

**Disability Rights in Africa:
Towards a Citizenship Approach**

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Abstract

This thesis evaluates the status of the rights of persons with disabilities in the African context drawing from international, regional and national perspectives. It assesses the adequacy and effectiveness of the existing legal frameworks in Africa for achieving the full citizenship rights of persons with disabilities. It uses the concept of citizenship to justify and advocate for the protection and promotion of the rights of persons with disabilities.

The thesis begins by reviewing various theoretical and conceptual models of disability rights and the emergence of anti-discrimination rights and the duty to accommodate in various jurisdictions. It then examines significant developments in international human rights law, culminating in the coming into force of the *Convention on the Rights of Persons with Disabilities*. I underscore the shift that has occurred away from a biomedical/charity model of disability towards a human rights and citizenship-based paradigm. In the African context, however, this shift has not yet occurred. I argue that the existing regional legal framework in Africa does not provide adequate legal protections and guarantees for safeguarding the human rights of persons with disabilities. The African regional human rights instruments often portray persons with disabilities as recipients of care, assistance and rehabilitation services, replicating the perspective of the individual/bio-medical model. The progress towards a human rights approach to disability rights in Africa has been very slow. I suggest that the African Union should adopt a separate and specific convention or protocol on the rights of persons with disabilities in Africa. At the national level, many African states have disability-

related laws that continue to reflect attitudes rooted in the individual/bio-medical model. To date, many African states have not enacted laws that meaningfully respect and protect disability human rights. I argue that states should primarily be responsible for ensuring the full citizenship status of persons with disabilities. I maintain that persons with disabilities should be reasonably accommodated to meet their needs in all circumstances in order to attain this objective. Otherwise, eliminating the exclusion, marginalization and discrimination experienced by persons with disabilities will remain an unfulfilled dream.

Résumé

Cette thèse évalue le statut des droits des personnes handicapées dans le contexte Africain, en puisant dans des perspectives internationales, régionales et nationales. Elle étudie également l'adéquation et l'efficacité des cadres légaux existants actuellement en Afrique pour établir les pleins droits civils des personnes handicapées.

La thèse commence par passer en revue plusieurs modèles théoriques et conceptuels des droits des personnes handicapées et l'émergence de droits antidiscriminatoires et du devoir d'accommodation dans plusieurs juridictions. Elle examine ensuite les développements significatifs dans le droit international de la personne, culminant avec l'entrée en vigueur de la *Convention relative aux droits des personnes handicapées*. À cet égard, je souligne le changement qui s'est opéré en passant d'un modèle biomédical/charité vers un paradigme basé sur les droits des personnes handicapées et la citoyenneté. Dans le contexte Africain, ce changement n'a en revanche pas encore eu lieu. Je soutiens que le cadre légal régional présentement en place en Afrique n'offre pas de protection légale ou de garanties pour la protection des droits des personnes handicapées adéquates. Les instruments régionaux Africains des droits de la personne décrivent souvent les personnes handicapées comme des receveurs d'aide, d'assistance et de services de réhabilitation, reproduisant ainsi la perspective du modèle individuel/biomédical. L'évolution vers une approche des droits de la personne pour les personnes handicapées en Afrique est très lente. Je suggère que l'Union Africaine devrait

adopter une convention ou un protocole séparé et spécifique aux droits des personnes handicapées en Afrique. De même, au niveau national, de nombreuses nations Africaines légifèrent des lois sur le handicap qui continuent de refléter des attitudes ancrées dans le modèle individuel/biomédical. Présentement, de nombreux pays Africains n'ont pas adopté de lois qui respectent et protègent de façon significative les droits des personnes handicapées. Je soutiens que les états devraient être principalement responsables d'assurer le plein statut de citoyen des personnes handicapées. Je maintiens que les personnes handicapées devraient être raisonnablement accommodées pour pourvoir à leurs besoins en toutes circonstances pour atteindre cet objectif. Sinon, l'élimination de l'exclusion, de la marginalisation et de la discrimination envers les personnes handicapées restera un rêve inachevé.

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Dedication

I dedicate this work to my close friend, Zenawi Siyum, for overcoming the challenges of his double disabilities in a developing country. He has been, and remains, my inspiration to appreciate life.

Acronyms and Abbreviations

ACHPR: African Charter on Human and Peoples' Rights.

ACHPR Court Protocol: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights

ACHPR, Res.118: Resolution on the Establishment and Appointment of a Focal Point on the Rights of Older Persons in Africa, ACHPR/Res.118 (XXXXII) 07.

ACHPR, Res.143: Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, ACHPR/Res.143 (XXXXV) 09.

ACHPR, Res.170: Resolution to Increase Members of the Working Group on Older Persons and People With Disabilities in Africa, ACHPR/Res.170 (XLVIII) 2010.

ACHPR Women's Protocol: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

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

African Decade: African Decade of Disabled Persons.

ARI: African Rehabilitation Institute.

ARI Agreement: Agreement for the Establishment of an African Rehabilitation Institute.

AU: African Union.

AU Constitutive Act: Constitutive Act of the African Union.

AU Displaced Persons Convention: African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women.

Court of Justice Protocol: Protocol of the Court of Justice of the African Union.

CRC: Convention on the Rights of the Child.

CRPD: Convention on the Rights of Persons with Disabilities.

Decade Action Plan: Continental Action Plan for the African Decade of Persons with Disabilities 1999-2009.

Decade Declaration: Declaration of the African Decade of the Disabled Persons 1999-2009.

Democracy Charter: African Charter on Democracy, Elections, and Governance.

DPOs: Disabled persons' organizations.

Grand Bay Declaration: Grand Bay Mauritius Declaration and Plan of Action.

ICCPR: International Covenant on Civil and Political Rights.

ICD: International Classification of Diseases.

ICERD: International Convention on the Elimination of All Forms of Racial Discrimination.

ICESCR: International Covenant on Economic, Social and Cultural Rights.

ICF and ICIDH-2: International Classification of Functioning, Disability and Health.

ICIDH: International Classification of Impairments, Disabilities and Handicaps.

ICPRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

JHR Court Protocol: Protocol on the Statute of African Court of Justice and Human Rights.

JHR Court Statute: Statute of the African Court of Justice and Human Rights of the AU.

ILO: International Labor Organization.

MI Principles: Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.

NGOs: Non-Governmental Organizations.

OAU: Organization of African Unity.

OAU Charter: Charter of the Organization of African Unity.

OAU Refugee Convention: OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

Peace Council Protocol: Protocol Relating to the Establishment of the Peace and Security Council of the African Union.

Standard Rules: Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

UDHR: Universal Declaration of Human Rights.

UN: United Nations.

WHO: World Health Organization.

WPA: World Program of Action Concerning Disabled Persons.

CHAPTER ONE:

INTRODUCTION

1.1. Introduction

It was almost seventeen years ago that a friend of mine in Eritrea lost his hearing, an event that absolutely turned his life upside down. This was not the only disappointing event in his life. What was very shocking to my friend and to all of us around him was that the hearing impairment was an added problem to his existing total vision loss.¹ One can imagine how challenging life would be for a person with a disability in a developing country, and especially for a person with multiple disabilities. My friend's dream of becoming a great singer and musician came to an end. As a result, he had no hope of supporting himself in the future. No educational or vocational training was available to help him gain any form of employment. In the absence of any kind of technology for people with seeing and hearing impairments in his country, and since importing such technologies was unthinkable because of his very poor financial resources, he struggled on his own to invent a communication tool using a combination of Tigrigna and Latin letters in print and braille. The fact that he was already capable of speaking and was a braille user helped him significantly in his communication endeavours. His new tool enabled him to communicate with friends without much difficulty. Since no social security exists in Eritrea for people with disabilities whose impairments

¹ My friend lost his hearing ability when he was in the last year of secondary school. Since he was already a braille user, he brilliantly came up with a communication tool on which letters are

weren't caused by their involvement in the liberation struggle or in wars following the country's independence, my friend's only recourse was to beg in the city, which he began to do. When he was told that he could not beg in the streets of the city, he asked me if there were any legal grounds under the Eritrean laws that would oblige the Government either to provide him with the necessary social services or to let him beg in the streets. That question was very difficult to answer for many reasons, but it inspired me to undertake my studies of disability rights.

Disability, both physical and mental, is widespread, and its incidence is increasing throughout the world.² The figure has reached the point where "persons with disabilities" now constitute one of the largest minority groups in the world.³ According to the World Health Organization's *World Report on Disability 2011 (WHO World Report)*, "More than one billion people in the world live with some form of disability, of whom nearly 200 million experience considerable difficulties in functioning."⁴ Four out of five persons with disabilities live in developing countries.⁵

1.2. The Situation of Persons with Disabilities in the African Context

Although human rights abuses and atrocities are not specific to Africa,⁶ it

written in both braille and print.

² World Health Organization & World Bank, *World Report on Disability 2011* (Geneva: World Health Organization, 2011) at xi, online: WHO <http://www.who.int/disabilities/world_report/2011/en/index.html> [WHO World Report].

³ Paul Harpur, "Time to be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change" (2011) 45 Val. U. L. Rev. 1271 at 1271.

⁴ WHO World Report, *supra* note 2 at xi, 24-32.

⁵ UN Enable, *Factsheet on Persons with Disabilities*, online: UN Enable <<http://www.un.org/disabilities/default.asp?navid=34&pid=18>> [UN Enable Factsheet].

⁶ Nsongurua Udombana, "Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter" (2004) 40 Stan. J. Int'l L. 105 at 105.

is not an exaggeration to say that many countries in Africa have a very poor record of respecting human rights and fundamental freedoms. Reports on egregious violations and abuses of human rights by African states against their own people are in the headlines of news reports on a daily basis, and they constitute the key issues covered in the reports of various regional and international human rights organizations and individual human rights advocates.⁷ In this context, one cannot expect that the human rights of persons with disabilities would be better ensured and protected than those of the general public. Persons with disabilities in Africa enjoy and exercise less protections, guarantees and human rights entitlements due to additional factors, including prejudicial religious and cultural beliefs, stereotypes and negative attitudes against persons with disabilities, and other inhibiting institutional, physical, structural and environmental barriers. Viewing the rights of persons with disabilities from a human rights perspective is still in its infancy stage in Africa; as a result, the visibility of disability issues as human rights issues throughout the Continent is very low.⁸ The African community and every African state therefore need to act quickly and take all the necessary steps towards ensuring and protecting the human rights of persons with disabilities, thereby empowering them to become full citizens and improving their standard of living.

It is difficult to generalize about the legal status and situation of persons

⁷ See, for example, the serious human rights violations of the Eritrean Government as reported by Human Rights Watch in: *Service for Life: State Repression and Indefinite Conscription in Eritrea* (New York: Human Rights Watch, 2009), online: Human Rights Watch <http://www.hrw.org/sites/default/files/reports/eritrea0409web_0.pdf>.

⁸ Japhet Biegon, "The Promotion and Protection of Disability Rights in the African Human Rights System" in Ilze Grobbelaar-du Plessis & Tobias van Reenen, eds., *Aspects of Disability Law in*

with disabilities throughout Africa given that the Continent is comprised of fifty-four different countries and does not form a single uniform entity. The legal status and situation of persons with disabilities throughout Africa is influenced by the Continent's diverse social, cultural, economic, geo-political, and educational factors.⁹ Bearing this caveat in mind, a few general observations can be made regarding the situation of persons with disabilities in Africa. A report of the Working Group on the Rights of Older Persons and People with Disability in Africa noted: "Many people are disabled in Africa due to malnutrition, diseases, environmental hazards, natural disasters, traffic and industrial accidents, civil conflict and war."¹⁰ Out of the total world population of persons with disabilities, around 80 million live in Africa.¹¹ This figure is based on the *WHO World Report*, which estimates that persons with disabilities represent approximately 15% of the world's total population.¹² However, African countries usually come up with a figure that is much lower than 15%, very often estimating less than 5% of their total population.¹³ For example, in the census of 1996, persons with

Africa (Pretoria, South Africa: Pretoria University Law Press, 2011) 53 at 54 [Biegon].

⁹ Anne-Marie Mooney Cotter, *Disability: An International Legal Analysis of Disability Discrimination* (Burlington, England: Ashgate Publishing Ltd, 2007) at 121.

¹⁰ Commissioner Y. K. J. Yeung Sik Yuen, *Draft Report on the Activities of the Working Group on the Rights of Older Persons and People with Disabilities in Africa*, Inter-Session Period, May-November 2009 at para. 29, online: ACHPR.ORG <http://www.achpr.org/english/Commissioner's%20Activity/.../older_persons.pdf> [Working Group Activity Report].

¹¹ Biegon, *supra* note 8 at 53. See also: Africa Campaign on Disability and HIV & AIDS, *Campaign Strategy for 2007-2011* at 4, online: The Africa Campaign <http://www.africacampaign.info/uploads/media/Campaign_Strategy_for_2007-2011.doc> [Africa Campaign].

¹² WHO World Report, *supra* note 2 at 29.

¹³ Mitchell E. Loeba, Arne H. Eide & Daniel Mont, "Approaching the Measurement of Disability Prevalence: The Case of Zambia" (2008) 2 ALTER, Rev. euro. de recherche sur le handicap 32 at 33, online: Worldbank.org <<http://siteresources.worldbank.org/DISABILITY/Resources/Data/ApprchngMeasureZambia.pdf>> [Mitchell]. Developed countries very often report that persons with disabilities represent more than 10% of their total population.

disabilities in Egypt were estimated to represent only about 0.48% of the country's total population.¹⁴ Even so, these figures are just estimates. Only around fifteen out of fifty-four African countries gather data on persons with disabilities through housing and population censuses.¹⁵ Where there is data collection on persons with disabilities, very often the gathering of data is not comprehensive and it may focus mainly on severe disabilities. Moreover, the data may vary depending on multiple factors such as the definition of disability employed; the purpose, methodology and quality of the study;¹⁶ the failure to admit disability cases because of prevailing customs, traditions, little/no educational background and other social reasons; problems in collecting data in areas affected by civil/armed conflicts, violence, and political instability and so on.¹⁷ For instance, persons with HIV/AIDS are not considered persons with disabilities in most African countries, although they are in the United States.¹⁸ To take another example, in a society with a high rate of illiteracy, or where education means next to nothing due to illiteracy, persons with learning disabilities may not be

¹⁴ Bothaina El Deeb, *National Report on Disability Statistics in Egypt*, Economic & Social Commission for Western Asia (ESCWA) and Central Agency for Public Mobilization & Statistics (CAPMAS) (March 2005) at 3, online: ESCWA <<http://www.escwa.un.org/divisions/sdd/events/21mar/egypt-e.pdf>> [El Deeb].

¹⁵ Economic Commission for Africa, "Persons with disabilities begin discussions on actions against poverty and discrimination", News report on a conference of persons with disabilities on actions against poverty and discrimination. Conference co-organized by the Economic Commission for Africa (ECA) and Leonard Cheshire Disability in Addis Ababa, Ethiopia on 20 May 2008, online: UNECA <http://www.uneca.org/eca_resources/news/2008/160521disabilities.htm>.

¹⁶ Mitchell, *supra* note 13.

¹⁷ El Deeb, *supra* note 14.

¹⁸ The *Americans with Disabilities Act* (ADA)'s definition of disability includes the impairment of a function that substantially limits one or more major life activities. In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the US Supreme Court ruled that reproduction qualifies as a major life activity and that an individual with HIV/AIDS who has an impaired reproductive function has a disability.

recognized as persons with disabilities.¹⁹

Persons with disabilities in Africa are in great measure excluded, discriminated against and subjected to prejudice, bias and negative attitudes civilly, politically, economically, socially and culturally, and they are excluded from mainstream society because of their disability or perceived disability. They do not receive adequate services from their governments to ensure their meaningful participation in their societies.²⁰ The few individuals with disabilities who get institutionalized in segregated institutions and schools in Africa are fortunate in some respects, although such institutions are criticized in Europe, Asia and the Americas as places where serious human rights violations and abuse against disabled individuals occur.²¹ This is not to say that human rights abuses and violations do not take place in such institutions in Africa, but individuals at least receive some services through institutions. They obtain accommodations, food, medication, basic education and other essential services that they would not normally obtain outside of the institutions. Access to education also increases

¹⁹ Raymond Lang, "The Development and Critique of the Social Model of Disability" (Working Paper Series: No.3, Leonard Cheshire Disability and Inclusive Development Centre, 2007) at 22-23, online: UCL <http://www.ucl.ac.uk/lc-ccr/workingpapers/WP3_Development_Critique.pdf>.

²⁰ See, for example, the 2010 Human Rights Watch report on the situation of women with disabilities in Uganda: *As If We Weren't Human: Discrimination and Violence Against Women with Disabilities in Northern Uganda* (New York: Human Rights Watch, 2010), online: Human Rights Watch <http://www.hrw.org/sites/default/files/reports/uganda0810webwcover_0.pdf>.

²¹ Eric Rosenthal & Clarence J. Sundram, "Recognizing Existing Rights and Crafting New Ones: Tools for Drafting Human Rights Instruments for People with Mental Disabilities" in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds., *The Human Rights of Persons with Intellectual Disabilities* (Oxford: Oxford University Press, 2003) 467. The NGO Mental Disability Rights International (MDRI) has identified extensive problems with inhumane and degrading treatment of individuals with intellectual disabilities in segregated institutions, psychiatric hospitals and social care homes in Mexico; Uruguay; Peru; Hungary; Rumania; Serbia; Kosovo; Turkey; and other countries. For more information, consult MDRI's full reports and publications on specific countries online: Mental Disability Rights International, <<http://www.disabilityrightsintl.org/media-gallery/our-reports-publications/>>.

their prospects for employment. For instance, excluding those who lost their sight in a war during the liberation struggle, almost 100% of the employees with vision impairments in Eritrea, including myself, received their primary education and all their essential services while living in a segregated school for the blind. Thus for us, the school for the blind was a very important institution that paved the way to living independently and gaining some social respect. We were able to sustain ourselves economically, as well as our families. Without the school for the blind, most of us would have spent our lives behind locked doors in private homes -- the worst form of segregation in society. It would not be an exaggeration to say that no one with vision impairment in Eritrea would support the closure of such institutions. The findings from research conducted in three districts in Malawi also indicated that “the teaching method for deaf children and children with hearing impairments was ‘the oral method’, that is, teaching through lip-reading. Sign language is not used. The report notes that where these learners are integrated into mainstream schools, major communication difficulties exist between educators and learners.”²²

In Africa, persons with disabilities are among the poorest of the poor, representing 20% of the poor.²³ Despite variations in defining and measuring disability and poverty, evidence shows that they are closely interrelated in the sense that disability may cause poverty and vice versa.²⁴ For example, individuals

²² Helene Combrinck, “The Hidden Ones: Children with Disabilities in Africa and the Right to Education” in Julia Sloth-Nielsen, ed., *Children's Rights in Africa: A Legal Perspective* (Aldershot, England: Ashgate Publishing Ltd, 2008) 299 at 304 [Combrinck, “Hidden Ones”].

²³ UN Enable Factsheet, *supra* note 5.

²⁴ Charles Lwanga-Ntale, “Chronic Poverty and Disability in Uganda” (Paper presented at the international conference “Staying Poor: Chronic Poverty and Development Policy” at the

with disabilities have fewer prospects and opportunities for education and skills training, and consequently have fewer opportunities for employment than individuals without disabilities.²⁵ Thus, they are more likely to live in poverty than persons without disabilities.²⁶ Likewise, individuals living in poverty suffer from malnutrition, poor health care services, and inadequate information and education about health care and disease prevention, the consequences of which may cause or accelerate disability.²⁷

In terms of education, persons with disabilities are among the least educated and have the highest rate of illiteracy throughout African countries. Around 98% of children with disabilities in Africa lack access to basic education.²⁸ Even when they do have access to education, the majority do not get beyond the primary level of education. Thus, persons with disabilities are among the most under-employed or unemployed throughout Africa. For instance, studies from South Africa show that less than 1% of the total population of persons with disabilities is meaningfully employed in the country's economic sector.²⁹

In addition to problems with the inaccessibility of health care facilities and information, persons with disabilities suffer due to insufficient and poor health

University of Manchester, April 2003) at 1-2, online: Chronic Poverty <<http://www.chronicpoverty.org/pdfs/2003conferencepapers/lwangaNtale.pdf>>.

