²⁰⁰ The matter related to the failure by government to take measures that would ensure access to education by children with severe and intellectual disabilities. In terms of White Paper 6, it was envisaged that in the course of the progressive implementation of education for children with disabilities, the education of children with profound intellectual disabilities, who were categorised as requiring 'intensive support', would be provided in special schools.²⁰¹ However, this would be done 'at some point in future' during the implementation. The government justified this approach on the basis of reconciling the scarcity of resources. However, the Policy also envisaged that there could be other

¹⁹⁶ White Paper 6 (2001) 10, 22-23 & 27.

¹⁹⁷ See White Paper 6 (2001) 7, 21 & 28.

¹⁹⁸ See White Paper 6 (2001) 28-29. The Policy further expects full-service schools and 'ordinary' schools to take measures to accommodate learners with disabilities in mainstream classes. See White Paper 6 (2001) 10, 15, 28-29.

¹⁹⁹ It is noteworthy that there are other policy documents and directives that have subsequently been issued to guide the implementation of White Paper 6. These include the National Strategy on Screening, Identification, Assessment and Support; the Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Special Schools as Resource Centres, Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres (2007); and the Guidelines for Full-service/Inclusive Schools (2010). It is not within the scope of the chapter to provide a detailed discussion relating to these documents.

²⁰⁰ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another* 2011 (5) SA 87 (WCC); 2011 JDR 0375 (WCC). The case is discussed in 4.2.4 below.

²⁰¹ See White Paper 6 (2001) 22 & 24.

categories of children with severe and profound disabilities who could be deemed as being incapable from benefitting from any level of education with the effect that they could be considered to be 'uneducable'. The Court faulted White Paper 6 for have a discriminatory implication in that it did not envisage measures that could be taken to ensure access to education by the affected children with disabilities at the time or in the immediate/near future but only towards the end of the 20 year phased implementation; and yet such children belonged to a category of persons that are most vulnerable and whose needs are urgent. Ultimately, the Court found that White Paper 6 could not provide a lawful justification for limiting the rights of children with disabilities (to education and non-discrimination) in terms of section 36 of the Constitution.

Accordingly, it can be observed from the Court's finding that White Paper 6 does not adequately address the education of children with severe and profound disabilities who are deemed to require intensive support as it does not envisage the provision of their education in the early stages of the Policy's implementation. Above all, the education of such children would be provided in special schools as opposed to full service schools. This contradicts the requirement to provide the education of all children with disabilities in inclusive mainstream schools.²⁰²

Therefore, it can be observed that White Paper has a number of positive aspects that could play a role in providing the policy tool for the implementation of the right to education for children with disabilities as it seeks to increase access to inclusive ordinary schools by children/persons with disabilities. In addition, it emphasises inclusive education over special and integrated education through the prioritisation of 'full service schools'. Nonetheless, it has a number of gaps that could be identified (such as the failure to advocate for a single inclusive education system at all levels).

²⁰² See also Ngwena (2013) 161-162, where the Policy has been criticised for still retaining special schools alongside full service schools.

4.2.4 Other mechanisms: Justiciability and domestic incorporation

Malawi's position on domestication of applicable treaties and justiciability of pertinent rights

Malawi has a dualist legal system which requires ratified treaties to be incorporated by an Act of Parliament to become domestically enforceable.²⁰³ However, the Constitution provides that the treaties which Malawi ratified before the commencement of the 1995 Constitution do not need to be incorporated.²⁰⁴ Accordingly, Malawi follows the monist approach in respect of the treaties that were ratified before the 1995 democratic Constitution and the dualist approach in respect of the treaties ratified by Malawi after the Constitution was adopted.²⁰⁵ Consequently, the CRPD and the African Children's Charter would require incorporation since they were ratified after the commencement of the 1995 Constitution. Malawi is yet to incorporate the CRPD. On its part, the CCPJA domesticates the CRC and the African Children's Charter.²⁰⁶ Hence, the courts can enforce the rights of children with disabilities guaranteed under the CRC's article 23 and African Children's Charter's article 13 by virtue of the domestication.

In respect of justiciability of the rights of children with disabilities, the Malawi Constitution and the CCPJA, amongst other legal documents, contain justiciable rights of children, including non-discrimination (as discussed above).²⁰⁷ For example, the general rights of children in addition to the right to equality and

²⁰³ See Malawi Constitution, sec 211(1); *Chihana v Republic* [1992] 15 MLR 86 (Supreme Court).

²⁰⁴ See sec 211(2). See also Chirwa (2011) 29-30; *Kalinda v Limbe Leaf Tobacco Ltd*, where the High Court held that the ILO Convention No. 158 (Termination of Employment Convention (1983) No. 158) is applicable in labour matters through sec 211; *Banda v Dimon (Mw) Ltd* [2008] MLLR 92; *Malawi Telecommunications v Makande and Another* [2008] MLLR 35.

²⁰⁵ See Killander & Adjolohoun in Killander (ed) (2010) 13; Hansen TT 'Implementation of international human rights standards through national courts in Malawi' (2002) 46 *Journal of African Law* 31-42; Maluwa T 'The role of international law in the protection of human rights under the Malawi Constitution' (1995) 3 *African Yearbook of International Law* 53-79, 74; Chirwa (2011) 29-30.

²⁰⁶ Sec 4(c) of Third Schedule. The domesticating provision states in part that:

'A child shall have the rights-...

(c) to exercise, in addition to all rights states this Schedule and this Act, all the rights set out in the United Nations Convention on the Rights for the Child and the Organization of African Union Charter on the Rights and Welfare of the African Child with appropriate modifications to suit the circumstances in Malawi that are not specifically mentioned in this Act'.

²⁰⁷ See 4.2.1 & 4.2.2 above for the discussion in this regard.

non-discrimination are set out in the justiciable Bill of Rights,²⁰⁸ which is contained in Chapter 4 of the Malawi Constitution.²⁰⁹ On its part, the Disability Act contains a number of justiciable rights (including the rights that must be specifically exercised without discrimination), which are applicable to children with disabilities (as discussed above).²¹⁰ However, it is noteworthy that Malawian courts are yet to determine a matter relating to persons/children with disabilities or disability although they have dealt with cases of non-discrimination.²¹¹ Perhaps the enactment of the Disability Act could trigger litigation.²¹² Therefore, it can be observed from the foregoing discussion that Malawi's legal framework recognises to a large extent the justiciability of the substantive rights of children with disabilities.²¹³

South Africa's position on domestication of applicable treaties and justiciability of pertinent rights

South Africa is largely a dualist state since the Constitution requires the incorporation of ratified treaties by Parliament for them to become domestically enforceable.²¹⁴ It is noteworthy that South Africa is yet to domestically incorporate the CRPD, the CRC, and the African Children's Charter in the Children's Act or in any legislation although the Child Justice Act appears to have 'domesticated' the CRC and African

²⁰⁸ Secs 23 & 20(1).

²⁰⁹ See sec 15, which provides that the entire Chapter 4 is justiciable.

²¹⁰ See 4.2.2 above for the discussion in this regard.

²¹¹ See e.g. *The University Workers Trade Union v The Council of the University of Malawi* IRC matter no. 46 of 2003; *Mhango & Others v Council of the University of Malawi* [1993]16(2) MLR 605 (High Court). It is not within the scope of the study to give a detailed discussion of the cases since they do not address issues relating to the rights of children with disabilities. In any case, the decisions do not provide additional insights into the understanding of non-discrimination beyond the principles discussed above.

²¹² See e.g. Kalaluka 'Towards an effective litigation strategy of disability rights' (2013) 175-178, where it is highlighted that the perception that 'disability rights' are non-justiciable under a country's domestic legal framework is one of the obstacles to 'disability rights' and that in terms of Zambia's national legal framework, 'the promotion and protection of disability rights is mostly governed by the laws passed by Parliament'. In this regard it is stated that although the provisions on disability in the Constitution of Zambia are listed as state directives, Zambia has also enacted the Persons with Disabilities Act 6 of 2012, which 'provides for the various rights of persons with disabilities'. In view of this, it is submitted by the candidate that the enactment of disability specific legislation in Zambia, as is the case in Malawi, implies that 'disability rights' are currently justiciable under the country's domestic legal framework with the effect that the justiciability issue might no longer be regarded as an obstacle to litigation.

²¹³ It is also noteworthy that the Malawi Constitution recognises the role of international law as section 11(2)(c) requires the court to have regard to the norms of international law when interpreting constitutional provisions. Accordingly, the courts are expected to give an interpretation that is consistent with international law.

²¹⁴ See sec 231; *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC) 374, para 92; Dugard (2011) 53-56.

Children's Charter.²¹⁵ In any case, such 'domestication' by the Child Justice Act would result in children with disabilities enjoying or enforcing the rights in the two treaties within the justice system and not in the other sectors.²¹⁶ Accordingly, despite the Children's Act being comprehensive and containing disability specific provisions, it would be necessary for the Children's Act to incorporate/domesticate the CRPD, the CRC and the African's Children's Charter so that the rights of children with disabilities set out in these treaties should be applicable in other sectors beyond the justice system/sector.

In respect of justiciability, South Africa's Constitution contains a Bill of Rights that is justiciable and includes the rights of children and the right to equality and non-discrimination, as discussed above.²¹⁷ Similarly, the PEPUDA and the Children's Act legally protect and recognise the justiciable right to equality and non-discrimination and the rights of children with disabilities respectively, as discussed above.²¹⁸ In addition, the PEPUDA gives competence to Equality Courts to adjudicate over matters relating to equality and non-discrimination arising from the Act.²¹⁹ It also makes provision for judicial remedies whenever the right is violated or threatened.²²⁰

In respect of litigation, it is noteworthy that unlike Malawi, South African courts have dealt with a few cases involving issues relating to disability broadly and relating to children with disabilities specifically.²²¹ For example, in *Western Cape Forum for Intellectual Disability v Government of the Republic*

²¹⁵ See Child Justice Act, 75 of 2008, 3(i), where the general principles of the Act recognise, among others, that the Act's application must take into account the rights and obligations of the child contained in the CRC and African Children's Charter.

²¹⁶ (The Act provides for matters relating to the justice system of children who are in conflict with the law).

²¹⁷ See secs 28 & 9. See also sec 38, which gives competence to the courts to adjudicate matters relating to infringements of any right in the Bill of Rights.

²¹⁸ See 4.2.1 & 4.2.2 above for the discussion in this regard.

²¹⁹ See generally chap 4, secs 14-20.

²²⁰ See sec 21.

²²¹ Cases that involved adults with disabilities include *Singh v Minister of Justice and Constitutional Development* 2013 (3) SA 66 (EqC), where the High Court (in para 32) observed that in terms of sec 9(3) of the Constitution, which recognises the right to freedom from disability based discrimination, the government has a duty to 'advance and promote the position of [people with disabilities]'; *Willem H*

of South Africa, and Another,²²² the Court addressed a number of issues, including equality and education. The matter arose out of a provincial education policy and practice which differentiated between children with 'severe or profound' intellectual disabilities and other children, including children with other types of disabilities. Whilst other children with disabilities attended the few available special schools and mainstream schools that had considerable state funding directly provided by the Department of Education, the children with profound 'intellectual disabilities' would receive an education in certain 'special care centres', which were operated and owned by non-state organisations such as NGOs. Unlike the special schools and ordinary mainstream schools, the Department of Education did not provide direct education related funding to these 'special care centres'. Instead, the funding (in the form of a 'subsidy') was channeled through the Department of Health, which would then remit the funds to the centers. However, this funding by the Department of Health was very low and many children with profound intellectual disabilities then could not access education. Hence, the practice and policy approach by the government resulted in the exclusion of this category of children with disabilities from attaining an education. Both the policy and practice were based on the misconception that the affected children (with severe or profound intellectual disabilities) could not have an equal entitlement to state-funded basic education since their education needs were different and their education was not compelling and immediate as it was assumed that they were in some cases 'uneducable'. The children claimed violations of rights to education, dignity and equality, among others.

Bosch v South African Police Service (2005) (unreported), where the Equality Court held that the government has the duty to ensure access by persons with disabilities to government office premises and hence directed that all police stations be made accessible; *Esthé Muller v Department of Justice and Constitutional Development & Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03), which was settled out of Court in 2004 related to accessibility of court buildings by a wheelchair user who was a lawyer. (The facts arose from the contention that respondents' failure to adequately provide proper wheelchair access to the court buildings amounted to unfair discrimination against persons with disabilities.) In terms of the settlement agreement, the government was ordered to make court premises accessible to persons with disabilities.

²²² 2011 (5) SA 87 (WCC); 2011 JDR 0375 (WCC).

In its determination, the Court found (in favour of the children) that every child with a disability is capable of learning and the state should provide funding for the children.²²³ Hence, it faulted the state for providing less funding towards the education of such children with disabilities compared to the education of other children. It held that the state had to spread its funding towards the education of all categories of children, including the children with disabilities that were affected.²²⁴ The Court ordered the state reasonable measures (including interim steps) that would ensure the education of the children.²²⁵ Furthermore, the High Court made a specific finding that the policy and practice constituted a violation of the right of children with disabilities to equality and dignity.²²⁶ In this regard, authors such as Ngwena have acknowledged that the case raises substantive equality issues.²²⁷

Similarly, in another case that was brought before the Equality Court in Mpumalanga Province, the Witbank Equality Court ordered a private schooling institution, the St. Thomas Aquinas private school, to re-admit a former learner with disabilities after the school had rejected her re-admission on the basis of her physical disabilities.²²⁸ The learner had apparently withdrawn from the school due to accessibility challenges in the school environment. The Court observed that the refusal to re-admit the learner constituted unfair discrimination on the basis of disability. It further ordered the private institution to take

²²³ See *Western Cape Forum for Intellectual Disability* case 2011 JDR 0375 (WCC), paras 19, 20, 23, 24 & 26.

²²⁴ The court's decision was not based on the concept of inclusive education but on the violations of the right to receive education, the principle of equality and equal human dignity. In its determination, the Court made express reference to the education provision in the CRC (art 28) & the African Children's Charter (art 11); & the provision relating to children with disabilities and inclusive education in the CRPD (preamble paras (m) & (r); & art 24). See *Western Cape Forum for Intellectual Disability* case, paras 20, 21 & 23.

²²⁵ See *Western Cape Forum for Intellectual Disability* case, para 52.

²²⁶ See *Western Cape Forum for Intellectual Disability* case, paras 45, 46 & 52.

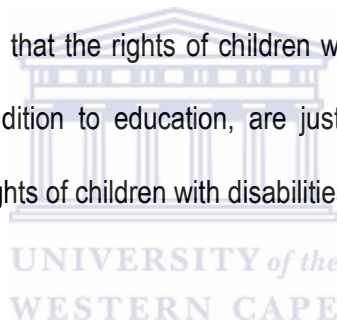
²²⁷ See Ngwena & Pretorius (2012) 85. See also Ngwena (2013) 139-164, for a detailed analysis of the case.

²²⁸ See *Lettie Hazel Oortman v St Thomas Aquinas Private School & Bernard Langton* Equality Court Case No 1 of 2010 (Witbank) (*Oortman* case). See also South African Human Rights Commission *Annual international report* (2011) 56-57.

reasonable steps to remove all obstacles so that the learner should have wheelchair access to classrooms and other facilities.²²⁹

Above all, the South African courts have embraced the concept of reasonable accommodation as a significant notion for ensuring substantive equality.²³⁰ For example, in the case of *MEC for Education: KwaZulu-Natal & Others v Pillay*, the Constitutional Court observed that the essence of reasonable accommodation is that the state or society 'must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally'.²³¹ The courts have also expressly recognised the duty to take special measures, including affirmative action measures, in ensuring non-discrimination and substantive equality for all persons.²³²

Therefore, it can be observed that the rights of children with disabilities, including rights such as equality and non-discrimination in addition to education, are justiciable with the effect that the courts adjudicate on matters relating to the rights of children with disabilities.²³³



4.3 Concluding observations

The chapter has provided a descriptive and comparative discussion of the general legal and policy frameworks for implementing the rights of children with disabilities in Malawi and South Africa. It has

²²⁹ See South African Human Rights Commission *Annual international report* (2011) 57.

²³⁰ See generally Ngwena (2013) 139, 157.

²³¹ *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (2) BCLR 99 (CC) para 73. See also *Pillay Case*, para 64; Currie & De Waal (2013) 234-235.

²³² See e.g. *Harmsey v City of Cape Town* 2003 6 BLLR 557 (LC) para 47. (The case did not address disability issues but is relevant for recognising the role that special measures for achieving *de facto* equality play.)

²³³ For a discussion on how the South African courts have applied international law in respect of children's constitutional rights, see generally Ngidi RLK 'The role of international law in the development of children's rights in South Africa: A children's litigator's perspective' in Killander & Adjolohoun (eds) (2010) 173-191.

observed that both jurisdictions have progressive constitutions that could facilitate the implementation of the rights, including providing express protection of the right to equality and freedom from disability based discrimination. The two jurisdictions also have child protection legislation and disability policies. However, unlike South Africa, Malawi has disability specific legislation. On its part, South Africa has got anti-discrimination legislation while Malawi does not have this. In addition, Malawi's CCPJA has domesticated the CRC and the African Children's Charter while South Africa's Children's Act is yet to do so.

It has been observed that despite the similarities and differences, there are a number of gaps that could be highlighted in the frameworks in both countries.²³⁴ The comparative analysis suggests that South Africa's domestic implementation framework has fewer gaps than that of Malawi. This could be attributed to a number of factors. Amongst others, it is only the South Africa's legislative framework that has a specific provision that sets out the substantive rights of children with disabilities in its Children's Act that could guide the 'legal' implementation of the rights of children with disabilities. In addition, it is only South Africa's framework through the PEPUDA that expressly recognises that the failure to provide reasonable accommodation constitutes discrimination.

In view of this, it is relevant to assess how the general domestic implementation frameworks of Malawi and South Africa comply with the international standards and fundamental attributes for ensuring the appropriate national implementation of the rights of children with disabilities. Accordingly, the next chapter explores the extent to which the two countries' applicable constitutional, legislative and policy frameworks conform to the six fundamental attributes for ensuring the appropriate national implementation of the rights of children with disabilities that the previous chapter has established.

²³⁴ (These gaps could affect the conformity by the frameworks to the fundamental attributes for ensuring the appropriate national implementation of the rights of children with disabilities.) The analysis of the gaps and their impact on the national implementation of the rights of children with disabilities in Malawi and South Africa is provided in the next chapter.

Chapter 5

Assessment of conformity to fundamental attributes pertaining to domestic implementation of the rights of children with disabilities by Malawi and South Africa

5.1 Introduction

5.1.1 Purpose and outline of chapter

The previous chapter has discussed the measures that Malawi and South Africa are taking for implementing the rights of children with disabilities at national level. It has observed, amongst others, that both jurisdictions have progressive constitutions that could facilitate the implementation of the rights. They also have child protection legislation and disability policies. However, Malawi has disability legislation whilst South Africa has pro-equality and anti-discrimination legislation. In addition, Malawi's child protection statute has domesticated the CRC and the African Children's Charter while South Africa's corresponding legislation has not domesticated the two treaties. Furthermore, both jurisdictions recognise the justiciability of the rights of children, including children with disabilities.

