

THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA: PROGRESS AFTER 5 YEARS

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1 Introduction

*One must resist the temptation of elegance or the easy assumption
that words alone will bring about the kind of change needed.*

(QUINN, 2009a, p. 216)

The UN Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol (OP) are intended to break “revolutionary” new ground in the field of disability rights law internationally and domestically.¹ While the particular dynamics of each regional system complicate direct comparison, it had become apparent in recent years that the development of disability rights in the African human rights system was progressing at a slower pace than in its European and Inter-American counterparts. However, the introduction of the CRPD offers new opportunities to African countries that have committed themselves to the Convention through signature and/or ratification to reconsider their domestic legal regimes relating to disability rights – in fact, it demands of them to do so. The purpose of this paper is accordingly to provide insight into the potential impact of the CRPD on the African continent and in the domestic legal systems of selected African states.²

In pursuance of this aim the article first provides an overview of the current status of the protection of the rights of persons with disabilities in the texts of the African political and human rights instruments. Secondly, it assesses the African encounter with the drafting of the CRPD. Thirdly, it considers the current debate with respect to options for improving the position of persons with disabilities in Africa. Fourthly, it examines the state of disability rights law in the selected African

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countries after ratification of the CRPD. Finally, it concludes with a number of considerations that may impact on the effective incorporation of the Convention into both the regional framework and domestic legal regimes.

2 Current status of disability rights protection in the African system

2.1 Background

The African human rights system has been described as the “least developed” among the regional systems (STEINER; ALSTON; GOODMAN, 2007, p. 1062). This perspective has been questioned (OLOWU, 2009, p. 50), and may admittedly underestimate the contribution that Africa has made to international human rights law (VILJOEN, 2001, p. 18). One must nonetheless concede that the African system has hitherto failed to prioritise disability rights.³

In order to put the potential consequences of the CRPD in Africa into context, it is necessary to consider the position prior to its adoption by the UN General Assembly and its subsequent ratification by various African states. For this purpose, a brief overview of the key features of the African human rights system is provided. Although this article is essentially focused on disability rights as human rights, these cannot be discussed without reference to the political and institutional system(s) within which they originate and apply. We accordingly intend here to gain an understanding of the “African”⁴ approach to human rights, and also to point out how this approach has gradually undergone a shift to become more inclusive of persons with disabilities.

The African human rights approach is traditionally perceived to be premised on a communitarian understanding of humanity, human society and the individual human being.⁵ To the extent that they are recognised, the interests and rights of the individual are subsumed under the interests and well-being of the community or society. The notions of community or society are sometimes used interchangeably. In the appropriate context, both, or either, can mean any form of unit consisting of more than a single human being. These collective units or groups range from the individual family group at the one end, through the clan, the tribe, the ‘people’, the nation, and the state right up to the Pan-African Community at the other end. The reason for being born human is to spend one’s life being useful to the community. Consequently, it does not come as a surprise that the granting of individual rights is coupled with the demand of concomitant duties towards the community. Moreover, it is accepted as indisputably logical that groups and/or ‘peoples’ should also be granted rights. Communitarian culture, in the sense of the African way of doing things, and communitarian values, in the sense of the African notions of right and wrong and good and bad/evil, strongly impact on the origins, contents and purpose of human rights in Africa.

In the discussion below, we shall demonstrate these traits with reference to selected key African political and human rights instruments. The reader is alerted to the dynamics of the developments from the essentially patriarchal

(paternalistic) African cultural and value systems to more tolerant, inclusive, and in places, more egalitarian systems. These dynamics are evidenced by the gradually introduced references to women's rights, gender equality, the youth and persons with disabilities. The terminology employed in references to the latter group ranges from "the disabled", "disabled people", "the handicapped", to "persons/people with disabilities" (often their inclusion is simply to be deduced under the default concept of groups or people "of any other status").

2.2 *Political instruments and structures of the African system*⁶

As point of departure the *Charter of the Organization of African Unity* (OAU) (ORGANISATION OF AFRICAN UNITY, 1963), as the founding legal and political instrument of the Pan-African Community, articulates the premises upon which it has been written and adopted. It expresses the conviction that it is the inalienable right of all people to control their own destiny; and it reaffirms the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples. The Charter proclaims the adherence of African States to the principles of the Charter of the United Nations and the Universal Declaration of Human Rights and links it with the desire that all African states should unite so that the welfare and well-being of their peoples can be assured.

Given the historical moment of its establishment, the OAU was primarily concerned with the struggle against colonialism and apartheid, the preservation of territorial integrity and non-interference in the internal affairs of States – rather than the prioritisation of human rights (OJO; SESAY, 1986, p. 92; NALDI, 2008, p. 45). With the subsequent transition from the OAU to the African Union (AU) this position changed: as explained below, human rights and democratic values are more clearly articulated as the foundational principles of the AU.

The OAU was superseded by the AU in 2000. Its Constitutive Act emphasises the common need to build a partnership between governments and all segments of civil society, in particular "women, youth and the private sector" in order to strengthen solidarity and cohesion among their peoples and to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law. The functioning of the AU is to be guided by the principles in Article 4. A number of these principles directly refer to human rights: the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances (namely war crimes, genocide and crimes against humanity); the promotion of *gender* equality; and respect for democratic principles, human rights, the rule of law and good governance. In terms of Article 13.1, the Executive Council of the AU must coordinate and take decisions on policies in areas of common interest to the Member States including social security, which incorporates "policies relating to the disabled and the handicapped".

In 2003 the *Protocol on Amendments to the Constitutive Act* inserted under the Objectives (AFRICAN UNION, 2003a, art. 3) a new subparagraph that requires the effective participation of *women* in decision-making, particularly in the political,

economic and socio-cultural areas. This failure to explicitly enumerate persons with disabilities in the same way represented a lost opportunity for inclusion.

The purpose of the *Economic, Social and Cultural Council* (ECOSOCC), established in 2004,⁷ is to promote popular participation in the activities of the African Union, as enunciated in the African Charter for Popular Participation in Development and Transformation. As an advisory organ of the African Union, ECOSOCC must be composed of different social and professional groups of the Member States of the African Union. Civil Society Organisations (CSOs) include, but are not limited to, the following: groups such as those representing women, children, the youth, the elderly and people with disability and special needs. This body provides an important opportunity for civil society organisations to participate in and gain insight into the work of the AU.

In the *African Charter on Democracy, Elections and Governance* (AFRICAN UNION, 2007a) States Parties commit themselves to promote the universal values and principles of democracy, good governance, human rights and the right to development (Preamble). In terms of Article 8, States Parties are required to –

1. eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as “any other form of intolerance”; and
2. adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalised and vulnerable social groups.

According to this Charter, States Parties undertake to promote participation of “social groups with special needs” (including the youth and people with disabilities) in the governance process, and to ensure systematic and comprehensive civic education in order to encourage full participation of these social groups in democracy and development processes (Article 41). They further agree to provide and enable access to basic social services, for example, free and compulsory basic education to all, especially girls, rural inhabitants, people with disabilities and other marginalised social groups (Articles 41; 43).

It is interesting to note that this Charter has to date been ratified by only eight States. This stands in contrast to the *African Youth Charter* (below) (AFRICAN UNION, 2007b), which was adopted in the same year,⁸ but attracted sufficient ratifications to come into operation on 8 August 2009.

2.3 Regional human rights instruments

2.3.1 General and thematic human rights protection

The *African Charter on Human and Peoples’ Rights* (ORGANISATION OF AFRICAN UNITY, 1981) (also known as the “Banjul Charter”)⁹ is the pivotal instrument of the African human rights system. It recognises individual rights as well as peoples’ rights, duties, and certain socio-economic rights, in addition to civil and political

rights. The supervisory mechanism initially created by the Charter is the African Commission on Human and Peoples' Rights (the African Commission), which was recently supplemented by the introduction of the African Court on Human and Peoples' Rights.¹⁰

The Charter explicitly emphasises that the virtues of the historical tradition and the values of African civilisation should inspire and characterise the reflection on the concept of human and peoples' rights; recognising on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights. Similar to the *American Declaration of the Rights and Duties of Man* (ORGANISATION OF AMERICAN STATES, 1948),¹¹ the African Charter recognises the consideration that the enjoyment of rights and freedom also implies the performance of duties by the individual towards her family and society, the state and other legally recognised communities and the international community.

