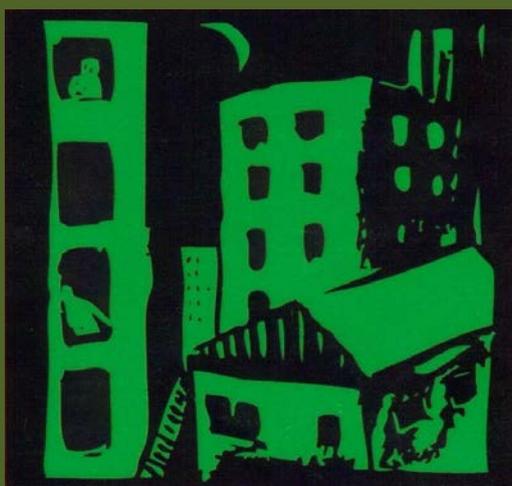


LAW
DEMOCRACY
& DEVELOPMENT



VOLUME 21 (2017)

State obligations in international law related to the right to an adequate standard of living for persons with disabilities

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1 INTRODUCTION

The role played by international law in guaranteeing the right to an adequate standard of living is an important one.¹ For a number of years, international bodies have sought to introduce certain levels of financial and other benefits which aim to provide for a basic standard of living for persons in need.² In addition, international law has recently turned to the issue of the rights of persons with disabilities, which includes the right to social security and an adequate standard of living. The United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD)³ was adopted by the General

¹Olivier M, Smit N, Kalula E *et al* *Social security: A legal analysis* (Durban: LexisNexis Butterworths 2003) at 621.

²Olivier M, Smit N, Kalula E *et al* (Durban: LexisNexis Butterworths 2003) at 623.

³United Nations Convention on the Rights of Persons with Disabilities A/61/611 (2006). It entered into force on 3 May 2008.

Assembly in December 2006 and has become the primary international law instrument in realising the rights of persons with disabilities, including the right to an adequate standard of living.

The right to an adequate standard of living has been enshrined in numerous international instruments and the importance of an attempt to guarantee an adequate standard of living for persons with disabilities cannot be denied.⁴ Persons with disabilities have been marginalised historically, and the recognition that persons with disabilities may insist upon an adequate standard of living just as any other person is of extreme importance within the disability rights movement.

In this article, the current socio-economic position of persons with disabilities in South Africa will be considered, with particular focus on the levels of poverty experienced by persons with disabilities. Once this position has been set out, the development of the right to an adequate standard of living in international law will be discussed with the aim of establishing the scope and content of the right in the UN CRPD. The primary aim of this article is to establish what is expected of Member States in ensuring that persons with disabilities are provided with an adequate standard of living as envisioned by the abovementioned Convention. This will be accomplished by interpreting the provision of Article 28 of the CRPD in the context of the historical development of the right in international law.

2 POVERTY AND DISABILITY

Poverty and disability are inextricably linked, in that poverty contributes to the likelihood of the occurrence of disability, and disability increases the likelihood of poverty.⁵ To address the challenges faced by persons with disabilities, the poverty experienced by persons with disabilities must be carefully considered and addressed. It is widely recognised that persons with disabilities are a marginalised group and that special attention should be paid to their socio-economic needs.⁶ Poverty has been identified by the (UN) as a challenge for all persons; and the eradication of poverty and the improvement of living conditions of all persons (including persons with disabilities) worldwide is a priority for the UN.⁷ According to the British government Department for International Development (DFID), poverty is more than a lack of access to resources.⁸ A lack of access to resources may be a result of disability. Such exclusion from resources amounts to discrimination and is a direct cause of poverty.⁹

⁴ For example, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

⁵ Elwan A "Poverty and disability: a survey of the literature (English)" Background Paper for Human Development Network (1999) at 1.

⁶ O'Conneide, C "Extracting Protection for the Rights of Persons with Disabilities" in Arnardottir OM & Quinn G *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff Publishers 2008) at 171.

⁷ The eradication of poverty is one of the objectives of the Millennium Development Goals of the UN.

⁸ DFID "Disability, poverty and development" Discussion Paper (2000) at 3.

⁹ DFID (2000) at 3.

2.1 Approaches to determining levels of poverty

Poverty is not only a cause of disability, but it also exacerbates the effects of disability.¹⁰ It is therefore important to consider the poverty of persons with disabilities in relation to non-disabled persons in the same societal context.