This chapter provides a comparative assessment of how the general domestic implementation frameworks of Malawi and South Africa comply with the fundamental attributes for ensuring the appropriate national implementation of the rights of children with disabilities (in general). It explores the extent to which the two countries' implementation frameworks conform to the relevant fundamental attributes that Chapter 3 has established.¹ In achieving its objectives, the chapter first assesses the extent of the conformity before providing the immediate broad concluding observations that the comparative assessment establishes. The

¹ See section 3.3 of Chapter 3 for a detailed discussion on the relevant fundamental attributes

chapter follows the simultaneous comparison style, which entails that Malawi's and South Africa's frameworks will be analysed together with one following the other in the same discussion.

5.1.2 Fundamental attributes as 'analytical tools' for 'appropriate' domestic implementation framework

It has been observed in Chapter 3 that the international standards for national implementation of the rights of children with disabilities would, amongst others, expect the pertinent domestic implementation frameworks to conform to certain fundamental attributes. These attributes include: adherence to the human rights model in conceptualising disability; explicit mention and recognition of disability and the rights of children with disabilities; respect for non-discrimination which ensures substantive equality for children with disabilities; respect for the principle of inclusion of children with disabilities in the society; recognition of the principle of the best interests of the child as the paramount consideration in all matter affecting children with disabilities; and protection of survival and developmental rights of children, including children with disabilities.²

It was further highlighted in that conformity to certain attributes could also require compliance with various aspects that constitute the 'sub-categories' of the broad fundamental attribute.³ For example, it was established that the implementation of non-discrimination that ensures substantive equality requires states to take specific measures, which include: expressly recognising disability as prohibited ground of discrimination; providing reasonable accommodation; prohibiting all forms of discrimination; and taking special and affirmative action measures to facilitate *de facto* equality. Similarly, conformity to the attribute pertaining to inclusion entails taking measures that facilitate accessibility and participation in addition to

² The attributes are discussed and listed in this regard in 3.4.4 in Chapter 3.

³ See 3.4.4 in Chapter 3 for the discussion in this regard.

recognising 'inclusion focused' rights such as inclusive education and 'community living'. Therefore, the frameworks will be expected to comply with the relevant aspects which constitute the 'sub-categories' of the attributes in order to conform to the pertinent broader fundamental attribute. The following section analyses the extent to which the legal and policy implementation frameworks in Malawi and South Africa conform to these fundamental attributes, including their pertinent 'sub-categories'.⁴

5.2 Assessment of compliance with fundamental attributes

5.2.1 Adherence to the human rights model in conceptualising disability

Malawi

The Disability Act defines disability as:

[A] long-term physical, mental, intellectual or sensory impairment, which, in interaction with various barriers, may hinder the full and effective participation in society of a person on equal basis with other persons'.⁵

It can be observed that in defining disability, the Act attributes the disability 'problem' (obstacles that hinder full and effective participation) to the environment or other external barriers and not to the impairments of persons/children with disabilities thereby demonstrating compliance with the social model. It also highlights the need of ensuring full and effective participation by persons/children with disabilities on an equal basis with others thereby enunciating the human rights model. The definition given by the Act is also the same as

⁴ As explained in 4.1, the analysis focuses on the major legal and policy documents such as constitutions, child protection and disability or anti-discrimination laws, and disability policies. The analysis of applicable sectoral documents is limited to education laws and policies. The focus is put on policies that specifically address the right to education of persons/children with disabilities.

⁵ See sec 2.

the understanding of a 'person with disability' under CRPD's article 1. Accordingly, the Act conceptualises disability in terms of the social and human rights models.⁶

In addition, Malawi's Equalisation Policy recognises the need to conceptualise disability in terms of the human rights model.⁷ In emphasising the social and human rights models of disability, the Equalisation Policy observes that:

'The major problem facing people with disabilities in Malawi is that of exclusion. People with Disabilities are excluded from the mainstream of society and as such experience difficulty in accessing fundamental social political and economic rights'.⁸

Accordingly, the Equalisation Policy attributes the challenges that persons with disabilities in Malawi face to the barriers in the environment and society, thereby enunciating the social and human rights models of disability. Above all, one of the guiding principles of the Equalisation Policy expressly acknowledges that '[persons with disabilities] want equal rights, not charity. They are entitled to the same human rights, as all other citizens'.⁹ The positive approach that the Policy takes in regarding persons/children with disabilities as rights holders is consistent with and embodies the human rights model of disability.¹⁰

⁶ This also entails that the Act is based on the two models. See generally Chilemba (2013) 20. See also Chilemba E 'Promoting disability rights in Malawi' 23 July 2012: www.osisa.org/law/blog/promoting-disability-rights-malawi (accessed 29 May 2013).

⁷ See Equalisation Policy (2005) 3, where the Policy appreciates that disability is currently regarded as human rights issue by observing that:

'Disability tends to be couched within a medical and welfare framework, identifying people with disabilities as 'ill, different from their non-disabled peers, and in need of care... Because the emphasis is on the medical needs of people with disabilities, there is a corresponding neglect of their wider social needs. This has resulted in severe isolation for people with disabilities and their families. However, over the recent past years, disability has been repositioned as a human rights and development issue with the recognition that if society cannot cater for people with disabilities, it is society that must change.'

⁸ Equalisation Policy (2005) 3. The Policy further acknowledges that:

'Persons with disabilities face a number of barriers such as environmental, institutional, attitudinal and economic barriers that prevent them from participating fully in and being included in the mainstream of society'.

See Equalisation Policy (2005) 4.

⁹ See Equalisation Policy (2005) 7.

¹⁰ See Equalisation Policy (2005) 7.

However, the framework still retains terminologies and puts the focus on interventions which embody elements of the welfare and medical approaches to disability. For example, the child-specific provision in the Constitution of Malawi recognises the right of children with disabilities to be provided with assistance by the state, 'where appropriate'.¹¹ On its part, the CCPJA requires local authorities to register and give 'assistance, whenever possible', to children with disabilities to enable them to grow up with dignity among other children.¹² The Act also requires the proceedings in a child justice court to ensure that 'Children with disabilities are accorded assistance to meet their special needs where necessary.'¹³ It is noteworthy that the framework does not explain the nature of assistance that will be given or the meaning to be given to the phrase. Nonetheless, the use of the phrase 'giving assistance' as opposed to 'providing support' in the three provisions, including the child-specific provision in the Constitution, and the reference to 'special needs' of children with disabilities in section 145(d) reflect the welfare approach to disability. It could be considered that since the 'giving of assistance' by the local authorities in section 72 of the CCPJA is aimed at enabling children with disabilities to grow up with 'dignity', the appropriate implementation of the provision would take the human rights approach to disability by perceiving children with disabilities as rights holders. However, since the perception is that the dignity will be realised by provision of assistance, the welfare based approach to disability still remains. Thus the framework in certain aspects still regards children with disabilities as in need of 'care' or 'assistance' as opposed to regarding them as rights holders entitled to full human rights enjoyment.

¹¹ See Malawi Constitution, 195, sec 23(4), which provides that:

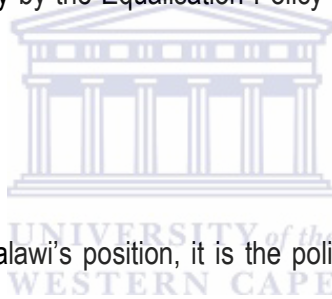
'All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and, in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance'.

¹² Sec 72.

¹³ Sec 145(d).

Nonetheless, the Disability Act recognises the right to economic empowerment, which requires the state to provide persons with disabilities with loans and other support measures so that they can engage in economic activities with the effect that it is impliedly acknowledged that they must not rely on charity.¹⁴ This right takes the positive approach which recognises persons with disabilities as rights holders. Although the right could be regarded as applicable to adults as opposed to children with disabilities, it is still significant for the positive approach it takes.

In view of the foregoing analysis, it can be concluded that, on the whole, Malawi's implementation framework satisfies the fundamental attribute which requires disability to be conceptualised in terms of the human rights model despite the traces of the welfare model which remain in certain aspects. This is because the understanding of disability by the Equalisation Policy and the Disability Act is consistent with the social and human rights models.



South Africa

It is noteworthy that, in contrast to Malawi's position, it is the policy framework, as opposed to the legal framework, that gives an indication of the approach to disability that South Africa follows.¹⁵ In this regard, the INDS acknowledges that disability used to be approached from the medical model perspective and that the medical model resulted in the continued marginalisation and exclusion of persons/children with

¹⁴ Disability Act, sec 23, which provides that:

'The Government shall recognize the importance of empowering persons with disabilities economically, without any form of discrimination, and shall ensure that the persons with disabilities are able to access loans and credit facilities for purposes of carrying out income generating activities'.

¹⁵ South Africa's applicable laws do not provide a general definition of disability. Nonetheless, the Employment Equity Act (EEA) defines 'persons with disabilities' in sec 1, as 'people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'. Similarly, the Social Assistance Act (SAA) 2004 defines a 'person with disability' in sec 9(b) as read with sec 1 as a person who 'owing to a physical or mental disability, [is] unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.' It can be observed that both definitions are based on the medical model of disability as it attributes the disability related challenges faced by persons with disabilities to their impairments and not to the environment'. However, it appears that the definition of 'person with disabilities' in the SAA was specifically designed to identify categories of persons with disabilities who qualify for a disability grant in terms of the Act whilst the definition of 'persons with disabilities' in the EEA is also applicable in the context of employment with the effect that the definitions do not purport to give a general understanding or conceptualisation of disability in South Africa.

disabilities.¹⁶ It further unequivocally states that disability is currently approached from the social model perspective and that the social model requires that the society should be restructured in order to address the challenges associated with disability.¹⁷

The INDS also recognises that disability should be conceptualised as a human rights and developmental issue where focus should be put on ‘the removal of barriers to equal participation and the elimination of discrimination based on disability’.¹⁸ Thus it highlights the need to adhere to the social and human rights models. Above all, the INDS explicitly observes that there has been a shift in the conception of disability from the medical to the social model.¹⁹ In cementing its emphasis that disability should be conceptualised in terms of the social model, the overall vision of the INDS seeks to ensure a society for all in which ‘the needs of all citizens constitute the basis for planning and policy, and the general systems and institutions of society are accessible to all’.²⁰ Since the INDS is currently South Africa’s principal disability specific policy, it can be concluded that the policy framework explicitly recognises that disability should be conceptualised in terms of the social and human rights models.²¹ This is consistent with the fundamental attribute which requires the implementation framework to be based on the human rights model of disability.²²

¹⁶ INDS (1997) 13 & 14.

¹⁷ INDS (1997) 15.

¹⁸ INDS (1997) 15.

¹⁹ See INDS (1997) 15-16, where it is stated that: ‘The paradigm shift (from the medical to the social model) has come about largely through the development of strong organisations of [persons with disabilities] (DPOs)’.

²⁰ INDS (1997) 22.

²¹ As explained in the previous chapter, South Africa is in the process of replacing the Strategy.

²² It is noteworthy that other policies such as the Policy on Disability and the INSSSCD also expressly adopt the social and human rights models of disability. See e.g. Policy on Disability (2009) 10 & 11; INSSSCD (2009) 9. It is note within the scope of the study to provide a detailed discussion of these policies.

Furthermore, the Children's Act expressly identifies the duty to recognise the disability of a child (in addition to his or her special needs) and the requirement to create an enabling environment which addresses the 'special needs' of children with disabilities as one of its general principles under section 6.²³ This obligation is consistent with the social and human rights models of disability as it appreciates that the 'challenges' that children with disabilities face are attributable to the lack of an 'enabling environment', thereby recognising that it is the barriers in the environment that must be eliminated for children with disabilities to be accommodated. It is also noteworthy that the Act requires the environment to be adjusted to accommodate the 'individual needs' of children with disabilities and not vice versa. This approach embodies the social and human rights models of disability.

Similarly, the disability specific section in the Children's Act recognises the obligation to provide individual children with disabilities and their care-giver(s) with the necessary support services.²⁴ It also explicitly requires the provision of 'conditions' that 'ensure dignity, promote self-reliance and facilitate active participation in the community' by children with disabilities.²⁵ The terminology and approach used in these provisions demonstrate that disability is conceptualised in terms of the human rights model as they perceive children with disabilities as rights holders who are entitled to be provided with 'necessary' support measures and further recognise that children with disabilities are entitled to respect for their dignity, autonomy (self-reliance) and participation.

On its part, the PEPUDA recognises that discrimination on the basis of disability includes the denial or withdrawal/removal of facilities that are necessary for the 'functioning' of persons/children with

²³ See Children's Act, sec 6 (2)(f), which provides that:

'(2) All proceedings, actions or decisions in a matter concerning a child must—...

(f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has'.

²⁴ Children's Act, sec 11(1)(d).

²⁵ Children's Act, sec 11(1)(c).

disabilities.²⁶ It further recognises the failure to eradicate all obstacles that restrict the enjoyment of equal opportunities by persons/children with disabilities as constituting disability based discrimination.²⁷ The approach taken by the PEPUDA in its understanding of discrimination is consistent with the social and human rights models as it recognises first, that the absence of the necessary 'external' facilities impedes the enjoyment of rights by children/persons with disabilities and, secondly, that children/persons with disabilities will enjoy equal opportunities if all 'external' barriers are eliminated. Thus the Act attributes the challenges faced by persons/children with disabilities to barriers that exist in the environment, including the failure to provide 'necessary facilities'. Above all, it recognises the obligation to ensure 'equal opportunities' for children/persons with disabilities. Accordingly, the PEPUDA reflects the social and human rights models of disability.

However, as is the case with the Malawi framework analysed above, South Africa's framework also retains terminologies and interventions which are imbued with elements of the medical model of disability. For example, the disability specific provision in the Children's Act provides that the 'special needs' of children with disabilities must be recognised;²⁸ and it sets out the right of children with disabilities to parental care or family care, including 'special care' whenever appropriate.²⁹ Similarly, the Act expressly identifies the need to recognise the 'special needs' of children with disabilities in its objectives.³⁰ The terminology and approach used in the two provisions embody elements of the outmoded welfare approach to disability by perceiving children with disabilities as having 'special needs' and requiring 'special care' as opposed to 'measures of support'. Thus the framework in certain aspects still regards children with

²⁶ See PEPUDA, sec 9(a).

²⁷ See PEPUDA, sec 9(c).

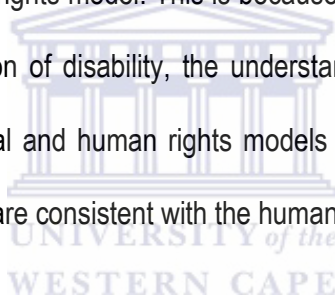
²⁸ See e.g. Children's Act, sec 11(1)(b).

²⁹ See Children's Act, sec 11(1)(a).

³⁰ See Children's Act, sec 2(h), which states that the objects of the Act include 'to recognise the special needs which children with disabilities may have'.

disabilities as individuals in need of 'care' or 'assistance' because they have 'special needs' as opposed to regarding them as rights holders entitled to full human rights enjoyment. Nonetheless, it can be observed that the instances and emphasis where the pertinent provisions in the Children's Act demonstrate consistency with the human rights model outnumber and outweigh the ones that reflect the welfare model of disability with the effect that the Act can be regarded as predominantly reflecting the human rights model of disability.

In view of the foregoing analysis, it can be concluded that South Africa's implementation framework largely conforms to the fundamental attribute which requires disability (in addition to the legislative and policy interventions taken to address issues relating to the rights of children with disabilities) to be conceptualised in terms of the human rights model. This is because although the legal framework does not give guidance on the conceptualisation of disability, the understanding of disability in the current policy framework is consistent with the social and human rights models of disability. In addition, the legislative framework contains interventions that are consistent with the human rights model of disability.



5.2.2 Disability explication: Explicit recognition of the rights of children with disabilities

Malawi

The Bill of Rights in the 1995 Malawi Constitution contains a child-specific provision that has a sub-section which explicitly guarantees children with disabilities the rights to live in safety and security and to be provided with assistance by the state.³¹ Thus the provision demonstrates compliance with the first aspect of the disability explication attribute, namely, making express provision for the rights of children with

³¹ See sec 23(4), which provides in part that: '[A]ll children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance'.

disabilities. However, as observed above,³² the provision takes a 'protection and welfare focused approach' which emphasises provision of 'safety security and assistance'; and is thus more grounded in the outmoded welfare approach to disability. Above all, these rights (of children with disabilities) are not set out in a separate sub-section but they are contained in the same sub-section that recognises the entitlement by all children to reasonable maintenance. This suggests that the Constitution regards children with disabilities as being in need of predominantly protective and charity based interventions. Accordingly the provision does not comply with the second aspect and the essence of the disability explication attribute since the approach it takes is contrary to the human rights model of disability.

In addition, the Bill of Rights contains a provision which expressly requires government to give special consideration to children and persons with disabilities in the application of the right to development.³³ On their part, the Principles of National Policy in the Constitution also contain disability provisions, which amongst others, expect government to ensure accessibility of persons with disabilities to public places and to equalise the opportunities of persons with disabilities in employment.³⁴ These two provisions demonstrate compliance with the disability explication attribute. The drawback is that the latter provisions are set out in the Chapter that contains non-justiciable state directives. Accordingly, the Constitution complies with certain aspects of the 'disability explication' attribute to the extent that it makes express provision for the rights of children/persons with disabilities.³⁵ However, the broad approach taken by the Constitution ultimately contradicts the essence of the attribute by taking a welfare based approach with the effect that it cannot not guide the implementation of the rights of children with disabilities in the

³² See 5.2.1 above for further discussion on the child-specific provision.

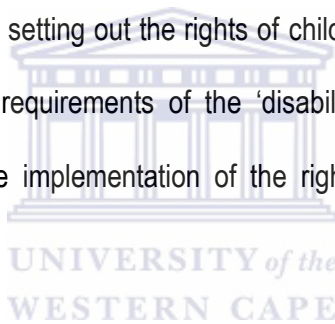
³³ See sec 30(1), which states that: 'All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and persons with disabilities in particular shall be given special consideration in the application of this right'.

³⁴ See sec 13(g).

³⁵ See 2.4.1 in Chapter 2 for further discussion on the 'disability explication' concept.

manner envisaged by the 'human rights based approach' to disability taken by the applicable international human rights law.

On its part, the Disability Act does not have any specific provisions on children with disabilities or a provision that sets out the measures to be taken in realising their rights. This is contrary to the fundamental attribute that requires the explicit recognition of the rights of children with disabilities, especially considering that the Act is a disability specific law. Nevertheless, the Act contains other substantive rights which can also be exercised by children with disabilities. These include housing, social protection and accessibility.³⁶ Therefore, the enactment of the Act plays a significant role in setting out in explicit terms a number of substantive rights for persons with disabilities, which also apply to children with disabilities. However, it is the failure to contain a specific section setting out the rights of children with disabilities which could be the drawback in terms of satisfying the requirements of the 'disability explication' attribute. The 'omitted' provision would inform and guide the implementation of the rights that are 'specifically' applicable to children with disabilities.