²⁵ *Ibid.*

²⁶ Lisbet Grut & Benedicte Ingstad, *Using Qualitative Methods in Studying the Link Between Disability and Poverty: Developing a Methodology and Pilot Testing in Kenya*, Report for the World Bank (Oslo: SINTEF Health Research, 2005) at 5-6 & 40-41, online: World Bank <<http://siteresources.worldbank.org/DISABILITY/Resources/Regions/Africa/LCKenya.pdf>>.

²⁷ Combrinck, "Hidden Ones", *supra* note 22 at 303.

²⁸ Africa Campaign, *supra* note 11.

²⁹ Andrew Dube, *Report on the Role and Effectiveness of Disability Legislation in South Africa* (Norwich and London: Knowledge and Research Programme, 2005) at 18-19, online: Disability Knowledge and Research <http://www.disabilitykar.net/docs/legislation_sa.doc>.

care services. Strangely enough, in many traditional African societies, cultural beliefs and assumptions about the contraction of certain diseases and about persons with disabilities very often contribute to the increased risk of infection of persons with disabilities with such diseases. The case of HIV/AIDS illustrates this phenomenon very well.³⁰

Some societies in Africa view persons with disabilities as sexually inactive and consequently assume that they may not be susceptible to HIV/AIDS and other sexually transmitted diseases.³¹ In many instances, this leads to the exclusion and marginalization of individuals with disabilities from educational and informational campaigns against HIV/AIDS and other sexually transmitted diseases, and from the allocation of resources for that purpose.³² The belief in “virgin cleansing” is germane to this discussion since it clearly puts individuals with disabilities at risk of infection.³³ Virgin cleansing is “the belief that persons who are HIV positive can rid themselves of the virus by transferring it, through sexual intercourse, to a virgin.”³⁴ This belief makes individuals with disabilities

³⁰ South African National AIDS Council, *HIV, AIDS and Disability in South Africa* (May 2008), online: ICDR <<http://www.icdr.utoronto.ca/Files/PDF/94a3663acf97d5f.pdf>> [SANAC]. See also: Rohleder Poul et al., “HIV/AIDS and disability in Southern Africa: A review of relevant literature” (2009) 31:1 *Disability & Rehabilitation* 51.

³¹ Jacinta M. Sweeney, *Double Exposure: Disability and HIV/AIDS in sub-Saharan Africa*, (M.A. Thesis, University of Manchester, 2004) at 19-20. Published by: Dutch Coalition on Disability and Development - Institute for Development Policy and Management (March 2008), online: DCDD <<http://www.dccd.nl/default.asp?action=article&id=3595>>

³² *Ibid.* at 19-25. See also: Nora Groce et al., “HIV/AIDS and Disability: A Pilot Survey of HIV/AIDS Knowledge Among a Deaf Population in Swaziland” (2006) 29:4 *Int J Rehabil Res.* 319. The authors undertook a cross-sectional survey among hearing and deaf adults in Swaziland in December of 2003. They found significant differences in the level of knowledge about HIV/AIDS symptoms, transmission, prevention and sources of information between hearing and deaf individuals. The deaf individuals were more likely to have incorrect beliefs about HIV/AIDS transmission and prevention methods.

³³ SANAC, *supra* note 30 at 6-7.

³⁴ Nora Groce & Reshma Trasi, “Rape of Individuals with Disability: AIDS and the Folk Belief of Virgin Cleansing” (2004) 363: 9422 *Lancet* 1663 [Groce].

vulnerable to rape and sexual assault since they are incorrectly considered to be sexually inactive and therefore virgins.³⁵

Beyond engendering stereotypes, negative perceptions and benign neglect of individuals with disabilities, other cultural beliefs and traditions may also lead to cruel and inhumane treatment and to the perpetration of serious crimes against persons with disabilities. Studies show that persons with disabilities are three times more vulnerable to physical, sexual and emotional abuse than non-disabled individuals.³⁶ Some parents hide and lock their disabled children up in very secluded places to prevent them from being seen by the public and to protect themselves from societal shame.³⁷ Many secluded children develop weak bones since they do not see sunlight.

Some societies in Africa also believe that the presence of a disabled child in the community brings about serious harm, such as death, diseases, many more disabilities and famine, since disability is viewed as a curse or a superstitious evil; these societies believe that disabled children should be exterminated or quickly killed before causing such harms.³⁸ A documentary that aired on CBC Radio1 in 2007 narrated the horrendous killing of a disabled child in a remote area of Ghana.³⁹ In the same vein, there are gruesome reports from Tanzania and neighboring countries of individuals with albinism being killed for their body

³⁵ *Ibid.*

³⁶ SANAC, *supra* note 30 at 5-8.

³⁷ Amanuel Mehreteab, *DDR Process and Disability Background Paper: A Practitioner's View* (July 2007) at 5, online: IFAANET <<http://www.ifaanet.org/Economicr/Disability.pdf>>.

³⁸ Mark Schneider, "Death of A Spirit Child", Radio Documentary aired 10 October 2007 on *The Current*, CBC Radio One, online: *The Current* <<http://www.cbc.ca/thecurrent/2008/07/july-14-2008.html>>.

parts, in particular for their bones, hair, and blood, to be used in underground trade since witch doctors demand that their clients bring these body parts for magical powers.⁴⁰ It is superstitiously believed that the body parts of individuals with albinism can bring wealth and prosperity to business persons.⁴¹ In some societies, individuals and criminal groups also use persons with disabilities as a source of income by kidnapping them and forcing them to beg the whole day for money and other items in the streets of big cities and towns.⁴²

Certain categories of individuals with disabilities are vulnerable to specific crimes and human rights violations. For instance, women with disabilities are more often exposed to rape, sexual assault and physical abuse than able-bodied women because they are easy targets. Such crimes are rarely reported to the police; victims are left without satisfactory legal recourses even when they do contact the police⁴³ since “persons with disabilities are not believed or are not viewed as credible and reliable witnesses by police and prosecutors.”⁴⁴

Beyond affecting the lives of persons with disabilities, cultural and traditional beliefs about disability may also affect the economic, social and

³⁹ *Ibid.*

⁴⁰ CBC Radio One, “Albino Killings” (26 November 2008), *The Current*, CBC Radio One, online: The Current <<http://www.cbc.ca/thecurrent/episode/2008/11/26/november-26-2008/>>.

⁴¹ Secretariat of the African Decade of Persons with Disabilities, “Persons with Albinism Cry for Protection” (2008) 3 *Human Rights Africa Quarterly Newsletter*, online: SADPD <<http://www.africandecade.org/humanrightsafrika/newsletter.2008-12-12.7822267770/view>>. See also: Mumbi Ngugi, “Butchering Our Children” *Amplifying Voices* 3, Open Society Initiative for Eastern Africa (September 2011) at 14-15, online: SOROS <http://www.soros.org/initiatives/osiea/articles_publications/publications/amplifying-voices-20110915/amplifying-voices-vol3-20110915.pdf>.

⁴² During my stay at the special school in Eritrea, I remember friends sharing their sad stories about being forced to beg in big Ethiopian cities.

⁴³ Groce, *supra* note 34.

⁴⁴ Stephanie Ortoleva, “Inaccessible Justice: Human Rights, Persons with Disabilities and the

cultural aspects, relations and well-being of their families. For instance, the birth of a disabled child is likely to cause family breakdowns or divorce.⁴⁵

The situation of persons with disabilities in Africa may also be worse in cases of ethnic violence, civil armed conflicts and political instability. African states are torn by ethnic violence and armed conflicts,⁴⁶ which not only create new disabled persons, but also affect the lives of persons with disabilities more than any other group in society.⁴⁷ Imagine, for example, how armed conflicts may bring about hardships and challenges in the lives of persons with disabilities. These individuals “cannot flee easily, are at greater risk of death and injury, and are less able to access rehabilitation services if needed.”⁴⁸ Emergency arrangements in camps hosting internally displaced persons and refugees rarely address the needs of persons with disabilities in the provision of services.⁴⁹ In wars and civil armed conflicts, women with disabilities are more exposed to rape,

Legal System” (2011) 17 ILSA J. Int’l & Comp. L. 281 at 311.

⁴⁵ Angelo Buhle Dube, *Protection of the Rights of Persons Living with Disabilities under the African Human Rights System* (LL.M. Thesis, University of Pretoria, 2007) at IV, online: <http://www.up.ac.za/dspace/bitstream/2263/5441/1/dube_2007.pdf> [Dube]. See also: Tsitsi Choruma, *The Forgotten Tribe: People with Disabilities in Zimbabwe* (London: Progressio, 2007) at 13-14, online: Progressio <<http://www.progressio.org.uk/sites/default/files/Forgotten-tribe.pdf>>.

⁴⁶ Ifeonu Eberechi, “Armed Conflicts in Africa and Western Complicity: A Disincentive for African Union’s Cooperation with the ICC” (2009) 3 Afr. J. Legal Stud. 53 at 54 & 75.

⁴⁷ Phitalis Were Masakhwe, *Post-election violence and disabled people in Kenya; issues for reflection and action* (2008) GLADNET Collection Paper 441, online: <<http://digitalcommons.ilr.cornell.edu/gladnetcollect/441>>.

⁴⁸ William Boyce, “Adaptation of Community Based Rehabilitation in Areas of Armed Conflict” *Disability World* 19 (June-August 2003), online: Disability World <http://disabilityworld.org/06-08_03/news/cbradaptation.shtml>.

⁴⁹ Michael Ashley Stein & Janet E. Lord, “Human Rights and Humanitarian Assistance for Refugees and Internally Displaced Persons with Disabilities” in Ilze Grobbelaar-du Plessis & Tobias van Reenen, eds., *Aspects of Disability Law in Africa* (Pretoria, South Africa: Pretoria University Law Press, 2011) 31 at 31-41 [Stein]. The authors discuss in detail the many disadvantages and challenges that refugees and internally displaced persons with disabilities may experience during and after flight to camps. See also: Michael Karanja, “Disability in Contexts of Displacement” (2009) 29:4 Disability Studies Quarterly, online: DSQ <<http://dsq-sds.org/article/view/969/1177>>.

sexual violence and other atrocious crimes, which may have long-lasting physical and mental effects on their lives.⁵⁰ Moreover, little attention is paid to persons with disabilities in development projects and poverty reduction programs undertaken by African states.⁵¹ Such programs are rarely designed to include persons with disabilities and thus have negligible effects in terms of reducing or alleviating their deeply-rooted poverty.⁵²

In addition to the aforementioned barriers, physical and environmental structures in Africa create great challenges for persons with disabilities in all spheres of life. In many parts of Africa, built environmental structures such as buildings, roads, transportation facilities and so on are not designed with due consideration for the needs of persons with disabilities.⁵³ Moreover, most rural areas in Africa, where the majority of individuals with disabilities live, are not accessible to transportation facilities due to insufficient infrastructure development and poor economic growth.⁵⁴ Thus, the natural environment (i.e.

⁵⁰ For a discussion of the risks to women in general, see: Amani El Jack, *Gender and Armed Conflict: Overview Report* (Brighton: Institute of Development Studies, 2003) at 16-20, online: <<http://konsnet.dk/multisites/konsnet/images/konsnet/pdf/CEP-Conflict-Report.pdf>>. See also: Judith Gardam & Michelle Jarvis, "Women and Armed Conflict: The International Response to the Beijing Platform for Action" (2000) 32 Colum. Hum. Rts. L. Rev. 1.

⁵¹ Stein, *supra* note 49 at 51.

⁵² Deutsche Gesellschaft für Technische Zusammenarbeit, "Disability and Development: A Contribution to Promoting the Interests of Persons with Disabilities in German Development Cooperation" 28 *Disability World* (November 2006) at 2.2, online: Disability World <http://disabilityworld.org/01_07/gdcpolicypaper.shtml>.

⁵³ *Proclamation on the Full Participation, Equality and Empowerment of People with Disabilities in Africa*, para. 4, Resolution of the 36th Ordinary Session of the Assembly of the Heads of State and Government of the OAU that adopted the *Declaration of the African Decade of the Disabled Persons* (Decision CM/De.535 (LXXII) Rev. 1) in Lome, Togo in July 2000.

⁵⁴ This statement is based on the 15% estimate indicated in WHO World Report, *supra* note 2. The African Development Indicators from the World Bank Group indicate that 65% of the Sub-Saharan African population lives in rural areas; this means that 65% of persons with disabilities in Africa also live in rural areas. See: World Bank Group, *50 Factoids about Sub-Saharan African countries*, online: World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTPUBREP/E>

mountains, valleys, and stony or rocky places) remains largely inaccessible to persons with disabilities.⁵⁵

1.3. Emerging Legal Responses to Disability

The issues addressed by disability law in the majority of countries around the world have generally centered on social security, welfare and health legislation. This legislation does not treat persons with disabilities as rights holders, but rather as objects of charity, medical treatment and social protection.⁵⁶ The impact of this legal response has been the segregation and exclusion of persons with disabilities from mainstream society, and at times the provision of special schools, sheltered workshops, and separate housing and transportation.⁵⁷ However, since the 1990's some countries have started adopting integrative and inclusive approaches towards persons with disabilities to enable them to effectively participate as full citizens and members of their societies. More than forty member countries of the United Nations (UN) have adopted some kind of anti-discrimination laws to protect persons with disabilities.⁵⁸ The United States,

XTSTATINAFR/0,,contentMDK:21106218~menuPK:3094759~pagePK:64168445~piPK:64168309~theSitePK:824043,00.html>

⁵⁵ Tom Shakespeare, "The Social Model of Disability" in Lennard J. Davis, ed., *The Disability Studies Reader* 2nd ed. (New York: Routledge, 2006) 197 at 201.

⁵⁶ Theresia Degener, "International Disability Law - A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999" (1999) 18 Berkeley J. Int'l L. 180 at 180.

⁵⁷ *Ibid.*

⁵⁸ Theresia Degener, "Disability Discrimination Law: A Global Comparative Approach" in Anna Lawson & Caroline Gooding, eds., *Disability Rights in Europe: From Theory to Practice* (Oxford, England: Hart Publishing, 2005) 87 at 88.

Canada, the United Kingdom and Australia are at the forefront, where much has been achieved in the struggle for equality for persons with disabilities.

At the international level, there have been similar trends in the development of human rights protections for persons with disabilities. For more than half a century, the majority of UN members believed that the existing international human rights instruments contained sufficient guarantees and tools to protect and ensure the rights of persons with disabilities. It was widely believed that the non-discrimination and equality provisions of the international human rights instruments and the universal nature of the international Bill of Rights could apply equally to persons with disabilities.⁵⁹ Although this may be true, the same reasoning did not bar the adoption of international treaties with respect to other categories of individuals who are vulnerable to discrimination, exclusion and marginalization throughout the world, such as women, children, migrant workers, and racial and ethnic groups.⁶⁰

The status quo of persons with disabilities continued unabated for a long time despite widespread discrimination, exclusion and marginalization. However, unlike other vulnerable groups, persons with disabilities were not accorded appropriate and adequate legal protections and rights guarantees in a separate

⁵⁹ Gerard Quinn 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). The authors explain in detail how the general international human rights instruments of the UN can be utilized to advance the human rights of persons with disabilities.

⁶⁰ See the international conventions adopted by the UN on these specific categories of individuals. For example, see: *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res. 34/180, 34 UN GAOR Supp. No. 46 at 193, UN Doc. A/34/46 (entered into force 3 September 1981).

international convention.⁶¹ On December 13, 2006, a dramatic shift occurred in the promotion, recognition and protection of the rights of persons with disabilities at the international level.⁶² By its resolution 61/106, the UN General Assembly adopted the *Convention on the Rights of Persons with Disabilities (CRPD)*, which was the first international human rights treaty of the 21st century.⁶³ The *CRPD* and its *Optional Protocol* entered into force on May 3, 2008 when the required number of state parties ratified both instruments.⁶⁴ Persons with disabilities have now joined the categories of individuals whose rights are specifically and explicitly recognized and protected under the international human rights treaties.

At the regional level in Africa, human rights protections for persons with disabilities are similar to those that existed at the UN before the adoption of the *CRPD*. Most of the categories of individuals who have attained explicit and specific legal protection under the international human rights instruments have also gained similar - though not sufficient - protection and attention at the regional level in Africa. Similarly, those who have been marginalized and denied adequate legal guarantees and protections under the international human rights system are also marginalized and left without legal protection in Africa. This has been the case for persons with disabilities. In 1981, the Organization of African Unity

⁶¹ Paul Harpur, "The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the US Experience" (2010) 37 N. Ky. L. Rev. 363 at 365-366.

⁶² Arlene S. Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities" (2007) 34 Syracuse J. Int'l L. & Com. 287 at 287-288.

⁶³ *Convention on the Rights of Persons with Disabilities*, adopted by General Assembly Resolution 61/106 on 13 December 2006 (entered into force 3 May 2008), online: UN Enable <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>> [*CRPD*].

⁶⁴ UN Enable, *Convention on the Rights of Persons with Disabilities*, online: UN Enable <<http://www.un.org/disabilities/default.asp?navid=14&pid=150>>.

(OAU) adopted the *African Charter on Human and Peoples Rights (ACHPR)*.⁶⁵ Theoretically, this *Charter* applies to all human beings residing in the states that ratify or accede to it.⁶⁶ However, the OAU has not refrained from adopting specific regional conventions and protocols to the *ACHPR* to further protect the rights of specific categories of individuals in Africa, such as refugees, women and children.⁶⁷ I believe that exclusion, marginalization and discrimination against persons with disabilities are widespread in Africa. Nonetheless, the African Union (AU), which replaced the OAU, has not yet adopted a regional convention or protocol on the rights of disabled persons in Africa.

At the state level, a few African nations have taken appropriate and adequate measures to ensure and protect the equality and non-discrimination of persons with disabilities and to guarantee and promote their participation as full citizens in their societies. Some African countries, such as South Africa, provide anti-discrimination provisions in their national constitutions to ensure and protect the rights of persons with disabilities.⁶⁸ A few other countries have specific legislation addressing the rights of persons with disabilities. For example, Ethiopia enacted a proclamation concerning the rights of disabled persons to

⁶⁵ *African Charter on Human and Peoples' Rights*, adopted by the 18th Annual Summit of the Assembly of the Heads of State and Government of the OAU in Nairobi, Kenya on 27 June 1981 (entered into force 21 October 1986), online: Africa-Union.org <http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf> [*ACHPR*].

⁶⁶ For a detailed discussion on the *ACHPR*, see Chapter 4 of this thesis.

⁶⁷ See the full texts of the regional human rights instruments adopted by the OAU/AU concerning the specific groups of persons in Africa.

⁶⁸ See for example: *Constitution of the Republic of South Africa of 1996*, No. 108 of 1996, c. 2, s. 3.

employment in 1994.⁶⁹ However, many countries, including Eritrea, have not yet enacted specific legislation related to disability or adopted a general disability policy.⁷⁰ Moreover, anti-discrimination provisions on the basis of disability are not incorporated in the constitutions of many African countries.⁷¹ It is not surprising then that disability law and policy is neither a subject of study nor a field of legal research in universities and higher educational institutions in many African states. However, it is worth noting that the Law Faculty of the University of the Western Cape in South Africa has recently established the Centre for Disability Law and Policy (CDLP), the first research centre of its kind on the African Continent, with the objective of researching and teaching disability law and policy in Africa.⁷²

There is very little scholarship on African regional disability law. There is the UN's compilation of *International Norms and Standards Relating to Disability*, but its discussion of Africa is exceedingly brief and lacks detailed information.⁷³ Angelo Buhle Dube's Master's thesis entitled *Protection of the Rights of Persons Living with Disabilities under the African Human Rights System* is a relatively extensive and comprehensive study of African regional disability

⁶⁹ Ethiopia, *A Proclamation Concerning The Rights Of Disabled Persons To Employment*, Proclamation N° 101/1994, 26 August 1994, online: DigitalCommons@ILR <<http://digitalcommons.ilr.cornell.edu/gladnetcollect/94>>.

⁷⁰ See Chapter 5 of this thesis for a detailed discussion of Eritrea.

⁷¹ For a detailed discussion of this issue, see the sub-section on Constitutional Responses of African States to Disability in Chapter 5 of this thesis.

⁷² University of the Western Cape, online: Faculty of Law <www.uwc.ac.za/index.php?module=cms&action>. The Centre's immediate focus is on activities pertaining to the implementation of the *CRPD* and its *Optional Protocol*.