Important from the perspective of disability, the Charter highlights the essential need to pay particular attention to the right to development and to the fact that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights. In these respects, the Charter is in line with the CRPD.

In Chapter I of the Charter, which deals with rights, States Parties to the Charter undertake to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the Charter (Article 1). Every individual is entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth *or other status* (Article 2). In the communication of *Purohit and Moore v. The Gambia*,¹² the complainants argued that the practice of detaining persons regarded as mentally ill indefinitely and without due process constituted discrimination on the analogous ground of disability – and hence a violation of Article 2 of the Charter. While the African Commission agreed that this Article, along with various others, had been violated, it unfortunately did not express itself on the issue of disability as an analogous ground (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHT, 2003, para. 54).

The Charter further states that every individual is equal before the law and entitled to equal protection of the law (Article 3). It recognises the “inviolability” of human beings (Article 4), and reaffirms the inherent right to dignity (Article 5). The civil and political rights to participate freely in the choice of government, the right of equal access to the public service of his country are to be accorded to every citizen, and the right of access to public property and services in strict equality of all persons before the law is to be accorded to every individual present in a country (Article 13).

Article 18 provides that the State has the duty to assist the family, which is the natural unit and basis of society and “the custodian of morals and traditional

values recognised by the community”. The State must ensure the elimination of every form of discrimination against women and also guarantee the protection of the rights of the woman and the child as stipulated in international declarations and conventions. Article 18(4) is of importance to persons with disabilities: it provides that the aged and the disabled have the right to “special measures of protection” in keeping with their physical or moral needs.

The *Agreement for the Establishment of the African Rehabilitation Institute* (ARI), adopted in 1985, made provision for the founding of the ARI. Drawing on the technical assistance of the International Labour Organisation, the aims of this Institute (which is located in Harare, Zimbabwe) are to assist the Members of the OAU to achieve a number of objectives with a strong emphasis on rehabilitation (ORGANISATION OF AFRICAN UNITY, 1985, art. II).¹³

The *African Charter on the Rights and Welfare of the Child*, 1990 (ACRWC) (ORGANISATION OF AFRICAN UNITY, 1990) is similar to the UN Convention on the Rights of the Child. However, the ACRWC also provides for an individual complaint procedure.¹⁴ Commentators’ views differ as to whether the ACRWC or the UN Convention provides a higher level of protection of the rights of children with disabilities (COMBRINCK, 2008, p. 310-311).

Article 13 of the ACRWC, which is entitled “Handicapped Children”, affords every child who is mentally or physically disabled the right to special measures of protection in keeping with his physical and moral needs and under conditions that ensure his dignity, promote his self-reliance and active participation in the community. States Parties are required to ensure, subject to available resources, to a disabled child and to those responsible for his care, assistance for which application is made and which is appropriate to the child’s condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development. States Parties must use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highways, buildings and other places “to which the disabled may legitimately want to have access to” (sic!) (ORGANISATION OF AFRICAN UNITY, 1990).

In July 1999, the OAU Heads of State and Government adopted a resolution declaring the period 1999-2009 as the *African Decade of Persons with Disabilities*. This proposal arose from the UN Decade of Persons with Disabilities (1983-1992) and the criticism levelled against this UN project for attempting to adopt global solutions without taking cognisance of the political and socio-economic realities of developing countries and emerging democracies (CHALKLEN; SWARTZ; WATERMEYER, 2006, p. 93).

The goal of the African Decade is the full participation, equality and empowerment of people with disabilities. In order to achieve this, a Continental Plan of Action was adopted by the AU in 2002. A Secretariat for the African Decade was established in Cape Town, South Africa, in 2004. Progress in commencing with activities under the Continental Plan of Action was initially extremely slow,

due to lack of financial resources. The Decade was recently extended for a second period, i.e. from 2009 to 2019.

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (African Women's Protocol)* (AFRICAN UNION, 2003c) owes its origins to a large extent to concerns about whether the formulation of Article 18(3) of the African Charter as set out above provides women with adequate protection of their rights (NSIBIRWA, 2001, p. 41; ONORIA, 2002, p.234). The Protocol is an extensive document addressing a number of rights of particular concern to women in the African context, including the rights to freedom from violence and harmful practices, to adequate housing, peace, sustainable development and participation in the political and decision-making process. Significantly, the Protocol pays considerable attention to the State obligations accompanying the recognition of these rights.

In terms of Article 23, which deals with the special protection of women with disabilities, States Parties undertake to: ensure the protection of women with disabilities and take specific measures to facilitate their access to employment, professional and vocational training as well as their participation in decision-making; ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity. Importantly, States Parties agree to provide appropriate legal and other remedies (Article 25) and to implement the Protocol at national level (Article 26).

In 2006 the AU adopted the *African Youth Charter* in recognition of the increasing calls and the enthusiasm of youth¹⁵ to “actively participate at local, national, regional and international levels to determine their own development and the advancement of society at large” (AFRICAN UNION, 2007b, preamble). The document explicitly acknowledges the needs and aspirations of young displaced persons, refugees and youth with special needs (AFRICAN UNION, 2007b, preamble).

One of the basic dispositions of the Charter is the entitlement of every young person to the enjoyments of the rights and freedoms recognised and guaranteed in the Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth “or other status”. States Parties must take appropriate measures to ensure that youth are protected against all forms of discrimination on the basis of status, activities, expressed opinions or beliefs (AFRICAN UNION, 2007b, art. 2).

The Charter devotes Article 24 to “mentally and physically challenged youth”.¹⁶ States Parties recognise the right of mentally and physically challenged youth to special care and commit themselves to: ensuring that these youth have equal and effective access to education, training, health care services, employment, sport, physical education and cultural and recreational activities; and working towards eliminating any obstacles that may have negative implications for the full integration of mentally and physically challenged youth into society including the provision of appropriate infrastructure and services to facilitate easy mobility.

Although not in so many words, the prohibition of discrimination and the requirement to attend to the special needs of mentally and physically challenged

youth and youth with special needs are extended into a number of other provisions of the Charter, including those addressing training and skills development, education, poverty eradication and socio-economic integration of youth, sustainable livelihoods and employment, health, elimination of harmful social and cultural practices, and the responsibilities of youth.

The *AU Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention)* (AFRICAN UNION, 2009) imposes a number of obligations on States Parties in respect of internally displaced persons (AFRICAN UNION, 2009).¹⁷ In particular, they are required to provide special protection for and assistance to internally displaced persons with special needs, including (amongst others) separated and unaccompanied children, the elderly and persons with disabilities (Article 9).

2.3.2 “Pronouncements” regarding the promotion and protection of human rights

Both the OAU and AU (or their organs) have at key historic moments issued declarations¹⁸ relating to human rights. For example, in the *Grand Bay (Mauritius) Declaration and Plan of Action*, adopted by the OAU Ministerial Conference on Human Rights in Africa in 1999, States reaffirm their adherence to the principles, rules and values of international and African human rights instruments (ORGANISATION OF AFRICAN UNITY, 1999). They recommit themselves to the promotion of human rights set out in these documents and undertake to eliminate obstacles to this goal (ORGANISATION OF AFRICAN UNITY, 1999, Preamble, and Articles 2 and 5). The Declaration further notes that the rights of people with disability and people living with HIV/AIDS, in particular women and children, are not always observed and urges all African states to work towards ensuring the full respect of these rights (ORGANISATION OF AFRICAN UNITY, 1999, Article 7).

Through the *Kigali Declaration* the Conference of State Parties recommit themselves to the objectives and principles contained in an extensive list of binding and non-binding political, legal and human rights instruments (AFRICAN UNION, 2003b). Singled out is the principle that all human rights are universal, indivisible, inter-dependent and inter-related (AFRICAN UNION, 2003b, para. 1).

The Conference specifically calls upon Member States to fulfil their obligations under international law and, in particular, to take the necessary measures to ensure the protection of civilian populations, particularly children, women, elderly persons and persons with disability in situations of armed conflict (AFRICAN UNION, 2003b, Paragraph 17). In Paragraph 19 it further notes with great concern the plight of vulnerable groups, including persons with disability, and calls upon Member States to provide adequate support to the African Rehabilitation Institute in Harare, Zimbabwe. Lastly, it enjoins Member States to develop a Protocol on the protection of the rights of people with disabilities and the elderly (AFRICAN UNION, 2003b, Paragraph 20).