The CCPJA contains two provisions relating to children with disabilities, as discussed above.³⁷ In this respect, the Act conforms to the first aspect of the disability explication attribute. However, as discussed above,³⁸ the provisions take the approach that emphasises welfare based interventions with the effect that they potentially defeat the essence of the attribute. In any case, the two provisions do not purport to guide the approach that should be taken in implementing the rights of children with disabilities broadly

³⁶ See secs 21, 14 & 8. See e.g. sec 6, which requires government to provide appropriate health care services to persons with disabilities, including prevention, early identification, intervention and other services designed to minimise and prevent the occurrence of more disabilities.

³⁷ See sec 72, which expects district assemblies or local government authorities to register all children with disabilities within their areas of jurisdiction and give them assistance, whenever possible, to enable them 'grow up with dignity among other children and to develop their potential and self-reliance'. See also sec 145(d), which requires the proceedings in a child justice court to ensure that 'Children with disabilities are accorded assistance to meet their special needs where necessary

³⁸ See 5.2.1 above for the discussion in this regard.

since the provisions apply to specific contexts, namely in respect of the duties of local authorities relating to children with disabilities and in proceedings in child justice courts involving children with disabilities. Therefore, the provisions cannot be regarded as sufficiently conforming to the disability explication attribute merely because they make explicit mention of children with disabilities.

Furthermore, the Act does not contain a specific provision which expressly sets out the substantive rights of children with disabilities although the rights guaranteed to all children are also applicable to children with disabilities. This implies that the Act does not provide any guidelines on how the substantive rights of children, including children with disabilities, should be implemented in a way that ensures compliance with the 'human rights based approach' to disability. Therefore, the legislative vacuum in respect of a provision specifying the rights of children with disabilities in Malawi is yet to be addressed.³⁹ This vacuum is inconsistent with the essence of the 'disability explication' fundamental attribute.⁴⁰

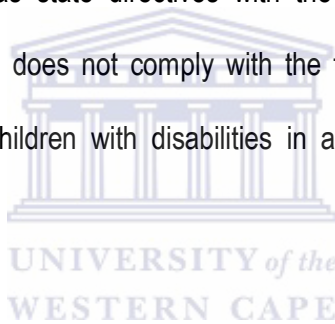
In respect of the policy framework, Malawi's Equalisation Policy does not contain a specific policy statement on children with disabilities that would have outlined how their rights should be implemented. Instead, it only mentions children with disabilities alongside other categories of persons with disabilities. Although the express mention of children with disabilities is commendable, the failure to include a specific policy statement on children with disabilities that would identify strategies for addressing the challenges they face is regrettable and does not conform to the disability explication attribute.

Therefore, it can be observed that Malawi's framework does not demonstrate conformity to the 'disability explication' attribute principally because the legislative and policy frameworks do not contain

³⁹ This implies that the children with disabilities will be expected to enjoy the rights guaranteed to all persons with disabilities broadly as long as the rights apply to children with disabilities. See e.g. Disability Act, sec 10- education & sec 8- accessibility, which contain substantive rights applicable to children with disabilities.

⁴⁰ Nonetheless, since the Act domesticates the African Children's Charter and the CRC, the provisions on children with disabilities in the two treaties are also incorporated into the Act. Hence, it could be argued, with regard to the disability provisions in the CRC, that implementation of the rights of children with disabilities incorporated into the Act is expected to take the approach that facilitates the inclusion of children with disabilities in society as recommended by the CRC Committee.

specific provisions that set out the rights of children with disabilities in such a way that they could guide the implementation of the rights (in the manner required by the applicable treaties). In terms of the Constitution, it expressly mentions children with disabilities in its child-specific provision in the Bill of Rights. The provision gives some sort of guidance on the approach to be taken in implementing the rights of children with disabilities. The drawback is that the provision emphasises a predominantly welfare based approach, which contradicts the broad ‘human rights based’ approach to disability taken by the applicable human rights law. Therefore, although it demonstrates some aspects of disability explication, it does so in a manner that defeats the essence of the attribute as envisaged by international human rights law. In addition, the provisions that specifically set out the rights of persons/children with disabilities in greater detail in the Constitution are listed as state directives with the effect that they are not justiciable.⁴¹ Ultimately, the framework as a whole does not comply with the fundamental attribute that requires the explicit recognition of the rights of children with disabilities in a manner envisaged by the applicable international human rights law.



South Africa

Unlike Malawi’s position, the Constitution of South Africa does not have specific substantive provisions on disability or the rights of children with disabilities apart from the general equality and non-discrimination clause in section 9.⁴² In addition, the Bill of Rights in the Constitution, which dedicates a specific provision to the rights of the child in section 28, does not make reference to disability or the rights of children with disabilities. Hence, the Constitution only mentions disability in its anti-discrimination provisions in section 9. The Constitution’s approach of mentioning disability only with respect to non-discrimination is similar to the previous ‘flawed’ approach taken by international law of assuming that disability issues would be addressed

⁴¹ See sec 13(g).

⁴² Thus the Constitution does not give any guidance relating to the implementation of the rights of children with disabilities.

through the enforcement of non-discrimination alone. Hence, the Constitution's approach is contrary to the 'disability explication' attribute

On its part, the Children's Act expressly mentions children with disabilities in its objectives and further dedicates a specific article to children with disabilities,⁴³ which sets out their rights. This approach is consistent with the first aspect of the disability explication attribute that requires the express recognition of the rights of children with disabilities.⁴⁴ In addition, the inclusion of the disability specific provision in the Act (by mentioning disability in the general principles and also in a dedicated provision setting out the rights of children with disabilities) serves as a reference point which guides the implementation of the rights of children with disabilities that are contained in the Act.⁴⁵ It also guides the application of the other provisions of the Act to children with disabilities. Above all, the guidance shows that the implementation of the rights of children with disabilities must regard the children as rights holders. For example, the provisions show that the application of the Act to children with disabilities and the implementation of their rights in the Act must address the 'particular needs' of children with disabilities and respect their dignity and autonomy in addition to ensuring their effective participation and inclusion in society. Indeed, the general principle under section 6 include an obligation to recognise the disability of a child (in addition to his or her special needs) and the requirement to create an enabling environment which addresses the 'special needs' of children with disabilities.⁴⁶ This obligation is consistent with the human rights approach to disability as it recognises that the barriers in the environment that must be eliminated for children with disabilities to be accommodated.

⁴³ See sec 2(h), which states that the objects of the Act include 'to recognise the special needs which children with disabilities may have'. This implies that the framers/drafters of the Act also had children with disabilities in mind in and recognised the need to make provision for their rights.

⁴⁴ The approach taken by the Act is a departure from the past where the rights of children with disabilities were merely 'assumed' in legal instruments but not specifically provided for.

⁴⁵ See sec 11.

⁴⁶ See Children's Act, sec 6 (2)(f), which provides that:

'(2) All proceedings, actions or decisions in a matter concerning a child must—...

Similarly, as discussed above,⁴⁷ the disability specific section in the Children's Act contains provisions which predominantly take the approach that recognises children with disabilities as rights holders who are entitled to respect for their dignity, autonomy (self-reliance) and participation.⁴⁸ However, as discussed above, the other sub-sections in the disability specific provision still retain elements that reflect the outmoded welfare approach to disability, by requiring children with disabilities to be provided with 'special care' as opposed to 'measures of support'.⁴⁹ Nonetheless, as observed above, the disability specific provisions in the Children's Act predominantly provide for measures and interventions that are more grounded in the human rights model of disability and also take the approach that considerably regards children with disabilities as rights holders. Consequently, the provisions demonstrate greater consistency with the disability explication fundamental attribute. Therefore, unlike the Malawi's position, the child protection legislation of South Africa has disability specific provisions that could guide the implementation of the rights of children with disabilities in a manner that is consistent with the 'human rights based approach' to disability taken by the applicable treaties. In this way, the disability-specific provisions in reflect the essence of the disability explication attribute.

The Children's Act further expressly mentions children with disabilities in a number of its provisions.⁵⁰ For example, the Act requires the state to provide funding for initiatives relating the provision of prevention and early intervention, which is mainly designed to act as a protection and developmental

(f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has'.

⁴⁷ See 5.2.1 above for the discussion in this regard.

⁴⁸ See e.g. Children's Act, sec 11(1)(c)-provision of necessary support services to individual children with disabilities and their care-giver(s) & sec 11(1)(d)- provision of 'conditions' that 'ensure dignity, promote self-reliance and facilitate active participation in the community' by children with disabilities. As discussed in 5.2.1 above, the obligations imposed by these provisions reflect the human rights approach to disability as they perceive children with disabilities as rights holders.

⁴⁹ See e.g. Children's Act, sec 11(1)(a). This suggest that the provision regards children with disabilities as individuals in need of 'care' or 'assistance' because of their 'special needs' as opposed to regarding them as rights holders. See 5.2.1 above for the discussion in this regard.

⁵⁰ See e.g. sec 13(1)- health information; sec 78(4)-partial care; sec 93(4)- early childhood development (ECD); sec 146(4)- early intervention and prevention; & sec 215(4)- on the role of drop-in centres.

strategy for children.⁵¹ Among others, the Act obliges the government to ensure that 'funding of prevention and early intervention programmes must be prioritised...to make prevention and early intervention programmes available to children with disabilities.'⁵² Similarly, the Act makes provision for drop-in centers, which are facilities 'providing basic services aimed at meeting the emotional, physical and social development needs of vulnerable children.'⁵³ The Act urges the state to come up with a strategy aimed at ensuring that drop-in centers are spread across the country and that in doing so, due consideration must be given 'as provided in section 11, to children with disability or chronic illnesses.'⁵⁴ Among others, the Act specifically mentions that the government has the obligation to ensure that '[t]he funding of drop-in centres must be prioritised...to make drop-in centres accessible to children with disabilities'.⁵⁵

It can be observed that the measures and interventions that are required to be taken in respect of children with disabilities principally seek to ensure that they have access to various crucial facilities, services and programmes provided to all children. This approach is consistent with the 'human rights based' approach to disability in that it mainly aims to ensure the participation and inclusion of children with disabilities in respect of various services provided to the community. Hence, the explicit mention of disability and the rights of children with disabilities in the various provisions of the Children's Act plays the crucial role of ensuring their human rights enjoyment. Thus the express recognition of the rights of children with disabilities by the Act demonstrates compliance with the 'disability explication' attribute.

⁵¹ See generally secs 143 & 144.

⁵² Sec 146(4)(b).

⁵³ See sec 213(1).

⁵⁴ Sec 214(1).

⁵⁵ See secs 215(1) & (4)(b). In addition, sec 13 (1) provides for the right of all children, including children with disabilities, to health related information. On its part, sec 78(4)(b) requires the government to ensure that in discharging its obligations related to partial care provision, the 'funding of partial care facilities must be prioritised... to make facilities accessible to children with disabilities.' Lastly, sec 93(4)(b), which relates to ECD programmes provision, requires the state to ensure that '[t]he funding of early childhood development programmes must be prioritised...to make early childhood development programmes available to children with disabilities.'

In respect of the policy framework, the INDS identifies children with disabilities and youth with disabilities among the categories of persons with disabilities who require special targeting and attention in order to redress past and existing inequalities.⁵⁶ However, just as is the case with Malawi's Disability Policy, the INDS does not have a specific policy objective, statement or guideline relating to children with disabilities. Instead, it mentions children with disabilities alongside other categories of persons with disabilities. Such omission is contrary to the standards that require specific recognition of the rights of children with disabilities. Nevertheless, the Policy's guidelines seek to address and apply to all persons with disabilities. In addition, the INDS has a number of policy guidelines that specifically mention children with disabilities. For example, the guideline on health care includes an express reference to child healthcare which states that '[m]easures need to be undertaken to implement comprehensive free health care for all children with disabilities under six, including free access to assistive devices and rehabilitation services'.⁵⁷ The express mention of children with disabilities in the Policy is commendable as it is consistent with the first aspect of the 'disability explication' attribute, namely, the need to make express mention of disability. Accordingly, the major drawback with the Policy is the failure to devote a specific policy guideline to children with disabilities which would guide the policy approach for implementing their rights in general. This omission makes the Policy to fail to comply with the crucial aspect of the 'disability explication' attribute.

Therefore, it can be observed from the foregoing assessment that South Africa's framework has a number of aspects that demonstrate compliance with the 'disability explication' attribute. This is the case mainly because the Children's Act contains specific provisions on the rights of children with disabilities and further contains a number of provisions which expressly set out their rights in such a way that the Act provides guidance on the approach that should be taken in implementing the rights of children with

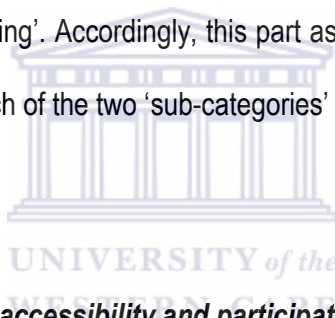
⁵⁶ INDS (1997), 12-13 & 16. The Policy particularly singles black children and black women with disabilities as the most marginalised.

⁵⁷ INDS (1997) 39.

disabilities. In addition, the guidance that the Act gives demonstrates greater consistency with the ‘human rights based approach’ to disability since the provisions take the approach that predominantly regards children with disabilities as rights holders. This position addresses the gaps left by the Constitution’s failure to contain disability specific provisions, including specific provision on the rights of children with disabilities.

5.2.3 Inclusion of children with disabilities in society

As discussed in Chapter 3 and above, the domestic implementation framework is expected to comply with a number of ‘sub-categories’ of the fundamental attribute relating to the need to respect the principle of inclusion.⁵⁸ These aspects include the need to respect the principle of inclusion broadly by ensuring participation and accessibility and to further recognise the crucial ‘inclusion focused rights’ such as inclusive education and ‘community living’. Accordingly, this part assesses the implementation frameworks of Malawi and South Africa against each of the two ‘sub-categories’ of the inclusion attribute.



Inclusion in broad terms: Inclusion, accessibility and participation

Malawi

The disability specific Principles of National Policy in section 13(g) of the Constitution expect the government to ensure ‘the fullest possible participation in all spheres of Malawian society’ by persons/children with disabilities. This provision is commendable as it is consistent with the attribute that requires the inclusion of children with disabilities in society (through full participation). Similarly, the child-specific Principles of National Policy in section 13(h) of the Constitution expect the state to adopt child related laws and policies that seek to ‘encourage and promote conditions conducive to the full development of healthy, productive and responsible members of society.’ The provision recognises that all children, who

⁵⁸ See 3.4.4 in Chapter 3 & 5.1.2 above for the discussion in this regard.

include children with disabilities, must be taken as members of the society and hence requires the state to respect their full development in that regard. This provision is consistent with the attribute that emphasises the inclusion and participation of children with disabilities in society. Nonetheless, the drawback could be the legal implications of the fact that the Principles of National Policy are non-justiciable.

On its part, the Disability Act requires government to recognise the rights of persons with disabilities to adequate standards of living, for themselves and their families (and ensure, among others, access to adequate food, clothing and housing), in addition to ensuring equal access by persons/children with disabilities to appropriate and affordable social services; and to social support programmes.⁵⁹ It also recognises accessibility as a right, whereby government is obliged to take appropriate measures to ensure that persons/children with disabilities have access to the physical environment, transportation, information and communications, including information and communication technologies and systems, and other facilities and services available or provided to the public.⁶⁰ These rights, especially the ones relating to accessibility, would facilitate the inclusion of children with disabilities in society.⁶¹ Similarly, the right to adequate standards of living, including access to social programmes and services, would facilitate the inclusion of persons/children with disabilities in society. Indeed, although the right mirrors the right to adequate standards of living under CRPD's article 28; it draws the obligations it imposes from the measures that the CRPD requires to be taken in implementing both article 28 on the right to adequate standards of living and social protection and article 19 on the right to 'community living', which aims at ensuring inclusion of persons with disabilities in the community.⁶²

⁵⁹ Sec 14.

⁶⁰ Sec 8.

⁶¹ It has already been demonstrated in Chapter 3 that accessibility facilitates inclusion. See 3.3.4 in Chapter 3. See also Jones in Rioux; Bassier & Jones (eds) (2011) 60.

⁶² See CRPD, arts 28(2)(a) & (b) & 19(c).

In terms of the policy framework, the Equalisation Policy mainly seeks to ensure equalisation of opportunities for persons with disabilities in all aspects of society.⁶³ In addition, its purpose is to promote the rights of persons with disabilities in Malawi and enable them to play a full and participatory role in society.⁶⁴ Hence, the Policy is consistent with the attribute of inclusion in terms of its goal, purpose and objective. The Policy also has 10 guiding principles, which include ensuring access for people with disabilities to all public sector activities; ensuring the inclusion of people with disabilities broadly; and monitoring and evaluating of inclusiveness of government programmes. These principles are consistent with the inclusion attribute.

Therefore, it can be observed that Malawi's framework demonstrates compliance with the attribute that requires the incorporation of the principle of inclusion. This is evidenced by the fact that the disability provisions in the Constitution speak to inclusion; the Disability Act contains rights such as accessibility that facilitate inclusion; and the main goal of the policy framework is to ensure inclusion.

South Africa

The preamble to South Africa's Constitution highlights that the country belongs to all the people who live in it and that the people are united in their diversity. In this regard, the founding principles of the Constitution provide that the country is one democratic state founded on values which include human dignity; the achievement of equality and non-sexism.⁶⁵ These provisions broadly speak to the vision of ensuring an inclusive society, which is reflected in the emphasis that the Constitution puts on perceiving the country as 'one and united in diversity'. For example, as observed in Chapter 3, equality facilitates the achievement of inclusion whilst tolerance (non-sexism) also fosters inclusion. Accordingly, the founding principles of the

⁶³ See Equalisation Policy (2005) 9, indicates that that the Policy's overriding objective is to 'integrate fully persons with disabilities in all aspects of life...'

⁶⁴ Equalisation Policy (2005) 1.

⁶⁵ See South Africa's Constitution, sec 1(a0 & (b).

Constitution impliedly provide the platform that would be conducive for ensuring the inclusion of all persons, including persons/children with disabilities, in 'one broad South African Society'.

Secondly, the substantive disability specific provisions in the Children's Act of South Africa expressly mention the need to make it possible for children with disabilities to participate in social, cultural, and religious activities.⁶⁶ In addition, the section explicitly requires the provision of 'conditions' that 'ensure dignity, promote self-reliance and facilitate active participation in the community' by children with disabilities, as discussed above.⁶⁷ These provisions are consistent with the fundamental attribute of inclusion by overtly emphasising the active participation of children with disabilities in the activities of the society/community.

In respect of the policy framework, the broad vision of the INDS is to ensure a society for all in which 'the needs of all citizens constitute the basis for planning and policy, and the general systems and institutions of society are accessible to all'.⁶⁸ This complies with the attribute relating to inclusion through its emphasis on fostering accessibility by all persons, including persons/children with disabilities, to the society's systems and institutions

Therefore, it can be observed that South Africa's framework contains a number of aspects that demonstrate conformity to the attribute that requires the incorporation of the principle of inclusion. Indeed, it has been observed that the Constitution perceives South Africa as one society for all persons who live in it, thereby reflecting the principle of inclusion. Above all, the legislative and policy frameworks put a particular emphasis on the need to ensure accessibility and the active participation of children with disabilities in the

⁶⁶ Sec 11(1)(b).