There is a general perception that persons with disabilities tend to be the most impoverished within their respective societal contexts.¹¹ This is consistent with findings of the World Bank “World report on disability”, which provides that persons with disabilities are considered by their non-disabled peers to be the most disadvantaged within their communities.¹² There are a number of different approaches which may be taken when measuring the poverty experienced by a certain group of persons. In addition, there are various poverty indicators which may be used to determine the type of poverty experienced by a particular group.¹³ For example, the World Bank recognises the use of the gross national income of a country divided by its mid-year population to determine the average wealth of persons in that country.¹⁴ Another example of a mechanism used to measure poverty is the investigation of the poverty gap between persons and a pre-determined amount.¹⁵ This method consists of determining the shortfall between a set amount and that of a particular group of persons. However, these mechanisms for determining poverty levels cannot be considered in a vacuum; other factors must be considered. These factors include social exclusion and inequality.

The approach taken to gauge the levels of poverty experienced by persons with disabilities cannot consist merely of a numerical assessment. It must take into consideration the distribution of resources, the level of inequality experienced, as well as the level of social exclusion experienced. Only then can a well-balanced finding be made regarding the position of persons with disabilities in relation to other members of the same society. It must also be noted that poverty in and of itself creates additional exclusion. Poverty and disability are therefore not only linked but cyclical, and it is this cycle which must be addressed when introducing poverty reduction schemes for persons with disabilities. For purposes of this article, a distinction will be made between purely economic poverty and poverty in the broader social sense.¹⁶

¹⁰ Elwan A (1999) at 2.

¹¹ UN “Fact sheet on persons with disabilities” available at <http://www.un.org/disabilities/default.asp?id=18> (accessed 7 August 2017).

¹² World Bank “World Report on Disability” 39.

¹³ World Bank “Poverty indicators” at <http://data.worldbank.org/indicator#topic-11> (accessed 15 August 2017).

¹⁴ World Bank “World Development Indicators: Distribution of income or consumption” <http://wdi.worldbank.org/table/2.9> (accessed 15 August 2017).

¹⁵ World Bank “Poverty gap at \$1.90 a day” available at <http://data.worldbank.org/indicator/SI.POV.GAPS> (accessed 15 August 2017).

¹⁶ The UN itself recognises that purely economic poverty cannot be used as an accurate reflection of the socio-economic position of persons with disabilities, and that poverty must be considered with reference to other factors as well. See UNESCO “Poverty” available at <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/poverty/> (accessed 19 February 2015).

2.2 Levels of poverty amongst persons with disabilities

Data related to the incidence of poverty amongst persons with disabilities is not freely available, and estimates related to the levels of poverty experienced by persons with disabilities are done in a piecemeal manner, usually based on country case studies.¹⁷ The available data relating to the poverty levels experienced by persons with disabilities worldwide is fragmentary and generally inconclusive, although certain findings based on the information available have been made by various institutions.¹⁸ Amongst these findings is the fact that an estimated 80 per cent of the total number of persons with disabilities live in developing countries which implies that the incidence of disability is high in countries with generally high levels of poverty.¹⁹ In addition, the prevalence of disability amongst the world's poorest population is estimated at 20 per cent,²⁰ which serves to prove the theory that disability and poverty are inextricably linked. While individual country studies are not comparable, it has emerged through the report of the World Bank that persons with disabilities in developed countries are twice as likely to be unemployed as their non-disabled peers.²¹ In developing countries, there is anecdotal evidence to suggest that households with a person with a disability experience higher levels of poverty than households without a person with a disability.²²

The UN estimates that 15 per cent of the world's population live with a disability.²³ This figure is steadily increasing as a result of population growth, medical advances in the identification of certain disabilities and the ageing process.²⁴ This means that approximately one billion persons are currently living with a disability. This makes persons with disabilities the largest minority in the world. The occurrence of disability is significantly higher in developing countries, since 80 per cent of the world's persons with disabilities are found in developing countries. However, it is difficult to provide definitive figures related to the worldwide prevalence of disability since some conflicting data in this regard has been reported.²⁵ These discrepancies are thought to be a result of different means of identifying persons with disabilities and the methods of

¹⁷ World Bank "World report on disability" (2011) at 39.

¹⁸ For example, World Bank "World report on disability" (2011) at 240.

¹⁹ UN "Fact sheet on persons with disabilities" available at <http://www.un.org/disabilities/default.asp?id=18> (accessed 7 August 2017).

²⁰ UN "Fact sheet on persons with disabilities" available at <http://www.un.org/disabilities/default.asp?id=18> (accessed 7 August 2017).

²¹ World Bank "World report on disability" (2011) at 39.