⁷³ United Nations, *International Norms and Standards Relating to Disability: Part III. The Regional Human Rights System*, online: UN Enable <<http://www.un.org/esa/socdev/enable/comp300.htm>>.

law.⁷⁴ However, the author's arguments are directly contrary to those I advance in this thesis; he maintains that the existing African human rights instruments provide adequate legal protection and guarantees to safeguard the human rights of persons with disabilities in Africa.⁷⁵ Very recently, some significant scholarship on African disability law has begun to emerge. One important contribution is an article by Japhet Biegon entitled "The Promotion and Protection of Disability Rights in the African Human Rights System".⁷⁶ Another is an article by Hel  ne Combrinck and Tobias Pieter Van Reenen entitled "The UN Convention on the Rights of Persons with Disabilities in Africa: Progress After 5 Years".⁷⁷ Combrinck has also done work on children with disabilities and access to education.⁷⁸

At the national level, there has been very little comparative research on multiple African countries, although there has been research on the situation of persons with disabilities within specific states. The *International Disability Rights Monitoring Compendium Report on Sub-Sahara* is by far the most important resource; it examines the constitutions of thirty Sub-Saharan African countries from a disability rights perspective and examines specific disability legislation of some African countries.⁷⁹ The recent scholarship by Combrinck and Pieter Van

⁷⁴ Dube, *supra* note 45.

⁷⁵ *Ibid.*

⁷⁶ Biegon, *supra* note 8.

⁷⁷ Hel  ne Combrinck & Tobias Pieter Van Reenen, "The UN Convention on the Rights of Persons with Disabilities in Africa: Progress After 5 Years" (2011) 8:14 SUR-Int'l J. Hu. Rts 132, online: SUR <http://www.surjournal.org/eng/conteudos/getArtigo14.php?artigo=14,artigo_07.htm> [Combrinck & Van Reenen].

⁷⁸ Combrinck, "Hidden Ones", *supra* note 22.

⁷⁹ International Disability Rights Monitor, 2003 *IDRM Compendium Report: Sub-Saharan Africa*, online: IDEAnet <<http://www.ideanet.org/content.cfm?id=5B5F77>>.

Reenen also briefly investigates the status of disability rights in four African national jurisdictions: South Africa, Ethiopia, Uganda and Tanzania.⁸⁰ Like the literature on African regional and national disability laws, the literature on Eritrean disability law is very scarce.

1.4. Research Objectives

This thesis examines the rights of persons with disabilities in Africa, drawing on comparative and international law developments. My main argument is that there are insufficient legal guarantees to ensure and protect the human rights of persons with disabilities in Africa. Although the protection of disabled persons in the early 1980's in the *ACHPR*⁸¹ was a laudable initiative at the time, the African regional human rights system is currently inadequate. It is my contention that the African Union should adopt a regional convention or protocol on the human rights of persons with disabilities in Africa. I further argue that, since regional and international human rights instruments seek to ensure and guarantee the human rights of individuals within states, states are obliged to make persons with disabilities full citizens in their societies. The discussion of international and regional disability laws in my thesis is therefore aimed at assessing these laws as tools for prompting states and the international community to more actively assume their responsibilities in advancing the human rights of persons with disabilities.

⁸⁰ Combrinck & Van Reenen, *supra* note 77 at 143.

Persons with disabilities are citizens, just like non-disabled persons. As citizenship bestows not only rights upon individuals but also obligations on states, I argue that states should have the primary responsibility of respecting, protecting, promoting and fulfilling the rights of persons with disabilities in Africa. With this in mind, I examine the general legislative and constitutional trends in selected African states in relation to persons with disabilities. Although my thesis focuses on formal law at the international, regional and state level, I am fully aware that law reform *per se* is not a panacea for realizing the human rights of persons with disabilities. Nor does law reform, in and of itself, guarantee the protection and promotion of the rights of persons with disabilities. Human rights protections and legislation need to be effectively enforced. I therefore explore some of the many challenges African states face in implementing and enforcing national, regional and international disability laws. It is my hope that this thesis will help to fill some of the significant gaps in research and scholarship regarding the rights of persons with disabilities in Africa.

In order to provide a more contextual analysis, I examine the Eritrean national legal framework with regards to the rights of persons with disabilities. Eritrea is a country situated in the Horn of Africa that gained independence from Ethiopia in May of 1993 after a referendum was held to determine the fate of the territory.⁸² I chose Eritrea as a case study for two reasons: First, I believe that the situation of persons with disabilities in Eritrea is not very different from many

⁸¹ ACHPR, *supra* note 65, art. 18.

⁸² Kjetil Tronvoll, *The Lasting Struggle for Freedom in Eritrea: Human Rights and Political Development, 1991-2009* (Oslo: HBO AS, Haugesund, 2009) at 25.

other African states. Thus, it is my belief that the study is representative of a number of African countries. Second, I myself am from Eritrea, I taught law there for five years, and I am one of the disabled persons from that country.

1.5. Organizational Structure of the Thesis

Having provided an overview of the general situation of persons with disabilities in Africa, of legal developments in this area, and of my research objectives, the second chapter of this thesis extensively examines the philosophical and theoretical foundations, models and underpinnings of the concept and definition of disability. It studies the implications of these theories and philosophies for disability laws and policies. This chapter discusses the legal definition of disability, as well as concepts of citizenship, equality, anti-discrimination, reasonable accommodation, and disproportionate/undue hardship in relation to persons with disabilities. A central theme of this chapter is the importance of viewing the rights of persons with disabilities as an issue of human rights in general and of citizenship in particular. The citizenship perspective provides a justification for establishing the responsibility to eliminate all disabling barriers and for according legal recognition and protection to the human rights of persons with disabilities.

The third chapter focuses on international disability law. It studies in detail the legal protections, guarantees and implementation mechanisms that are provided in the international human rights instruments pertaining to the rights of

persons with disabilities. The discussion focuses on the *Convention on the Rights of Persons with Disabilities (CRPD)*. I maintain that the *CRPD* illustrates the potential for understanding the human rights of persons with disabilities from a citizenship perspective. This chapter also illustrates the legal protections and guarantees available to persons with disabilities before and after the adoption of the *CRPD* in December of 2006, since this international disability law is expected to be implemented within national jurisdictions.

The fourth chapter of the thesis presents the African legal framework in relation to the rights of persons with disabilities. It examines the regional human rights instruments and their implications and roles in promoting, recognizing and protecting the rights of persons with disabilities. Noting the lack of a regional convention or protocol on the rights of persons with disabilities, I advocate for the adoption of such a convention or protocol.

As international and regional laws concerning human and individual rights are intended for persons within states, the fifth chapter examines the legal protections and guarantees available to persons with disabilities at the national level in Africa. The first sub-section of this chapter discusses which regional and international laws would have impacts within states' domestic jurisdictions and how they would constitute part of national laws. The next sub-section studies the constitutional and legislative responses of African states to the problems faced by persons with disabilities. My goal in this chapter is not to provide a comparative study of all African states. Rather, the chapter illustrates the general trends of the constitutional and legislative responses to disability issues in African states. I

advocate for constitutional, legislative and policy reform at the national level. I also contend that where state resources are inadequate to meet human rights obligations, the international community should be obliged to assist states in fulfilling their responsibilities. The next sub-section discusses some of the challenges that African states might encounter in the formulation and enforcement of disability laws and policies. Lastly, I present a more detailed analysis of the existing Eritrean legal framework in relation to the rights of persons with disabilities.

If persons with disabilities are to enjoy their human rights and fundamental freedoms equally with their fellow citizens, states - and societies for that matter - should be obliged to reasonably accommodate their needs and interests. If existing legal frameworks do not aim to ensure and provide such measures and fully implement them on the ground, persons with disabilities may not function as full citizens; their experiences of discrimination and exclusion will continue. One critical contribution of this thesis is therefore the relevance of the concept of citizenship to the realization of and advocacy for disability human rights.

CHAPTER TWO:

CONCEPTUALIZING DISABILITY RIGHTS: TOWARDS A CITIZENSHIP APPROACH

2.1. Introduction

This chapter examines different conceptions of disability. I first introduce the terminological challenges we encounter in describing persons with disabilities, and outline the World Health Organization (WHO)'s distinctions between impairment, disability and handicap. I then discuss the theoretical and philosophical models of disability and their implications for disability-related laws and policies. I examine the traditional approach, the bio-medical model, the social model, the minority rights approach and the universal disability model.

I argue that the existing disability models determine where to place responsibility for removing the limitations associated with disability based on their understandings of how disability is caused and/or where it is located or on the identification of the disabled group as a minority. I suggest that the concept of citizenship can provide an alternative justification for establishing the responsibility to dismantle barriers faced by people with disabilities. I therefore examine the concept of citizenship and its potential as a justification for disability human rights. I then discuss the principles of equality and non-discrimination as tools for realizing and ensuring the citizenship of persons with disabilities in society.

2.2. Disability and Terminology

2.2.1. Disability and Labeling

Due to their diverse cultures, laws and degrees of development, societies have different attitudes, perceptions and understandings of disability and of persons with disabilities.¹ They also use different terminologies to express similar notions and concepts. In most instances, terminologies used to label and describe disability and hence individuals with disabilities have negative implications. They might be the result of, or contribute to, the perpetuation of stereotypes, misperceptions and unfavorable social practices regarding persons with disabilities. They are very often offensive, and may be ridiculing, insulting and degrading. Descriptions and labels such as “crippled,” “deformed,” “invalid,” “dumb,” “mentally retarded” and “insane” are examples of expressions with degrading and humiliating effects on persons with disabilities.²

Persons with disabilities are often referred to as “sick people” or as “patients”. They are depicted as lifelong patients who never recover from their illnesses.³ Describing individuals with disabilities as “abnormal” can also have negative implications. Societies accept able-bodied individuals as the “norm”,

¹ Tsitsi Choruma, *The Forgotten Tribe: People with Disabilities in Zimbabwe* (London: Progressio, 2007) at 17, online: Progressio <<http://www.progressio.org.uk/sites/default/files/Forgotten-tribe.pdf>> [Choruma].

² Simi Linton, “Reassigning Meaning” in Lennard J. Davis, ed., *The Disability Studies Reader* 2nd ed. (New York: Routledge, 2006) 161 at 164-165 & 170 [Linton].

³ For a similar understanding of disability, see the discussion below on the bio-medical model of disability. I have personally very often experienced similar attitudes from my society due to my visual impairment. Elders, relatives and people that I know used to ask me if I was feeling better whenever they met me, thinking that I would eventually recover from my impairment.

thereby creating the classification of normal versus abnormal persons.⁴ Describing persons with disabilities as “abnormal” portrays these individuals as sub-human or inferior to able-bodied individuals. The expressions “disabled” or “handicapped” are also criticized because they put the focus on the disability rather than on the personhood of the individual.⁵ These expressions may convey “the idea that the entire person is disabled because of a specific impairment.”⁶

“Differently-abled persons” is another term used to refer to persons with disabilities.⁷ This term focuses on the abilities persons with disabilities have despite their disabilities, and it may imply that being disabled does not mean being disabled in all aspects of life.⁸ However, this terminology is very broad and it does not speak to the specificity of individuals with disabilities; every person has his/her own distinct repertoire of skills and capabilities.⁹ The expressions “physically-challenged” and “mentally-challenged” are also used to refer to individuals with physical and mental disabilities, but these terms have not garnered much support; they are criticized because physical and mental challenges are not the distinct characteristics of individuals with disabilities.¹⁰ Other scholars

⁴ Lennard J. Davis, *Enforcing Normalcy: Disability, Deafness and the Body* (London: Verso, 1995) at 24 [Davis, “Enforcing”]. Davis argues that the construction of normalcy creates the problems of persons with disabilities.

⁵ Richard Devlin & Dianne Pothier, “Introduction: Toward a Critical Theory of Dis-Citizenship” in Dianne Pothier and Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 11 at 12-13 [Devlin & Pothier].

⁶ *Ibid.*

⁷ Susan Wendell, “Toward a Feminist Theory of Disability” in Lennard J. Davis, ed., *The Disability Studies Reader* 2nd ed. (New York: Routledge, 2006) 243 at 251.

⁸ *Ibid.*

⁹ Davis, “Enforcing”, *supra* note 4 at XIII. See also: Dianne Pothier, “Miles to Go: Some Personal Reflections on the Social Construction of Disability” (1992) 14 *Dalhousie L. J.* 526 at 533-534. In describing her personal experience in this article, Pothier states that persons with disabilities have different ways of doing things.

¹⁰ Linton, *supra* note 2 at 164.

have recently begun using the word “capability” instead of “disability” in listing “disability” as a prohibited ground for discrimination.¹¹ They note that “disability” assumes the classification of human beings into disabled and non-disabled persons. They also consider disability to be a universal human condition. These scholars thus seek to use neutral terminology that covers all human beings, similar to terms such as race, sex, age and religion. They use capability to refer to the wide range of skills and capabilities of human beings.¹² However, incapability is the other side of capability, which refers only to certain categories of persons; this may weaken the neutrality claim of the term “capability”. Other scholars prefer to use the word “disablement” “to denote what is described by impairment / deficiency / medical problem / dysfunctioning / physical disability / physical inability / physical incapacity / handicap and related terms.”¹³ Nonetheless, as the word “disablement” is derived from the word “disability”, it is unlikely to be more neutral than the term “disability” itself.

Advocates of disability rights, disabled persons’ organizations (DPOs) and persons with disabilities seek to use politically correct terminologies to promote the dignity, respect and value of individuals with disabilities by focusing on their personality and entitlements to human rights. Hence, they choose to use the phrase “persons/individuals with disabilities” to achieve their political strategies.

¹¹ Aart C. Hendriks, “Different Definition, Same Problems: One Way Out?” in Silvia Yee and Mary Lou Breslin, eds., *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, NY: Transnational Publishers, 2002) 195 at 211-212 [Hendriks, “Different Definition”].

¹² *Ibid.*

¹³ Jerome Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) at 21 [Bickenbach].

This has become the most accepted terminology.¹⁴

2.2.2. *Disability and the International Classifications of Diseases and Health Conditions*

The World Health Organization (WHO) published manuals on international classifications of diseases and disability with the goal of creating a uniform and useful international framework for member states and other interested parties to use as a common language, and in order to facilitate the collection, interpretation and comparison of health data within and between populations.¹⁵ The initial framework was called the *International Classification of Diseases (ICD)*, and it has been through a series of revisions.¹⁶ The *ICD* is an international standard diagnostic classification that categorizes diseases and identifies the causes of diseases, deaths and other health problems. It serves as a basis for the preparation and compilation of national mortality and morbidity statistics and for epidemiological and clinical uses.¹⁷ The latest revision, *ICD-10*, was endorsed in 1990 and became effective in WHO member states in 1994.¹⁸

¹⁴ Davis, “Enforcing”, *supra* note 4 at xiii.

¹⁵ World Health Organization, *The WHO Family of International Classifications*, online: WHO <<http://www.who.int/classifications/en/>>.

¹⁶ World Health Organization, *International Classification of Diseases: History of the ICD*, online: WHO <<http://www.who.int/entity/classifications/icd/en/HistoryOfICD.pdf>> [WHO ICD History].

¹⁷ World Health Organization, *WHO International Classification of Diseases (ICD)*, online: WHO <<http://www.who.int/classifications/icd/en/>>.

¹⁸ *Ibid.* As described in the WHO ICD History, *supra* note 16, the ICD is a general nomenclature referring to the whole framework. The first ICD revision in 1990 revised the *International List of Causes of Death*. Having recognized the utility of internationally applicable uniform classifications, the 1855 meeting of the International Statistical Congress adopted, for the first time, the *Classification of Causes of Death*. The general arrangement of this classification later became the basis for the *International List of Causes of Death*, which was adopted in 1893 by the International Statistical Institute, the successor to the International Statistical Congress. Since 1900, from the time of the first revision of the *International List of Causes of Death*, ten major

Prior to 1980, the *ICD* had some significant shortcomings. It did not assist in gleaning data concerning non-fatal health outcomes since it only recognized diseases that were preventable, curable or that might cause death.¹⁹ As a result, it was difficult to measure and evaluate the health improvements of individuals and of the general population due to health care system interventions.²⁰

In order to deal with these problems and to complement the *ICD* framework, the WHO published the *International Classification of Impairments, Disabilities and Handicaps (ICIDH)* for trial purposes in 1980.²¹ The *ICIDH* aims to capture full data concerning the health state of individuals and populations by identifying and categorizing the consequences of diseases, illnesses and injuries that do not result in mortality. It draws conceptual distinctions between impairment, disability and handicap.²² The *ICIDH* defines impairment as “any temporary or permanent loss or abnormality of a body structure or function, whether physiological or psychological.”²³ It refers to consequences of disease or injury as experienced by the body.”²⁴ For example, a loss or defect of an eye is an impairment of that body part.

revisions have been made. The 6th revision of 1948 changed the name to *International Classification of Diseases, Injuries and Causes of Death*. As of 1946, the World Health Organization has assumed the work of reviewing and revising the ICD framework.

¹⁹ T. B. Üstün, et al., “The International Classification of Functioning, Disability and Health: A New Tool for Understanding Disability and Health” (2003) 25: 11 Disability & Rehabilitation 565-571 at 566, online: DOI <<http://dx.doi.org/10.1080/0963828031000137063>>.

²⁰ Bickenbach, *supra* note 13 at 23.

²¹ WHO ICD History, *supra* note 16.

²² World Health Organization, *1980 International Classification of Impairments, Disabilities and Handicaps* (Geneva: WHO, 1980) [*ICIDH 1980*].

²³ *Ibid.*

²⁴ David B. Gray & Gerry E. Hendershot, “The ICIDH-2: Developments for a New Era of Outcomes Research” (2000) 81: Suppl 2 Arch Phys Med Rehabil S10-S14 at S10 [Gray & Hendershot].

The *ICIDH* defines disability as “a restriction or lack (resulting from impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.”²⁵ An individual has a disability when he/she is limited in performing day-to-day activities such as seeing, walking, and dressing due to one or more impairments. Different types of impairments cause varying degrees of disability. However, not all impairments necessarily give rise to disabilities. For example, a person may be missing a nail from a finger, but this impairment does not cause a disability. Defining disability is not an easy task. How many activities or which activities in a person’s daily life must be limited in order for that person to be deemed to have a disability? Where do we draw the line? There is no clear-cut definition of disability; each society may conceptualize it differently.²⁶

According to the *ICIDH*, a “handicap” is “the result of an impairment or disability that limits or prevents the fulfillment of one or several roles regarded as normal, depending on age, sex and social and cultural factors.”²⁷ Handicaps are social disadvantages that individuals with impairments or disabilities may face as a result of society’s attitudes and perceptions towards their impairments or disabilities. The *ICIDH*’s definition of “handicaps” is criticized for assuming that handicaps result from impairments or disabilities, similar to other physical health conditions. Handicaps are sociological events which can also be caused by

²⁵ *ICIDH 1980*, *supra* note 23. See also: Penelope M. Kearney & Julie Pryor, “The International Classification of Functioning, Disability and Health (ICF) and Nursing: Nursing Theory and Concept Development or Analysis” (2004) 46: 2 *Journal of Advanced Nursing* 162 at 164.

²⁶ Bickenbach, *supra* note 13 at 36-43.

²⁷ *ICIDH 1980*, *supra* note 23.

society's false perceptions regarding the presence of impairments or disabilities.²⁸ The *ICIDH* of 1980 is also criticized for using the terms “disability” and “handicap”, which perpetuate negative attitudes and perceptions towards persons with disabilities, and for defining disability in bio-medical terms. Another criticism is that the *ICIDH* does not sufficiently address environmental factors.²⁹

In 2001, the WHO revised the *ICIDH* and endorsed the *International Classification of Functioning, Disability and Health (ICF or ICIDH-2)* with the aim of using it as an international standard for classifying and measuring functioning, disability and health.³⁰ The *ICF* is a multi-purpose classification of health and health-related domains from bodily, individual and societal perspectives.³¹ Unlike the *ICIDH*, the *ICF* employs terminology that is deemed to be neutral. To describe negative aspects of health, it uses the terms “impairment”, “activity limitation” and “participation restriction”. “Impairment” refers to a dysfunction of body (systems such as respiratory, mental, etc.) or body structures (such as legs, arms, heart, kidney, etc.). “Activity limitation” refers to the effect of an impairment on an individual's performance of daily tasks. For example, if you lose your legs, your “activity limitation” would be that you would be unable to walk; this limitation was referred to as a “disability” in the *ICIDH* of 1980. The term “participation restriction” in the *ICF* refers to the limitations of an individual's participation in society. For example, a person who uses a wheelchair

²⁸ Bickenbach, *supra* note 13 at 48-49.