⁶⁷ Sec 11(1)(c).

⁶⁸ INDS (1997) 30.

society. Indeed, the Children's Act contains provisions and rights that facilitate inclusion; and the principal purpose of the pertinent policy framework is to achieve inclusion through participation and accessibility.

'Inclusion focused' rights: Inclusive education in mainstream schools and 'community living'

Malawi

The provisions on education in the Malawi Constitution do not make reference to inclusive education or disability.⁶⁹ Nonetheless, the Disability Act recognises the right to education under section 10 in three separate paragraphs,⁷⁰ which, amongst others, provide for the right to education on the basis of equal opportunity; the obligation to ensure an inclusive education system and lifelong learning; and the obligation to ensure access to quality primary education. Thus the provision expressly makes reference to inclusive education. The education provision further emphasises the inclusive schools approach as it guarantees the right of persons/children with disabilities not to be excluded from the general education system.⁷¹ This is consistent with the CRPD's article 24(2).⁷² However, Malawi's new Education Act does not make any reference to education of children with disabilities or inclusive education apart from containing a non-discrimination clause that recognises disability as a protected ground.⁷³ Although the failure to make provision for inclusive education under the Education Act could be regarded as having been 'cured' by the

⁶⁹ See Malawi Constitution, sec 25.

⁷⁰ See sec 10.

⁷¹ See sec 10(a), which provides that:

'The Government shall recognize the rights of persons with disabilities to education on the basis of equal opportunity, and ensure an inclusive education system and lifelong learning by-

(a) ensuring that persons with disabilities are not excluded from the general education system at all levels and have access to quality primary education'.

Sec 2 also defines inclusive education as: 'a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities and reducing exclusion from and within education'.

⁷² The text of the legislative provision (sec 10(a)) is also similar to the CRPD's provision'.

⁷³ Act 21 of 2013. See sec 4(1)(a).

Disability Act, the Education Act should have made provision for inclusive education since it is the principal education legislation.

Furthermore, although Malawi's education related policies have a number of positive aspects which can promote inclusive education in mainstream schools such as recognising the concept of inclusive education, they put emphasis on integrated and special education as opposed to the inclusive schools approach.⁷⁴ For example, although the Equalisation Policy indicates that it will encourage inclusive education, it does not mention the need to ensure that children with disabilities learn in mainstream schools. Instead, it seeks to establish 'accessible specialist education resource centres throughout the country', which embodies the integrated schools approach.⁷⁵ Hence, although the Equalisation Policy recognises inclusive education, it does not expressly prioritise the inclusive schools approach. Instead, it requires the provision of 'special needs education' (SNE) while putting emphasis on special and integrated schools. Similarly, the pertinent education policies put their emphasis on special schools and integrated education that relies on resource centres.⁷⁶

Therefore, it can be observed that Malawi's implementation framework largely complies with the 'sub-category' of the attribute of inclusion that relates to the recognition of inclusive education that is based on the inclusive schools approach. This is particularly the case because the Disability Act expressly guarantees the right to inclusive education that requires persons/children with disabilities to be educated in the inclusive mainstream education system. However, there is disharmony between the policy and the legislative framework in that the policy framework emphasises integrated and special education.

⁷⁴ The policies include the Equalisation Policy; SNE Policy & National Education Sector Plan (NESP). For further discussion in this regard, see Chilemba (2013) 25.

⁷⁵ Equalisation Policy (2005) 15.

⁷⁶ See e.g. NESP (2008)11.

Nonetheless, the fact that the Disability Act recognises the right to inclusive education implies that it could address the policy gaps.

Furthermore, the legal framework, especially the Disability Act, fails to make provision for other crucial 'inclusion focused' rights contained in the CRPD such as 'community living and 'family-type alternative care'. The omission of the right to 'community living' is particularly regrettable since, as discussed in Chapter 4, the Disability Act contains a number of provisions that mirror the provisions in the CRPD. In addition, the right to community living is significant for the role it plays in ensuring the inclusion of persons with disabilities, including children with disabilities, in society. Therefore, the failure of the Disability Act to guarantee children with disabilities the right to 'community living' and 'family-type alternative care' is contrary to this 'sub-category' of the inclusion attribute.

South Africa

The provisions on education in the South Africa's Constitution do not make reference to inclusive education or disability.⁷⁷ Nevertheless, in addition to the constitutional guarantee of freedom from disability based discrimination,⁷⁸ the courts are expected to interpret the education provision and other constitutional provisions in accordance with international law.⁷⁹ Hence, the right to education for children with disabilities could be understood by the courts in terms of inclusive education as required by international law. Furthermore, the South African Schools Act (SASA) explicitly obliges government to provide the education for learners with 'special education needs' (SEN) at ordinary public schools, where reasonably practicable, and to provide them (the learners) with the pertinent educational support services.⁸⁰ This provision is

⁷⁷ See 1966 Constitution, sec 29.

⁷⁸ See 1966 Constitution, sec 9.

⁷⁹ See sec 39(1)(b); *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa* 1996 (4) SA 671, para 26.

⁸⁰ Sec 12(4).

consistent with the conception of inclusive education as it expects the inclusive schools approach to be prioritised. Indeed, the provision requires that persons/children with disabilities must be educated in 'ordinary' schools. However, the Act does not provide any clarification on the requirement to ensure inclusion by taking 'reasonable practicable' measures. Hence, it is not known what measures the state needs to take to ensure the inclusion of persons/children with disabilities in education that would be deemed 'reasonably practicable'. Nevertheless, the Act is commendable for impliedly recognising inclusive education.

On its part, the Policy on Special Needs Education (White paper 6) uses the concept of 'full service schools' instead of inclusive schools.⁸¹ As observed in the previous chapter, the Policy seeks to implement the right to education for persons/children with disabilities progressively by establishing the full service schools in phases for a period of 20 years (from 2001 to 2021).⁸² The policy apparently indicates the intention to reduce the number of special schools as it focuses on increasing inclusive schools with the view of ensuring the non-exclusion of persons/children with disabilities from regular education system.⁸³ It also intends to make most schools inclusive and utilise other special schools as resource centres for ordinary neighborhood schools (suggesting the integrated schools approach).⁸⁴ Hence, the Policy demonstrates the intention to achieve compliance with the CRPD's standards of inclusive education which requires the education of persons/children with disabilities to be provided in mainstream schools (inclusive/full-service schools) where children with disabilities learn together with other children. However, it still retains special schools which will be used in providing the education of persons/children with disabilities

⁸¹ In fact, the Policy does not provide the definition of inclusive education but sets out a number of its components. Amongst others, it acknowledges that inclusive education should focus on maximising the participation and development of individual strengths and capabilities of all learners in the process of learning. See White Paper 6 (2001) 16.

⁸² (This entails that inclusive education for children with disabilities will be realised progressively in terms of the Policy.) See 4.2.3 in Chapter 4 for further discussion of how White Paper 6 makes provision for the progressive realisation of the right.

⁸³ White Paper 6 (2001) 10, 22-23 & 27.

⁸⁴ See White Paper 6 (2001) 7, 21 & 28.

deemed to require more intensive levels of support. Hence, it does not advocate for a single inclusive education system at all levels. This aspect contradicts the 'sub-category' of the attribute.

Therefore, it can be observed that South Africa's implementation framework, on the whole, demonstrates a number of aspects that comply with the 'sub-category' of the attribute of inclusion relating to the recognition and prioritisation of inclusive education that is based on the inclusive schools approach. This is because the legislative framework expressly recognises the duty to provide the education of children/learners with disabilities in ordinary schools. In addition, although the policy framework (especially White Paper 6) retains special schools, it seeks to continuously reduce them whilst increasing the numbers of inclusive schools.

However, as is the case with Malawi, the legal and policy frameworks, fail to make provision for the crucial 'inclusion focused' right of 'community living' contained in the CRPD. The omission of the right to community living could be partly attributable to the fact that South Africa does not have disability specific legislation. Nonetheless, the Malawi position has demonstrated that having disability specific laws does not necessarily imply that they will contain all the rights that are set out in the CRPD. The failure to recognise the right to 'community living' is regrettable for the direct role it could play in facilitating the inclusion of persons/children with disabilities in society. However, the precise position taken by the Children's Act in emphasising the duty to ensure the inclusion of children with disabilities in society (as discussed above) could ameliorate the potential adverse impact of the omission.⁸⁵

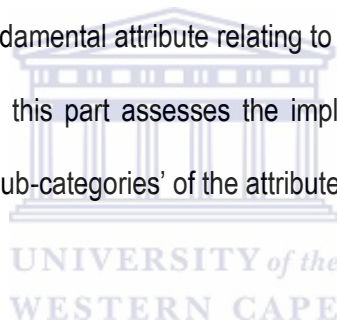
Nonetheless, the implementation of the right to 'community living' as envisaged by the CRPD requires discharging a number of specific obligations such as providing measures of support to persons/children with disabilities with a view to facilitating their inclusion and independent living in society,

⁸⁵ See Children's Act, sec 11(1)(b) & (c).

as discussed in Chapter 2 and Chapter 3.⁸⁶ Thus it is unlikely that the implementation of the disability-specific provision in the Children's Act would have the same effect as the implementation of the right to 'community living'. Therefore, it can be observed that, on the whole, the failure on the part of the framework to expressly recognise the right to 'community living' has the potential to make the framework fail to conform to certain aspects of this 'sub-category' of the attribute relating to inclusion, which requires the recognition of crucial 'inclusion focused rights'.

5.2.4 Ensuring non-discrimination and substantive equality

As discussed in Chapter 3 and above, the domestic implementation framework is expected to comply with a number of 'sub-categories' of the fundamental attribute relating to the need to ensure substantive equality and non-discrimination.⁸⁷ Accordingly, this part assesses the implementation frameworks of Malawi and South Africa against each of the four 'sub-categories' of the attribute which were highlighted in Chapter 3.⁸⁸



⁸⁶ The pertinent discussion is contained in 2.4.3 in Chapter 2 & in 3.3.4 in Chapter 3.

⁸⁷ See 5.1.2 above & 3.4.4 in Chapter 3 for the discussion in this regard.

⁸⁸ It is noteworthy that in terms of the CRPD's art 5(2), legal means (constitutional and legislative measures) are the recommended measures for implementing non-discrimination. See also CRPD Committee, Concluding Observations on Australia (2013) para 15, where the Committee recommends the explicit protection of non-discrimination in anti-discrimination laws; CRC Committee, General Comment No 9, para 9(a) & (b), where the Committee identifies constitutional, legislative and judicial means as tools for implementing non-discrimination; Committee on ESCR, General Comment No 5 (1994) para 16. For this reason, the assessment in this part with respect to compliance with the attribute and the 'sub-categories' of the broad attribute relating to equality and non-discrimination focuses on legal as opposed to policy measures. The candidate highlights, however, that policy and other implementation measures are also significant tools for implementing equality and non-discrimination for children with disabilities.

The general prohibition of discrimination- protection from all forms of discrimination

Malawi

The Bill of Rights in the Malawi Constitution contains a general equality and non-discrimination clause in section 20, which prohibits all forms of discrimination.⁸⁹ This also entails protection from discrimination in the enjoyment of any human right.⁹⁰ Consequently, the Constitution expressly recognises the substantive right to equality, which is violated when any form of discrimination occurs. In view of this, the provision complies with the 'sub-category' relating to the equality and non-discrimination attribute which requires the general prohibition of discrimination.

On its part, the Disability Act does not contain a general equality and anti-discrimination provision. Instead, the Act prohibits discrimination in the enjoyment of specified substantive rights.⁹¹ Such prohibitions of discrimination are contained in the sections that immediately follow some of the sections which set out the substantive rights. However, as discussed in Chapter 4, there are other sections containing substantive rights which do not have follow up sections that prohibit discrimination in the enjoyment of the rights. Hence, in terms of the approach taken by the Disability Act, children/persons with disabilities will have to establish that they have suffered discrimination in the enjoyment of a specified substantive right. The implication is that the Act does not guarantee children with disabilities the substantive right to equality which is violated in the event of any discrimination in the enjoyment of the rights that are not backed up by a follow up non-discrimination section. On the face of it, this is inconsistent with the international standards such as those under the CRC and the CRPD that contain a general anti-discrimination clause that

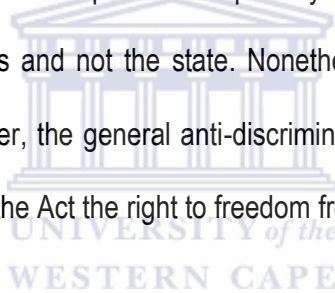
⁸⁹ See also sec 24(2), which prohibits all forms of discrimination against women, including on the basis of sex or gender; and requires legislation to be enacted to ensure non-discrimination in favour of women. Thus this provision also protects girls, including girls with disabilities, from discrimination.

⁹⁰ This is because sec 20(1) of the Constitution prohibits discrimination 'in any form'. Hence, it provides for the umbrella prohibition of discrimination which also entails that all human rights must be enjoyed without discrimination.

⁹¹ The substantive rights relevant to children with disabilities are discussed below; suffice to mention that they include accessibility, education and access to health.

recognise the substantive right to equality.⁹² In view of this, the Disability Act does not satisfy the ‘sub-category’ of the equality and non-discrimination legal attribute which requires the general prohibition of all forms of discrimination in the enjoyment of any human right. Nevertheless, the Constitution fills this gap as it prohibits all forms of discrimination by containing a general anti-discrimination clause.⁹³

Similarly, the CCPJA does not contain any substantive provision on equality and non-discrimination that requires both the state and non-state entities to protect children from all forms of discrimination. Instead it only refers to non-discrimination in the provision that sets out parental duties and responsibilities towards children.⁹⁴ Among others, the section obliges parents or guardians to ‘protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards’.⁹⁵ Accordingly, the Act places the primary responsibility to protect children from discrimination on parents or guardians and not the state. Nonetheless, since the Act ‘domesticates’ the CRC and the African Children’s Charter, the general anti-discrimination clauses in the two treaties fill the gap with the effect that they bring into the Act the right to freedom from discrimination (which the state must



⁹² The CRC’s non-discrimination clause is contained in art 2; while the CRPD guarantees the right to non-discrimination and equality in art 5.

⁹³ It is noteworthy that the absence of the anti-discrimination legislation implies that most cases that raise equality and non-discrimination issues have to be brought under the Constitution unless the relevant legislation contains a general non-discrimination clause. For example, issues relating to gender equality and non-discrimination can now be brought under the recently enacted Gender Equality Act (in addition to the Constitution) since the Act contains a general non-discrimination clause unlike the Disability Act. See Gender Equality Act 2012, sec 4, which prohibits all forms of discrimination based on sex.

⁹⁴ See generally sec 3, which seeks to complement section 23(3) of the Constitution that sets out the parental duty to raise children. The relevant provision (Sec 3(1)(b)) states that:

‘1) In addition to the duties and responsibilities imposed by section 23 of the Constitution, a parent or guardian-...

b) has responsibilities whether imposed by law or otherwise towards the child which include the responsibility to-

i) protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards...

except where the parent or guardian has forfeited or surrendered his or her rights and responsibilities in accordance with the law.

⁹⁵ See Sec 3(1)(b).

ensure). On its part, the recently enacted Education Act contains a general anti-discrimination clause,⁹⁶ which entails that it prohibits all forms of discrimination in education, thereby conforming to the 'sub-category' of the attribute.

Therefore, it can be observed that Malawi's legal implementation framework generally complies with the 'sub-category' of the attribute relating to equality and non-discrimination which requires the general prohibition of discrimination which provides protection from all forms of discrimination since its constitutional framework contains a general anti-discrimination provision. Hence, although the legislative framework does not sufficiently conform to the 'sub-category' of the attribute, the constitutional framework fills the legislative gap since the Constitution is Malawi's supreme law.⁹⁷

South Africa

The justiciable Bill of Rights in South Africa's Constitution contains a general equality and non-discrimination clause, which lists prohibited grounds of unfair discrimination.⁹⁸ This entails that the section provides for protection from all forms of unfair discrimination on prohibited grounds, which also implies an umbrella prohibition of unfair discrimination in the enjoyment of any right.⁹⁹ Consequently, the Constitution recognises the substantive right to equality. Accordingly, the provision is consistent with the 'sub-category' of the attribute relating to equality and non-discrimination which requires the general prohibition of discrimination.

⁹⁶ The provision (sec 4(1)(a)) states that '[i]t shall be the duty of the Minister to - (a) promote education for all people in Malawi; irrespective of race, ethnicity, gender, religion, disability or any other discriminatory characteristics.'

⁹⁷ See generally Malawi Constitution, sec 5.

⁹⁸ See sec 9. See in particular sec 9(3) & (4).

⁹⁹ Indeed, a closer look at the phraseology of the section shows that non-discrimination is aimed at ensuring equality- the provision states that non-discrimination must be enforced in order to achieve equality. In addition, the Constitution defines equality as including 'the full and equal enjoyment of all rights and freedoms'. See sec 9(2).

In respect of the legislative framework, the PEPUDA provides for a general prohibition of unfair discrimination in section 6. It further prohibits unfair discrimination on the basis of disability in section 9. As observed in the previous chapter, the two provisions take the form of a general equality and non-discrimination clause as they both contain a phrase that prohibits any person from unfairly discriminating against another person.¹⁰⁰ The implication is that the Act recognises non-discrimination as a principle that protects the substantive right to equality; and hence it also prohibits discrimination in the enjoyment of any right. In view of this, the PEPUDA complies with the ‘sub-category’ of the attribute relating to equality and non-discrimination in this regard.

Similarly, the Children’s Act recognises non-discrimination as one of its general principles under section 6.¹⁰¹ As observed in the previous chapter, the provision on non-discrimination takes the form of a general equality and non-discrimination clause, thereby also recognising the substantive right to equality.¹⁰² This is because although ‘non-discrimination’ is phrased as a general principle, the Act expressly requires children to be protected from any form of unfair discrimination. Therefore, on this aspect, the Children’s Act complies with the ‘sub-category’ of the attribute relating to equality and non-discrimination which requires a general prohibition of discrimination.

In respect of sectoral legislation, it can be observed that the applicable laws provide for a general prohibition of discrimination (within the pertinent sectors). For example, the National Educational Policy Act (NEPA) expressly recognises the obligation to ensure non-discrimination in the context of education.¹⁰³ The relevant provision expressly mentions the right to be protected from unfair discrimination ‘on any grounds

¹⁰⁰ See 4.2.2 in Chapter 4 for the discussion in this regard.

¹⁰¹ See sec 6 (2)(d).

¹⁰² See 4.2.2 in Chapter 4 for the pertinent discussion.