²² Groce N, Kembavi G, Wirs S *et al* "Poverty and disability: a critical review of the literature in low and middle – income countries" Working Paper Series: 16 University College London (2011) at 13; Mitra S, Posarac A & Vick B "Disability and poverty in developing countries: a snapshot from the world health survey" World Bank Social protection and labour, Human Development Network, Discussion Paper No 1109 (2011).

²³ UN "Fact sheet on persons with disabilities" available at <http://www.un.org/disabilities/default.asp?id=18> (accessed 7 August 2017).

²⁴ UN "Fact sheet on persons with disabilities" available at <http://www.un.org/disabilities/default.asp?id=18> (accessed 7 August 2017).

²⁵ World Bank "World report on disability" at 25.

data collection used. It is thus impossible to provide precise figures related to the prevalence of disability worldwide.

From the foregoing discussion, it becomes apparent that persons with disabilities generally experience lower standards of living relative to their non-disabled counterparts. The question to be asked is to what extent persons with disabilities may insist upon the implementation of measures to improve their current standard of living, on the one hand, and achieve an adequate standard of living, on the other.

3 HISTORICAL DEVELOPMENT OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

A number of international instruments have provided for the right to an adequate standard of living generally. In the following paragraphs, the right to an adequate standard of living in international law preceding the UN CRPD will be outlined.

3.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly on 10 December 1948.²⁶ It endeavours to ensure the inherent dignity and equality of every person and also recognises that every person possesses certain inalienable rights.²⁷ While the UDHR does not have the same status as a treaty of the UN and would otherwise not be binding on Member States of the UN, the UDHR has (at least in part) attained the status of customary international law.²⁸ Many of the principles contained in the UDHR have found their way into other international law instruments.²⁹

Article 1 of the UDHR provides for the rights of equality and dignity of each human being and Article 2 states: “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” It is important to note that Article 2 makes no express reference to persons with disabilities. It has been inferred that the open-ended phrase ‘other status’ includes disability.³⁰ Considering the spirit of inclusiveness of the UDHR,³¹ Article 2

²⁶ The Universal Declaration of Human Rights “History of the document” available at <http://www.un.org/en/documents/udhr/history.shtml> (accessed on 15 August 2017).

²⁷ Preamble to the UDHR. Adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December 1948.

²⁸ Von Bernstorff J “The changing fortunes of the Universal Declaration of Human Rights: genesis and symbolic dimensions of the turn to rights in international law” (2008) 19(5) *European Journal of International Law* at 913; Dimitrijevic V “Customary law as an instrument for the protection of human rights” *ISPI Working Paper Series WP – 7* (2006) at 9; Dugard J *International law: A South African perspective* (Juta, 2005) at 315; Hannum H “The status of the Universal Declaration of Human Rights in national and international law” (1996) 23 *Georgia Journal of International and Comparative Law* at 289.

²⁹ For example, the African Charter on Human and Peoples’ Rights incorporates the UDHR in its preamble.

³⁰ This approach has been followed by the UN Committee on Economic, Social and Cultural Rights, General Comment 5: Persons with Disabilities E/1995/22.

³¹ Preamble to the UDHR.

should be interpreted in a manner which includes persons with disabilities within its scope. Articles 22 and 25 of the UDHR deal with social security and an adequate standard of living. Article 22 provides:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

In addition, Article 25 guarantees the right to an adequate standard of living, which includes the right to security in the event of certain contingencies such as unemployment and disability.³² Article 25(1) expressly mentions disability as one of the instances in which a person is entitled to income security. The concept of an adequate standard of living is the cornerstone of many social security systems around the world, and is repeated in the International Covenant on Economic, Social and Cultural Rights (ICESCR).³³ The conjunction of the right to an adequate standard of living with the right to social security in the UDHR (and later instruments³⁴) is indicative of the recognition that social security in the form of financial support alone is insufficient to realise a better standard of living for persons in impoverished circumstances.

3.2 International Covenant on Economic, Social and Cultural Rights

After an extensive period of negotiation, the ICESCR was concluded in 1966 by the UN General Assembly and entered into force in 1976.³⁵ Approximately 165 countries have signed and ratified the ICESCR, which means that these countries are compelled to implement its provisions within their domestic law.³⁶ However, a lack of ratification does not mean that countries that have only signed the ICESCR are unaffected by the provisions therein. Countries that have signed and not ratified the ICESCR are obliged to refrain from enacting laws which conflict with the provisions of the ICESCR.³⁷

³² Article 25(1) of the UDHR.

³³ A/6316(1966). This concept is also repeated in the CRPD as having particular significance for persons with disabilities.