On the occasion of the 25th Anniversary of the African Charter, the AU adopted the *Banjul Declaration* (AFRICAN UNION, 2006). While this document

included a general reaffirmation of States' undertaking to respect and protect the rights set out in the African Charter, the Declaration does not make any explicit reference to disability.

2.3.3 Towards an African Disability Protocol?

As noted above, the Kigali Declaration called on Member States to develop a Protocol (to the African Charter) with the purpose of protecting the rights of persons with disabilities and the elderly (AFRICAN UNION, 2003b). Such a Protocol would presumably fulfil the same function(s) as the African Women's Protocol. Against this background, the African Commission appointed a "Focal Point on the Rights of Older Persons in Africa" in November 2007. However, since this Focal Point excluded persons with disabilities, the mandate of the Focal Point was subsequently broadened when it was transformed into a Working Group on The Rights of Older Persons and People with Disabilities in Africa in May 2009.¹⁹ The Working Group was tasked, *inter alia*, with drafting a concept paper for consideration by the African Commission that would serve as the basis for the adoption of a Draft Protocol on Ageing and People with Disabilities (BIEGON; KILLANDER, 2010, p. 220). A draft African Protocol on Disability dated November 2009 was produced;²⁰ at the time of writing, this Protocol has been withdrawn and the Working Group is reportedly planning further consultation on this issue.

The question whether such a Protocol is advisable, given the existence of the CRPD and the documented limitations of the implementation mechanisms of the African human rights system, is beyond the scope of this article. For the same reason, we also refrain from commenting on the contents of the draft Protocol dated 2009. It suffices to say that there are pressing questions regarding this proposed Protocol that should be still be debated extensively, and on an informed basis, with African disability sectors before the African Commission reaches its final decision.

2.3.4 Mechanisms for monitoring national compliance with regional human rights instruments

The mechanisms utilised in terms of all the regional human rights treaties (discussed in section 2.3.1, above) are those provided by the African Charter. These are the state reporting procedure, the communications procedure (or, differently put, the "individual cases procedure"), and the judicial procedure. In the case of the former two, the report and communications receiving institution is the African Commission. In the case of the latter procedure, the institution is the African Court on Human and Peoples' Rights. To date, this court has handed down only one judgment. Under the African Charter on the Rights and Welfare of the Child, the African Committee of Experts on the Rights and Welfare of the Child performs an additional, treaty-specific function similar to the African Commission. The committee has only recently started functioning.

Both the state reporting procedure and the communications procedure have chequered histories ranging from non-utilisation to ineffective and infrequent

utilisation.²¹ Against this background, making provision for a separate treaty body, similar to the African Children's Committee, will have to be thoroughly debated when contemplating an African Disability Rights Protocol.

2.4 Concluding observations

Looking at the political and human rights instruments examined above (both binding and non-binding), one notes that there is a degree of progress – from initial silence about disability to eventual inclusion. This is by no means a consistent trajectory: for example, as recently as 2004 the AU Assembly of Heads of State and Government adopted the *Solemn Declaration on Gender Equality in Africa*, which makes no reference to women with disabilities (AFRICAN UNION, 2004). We have also indicated a number of opportunities that could have been utilised to explicitly include disability in the normative framework of the African regional system.

A second observation, from an examination of these instruments, is that there are a number of binding and non-binding international instruments pertaining specifically to persons with disabilities adopted by the UN General Assembly, certain of its specialised agencies and other international organisations prior to 2006 that are not referred to in the African documents.²²

Since the majority of African states had already obtained their independence at the date of the earliest of these instruments, it can be relatively safely assumed that these states endorsed the adoption of these instruments by virtue of their membership of these organisations and the fact that the voting procedures of the latter are based on simple majority. To conclude that the latter had no impact on the policies and laws of African states would, therefore, be unfounded and unjustified.

On a formal level, it is somewhat disconcerting to note that the terminology in these instruments varies, from “handicapped”, to “challenged” to “the disabled”. It is axiomatic that terminologies may shift as political consciousness (both nationally and internationally) develops. It is nevertheless important for human rights instruments, which are potentially enormously powerful in shaping public awareness, to keep track with, and reflect human rights approaches that are steeped in a recognition of the capabilities rather than the limitations of persons with disabilities (UNITED NATIONS, 2006, art. 8).

Finally, it goes without saying that this overview only presents one side of the picture, i.e. *norm acceptance* at the regional level (HEYNS; VILJOEN, 2004, p. 133). The other side of this picture is *norm enforcement*, an aspect that has been plaguing the African system since its inception.²³

3 Provisional positioning of the CRPD in the African regional human rights context

African states were generally well represented and actively involved in the broader process leading up to the establishment of the *Ad Hoc* Drafting Committee by the UN General Assembly as well afterwards in the composition of the text of the Convention (KANTER, 2006-2007, p. 308; QUINN, 2009a, p. 256). This was a

departure from sometimes past practice where African states, owing to inadequate involvement at the global level, preferred to establish an almost identical parallel treaty at the regional level (VILJOEN, 1998, p. 205; KAIME, 2009, p. 55). It has been argued that the CRPD bears an “African” imprint through its emphasis on the links between disability, poverty and development. At the date of completion of this article 26 African states have ratified the Convention; 15 of these have also ratified the Optional Protocol (UNITED NATIONS, 2011).

Despite the potentially favourable impression created by the above remarks regarding the status of the CRPD, sight must not be lost of the fact that many of the “rule-making” activities occurring in the African regional human rights context (as discussed in paragraph 2.1 to 2.4 above) occurred parallel to the process of the negotiation and adoption, as well as after the coming into effect, of the CRPD. These activities involved the very same states that had ratified the CRPD. It is our view that one cannot, as matters presently stand, identify the CRPD as the preferred “normative framework” among African states. It seems to be, at best, one possible option among others.

At the risk of generalisation, other possibilities seem to include, first, attempts to optimise the existing African system by means of *ad hoc* soft-law reforms in the form of declarations; secondly, the adoption of an African disability rights protocol to the African Charter with or without its own separate treaty monitoring body; and, thirdly, assuming that the broad indications are adequately understood, the distillation of sets of standards specific to the rights of persons with disabilities cutting across the existing treaty regime – possibly under the guidance of the CRPD.

4 Disability rights law in selected African countries following ratification of the CRPD

The struggle for human rights will be won or lost at the national level.

(OLOWU, 2009, p. 73)

4.1 Introduction

4.1.1 Living up to the CRPD

We now turn to the next level of our investigation, i.e. “norm acceptance” in the national sphere. It is noteworthy that at the time of writing, around half of the 54 countries in Africa have ratified the CRPD. The current status of ratification, in respect of the Convention and its Optional Protocol, by the four countries examined for purposes of this article is set out in *Table 1* below. One thus notes an apparently enthusiastic response in terms of accepting the norms set out in the Convention. The question, however, is the extent to which this acceptance has also translated into norm implementation.

What can be expected from the CRPD at the national level? Stein and Lord

identify three areas where the CRPD may have an immediate national effect: the expressive value of acknowledging disability-based human rights; the impact of requiring States Parties to reflect upon and engage with domestic-level disability laws and policies; and advances in social integration by persons with disabilities that will be facilitated through the CRPD's inclusive development mandate (STEIN; LORD, 2009, p. 31). Given the short period of time since the adoption of this Convention, this article specifically focuses on the *second* of these areas. (This does not however mean that the other two areas should be discounted.)

For purposes of this discussion, then, the question is which elements should be taken into consideration when determining the extent to which the CRPD has infused domestic-level disability laws and policies. Analysts of disability legislation have reported that there are numerous variations internationally of legislative dispensations, with no specific “right” or “wrong” approach; what is important, is the practical impact of legislation (KANTER, 2003, p. 249-252; HERR, 2001, p. 355).

If the jurisdiction in question has not enacted “disability-specific” legislation, the question is whether disability is included in general anti-discrimination legislation addressing, for example, employment or social security. The effect to be avoided is that disability, included in generic legislation, becomes invisible yet again.

In addition to disability-focused legislation, an important point of inquiry should be the national constitution, particularly the Bill of Rights (LANDMINE SURVIVORS NETWORK, 2007, p. 15). Here the focus should be the anti-discrimination clause, as well as the question whether the constitution makes explicit provision for persons with disabilities as a marginalised group.