¹⁰³ Act 27 of 1996. See sec 4(a)(i).

whatsoever'.¹⁰⁴ This entails prohibition of all forms of discrimination in education. In addition, the provision takes the form of a general equality and non-discrimination clause. Accordingly, the provision conforms to the 'sub-category' of the equality attribute. On its part, the SASA obliges public schools to ensure that they do not unfairly discriminate against learners in any way in all matters relating to admission or their learning requirements.¹⁰⁵ However, as observed in the previous chapter, the drafting of the provision suggests that non-discrimination must only be ensured with regard to admission and learning requirements.¹⁰⁶ The Act does not clarify what the learning requirements might entail. Accordingly, the provision could be considered as not imposing the obligation to prohibit all forms of discrimination in all matters relating to the education of children, including children with disabilities. In this regard, the provision does not demonstrate full conformity to the 'sub-category' of the equality attribute.

Therefore, it can be observed that South Africa's legal implementation framework largely complies with the 'sub-category' of the fundamental attribute relating to equality and non-discrimination which requires a general prohibition of discrimination since its constitutional framework and a majority of the applicable laws contain general anti-discrimination provisions. Indeed, South Africa's Constitution, the PEPUA and the Children's Act, in addition to the NEPA, contain general non-discrimination clauses which protect the substantive right to equality.

¹⁰⁴ See sec c 4(a)(i), which does not mention any protected ground of unfair discrimination but provides a blanket prohibition of unfair discrimination on any ground.

¹⁰⁵ Act 84 of 1996. See sec 5(1).

¹⁰⁶ See 4.2.2 in Chapter 4 for the discussion in this respect.

The explicit recognition of disability as a prohibited ground of discrimination

Malawi

The provision in the Malawi Constitution's Bill of Rights which guarantees the right to equality and non-discrimination expressly recognises disability as a prohibited ground of discrimination.¹⁰⁷ Thus the Constitution complies with the 'sub-category' of the attribute relating to equality and non-discrimination that requires disability to be explicitly recognised as a prohibited ground of discrimination.

In respect of the legislative framework, the Disability Act defines and recognises disability-based discrimination.¹⁰⁸ In terms of its approach (which is discussed above and in Chapter 4), the Act expressly prohibits disability based discrimination in the enjoyment of specified substantive rights.¹⁰⁹ Therefore, the Act complies with this 'sub-category' of the attribute. On its part, the CCPJA does not list any prohibited grounds of discrimination in its 'non-discrimination' stipulation which is contained in a provision that sets out parental duties and responsibilities towards children.¹¹⁰ Nevertheless, since the Act 'domesticates' the CRC, the express prohibition of disability based discrimination under the CRC is also incorporated into the CCPJA. In addition, the recently enacted Education Act expressly recognises disability as a prohibited ground of discrimination.¹¹¹

Therefore, it can be observed that Malawi's legal implementation framework generally conforms to the 'sub-category' of the fundamental attribute relating to equality and non-discrimination that requires the

¹⁰⁷ Malawi Constitution, sec 20(1).

¹⁰⁸ See Disability Act, sec 2. (The definition of discrimination is almost the same as the CRPD's definition).

¹⁰⁹ The provisions that provide for non-discrimination in the enjoyment of substantive rights relevant to children with disabilities include sec 9 (accessibility); sec 11 (education and training); sec 7 (access to health); sec 15 (social protection and services); sec 20 (cultural and sporting activities and recreational services); sec 22 & (housing).

¹¹⁰ See CCPJA sec 3(1)(b)(i).

¹¹¹ See sec 4(1)(a), which requires the Minister to promote education without discrimination on the basis of disability and other status.

explicit recognition of disability as a prohibited ground of discrimination especially because the constitutional framework and applicable laws explicitly list disability among the prohibited grounds of discrimination.

South Africa

The equality and non-discrimination clause in the justiciable Bill of Rights in the South Africa's Constitution expressly recognises disability as a prohibited ground of discrimination.¹¹² Accordingly, the Constitution, through this provision, complies with this 'sub-category' of the attribute relating to equality and non-discrimination. In respect of the legislative framework, the PEPUDA expressly prohibits disability based discrimination under section 9, which provides in part that 'no person may unfairly discriminate against any person on the grounds of disability...'¹¹³ Similarly, the Children's Act explicitly mentions the need to protect children from disability based discrimination as a general principle by listing disability as a protected ground of discrimination.¹¹⁴ Therefore, it can be observed that the PEPUDA and the Children's Act conform to this 'sub-category' of the equality and non-discrimination attribute.

As regards sectoral laws, the NEPA and the SASA recognise the right to freedom from discrimination on any grounds within the context of education.¹¹⁵ However, the non-discrimination provisions in the two statutes do not list any protected grounds of discrimination. Nevertheless, since the laws prohibit discrimination on any grounds, disability could be included in the prohibited grounds in keeping with the position taken by the Constitution, the PEPUDA and the Children's Act. Nonetheless, the failure by the statutes to expressly mention disability as a protected ground (of discrimination) is inconsistent with the 'sub-category' of the fundamental attribute.

¹¹² See South African Constitution, 1996, sec 9(3).

¹¹³ See PEPUDA, sec 9.

¹¹⁴ See sec 6 (2)(d).

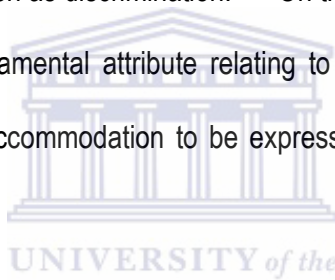
¹¹⁵ See NEPA, sec c 4(a)(i) & SASA, sec 5(1).

In view of this, it can be observed that South Africa's constitutional and legislative implementation frameworks demonstrate conformity to this 'sub-category' of the fundamental attribute relating to equality and non-discrimination since the Constitution and most of the applicable laws recognise disability as a prohibited ground of unfair discrimination.

Inclusion of the concept of reasonable accommodation in the definition of discrimination

Malawi

The Malawi Disability Act contains definitions of both discrimination on the basis of disability and reasonable accommodation.¹¹⁶ However, as explained in the previous chapter, the Act does not recognise the denial of reasonable accommodation as discrimination.¹¹⁷ On this account, the Act does not conform to the crucial 'sub-category' of the fundamental attribute relating to equality and non-discrimination which requires the concept of reasonable accommodation to be expressly recognised as constituting disability based discrimination.



Furthermore, the Act merely defines reasonable accommodation without mentioning it anywhere in the other provisions. Hence, the concept does not have any implications for the implementation of the rights of children/persons with disabilities, including the rights that require the provision of reasonable accommodation, such as equality and non-discrimination, employment and education.¹¹⁸ Therefore, unless the courts interpret disability based discrimination under the Constitution (or the Act) as including the duty to provide reasonable accommodation, the obligation to ensure non-discrimination under the Act would

¹¹⁶ See Disability Act, sec 2.

¹¹⁷ See the definition of discrimination (on the basis of disability) in sec 2 which does not include the concept of reasonable accommodation. Further discussion in this regard is contained in 4.2.2 in Chapter 4 of the thesis.

¹¹⁸ This development suggests that the concept was either included in the Act accidentally or it was inadvertently omitted from being included in the definition of discrimination or in the other substantive provisions of the Act.

exclude the duty to provide reasonable accommodation.¹¹⁹ On their part, the CCPJA and all other sectoral laws do not recognise the concept of reasonable accommodation.

Accordingly, it can be observed that Malawi's legal implementation framework does not conform to the 'sub-category' of the fundamental attribute relating to equality and non-discrimination which requires the express inclusion of the concept of reasonable accommodation in the definition of discrimination on the basis of disability. This is attributable to the fact that the legislative framework merely provides the definition of reasonable accommodation without the concept having any implication for any right, including equality and non-discrimination. This position is regrettable as it entails that Malawi's framework does not conform to the broad fundamental attribute for ensuring the 'human rights based' approach to disability in the realisation of non-discrimination and substantive equality for children with disabilities.

South Africa

The provision in section 9 of the PEPUDA expressly recognises that the failure to provide reasonable accommodation constitutes discrimination on the basis of disability.¹²⁰ In addition, the Act explicitly obliges the state to adopt codes that ensure the provision of reasonable accommodation.¹²¹ On this account, the PEPUDA complies with the crucial 'sub-category' of the fundamental attribute relating to equality and non-discrimination which requires the express inclusion of the concept of reasonable accommodation in the definition of discrimination. On its part, the Children's Act does not make reference to the concept of

¹¹⁹ On its part, the Act does not expressly require the courts to consider international law in interpreting its provisions. Nevertheless, the interpretation of any Act is required to be consistent with the Constitution otherwise the provisions of the Act would be declared invalid. See Malawi Constitution, secs 10 & 11(3).

¹²⁰ See sec 9(c), which provides that disability discriminations includes 'failing to take steps to reasonably accommodate the needs' of persons with disabilities. This entails that the failure to provide reasonable accommodation to children with disabilities as one of the ways for ensuring non-discrimination would suffice as discrimination against children with disabilities on the basis of disability. It is noteworthy that the provisions in sec 9 require every person, including both the state and non-state entities, to ensure non-discrimination. Consequently, it expects the state and any person to provide reasonable accommodation.

¹²¹ See PEPUDA, sec 25(1)(c)(iii), which provides that: 'The State must, where necessary with the assistance of the relevant constitutional institutions—...develop codes of practice as contemplated in this Act in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation'.

reasonable accommodation. Similarly, sectoral legislation (such as the SASA or NEPA) does not mention the concept of reasonable accommodation. Hence, it is the PEPUDA which plays a crucial role in ensuring a legislative framework that complies with this 'sub-category' of the fundamental attribute.

It is noteworthy that, as discussed in Chapter 4,¹²² South Africa's courts have embraced the concept of reasonable accommodation as a significant obligation for ensuring non-discrimination and substantive equality.¹²³ For example, in the case of *MEC for Education: KwaZulu-Natal & Others v Pillay*, the Constitutional Court of South Africa recognised the significance of providing reasonable accommodation 'to allow all people to participate and enjoy all their rights equally'.¹²⁴

In view of the foregoing analysis, it can be observed that South Africa's legal implementation framework conforms to the 'sub-category' of the fundamental attribute relating to equality which requires the express recognition of the duty to provide reasonable accommodation in the implementation of non-discrimination and substantive equality for persons/children with disabilities. This is attributable to the fact that the legislative framework, through the PEPUDA, expressly recognises that the failure to provide reasonable accommodation constitutes disability based discrimination.

Provision for temporary special (or affirmative action) measures to foster substantive equality

Malawi

The Malawi Constitution recognises that special measures in the form of legislation may be taken to achieve *de facto* equality.¹²⁵ It can be observed that the drafting of the provision is ambiguous as it only

¹²² See 4.2.4 for the discussion in this regard.

¹²³ See generally Ngwena (2013) 157.

¹²⁴ 2008 (2) BCLR 99 (CC) para 73. It is noteworthy that the case did not address the issue of reasonable accommodation in the context of disability. Nonetheless, the case is significant for expressly recognising the role that the concept plays in ensuring the equality of all persons.

¹²⁵ See Malawi Constitution, sec 20(2), which provides that: 'Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.'

mentions legislative measures aimed at addressing inequalities. Hence, it is not clear whether this could also include 'non-statutory' measures such as policies or other strategies aimed at addressing inequalities (although there is no doubt that the provision envisages all forms of 'affirmative action'). It is noteworthy that there are other measures that could be used in fostering substantive equality apart from enactment of legislation. These measures include awareness-raising through civic education and other administrative strategies.¹²⁶ Nevertheless, by recognising the role of special measures in ensuring non-discrimination and substantive equality, the provision complies with international standards and the 'sub-category' of the attribute relating to equality and non-discrimination which requires the taking of special measures for achieving substantive equality.¹²⁷ However, the *de facto* equality provision in section 20(2) of the Constitution does not require the special measures to be temporary, thereby contradicting the international standards which require such measures to be temporary, among others.¹²⁸ Nonetheless, the recognition of special measures for *de facto* equality has been hailed as it underscores the fact that the Constitution guarantees the right to substantive (as opposed to formal) equality.¹²⁹

In respect of the legislative framework, the CCPJA does not contain any provision relating to substantive equality or the taking of special measures, including affirmative action, in favour of any marginalised categories of children such as children with disabilities.¹³⁰ On its part, the Disability Act does

¹²⁶ See e.g. Chirwa (2011) 153. This could be contrasted with the South Africa's constitutional position which is discussed below. On his part, Chirwa observes that sec 20(2) 'requires affirmative action measures to be backed up by legislation...to avoid the introduction of arbitrary measures and measures which have not been properly and fully debated publicly.' See Chirwa (2011) 155. Chirwa further observes that the requirement for taking affirmative action is a component of the right to equality rather than a limitation. See Chirwa (2011) 154.

¹²⁷ In any case, the international standards recognise legislative measures as the preferred means of implementing non-discrimination.

¹²⁸ Nevertheless, it is expected that the courts would require such measures to be temporary since the Constitution requires the courts to have regard to international law in interpreting the provisions of the Constitution. See sec 11(c).

¹²⁹ *Rep v Chinthiti & Others* [1997] 1 MLR 59, 65 (High Court of Malawi); Chirwa (2011) 151&152. See also sec 30(3) of the Constitution which provides that: 'The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities'. Hence, the Constitution recognises the obligation to take special measures aimed at eradicating inequalities and achieving substantive equality.

¹³⁰ This could be attributed to the failure by the Act to make express provision for the right to equality and non-discrimination enforceable by the state through a general anti-discrimination clause.

not recognise the 'general' obligation to take special measures for purposes of achieving *de facto* equality of children with disabilities. Although elsewhere the Act requires the state to take measures for equalisation of opportunities, this is not the same as ensuring substantive equality.¹³¹ Indeed, substantive equality requires more positive action beyond equalisation of opportunities which are but an element of substantive equality measures.¹³² Hence, it is regrettable that the Act does not expressly require the state to take special or affirmative action measures to achieve substantive equality. It is noteworthy, as highlighted above, that the Constitution expects the passing of legislation that is intended to address inequalities. Considering that disability based discrimination is the main cause of the failure by children with disabilities to enjoy human rights on an equal basis with others, the Disability Act has missed the opportunity offered by the Constitution to foster substantive equality of children with disabilities.¹³³ Therefore, the legislative framework does not conform to this 'sub-category' of the attribute pertaining to substantive equality.

Therefore, it can be observed that Malawi legal framework largely complies with the 'sub-category' of the fundamental attribute relating to equality and non-discrimination which requires the taking of special measures, including affirmative action measures, for ensuring substantive equality in the implementation of non-discrimination for all persons, including children with disabilities. This is due to the fact that the Constitution recognises the obligation to take such measures.

¹³¹ See sec 3, which requires the Government to 'adopt policies and legislation on equalization of opportunities for persons with disabilities'.

¹³² Further discussion on the elements of non-discrimination and the concept of substantive equality is contained in 3.3.3 in Chapter 3 of this thesis.

¹³³ This omission could be partly attributed to the Act's failure to contain a general non-discrimination clause.

South Africa

South Africa's Constitution recognises that special measures may be taken to achieve *de facto* equality.¹³⁴ Unlike the Malawi Constitution, South Africa's Constitution does not solely prescribe legislative measures but leaves room for other measures to be taken.¹³⁵ However, as is the case with the Malawi Constitution, the provision does not require such special measures to be temporary.¹³⁶ In respect of the legislative framework, the PEPUDA expressly recognises that the taking of special measures, including affirmative action, that are intended to foster *de facto* equality or eliminating the causes of inequalities would not constitute unfair discrimination.¹³⁷ Accordingly, the provision allows for the taking of such measures.¹³⁸ Thus the provisions of the Constitution and the PEPUDA are consistent with 'sub-category' of the fundamental attribute relating to equality and non-discrimination which requires the taking of special measures to achieve substantive equality for children with disabilities. The drawback on the part of the Act is that, as is the case with the provision in the constitution, the applicable provision does not require such measures to be temporary.¹³⁹

On its part, the Children's Act does not make express reference to the concept of affirmative action. Nevertheless, since the PEPUDA and the Constitution recognise the obligation, children with disabilities would claim their entitlement to the special measures under the PEPUDA and the Constitution.

¹³⁴ See sec 9(2) which provides in part that '[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.

¹³⁵ In addition, the drafting of the provision clearly shows that special measures for achieving *de facto* equality must be taken unlike the drafting of the corresponding provision in the Malawi Constitution. See sec 20(2) of the Malawi Constitution.

¹³⁶ Nonetheless, it is expected that the courts would require such measures to be temporary since the courts are supposed to consider international law when interpreting the Bill of Rights. See e.g. South Africa's Constitution, sec 39(c).

¹³⁷ PEPUDA, sec 14(1), which provides that: 'It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or members of such groups or categories of such persons'.

¹³⁸ See also sec 4(2) & 24, which highlight the need to take measures aimed at eliminating inequalities and the duty to promote and achieve equality.

¹³⁹ Nonetheless, it is expected that the courts would require such measures to be temporary since the Constitution requires the courts to prefer an interpretation of legislative provisions that is consistent with international law. See sec 233.

Above all, the South African courts have expressly recognised the duty to take special measures, including affirmative action measures, in ensuring non-discrimination and substantive equality.¹⁴⁰

Therefore, it can be observed that South Africa's legal framework generally complies with the 'sub-category' of the equality and non-discrimination fundamental attribute that requires the taking of special measures for achieving substantive equality in the implementation of non-discrimination for all persons, including children with disabilities. This is due to the fact that the Constitution and the PEPUDA expressly make provision for the taking of such measures.

5.2.5 Incorporation of the paramountcy principle of the best interests of the child

Malawi

The child-specific provisions in the Malawi Constitution, as amended in 2010,¹⁴¹ expressly recognise the best interests of the child as a primary consideration in all matters affecting children.¹⁴² However, as discussed in the previous chapter, the drafting shows that the provision takes after the CRPD and the CRC in recognising the best interests principle to be one of the influential factors and not the overriding consideration.¹⁴³ Nonetheless, the entrenchment of the principle in the Constitution is commendable since, as mentioned in the previous chapter, the fact that the Constitution is Malawi's supreme law implies that any law or action that conflicts with the best interests of the child in matters involving children could be

¹⁴⁰ See e.g. *Harmsey v City of Cape Town* 2003 6 BLLR 557 (LC) para 47, where the Labour Court observed that the failure to ensure affirmative action measures could constitute unfair discrimination. The matter arose under the EEA and it did not deal with matters relating to children with disabilities. Nonetheless, it is significant for recognising the broad obligation to take affirmative action measures to facilitate *de facto* equality.

¹⁴¹ Act 8 of 2010 & Act 11 of 2010.

¹⁴² See sec 23(1).

¹⁴³ This is because the provision recognises the principle as 'a' primary consideration and not as 'the' primary consideration. See 4.2.1 in Chapter 4 for further discussion.

invalidated by the courts on the basis of being unconstitutional. Therefore, although the principle is not of paramount importance, its constitutional entrenchment could strengthen its potential to have the effect of overriding other factors that conflict with it.