³⁴ Such as, the ICESCR and the CRPD.

³⁵ United Nations Human Rights "International Covenant on Economic, Social and Cultural Rights" available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> (accessed on 5 March 2015); Bruce A, Quinn G *et al* "Disability and social justice: the International Covenant on Economic, Social and Cultural Rights" in Quinn G and Degener T *et al Human Rights and Disability: The Current Use and Future Potential of United Nations human rights instruments in the context of disability* (New York & Geneva: United Nations 2002) 53.

³⁶ Section 27(2) of the ICESCR provides that each State ratifying the ICESCR becomes bound by its provisions three months after such ratification. UN Committee on Economic, Social and Cultural Rights "Status of the International Covenant on Economic, Social and Cultural Rights" available at UN Committee on Economic, Social and Cultural Rights "Status of the International Covenant on Economic, Social and Cultural Rights" (accessed on 15 August 2017).

³⁷ Article 18 of the Vienna Convention on the Law of Treaties 1969. The implementation of the provisions of the ICESCR by States that have ratified it is monitored by the Committee on Economic, Social and Cultural Rights. This committee is also responsible for releasing General Comments on the ICESCR in order to clarify the obligations created by its various provisions. The Committee was established in 1985 in terms of the Economic and Social Council Resolution 1985/17. Puta-Chekwe C & Flood N 'From

The ICESCR does not make express provision for persons with disabilities, although the protection of the rights of persons with disabilities can be inferred from not only the language of the ICESCR,³⁸ but also from the spirit and objects of the ICESCR.³⁹ Since the ICESCR applies equally to all persons, persons with disabilities are protected by the ICESCR. The link between the ICESCR and persons with disabilities has been recognised⁴⁰ and, as such, the ICESCR is an instrument which must be considered when discussing the rights of persons with disabilities.

The ICESCR prohibits discrimination on a number of grounds, and makes use of the phrase “other status” when setting out the grounds upon which discrimination is prohibited.⁴¹ Discrimination on the ground of disability would be prohibited in terms of the ICESCR and would be categorised as an “other status”.⁴² The ICESCR compels States Parties thereto to guarantee that “the rights enunciated in the present Covenant will be exercised without discrimination of any kind”.⁴³ It has been suggested that the lack of express mention of persons with disabilities in the ICESCR is a result of a “lack of awareness” that such express provisions were necessary at the time.⁴⁴

General Comment 19 provides for basic principles which must be present in any social security system. These principles are: the availability (or existence) of a social security system to begin with; coverage of persons affected by the various contingencies mentioned above; adequacy of benefits in respect of both the level of benefits and the duration for which they are provided; accessibility of benefits; and the use of social security measures to realise other rights within the ICESCR.⁴⁵ Social security benefits intended for persons with disabilities are required to comply with these basic principles.

Article 11 of the ICESCR provides that everyone is entitled to an adequate standard of living. While the right to social security creates the entitlement to adequate income support, the right to an adequate standard of living goes further by guaranteeing access to “adequate food, clothing and housing and the continuous

division to integration: economic, social and cultural rights as basic human rights’ in Merali I & Oosterveld V (eds) *Giving meaning to economic, social and cultural rights* (Philadelphia: University of Pennsylvania Press 2001) 47. The Committee was first invited to prepare general comments in 1987 – Economic and Social Council Resolution 1987/5. See also Tomuschat C *Human rights: between idealism and realism* (Oxford: Oxford University Press 2008) 190.

³⁸ General Comment 19 Item 23 makes special mention of the coverage of “individuals belonging to the most disadvantaged and marginalized groups”.

³⁹ General Comment 5 Item 5.

⁴⁰ Bruce A & Quinn G *et al* (2002) at 84.

⁴¹ Article 2(2) of the ICESCR provides that “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*” (my emphasis).

⁴² Degener T & Koster-Dreese Y (eds) *Human rights and disabled persons* (New York: Routledge 1995) at 2.

⁴³ Article 2(2) of the ICESCR.

⁴⁴ General Comment 5 Item 6.