²⁹ Gray & Hendershot, *supra* note 24 at S11.

³⁰ World Health Organization, *WHO Resolution WHA 54.21*, 54th World Health Assembly (22 May 2001), online: WHO <<http://www.who.int/classification/icf/en>>.

³¹ World Health Organization, *International Classification of Functioning, Disability and Health*, online: WHO <<http://www.who.int/classifications/icf/en>>.

may be unable to access a building or take public transportation; nearly the same condition is described in the *ICIDH* of 1980 as “handicap”. However, the *ICF* incorporates environmental factors such as physical structures, institutions, laws and attitudes, as well as personal factors such as age, gender and experience to measure an individual’s participation restrictions in society.

Broadly speaking, “disability” is a common term used to describe all three dysfunctions: “impairments”, “activity limitations” and “participation restrictions”.³² Noting that “every human being can experience a decrement in health and thereby experience some disability [...]”³³, the *ICF* recognizes disability as a “universal human experience.”³⁴ Some scholars argue that the *ICF* should provide a detailed explanation of the uses, implications and relevance of the universalism of disability to disability policies.³⁵ However, the concept of the universalism of disability belittles the experience of discrimination and exclusion and the negative attitudes and perceptions that persons with disabilities encounter in their lives. It seems to ignore the special needs and human rights of persons with disabilities by expanding disability in the form of health decrement to all human beings. Furthermore, by requiring an impairment of a body or body structure as a basis for any type of activity limitation or participation restriction, it seems to leave out participation restrictions that may occur independently of

³² World Health Organization, *Towards a Common Language for Functioning, Disability and Health ICF* (Geneva: World Health Organization, 2002) at 2-14, online: WHO <<http://www.who.int/>>.

³³ *Ibid.* at 3

³⁴ *Ibid.*

³⁵ Rob Imrie, “Demystifying Disability: A Review of the International Classification of Functioning, Disability and Health” (2004) 26: 3 *Sociology of Health & Illness* 287 at 299.

physical or mental impairments.³⁶

2.3. Disability: Theoretical and Philosophical Models

2.3.1. The Traditional Approach to Disability

By “traditional approach to disability”, I mean the understanding and concept of disability that was prevalent in many societies prior to the emergence of modern science, and that lives on due to its penetration into cultures, traditions, customs and religions. This is not a theoretical or academic disability model to which scholars subscribe. However, by including it here among the approaches to disability, I seek to show how much societies’ cultures, customs, traditions, practices and religious beliefs impact the understanding and conception of disability, and thereby impact the lives of persons with disabilities in contemporary societies. Furthermore, there is no doubt that societies’ customs, traditions, practices and religious beliefs influence policies and laws.³⁷

Traditionally, in many societies disability has been seen as an illness or a bodily impairment caused by a curse/sin, an evil spirit or witchcraft.³⁸ For instance, the Bible and other religious texts, which essentially constitute elements of tradition, teach that disability is a sin/curse or dirt from which the disabled

³⁶ For a similar analysis, see the discussion below on the social model of disability.

³⁷ See the attitudes, perceptions and stigma in South African society in the context of HIV-AIDS: South African National AIDS Council, *HIV, AIDS and Disability in South Africa* (May 2008) at 1-2 & 5-8, online <http://www.icdr.utoronto.ca/Files/PDF/94a3663acf97d5f.pdf> [SA AIDS Council].

³⁸ Choruma, *supra* note 1 at 8.

must be cleansed.³⁹ Many societies portray persons with disabilities as incapable, as always requiring assistance and as useless liabilities having no role to play in society.⁴⁰ Many people also assume that dying is better than having a disability. Consequently, persons with disabilities are seen as having less value and are considered to be sub-humans that deserve no human dignity, respect and protection.⁴¹ In some societies, persons with disabilities are considered to be things possessed by evil spirits that can cause serious harm to society; they are thus subject to brutal killings to avoid the perceived harm.⁴²

The cultural values, religious beliefs and other practices of many societies therefore degrade and demean the dignity, humanity and value of persons with disabilities, resulting in their exclusion and marginalization in society.⁴³ Consequently, the response to persons with disabilities in these societies has merely been moral: sympathy. Persons with disabilities are expected to receive alms and charity to sustain their lives. Many individuals believe they may absolve

³⁹ King James Bible, Matthew 15: 30 and the following texts, and Luke 18: 35 and the following texts. In the Hindu tradition as well, it is believed that people experience bad things or events because they accumulate bad karmas in their lives. Bad karmas are wrong deeds.

⁴⁰ Choruma, *supra* note 1 at 8.

⁴¹ *R. v. Latimer*, [2001] 1 S.C.R. 3. The accused claimed that he killed his 12-year-old daughter, who had a severe form of cerebral palsy, on compassionate grounds.

⁴² Mark Schneider, "Death of A Spirit Child", Radio Documentary aired 10 October 2007 on *The Current*, CBC Radio One, online: <http://www.cbc.ca/thecurrent/2008/07/july-14-2008.html>>. The Committee on the Rights of the Child also observed that there is actual killing of children with disabilities by state parties. For details, see: Committee on the Rights of the Child, *General Comment No. 9: Rights of Children with Disabilities*, 43rd Session, 02/27/2007, CRC/C/GC/9, online: UNHCHR <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.GC.9.En](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.GC.9.En)>. The Committee on the Rights of the Child is the treaty body established under the *Convention on the Rights of the Child (CRC)* to monitor the *Convention's* implementation.

⁴³ SA AIDS Council, *supra* note 37.

themselves from curses or sins by giving alms and charity to persons with disabilities or to institutions that care for them.⁴⁴

2.3.2. *The Individual/Bio-Medical Model*

The first disability model to emerge was the individual/bio-medical model. Relying on bio-medical science, this model sees disability as a biological, physiological, anatomical and psychological malfunction of body or body structures. It views disability as a defect located in the person's body.⁴⁵ The bio-medical model considers disability to be the tragic consequence of an illness, injury or impairment. This scientific approach views persons with disabilities as sub-normal, biologically different and inferior to other human beings.⁴⁶ It portrays them as ill and as lifelong patients deserving medical treatment or rehabilitation services.⁴⁷

Disability laws that adopt the bio-medical approach therefore focus on curing and preventing disabilities and on rehabilitating persons with disabilities.⁴⁸ The bio-medical model does not address entitlements to medical treatment or rehabilitative programs and services as human rights of persons with disabilities.

⁴⁴ David M. Lepofsky, "Discussion: The Charter's Guarantee of Equality to People with Disabilities: How Well Is It Working?" (1998) 16 Windsor Y.B. Access Just. 155 at 159-162 [Lepofsky, "Discussion"]. The author explains in detail how public perceptions and attitudes towards persons with disabilities affect their lives in the Canadian context.

⁴⁵ Bickenbach, *supra* note 13 at 61-62.

⁴⁶ *Ibid.* at 62.

⁴⁷ Michael Oliver, *Understanding Disability: From Theory to Practice* (New York: St. Martin's Press, 1996) at 35-36 [Oliver, "Understanding"].

⁴⁸ See the discussion in: Anna Lawson, "The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?" (2007) 34 Syracuse J. Int'l L. & Com. 563 at 571.

Nor does it recognize the impacts of environmental factors on the lives of persons with disabilities. The problems and challenges these people face due to society's attitudes, cultural beliefs and practices, and physical structures and institutions, including laws and policies, are seen as disadvantages they should confront as a consequence of their physical and/or mental impairments.

According to this model, in order for people with disabilities to cope with the environment, their impairments must be cured or their effects minimized through medical interventions or rehabilitative techniques.⁴⁹ Medical and rehabilitative professionals are assumed to have the utmost knowledge and skills to determine the needs of persons with disabilities in terms of treatment and services. This culture of paternalism and caring views persons with disabilities as objects of professionals' judgments. The laws and policies of most countries in the world today are based on the bio-medical model's understanding of disability. Health, rehabilitation, charity and social welfare programs and services are designed and developed accordingly.⁵⁰

Despite its limitations, the individual/bio-medical model of disability has some positive aspects. The interventions and techniques administered by medical and rehabilitative professionals are essential to remove or ameliorate the disabling conditions of persons with disabilities and thereby help advance their independence and autonomy.⁵¹ The bio-medical model is also helpful in preparing

⁴⁹ Mary Crossley, "The Disability Kaleidoscope" (1999) 74 Notre Dame L. Rev. 621 at 649-650.

⁵⁰ Theresia Degener, "International Disability Law - A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999" (2000) 18 Berkeley J. Int'l L. 180 at 180.

⁵¹ Devlin & Pothier, *supra* note 5 at 16.

and analyzing impairment/disability statistics of a given population. Moreover, it can be used to determine which physical and/or mental impairments should be allocated resources. The bio-medical model has also replaced the traditional view of the cause of disability; disability is no longer viewed as an outcome of one's curse or sins.⁵²

2.3.3. The Social Model

The social model views disability “not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations.”⁵³ In other words, disability consists of the disabling barriers of prejudice, discrimination and social exclusion of persons with disabilities which are caused by society's reactions towards impairments. Impairments are thus simply characteristics of bodies and minds.⁵⁴ Michael Oliver, a proponent of the social model, defines disability as “the disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities.”⁵⁵ Persons with

⁵² Bickenbach, *supra* note 13 at 61-62.

⁵³ Richard K. Scotch, “Models of Disability and the Americans with Disabilities Act” (2000) 21 Berkeley J. Emp. & Lab. L. 213 at 214.

⁵⁴ Jenny Morris, “Impairment and Disability: Constructing an Ethics of Care That Promotes Human Rights” (2001) 16:4 Hypatia 1.

⁵⁵ Oliver, “Understanding”, *supra* note 47 at 22.

disabilities are prevented from fully participating in society due to social restrictions that are imposed on them by society and are unrelated to any personal limitations.⁵⁶ Michael Oliver views disability as a “particular form of social oppression”⁵⁷ that society should eliminate. If a person with a visual impairment is not able to read a newspaper, his/her disability in reading results not from the impairment, but rather from the unavailability of the information in an alternate format such as electronic text, braille or audio.⁵⁸

The social model therefore shifts the concept of disability from the individual to society. An individual’s physical and/or mental impairments have little or no relevance; they are simply seen as human differentiations that should be ignored. The social model imposes the responsibility of either removing or reducing environmental barriers on the society that creates the disability.⁵⁹ Laws and policies based on the social model aim to remove or reduce existing barriers and to prevent new socially constructed barriers from emerging. The failure to take such measures would allow for the continuation of discrimination and the exclusion of persons with disabilities from mainstream society.⁶⁰

Although disabilities may be socially and culturally caused, the social model of disability downplays the real effects of physical or mental impairments

⁵⁶ Michael Oliver, “Social Policy and Disability: Some Theoretical Issues” (1986) 1: 1 *Disability & Society* 5 at 6.

⁵⁷ Oliver, *supra* note 47 at 22.

⁵⁸ In analyzing the social construction of disability, Pothier, *supra* note 9 at 526 stated: “The greatest handicap I face as a visually disabled person is not the physical limitations occasioned by the poor eyesight, but rather the attitude of others toward my disability.”

⁵⁹ Rosemary Kayess & Phillip French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities” (2008) 8 *Hum. Rts. L. Rev.* 1 at 6.

⁶⁰ Tom Shakespeare, “The Social Model of Disability” in Lennard J. Davis, ed., *The Disability*

on the lives of disabled persons.⁶¹ For instance, impairments limit the range of employment opportunities available to disabled persons or may affect their performance of certain work-related tasks. Disclaiming this fact means denying the reality of persons with disabilities.⁶² In actual fact, disabilities are combinations of biological, psychological, cultural and socio-political factors.⁶³ However, social factors alone may cause perceived disabilities even when no actual physical or mental impairments exist.⁶⁴

The social model may also lead to the incorrect assumption that once the socially constructed disability is removed, disability ceases to exist.⁶⁵ For example, even if a person with a visual impairment is employed (i.e. the disability to employment has been removed), the impairment will continue to have an impact on the person's life.⁶⁶ The social model also tends to deny the causal connection between socially constructed disabilities and individuals' actual or perceived physical and mental impairments.⁶⁷ It does not distinguish social disadvantages of persons with disabilities from the disadvantages of non-disabled populations such as women, children and other vulnerable groups.⁶⁸ Problems

Studies Reader 2nd ed. (New York: Routledge, 2006) 197 at 199 [Shakespeare, "Social Model"].

⁶¹ For a discussion on the role of impairments, see: Liz Crow, "Including All of Our Lives: Renewing the Social Model of Disability" in Colin Barnes & Geof Mercer, eds., *Exploring the Divide* (Leeds: The Disability Press, 1996) 55 at 57-58. See also a discussion criticizing impairment/disability as a social construct in: Tom Shakespeare & Nicholas Watson, "The Social Model of Disability: An Outdated Ideology?" (2002) 2 *Research in Social Science and Disability* 9, online: <[http://dx.doi.org/10.1016/S1479-3547\(01\)80018-X](http://dx.doi.org/10.1016/S1479-3547(01)80018-X)>.

⁶² Shakespeare, "Social Model", *supra* note 60 at 200.

⁶³ *Ibid.* at 201.

⁶⁴ Carol Thomas, "How is Disability Understood? An Examination of Sociological Approaches" (2004) 19: 6 *Disability & Society* 569 at 574 [Thomas].

⁶⁵ Shakespeare, "Social Model", *supra* note 60 at 202.

⁶⁶ *Ibid.* at 201-202.

⁶⁷ Thomas, *supra* note 64 at 577 & 580.

⁶⁸ Tom Shakespeare, "Disability, Identity and Difference" in Colin Barnes & Geof Mercer, eds.,

may thus arise in determining who has a disability.

Why should we strive to totally shift disability to society or to establish a causal link with society in order to make society responsible for eliminating socially constructed disability? Persons with disabilities are citizens and members of states and societies. States and societies are therefore obliged to reduce or eliminate every possible environmental barrier persons with disabilities face to enable them to participate and live independently in their societies as full members and citizens.⁶⁹ Disability is a concern of society, and society has the responsibility of addressing that social concern. Moreover, the social model's definition of disability may be of little assistance in measuring the degree and prevalence of impairments/disabilities and in preparing statistics on such issues. Gathering information would be difficult, if not impossible, using the social model since its definition of disability covers a range of social disadvantages other than those relating to actual or perceived impairments.⁷⁰

2.3.4. The Minority Rights/Civil Rights Model

The minority rights model adds another dimension to the social model by politicizing the responsibility a society owes to persons with disabilities to remedy

Exploring the Divide (Leeds: The Disability Press, 1996) 94 at 96-97, online: <<http://www.leeds.ac.uk/disability-studies/archiveuk/Shakespeare/Chap6.pdf>>.

⁶⁹ For my detailed argument on the notion of citizenship vis-a-vis the responsibility to remove disabling barriers, see the sub-section examining the concept of citizenship and disability human rights, *infra*.

⁷⁰ See the text associated with notes 64-68.

socially produced disability.⁷¹ It advocates for either the elimination or reduction of the environmental factors causing disability as “civil rights” of persons with disabilities.⁷² The minority rights model analogizes the rights of persons with disabilities with the rights achieved in the context of race and gender equality.⁷³ Similar to those minority groups, the disability minority rights model characterizes persons with disabilities as “a discrete and insular minority, who have suffered from a history of discrimination and who are relatively powerless politically and are socially excluded.”⁷⁴ Together with the social model movement, this analysis significantly and positively impacted the passage of disability anti-discrimination laws in several countries. For example, according to the *Americans with Disabilities Act (ADA)* of 1990, “Individuals with disabilities are a discrete and insular minority who have been subjected to a history of purposeful unequal treatment, isolation and segregation, relegated to a position of political powerlessness, and continually encounter various forms of discrimination in their lives.”⁷⁵

Some scholars criticize the minority rights approach for viewing disability as a characteristic of a discrete and insular minority, which creates a protected

⁷¹ Bickenbach, *supra* note 13 at 152-153.

⁷² Laura L. Rovner, “Disability, Equality, and Identity” (2004) 55 Ala. L. Rev. 1043 at 1054-1055.

⁷³ Sandra Fredman, “Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?” in Anna Lawson & Caroline Gooding, eds., *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 199 at 204-205 [Fredman].

⁷⁴ *Ibid.* at 205. See also the discussion on the concepts of equality and non-discrimination in subsection 2.5 of this chapter. These concepts are intended to eliminate social inequalities and discrimination against individuals in society.

⁷⁵ *Americans with Disabilities Act of 1990 (ADA)*, 42 U.S.C. § 12101 et seq. (Pub.L. 101-336, July 26, 1990, 104 Stat. 327), Sec. 2 [ADA].

class of individuals.⁷⁶ They argue that “the requirement of class membership necessarily excludes some individuals with impairments from disability protections.”⁷⁷ However, a broad definition of disability can be adopted to enlarge the protected class of individuals. Furthermore, a definition of disability or self-identification as a disabled minority may not be required in all cases of discrimination.⁷⁸ Other scholars criticize the minority rights model because disabled persons lack group defining characteristics, such as a language, a culture or a set of experiences that unites them;⁷⁹ “there is almost no commonality of experience, or feelings of solidarity, between people with diverse disabilities.”⁸⁰ Scholars therefore contend that persons with disabilities do not constitute a discrete and insular minority.⁸¹

In fact, being disabled is not enjoyable, and it does not make someone proud of his/her disability. No one wishes to be disabled or makes an effort to have a disability. Of course we should be concerned with disability-causing factors such as diseases, accidents, conflicts, wars and malnutrition, and we should work to prevent, cure or reduce disability or the impacts of disability. The gist of my argument here is that once we are born or become disabled, disability

⁷⁶ Ani B. Satz, “Disability, Vulnerability, and the Limits of Antidiscrimination” (2008) 83 Wash. L. Rev. 513 at 535 [Satz].

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 535-537. The author explains the legal reasoning adopted by the American courts to enlarge the protected class of persons with disabilities. He maintains that the expanded definition of disability is still inadequate in including all persons with impairments.

⁷⁹ Bickenbach, *supra* note 13 at 155.

⁸⁰ Jerome E. Bickenbach, et al., “Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps” (1999) 48 J. Soc. Science & Med. 1173, online: Science Direct <<http://www.sciencedirect.com/science/article/pii/S0277953698004419>> [Models].

⁸¹ Fredman, *supra* note 73 at 206.

constitutes a part of our identity.⁸² Many persons with disabilities may not dare to identify themselves as disabled for fear of stigmatization, discrimination, exclusion and segregation in their societies.⁸³ The struggle of persons with disabilities is not to preserve the disability identity, but rather to ensure that their basic human rights are recognized and protected as human beings and that they can live independently and participate effectively in their societies as full members and citizens. Despite their diversity, persons with disabilities throughout the world experience the same problems of discrimination, segregation and exclusion from mainstream society. Disability and its experience serve as a link and create a strong sense of solidarity among persons with disabilities. These people need not share a common culture, language or ethnicity to constitute a minority.⁸⁴ Moreover, the concept of minorities is evolving, and it is not limited to ethnic, cultural, linguistic and religious groups. However, due to the complex nature of disability, problems may arise regarding who constitutes the minority group.

The minority rights model may also create conflicts of interests in the distribution of resources required to meet the special needs of persons with

⁸² David Ruebain, "What is Prejudice as It Relates to Disability Anti-Discrimination Law?" in Silvia Yee & Mary Lou Breslin, eds., *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, NY: Transnational Publishers, 2002) 369 at 369-370.

⁸³ *Ibid.* at 92-99. Lennard Davis points out in detail in his book, *supra* note 4 at 93-99, how the former US president, President Franklin Roosevelt, struggled to hide his disability from public view. He notes that the President did not want to be seen in a wheelchair or being lifted up stairs, and that he wanted to prove to the public that he had actually overcome his disability. The mass media was accordingly not permitted to expose such footage to the public.