An important consideration is what the overall approach is taken to persons with disabilities in the constitutional and legislative framework, i.e. whether a paternalistic, “welfare” approach (typical of the so-called medical model) is adopted, or a social and human rights approach that recognises and encourages autonomy and dignity? The medical approach usually perceives persons with disabilities as “objects” of legal intervention, while the human rights approach implies seeing persons with disabilities as persons acting with agency—the holders of rights.

Another dimension to figure into the analysis is the interrelation between equality and socio-economic rights: it has been noted that interests of persons with disabilities are often most acutely affected in the social and economic arena; they are most vulnerable in the areas of employment, health, education and social services (BHABHA, 2009, p. 219). Does the constitution or legislation require the State to take positive measures to advance these rights for persons with disabilities?

A comprehensive analysis of each legal system is beyond scope of this article (the rules relating to the legal capacity of persons with intellectual disabilities, for example, can be complex, especially where encompassed in both common law and statute, as in South Africa). The authors acknowledge that a comprehensive comparative review would include a far more detailed analysis than is possible within the scope (and purpose) of this exploratory article. For example, in order to grasp the political choices underlying all law reform initiatives – and concomitant

advocacy processes – it would have been necessary to delve far more deeply into the power dynamics operating within the disability sectors/movements at national level.²⁴ This article is accordingly limited in that it only focuses on the “bare bones” of the legislative and policy provisions, rather than their implementation in practice. However, by bearing the above factors in mind when constructing an overview of the constitutional and legal framework, one can begin to gain an impression of the extent to which the particular system has seriously begun to align itself with the CRPD.²⁵

4.1.2 What does “domestic incorporation” of the CRPD mean in practice?

The ways in which norms and standards emerging at the level of international human rights law (in this instance, the CRPD and its interpretation) may bring to bear an influence on national law would traditionally depend on the relationship between international and a particular national legal system, and more specifically, whether the national legal system follows a *monist* or *dualist* approach to the reception of international law (ADJAMI, 2002, p. 108; OPPONG, 2007, p. 297).²⁶

In terms of the monist approach, international and national law form part of a single legal order, and international law is therefore directly applicable in the national legal order – there is no need for any act of domestic incorporation. The dualist view, on the other hand, entails that international and national law comprise distinct legal orders. In order for international law to be applicable in the national legal order, it must be received through domestic legislative measures, the effect of which is to transform the international legal rule into a national one. It is only after such an act of transformation (or domestic incorporation)²⁷ that individuals within the State may benefit from or rely on the international (now national) law. However, even when an international instrument has not been incorporated, it may still serve as an aid to interpretation of domestic constitutions or ordinary laws, as will be shown below (VILJOEN, 2007, p. 540).

African states for the most part inherited the legal framework (including the approach to international law) of their colonial predecessors. Most Francophone countries that were under French or Belgian rule adopted a monist approach to international law, whereas the Anglophone states of British colonial heritage took the dualist position generally found in common law systems (ADJAMI, 2002, p. 110). In addition to the framework provided by colonial legal systems, African legal systems also incorporate African customary law as well as the provisions of religious laws, for example, Islamic law.

Since 1990, a number of national constitutions have been enacted in African countries that place international law in a more prominent position than it would have enjoyed under a traditionally dualist system. The constitutions of Namibia, Malawi and South Africa are cases in point (ADJAMI, 2002, p. 110-112). For this reason, it is important to also examine the constitutional provisions (if any) prescribing the relationship between international law and the national legal system in order to determine the influence of the CRPD in each instance (LANDMINE SURVIVORS NETWORK, 2007, p. 21-22).

4.2 *Four African jurisdictions*

4.2.1 South Africa

The South African Constitution contains an equality clause with an anti-discrimination provision that explicitly lists disability among the prohibited grounds of discrimination (SOUTH AFRICA, 1996a, section 9(3)). The Bill of Rights further sets out the rights to dignity (section 10), to security of the person, which includes the right to freedom from all forms of violence (section 12), as well as the right to have access to adequate housing (section 26). Section 27 provides for all persons the right to have access to health care services, including reproductive health care, sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. In terms of section 29, everyone has the right to a basic education, including adult basic education. All of these provisions are underpinned by section 7(2), which enjoins the State to “respect, protect, promote and fulfil the rights in the Bill of Rights”. Although sign language is not one of the official languages, the Constitution does require that sign language should be promoted and that conditions should be created for its development and use (section 6).

The Constitution is far-reaching in its inclusion of provisions defining the relationship between international and national law. Although Section 231 requires an act of incorporation by parliament in order for an international agreement (such as the CRPD) to become law in the country, the Constitution also states that customary international law is law in South Africa unless it is inconsistent with the Constitution or national legislation (section 232). Importantly, Section 39(1)(b) of the Constitution requires a court to consider international law when interpreting the Bill of Rights. This may include both binding (i.e. treaties and conventions ratified by South Africa) and “non-binding” sources of international law (SOUTH AFRICA, *S v. Makwanyane*, 1995). In addition, section 233 of the Constitution states that every court, when interpreting legislation, must prefer any reasonable interpretation of such legislation that is consistent with international law.

South Africa does not at present have all-inclusive disability legislation. The implementation of disability rights is dealt within “generic” anti-discrimination legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act (SOUTH AFRICA, 2000),²⁸ and other legislative arrangements (SOUTH AFRICA, 1996b, 1998, 2002, 2004, 2005).

Given a relatively progressive constitutional and legal framework, it is somewhat surprising that South Africa has not yielded more in the form of disability jurisprudence – apart from two cases arising from the field of employment law (SOUTH AFRICA, *Independent Municipal and Allied Trade Union v. City of Cape Town*, 2005; *Standard Bank v. Commission for Conciliation, Mediation and Arbitration*, 2007) and a recent case relating to the right to education of children with severe and profound intellectual disabilities (SOUTH AFRICA, *Western Cape Forum for Intellectual Disability v. The Government of South Africa*, 2010). Importantly, the Constitutional Court has not yet had been faced with the interpretation of substantive equality in the context of disability.²⁹

4.2.2 Federal Democratic Republic of Ethiopia

The Constitution of the Federal Democratic Republic of Ethiopia was adopted in 1995, and it therefore pre-dates the CRPD by several years.³⁰ However, it can be seen as one of the “new generation” of African constitutions, which clearly engages with the role that international human rights law should play at domestic level. For example, Article 9.4, which deals with the supremacy of the Constitution, provides that international agreements ratified by Ethiopia “are an integral part of the law of the land”. This places Ethiopia squarely in the “monist” category. Furthermore, Article 13.2 (which forms the introduction to Chapter 3, setting out fundamental rights and freedoms) notes that this Chapter must be interpreted “in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia” (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995).

Looking at the provisions of Chapter 3, a number of rights are of particular significance to persons with disabilities. Article 24.1 stipulates that everyone shall have the right to dignity, and the same article also notes that everyone shall have the right to freely develop his personality in a manner consistent with the rights of others (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, art. 24.1 and 24.2). The equality clause, which is accompanied by a prohibition of discrimination, lists a number of prohibited grounds, such as race, nationality, sex, language and religion... “or other status” (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, art. 25). Disability is not explicitly listed.

Article 41, which addresses economic, social and cultural rights, provides that all Ethiopians have the right to engage in any economic activity and gain their living by work that they freely choose (Article 41.1). They further have the right to choose their vocation, work and profession (Article 41.2). Every Ethiopian citizen has the right to equal access to social services run with state funds (Article 41.3).

This Article also lays down certain obligations for the Ethiopian State in addition to describing these rights. It notes firstly that the State must “progressively” allocate increasing funds for the purposes of promoting access to health, education and other social services (Article 41.4). The State must further, within the limits permitted by the economic capability of the country, care for and rehabilitate “the physically and mentally handicapped, the aged, and children who are left without parents or guardian” (Article 41.5). In addition, the State must devise policies designed to create employment of the poor and unemployed, issue programmes designed to open up work opportunities in the public sector and “undertake projects” (Article 41.6) (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995).