⁴⁵ General Comment 5 Item 6.

improvement of living conditions”.⁴⁶ The right to an adequate standard of living therefore complements the right to social security by requiring Member States to “take measures to combat poverty and social exclusion and providing supporting social services”.⁴⁷ Although these two rights contained in the ICESCR are complementary, the one cannot substitute for the other.⁴⁸

It is not possible to specify what a universal adequate standard of living would be, but the Committee on Economic, Social and Cultural Rights has established certain guidelines in determining what would be an adequate standard of living in a particular scenario. Full respect should be paid to the principle of human dignity, as contained in the Preamble of the ICESCR, as well as the principle of non-discrimination⁴⁹ in determining what would constitute an adequate standard of living and adequate social security.⁵⁰

Essentially, the Committee on Economic Social and Cultural Rights provides that an adequate standard of living includes the provision of adequate housing, food and clothing.⁵¹ Social security measures must therefore permit persons in receipt thereof to “acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education”.⁵² This principle, along with the principles which must be present in any social security system, provide for guidelines for States in establishing their respective social security systems.

From the aforementioned discussion, it is apparent that “everyone” has a right to social security and an adequate standard of living, including persons with disabilities. In addition, persons with disabilities may have specific social security requirements which differ from the needs of other persons entitled to social security. For example, persons with disabilities may have a need to access rehabilitation therapy in order to manage the realities of their particular disability.⁵³ Social security for persons with disabilities therefore goes beyond the traditional notion of financial support, and extends to support services required by the particular individual.

In terms of General Comment 19, social security benefits provided to persons with disabilities “must be adequate in amount and duration”. This is confirmed by ICESCR General Comment 5 on Persons with Disabilities which provides that persons with disabilities are entitled to adequate income support as per the rules of the social security system in that particular country.⁵⁴ The provision of adequate social security

⁴⁶ Article 11(1) ICESCR.

⁴⁷ General Comment 19 Item 28.

⁴⁸ General Comment 19 Item 26.

⁴⁹ Article 2 ICESCR.

⁵⁰ General Comment 19 Item 22.

⁵¹ General Comment 19.

⁵² General Comment 19 Item 59.

⁵³ World Bank “World report on disability” (2011) at 9.

⁵⁴ General Comment 5 Item 28.

benefits to persons with disabilities contributes to an adequate standard of living as contained in Article 11 of the ICESCR.⁵⁵

While the interdependence of the rights to social security and an adequate standard of living is considered of general importance,⁵⁶ this interdependence is of particular importance in the context of the rights of persons with disabilities. In other words, the provision of income support to persons with disabilities in lieu of other services and / or items is insufficient to guarantee that the quality of life of the person with a disability is of an acceptable standard. While the right to social security encompasses the satisfaction of basic material needs, the right to an adequate standard of living extends beyond the provision of basic items to include the provision of items necessary to allow persons with disabilities a maximum level of independence and exercising of their rights. The right to an adequate standard of living therefore includes access to assistive devices, the right to adequate clothing and the right to accessible housing.⁵⁷ The protection afforded to persons with disabilities in terms of the ICESCR therefore goes further than the provision of financial support traditionally associated with social security, and resembles the notion of social protection put forward by later instruments.⁵⁸

4 ARTICLE 28 OF THE CRPD

The CRPD was a result of the recognition that discrimination against persons as a result of disability is unacceptable and that there is a need to promote and protect the fundamental human rights of persons with disabilities.⁵⁹ The Preamble provides that

[A] comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries...⁶⁰

The CRPD encompasses the most comprehensive list of fundamental rights afforded to persons with disabilities. Many of these fundamental rights have been recognised in UN policy documents prior to the formulation of the CRPD.⁶¹ It is important also to note that the instruments recognising those fundamental rights are not binding on Member States of the UN. The CRPD is therefore the first extensive, binding international instrument dealing with the rights of persons with disabilities. The CRPD consolidates,

⁵⁵ General Comment 19 Item 22.

⁵⁶ General comment 19 Item 28.

⁵⁷ General Comment 5 Item 33.

⁵⁸ For example, Item 29 of General Comment 5 provides that institutionalising persons with disabilities should be avoided unless absolutely necessary and that the need for social security measures will not be supplanted by the institutionalisation. Institutionalisation of persons with disabilities also has an impact on their Art 11 right to an adequate standard of living, which right is inextricably linked to the right to social security.

⁵⁹ Preamble to the CRPD.

⁶⁰ Item (y) of the Preamble to the CRPD.

⁶¹ For example, the World Programme of Action concerning Disabled Persons (1983) A/RES/38/28.

updates and adds to the existing international law provisions for persons with disabilities⁶² and subscribes to the human rights model of disability, which places the focus on the capability of the person with the disability and aims for full inclusion of that person in society.⁶³ For purposes of this paper, the most important provision in the CRPD is Article 28, which guarantees the right of everyone to an adequate standard of living, although other Articles are also discussed in order to contextualise Article 28.