⁸⁴ Individuals with hearing impairments disassociate themselves from the disabled group and consider themselves to be members of a linguistic minority. The inability to hear is paralleled with the inability to understand or communicate in a language one can't speak. Hence, deaf people see deafness as a communication difference. For details, see: Harlan Lane, "Construction of Deafness" in Lennard J. Davis, ed., *The Disability Studies Reader* 2nd ed. (New York: Routledge, 2006) 79.

disabilities since it makes persons with disabilities compete for resources with the rest of the population.⁸⁵ Moreover, there is a concern that maintaining persons with disabilities as a distinct group may unintentionally reinforce the disabled/non-disabled distinction, which is a medical model conception.⁸⁶ However, maintaining the distinctness of persons with disabilities as a group recognizes a reality, and it can serve as a tool not only for taking disability into consideration as a difference in ensuring equality guarantees, but also in advocating for the human rights of persons with disabilities, as it does with respect to race or gender.

2.3.5. The Universalism Model

Critics of the minority rights model developed the universalism model as a political strategy and alternative. The universalism model sees disability not as a human attribute that distinguishes the disabled from the non-disabled, but rather as a universal feature of all human beings. All human beings experience some degree of impairment or disability.⁸⁷ Advocates of this model explain that persons with disabilities encounter essentially different forms of social ills, injustice and inequality in all areas of social life, not due to discrimination on the ground of disability, but rather due to the misdistribution of resources, opportunities and

⁸⁵ Fredman, *supra* note 73 at 207.

⁸⁶ Michael Oliver & Gerry Zarb, "The Politics of Disability: A New Approach" (1989) 4: 3 *Disability & Society* 221 at 225.

⁸⁷ Bickenbach et al., "Models", *supra* note 80 at 1182.

power in their societies.⁸⁸ The proponents of this model claim that by universalizing disability, which would expand the range of human normality, resources and opportunities would be distributed fairly to eliminate all sorts of social ills without recognizing the uniqueness of disability.⁸⁹ As Irving Kenneth Zola points out, “by seeing people with a disability as ‘different,’ with ‘special’ needs, wants, and rights in this currently perceived world of finite resources, they are pitted against the needs, wants, and rights of the rest of the population.”⁹⁰ Therefore, “an exclusively special needs approach to disability is inevitably a short-run approach [... that will] further create and perpetuate a segregated, separate but unequal society, a society inappropriate to a larger and older changing needs population.”⁹¹ For proponents of the universalism model, disability policy is therefore not a policy for persons with disabilities, but rather a policy for all people.⁹² From this perspective, a policy of universal design with respect to public buildings, transportation, residences, workplaces and other aspects of human activities has a meaningful purpose to achieve the necessities of daily-living not only for persons with disabilities, but for the entire society.⁹³ Thus, a universal policy towards disability serves the concerns and interests of the whole population.⁹⁴

Universal design policy, one of the most significant contributions of the

⁸⁸ *Ibid.* at 1181.

⁸⁹ Fredman, *supra* note 73 at 207.

⁹⁰ Irving Kenneth Zola, “Toward the Necessary Universalizing of a Disability Policy” (2005) 83: 4 *Milbank Quarterly* 1 at 19, online: *Milbank* <<http://www.milbank.org/quarterly/830433zola.pdf>> [Zola].

⁹¹ *Ibid.* at 1.

⁹² Bickenbach et al., “Models”, *supra* note 80 at 1182.

⁹³ Zola, *supra* note 90 at 7-19.

universalism model, is very significant for persons with disabilities. Universal design policy aims to develop structures such as buildings, transportation and manufactured products that are universally accessible and useable by all persons, including persons with disabilities, without having to adapt or retrofit them for special use.⁹⁵ Advocates of the universalism model nevertheless belittle the discrimination and exclusion that people experience due to their disabilities in all aspects of social life. They thus undermine the relevance and significance of disability anti-discrimination legislation. By rhetorically eliminating the disabled/non-disabled distinction, advocates of the universalism model also downplay the special needs of persons with disabilities, which may require special attention, legislation and agencies.⁹⁶

It is true that no individual has complete and perfect health, bodily functions and capabilities. However, some of us have more limitations because of our physical or mental impairments, while others have fewer limitations; this is enough to make the disabled/non-disabled distinction.⁹⁷ Human beings suffer from discrimination, exclusion and stigma due to imperfections in their health or functions when they have or are perceived to have a form of disability. Were this not the case, persons with disabilities would not experience higher rates of unemployment than non-disabled people due to discrimination on the basis of

⁹⁴ *Ibid.* at 21.

⁹⁵ Fredman, *supra* note 73 at 207-208.

⁹⁶ See the arguments for universalism in: Bickenbach et al., “Models”, *supra* note 80 at sub-section entitled: “Minority Group Discrimination and Universal Human Condition”.

⁹⁷ Carlos A. Ball, “Autonomy, Justice, and Disability” (2000) 47 UCLA L. Rev. 599 at 651 [Ball].

disability.⁹⁸

To take an example in the Canadian context, despite the huge costs involved, snow-clearing operations are conducted throughout Canada each year not because snow is a barrier for persons with disabilities, but because it is a barrier for everyone. If it were only a barrier for persons with disabilities, I believe it would not have received the same attention and service. In other words, if disability were really a universal human experience, persons with disabilities would not need to press for the protection of their rights. Society or the government would have dealt with disability-related problems swiftly, as it deals with the snow. Moreover, the fact that the whole population, and especially the aged population, is vulnerable to illness, injury and impairment, or that any individual may develop a disability at some point in their life, should not universalize disability. Nor should it be a reason for denying the experience of discrimination and exclusion of persons with disabilities on the ground of disability and the recognition of their human rights. Rather, it should drive advocacy and recognition of the rights of persons with disabilities since everybody is potentially a prospective disabled person. “Recognizing vulnerability to illness as universal suggests the need for universal health care, or [for] treating access to health care as a matter of social welfare rather than disability law.”⁹⁹ Universalizing disability would also be of little assistance in

⁹⁸ International Labor Organization, *Facts on Disability in the World of Work* (Geneva: ILO, 2007), online: ILO <<http://www.ilo.org/employment/disability>>.

⁹⁹ Satz, *supra* note 76 at 514. The author correctly argues that discrimination against persons with disabilities does not only occur in discrete environments. However, the author’s argument throughout the article that our vulnerabilities to disability are the basis of discrimination is not persuasive. For me, it is the disability and not the vulnerability to disability or illness for that

capturing disability statistics since it expands disability to all human beings.¹⁰⁰

2.4. Disability Rights Through the Lens of Citizenship

The foregoing discussion on the theoretical models of disability mainly explored what disability is and how it is caused from various perspectives. These models also seek to establish the responsibility for removing the limitations associated with disability based on either the theory of disability causation/location or on the recognition of persons with disabilities as a minority group.¹⁰¹

My goal here is not to initiate a new analysis of disability/impairment causation and its associated hurdles. Nor am I trying to prove that persons with disabilities are capable of performing various kinds of tasks despite their disabilities/impairments. Instead of relying on theories of disability causation/location or on the identification of persons with disabilities as a minority group, I examine how the concept of citizenship provides an alternative justification for establishing the responsibility to either eliminate or reduce the limitations associated with disability.

matter, which leads to discrimination.

¹⁰⁰ See also the discussion on the concept of disability in: WHO ICF of 2001, *supra* note 30.

¹⁰¹ For details, see the discussion on the theoretical and philosophical models of disability, *supra*.

2.4.1. *The Status of Persons with Disabilities in the Context of Citizenship*

Historically, persons with disabilities have been invisible both in the explanation of citizenship values and in citizenship claims. Citizens were only able-bodied, middle class men.¹⁰² It should be noted, however, that persons with disabilities were not the only ones excluded from entitlements to citizenship rights.¹⁰³ Persons with disabilities continue to be excluded, discriminated against and segregated from mainstream society. In many instances, they have been subject to abuse, violence, mistreatment and degradation of their fundamental rights and freedoms, and have been exposed to deplorable human conditions.¹⁰⁴ Many have been sterilized and killed simply due to their physical or mental disabilities.¹⁰⁵ In addition to facing deplorable civil and political conditions, persons with disabilities also have the least access the health care services, are the least educated or have the highest rate of illiteracy, are the most under-employed or unemployed, and constitute a large proportion of the people living in poverty.¹⁰⁶ They are one of the groups most affected by biases, stereotypes,

¹⁰² Julia Preece, "The Learning of Citizenship and Governance: A Gender Perspective" in M. Schweisfurth, L. Davies & C. Harber, eds., *Learning Democracy and Citizenship: International Experiences* (Oxford: Symposium Books, 2002) 81 at 23.

¹⁰³ *Ibid.*

¹⁰⁴ UN Enable, *Factsheet on Persons with Disabilities*, online: UN Enable <<http://www.un.org/disabilities/default.asp?navid=34&pid=18>> [UN Enable Factsheet].

¹⁰⁵ Ruth Hubbard, "Abortion and Disability: Who Should and Who Should Not Inhabit the World?" in Lennard J. Davis ed., *The Disability Studies Reader* 2nd ed. (New York: Routledge, 2006) 93 at 93-99. Hubbard explains the scientific, political and legal measures undertaken in the US, Great Britain and Germany in the 19th and 20th centuries to sterilize and exterminate persons with disabilities and disability with the aim of preventing racial deterioration and human race defects in the future. Hundreds of thousands of persons with disabilities were sterilized and exterminated throughout the world. As the author points out on pp. 97-98, by 1939 between 300 000 and 400 000 people had been sterilized, and by 1941 more than 70 000 people with disabilities had been killed in Germany alone. The Nazi extermination programs in Germany were designed and exercised on persons with disabilities on a large scale prior to being extended to Jews, Gypsies, Communists, homosexuals and other 'undesirables'.

¹⁰⁶ Dick Thornburgh, "Globalizing a Response to Disability Discrimination" (2008) 83 Wash. L.

negative attitudes and benign neglect resulting from deeply-rooted religious and cultural traditions that continue to generate their cultural exclusion, degrading treatment and benign neglect.¹⁰⁷

Statistics compiled by the UN or its specialized agencies and other organizations illustrate the extent to which persons with disabilities are relegated to second class citizenship throughout the world, often assuming a lower status:¹⁰⁸

The mortality rate for children with disabilities may be as high as 80% in countries where under-five mortality as a whole has decreased below 20%, according to the United Kingdom's Department for International Development, which adds that in some cases it seems as if children are being 'weeded out'. [...] Ninety percent of children with disabilities in developing countries do not attend school, according to UNESCO. [...] The global literacy rate for adults with disabilities is as low as three percent, and one percent for women with disabilities, according to a 1998 UNDP study. [...] The World Bank estimates that 20% of the world's poorest people are disabled, and tend to be regarded in their own communities as the most disadvantaged. [...] Unemployment amongst disabled persons is as high as 80% in some countries, according to the ILO. [...] According to UNICEF, 30% of street youths are disabled. [...] Persons with disabilities are more likely to be victims of violence or rape, according to a 2004 British study, and less likely to obtain police intervention, legal protection, or preventive care. [...] Women and girls with disabilities are particularly vulnerable to abuse. A small 2004 survey in Orissa, India, found that virtually all of the women and girls with disabilities were beaten at home, 25% of women with intellectual disabilities had been raped, and six percent of disabled women had been forcibly sterilized. [...] Research indicates that violence against children with disabilities occurs at annual rates at least 1.7 times greater than for their non-disabled peers.¹⁰⁹

Rev. 439 at 444.

¹⁰⁷ See the discussion on the traditional approach to disability in sub-section 2.2.2.1 of this chapter, *supra*.

¹⁰⁸ For details, see: UN Enable Factsheet, *supra* note 104.

¹⁰⁹ *Ibid*.

Overall, persons with disabilities are relegated to second class citizenship, as if human rights were meant only for able-bodied persons. As Professors Richard Devlin and Dianne Pothier pointed out, many persons with disabilities live in “a system of deep structural economic, social, political, legal, and cultural inequality in which persons with disabilities experience unequal citizenship, a regime of dis-citizenship.”¹¹⁰ Given that persons with disabilities are the largest minority group in the world today, constituting 10% of the world population,¹¹¹ the international community in general and states in particular must take action to enable persons with disabilities to enjoy and exercise their fundamental rights by ensuring and promoting their full membership in society. I believe that a reconsideration of the concept of citizenship, specifically in terms of its inclusionary implications as discussed below, can advance the claims of persons with disabilities to full citizenship and membership in society.

2.4.2. *The Concept of Citizenship: A Justification for Disability Rights?*

The most common definition of citizenship is having a legally recognized status of membership in a particular sovereign state.¹¹² All who possess the citizenship status are equal with respect to the rights, benefits and obligations that flow from membership status.¹¹³ The difficulty with this definition of citizenship

¹¹⁰ Devlin & Pothier, *supra* note 5 at 11.

¹¹¹ UN Enable Factsheet, *supra* note 104.

¹¹² Roger M. Smith, “Modern Citizenship” in Engin F. Isin & Bryan S. Turner, eds., *Handbook of Citizenship Studies* (New Delhi: SAGE Publications Inc., 2002) 105.

¹¹³ Ruth Lister, *Citizenship: Feminist Perspectives* (New York: New York University Press, 1997) at 14 [Lister, “Citizenship: Feminist”].

is its exclusionary implications for non-citizens, as they may not be subject to the same rights and obligations as citizens. In this sense, citizenship rights do not extend to non-members of states or beyond state boundaries.

A second, broader definition of citizenship conveys membership status to any socio-political community instead of limiting it to sovereign states.¹¹⁴ This resonates more with human rights, which may apply to everyone within a given socio-political community rather than being based on membership in a particular sovereign state. Rather than using the concept of citizenship in the context of disability as a replacement or an alternative to the discourse of human rights, I use it to complement this discourse. I argue that it strengthens and advances the recognition, protection, and promotion of human rights of persons with disabilities by establishing the responsibility of any socio-political organization, such as states and the international community, towards persons with disabilities through the concept of citizenship.

In the context of states, for example, the status of citizenship creates a relationship between individuals and the state, and between individual citizens.¹¹⁵ Beyond defining the rules governing relations, the relationship between individuals and the state created by the notion of citizenship is very special. Individuals delegate authority to the state in the process of state formation so that the state not only serves as their representative, but also as a provider of

¹¹⁴ Christine Fiddler, *Citizenship and the Euro: Perceptions and Attitudes to the Process of Socio-Economic Integration between 1992 and 2002*, Working Paper (Sheffield University, UK, 2002) at 8, online: <www.sheffield.ac.uk/polopoly_fs/1.714551/file/fiddler.pdf>.

¹¹⁵ Lister, "Citizenship: Feminist", *supra* note 113 at 14.

protection and other services. Hence even in extreme cases, when persons with disabilities lose their functional capacity, which greatly affects their daily activities and thereby diminishes their citizenship role and participation within the state, the state should have the responsibility to assist in promoting their full membership and independence in society or to take every possible measure to help them move towards attaining full citizenship and independence.¹¹⁶ The notion of citizenship expands the special type of relationship created between individuals and the state and the sense of responsibility emerging from the nature of the relationship, even in the context of other socio-political communities. Because of this relationship, I argue that the state, or the community for that matter, is well situated to bear the responsibility for ensuring and promoting - or at least assisting in moving towards - full membership status of persons with disabilities in society.

In the context of national states, citizenship bestows a bundle of rights and obligations on individuals. The liberal/social rights and the civic republican political traditions have greatly influenced the meaning, conceptual evolution and political application of the concept of state citizenship.¹¹⁷ “The [liberal/social rights tradition] emphasizes the individual and his rights, [while the civic republican tradition emphasizes] the community and the political obligations of individuals to that community.”¹¹⁸ Citizenship rights are usually considered to entail only political rights, which include among other things the right to vote, the

¹¹⁶ Ball, *supra* note 97 at 635-650.

¹¹⁷ Ruth Lister, “Citizenship on the Margins: Citizenship, Social Work and Social Action” (1998) 1:1 *European Journal of Social Work* 5 at 5 [Lister, “Citizenship on the Margins”].

right to hold office of public functions or to participate in government administration and public governance, and the right to establish political parties. For Marshall, however, the concept of citizenship also comprises civil, political and social rights.¹¹⁹ The civil aspects of citizenship entail a set of individual rights including liberty, freedom of speech, freedom of thought, freedom of religion, and the right to own property. The social aspects of citizenship, which emerged in the 20th century, include welfare, security and education.¹²⁰ It is not clear whether cultural and economic rights are included in Marshall's definition of social rights. Human rights comprised of civil, political, economic, social and cultural rights are now understood to be indivisible and interconnected.¹²¹ Individuals' civil and political rights cannot flourish without guaranteeing economic, social and cultural rights.¹²² In the context of persons with disabilities, guaranteeing economic, social and cultural rights is crucial. Persons with disabilities cannot participate effectively in all aspects of life as full members of a society if economic, social and cultural rights are not recognized and reasonable efforts are not made towards realizing these rights.¹²³

In order to enable persons with disabilities to become full-fledged members of their societies, the concept of full or inclusive citizenship should recognize some basic values. First, it should recognize the inherent dignity and

¹¹⁸ *Ibid.* at 5.

¹¹⁹ Seymour Martin Lipset, "Introduction" in T. H. Marshall, *Class, Citizenship, and Social Development* (New York: Doubleday Company Inc., 1964) at ix [Lipset].

¹²⁰ *Ibid.*

¹²¹ Fay Faraday, "Access to Social Programs: Substantive Equality under the Charter of Rights" (2006) 21 Nat'l J. Const. L. 111 at 113 [Faraday].

¹²² *Ibid.*

¹²³ Ena Chadha & C. Tess Sheldon, "Promoting Equality: Economic and Social Rights for Persons

the equal value and worth of all human beings so that every individual or group feels self-respect and self-worth.¹²⁴ The recognition of inherent human dignity means “recognize[ing] the integral role of every individual as a worthy member of society, with his or her own unique and valuable abilities”¹²⁵, and as capable of contributing to society. This acknowledges disability as part of human diversity, and hence the state or the community can aim to accommodate persons with disabilities to enable them to become full members of society. Considering persons with disabilities as inferior and as less valuable or worthy than other human beings is the main reason for the unabated denial of fundamental rights, abuse, violence, mistreatment, negative attitudes towards and stereotypes of persons with disabilities.

Second, inclusive citizenship should also entail the value of personal autonomy or independence.¹²⁶ Individuals should have the freedom and autonomy to make decisions and choices concerning their lives.¹²⁷ This value is very important for persons with disabilities. Because of their disabilities or impairments, persons with disabilities are assumed to be dependent and to lack the capacity to make life choices in their daily activities. Family members, friends, and medical and rehabilitative professionals are assumed to have the capacity to make important life decisions and choices for persons with disabilities. The value of personal autonomy or independence thus promotes the capacity, self-

with Disabilities under Section 15” (2004) 16 Nat’l J. Const. L. 27 at 41-43 [Chadha & Sheldon].

¹²⁴ Ruth Lister, “Inclusive Citizenship: Realizing the Potential” (2007) 11:1 Citizenship Studies 49 at 50 [Lister, “Inclusive Citizenship”].

¹²⁵ Chadha & Sheldon, *supra* note 123 at 73.

¹²⁶ Lister, “Inclusive Citizenship”, *supra* note 124 at 50.

¹²⁷ Chadha & Sheldon, *supra* note 123 at 73.

determination and participation of individuals with disabilities in all matters concerning their lives.¹²⁸ However, this does not mean that persons with disabilities do not require any assistance or support to meet their needs. Rather, assistance, support or any other service should be provided to individuals with disabilities as of right, not as a charity or out of sympathy, in order to help them to live an autonomous and good life or to move towards attaining as much personal independence as possible.¹²⁹ This in turn may help realize the full membership of individuals with disabilities in society. Professor Carlos Ball discussed the concept of autonomy as a norm of justice to provide a philosophical foundation for an active governmental role in promoting rights and benefits for persons with disabilities:

It is impossible to lead a good human life in the absence of the freedom and opportunity to exercise personal autonomy, by which I mean the capability to make important life decisions and choices. That exercise, in turn, is impossible in the absence of basic human functional capabilities. For this reason, society is morally obligated to assist disabled individuals with those basic human functional capabilities without which it is impossible for anyone to lead an autonomous life.¹³⁰

Another significant value that full citizenship should incorporate is social inclusion or participation. Individuals should have the capacity to fully participate in all political, economic, social and cultural institutions of society.¹³¹ Social participation is significant for persons with disabilities since they are often segregated and excluded, as if they were not members of society. Efforts should

¹²⁸ *Ibid.* at 73.