In spite of the inclusion of a relatively comprehensive Bill of Rights in the Constitution, in practice the Ethiopian courts have been reluctant to develop a rights-based jurisprudence. The courts have in fact generally been unwilling to engage in the interpretation of the Constitution as such—there is a general conviction among judges that the courts are not allowed to discuss the provisions of the Constitution when they consider cases (FESSHA, 2006, p. 79; YESHANEW, 2008, p. 279). The reason for this is to be found in Articles 83 and 84 of the Constitution, which provide that all “constitutional

disputes” must be decided by the House of the Federation³¹ upon the recommendation of the Council of Constitutional Inquiry that it is necessary to interpret the Constitution. Few such disputes have been referred to the House of Federation. The consequence of this arrangement is that courts decide matters on the level of statutory (rather than constitutional) rights and obligations, and that key questions regarding the rights set out in the Constitution have not been clarified (FESSHA, 2006, p. 80).

In comparable vein, many members of the judiciary believe that the rights included in ratified international treaties but which are not clearly guaranteed in domestic laws are not justiciable (YESHANEW, 2008, p. 286). This results in litigants as well as courts avoiding reference to international human rights instruments ratified by Ethiopia, even in cases where they are directly relevant.

Similar to the case of South Africa, Ethiopia has not enacted all-encompassing disability legislation. However, in 2008 it adopted new labour legislation relating to persons with disabilities. The Proclamation on “The Right to Employment of Persons with Disability” clearly states its objective (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 2008, preamble). It notes that deeply-rooted negative perceptions of disability had affected the rights of persons with disability to employment and by reserving vacancies for persons with disabilities, previous legislation on the right to employment of persons with disabilities had created an image that disabled persons were regarded as incapable of performing jobs based on merit—thus failing to guarantee their right to reasonable accommodation and to provide for proper protection. It therefore became necessary to enact new legislation that would comply with the country’s policy of equal employment opportunity, provide reasonable accommodation for persons with disabilities and also provide for a simplified remedy in the event of employment discrimination.

The Proclamation defines “person with disability” in line with the CRPD,³² and further provides explanations for “discrimination”,³³ “reasonable accommodation”³⁴ and “undue burden”.³⁵ It prohibits discrimination against persons with disabilities in employment practices and imposes concomitant responsibilities on employers, including taking measures to provide appropriate working and training conditions and materials for persons with disabilities, taking all reasonable accommodation and measures of affirmative action to women with disability, taking into account the multiple burden that arise from their sex and disability and assigning assistants to enable persons with disabilities to perform their work or follow their training. Significantly, a duty is imposed on employers to protect women with disabilities from sexual violence that occurs in work places.

4.2.3 Uganda

The Constitution of Uganda was adopted in 1995 and amended in 2005. It includes a Bill of Rights (embodied in Chapter Four), which contains dedicated provisions on the rights of marginalised groups, i.e. women, children and persons with disabilities (UGANDA, 1995, art. 32-35).

In addition to the Bill of Rights, it is also important to look at the introductory section to the Constitution, entitled “National Objectives and Directive Principles

of State Policy”; these principles are intended to guide all organs and agencies of the State, citizens and all other bodies and persons in applying or interpreting the Constitution or any other law and in implementing policy decisions. Under the heading of “*Social and economic objectives*”, the Directive Principles stipulate that society and the State are to recognise the right of persons with disabilities to respect and human dignity (Principle XVI).³⁶ According to Principle XXIV, the State must promote the development of sign language for the Deaf. While providing guidance, the Directive Principles are not justiciable.

Chapter Four of the Constitution sets out the important declaration that the fundamental rights and freedoms of the individual are inherent – and not granted by the State (Article 20). It enjoins all organs and agencies of government (and indeed, all persons) to respect, uphold and promote the rights and freedoms in this Chapter. The equality clause contains an anti-discrimination provision, which expressly lists disability as prohibited ground of discrimination (Article 21(2)). The State is required to take affirmative action in favour of groups marginalised on the basis of gender, age, disability, “or any other reason created by history, tradition or custom”, for the purposes of redressing imbalances that exist against them (UGANDA, 1995, art. 32). Parliament is required to make relevant laws to give effect to this provision.

As noted above, the Constitution provides that persons with disabilities have a right to respect and human dignity, and the State and society must take appropriate measures to ensure that they realize their full “mental and physical potential” (UGANDA, 1995, art. 35). Parliament is accordingly required to enact laws “appropriate for the protection of persons with disabilities”.

The Ugandan Constitution furthermore prescribes that parliament (at the national level) must be composed of one woman representative per district, and such representatives of other marginalised groups as parliament may determine (Article 78(1)). In terms of this provision, six seats have been designated for persons with disabilities (five representing each of the regions and one representing women with disabilities nationally) (UGANDA, 1997; HUMAN RIGHTS WATCH, 2010, p. 65). Article 180 of the Constitution similarly stipulates that the composition of local government councils must provide for affirmative action for all marginalised groups, including persons with disabilities.³⁷

Regarding international law, the Ugandan system is a dualist one, requiring domestic incorporation of international treaties or agreements through enabling legislation (MUJUZI, 2009, p. 580). Although neither the Supreme Court nor the Constitutional Court of Uganda is expressly empowered by the Ugandan Constitution to draw interpretative guidance from international law, both these courts have shown themselves willing to do so on occasion.³⁸

Against this background, the Ugandan parliament enacted the Persons with Disabilities Act (UPDA) in August 2006 (UGANDA, 2006).³⁹ Although the Act thus predates the adoption of the CRPD, the ethos of the Convention appears to a large extent to have informed the drafting of the text. For example, the objectives of the Act include *inter alia* the promotion of dignity and equal opportunities to persons with disabilities, encouraging the people and all sectors of government and society to recognise, respect and accept difference and disability as part of

humanity and human diversity and promoting a positive attitude towards and image of persons with disabilities as capable and contributing members of society (Article 3). These objectives convey a meaning similar to those found in Articles 3 and 8 of the CRPD.

The UPDA addresses a broad range of areas, including education (Articles 5-6), health services (Articles 7-8), rehabilitation (Article 10) and vocation rehabilitation (Article 11). It specifically provides for the prevention of disability (Article 9). The Act further contains chapters on employment (Articles 12-18), accessibility (Articles 19-24) and discrimination in relation to goods, services and facilities (Articles 25-31).

Part VI of the Act is significant in that it requires the Government to take affirmative action in favour of persons with disabilities for the purpose of “redressing imbalances” that exist against them (UGANDA, 2006, art. 33). It prohibits cruel, unusual or degrading treatment of a person with disability by any person or institution (Article 34), and provides that persons with disabilities, including those in institutions, are not to be subjected to arbitrary or unlawful interference with their privacy (Article 35). This chapter further makes provision for the rights of persons with disabilities to a family and to participation in public and in cultural life (Articles 36-37).

The Act has been criticised for its “cautious approach” in that it uses the language of human rights in a minimalist manner; on the other hand, it does impose obligations on the State that could, if read conversely, imply rights for persons with disabilities (MBAZIRA, 2009, p. 45). Importantly, the general principles underpinning the Act appear to be in line with those animating the CRPD, viz. autonomy, accessibility and dignity.

However, there is one disquieting exception, to be found in the Act’s definition of disability,⁴⁰ which appears to rely on broad—and medically unfounded⁴¹—categories. It is difficult to see how these categories can be justified, and we argue that this is an area for reconsideration to align the UPDA with the CRPD.⁴²

A number of practical problems have emerged since the enactment of the UPDA. The most disconcerting one is a dispute between the Ministry of Justice and the National Union of Disabled People of Uganda (NUDIPU)⁴³ regarding the enforceability of the legislation (HUMAN RIGHTS WATCH, 2010, p. 65). The Ministry maintains that the language of the UPDA is “aspirational” and therefore not enforceable. The disability sector, including NUDIPU, disagrees with this view, and opposes efforts on the part of the government to repeal this Act before new legislation is ready for adoption.

A second problem, which goes to the implementation of this Act (and any future legislation), is the capacity of the National Disability Council to first, act on complaints received regarding the violation of rights of persons with disabilities, and secondly, to monitor the implementation of the CRPD (HUMAN RIGHTS WATCH, 2010, p. 66-67). This capacity currently appears to be limited.