With regard to the legislative framework, the Disability Act does not make reference to the best interests of the child concept. This could be attributed to the fact that the Act does not have a specific provision on the rights of children with disabilities, as discussed above. In addition, the CCPJA does not expressly recognise the best interests standard as a general principle of the Act. Instead, it specifically requires the best interests of the child to be considered or applied in particular instances. In fact the Act mentions the concept in almost 20 instances and thus it is surprising that the Act does not expressly recognise it as a general principle.¹⁴⁴ Considering that the Act is a child specific law that was enacted recently, it is surprising that it does not mirror the CRC, the African Children's Charter or the CRPD in the manner it recognises the best interests of the child principle.¹⁴⁵ Nonetheless, since the CCPJA domesticates the CRC and the African Children's Charter, as highlighted in the previous chapter, the provisions on the best interests of the child standard in the two treaties can be enforced domestically through litigation.¹⁴⁶

Furthermore, the courts have applied the concept or standard in matters relating to the adoption of children where they recognised it as a determinative consideration although they are yet to apply it in cases

¹⁴⁴ These specific instances include where application is made to have a person foster a child of the opposite sex; where application is made for the appointment of a guardian by other persons other than a child or a family member; and in child custody or access application. See secs 54(1)(b); 41(1) & 8(3). See also ACPF *In the best interest of the child: Harmonising laws in Eastern and Southern Africa- Country briefs* (2012) 102.

¹⁴⁵ The Act was adopted almost 20 years after Malawi had become a party to the CRC; and by going as far as domesticating the CRC, it could be envisaged that the Act would reflect the CRC's provisions.

¹⁴⁶ See 4.2.4 in Chapter 4 of the thesis for this discussion.

involving children with disabilities.¹⁴⁷ While the courts are willing to recognise the principle as the overriding consideration in matters relating to adoption, it might not be certain if they would take the same approach in respect of all matters concerning children in light of the best interests standard taken by the Constitution.

Therefore, it can be observed that Malawi's framework does not demonstrate conformity to the fundamental attribute that requires the incorporation of the principle of the best interests the child to be of paramount importance in all matters affecting children with disabilities. This is the case since the Constitution expressly recognises the principle as one of the influential factors and not as an overriding factor. Although the fact that the CCPJA domesticates the African Children's Charter (which regards the best interests principle as 'the' overriding consideration), implies that the standard also becomes the paramount consideration under the Act, the express position taken by the Constitution does not elevate the principle to the African Children's Charter's standards. Therefore, unless the courts 'consistently' regard the principle as an overriding factor, in terms of Malawi's constitutional position, the best interests principle is currently one of the influential factors but not an overriding consideration in all matters concerning children. In view of this, it can ultimately be observed that Malawi's implementation framework does not conform to the fundamental attribute.

South Africa

The child specific section in the Constitution of South Africa expressly recognises the best interests of the child principle.¹⁴⁸ Similarly, the Children's Act incorporates the concept in section 9.¹⁴⁹ Above all, the Act expressly recognises the need to take into account the disability that a child might have as one of the

¹⁴⁷ See generally *In re Adoption of David Banda*, Adoption Cause No 2 of 2006; [2008] MWCH 3 (28 May 2008) (High Court of Malawi). Nonetheless, the fact that the courts are willing to apply the principle is commendable.

¹⁴⁸ See sec 28(2), which provides that 'A child's best interests are of paramount importance in every matter concerning the child'.

¹⁴⁹ Sec 9 provides that: 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied.'

factors that must be considered in the application of the best interests concept.¹⁵⁰ This provision imposes an obligation to ensure that the application of the best interests principle should take an individualised 'disability specific context and consideration' whenever any action that affects children with disabilities is being taken. This position is not only consistent with the fundamental attribute that requires the incorporation of the principle but also complies with the CRC Committee's recommendation in this regard.¹⁵¹

Above all, the two provisions in the Constitution and the Children's Act explicitly recognise the best interests principle as being of paramount importance, as discussed in the previous chapter.¹⁵² This means that, unlike Malawi's position, the best interests principle has the potential to override other factors in all matters affecting children.¹⁵³ This is consistent with the standards under the African Children's Charter and the standards recommended by the CRC Committee. In addition, South Africa's courts have recognised the best interests principle to be of paramount importance in a number of cases involving children, although the cases have not dealt with children with disabilities.¹⁵⁴ The courts have also struck down legislative provisions that were found to be in conflict with the best interests constitutional provision in a number of

¹⁵⁰ See sec 7 (1)(h), which provides that:

'Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-...

any disability that a child may have'.

¹⁵¹ See General Comment No 9, para 30.

¹⁵² See 4.2.1 & 4.2.2.

¹⁵³ Although the drafting of the provisions does not give guidance on whether or the principle takes the African Children's Charter's or the CRPD's standard, the ordinary meaning of the phrase 'of paramount importance' entails 'an overriding implication'.

¹⁵⁴ See e.g. *DPP Transvaal v Minister for Justice and Constitutional Development* 2009 (7) BCLR 637 (CC) para 47, where the Constitutional Court, per Ngcobo J, emphasised the courts were under obligation in terms of sec 28(2) of the Constitution to apply the best interests principle in all matters that came before the courts and which involved children. For further discussion on the best interests principle under South Africa's framework, including how the courts in South Africa have applied the principle, see generally Skelton in Currie & De Waal (2013) 619-623; Sloth-Nielsen J & Mezmur BD '2 + 2 = 5? Exploring the domestication of the CRC in South African jurisprudence (2002-2006)' (2008) 16 *International Journal of Children's Rights* 1-28, 21-25.

cases.¹⁵⁵ Thus the constitutional entrenchment of the principle also strengthens its potential to override other factors since, as the courts' practice has demonstrated, any law or practice that conflicts with the principle could be declared unconstitutional and invalidated.

Therefore, it can be observed that South Africa's framework conforms to the fundamental attribute that requires the incorporation of the principle of the best interests of the child to be of paramount consideration in all matters affecting children, including children with disabilities. This is the case because the constitutional and legislative frameworks expressly require the best interests of the child to be of paramount importance in all matters affecting the child. In addition, although the courts are yet to decide cases that specifically deal with the best interests of children with disabilities, they have demonstrated that they are willing to have regard to the best interests of the child paramouncy principle whenever they deal with matters relating to children.



5.2.6 Protection of survival and developmental rights

As observed in Chapter 3, the domestic implementation framework is expected to expressly protect rights that facilitate the survival and development of children, including children with disabilities. Accordingly, the

¹⁵⁵ See e.g. *Minister for Welfare and Population Development v Fitzpatrick & others* (2000) (7) BCLR 713, paras 16 & 19, where the Constitutional Court found that a legislative provision (Child Care Act 74 of 1983, sec 18(4)(f)) which prohibited adoption by non-citizens was unconstitutional for conflicting with the best interests principle recognised under sec 28(2) of South Africa's Constitution in that it strictly proscribed such adoptions without having regard to the best interests of the child. See also Mezmur 'From Angelina (to Madonna) to Zoe's Ark' (2009) 153-154. Similarly, in *Du Toit and Another v Minister of Welfare and Population Development and Others*, 2002 (10) BCLR 1006 (CC), the Constitutional Court struck down legislative provisions (Child Care Act 74 of 1983, sec 17 & Guardianship Act 192 of 1993, sec 1(2)) which could not permit partners in a same sex union to jointly adopt a child since the provisions only permitted adoption by a single persons or married couple, upon finding, among other grounds, that the said provisions were unconstitutional for conflicting with the best interests principle recognised under sec 28(2) of the Constitution in that it strictly proscribed such adoptions without having regard to the best interests of the child.

assessment in this part looks into the extent to which the implementation frameworks of Malawi and South Africa recognise and protect these rights.¹⁵⁶

Malawi

The Bill of Rights in the Malawi Constitution guarantees all children the right to be protected from economic exploitation, treatment or work or punishment that could be hazardous or have a negative impact on their education or development in general.¹⁵⁷ In addition, section 23(4) recognises the right of all children to be provided with reasonable maintenance by parents or guardians.¹⁵⁸ Moreover, the same sub-section guarantees the right of children with disabilities 'to live in safety and security and, where appropriate, to State assistance'. These rights facilitate the development and survival of children with disabilities. The Constitution also sets out the rights of children who are in conflict with the law under section 42(g). These include the rights to be separated from adults when imprisoned; to be imprisoned only as a last resort and for the shortest period of time; and to be treated in a manner that envisages their later reintegration in society. These rights are equally guaranteed to children with disabilities by virtue of the non-discrimination clause in section 20.¹⁵⁹ Above all, it is said that these rights seek 'to protect and promote the child's dignity,

¹⁵⁶ It is noteworthy that legal measures are more attuned to ensure 'protection' of rights as they entail making the rights justiciable in addition to making provision for judicial remedies when they are threatened as opposed to policy measures. In view of this, the assessment of compliance with the attribute relating to the protection of survival and developmental rights in this part only considers the constitutional and legislative frameworks. Nonetheless, it is acknowledged by the candidate that policy measures are also significant in the realisation or protection of all rights, including survival and developmental rights.

¹⁵⁷ Sec 23(5). See also Chirwa (2011) 217-221 for further discussion on this sub-section. The provision is complimented by sec 22(2) of the Constitution which guarantees the right of every family member to legal protection from neglect, cruelty or exploitation. See Chirwa (2011) 217. (It is noteworthy that the Employment Act 6 of 2000, sec 21(1), prohibits the employment of children under the age of 14 years in private or public agricultural, industrial or non-industrial activities, except if the work is not done in homes, vocational or technical schools or training institutions. If children between the age of 14 and 18 are employed, the work must not be of such nature as to be likely to be harmful to the health, safety, education, development of the children or to have adverse implications on their school or vocational training attendance. See Employment Act, sec 22.)

¹⁵⁸ See sec 23(4), which provides in part that: 'All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians...'

¹⁵⁹ For further discussion on the rights of Malawian children within the context of child justice under the Constitution, see Chirwa (2011) 221-224.

life, survival and development'.¹⁶⁰ Above all, the Constitution recognises the right to development in section 30.

On its part, the Disability Act contains a number of survival and developmental rights that are guaranteed to all persons with disabilities. These include: health care;¹⁶¹ accessibility;¹⁶² education;¹⁶³ and social protection and adequate standards of living (which entails, amongst others, access to adequate food, clothing and housing, and equal access to appropriate and affordable social services and to social support programmes).¹⁶⁴ Similarly, the CCJPA sets out a number of survival and developmental rights of children which also apply to children with disabilities by virtue of the non-discrimination clause in section 20 of the Constitution. For example, the Act contains provisions on alternative care, which include provision of temporary place of safety or custody to children who are deemed to be 'in need of care and protection';¹⁶⁵ fosterage in the form of places or institutions that serve as public or private foster homes;¹⁶⁶ and appointment of a guardian of the child.¹⁶⁷ The Act further requires local authorities to provide shelter to children within their areas who are lost, abandoned or in need of refuge and to trace the parents of such children.¹⁶⁸ The provisions on alternative care are commendable as they ultimately protect children from neglect.¹⁶⁹ In addition, the Act criminalises acts relating to child neglect or desertion.¹⁷⁰ However, the

¹⁶⁰ Chirwa (2011) 221.

¹⁶¹ Sec 6.

¹⁶² Sec 8.

¹⁶³ Sec 10.

¹⁶⁴ Sec14.

¹⁶⁵ See Part II Division 2 of the Act (e.g. secs 23 & 24).

¹⁶⁶ See Part II Division 4 of the Act (e.g. secs 46-49).

¹⁶⁷ See Part II Division 3 of the Act (e.g. secs 38-41). See e.g. CCPJA, sec 41, which gives powers to the Child Justice Court to appoint a guardian if the parents of a child cannot be found or have passed on.

¹⁶⁸ CCPJA, secs 73 & 74.

¹⁶⁹ See generally Chirwa (2011) 214-217 for further discussion of alternative care within the context of Malawi.

drawback is that the sections do not expressly emphasise the provision of family-type alternative care as required by the international standards.¹⁷¹ Nevertheless, the recognition of guardianship and the exception given to relatives or guardians to act as foster parents without making a formal application to be allowed to act as such are consistent with the concept of family-type alternative care.¹⁷²

The Act also imposes duties on the parent or guardian to take care of children.¹⁷³ Among others, the responsibilities include 'non-deprivation' or provision of welfare and primary responsibility for raising children¹⁷⁴ The parental duties further extend to protection from neglect, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards; provision of proper guidance, care, assistance and maintenance for the child's survival and development, including adequate diet, clothing, shelter and medical attention; and ensuring that there is always a competent person to care for the child.¹⁷⁵ The Act further requires parents or guardians to ensure the birth registration of a child.¹⁷⁶ Furthermore, the Act makes provision for the protection of children from undesirable practices, which include child abduction; child trafficking; harmful cultural practices; forced marriage or betrothal; and pledge of a child as security.¹⁷⁷ In addition, the Act criminalises the perpetration of such forms of violence against

¹⁷⁰ See sec 22.

¹⁷¹ See CRPD, art 23(5); CRC, art 20; General Comment No 9, paras 45, 46, 47.

¹⁷² See secs 52, 41 & 42.

¹⁷³ See CCPJA, sec 3.

¹⁷⁴ Sec 3(1)(a) & (b)(iv).

¹⁷⁵ Sec 3(1)(b)(i)(ii) & (iii).

¹⁷⁶ Sec 3(2). These parental duties are crucial in respect of children with disabilities who are often at the receiving end of parental or societal neglect, as explained in 1.1.1 in Chapter 1. On its part, the right to birth registration would prevent systematic killings of children born with disabilities.

¹⁷⁷ See Part II Division 6 of the Act (e.g. secs 78-82). See also, sec 80, which states that 'No person shall subject a child to a social or customary practice that is harmful to the health or general development of the child'.

children.¹⁷⁸ It can be observed that the protection of these rights would also promote the survival and development of children with disabilities since the rights contained in the Act are guaranteed to all children.

In view of this, it can be observed that Malawi's legal implementation framework largely conforms to the fundamental attribute that requires the protection of survival and developmental rights of children, who include children with disabilities. This is due to the fact that the legal framework recognises a number of rights that promote the survival and development of the child. In addition, a number of provisions expressly protect children, including children with disabilities, from acts or practices that could threaten their survival and development.

South Africa

The child specific provision in South Africa's Constitution guarantees a number of survival and developmental rights to all children.¹⁷⁹ For example, the section recognises the right of the child to social services and not to be required or permitted to perform work or provide services that place at risk the child's, education or social development.¹⁸⁰ In addition, the provision recognises the right of children to protection from 'maltreatment, neglect, abuse or degradation'.¹⁸¹ Section 28 further guarantees children the right to 'to family care or parental care, or to appropriate alternative care'.¹⁸²

On its part, the disability specific provision in the Children's Act, amongst others, guarantees every child with disability 'the right not to be subjected to medical, social, cultural or religious practices that are

¹⁷⁸ Sec 83.

¹⁷⁹ See sec 28(1).

¹⁸⁰ Sec 28(1)(c) & (f)(ii). See also Sloth-Nielsen (2001) 210-231.

¹⁸¹ Sec 28(1)(d).

¹⁸² Sec 28(1)(b).

detrimental to his or her health, well-being or dignity.¹⁸³ Furthermore, the Children's Act sets out a number of developmental and survival rights in addition to the general rights of children. These include the right to freedom from harmful practices such as those based on culture, society or religion.¹⁸⁴ The Act further makes provision for 'particular measures' that address children in need of protection. For example the Act contains rights pertaining to alternative care.¹⁸⁵ These include the recognition of child-headed households;¹⁸⁶ foster care,¹⁸⁷ child and youth care centres,¹⁸⁸ and residential care programmes. In addition, the Act makes provision for various avenues for protecting children in need of protection.¹⁸⁹ These include provision for designated child protection services; national norms and standards for child protection; designation of child protection organisations; child welfare organisations; and reporting of an abused or neglected child and a child in need of care and protection.¹⁹⁰ These measures facilitate the protection of the developmental and survival rights of all children, including children with disabilities.

In view of this, it can be observed that South Africa's legal framework largely complies with the fundamental attribute that requires the protection of survival and developmental rights of children, including children with disabilities. This position is attributable to the fact that the legal framework contains a number of rights and provisions that protect the survival and development of children.

¹⁸³ Sec 11(3). The prohibition of practices that are detrimental to the dignity of children with disabilities (in addition to their health or well-being) is sufficiently broad to prohibit any practices that are contrary to international human rights standards. This is because the dignity of any person can only be respected if their human rights are protected.

¹⁸⁴ See generally sec 12, which provides that 'Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.' The protection of such rights is particularly crucial for children with disabilities in South Africa who are often subjected to harmful practices, as explained in 1.1.1 in Chapter 1 of this study. See also generally ACPF *Children with disabilities in South Africa: The hidden reality* (2011) 36-37.

¹⁸⁵ See secs 137, 167-179.

¹⁸⁶ These are not strictly recognised as forms of alternative care.

¹⁸⁷ See also sec 80.

¹⁸⁸ See also sec 191.

¹⁸⁹ See secs 104-110.

¹⁹⁰ It is not within the scope of the thesis to provide detailed discussion of these provisions.

5.3 Concluding observations

The chapter has assessed the conformity of Malawi's and South Africa's domestic implementation frameworks to the fundamental attributes for ensuring the appropriate implementation of the rights of children with disabilities at national level. A number of observations can be made in respect of the assessment.¹⁹¹ The comparative analysis demonstrates, amongst others, that South Africa's domestic framework complies with the fundamental attributes to a larger extent than Malawi's framework. For example, South Africa's framework for implementing non-discrimination largely complies with all the 'sub-categories' of the equality and fundamental attribute as opposed to Malawi's framework. This is the case mainly because unlike Malawi, South Africa's legal framework through the PEPUDA explicitly recognises the duty to provide reasonable accommodation in implementing non-discrimination (by including the concept in the definition of disability based discrimination) as required by the applicable international standards.

Similarly, South Africa's framework conforms to the fundamental attribute which requires the explicit recognition of the rights of children with disabilities (the disability explication attribute) since its Children's Act contains a disability specific provision that sets out the rights of children with disabilities. The provision could also serve as a reference point which could guide the implementation of the rights of children with disabilities in the manner that is consistent with the human rights approach to disability. In contrast, Malawi's Disability Act and child protection legislation (CCPJA) do not contain a stand-alone provision that sets out the rights of children with disabilities.

Nonetheless, the assessment also shows that both frameworks conform to a number of attributes such as those relating to the incorporation of the principle of inclusion of children with disabilities in society;

¹⁹¹ This part provides a broad overview of the conclusions that could be drawn from the comparative assessment since the next chapter contains a detailed discussion of the conclusions in providing the findings drawn from the entire study.

the protection of survival and developmental rights of children, including children with disabilities; and adherence to the human rights model in conceptualising disability. However, the analysis also shows that there are a number of gaps in both frameworks which prevent them from satisfying certain 'salient elements' of the attributes. For example, both frameworks still retain aspects that embody the outmoded welfare approach to disability by providing for measures and interventions that regard children with disabilities as requiring 'special care' and 'assistance' as opposed to regarding them as rights holders. In addition, the frameworks do not expressly recognise the crucial 'inclusion focused right' of 'community living'. Accordingly, it can be observed that the frameworks in both jurisdictions do not demonstrate full conformity to the fundamental attributes in the manner required by the applicable international human rights law and the 'human rights based approach' to disability that the law takes.