¹²⁹ *Ibid.*

¹³⁰ Ball, *supra* note 97 at 635-636.

be made to eradicate the disabling barriers to social participation if individuals with disabilities are to fully and meaningfully participate in all aspects of life as full citizens.¹³²

In the international context, the concept of global citizenship emerges to provide an international interpretation of the notion of citizenship that emphasizes the status of membership in the international community. This global understanding of citizenship focuses on “the responsibilities of the more affluent nation states towards those on the global economic margins that lack the resources necessary to translate human rights (as defined by the UN to embrace economic, social and cultural rights) into effective citizenship rights.”¹³³ Understanding citizenship in its expanded sense is very significant for persons with disabilities. The responsibility of having international/state cooperation with the goal of allocating resources from the more affluent states to the less affluent states would hugely contribute to realizing the economic, social and cultural rights of persons with disabilities in developing countries. The following sub-section discusses how the principles of equality and discrimination may provide tools for realizing and advancing the full citizenship rights of persons with disabilities.

¹³¹ Devlin & Pothier, *supra* note 5 at 11.

¹³² Chadha & Sheldon, *supra* note 123 at 73-74.

¹³³ Lister, “Citizenship on the Margins”, *supra* note 117 at 9.

2.5. Disability and Concepts of Equality and Non-discrimination

2.5.1. Disability and Conceptions of Equality

Equality is one of the key political and legal tools that states may utilize to ensure and realize the full citizenship of persons with disabilities in society. Constitutional, national and international human rights instruments incorporate equality as one of the main principles for ensuring the basic human rights and fundamental freedoms of all persons. According to Gerard Quinn and Theresia Degener, the core premise of equality “is that all persons not only possess inestimable inherent self-worth but are also inherently equal in terms of self-worth, regardless of their difference.”¹³⁴ Defining the notion of equality is a very difficult task and it often raises a plethora of controversies and debates. One source of controversy is the distinction between two interpretations of the notion of equality: formal and substantive equality.¹³⁵

The notion of formal equality, which is also known as juridical equality, is centered on the principle of sameness. It asserts that all human beings are the same, and hence the law should give identical respect, protection and treatment to all.¹³⁶ This is based on the Aristotelian notion of equality, according to which

¹³⁴ Quinn & Degener, “The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform” in Gerard Quinn, 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) 13 at 16.

¹³⁵ For the distinction between formal and substantive equality, see also: Colleen Sheppard, *Litigating the Relationship between Equity and Equality*, (Study Paper prepared for the Ontario Law Reform Commission, 1993) at 4-5, online: McGill <http://people.mcgill.ca/files/colleen.sheppard/Litigating_Equity_Equality.pdf> [Sheppard, “Litigating”].

¹³⁶ Aart Hendriks, “The Significance of Equality and Non-Discrimination for the Protection of the Rights and Dignity of Disabled Persons” in Theresia Degener & Yolan Koster-Dreese, eds.,

“things that are alike should be treated alike, whereas things that are unlike should be treated unlike in proportion to their unalikehood.”¹³⁷ The understanding and interpretation of who is alike and who is different has shaped the development and meaning of the conception of equality.¹³⁸

Traditionally, equality was only meant for those who were characterized as equals and as “real human beings”. The right to equal treatment, therefore, was not extended to those who were considered different and unequal, such as women, blacks and the disabled.¹³⁹ In other words, difference was used to exclude and to deny entitlements and rights. In its modern sense, formal equality seeks to treat all persons similarly and to provide identical treatment for all regardless of human variations, such as race, sex, religion and age. It aims to distribute goods and services on the basis of individual merit and free competition.¹⁴⁰ According to this principle, all persons are entitled to the same rights, benefits and obligations of the law on an equal basis without any distinctions.¹⁴¹ However, human differences are not always irrelevant, and thus all persons may not receive identical treatment. Differential treatment on the bases of relevant human attributes might be justified and legitimate.¹⁴² Moreover, identical treatment may not always achieve meaningful and true equality for persons with disabilities and

Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments (Dordrecht, Boston & London: Martinus Nijhoff, 1995) 40 at 45-46 [Hendriks, “Significance of Equality”].

¹³⁷ As quoted in *ibid.* at 46.

¹³⁸ Rory O’Connell, “The Role of Dignity in Equality Law: Lessons from Canada and South Africa” (2008) 6 *Int’l J. Const. L.* 267 at 268.

¹³⁹ Fredman, *supra* note 73 at 201.

¹⁴⁰ Arlene B. Mayerson & Silvia Yee, “The ADA and Models of Equality” in Silvia Yee & Mary Lou Breslin, eds., *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, NY: Transnational, 2002) 283 at 287.

¹⁴¹ Hendriks, “Significance of Equality”, *supra* note 136 at 46-47.

other disadvantaged groups;¹⁴³ it could instead perpetuate existing group-based disadvantages.¹⁴⁴ This is the case, for instance, in situations where persons with disabilities cannot be autonomous and independent and cannot participate effectively as full citizens in their societies unless governments and societies make efforts to eliminate or reduce disadvantages and barriers.¹⁴⁵

The notion of substantive equality, which is also known as material equality, emerged later in the 1970's and 80's to remedy inequalities and disadvantages and to level the playing field for all members of society. Substantive equality includes elements of formal equality and of economic, social and cultural equality. Unlike formal equality, substantive equality seeks to distribute goods and services on the basis of need rather than merit. It acknowledges that human differences should be taken into account in order to achieve the right to equal treatment.¹⁴⁶ A society that does not accommodate individual and group differences cannot construct an equal and just society.¹⁴⁷ Proponents of substantive equality hence advocate for the elimination or reduction of barriers, such as environmental barriers, that impede an individual or a group's societal participation and inclusion.¹⁴⁸ The incorporation of this notion into human rights legislation and constitutional provisions enables laws to respond to the concrete needs of persons with disabilities and to translate those needs into

¹⁴² Hendriks, "Different Definition", *supra* note 11 at 213.

¹⁴³ Chadha & Sheldon, *supra* note 123 at 67-68.

¹⁴⁴ Sheppard, *supra* note 135 at 4.

¹⁴⁵ For more discussion on the interpretation of equality and identical treatment with respect to persons with disabilities under the *International Covenant of Economic, Social and Cultural Rights* (ICESCR), see: *General Comment* issued by the Committee on the ICESCR in 1994 *infra*.

¹⁴⁶ Hendriks, "Significance of Equality", *supra* note 136 at 48.

¹⁴⁷ Quinn & Degener, *supra* note 134 at 16.

legally enforceable rights. It would be possible to take measures in the form of affirmative action or reasonable accommodation, or both, to rectify the disadvantages persons with disabilities face in their day-to-day activities and to enable them to live independent lives as full citizens.

Nevertheless, heated debates and discussions have ensued regarding how substantive equality should be, what substantive values the notion of equality should promote, and to what extent human differences should be taken into account in the provision of equal treatment. For those who support a very limited consideration of differences, special measures are justified and legitimate only if their goal is to correct historic wrongs and to remedy existing inequalities and injustices of individuals and groups in society. Such measures may not be adequate to accommodate the day-to-day needs of persons with disabilities. Even after eliminating inequalities and injustices linked with disabilities, other measures may be necessary to eliminate or reduce the barriers and disadvantages that persons with disabilities face in their day-to-day activities. Accommodating persons with disabilities should therefore be a continuous and ongoing obligation of service providers since disability and its associated limitations, as well as environmental barriers, will continue to exist.¹⁴⁹

The strong interpretation of substantive equality thus unambiguously recognizes the duty to accommodate persons with disabilities in all cases to meet

¹⁴⁸ Hendriks, “Significance of Equality”, *supra* note 136 at 48.

¹⁴⁹ For further discussion on the concept of the duty to accommodate, see the next sub-section of this thesis.

their needs up to the point of undue hardship.¹⁵⁰ The purpose of the duty to accommodate is to make persons with disabilities full citizens by recognizing their right to full inclusion and participation in a barrier-free society in all aspects of life.¹⁵¹ This interpretation of equality recognizes obligations to remove existing barriers, to make accommodations to overcome barriers if their removal is impossible or unduly burdensome, or to prevent the creation of new and additional barriers.¹⁵² This not only creates equality of opportunity for persons with disabilities, but also ensures that they equally enjoy and exercise the rights, benefits and obligations given to the general public by legislation or by government.¹⁵³

The strong interpretation of substantive equality should be favored to ensure the effective and meaningful participation and inclusion of persons with disabilities in their societies and to enable them to enjoy and exercise their rights, benefits and obligations as full citizens with as much independence as possible.¹⁵⁴ At minimum, substantive equality should aim to respect the equal dignity and worth of all human beings, including persons with disabilities. It should also aim to eliminate the cycle of disadvantage and inequalities, such as stigma, stereotypes, exclusion, discrimination, benign neglect and abuse associated with disability, and to ensure the full participation, inclusion and independence of

¹⁵⁰ Lepofsky, "Discussion", *supra* note 44 at 168.

¹⁵¹ *Ibid.* at 168.

¹⁵² David M. Lepofsky, "Federal Court of Appeal De-Rails Equality Rights for Persons with Disabilities - Via Rail v. Council of Canadians with Disabilities and the Important Duty Not to Create New Barriers to Accessibility" (2006) 18 Nat'l J. Const. L. 169 at 181 [Lepofsky, "Federal Court"].

¹⁵³ Lepofsky, "Discussion", *supra* note 44 at 168.

¹⁵⁴ Chadha & Sheldon, *supra* note 123 at 73-74 & 77.

persons with disabilities in society.¹⁵⁵ Besides incorporating the values of a strong substantive equality into legislation and policies,¹⁵⁶ those who are involved in the application and interpretation of laws and policies in disability cases, such as judges, administrative officers and lawyers, should have an awareness and understanding of equality that could advance a true and meaningful equality for persons with disabilities.

2.5.2. *Disability and the Concept of Non-discrimination*

The concept of non-discrimination is closely related to the notion of equality. It aims to ensure and protect basic human rights and fundamental freedoms by prohibiting discrimination on the basis of irrelevant group characteristics, and it may thereby realize the full citizenship of persons with disabilities. Human rights instruments recognize the significance of the principle of non-discrimination and incorporate it as one of the bedrocks of human rights legislation. At times drawing distinctions between the principles of non-discrimination and equality is difficult since the idea of equality can manifest itself through the realization of non-discrimination.¹⁵⁷

Discrimination involves harmful or prejudicial distinctions. It means treating an individual or a group unfairly or less favorably than others on the basis

¹⁵⁵ Fredman, *supra* note 73 at 214.

¹⁵⁶ Anne-Marie Mooney Cotter, *Disability: An International Legal Analysis of Disability Discrimination* (Burlington, England: Ashgate Publishing Ltd, 2007) at 1.

¹⁵⁷ Hendriks, "Significance of Equality", *supra* note 136 at 54.

of selected human attributes that are irrelevant in a given context.¹⁵⁸ As one scholar pointed out:

Not every human attribute qualifies as a prohibitive ground for discrimination. The principle of non-discrimination primarily seeks to prevent the unfair or less favorable treatment of people because of immutable characteristics that are either inherent or uncontrollable (such as sex and race), or characteristics which only can be changed or suppressed at the detriment of one's identity (such as religion, political opinion and sexual preference).¹⁵⁹

Human rights instruments often provide a list of grounds for which discrimination is prohibited.¹⁶⁰ Several national and international instruments have recently included disability as one of the prohibited grounds for discrimination, in many cases including both physical and mental disabilities.¹⁶¹

In some cases, non-discrimination requires the equal treatment of persons with disabilities.¹⁶² In other cases, more favorable treatment to benefit disadvantaged groups may be justified if such distinctions have legitimate objectives. Objectives or purposes such as addressing and eliminating group-based social inequalities, segregation and exclusion, and enforcing equal membership in society can usually be viewed as justified or legitimate.¹⁶³

¹⁵⁸ Hendriks, "Different Definition", *supra* note 11 at 195.

¹⁵⁹ *Ibid.* at 209.

¹⁶⁰ For a detailed discussion on how discrimination is defined in international human rights instruments, see the chapter on the rights of persons with disabilities in international law. However, I do not comprehensively discuss definitions in national legislation.

¹⁶¹ John Hasnas, "Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination" 02-28 *Law and Economics Working Paper Series* at 8, online: <<http://faculty.msb.edu/hasnasj/gtwebsite/EqualPrintVersion.pdf>>.

¹⁶² Hendriks, "Different Definition", *supra* note 11 at 213.

¹⁶³ Samuel R. Bagenstos, "Rational Discrimination, Accommodation, and the Politics of Disability Civil Rights" (2003) 89 Va. L. Rev. 825 at 839 [Bagenstos].

International law and several national laws have also recognized the provision of reasonable accommodations to persons with disabilities as one of the basic elements of the principle of non-discrimination.¹⁶⁴ Failure to provide reasonable accommodations thus constitutes discrimination against persons with disabilities.¹⁶⁵

Discrimination may be either direct or indirect,¹⁶⁶ and it may either affect individuals or be systemic in nature. Direct discrimination, which is also known as disparate treatment discrimination, is harmful discrimination on prohibited grounds of group characteristics caused intentionally by facially discriminatory laws, rules, standards or procedures.¹⁶⁷ Direct discrimination may contribute to systemic discrimination affecting members belonging to a single or several categories “when problems of direct discrimination are pervasive, not taken seriously, and left unremedied within an institution.”¹⁶⁸ The following is an example of direct discrimination: If an employer denies the application of a qualified person with a disability due to false stereotypes and misperceptions about the capacity of persons with disabilities as a whole, but the particular person’s disability is irrelevant for the performance of the job’s essential

¹⁶⁴ For example, see Art.2 of the *Convention on the Rights of Persons with Disabilities*, adopted by General Assembly Resolution 61/106 on 13 December 2006 (entered into force 3 May 2008) [CRPD].

¹⁶⁵ *Ibid.*

¹⁶⁶ Steven L. Willborn, “Proof of Discrimination in the United Kingdom and the United States” (1986) 5 C.J.Q. 321 at 321 [Willborn]. The term “direct discrimination” is used in the United Kingdom, while “disparate treatment discrimination” is used in the United States.

¹⁶⁷ *Ibid.*

¹⁶⁸ Colleen Sheppard, “Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment” (1995) 3 Can. Lab. & Employ. L.J 249 at 258.

functions, the individual has been subjected to direct discrimination.¹⁶⁹ For this type of discrimination, “proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.”¹⁷⁰

Indirect discrimination, which is also known as disparate impact discrimination¹⁷¹ or adverse impact/effect discrimination, is caused by facially neutral laws, rules, criteria, procedures or practices that seemingly apply equally to all but that have harmful discriminatory impacts or effects on members of certain groups.¹⁷² For this type of discrimination, “the effect of the law or policy, not its intent, determines whether or not discrimination has occurred.”¹⁷³ Adverse effects discrimination may also be a component of systemic discrimination in the sense that the effects are pervasive and institutionalized, affecting the whole group or individuals of certain groups.¹⁷⁴ As Professor Dianne Pothier explained, a substantial degree of discrimination against persons with disabilities occurs in instances of adverse impact discrimination.¹⁷⁵

2.5.3. The Concepts of Reasonable Accommodation and Undue Hardship

As noted above, reasonable accommodation is an integral component of

¹⁶⁹ Lepofsky, “Discussion”, *supra* note 44 at 167.

¹⁷⁰ Bagenstos, *supra* note 163, at 834.

¹⁷¹ Willborn, *supra* note 166, at 321. The term “indirect discrimination” is used in the United Kingdom, while “disparate impact discrimination” is used in the United States.

¹⁷² Lepofsky, “Discussion”, *supra* note 44 at 165. See also: Dianne Pothier, “Tackling Disability Discrimination at Work: Toward a Systemic Approach” (2010) 4: 1 McGill J. L. & Health 17 at 22-24 [Pothier, “Tackling”].

¹⁷³ Sheppard, “Litigating”, *supra* note 135 at 6.

¹⁷⁴ *Ibid.* at 7.

¹⁷⁵ Pothier, “Tackling”, *supra* note 172 at 22-23.

equality and non-discrimination for persons with disabilities. If persons with disabilities are to enjoy and exercise their full citizenship and meaningful equality, the duty to accommodate persons with disabilities should be well recognized as of right in all cases up to the point of undue hardship.¹⁷⁶ Recognition of the duty to accommodate is vital to advance a meaningful equality for persons with disabilities. As David Lepofsky emphasized, “Many, if not most of the barriers impeding people with disabilities could be removed or redressed if reasonable steps were taken to accommodate their needs.”¹⁷⁷

Such recognition can serve as an important tool for translating the needs of persons with disabilities into legally enforceable rights. Accommodations do not seek to create advantages for persons with disabilities over other groups of people. Rather, they aim to level the playing-field and ensure meaningful equality and full citizenship for persons with disabilities. Lepofsky identified three components of the right to be accommodated:

First, where existing barriers impede persons with disabilities from fully participating in an opportunity covered by the applicable equality guarantee, there is a duty to remove that barrier. Second, if immediate removal of the barrier is shown to be impossible, there is then a duty in the interim to make individual accommodations so an otherwise impeded person with a disability can overcome or circumvent the barrier and achieve full participation in the opportunity. Third, there is an ongoing obligation to prevent new barriers from being created now or in the future. This effectively requires a legislature, government or other body that is required by law to respect disability equality when they set about to design or implement a new law, program or other activity to identify and take into account the needs of persons with disabilities for full

¹⁷⁶ Lepofsky, “Discussion”, *supra* note 44 at 168.

¹⁷⁷ *Ibid.* at 166.

participation.¹⁷⁸

Nowadays, the failure to provide reasonable accommodations for persons with disabilities is recognized as a form of discrimination against which persons with disabilities should be protected.

Jurisdictions use different terminologies to convey the concept of reasonable accommodation. For example, while reasonable accommodation is employed in the US, the UK refers to “reasonable adjustments”, Finland uses “reasonable steps”, and Ireland and France use “appropriate measures” in their disability or labor-related legislation.¹⁷⁹ The *Convention on the Rights of Persons with Disabilities (CRPD)* uses several of these terminologies in its provisions. Although it only provides a definition of reasonable accommodation,¹⁸⁰ it also employs “appropriate measures”, “appropriate steps”, “necessary measures”, “specific measures” and “measures” in its different provisions, perhaps with varying implications.¹⁸¹

An accommodation is generally any alteration of a physical structure, premise, facility, good or service to meet the needs of persons with disabilities.¹⁸² In other words, “a reasonable accommodation is a modification or adjustment that is effective in enabling a person with disabilities to participate in society on an

¹⁷⁸ *Ibid.* at 169.

¹⁷⁹ Lisa Waddington, “When It is Reasonable for Europeans to Be Confused: Understanding When a Disability Accommodation is Reasonable from a Comparative Perspective” (2008) 29 *Comp. Lab. L. & Pol’y J.* 317 at 321 [Waddington].

¹⁸⁰ *CRPD*, *supra* note 164, Art.2.

¹⁸¹ *Ibid.* Arts. 4-30.

¹⁸² Hendriks, “Significance of Equality”, *supra* note 136 at 58.

equal footing with non-disabled persons.”¹⁸³ In the context of employment, for example, reasonable accommodation may include providing adaptive equipment, altering the physical premises, changing job duties, altering work schedules or providing part-time work.¹⁸⁴ An accommodation can be either individualized or systemic; the former seeks to address the needs of a particular individual with a disability, while the latter aims to eliminate discrimination against persons with disabilities as a whole by addressing their diverse needs and concerns.¹⁸⁵ For example, as a solution for buildings or manufacturing products that are inaccessible to persons with disabilities, “universal design seeks to design all products, buildings and interiors to be used by all people to the greatest extent possible regardless of their physical abilities.”¹⁸⁶

The duty to accommodate is an ongoing obligation that may be tailored to the needs of specific individuals with disabilities.¹⁸⁷ It would not cease even if a meaningful equality were theoretically achieved for persons with disabilities. Since disability cannot be eliminated, the limitations associated with it and in relation to the environment as a whole will continue to exist. Accommodations without time limits are therefore needed in order to overcome these limitations and to enable persons with disabilities to continuously maintain their participation and full citizenship in their societies.

However, determining which accommodations are reasonable may give

¹⁸³ *Ibid.*

¹⁸⁴ David M. Lepofsky, “The Duty to Accommodate: A Purposive Approach” (1992) 1 Can. Lab. L. J. 1 at 4-5 [Lepofsky, “Duty”].