A third area of contention that has troubled the Ugandan disability sector is the respective roles of the National Disability Council⁴⁴ and NUDIPU in selecting the parliamentary representatives referred to above. Commentators have observed

correctly that these governance difficulties will have to be resolved before the rights of persons with disabilities, whether under the Constitution, legislation or the CRPD, can be fully and effectively realised in Uganda (HUMAN RIGHTS WATCH, 2010, p. 67). At the same time, it has also been pointed out that certain serious rights violations, such as the continued detention of prisoners with psychosocial disabilities, remain unresolved.⁴⁵

4.2.4 United Republic of Tanzania

The United Republic of Tanzania (URT) is a political union of two semi-autonomous entities: the mainland area of Tanzania and the islands of Zanzibar. The Constitution of the URT dates from 1977 (UNITED REPUBLIC OF TANZANIA, 1977).⁴⁶ Part III of the Constitution sets out a number of basic rights and duties. Article 12 provides that all persons are born free and equal, and everyone is entitled to respect for his dignity. The concomitant anti-discrimination clause does not expressly include disability as a prohibited ground; although the list of grounds provided in the Article is not as clearly “open-ended” as the other examples provided above, the clause does arguably allow for “reading in” of additional grounds.⁴⁷

It is noteworthy that this Constitution sets out mostly those rights that are traditionally regarded as civil and political rights; among those usually termed socio-economic rights, only the right to work and the right to own property are included here. The Constitution also lists a number of duties resting on the individual.⁴⁸

Similar to the Ugandan document discussed above, the Constitution of the URT contains a number of (non-justiciable) “Fundamental Objectives and Directive Principles of State Policy” (Part II). These principles must be acknowledged and applied by the Government, all its organs and all persons or authorities exercising executive, legislative or judicial functions; however, the directive principles are not enforceable by the courts (Article 7). The Directive Principles include *inter alia* obligations resting on the Government, with its agencies, to direct its policies and programmes towards ensuring that human dignity and other human rights are respected (Article 9).

Although the Tanzanian Constitution is silent on the relationship between national law and international law, the country has generally accepted to adopt a dualist approach. Regarding the interpretative guidance to be taken from international law, the Tanzanian High Court resolved this question subsequent to the inclusion of the Bill of Rights in the Tanzanian Constitution. In a matter dealing with women’s right to inherit under Haya Customary Law, the Tanzanian High Court made it clear that it regarded international human rights law as an essential guide in its interpretation of the Constitution, in this instance, the equality clause (UNITED REPUBLIC OF TANZANIA, *Ephraim v. Pastory*, 1990).

Tanzania⁴⁹ enacted a comprehensive disability law in 2010, entitled the “Persons with Disabilities Act” (TPDA) (UNITED REPUBLIC OF TANZANIA, 2010). The Act, which is an ambitious document, is clearly inspired by the CRPD: several provisions follow the Convention *verbatim* (with interesting variations).⁵⁰ For example, the Act tasks the responsible Minister with a number of obligations for the realisation of the

rights of persons with disabilities on (Article 5); the text of this article is very close to that of Article 4 of the CRPD (which sets out the general obligations of State Parties).⁵¹ So, too, the provision on awareness-raising (Article 7).

The TPDA makes provision for healthcare for persons with disabilities (Article 26), education (Articles 27-29), rehabilitation and employment (Articles 30-34), and various aspects of accessibility (Articles 35-50). It addresses participation in political and public life (Articles 51-54) and communication (Articles 55-56). The Act further provides for the establishment of a National Advisory Council for Persons of Disabilities (Articles 8-14) and a National Fund for Persons with Disabilities (Articles 57-58).

A number of noteworthy provisions are encapsulated in a chapter entitled “Integration of persons with disabilities”. This chapter sets out the general principle that every person with disability must be assisted by their local government authority, relative, disability organizations, civil society or any other person to live as independently as possible and be integrated in the community (Article 15). A person with a disability may not be forced to live in an “institution” or in a particular living arrangement. The responsible Minister is required to take measures to enable and support persons with disabilities to live independently and fully integrated in the community.

Specific attention is paid to the role of local government authorities, which are required to provide support services to persons with disabilities. Firstly, the Act imposes a duty to “safeguard and promote the rights and welfare” of a person with disability within its jurisdiction (Article 20). The local government authority must provide counselling to parents, guardians, relatives and persons with disabilities for the purpose of reducing or removing the degree of stigma among them. The local government authority must also, within its area of jurisdiction, provide assistance to persons with disabilities to enable them to develop their “potential, empowerment and self reliance”.

Article 21 imposes a duty on any member of the community who has “evidence or information” that the rights of a child with disabilities are being infringed to report the matter to the local government authority as well as to any other relevant authority in the area. A similar reporting duty exists where a parent, guardian or relative of a person with disabilities “having custody” of a person with disabilities is able to, but refuses or neglects to provide the right to play, medical care, leisure and education.

The Commissioners for Social Welfare are required to establish and maintain a register of persons with disabilities and settlements (Article 23). This register may only be used for “identification and other statistical purposes”.

4.3 Observations

The four jurisdictions examined above illustrate different configurations of constitutional and legal frameworks within which the rights of persons with disabilities are to be protected and promoted. These frameworks, in turn, slot into the broader African regional system and ultimately, into the framework recently established by the CRPD.

In the case of South Africa, which has a “hybrid” system (dualist, but with clear provisions regarding interpretative guidance and customary international law deemed to form part of national law), the existing generic legislation does make provision for certain areas of life such as employment. However, it is clear that in order to fully incorporate the CRPD into domestic law, additional steps, likely in the form of comprehensive disability legislation, should be considered.

The position of Ethiopia is different from South Africa, in that it has a clear monist system. Whereas certain of its constitutional provisions relating to socio-economic rights of persons with disabilities are accordingly much weaker than those set out in the South African Constitution, the provisions of the CRPD are already effectively part of Ethiopian law. However, this is not where the matter ends, given the complicating effect of the arrangements regarding constitutional review and the reluctance of the courts to interpret provisions of the Constitution and apply international human rights agreements that have not been articulated in statute. Additional statutory intervention, along the lines of the Proclamation examined here, is accordingly required to ensure effective incorporation of the Convention.

While there are aspects of both the Ugandan and Tanzanian disability laws that are somewhat troubling (in the case of the latter, for example, the question of registration of persons with disabilities), both constitute a major step towards the recognition of rights of persons with disabilities and the realisation of those rights, especially in the socio-economic spheres. It is somewhat disconcerting to note that Uganda, for example, is lagging behind when it comes to the question of accessibility of the built environment, given the strong emphasis on this question in the UPDA (MBAZIRA, 2009). This again confirms the truism that rights are only as powerful as their implementation.

5 Conclusions

Our investigation of the African regional system and the four domestic systems indicates that the normative framework bound up in the CRPD has not yet been successfully incorporated at either level. While one does not wish to undermine the efforts that have been made, for example, in Tanzania to enact innovative legislative measures clarifying the duties of local government authorities, the reality is that in many jurisdictions, the act of ratification has been little more than a hollow promise. The history of disability rights at the continental level, as we have attempted to show by means of this brief overview, has at best been one of “benign neglect”.

However, the picture is not all bleak and discouraging. As illustrated, significant shifts have already taken place, and the CRPD has further opened up windows of opportunity both at regional and national level.

For instance, Article 43 of the CRPD allows for “regional integration organisations” to formally confirm or accede to the Convention. While this option is not open to the AU, due to the specific definition of “regional integration organisations” in Article 44, there is nothing that prevents the AU from adopting

a Declaration or Resolution in which it expresses its support of and commitment to the principles of the Convention. This will be a powerful public statement of endorsement.

There is much to be done to ensure that disability rights are integrated into the work of AU institutions, including the African Commission. A proliferation of instruments is not necessarily the panacea. However, in the event that the drafting of additional human rights documents is considered essential, we propose that two aspects are paramount: the importance of working with the African disability sectors, and ensuring that terminologies are inclusive and respectful.

These principles are also applicable at national level, where we have for example, identified the need for an instrument of incorporation in the case of South Africa, and additional steps to ensure that Ethiopian courts are less reluctant to apply the rights set out in the CRPD (even though these principles already form part of domestic law). It goes without saying, in respect of all the jurisdictions considered here, that well-drafted national legislation will facilitate the interpretative task of judicial officers who may never before have been confronted with the substance of “disability rights”.

Furthermore, if national legislation is clear in its provision for further regulatory mechanisms, it will make related issues such as the exercise of discretion by employers and administrators much easier. It will also allow for the easy development of indicators for monitoring and evaluation, which is required in terms of the CRPD (UNITED NATIONS, 2006, art. 33).