The need to include an Article dealing with the right to social security in the CRPD was clear from the outset of the deliberations preceding and during the drafting of the CRPD.⁶⁴ In addition, the Ad Hoc Committee acknowledged the need to make provision for an improved standard of living for persons with disabilities around the world.⁶⁵

Article 28 reads:

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures

(a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

(b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

(c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability related

⁶² Preamble to the CRPD.

⁶³ Melish TJ "The UN Disability Convention: historic process, strong prospects and why the US should ratify" (2007) 14(2) *Human Rights Brief* at 37.

⁶⁴ See "Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities". Working Paper submitted by Mexico (Draft of a convention submitted by Mexico) (A/AC.265/WP.1) and "Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities". Position Paper submitted by China(A/AC.265/WP.3) which were submitted at the First Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 29 July – 9 August 2002.

⁶⁵ Compilation of proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities (a/ac.265/crp.13) submitted at the second session of the Ad Hoc Committee on a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities, 16 – 27 June 2003, New Mexico.

expenses, including adequate training, counselling, financial assistance and respite care;

(d) To ensure access by persons with disabilities to public housing programmes;

(e) To ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 28 confirms the rights to an adequate standard of living and social protection and then goes about providing some indication as to the meaning of those rights. In other words, the Article mentions measures that would contribute to the realisation of the rights in question. However, the precise scope and content of these rights have not yet been clarified since no extensive research has been undertaken in this regard. What follows will thus be an attempt to expand upon the meaning of the right to social protection and the right to an adequate standard of living and, importantly, to determine the obligations created by Article 28 for States Parties.

4.1 The scope and content of the right to an adequate standard of living in the CRPD

A number of the Articles in the CRPD echo the ICESCR. Since only two General Comments have been released on the CRPD to date, the General Comments on the ICESCR have been used as a guideline for the interpretation of the similar provisions of the CRPD for which there are no General Comments.⁶⁶

Article 28 of the CRPD is similarly worded to Article 11 of the ICESCR, which means that the two Articles may be interpreted similarly.⁶⁷ The General Comment applicable to Article 11 of the ICESCR provides insight into the scope and extent of the right to an adequate standard of living for persons with disabilities and simultaneously provides some content for the right to social security in the ICESCR. However, unlike the ICESCR, the CRPD does not have a provision which specifically refers to the social security rights of person with disabilities and therefore the General Comments on Article 9 of the ICESCR are of limited use in interpreting Article 28(2) of the CRPD. Article 28 consists of two primary sections, namely, Article 28(1) which provides for the right to an adequate standard of living, and Article 28(2) which provides for the right to social protection. The Articles will be dealt with as they appear in the CRPD.

Article 28(1) provides that persons with disabilities have the right to an adequate standard of living, which includes certain basic necessities (food, clothing, housing) and the continual improvement of living conditions of persons with disabilities. Since the term “adequate standard of living” has previously been used in a

⁶⁶ The link between the ICESCR provisions regarding mental health and the equivalent CRPD provisions was investigated by Deshraj S *The neglected shadow: enlightening the right to mental health under international human rights law* (unpublished PhD thesis, Utrecht University, 2010). For another example of the ICESCR general comments as an interpretive tool for the CRPD, see Schulze, M *Understanding the UN Convention on the Rights of Persons with Disabilities 2nd version updated* (New York: Handicap International 2009).

⁶⁷ These general rights must be interpreted in the context of persons with disabilities.

number of international human rights instruments⁶⁸ and since the wording of Article 28(1) is not entirely new, the meaning of the provision and the rights it creates will not be entirely new either. However, the precise meaning of the term “adequate standard of living” must be customised for implementation for persons with disabilities. The existing understanding of the right to an adequate standard of living must therefore be modified in the context of the rights of persons with disabilities and the objects of the CRPD.

In terms of the ICESCR, the right to an adequate standard of living is understood to include the provision of adequate food, clothing and housing. However, it is submitted that the right to an adequate standard of living is substantially broader than this. Basic human needs include water, sanitation, access to medical services and even financial support. Since the ICESCR aims to provide holistically and comprehensively for the right to an adequate standard of living, these goods and services must be provided for those persons with disabilities who are unable to provide for themselves. Further, while the ICESCR provides for the right to an adequate standard of living generally, the CRPD requires adapting and contextualising these rights for persons with disabilities. Persons with physical disabilities will have different housing needs to non-disabled persons or persons with other forms of disability. A “one size fits all” solution in this regard is therefore not possible.