¹⁸⁵ Pothier, “Tackling”, *supra* note 172 at 26-27.

¹⁸⁶ *Ibid.* at 27.

rise to controversy. Reasonableness is firstly and ordinarily interpreted as a qualifier of the requirement to accommodate. Reasonable accommodation implies an accommodation which does not result in excessive costs or difficulties; otherwise, the accommodation becomes unreasonable.¹⁸⁸ The second interpretation of reasonableness is as a modifier to the quality or nature of the accommodation itself. In other words, reasonableness refers to the quality and effectiveness of the accommodation.¹⁸⁹ In both interpretations, a disproportionate burden or undue hardship is therefore a defense justifying a lack of accommodation or determining the quality of the accommodation requested. Similar terminologies, such as “unjustifiable or unreasonable hardship; unreasonable disruption; unreasonable requirement; and unjustified, unreasonable or significant costs”,¹⁹⁰ are also used in different jurisdictions to convey the concepts of disproportionate burden or undue hardship.

In order to assess the reasonableness of an accommodation, various factors may be taken into consideration. Although the factors may vary across jurisdictions, factors to consider include: the nature and cost of the accommodation; the financial resources of the accommodation provider; the size of the business and the number of persons employed by the provider; and the accommodation’s effects on the expenses and resources or on the operations of

¹⁸⁷ Lepofsky, “Duty”, *supra* note 184 at 4-5.

¹⁸⁸ Waddington, *supra* note 179 at 321.

¹⁸⁹ *Ibid.* at 322.

¹⁹⁰ United Nations Department of Economic and Social Affairs, “The Concept of Reasonable Accommodation in Selected National Disability Legislation” (Background conference document prepared for the 7th 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 in New York, 16 January-3 February 2006 [UN Economic Dept.].

the provider.¹⁹¹ The *CRPD* seems to convey both interpretations of reasonable accommodation by defining it as a necessary and appropriate accommodation that should not result in a disproportionate or undue burden or hardship.¹⁹²

Although the interpretation of the principle of reasonable accommodation could be controversial or confusing, I argue that it should be effective but subject to undue hardship. Reasonable accommodation should be made available to persons with disabilities as of right in all circumstances in their day-to-day activities to enable them as much as possible to participate effectively, independently and as full citizens.¹⁹³

Who should cover the costs of providing reasonable accommodations also warrants discussion. Evidence from an empirical study in the US in the employment context showed that 72% of the requested accommodations required no cost at all.¹⁹⁴ With regards to physical infrastructure, premises, transportation equipment, goods and so on, the costs of accommodations are very small if the required accommodations are incorporated into the design and production of the materials rather than having to retrofit them.¹⁹⁵ In the case of buildings, for example, it has been proven that “providing full access facilities from the outset has additional costs of approximately 1%. However, the cost of making adaptations after a building is completed is far greater; it can rise up to 5% or

¹⁹¹ *ADA*, *supra* note 75, Sec. 1001 at para.10 (B). See also the discussion on the concepts of reasonable accommodation and undue hardship of selected countries in *ibid*.

¹⁹² See the definition of reasonable accommodation in Art.2 of the *CRPD*, *supra* note 164.

¹⁹³ Chadha & Sheldon, *supra* note 123 at 73-74 and 77.

¹⁹⁴ Michael Ashley Stein, “Empirical Implications of Title I” (2000) 85 Iowa L. Rev. 1671 at 1674. This figure is based on an “examination of some 500 accommodations made by Sears, Roebuck and Co. from 1978 to 1997.”

more of total cost depending on the modification of the architectural features of the building.”¹⁹⁶ Not every type of accommodation necessarily entails huge expenses. Many accommodations require no or very minimum costs, especially if efforts are made to incorporate them in the design of products and services. However, there are still costs involved, and issues may arise as to who should bear these costs.

In the employment context, employers may be required to provide the accommodations. However, in countries where small-scale employment is the dominant sector, accommodations that require even minimal costs would not be made as they could impose undue hardship on small-scale employers. Moreover, employment is only one aspect of life; the need to accommodate persons with disabilities extends beyond the area of employment to all aspects of life. Hence, I argue that the government should primarily be responsible in all circumstances for ensuring that reasonable accommodations are provided to persons with disabilities up to the point of undue hardship to enable them live in their societies as full citizens. Governments should also ensure that physical infrastructures, buildings, transportation and other facilities are accessible to and useable by persons with disabilities either by requiring accommodations to be incorporated into material design and production processes to prevent the creation of new barriers, or by requiring owners of facilities to retrofit their structures to remove barriers as much as possible up to the point of hardship.

¹⁹⁵ Zola, *supra* note 90 at 7-8.

¹⁹⁶ Harold Snider & Nazumi Takeda, *Design for All: Implications for Bank Operations*

The more access persons with disabilities have to public and private facilities, the more opportunities they have to move towards achieving independence, inclusion and full citizenship. Nevertheless, litigation based on individual complaints is time and energy consuming, is very costly, and has uncertain outcomes. It cannot bring about meaningful and immediate remedies to eliminate systemic inequalities and disadvantages that persons with disabilities face as a group in all aspects of life. Hence, governments should undertake proactive initiatives which are “essential to remedying the systemic and pervasive inequalities experienced by disadvantaged groups in society.”¹⁹⁷ This would help make legislative, structural and institutional changes with the goal of accommodating socially disadvantaged groups, instead of focusing on measures that simply accommodate individuals while retaining existing systemic barriers.¹⁹⁸

Determining the comparator is another issue in equality and non-discrimination claims by disadvantaged groups in general, and by persons with disabilities in particular. In litigation, claims for the right to equality or non-discrimination must be substantiated in comparison with an appropriate comparator. Individuals cannot claim that they have been discriminated against without comparing their situation with that of a standard person.¹⁹⁹ Finding the appropriate comparator in the context of persons with disabilities may be

(Washington, DC: World Bank, October 2008) at 4, online: World Bank <http://siteresources.worldbank.org/DISABILITY/Resources/Universal_Design.pdf>.

¹⁹⁷ Sheppard, “Litigating”, *supra* note 135 at iii.

¹⁹⁸ See also the full discussion on the systemic approach to accommodation in Pothier, “Tackling”, *supra* note 172.

¹⁹⁹ Hendriks, “Different Definition”, *supra* note 11 at 211.

controversial: should the comparator be a non-disabled person, a disabled person with the same type of disability, or a different group of persons with disabilities (since disabilities are diverse)?²⁰⁰

Very often, accommodations that are necessary for persons with disabilities may not be necessary for non-disabled individuals. Hence, the lack of availability of such accommodations for non-disabled individuals cannot in any way justify the failure to provide such accommodations for individuals with disabilities. For instance, in the context of employment, alterations to the workplace may not be of much use to non-disabled employees. On the other hand, the failure to provide an accommodation or a social service to one group of persons with disabilities cannot justify the failure to provide an accommodation to another group. It can be argued that if there is a duty to accommodate persons with disabilities in order to meet their needs, it is not necessary to undertake a discrimination analysis in order to provide the requested accommodation. Adopting the non-disabled group or another group of persons with disabilities as a comparator group in analyzing equality and non-discrimination claims of persons with disabilities reinforces formal equality's "similarly situated" test, which does not accommodate the needs and differences of persons with disabilities.²⁰¹

If a comparator is required to determine whether a requested accommodation should be made, the comparator should not be the non-disabled or other groups of persons with disabilities, but rather an ideal citizen, a citizen

²⁰⁰ See the discussion on "appropriate comparators" in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 at paras. 49-60.

who enjoys and exercises fundamental human rights and freedoms with dignity, respect, self-worth and independence and who meaningfully and effectively participates in society. The ideal citizen should not be interpreted as reinforcing the stereotyped able-bodied person who enjoys and exercises rights in exclusion to others, but rather should be imagined as the citizen who is a full-fledged member of the community. Thus, claims for accommodations, and in turn claims for full citizenship by persons with disabilities, should be analyzed contextually from the perspective of the individual claimants.²⁰²

The analysis should focus on the significance and reasonableness of the accommodation sought. Subject to reasonable limits, the accommodations and other services provided to individuals with disabilities should be geared towards making these individuals participate independently and meaningfully as full members and citizens of society. To make a comparison with an image of ideal citizenship would provide an aspiration and would help measure progress towards achieving this goal.²⁰³ Moreover, it can serve as an instrument to translate the needs of individuals with disabilities into legally enforceable rights through which they may become full members and citizens of their societies. It can also serve as an inspiration to take proactive measures to eradicate structural barriers and other systemic inequalities persons with disabilities face in all aspects of life: civil, political, economic, social and cultural. Although the challenges and problems that persons with disabilities face in their daily lives are a collective experience,

²⁰¹ Faraday, *supra* note 121 at 124-125.

²⁰² *Ibid.*

²⁰³ Lipset, *supra* note 119 at x.

remedies awarded to individual complainants in litigation cannot bring about a transformation in the existing systemic inequalities and disadvantages of persons with disabilities. By working with the image of ideal citizenship, proactive measures can be initiated with the aim of ensuring the full citizenship and membership of persons with disabilities in their societies.

2.6. Conclusion

Persons with disabilities are often subjected to abuse, violence, mistreatment and degradation of their fundamental rights and freedoms. They are denied access to health care services, they are amongst the least-educated and the most under-employed or unemployed, and they constitute a large proportion of the people living in poverty. Overall, persons with disabilities are relegated to second class citizenship.²⁰⁴

This chapter inquired into how persons with disabilities may attain the full status of citizenship, holding and exercising all the rights of citizenship. The disability models presented in this chapter mainly explore what disability is and how it is caused from different perspectives. I argue that the concept of citizenship can provide an alternative justification for establishing the responsibility to dismantle the barriers encountered by persons with disabilities.

Approaching disability from a full citizenship perspective seeks to meet

²⁰⁴ For various statistics on persons with disabilities, see: UN Enable Factsheet, *supra* note 111.

the needs of persons with disabilities in all aspects of life by imposing the duty to accommodate primarily on the state, unless the required accommodation is unreasonable or results in disproportionate or undue hardship. Otherwise, the failure to accommodate will simply perpetuate the exclusion and marginalization of persons with disabilities in society.²⁰⁵ Recognizing the failure to provide reasonable accommodations as a form of prohibited discrimination is necessary. The *Convention on the Rights of Persons with Disabilities (CRPD)* of 2006, which I will examine in the ensuing chapter, has adopted this approach.²⁰⁶

²⁰⁵ Faraday, *supra* note 121 at 124-125.

²⁰⁶ *CRPD*, *supra* note 164, Art. 2. This Article defines the failure to provide reasonable accommodation as discrimination.

CHAPTER THREE:

INTERNATIONAL LAW AND THE RIGHTS OF PERSONS WITH DISABILITIES

3.1. Introduction

December 13, 2006 was a very special day for disabled persons' organizations (DPOs) and for the almost one billion persons with disabilities throughout the world.¹ It was the day on which the UN General Assembly, by resolution 61/106, unanimously adopted the *Convention on the Rights of Persons with Disabilities (CRPD)* and its *Optional Protocol* to recognize, protect and promote the rights and dignity of persons with disabilities.² The outgoing Secretary General of the UN, Kofi Annan, referred to the adoption of the *CRPD* as "the dawn of a new era -- an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long"; he hailed the *CRPD* as "a remarkable and forward-looking document."³

Drafting and negotiating the *CRPD* took almost five years, culminating in the adoption of a treaty. In December of 2001, the Mexican Government proposed

¹ This figure is based on the estimate in the World Health Organization (WHO) and World Bank's 2011 disability report. See: World Health Organization & Worldbank, *World Report on Disability 2011* (Geneva: United Nations, 2011) at 29, online: WWW.WHO.INT/

<http://www.who.int/disabilities/world_report/2011/en/index.html> [WHO World Report].

² UN Enable, *Latest Developments of the Convention on the Rights of Persons with Disabilities and Optional Protocol*, online: UN Enable <<http://www.un.org/esa/socdev/enable/>> [UN Enable, "Latest Developments"]

to the UN General Assembly the establishment of an ad hoc UN committee to study the adoption of a comprehensive and integral international convention for the purpose of protecting and promoting the rights of persons with disabilities.⁴ Accordingly, on December 19, 2001, the UN General Assembly, in its sixty-first session, passed resolution 56/168 to establish an Ad Hoc Committee “open to the participation of all Member States and observers to the UN, to consider proposals for a comprehensive [international disability convention] based on a holistic approach in the work done in the fields of social development, human rights and non-discrimination.”⁵ The Committee took on the tasks and responsibilities provided for in the UN resolution. After intensively developing and deliberating every detail of the draft text and the substance of the *Convention* during the eight sessions of the Committee over five years, the Ad Hoc Committee approved the final draft text of the *CRPD* in December 2006.⁶ The UN General Assembly adopted the *CRPD* and its *Optional Protocol* on December 13, 2006.⁷

The *CRPD* and its *Protocol* were opened for signature and ratification by state parties and regional integration organizations on March 30, 2007. Within a

³ UN Secretary-General, *Secretary General Hails Adoption of Landmark Convention on Rights of People with Disabilities*, 13 December 2006, SG/SM/10797, HR/4911, L/T/4400, online: United Nations <<http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm>> .

⁴ Tracy R. Justesen & Troy R. Justesen, “An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals with Disabilities: Why the United States Refuses to Sign This UN Convention” (2007) 14:2 Hum. Rts. Brief 36 at 38 [Justesen & Justesen].

⁵ Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *Final Report – Annex: Draft Resolution on the Convention on the Rights of Persons with Disabilities*, A/61/611, Distr.: General, 6 December 2006, online: UN Enable <http://www.un.org/esa/socdev/enable/rights/ahcfinalrepe.htm>.

⁶ Anna Lawson, “The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?” (2007) 34 Syracuse J. Int’l L. & Com. 563 at 563 [Lawson].

⁷ UN Enable, “Latest Developments”, *supra* note 2.

year and three days, 126 parties had signed the *CRPD* and seventy-one had signed the Protocol; twenty parties had ratified the *CRPD* and thirteen had ratified both the *Convention* and the *Protocol*.⁸ The *CRPD* and its *Protocol* entered into force on May 3, 2008 since the required number of state parties had ratified both instruments on April 3, 2008.⁹ For the first time in history, persons with disabilities joined the categories of individuals whose rights are “specifically and explicitly” recognized and protected under the international human rights system.

The passage of this disability-based international human rights treaty was not an easy task. Human rights organizations, DPOs and individual human rights advocates had waited for nearly two decades for such an international convention to come to fruition.¹⁰ In this chapter, I outline the key principles and rights recognized under the *CRPD*. I also show how the *CRPD* ensures and promotes the full citizenship of persons with disabilities, thereby affirming their equal worth and dignity and their independence and inclusion in society. I begin by reviewing the status of disabled persons at the international level prior to the adoption of the *CRPD*.

⁸ *Ibid.* On the first day of the opening ceremony, 82 and 44 parties signed the *CRPD* and its *Optional Protocol* respectively. The UN announced that this was the greatest number of parties to sign an international treaty at its opening ceremony.

⁹ *Ibid.* Twenty state parties had to ratify the Convention to bring it into force and ten state parties had to ratify the Protocol. The Convention entered into force thirty days after the twentieth instrument of ratification was deposited. Ratifications made by regional integration organizations are not counted for these purposes.

3.2. Protections of Disability Rights under International Law Prior to the Adoption of the *Convention on the Rights of Persons with Disabilities*

International law is composed of binding rules to which state parties consent to be bound, such as treaties and protocols, and nonbinding rules, such as general comments made by treaty monitoring bodies and declarations or resolutions adopted by the UN General Assembly. This section discusses how the current international legal framework treats disabled persons. Regional developments are not discussed in this chapter, although they are also part of the international legal framework.

3.2.1. General International Human Rights Treaties and Disability Protections

When the UN was established in 1945, its main purpose and objective (as declared in its constituting act, the *Charter of the United Nations*) was to maintain international peace and security.¹¹ Another core purpose asserted in the *UN Charter* is the “promot[ion] and encourage[ment of] respect for human rights and fundamental freedoms for all”.¹² The *Charter* affirms that as an international organization, the UN promotes and encourages “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹³ Disability is not listed as a prohibited

¹⁰ Don MacKay, “The United Nations Convention on the Rights of Persons with Disabilities” (2007) 34 *Syracuse J. Int’l L. & Com.* 323 at 323 [MacKay].

¹¹ *Charter of the United Nations*, signed in San Francisco on 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force 24 October 1945), Art. 1(1) & Preamble [*UN Charter*].

¹² *Ibid.* Art. 1(3).

¹³ *Ibid.* Art. 55 C, Preamble & Art. 1(3).

ground of discrimination. However, the *Charter* recognizes the universality of human rights and fundamental freedoms and the ideal that all human beings should enjoy them without discrimination.¹⁴ The Preamble of the *Charter* reinforces the universality of human rights by reaffirming “faith in fundamental human rights” and “in the dignity and worth of the human person.”¹⁵ By implication, as members of the human family, disabled persons have the right to enjoy such human rights and fundamental freedoms.

The UN has adopted multiple international human rights instruments through its General Assembly. The *Universal Declaration of Human Rights* of 1948 (*UDHR*), the *International Covenant on Civil and Political Rights* of 1966 (*ICCPR*) and the *International Covenant on Economic, Social and Cultural Rights* of 1966 (*ICESCR*) are together known as the International Bill of Human Rights.¹⁶ The first UN international human rights instrument was the *UDHR*. This declaration contains a diverse range of human rights, from civil and political rights to economic, social and cultural rights.¹⁷ Although this declaration is by nature a nonbinding law, the principles it contains have gained the status of international customary law to which all states are obligated to adhere.¹⁸ The *ICCPR* contains a range of civil and political rights. The *ICESCR* embodies a

¹⁴ Lawrence O. Gostin & Lance Gable, “The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health” (2004) 63 Md. L. Rev. 20 at 31 [Gostin & Gable].

¹⁵ *UN Charter*, *supra* note 11, Preamble.

¹⁶ Theresia Degener, “Disability and Freedom: The International Covenant on Civil and Political Rights (ICCPR)” in Gerard Quinn, et al. eds., *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 at 53 [Degener, “Disability and Freedom”].

¹⁷ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948) [*UDHR*].

range of economic, social and cultural rights, which are not covered in the *ICCPR*.¹⁹

All three instruments of the International Bill of Rights are universal in their scope in the sense that they can technically be applied to all human beings without discrimination.²⁰ In their Preambles, these instruments recognize that all members of the human race have “inherent dignity and [...] equal and inalienable rights.”²¹ The *UDHR* further affirms that “all human beings are born free and equal in dignity and rights”²²; it emphatically proclaims that the human rights it embodies are “a common standard of achievement for all peoples and all nations.”²³ None of these international human rights instruments clearly and specifically provides for any rights of persons with disabilities or lists disability or any related term as a factor of prohibited discrimination to entitlements of the fundamental human rights and freedoms.

Article 2 of the *ICCPR* states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without

¹⁸ Arlene S. Kanter, “The Globalization of Disability Rights Law” (2003) 30 *Syracuse J. Int’l L. & Com.* 241 at 252-253 [Kanter].

¹⁹ Gerard Quinn & Theresia Degener, “Building bridges from ‘soft law’ to ‘hard law’: The relevance of the United Nations human rights instruments to disability” in Gerard Quinn, et al. eds., *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) 47 at 47 [Quinn & Degener, “Building Bridges”].

²⁰ Michael Ashley Stein, “Disability Human Rights” (2007) 95 *Cal. L. Rev.* 75 at 79 [Stein].

²¹ *UDHR*, *supra* note 17; *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. No. 16 at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 March 1976) [*ICCPR*]; *International Covenant on Economic, Social and Cultural Rights*, GA Res.2200A (XXI), 21 UN GAOR Supp. No. 16 at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 January 1976) [*ICESCR*].