The challenge, ultimately, for disability rights advocates in Africa lies in ensuring that the impact of the CRPD at the national (and, we would argue, regional) levels pervades all three areas identified above by Stein and Lord, i.e. the expressive value of acknowledging disability-based human rights; requiring States Parties to engage with domestic-level disability laws and policies; and advances in social integration by persons with disabilities. The revolution implied by the adoption of the Disability Convention is still incomplete, at least as far as Africa is concerned.

Table 1

CURRENT STATUS OF SIGNATURE AND RATIFICATION OF CRPD AND ITS OPTIONAL PROTOCOL (AS AT 26 FEBRUARY 2011)				
Country	Convention		Optional Protocol	
	Signed	Ratified	Signed	Ratified
Ethiopia	30 Mar. 2007	7 July 2010	-	-
South Africa	30 Mar. 2007	30 Nov. 2007	30 Mar. 2007	30 Nov. 2007
Uganda	30 Mar. 2007	25 Sept. 2008	30 Mar. 2007	25 Sept. 2008
United Republic of Tanzania	30 Mar. 2007	10 Nov. 2009	29 Sept. 2008	10 Nov. 2009

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NOTES

1. The Convention on the Rights of Persons with Disabilities and the Optional Protocol were adopted by the UN General Assembly on 13 December 2006 and entered into force on 3 May 2008.
2. Four jurisdictions in Southern and Eastern Africa have been selected, viz South Africa, the United Republic of Tanzania, Uganda and the Federal Democratic Republic of Ethiopia. It is acknowledged that these jurisdictions are not representative of Africa as such (or indeed Anglophone Africa or the SADC countries plus Ethiopia). With a sample of 4 out of 54 countries, little more than a "qualitative" discussion is possible – it is not even really possible to distinguish trends.
3. A similar argument may be made in respect of women's rights; however, this situation has (arguably) been addressed through the adoption of the African Women's Protocol in 2003.
4. This article admittedly makes use of generalised terminology such as "the African approach" and "the African context", while at the same time disavowing any assumption to the effect that there is a homogenous "African experience" that applies to all persons with disabilities in the region.
5. There has been a great deal of discussion in the literature as to the nature of human rights in Africa, including the debate between the universalists and the cultural relativists (COBBAH, 1987, p. 320; ZELEZA, 2004, p. 13; IBHAWOH, 2004, p. 29; HEYNS; VILJOEN, 2004, p. 129; OLOWU, 2009, p. 51).
6. This article does not attempt a comprehensive analysis of the African regional architecture. There are, for example, a number of the African Union's initiatives such as the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism, which we have omitted due to length constraints. The same applies to AU programmes such as the Social Affairs Directorate, under which "disability" resorts.
7. The First Permanent General Assembly of the ECOSOC was elected on 8 September 2008, in Dar es Salaam, United Republic of Tanzania.
8. The African Charter on Democracy, Elections and Governance was adopted on 30 January 2007; the African Youth Charter on 2 July 2007. Both require 15 ratifications to come into operation. At the time of writing, 20 States have ratified the latter Charter.
9. We refer to the document as "the African Charter" in this article for ease of reference.
10. The findings of the African Commission are not legally binding. In 1998, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights ("the African Court Protocol") was adopted; however, due to slow ratification by Member States, this Protocol only came into force on 25 January 2004. (In the meantime the Protocol on the Court

of Justice of the African Union had been adopted on 11 July 2003, and measures had been taken for the merger of the two courts. The combined court will be known as the African Court of Justice and Human Rights.) The first eleven judges were elected to the African Court on Human and Peoples' Rights in 2006, and at the time of writing, the court is operational. It may receive cases from States Parties, the African Commission, and individuals and NGOs with observer status before the African Commission, provided that the State Party in question has recognised the Court's jurisdiction in respect of direct access by individuals and NGOs. (Articles 5(3) and 34(6) of the African Court Protocol – above).

11. The American Declaration contains a number of articles detailing the duties of the citizen, including the duty to 'aid, support, educate and protect his minor children', to 'acquire at least an elementary education', to 'obey the law and other legitimate commands of the authorities' and to work (ORGANISATION OF AMERICAN STATES, 1948, art. XXX, XXXI, XXXIII, XXXVII).

12. This is the only communication relating to disability yet brought before the African Commission.

13. The mandate of the ARI, while still based on the original aims, has been adapted to include new societal demands and developments, taking into consideration building the capacity of governments and the concerns of disabled people's organisations. The mandate accordingly includes the promotion and encouragement of the implementation of the Continental Plan of Africa Decade of People with Disabilities as well as the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities among the Member States of the AU (ORGANISATION OF AFRICAN UNITY, 1985).

14. The monitoring body of the African Children's Charter is the Committee on the Rights and Welfare of the Child, which held its first meeting in 2002.

15. For the purposes of this Charter "minors" means young people aged 15 to 17 years and 'youth' or 'young people' refer to every person between the ages of 15 and 35 years.

16. There is no reference to youth with sensory impairments. It is uncertain whether they should merely be included under the descriptions of either "physically challenged youth" or "youth with special needs".

17. In this context, the important role of the *Peace and Security Council of the AU* (established in 2002) in post-conflict situations also needs to be stressed. The Council must, among other duties, assist in the resettlement and reintegration of refugees and internally displaced persons, particularly vulnerable persons, including children, the elderly, women and other traumatised groups in society. In the devising of preventative measures, the Council must encourage non-governmental organisations, community-based

and other civil society organisations, particularly women's organisations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa.

18. In terms of international law, such Declarations constitute so-called "soft law" and therefore do not have binding effect.

19. The establishment of working groups has been one of the special mechanisms which the African Commission has utilised to deal with specific thematic human rights issues.

20. Copy on file with authors.

21. The serious implications of this state of affairs are succinctly exposed by Evans and Murray (2008, p. 63).

22. Instruments adopted by the UN General Assembly include the Declaration on the Rights of Disabled Persons (UNITED NATIONS, 1975); the World Programme of Action concerning Disabled Persons (UNITED NATIONS, 1982); Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (UNITED NATIONS, 1991); and the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (UNITED NATIONS, 1993). Instruments adopted by the General Conference of the International Labour Organisation (ILO): the Recommendation Concerning Vocational Rehabilitation of the Disabled (INTERNATIONAL LABOUR ORGANISATION, 1955); the Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons) (INTERNATIONAL LABOUR ORGANISATION, 1983a); and the Recommendation Concerning Vocational Rehabilitation and Employment (Disabled Persons) (INTERNATIONAL LABOUR ORGANISATION, 1983b).

23. This issue is beyond the scope of this article.

24. Such an inquiry would have yielded *inter alia* a perspective on why certain groups or sectors appear to be marginalised even further within the already marginalised disability sectors, for example, persons with albinism in Tanzania. See European Parliament (2008).

25. A crucial aspect of the implementation of the Convention, which we have not considered here, is that of the enforcement mechanisms set out in Article 33, i.e. national focal points, coordination mechanisms, and independent mechanisms.

26. This traditional binary distinction is not beyond criticism; however, it is useful for emphasising the basic differences between legal systems in respect of the reception of international treaty obligations (LORD; STEIN, 2008, p. 451).

27. This process is often, somewhat misleadingly, referred to as "domestication".

28. The Act lists specific instances of discrimination on the grounds of race, gender and disability. Section 9 provides that no person may unfairly

discriminate against any person on the ground 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.

29. It has been argued before the Constitutional Court that it should deal with discrimination based on HIV status as disability-related discrimination; however, the Court declined to do so, and decided the matter on HIV-based discrimination only (SOUTH AFRICA, *Hoffman v. South African Airways*, 2001).

30. The Constitution of the Federal Democratic Republic of Ethiopia was adopted on 8 December 1994 and came into effect in August 1995 (FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995).

31. The House of Federation (“the House”) can be seen as the “Upper House” or “Second Chamber” of the bicameral parliament of Ethiopia (FESSHA, 2006, p. 53). The Council of Constitutional Inquiry is a body composed of members of the judiciary, legal experts appointed by the House of Peoples’ Representatives and three persons designated by the House from among its members, to examine constitutional issues and submit its recommendations to the House for a final decision.

32. “Person with disability” means an individual whose equal employment opportunity is reduced as a result of his physical, mental or sensory impairments in relation with social, economic and cultural discrimination.

33. “Discrimination” means to accord different treatment in employment opportunity as a result of disability; provided, however, that any inherent requirement of the job or measures of affirmative actions may not be considered as discrimination.