The right to an adequate standard of living has been linked with the right to dignity.⁶⁹ The recognition of the inherent dignity of persons with disabilities is one of the named major principles of the CRPD. It is understood that an adequate standard of living can only be achieved if the person or persons in question are able to live a life of dignity through having their basic needs met – the rights are therefore interrelated. The proper implementation of the right to an adequate standard of living will permit person(s) with disabilities to participate fully and equally with other people on a daily basis.⁷⁰ In terms of the obligations created by Article 28(1) of the CRPD, this means that States Parties have a duty to ensure that persons with disabilities are given the means to participate fully and equally in mainstream society. In doing so, States Parties may make use of the mechanisms listed in Article 4 of the CRPD as discussed below.

5 STATE OBLIGATIONS CREATED BY ARTICLE 28 OF THE CRPD

In ensuring an adequate standard of living, States Parties may be required to provide a range of goods and services to persons with disabilities. Article 28(1) lists a number of these, namely clothing, housing and food. However, it is clear that an adequate standard of living consists of more than simply having access to the aforementioned items. The right to an adequate standard of living therefore requires more from States Parties than the mere provision of these items. A precise list of goods and services contributing to

⁶⁸ These include the UDHR, the ICESCR and the UN Convention on the Rights of the Child, 1989.

⁶⁹ See, for example, General Comment 12 of the Committee on Economic, Social and Cultural Rights.

⁷⁰ See Icelandic Human Rights Center at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightskonceptsideasandfora/substantivehumanrights/therighttoanadequatestandardofliving/> (accessed on 19 May 2014).

the achievement of an adequate standard of living for persons with disabilities cannot be compiled, because the right is highly subjective and what is required must be determined on a case by case basis.⁷¹ Certain goods and services can, however, clearly be considered part of the right to an adequate standard of living for persons with disabilities.⁷²

Article 28(1) also makes provision for the “continuous improvement of living conditions” of persons with disabilities. This means that States Parties have an obligation to progressively take measures to provide persons with disabilities with an adequate standard of living. States Parties must therefore evaluate and monitor the standard of living of persons with disabilities within their territory and, importantly, must endeavour to improve on that position.

As mentioned previously, the ICESCR also recognises the right to an adequate standard of living in the same terms used in the CRPD. According to the Committee on Economic, Social and Cultural Rights, the right to an adequate standard of living involves full social participation, eradication of poverty and access to social services, including social security. The interpretation of that article is thus helpful in establishing what is required in terms of Article 28(1) of the CRPD, and has been taken into consideration in the aforementioned discussion.

The nature and content of the obligations created by the CRPD must be established in order to determine what is expected from Member States that have signed and ratified it. Article 4 of the CRPD (entitled “General obligations”) states the duties of the Member State which must be borne in mind when interpreting the other provisions of the CRPD.

Article 4 provides that States Parties must “ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities”. Articles 4(1)(a)-(i) provide various types of actions which can be utilised by Member States in meeting the obligations created by the CRPD. These actions are: adopting legislative and other measures; repealing legislation; mainstreaming protection and promotion; training personnel; providing specific services or assistance; consulting with representative organisations of persons with disabilities; developing effective awareness campaigns; modifying infrastructures; and involving persons with disabilities and their representative organisations in monitoring.⁷³

Further, Article 4(2) provides that the rights in the CRPD must be progressively realised within the maximum of the resources of States Parties’ available, excluding those obligations in the CRPD which must be implemented immediately according to international law.

⁷¹ Moeckli D & Shah S (eds) *International Human Rights Law* (Oxford: Oxford University Press 2010) at 196.

⁷² For instance, food, clothing and housing have been expressly included in Art 28.

⁷³ Thornicroft G & Szmukler G (eds) *Oxford textbook of community mental health* (Oxford: Oxford University Press 2011) at 233; Allain J “*Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities*” Disability Actions’ Centre on Human Rights for People with Disabilities (Legal Reports No 2 2009) 14.

The language of the CRPD appears to be peremptory in a number of instances.⁷⁴ The use of the word “shall” is repeated in a number of Articles and is followed by some form of undertaking by the Member State. However, the word “shall” does not always create firm obligations in the CRPD.⁷⁵ The content of the word “shall” depends upon that which follows it: for example, Article 12(2) reads “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”; which indicates a specific obligation to which the Member States must adhere.⁷⁶ By contrast, Article 12(3) reads: “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”; which does create an obligation, but leaves the Member State itself to choose the form of the obligation.⁷⁷

Put differently, the CRPD as a whole creates obligations related to specific rights; for example, Article 5(2) provides that “States Parties shall prohibit all discrimination on the basis of disability...”. This is a clear obligation placed on Member States. The manner in which Member States can prohibit such discrimination is then left to each Member State individually, and Article 4(1) provides a number of ways in which this prohibition can be achieved. While the items listed in Article 4(1) are the general, primary obligations of the CRPD, the mechanisms listed in Article 4(a) – (i) are to be used to ensure the full realisation of the specific rights listed in the CRPD.