Therefore, it can be concluded that both Malawi and South Africa need to take extra measures in order to have domestic implementation frameworks that fully conform to the fundamental attributes in order to be in a position to comply with international standards. In view of this, the next chapter explores the measures that the two jurisdictions could take to address the gaps which have been identified and achieve compliance with the international standards and fundamental attributes for ensuring the appropriate domestic implementation of the rights of children with disabilities. The chapter further discusses the findings and conclusions that can be drawn from the entire study.

Chapter 6

Conclusions and recommendations

6.1 Introductory remarks

The thesis in the previous chapters has sought to address the central research question of the study by determining how African states parties to human rights treaties that guarantee the rights of children with disabilities should implement the international human rights law at national level. It has approached the question with a particular focus on Malawi and South Africa. Chapter 1 provided the general introduction and background to the study in addition to its objectives, scope, methodology, central research question and underlying assumption. Chapter 2 and Chapter 3 have determined the approach that the applicable international human rights law takes in providing for the rights of children with disabilities in Africa, including extrapolating the fundamental conceptual attributes that the law expects African states parties to adhere to in implementing the rights at national level. Chapter 4 and Chapter 5 have analysed the domestic implementation frameworks in Malawi and South Africa and assessed, in a comparative perspective, the extent to which they demonstrate conformity to the attributes. The assessment has observed that the frameworks in both jurisdictions have positive aspects and gaps that result in conformity to certain attributes and also non-compliance with others.

This chapter provides the summary, findings, conclusions and lessons that can be drawn from the study and suggests a number of recommendations which Malawi and South Africa could explore in order to conform to the fundamental attributes. It first discusses the findings on the approach taken by international human rights law in providing for the rights and the fundamental attributes that the law emphasises for states parties to conform to. Thereafter, it provides findings on the comparative assessment of the domestic

implementation of the rights by Malawi and South Africa with regard to aspects of compliance and non-compliance with the attributes before discussing the pertinent recommendations. Lastly, it discusses the overall conclusions and draws lessons that could have implications for other African countries.

6.2 Broad findings on applicable international human rights law

The thesis in Chapter 2 and Chapter 3 has made a number of findings in respect of the approach taken by the applicable human rights law in providing for the rights of children with disabilities in Africa.¹ It has been established in Chapter 2 that before the adoption of the CRC and subsequently, the CRPD, the existing UN human rights treaties did not regard disability as a human rights issue with the effect that they did not contain provisions on disability. At that time, the approach to disability was based on the medical or welfare model that emphasises medical, welfare and charity based interventions in addressing issues relating to persons/children with disabilities. Accordingly, the treaties could not provide a framework capable of ensuring full human rights enjoyment by children with disabilities.² The subsequent shift in the approach to disability from the medical model to the social and human rights models resulted in international law recognising disability as a human rights issue. Thus human rights treaties began to make explicit reference to disability. These treaties include the CRC and the applicable African regional treaties.

However, it has been found that the frameworks created by the CRC and the African regional treaties could not provide full human rights guarantees for children with disabilities in Africa.³ This was attributed to the fact that the treaties did not comprehensively break away from the welfare approach to disability as they still perceived children with disabilities as persons requiring predominantly protection and

¹ The discussion in this regard is contained in 2.6 in Chapter 2 & 3.3 in Chapter 3.

² See 2.1.2, 2.2 & 2.6.1 in Chapter 2.

³ See 2.3.5 & 2.5.3 in Chapter 2.

charity based measures. Accordingly, the gap regarding disability and the rights of children with disabilities under international law remained unfilled. Consequently, the CRPD was adopted to fill this gap.

On its part, the CRPD takes the human rights based approach to disability in providing for the rights by unequivocally recognising children with disabilities as subjects of rights.⁴ Through this approach, the CRPD seeks to ensure full human rights enjoyment by children/persons with disabilities on an equal basis with others. Consequently, the CRPD has to be applied together with the other pertinent treaties in such a way that the CRPD addresses the gaps that exist in the other treaties with respect to disability. Hence, in accordance with the VCLT, since the CRPD is the latest international treaty to be adopted in respect of the rights of persons/children with disabilities, its provisions must also prevail over any inconsistent stipulations in the earlier treaties unless the provisions in the other treaties set higher standards of protection than the CRPD.⁵ Ultimately, it has been established that the adoption of the CRPD implies that the application of the entire international human rights law, as one body of law, should reflect the human rights based approach to disability in making provision for the rights of children with disabilities. The thesis in Chapter 2 and Chapter 3 has highlighted that this approach seeks to achieve one principal purpose- the full human rights enjoyment by children with disabilities on an equal basis with other children.⁶

Furthermore, it has been observed in Chapter 3 that in seeking to ensure the full human rights enjoyment by children with disabilities, the applicable human rights law emphasises a number of obligations that states must discharge. It has been argued that the obligations reflect a number of conceptual attributes which embody the essential values that the law seeks to advance in providing for the human rights guarantees for children with disabilities. The thesis has identified six such fundamental attributes, namely:

⁴ See 2.4.5 in Chapter 2.

⁵ See VCLT, art 30(2) & (3); CRPD, art 4(4). See 2.4.5 in Chapter 2 for further the discussion pertaining to the standards that must prevail in case of conflicting treaty provisions.

⁶ See e.g. 2.6 in Chapter 2.

adherence to the human rights model in the conceptualisation of disability; explicit mention and recognition of disability and the rights of children with disabilities; respect for non-discrimination which ensures substantive equality for children with disabilities; respect for the principle of inclusion of children with disabilities in the society; recognition/incorporation of the principle of the best interests of the child as the paramount consideration in all matter affecting children with disabilities; and protection of survival and developmental rights for children, including children with disabilities.⁷ Since these attributes are embedded in the obligations that seek to ensure the full human rights enjoyment by children with disabilities, the thesis has found that the attributes constitute the fundamental 'ingredients' of the 'human rights based approach'. Accordingly, it has been highlighted that a domestic framework that conforms to the fundamental attributes explained above could be said to be in position to adhere to the international standards for ensuring the appropriate national implementation of the rights of children with disabilities.

The thesis in Chapter 5 has provided a comparative assessment of how the domestic implementation frameworks of Malawi and South Africa conform to the fundamental attributes and it has established that the frameworks in both jurisdictions have aspects that show compliance while also having other aspects that do not conform to the attributes.⁸

6.3 Findings on conformity to the fundamental attributes

6.3.1 Malawi

The analysis in Chapter 5 has established that Malawi's framework demonstrates compliance with a number of fundamental attributes. First, it has been found that, on the whole, the framework satisfies the attribute that requires disability to be conceptualised in terms of the human rights model despite the traces

⁷ The discussion pertaining to the extrapolation of these fundamental attributes is contained in 3.3 in Chapter 3.

⁸ The assessment is contained in 5.2 in Chapter 5.

of the welfare approach which remain in certain aspects.⁹ The compliance is attributable to the fact that the understanding of disability by the Disability Act and the Equalisation Policy is consistent with the human rights model of disability. On its part the Disability Act provides a definition of disability that mirrors the CRPD's conceptualisation of disability and 'persons with disabilities', thereby demonstrating conformity.

Secondly, the framework demonstrates compliance with the attribute that requires the incorporation of the principle of inclusion.¹⁰ The conformity arises due to the following main reasons: the provisions on disability in the Constitution speak to inclusion, amongst others, by expecting the government to ensure that persons/children with disabilities should have 'the fullest possible participation in all spheres of Malawian society';¹¹ the Disability Act contains rights such as accessibility that facilitate inclusion; and the main goal of the policy framework is to ensure inclusion.

Thirdly, the framework largely complies with the 'sub-category' of the attribute of inclusion that relates to the recognition of inclusive education that is based on the inclusive schools approach.¹² This is the case particularly because the Disability Act expressly guarantees the right to inclusive education that requires children with disabilities to be educated in the inclusive mainstream education system.¹³ However, there is disharmony between the policy and the legislative framework in that the policy framework emphasises integrated and special education. Nonetheless, the Disability Act could address the gaps created by this 'policy disharmony'.

⁹ See 5.2.1 in Chapter 5. Further discussion of the persistent elements of the welfare approach in the framework is contained in 6.4.1 below.

¹⁰ See 5.2.3 in Chapter 5.

¹¹ Sec 13(g).

¹² See 5.2.3 in Chapter 5.

¹³ Disability Act, sec 10.

Fourthly, it has been found that Malawi's implementation framework complies with the 'sub-category' of the attribute relating to equality and non-discrimination which requires the general prohibition of discrimination mainly because the Constitution contains a general anti-discrimination provision.¹⁴ Although the Child Care, Protection and Justice Act (CCPJA) and the Disability Act do not contain a general non-discrimination clause (which would impose an obligation on the state to ensure the substantive right to equality), the Constitution fills the gap since it is Malawi's supreme law.

Fifthly, Malawi's legal implementation framework conforms to the 'sub-category' of the attribute relating to equality and non-discrimination which requires the explicit recognition of disability as a prohibited ground of discrimination.¹⁵ This is because the Constitution and applicable laws explicitly list disability among the prohibited grounds of discrimination. In addition, the Disability Act requires a majority of the rights it guarantees to be exercised without disability based discrimination.

Sixthly, the legal framework generally conforms to the 'sub-category' of the fundamental attribute relating to equality and non-discrimination which requires the taking of special measures, including affirmative action measures, for ensuring substantive equality for children with disabilities.¹⁶ This is on account of the fact that the Constitution permits the taking of such measures.¹⁷

Lastly, the legal framework largely conforms to the attribute that requires the protection of survival and developmental rights of children, including children with disabilities.¹⁸ This is due to the fact that the framework recognises and protects a number of rights that promote the survival and development of the

¹⁴ See 5.2.4 in Chapter 5.

¹⁵ See 5.2.4 in Chapter 5.

¹⁶ See 5.2.4 in Chapter 5.

¹⁷ Malawi Constitution, sec 20(2).

¹⁸ See 5.2.6 in Chapter 5.

child. These rights include life; education; health; adequate standard of living, social protection and social services; parental care and freedom from violence, abuse, exploitation and other harmful practices.

6.3.2 South Africa

It has been found in Chapter 5 that South Africa's framework also complies with a number of fundamental attributes. First, the implementation framework largely conforms to the attribute which requires disability to be conceptualised in terms of the human rights model.¹⁹ This is because although the legal framework does not give clear guidance on the conceptualisation of disability,²⁰ the understanding of disability in the policy framework is consistent with the social and human rights models of disability. For example, the INDS expressly recognises that disability should be conceptualised as a 'human rights and developmental issue' where focus should be placed on 'the removal of barriers to equal participation and the elimination of discrimination based on disability'.²¹ In addition, the legislative framework emphasises interventions that are consistent with the human rights model of disability. For example, the Children's Act recognises the requirement to create an enabling environment for children with disabilities as one of its general principles.²² In addition, the Act imposes the duty to ensure the provision of 'conditions' that 'ensure dignity, promote self-reliance and facilitate active participation in the community' by children with disabilities in its disability specific provision.

Secondly, the framework largely complies with the 'disability explication' fundamental attribute, which requires the implementation framework to make express recognition of disability and the rights of

¹⁹ See 5.2.1 in Chapter 5.

²⁰ See 6.4.2 below for a discussion of the findings on the legal definition of disability under South Africa's framework.

²¹ INDS (1997) 15.

²² Children's Act, sec 6(2)(f).

children with disabilities.²³ This is mainly because the Children's Act contains a specific provision that explicitly sets out the rights of children with disabilities.²⁴ The Act further contains a number of provisions in its general sections which expressly set out other rights of children with disabilities. Above all, the disability specific provisions in the Act provide guidance on the 'overall' approach that should be taken in implementing the rights. The guidance demonstrates greater consistency with the social and human rights models of disability by emphasising measures that predominantly perceive children with disabilities as rights holders, thereby demonstrating compliance with the essence of the disability explication attribute.

Thirdly, the framework contains a number of aspects that demonstrate conformity to the attribute that requires the incorporation of the principle of inclusion particularly through the emphasis that the legislative and policy frameworks put on ensuring accessibility and the active participation of children with disabilities in the society.²⁵ For example, it has been observed that the disability specific provisions in Children's Act contain stipulations that facilitate inclusion by, amongst others, imposing the duty to ensure the provision of 'conditions' that facilitate the active participation of children with disabilities in the community.²⁶ In addition, the principal purpose of the pertinent policy framework is to achieve inclusion through participation and accessibility.²⁷

Fourthly, South Africa's framework largely conforms to the 'sub-category' of the attribute of inclusion relating to the recognition and prioritisation of inclusive education that is based on the inclusive schools approach.²⁸ This is because the legislative framework expressly recognises the duty to provide the

²³ See 5.2.2 in Chapter 5.

²⁴ Children's Act, sec 11.

²⁵ See 5.2.3 in Chapter 5.

²⁶ Sec 11(1)(c).

²⁷ See e.g. INDS (1997) 30.

²⁸ See 5.2.3 in Chapter 5.

education of children/learners with disabilities in mainstream schools.²⁹ In addition the policy framework (especially White Paper 6) seeks to prioritise the provision of education for children with disabilities in 'full-service' or inclusive schools whilst continuously reducing special schools.³⁰

Fifthly, the legal framework largely conforms to the 'sub-category' of the fundamental attribute relating to equality and non-discrimination which requires a general prohibition of discrimination since its constitutional framework and a majority of the applicable laws, including the PEPUDA and the Children's Act, contain general anti-discrimination provisions.³¹

Sixthly, South Africa's legal framework demonstrates conformity to the 'sub-category' of the fundamental attribute relating to equality and non-discrimination which requires the explicit recognition of disability as a prohibited ground of discrimination.³² This is the case because the Constitution and most of the applicable laws explicitly list disability among the prohibited grounds of unfair discrimination.³³

Seventhly, the legal framework complies with the 'sub-category' of the fundamental attribute relating to equality which requires the express recognition of the duty to provide reasonable accommodation in the implementation of non-discrimination for persons/children with disabilities.³⁴ Indeed, the PEPUDA expressly recognises that the failure to provide reasonable accommodation constitutes disability based discrimination.³⁵

²⁹ See e.g. SASA, sec 12(4).

³⁰ See e.g. White Paper 6 (2001) 1, 7, 16, 21 & 28.

³¹ See 5.2.4 in Chapter 5.

³² See 5.2.4 in Chapter 5.

³³ See e.g. South Africa's Constitution, sec 9(3); PEPUDA, sec 9; Children's Act, sec 6(2)(d).

³⁴ See 5.2.4 in Chapter 5.

³⁵ Sec 9(c).

Eighthly, South Africa's legal framework generally complies with the 'sub-category' of the equality and non-discrimination fundamental attribute that requires the taking of special measures, including affirmative action measures, for ensuring *de facto* equality in the implementation of non-discrimination for all persons, including children with disabilities.³⁶ This is due to the fact the Constitution and the PEPUA expressly permit the taking of such measures.³⁷

Ninthly, the framework complies with the fundamental attribute that requires the incorporation of the principle of the best interests of the child to the paramount consideration in all matters affecting children, including children with disabilities.³⁸ This is the case since the Constitution and the Children's Act expressly recognise the paramountcy principle of the best interests of the child.³⁹ The Children's Act also requires 'the disability' that a child might have to be taken into account when applying the principle.⁴⁰

Tenthly, the legal framework demonstrates conformity to the fundamental attribute that requires the protection of survival and developmental rights of children, including children with disabilities.⁴¹ Indeed, the framework contains a number of rights and provisions that facilitate and protect the survival and development of the child. These rights include life, education, health, alternative care, social services; freedom from violence, abuse, exploitation and other harmful practices; and parental care. Above all, the Children's Act recognise the right of a child with disability 'not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity'.⁴²

³⁶ See 5.2.4 in Chapter 5.

³⁷ See e.g. South Africa's Constitution, sec 9(2); PEPUA, sec 14(1).

³⁸ See 5.2.5 in Chapter 5.

³⁹ See South Africa's Constitution, sec 28(2); Children's Act sec 9.

⁴⁰ Sec 7(1)(h).

⁴¹ See 5.2.6 in Chapter 5.

⁴² Sec 11(2).

6.4 Addressing the gaps: Aspects of non-compliance and recommendations for achieving conformity to the fundamental attributes

There are a number of aspects in which the frameworks of the two jurisdictions do not demonstrate conformity to the fundamental attributes. This part discusses the findings on the areas of non-compliance and suggests a number of recommendations on how conformity to the attributes can be achieved.

6.4.1 Malawi

Towards disability explication: Express recognition of the rights of children with disabilities

The assessment in the Chapter 5 has established that Malawi's framework does not conform to the 'disability explication' attribute principally because the legislative and policy frameworks do not contain specific sections that set out the rights of children with disabilities in such a way that they could guide the implementation of the rights (in the manner required by the applicable treaties).⁴³ For example, the Disability Act does not contain a specific provision that sets out the rights of children with disabilities. In addition, the child-specific section in the Constitution's Bill of Rights and the two disability specific provisions in the CCPJA recognise the entitlement of children with disabilities to be 'given assistance'.⁴⁴ Accordingly, all the three provisions take a predominantly 'welfare based approach' as they emphasise the 'giving of assistance'. Therefore, although they mention children with disabilities; they do so in a manner that defeats the essence of the disability explication attribute. Above all, the stipulations on children with disabilities in the CCPJA do not purport to guide the overall approach that should be taken in implementing

⁴³ See 5.2.2 in Chapter 5.

⁴⁴ SEE Malawi Constitution, sec 23(4); CCPJA, secs 72 & 145(d).

their rights since they apply to specific contexts, namely, in respect of the duties of local authorities with regard to children with disabilities (section 72) and in proceedings in child justice courts involving children with disabilities (section 45(d)). Therefore, they cannot be regarded as demonstrating sufficient compliance with the disability explication attribute merely because they expressly mention 'children with disabilities'.

In view of this, it is recommended, that the provisions on children with disabilities in the Constitution and the CCPJA be revised to incorporate terminology that regards the children as rights holders by, amongst others, emphasising the concept of dignity and requiring the provision of measures of support as opposed to assistance. This will entrench the perception that children with disabilities are entitled to full human rights enjoyment on an equal basis with other children as individuals with equal dignity. It will also serve as a guide that the implementation of the rights of children with disabilities should be directed at respecting their dignity as opposed to providing them with charity.

In addition, the constitutional stipulations on children with disabilities should be set out in their own sub-section as is the case with the two provisions in the CCPJA to prevent the rights from being clumped together with obligations that mainly seek to provide forms of care, assistance and maintenance to all children. In this way, the perception that issues relating to children with disabilities should be addressed by giving them 'assistance' will be eliminated. Above all, by making provision for the rights of children with disabilities in a separate sub-section, the Constitution will achieve compliance with the 'literal' meaning of the disability explication attribute.

In respect of the CCPJA and the Disability Act, lessons should be drawn from the Children's Act of South Africa by being revised to include a specific section that explicitly sets out the substantive rights of children with disabilities. However, unlike the position taken by the Children's Act, the new provision to be introduced in the CCPJA and the Disability Act should clearly recognise the entitlement by children with disabilities to enjoy all human rights on an equal basis with other children. Malawi could also draw lessons

from the approach taken by the Children’s Act of Kenya,⁴⁵ which contains a specific provision that sets out the rights of a child with disability.⁴⁶ In this way, these disability specific provisions will reflect the essence of the disability explication attribute, namely guiding the implementation of the rights of children with disabilities in a manner that complies with the human rights approach to disability.