34. “Reasonable accommodation” means an adjustment or accommodation with respect to equipment at the work place, requirement of the job, working hours, structure of the business and working environment with a view to accommodate persons with disabilities to employment.

35. “Undue burden” means an action that entails considerable difficulty or expense on the employer in accommodating persons with disabilities when considered in light of the nature and cost of the adjustments, the size and structure of the business, the cost of its operations and the number and composition of its employees.

36. A number of these Directive Principles are of

particular significance to persons with disabilities (e.g. Directive Principle VI, which requires the State to ensure gender balance and fair representation of marginalised groups on all constitutional and other bodies, and Directive Principle XI(i), which states that the State must give the highest priority to the enactment of legislation establishing measures that protect and enhance the right of the people to equal opportunities in development). However, Directive Principle XVI is the only one that specifically refers to persons with disabilities.

37. It has been observed that this provision has in practice resulted in a significant increase in representation of people with disabilities in local governments in Uganda (LANDMINE SURVIVORS NETWORK, 2007, p. 20).

38. For example, the Supreme Court of Uganda drew on international law in its judgment on the death penalty in (UGANDA, *Attorney-General v. Kigula and Others*, 2009).

39. The 2006 Act was preceded by the National Council for Disability Act, which was adopted in 2003 (and remains in force). This Act established the National Council for Disability, which has the mandate to promote the rights of persons with disabilities as set out in international conventions and legal instruments, the Constitution and other laws. The Council serves as the body through which the needs and concerns of persons with disabilities can be communicated to Government and its agencies for action. Although the Act refers to the UN Standard Rules on Equalisation of Opportunities for Persons with Disabilities and the Constitution as standards that should guide the Council, it does not define the rights of persons with disabilities (MBAZIRA, 2009, p. 42).

40. The UPDA gives an explanation for both “disability” and “person with disability” in the definition clause. “Disability” is defined as “a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation”; “person with disability” is defined as “a person having physical, intellectual, sensory or mental impairment which substantially limits one or more of the major life activities of that person”. The Act then further states that the “disability codings” in its Schedule 1 will determine whether an impairment has a substantial function limitation of daily activities, or whether an impairment has a long-term effect on a person (Article 4(1) and (2)). In addition, a medical officer and any relevant organisation of or for persons with disabilities must be consulted. Schedule 1 consists of a very broad list of these “disability codings”. For instance, under the heading of “Skin diseases”, one finds “diseases of the skin and cellular tissues”.

41. For example, under “mental disorders” in Schedule 1, one finds the following entries “psychoneuroses (e.g. anxiety or obsessional states hysteria (sic); other mental illness and mental sub-normality”. Aside from the fact that these “definitions” may be scientifically objectionable, the

terminology employed here is unfortunate. See also our earlier comments regarding terminology in Section 2.1. above.

42. The CRPD does not attempt to define "disability"; instead, it states that "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" (Article 1).

43. The National Union of Disabled Persons of Uganda (NUDIPU), founded in 1987, is an umbrella organisation of physical, mental, intellectual and sensory disability organisations. Members include national DPOs and district disabled persons' unions, including associations of the deaf, blind and people with physical disabilities, organisations of persons with psychosocial disabilities, and epilepsy organisations. While it is an NGO, its role in aiding in elections for members of parliament representing persons with disabilities is explicitly set out in s 118 of the Local Government Act, 1997 (HUMAN RIGHTS WATCH, 2010, p. 65, 250).

44. In terms of s 6 of the National Council for Disability Act, 2003, the Council is mandated to assist the electoral commission in conducting elections for members of parliament representing persons with disabilities.

45. At the time of writing, Human Rights Watch had identified 11 prisoners with psychosocial or mental disabilities who had been found not guilty of criminal offences by reason of "insanity" but returned by the courts to prison, where they are placed on "minister's orders" status indefinitely until the minister decides on a course of action. Under Ugandan criminal law, once a judge orders an individual to await the minister's order, the minister is supposed to determine whether the person should be released or placed in "appropriate custodial care". One detainee has been awaiting minister's orders for 16 years, and another for over ten. The remaining nine detainees have been waiting between one and six years (HUMAN RIGHTS WATCH, 2011).

46. This Constitution did not initially contain a Bill of Rights: this Chapter was introduced into the Constitution through the Fifth Amendment to the Constitution.

47. Article 13(5) reads: "For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or *station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications.*" (UNITED REPUBLIC OF TANZANIA, 1977, Emphasis added).

48. For example, Article 25 notes that "work alone creates the material wealth in society and is the source of the well-being of the people and the measure of human dignity. Accordingly, every person has the duty to participate voluntarily and honestly in lawful and productive work; and observe work discipline and strive to attain the individual and group production targets desired or set by law" (UNITED REPUBLIC OF TANZANIA, 1977).

49. A distinction should be drawn between the United Republic of Tanzania (which includes both the islands of Zanzibar and "mainland" Tanzania), which have autonomous legislative capacity in certain spheres. The Act under discussion here was passed by and relates only to mainland Tanzania; it thus excludes Zanzibar.

50. Compare, for example, Art 4, which sets out the basic principles of the Act, with the general principles of the CRPD: the principle of "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity" as included in Art 3(d) of the CRPD does not appear in the Tanzanian Act. Similarly, the principle of respect for the evolving capacities of children with disabilities (Art 3(h)) is not included. The TPDA in turn adds a principle that does not appear in the CRPD, i.e. "provide basic standard of living and social protection" (sic)—Art 4(g). Another interesting area of comparison lies in the definition clause – see e.g. the definition of "person with disability" in the TPDA, which differs quite significantly from that found in the CRPD.

51. Again, deviations from the Convention's text require further scrutiny; however a comprehensive discussion goes beyond the scope of this article.

RESUMO

Este artigo analisa o impacto provável da adoção da Convenção da ONU sobre os Direitos das Pessoas com Deficiência tanto no sistema regional de direitos humanos vigente na África, quanto em certos ordenamentos jurídicos nacionais na África austral e oriental, em contraponto a um contexto histórico de “omissão benigna” no que diz respeito a direitos de pessoas com deficiência. Em primeiro lugar, este artigo apresenta um visão geral sobre a proteção, ora existente no sistema regional africano de direitos humanos, aos direitos de pessoas com deficiência. Em segundo lugar, este trabalho discute a contribuição regional africana para a elaboração da Convenção sobre os Direitos das Pessoas com Deficiência. Em seguida, em terceiro lugar, o presente artigo avalia os debates predominantes sobre quais seriam as alternativas para melhorar a condição de pessoas com deficiência na África. Este artigo, portanto, analisa sucintamente as exceções legais referentes à deficiência existente na África do Sul, República Federativa Democrática da Etiópia, Uganda e a República Unida da Tanzânia. Ao fim, os autores fazem recomendações sobre como harmonizar os ordenamentos jurídicos nacionais e o sistema regional à Convenção sobre os Direitos das Pessoas com Deficiência.

PALAVRAS-CHAVE

Legislação sobre direitos de pessoas com deficiência – Sistema regional africano de direitos humanos – Convenção sobre os Direitos de Pessoas com Deficiência e seu Protocolo Opcional – Estados africanos – Internalização de tratados.

RESUMEN

Este artículo examina el impacto potencial de la adopción de la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad (CDPD) tanto en el sistema regional africano de derechos humanos como en sistemas jurídicos nacionales selectos de África Austral y Oriental, frente a antecedentes históricos de “descuido benigno” de los derechos de estas personas. En primer lugar, el artículo ofrece un panorama de la actual protección de esos derechos en el sistema regional africano de derechos humanos; en segundo lugar, muestra cómo la región africana contribuyó a dar vida a la CDPD; en tercer lugar, considera los debates en curso respecto a opciones para mejorar la posición de las personas con discapacidad en África; luego pasa a examinar brevemente las disposiciones de Sudáfrica, la República Federal Democrática de Etiopía, Uganda y la República Unida de Tanzania en relación con la discapacidad. Concluye con recomendaciones para armonizar los sistemas tanto regionales como nacionales con la Convención.

PALABRAS CLAVE

Legislación sobre los derechos de las personas con discapacidad – Sistema regional africano de derechos humanos – Convención sobre los Derechos de las Personas con Discapacidad y su Protocolo Facultativo – Estados africanos – Incorporación nacional