Since the obligations therein are binding on Member States that have signed and ratified the CRPD, it is important that a framework be put in place to measure compliance with the various obligations. While a small number of General Comments on the CRPD have been released, no General Comments currently deal specifically with the rights to an adequate standard of living and social protection.⁷⁸ For this reason, a detailed interpretation of those rights is necessary and the discussion of the rights in this article is intended to provide clarity on the scope and content of the obligations contained in Article 28(1).

Considering the importance attached to Article 28 generally and the right to an adequate standard of living in particular, States Parties must ensure that they enact legislation and policy in such a manner as to be compliant with the CRPD. Specifically, persons must be given access to the goods and services which are integral to the progressive realisation of an adequate standard of living. Article 4 provides for specific mechanisms through which the right may be progressively realised.

One of the purposes of international law is to set standards to which the States bound thereby must aspire.⁷⁹ Generally, the scope and content of rights in international

⁷⁴ Allain (2009) at 10.

⁷⁵ Allain (2009) at 10.

⁷⁶ Allain (2009) at 11.

⁷⁷ Allain (2009) at 11.

⁷⁸ There are currently four general comments on the CRPD – see UN Committee on the Rights of Persons with Disabilities “General comments” <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx> (accessed on 15 August 2017).

⁷⁹ O’Connell ME *The power and purpose of international law: insights from the theory and practice of enforcement* (New York: Oxford University Press 2008) at 132.

law are interpreted and explained through the release of General Comments and the work of experts in the relevant field.⁸⁰ As has been mentioned previously, only two General Comments on the CRPD have yet been adopted. In addition, certain aspects of the CRPD have not yet been interpreted and explained by experts in these areas. One of these areas is the right to social protection and the obligations imposed by Article 28 on States Parties. The foregoing interpretation of Article 28 is therefore the first of its kind.

Since international law sets standards to which States must conform, it is logical that international law be used to establish guidelines for the implementation of the rights therein. The interpretation of Article 28 in this article (combined with previous research on the rights to social protection and an adequate standard of living) lends itself to the generation of a number indicators which may be used to determine whether a States Party is currently meeting its obligations in terms of Article 28. These indicators include access to clothing, housing, retirement schemes, financial assistance and healthcare services. This is not a *numerus clausus*. The extent of a Member's compliance with the CRPD can therefore be measured and monitored to ensure a continued movement towards the full realisation of the right to an adequate standard of living.

6 CONCLUSION

From the foregoing discussion, it is clear that there is much scope for different interpretations of the right to an adequate standard of living in the context of persons with disabilities. While general international law has previously provided some guidance as to the broader content of the right to an adequate standard of living, these explanations have not provided a checklist or objective set of criteria against which a State can ascertain its compliance with the obligations imposed by international law in this regard. That is not to say that such a checklist should be compiled; however, Member States need some form of official guidance as to the content of the right.

At present, the only indication of the content of the right to an adequate standard of living for persons with disabilities can be gleaned from the meager information provided by the CRPD itself, along with the General Comments on this right in earlier international law. At best, we can currently infer that the right to an adequate standard of living for persons with disabilities includes, but is not limited to, access to: clothing, housing, retirement schemes, financial assistance, and healthcare services. However, these categories are so broad that a Member State still has little direction as to the specific goods and services that it would need to provide. These categories do provide a basis upon which Member States can, and should, attempt to improve.

The primary goal of the CRPD is to include persons with disabilities in society and allow for full participation in society. What this overarching requirement allows is for each Member State to make an individual assessment on what is required by persons with disabilities in their jurisdiction, whilst making use of the indicators

⁸⁰ "Compilation of General Comments and General Recommendations adopted by human rights treaty bodies" U.N. Doc. HRI\GEN\1\Rev.6 (2003) at 8.

mentioned above as a starting point. The goal of full and equal participation can only be reached once persons with disabilities are equal to their non-disabled peers in every sphere, including employment, basic amenities of life, and access to all goods and services they require. It is the responsibility of the State to provide these items and, ultimately, to ensure that the right to an adequate standard of living of persons with disabilities is made a priority. Indeed, the mere act of prioritising this right will be a major victory in the realisation of the right to an adequate standard of living.