Towards the recognition of crucial ‘inclusion focused’ rights: Community living

Chapter 5 has further established that Malawi’s framework does not conform to the ‘sub-category’ of the attribute that requires the recognition of crucial ‘inclusion focused’ rights such as the right to ‘community living’ and ‘family-type alternative care’.⁴⁷ In view of this, it is recommended that Malawi should consider reviewing the Disability Act to introduce a section that sets out the right to ‘community living’. The section should also outline the obligations to be taken to facilitate the active participation and independent living of persons/children with disabilities in the community. In this regard, Malawi could follow the approach taken by Tanzania’s Persons with Disabilities Act,⁴⁸ which contains a specific substantive provision that guarantees the right of persons/children with disabilities to independent and ‘community living’.⁴⁹

⁴⁵ Chapter 141.

⁴⁶ See Kenya’s Children’s Act sec 12, which provides that: ‘A disabled child shall have the right to be treated with dignity, and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible’. However, as suggested above, Malawi’s legislation should disregard the concept of ‘special care’ as it embodies elements of the welfare approach to disability but it could embrace the concept of dignity and the rights to education and training, and medical treatment. (It is noteworthy that Kenya is also a state party to the CRPD having ratified the Convention on 19 May 2008).

⁴⁷ See 5.2.3 in Chapter 5.

⁴⁸ Act 9 of 2010.

⁴⁹ See Tanzania’s Persons with Disabilities Act, sec 15. Sec 15(2) & (3) provide in part that:

‘(2) A person with disability shall not be forced to live in an institution or in a particular living arrangement including settlement for persons in need of special protection.

(3) The Minister shall, in consultation with the Council, make regulations and take other effective measures as may be necessary to enable and support persons with disabilities to live as independently and fully integrated in the community...’

It is noteworthy that the provision further sets out the obligations that government should take in implementing the right in sec 15(3) in three separate paras. (The United Republic of Tanzania ratified the CRPD on 10 November 2009).

Similarly, the right to family-type alternative care which requires alternative care for children with disabilities to emphasise the provision of care in family-type settings within the community as opposed to institutionalisation could be introduced into either the CCPJA or the Disability Act; or in both.

Towards substantive equality: The recognition of the duty to provide reasonable accommodation

Chapter 5 of the thesis has also found that Malawi's legal framework does not conform to the 'sub-category' of the legal attribute relating to equality and non-discrimination which requires the provision of reasonable accommodation in realising substantive equality and non-discrimination for persons/children with disabilities.⁵⁰ This is attributable to the fact that the Disability Act merely defines reasonable accommodation (in section 2) without the concept having any implication for the exercise of any right; the definition of discrimination (in section 2) does not include the concept of reasonable accommodation; and there is no substantive provision in the Act that makes reference to the concept. It is thus recommended that Malawi should revise the definition of disability based discrimination in the Disability Act to explicitly include the denial of reasonable accommodation. In this regard, Malawi could follow the approach taken by South Africa's PEPUDA in recognising the denial of reasonable accommodation as constituting disability based discrimination.⁵¹ Malawi could also look at the approach taken by Zambia's disability specific legislation- the Persons with Disabilities Act,⁵² which explicitly defines disability based discrimination as including the denial of reasonable accommodation.⁵³

⁵⁰ See 5.2.4 in Chapter 5.

⁵¹ PEPUDA, sec 9(c).

⁵² Act 6 of 2012.

⁵³ See Zambia's Persons with Disabilities Act, sec 2, which defines discrimination as:

'[A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any field, and it includes all forms of discrimination, such as denial of reasonable accommodation, and the term "discrimination on the basis of disability" shall be construed accordingly.'

(Zambia ratified the CRPD on 1 February 2010).

Towards recognising the paramouncy principle of the best interests of the child

The discussion in Chapter 5 has found that Malawi's framework does not conform to the attribute that requires the best interests of the child to be of paramount importance in all matters affecting children with disabilities.⁵⁴ This is the case since the Constitution, as amended in 2010, expressly takes after the CRPD and the CRC in recognising the best interests principle to be one of the influential factors and not the overriding consideration.⁵⁵ In addition, the CCPJA and the Disability Act do not recognise the best interests concept as a general principle that should be applied in all matters affecting children, including children with disabilities. Nonetheless, it could be argued that since the CCPJA domesticates the African Children's Charter, which regards the best interests concept as 'the' overriding consideration, then it should be considered that the principle also becomes the paramount consideration under the Act. However, since the Constitution does not elevate the concept to the African Children's Charter's standards, it could be concluded that the best interests principle is in effect one of the influential considerations.

Accordingly, it is recommended that Malawi should amend the sub-section on the best interests principle in the Constitution to expressly provide that the best interests of the child should be the paramount consideration. In addition, the CCPJA could be revised to introduce a section that incorporates the paramouncy of the best interests concept. In this regard, Malawi could follow the approach of South Africa's Constitution and the Children's Act in recognising the best interests of the child paramouncy principle.⁵⁶ Similarly, the suggested amendment to the Malawi Constitution could also emulate the Constitution of Kenya, which expressly recognises the best interests of the child paramouncy principle.⁵⁷

⁵⁴ See 5.2.5 in Chapter 5.

⁵⁵ This is because as highlighted in 4.2.1 in Chapter 4, the provision in sec 23(1) of the Constitution recognises the principle as 'a' as opposed to 'the' primary consideration.

⁵⁶ See South Africa's Constitution, sec 28(2); Children's Act sec 9.

⁵⁷ See Kenya's Constitution, sec 53(2), which provides that: 'A child's best interests are of paramount importance in every matter concerning the child'.

6.4.2 South Africa

Towards the legal entrenchment of the ‘human rights based’ understanding of disability

It has been observed in Chapter 5 that South Africa’s framework does not have a legal definition of disability that is consistent with the human rights model. This is because the legal definition of ‘persons with disabilities’ that exists in other statutes reflects the welfare approach to disability although it does represent the legal understanding of disability in South Africa.⁵⁸ However, as discussed above, South Africa, through its policy framework, expressly recognises that the jurisdiction follows the human rights model, thereby demonstrating compliance with the broad attribute. Nevertheless, since the legal definition of ‘persons with disabilities’ reflects the outmoded medical model, there is disharmony between the framework’s overall approach to disability and the legal definition of disability.

In addition, as is the case with the Malawi framework analysed above, South Africa’s framework retains terminology and the deployment of interventions which are imbued with elements of the welfare approach to disability. For example, the disability specific provisions in the Children’s Act recognise the right of children with disabilities to ‘special care’ whenever appropriate.⁵⁹ The Act also expressly identifies the need to recognise the ‘special needs’ of children with disabilities in its objectives.⁶⁰ Therefore, although the Act predominantly emphasises interventions that are consistent with the human rights model of disability as explained above,⁶¹ the traces of the welfare approach would need to be eliminated.

⁵⁸ See 5.2.1 in Chapter 5.

⁵⁹ See Children’s Act, sec 11(1)(a).

⁶⁰ See Children’s Act, sec 2(h).

⁶¹ See 6.3.2 above for the discussion of the findings in this regard.

In view of this, it is recommended that South Africa should consider including a definition of disability or 'person with disability' in the PEPUDA that should reflect the human rights model of disability. It is suggested that the PEPUDA could adopt the understanding of 'persons with disabilities' contained in the CRPD.⁶² South Africa could also follow the approach taken by Zambia's Persons with Disabilities Act, which explicitly defines disability in a manner that is consistent with the CRPD's understanding of 'persons with disabilities'.⁶³ South Africa could also follow the approach taken by Malawi's Disability Act to provide for a definition of disability which reflects the CRPD's understanding of disability.⁶⁴

Furthermore, it is recommended that the sub-sections that make reference to 'special care' and 'special needs' in the disability specific provision in the Children's Act should be revised to incorporate terminology that regards children with disabilities as rights holders by, amongst others, requiring the provision of measures of support as opposed to 'special care' and recognising that children with disabilities might have 'individual or particular needs' as opposed to 'special needs'. It is noteworthy that the provision in the Children's Act already makes reference to the obligation to provide support to children with disabilities and their care-givers.⁶⁵ Accordingly, the 'special care' phrase in the provision could be deleted and replaced with other forms of support measures.

Towards the recognition of crucial 'inclusion focused' rights: Community living

It has been established that, as is the case with Malawi, South Africa's legislative framework fails to make provision for the crucial 'inclusion focused' right of 'community living' contained in the CRPD, thereby failing

⁶² Thus the current legal definition of 'persons with disabilities' (in the SAA & the EEA) should be revised to be consistent with the CRPD's understanding of 'persons with disabilities'.

⁶³ See Zambia's Persons with Disabilities Act, sec 2, which defines a 'person with disability' as: '[A] person with a permanent physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder that person to fully and effectively participate in society on an equal basis with others'.

⁶⁴ Malawi's Disability Act, sec 2.

⁶⁵ Children's Act, sec 11(1)(d).

to conform to the 'sub-category' of the pertinent inclusion attribute in this regard.⁶⁶ It is thus recommended that South Africa should consider introducing a provision in its legislative framework that explicitly recognises the right. In the absence of disability legislation, the right could be introduced in the disability specific provision in the Children's Act so that it should be guaranteed to children with disabilities.

6.5 Overall conclusions and lessons

The thesis has investigated how African states parties to treaties that guarantee the rights of children with disabilities should implement the applicable treaty law at national level in order to ensure the enjoyment of human rights by children with disabilities in their jurisdictions. This followed the observation that many children with disabilities in Africa face various obstacles that prevent them from enjoying human rights on an equal basis with other children despite the fact that the majority of African states are party to the pertinent treaties. The thesis has undertaken this investigation by comparatively analysing the extent to which the domestic implementation frameworks of Malawi and South Africa demonstrate compliance with six fundamental attributes (identified by the study) for ensuring adherence to international standards for the domestic implementation of the rights.

The comparative study has found that the frameworks in both jurisdictions have progressive constitutions, child protection legislation and disability policies that facilitate the implementation of the rights. However, only Malawi has adopted disability specific legislation; while only South Africa has anti-discrimination legislation. In addition, Malawi's child protection legislation has domesticated the CRC and the African Children's Charter; while South Africa's child protection statute is yet to do so. Thus there are differences and similarities in the implementation measures adopted by the two jurisdictions.

⁶⁶ See 5.2.3 in Chapter 5.

Despite these similarities and differences, it has been found that South Africa's framework demonstrates greater compliance with the fundamental attributes than Malawi's framework. Ultimately, it has been found that both frameworks have gaps that prevent the achievement of full conformity to the fundamental attributes. This finding demonstrates that the failure by children with disabilities in Malawi and South Africa to fully enjoy human rights on an equal basis with other children could significantly be attributed to these gaps and consequently, in the context of the study, to the failure by the two countries to take measures that comply with international standards and conform to the fundamental attributes.⁶⁷ The study has suggested a number of measures that the two countries could take from within their existing implementation frameworks to ensure full conformity to the attributes.

Furthermore, there are a number of lessons that could be drawn from the comparative assessment, which lessons have implications for the pertinent African countries. First, it has been found that, in the absence of disability legislation, South Africa's child protection statute plays a significant role in ensuring that South Africa's framework conforms to most of the attributes, especially the disability explication attribute. In contrast, Malawi's child specific legislation and the disability specific law have a number of gaps that make the framework fail to conform to certain attributes, including the 'disability explication' attribute. Indeed, South Africa's child protection law contains a specific section that sets out the rights of children with disabilities. The provision could guide the 'overall' approach to be taken in implementing the rights of children with disabilities, thereby satisfying the disability explication attribute. In contrast, neither the disability specific legislation nor the child protection law of Malawi contains such a provision.

⁶⁷ Thus it is acknowledged by the candidate that in addition to the gaps in the implementation framework, there could be other factors falling beyond the scope of this study which might also contribute to the situation. These could include factors relating to finance/budgetary allocations and lack of capacity in terms of trained personnel or technical know-how, amongst others.

This development suggests that the adoption of disability specific laws does not necessarily imply that they will protect the rights of children with disabilities. Perhaps disability specific laws are more attuned to making provision for the rights of persons with disabilities broadly with the effect that they might not pay due attention to the rights of children with disabilities. The development also suggests that if child protection laws are strengthened to conform to the attributes identified in this study, they could provide an adequate framework to promote the realisation of the rights of children with disabilities.

In this regard, African countries that are in the process of undertaking appropriate measures for implementing the rights of children with disabilities will be expected to make an informed decision on the type of legislation to be utilised as the principal implementation tool. They should appreciate the fact that disability specific legislation could run the risk of taking an adult focused approach to the detriment of children with disabilities. Hence, if they opt to make use of a disability statute, they should guard against this potential risk and make sure that such legislation conforms to the fundamental attributes, including the disability explication attribute. Furthermore, they will be expected to acknowledge the fact that child protection laws could also provide an adequate enabling framework for implementing the rights if it conforms to the attributes, including the disability explication attribute.

Secondly, it has been found that South Africa's anti-discrimination (and pro-equality) law plays a significant role in ensuring that South Africa's framework conforms to all the 'sub-categories' of the attribute relating to the duty to ensure non-discrimination and substantive equality; whilst Malawi's disability law contains gaps that make Malawi's framework to fail to conform to one of the 'sub-categories' of the attribute. For example, Malawi's disability law does not recognise the obligation to provide reasonable accommodation in ensuring non-discrimination and substantive equality whilst South Africa's pro-equality and anti-discrimination law recognises that the failure to provide reasonable accommodation constitutes discrimination on the basis of disability.

However, it has also been found that through Malawi's disability specific law, Malawi's framework entrenches the legal definition of disability that complies with the human rights model. In contrast, South Africa's framework does not give a clear indication on the legal definition of 'disability' or 'person with disability' and the legal definition that exists reflects the welfare approach to disability although it does not purport to represent the legal understanding of disability in South Africa. Consequently, South Africa's framework does not have a legal definition of disability that is consistent with the human rights model.⁶⁸ Hence, Malawi's disability law provides the tool for entrenching the appropriate legal definition of disability. This implies that disability specific laws could play a significant role in ensuring conformity by a framework to other attributes such as the one relating to the need to conceptualise disability in terms of the human rights model. However, it is noteworthy that disability related definitions that are consistent with the human rights model could as well be set out in anti-discrimination or child protection laws, which South Africa has adopted.

Accordingly, it could be concluded from these observations that the appropriate implementation and the consequent realisation of the rights of children with disabilities, including the right to equality and non-discrimination, does not depend on the adoption of disability specific laws or child protection laws or anti-discrimination laws; but on the extent to which the applicable laws or the legal framework as a whole demonstrate compliance with the fundamental attributes. This position has significant implications for African countries that are yet to take appropriate domestic legal reforms aimed at promoting and protecting the rights of children with disabilities. Such countries will be expected to first do a comprehensive audit of existing legislation that impacts on children, including children with disabilities, to identify the gaps which prevent the achievement of conformity to the fundamental attributes. Thereafter, they will have to decide on the appropriate legal reforms to be taken to address the identified gaps. It could be discovered in the

⁶⁸ Nonetheless, it has been highlighted in 6.3.2 above & in 5.2.1 in Chapter 5 that despite this position, South Africa's framework conforms to the attribute that requires disability to be conceptualised in accordance with the social and human rights models since the policy framework expressly indicates that the jurisdiction follows the two approaches in conceptualising disability.

process, for example, that such gaps could be filled by amending the applicable laws or by adopting disability specific or child protection laws or by enacting anti-discrimination laws. Therefore, the choice of the nature of legal reforms will be informed by the measures that should be taken to fill the gaps that exist in the legal framework as a whole with a view of ensuring that it conforms to the fundamental attributes.

Lastly, it has been found that the implementation frameworks of Malawi and South Africa do not recognise certain 'inclusion focused' rights such as the right to 'community living' in their legal provisions and policies. This observation implies that even if states adopt disability specific or child protection laws, or any other applicable laws and policies, the implementation framework could still fail to make provision for other rights that play a significant role in ensuring conformity to the fundamental attributes or their 'sub-categories'. Such gaps could be addressed by resorting to the 'domestication' of the CRPD and the other applicable treaties.

Indeed, Malawi and South Africa are yet to 'domesticate' the CRPD. If the two countries domesticate the Convention, the 'omitted' provisions on the right to 'community living' would be incorporated into their domestic implementation frameworks. Similarly, in the case of Malawi, the 'omitted' obligation to provide reasonable accommodation would be incorporated into the Disability Act or other applicable laws; whilst in respect of South Africa; the appropriate legal definition of disability would be incorporated into the PEPUDA or other applicable laws.

The implication of this for African states, especially the countries that have a dualist legal system, is that they will be expected to appreciate the fact that the 'domestication' of the applicable treaties might be indispensable considering that any measures they undertake might still have gaps that prevent the achievement of full conformity to the attributes. Therefore, it can be concluded from these observations that the pertinent African states parties should be expected to demonstrate flexibility in their approach to domestic implementation with regard to the measures they undertake for this purpose.

Ultimately, such measures must be geared towards ensuring that the domestic framework as a whole conforms to the fundamental attributes since it is such framework that will be in a position to ensure the full human rights enjoyment by children with disabilities on an equal basis with other children. In this way African states will be acknowledging that the phrase 'on an equal basis with other children' in reference to the enjoyment of human rights by children with disabilities⁶⁹ (and 'on an equal basis with others' in reference to human rights enjoyment by persons with disabilities broadly) as used by the CRPD embodies its philosophical vision to recognise and protect the 'equal dignity' of persons/children with disabilities.⁷⁰ Indeed, just as it has been stated in the Vienna Declaration that the 'place of [persons/children with disabilities] is everywhere',⁷¹ persons/children with disabilities should share the same space occupied by other persons/children. To realise this 'goal', the first step to be taken by African states is to look no further than ensuring that they design the framework for implementing the rights of children with disabilities in such a way that it conforms to the fundamental attributes identified by this study. In this way, children with disabilities will enjoy human rights on an equal basis with other children in addition to having their place together with other children 'everywhere'.

(97, 000 words)

⁶⁹ See e.g. preamble para r & art 7(1), where it specifically requires children with disabilities to enjoy human rights 'on an equal basis with other children'. See 2.4.1, 2.4.5 & 2.6.1 in Chapter 2 & in 3.3.2 & 3.3.3 in Chapter 3 of this study for the pertinent discussion.

⁷⁰ See e.g. CRPD, preamble para y & & art 1.

⁷¹ See Vienna Declaration (1993) Part I, para. 22, & Part II, paras 63 & 64, where it is stated that:

'Every person is born equal and has the same rights to life and...active participation in all aspects of society...*The place of disabled persons is everywhere*. Persons with disabilities should be guaranteed equal opportunity through the elimination of all socially determined barriers... which exclude or restrict full participation in society.'

(Emphasis added by candidate).

7 Bibliography

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7.1.5 African regional instruments

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South Africa

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Malawi

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South Africa

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