²² *UDHR*, *supra* note 17, Art. 1.

distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁴ It can be argued that, although there is no explicit mention of disability in the texts of these instruments, the phrase “other status” may include disability as a factor; discrimination on account of disability is thus prohibited under the international instruments. Moreover, the words “everyone”, “no one” and “all” that appear in the entitlements and in the non-discrimination clauses throughout these instruments may indicate that the human rights and fundamental freedoms recognized in these texts are also meant for persons with disabilities. The *UDHR*, for example, states that “all are equal before the law and are entitled without any discrimination to equal protection of the law.”²⁵ Other articles also provide that everyone has the right to life²⁶, work²⁷ and education.²⁸

Out of these three instruments, the only article that mentions disability is Article 25 of the *UDHR*, which pertains to social security. This article provides that “everyone has the right [...] to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”²⁹ This depiction of “disabled persons as dependents of social security and welfare, and in need of segregated services and

²³ *Ibid.* Preamble.

²⁴ *ICCPR*, *supra* note 21, Art.2 (1). See also similar text in: *UDHR*, *supra* note 17, Art. 2 and *ICESCR*, *supra* note 21, Art. 2(2).

²⁵ *UDHR*, *supra* note 17, Art. 7. See also: *ICCPR*, *supra* note 21, Art. 26.

²⁶ *ICCPR*, *supra* note 21, Art. 6(1).

²⁷ *ICESCR*, *supra* note 21, Art. 6.

²⁸ *UDHR*, *supra* note 17, Art. 26(1). See also: *ICESCR*, *supra* note 21, Art. 13.

²⁹ *UDHR*, *supra* note 17, Art. 25(1).

institutions”³⁰ prevailed in the international human rights treaty system until the 1970’s; it reflects the bio-medical model of disability, which views disabled persons as “individuals with medical problems”.³¹

Another universal international human rights treaty is the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*. This *Convention* was adopted by the UN General Assembly in 1984 and came into force in June of 1987.³² Although the *CAT* aims to protect individuals from a specific human rights violation, it is general and universal in character since its provisions apply to all members of the human family without distinction.³³ Hence, it could be of very great importance and relevance to disabled persons in protecting their dignity and physical integrity. Many individuals throughout the world become disabled as a result of torture and cruel and inhumane treatment and punishment³⁴ committed by governments. The *CAT* could also be relevant to persons who are institutionalized because of their disabilities and are exposed to cruel and inhumane treatment and punishment within institutions.³⁵

³⁰ Theresia Degener & Gerard Quinn, “A Survey of International, Comparative and Regional Disability Law Reform” in Silvia Yee & Mary Lou Breslin, eds., *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, NY: Transnational Publishers, 2002) 3 at 12.

³¹ *Ibid.*

³² *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 39/46, Annex, 39 UN GAOR, Supp. No. 51 at 197, UN Doc. A/39/51 (1984), (entered into force 26 June 1987) [CAT].

³³ Stein, *supra* note 20 at 81. See also: *UDHR*, *supra* note 17, Art. 5; *ICCPR*, *supra* note 21, Art. 7. clearly articulate that “no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.”

3.2.2. Specific International Human Rights Treaties and Disability Protections

There are a number of specific human rights treaties at the international level that are relevant to the rights of persons with disabilities. They are specific in the sense that they focus on the human rights and fundamental freedoms of particular or limited categories of persons throughout the world who are exposed to “double discrimination” because of their membership in specific groups, such as racial and ethnic groups³⁶, women³⁷, children³⁸, migrant workers³⁹ and general employees.⁴⁰

The convention with respect to race and ethnicity is the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, which was adopted by the UN General Assembly in 1965 and entered into force on January 4, 1969. This *Convention* aims to ensure understanding and respect for the dignity of the person and for all races without any distinctions. The *ICERD* requires state parties to take all necessary measures to eliminate all forms and manifestations of discrimination⁴¹ based on “race, color, descent, or national or

³⁴ Degener, “Disability and Freedom”, *supra* note 16 at 54.

³⁵ Quinn & Degener, “Building Bridges”, *supra* note 19 at 47-48.

³⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res. 2106 (XX), Annex, 20 UN GAOR Supp. No. 14 at 47, UN Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 January 1969) [*ICERD*].

³⁷ *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res. 34/180, 34 UN GAOR Supp. No. 46 at 193, UN Doc. A/34/46 (entered into force 3 September 1981) [*CEDAW*].

³⁸ *Convention on the Rights of the Child*, GA Res. 44/25, Annex, 44 UN GAOR Supp. No. 49 at 167, UN Doc. A/44/49 (1989), (entered into force 2 September 1990) [*CRC*].

³⁹ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res. 45/158, Annex, 45 UN GAOR Supp. No. 49A at 262, UN Doc. A/45/49 (1990), (entered into force 1 July 2003) [*ICPRMW*].

⁴⁰ International Labor Organization, *Discrimination (Employment and Occupation) Convention*, ILO General Conference, 42 Sess. (ILO No. 111), 362 U.N.T.S. 31 (entered into force 15 June 1960).

⁴¹ *ICERD*, *supra* note 36, Arts. 2-7.

ethnic origin”⁴² in the “recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”⁴³

With regards to women, the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* was adopted by the UN General Assembly in 1979 and came into effect on September 3, 1981. The provisions of *CEDAW* ensure the equality of women with men and oblige state parties to take all appropriate measures to eliminate and prevent all forms of discrimination against women in their civil, political, economic, social and cultural lives.⁴⁴

With respect to children, the *Convention on the Rights of the Child (CRC)* was adopted by the UN General Assembly in 1989 and entered into force on September 2, 1990. The *CRC* ensures the human rights and fundamental freedoms of children without discrimination of any kind by particularizing the rights provided under the *ICCPR* and the *ICESCR* to their needs.⁴⁵ A similar convention dealing with the rights of migrant workers, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW)* was adopted by the UN General Assembly in 1990 and came into force on July 1st, 2003.⁴⁶ Another convention with respect to the rights of employees in general was adopted by a UN specialized agency, the General Conference of the International Labor Organization (ILO): the *Discrimination*

⁴² *Ibid.* Art. 1(1).

⁴³ *Ibid.* Art. 1(1).

⁴⁴ *CEDAW*, *supra* note 37, Arts. 2-16.

⁴⁵ *CRC*, *supra* note 38, Arts. 2-41.

⁴⁶ *ICPRMW*, *supra* note 39.

(Employment and Occupation) Convention (ILO No. 111) was adopted in June of 1958 and entered into force on June 15, 1960.

According to scholars, these specialized treaties serve two purposes: “First, they establish the principle of nondiscrimination with respect to the enjoyment of all human rights for the categories of persons covered. Secondly, and to the extent required, they add specificity to the general *ICCPR* and *ICESCR* rights, tailoring them more directly to the circumstances of the groups covered.”⁴⁷

In the context of disability, these specific international treaties are relevant since in addition to having a disability, disabled persons may face “double discrimination” because of their membership in these particular categories.⁴⁸ As with the aforementioned universal treaties, none of the specific treaties (with the exception of the *CRC*) mention disability as a prohibited ground for discrimination. Article 2 of the *CRC* ensures the rights of children without discrimination of any kind, including disability.⁴⁹ Moreover, Article 23 of the *CRC* recognizes the rights of mentally or physically disabled children to special care and assistance, effective access to education, health care services, rehabilitation services, employment opportunities and so on, to enable these children to have decent and dignified lives.⁵⁰ This applies only to children with disabilities. It was the first attempt to deal with disability rights in a binding international treaty, although it is limited in its scope since it pertains only to

⁴⁷ Quinn & Degener, “Building Bridges”, *supra* note 19 at 48-49.

⁴⁸ *Ibid.*

⁴⁹ *CRC*, *supra* note 38, Art. 2.

⁵⁰ *Ibid.* Art. 23.

children. This slight shift in the notion of disability was not supported by the adoption of a binding specific international convention pertaining to the rights of disabled persons until fifteen years later.

Outside of the UN General Assembly, on June 20, 1983 the General Conference of the International Labor Organization (ILO) adopted the *ILO Convention (No. 159) concerning Vocational Rehabilitation and Employment (Disabled Persons)*, which came into effect on June 20, 1985. Article 1 of the *Convention* defines a disabled person as “an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment.”⁵¹ It aims at ensuring vocational rehabilitation measures for all categories of disabled persons with the purpose of enhancing their employment prospects.⁵² The *Convention* requires ratifying states to formulate, implement and periodically review their national policy with respect to vocational rehabilitation and employment of disabled persons.⁵³ It also recognizes that special positive measures taken to promote equal employment opportunities for disabled persons should not be regarded as discrimination against other workers.⁵⁴

The notion of disability adopted in the *Convention* is based on the biomedical model, which aims primarily to rehabilitate disabled persons by making vocational rehabilitation measures available to all categories of disabled persons

⁵¹ *ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159)*, 1983, Art. 1(1).

⁵² *Ibid.* Art. 3.

⁵³ *Ibid.* Art. 2.

⁵⁴ *Ibid.* Art. 4.

so that they can be integrated into society. Also, the definition of disabled persons provided in the *Convention* assumes that disabled persons are not competent to secure or retain employment because of their physical or mental impairments. On the other hand, the *Convention* also incorporates a principle that signifies a shift in the understanding of the human rights of disabled persons by emphasizing that policy “shall be based on the principle of equal opportunity.”⁵⁵ As scholars have pointed out, “This emphasis on equality is not found in the earlier ILO [Recommendation 99 of 1955].”⁵⁶

3.2.3. *Non-binding International Laws and Disability Protections*

Unlike most of the binding international human rights treaties discussed above, a number of non-binding laws specifically and explicitly deal with the rights of disabled persons at the international level.

The first such law was the 1971 UN General Assembly *Declaration on the Rights of Mentally Retarded Persons*.⁵⁷ This was the first sign of the explicit shift from the medical notion of disability to the human rights approach, which explicitly recognizes disabled persons - and in particular mentally disabled persons - as rights holders. The *Declaration* affirms that “mentally retarded

⁵⁵ *Ibid.*

⁵⁶ Lisa Waddington & Matthew Diller, “Tensions and Coherence in Disability Policy: The Uneasy Relationship between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law” in Silvia Yee and Mary Lou Breslin, eds., *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, NY: Transnational Publishers, 2002) 241 at 268 [Waddington & Diller].

persons have, to the maximum degree of feasibility, the same rights as other human beings.”⁵⁸ However, this recognition is somewhat restricted by the phrase “to the maximum degree of feasibility”, which does not put mentally disabled persons on a completely equal footing with other human beings. The *Declaration* also affirms that mentally retarded persons have the right to proper medical care and physical therapy, education, training, rehabilitation and guidance⁵⁹ and economic security to enable them to have a decent standard of living.⁶⁰ It emphasizes that mentally retarded persons should be rehabilitated and that their medical problems should be solved medically. Another problem with the *Declaration* of 1971 is that it covers only one sub-group of disabled persons rather than the whole category of disabled persons.

Four years later in 1975, the UN General Assembly adopted the *Declaration on the Rights of Disabled Persons*, which covers the whole range of disabled persons. This *Declaration* states that all disabled persons should enjoy all the rights granted within it without any exception whatsoever and without any distinction or discrimination.⁶¹ It further recognizes that all disabled persons should have the same fundamental rights as other human beings, which respects the equality of disabled persons with all members of the human race.⁶² However, although the *Declaration* reiterates that all disabled persons should have the same

⁵⁷ *Declaration on the Rights of Mentally Retarded Persons*, GA Res. 2856 (XXVI), 26 UN GAOR Supp. No. 29 at 93, UN Doc. A/8429 (1971) [DRMRP].

⁵⁸ *Ibid.* at para. 1.

⁵⁹ *Ibid.* at para. 2.

⁶⁰ *Ibid.* at para. 3.

⁶¹ *Declaration on the Rights of Disabled Persons*, GA Res. 3447 (XXX), 30 UN GAOR Supp. No. 34 at 88, UN Doc. A/10034 (1975) at para. 2 [DRDP].

⁶² *Ibid.* at para. 3.

civil and political rights as other human beings,⁶³ there is no mention of economic, social and cultural rights. This weakens its guarantees of equality and non-discrimination. It is worth noting though that the *Declaration* provides that disabled persons have the right to economic and social security⁶⁴; to medical, psychological and functional treatment, including prosthetic and orthotic appliances; and to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counseling, placement services and other services hastening the processes of their social integration.⁶⁵ Moreover, the definition of disabled persons adopted in the *Declaration* reflects the bio-medical model, which treats disability as the inherent problem of the disabled individual.⁶⁶ Paragraph 1 of the *Declaration* defines a disabled person as “any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.”⁶⁷

In the 1980's, the human rights approach to the notion of disability was gaining momentum; this was reflected in the resolutions and declarations adopted by the UN. Back in December of 1976, the UN General Assembly had proclaimed the year 1981 to be the International Year of Disabled Persons to be celebrated with the theme of “full participation and equality”. As a reformulation of the International Year of the Disabled, in 1982 the Assembly adopted a milestone

⁶³ *Ibid.* at para. 4.

⁶⁴ *Ibid.* para. 7.

⁶⁵ *Ibid.* para. 6.

⁶⁶ Stein, *supra* note 20 at 86.

⁶⁷ *DRDP*, *supra* note 61 at para. 1.

resolution called the World Program of Action Concerning Disabled Persons (WPA).⁶⁸ It also declared the decade between 1983 and 1992 to be the International Decade of Disabled Persons;⁶⁹ the WPA became the guiding instrument during this decade.⁷⁰ Generally, the WPA provides a policy framework aimed at promoting effective measures for the prevention of disability, rehabilitation of the disabled, and attainment of equal opportunities for disabled persons in their daily lives.⁷¹ The first two objectives reflect the traditional bio-medical notion of disability which aims to cure disability, and if this is not possible, to rehabilitate the disabled. The third aim - the equalization of opportunities - was evidence that the shift towards the human rights model had already begun.⁷² Paragraph 12 of the WPA defines the equalization of opportunities as:

[...] the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all. Experience shows that it is largely the environment which determines the effect of impairment or a disability on a person's daily life. Thus, achieving equality of

⁶⁸ Gerard Quinn & Theresia Degener, "The application of moral authority: the shift to the human rights perspective on disability through United Nations 'soft' law" in Gerard Quinn et al., eds., *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) 29 at 29 [Quinn & Degener, "Application"].

⁶⁹ Robert L. Metts, "Disability Issues, Trends and Recommendations for the World Bank" (February 2000) at 16, online: World Bank <<http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172606907476/DisabilityIssuesMetts.pdf>> [Metts].

⁷⁰ Theresia Degener, "International Disability Law- A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999" (2000) 18 Berkeley J. Int'l L. 180 at 188 [Degener, "International"].

⁷¹ Metts, *supra* note 69 at 15.

⁷² Quinn & Degener, "Application", *supra* note 68 at 30.

opportunity means tackling structural exclusion [...].⁷³

The WPA called for the appointment of a special representative of the Secretary General to monitor the implementation of the program during the International Decade. With regards to monitoring the program at the domestic level, the WPA called for the establishment and development of national coordinating committees or similar bodies. The WPA also required a review of the program every five years.⁷⁴ Accordingly, in 1987 a global expert meeting was held in Stockholm to review the program.⁷⁵ The experts at this meeting ultimately recommended the preparation of a draft international convention on the elimination of all forms of discrimination against disabled persons.⁷⁶ Italy introduced a draft to the UN General Assembly for adoption in 1987, and Sweden did so in 1989; however, an agreement could not be reached on this issue on either occasion.⁷⁷ A few years later in 1993, as an alternative to a convention, the UN General Assembly adopted the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules)*.⁷⁸

The *Standard Rules* are the most remarkable non-binding international laws concerning disabled persons adopted by the UN General Assembly. The rules of this resolution were developed based on the experience gained from the previous international human rights instruments, which became the political and

⁷³ *Ibid.*

⁷⁴ *Ibid.* at 31-33.

⁷⁵ *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, A/RES/48/96, 85th Plenary Meeting (20 December 1993) at para.7, Intro. [*Standard Rules*].

⁷⁶ *Ibid.* at para. 8, Intro.

⁷⁷ *Ibid.* at para. 9, Intro.

⁷⁸ Degener, “International”, *supra* note 70 at 189.

moral foundations for these *Rules*.⁷⁹ Rather than adhering to the bio-medical model of disability, this resolution emphatically adopted the human rights approach,⁸⁰ which sees persons with disabilities as rights holders because of their humanity. This can clearly be discerned from the title of the resolution. The *Standard Rules* aim to ensure that people with disabilities have the same rights and obligations as their fellow citizens⁸¹ and to create and promote equal opportunities for persons with disabilities in their respective societies in the main target areas such as accessibility of the physical environment and communications, education, employment.⁸² The language employed in the resolution – i.e. “persons with disabilities” - also indicates that the emphasis is now on the humanity of the individual.

The *Standard Rules* recognize that awareness raising⁸³, medical care⁸⁴, rehabilitation⁸⁵ and support services⁸⁶ are pre-conditions for the equalization of opportunities for persons with disabilities. They also identify key target areas where equal opportunities for persons with disabilities should be created: accessibility of the physical environment and communications⁸⁷; education⁸⁸; employment⁸⁹; income maintenance and social security⁹⁰; family life and personal

⁷⁹ *Standard Rules*, *supra* note 75 at para. 13, Intro.

⁸⁰ Kanter, *supra* note 18 at 256.

⁸¹ *Standard Rules*, *supra* note 75, Rule 1 (2).

⁸² *Ibid.* Rules 5-8.

⁸³ *Ibid.* Rule 1.

⁸⁴ *Ibid.* Rule 2.

⁸⁵ *Ibid.* Rule 3.

⁸⁶ *Ibid.* Rule 4.

⁸⁷ *Ibid.* Rule 5.

⁸⁸ *Ibid.* Rule 6.

⁸⁹ *Ibid.* Rule 7.

⁹⁰ *Ibid.* Rule 8.

integrity⁹¹; culture⁹²; recreation and sports⁹³; and religion.⁹⁴ Unlike other UN declarations and resolutions, the *Standard Rules* require the appointment of a Special Rapporteur to measure the progress and the effective implementation of the *Rules*. A panel of experts was also established to advise the Special Rapporteur in undertaking the *Rules*' mandates.⁹⁵ One big weakness of the resolution is that it does not have legal effect since it is just a declaration, although its rules and principles may develop the status of international customary law through state practices over time.⁹⁶

One other development is noteworthy. In 1991, the UN General Assembly adopted the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (MI Principles)*.⁹⁷ These are the core of international human rights laws that specifically and explicitly deal with the rights of persons with mental illness in a comprehensive way,⁹⁸ although they don't have any legal effect.⁹⁹ Principle I of the *MI Principles* affirms that all persons with mental illness have the right to exercise all the civil, political, economic, social and cultural rights as recognized in all international human rights

⁹¹ *Ibid.* Rule 9.

⁹² *Ibid.* Rule 10.

⁹³ *Ibid.* Rule 11.

⁹⁴ *Ibid.* Rule 12.

⁹⁵ *Ibid.* Rule 22 (2), (3).

⁹⁶ *Ibid.* at para. 14, Intro.

⁹⁷ *Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care*, GA Res. 46/119, 46 UN GAOR Supp. No. 49 at 189, UN Doc. A/46/49 (1991) [MI Principles].

⁹⁸ Aaron A. Dhir, "Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities" (2005) 41 Stan. J. Int'l L. 181 at 188 [Dhir].

⁹⁹ Gostin & Gable, *supra* note 14 at 24.

instruments.¹⁰⁰ All persons with mental illness are entitled to the rights provided in the *Principles* without any kind of discrimination, including discrimination based on disability or mental illness.¹⁰¹ Among other rights, persons with mental illness have the right to the best available mental health care¹⁰²; to treatment with respect and dignity to humanity¹⁰³; to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment¹⁰⁴; and as far as possible, to treatment and care in the community in which they live.¹⁰⁵ Most importantly, the *Principles* provide for the right not to be treated medically without obtaining informed consent¹⁰⁶, which also implies the right to refuse or stop medical treatment.¹⁰⁷

The principles relating to medical treatment deserve further discussion. Although medical treatment cannot be given to a person with a mental illness or continued without his/her informed consent¹⁰⁸, according to the *MI Principles*, a proposed plan of treatment for a person with a mental illness can be determined largely by domestic laws, medical health practitioners and independent authorities. For example, a person with a mental illness can be subject to a proposed treatment plan without his/her informed consent and cannot refuse or stop a proposed treatment if an established independent authority is satisfied that

¹⁰⁰ MI Principles, *supra* note 97, Princ. 1 at para. 5.

¹⁰¹ *Ibid.* Applic.

¹⁰² *Ibid.* Princ. 1 at para. 1.

¹⁰³ *Ibid.* Princ. 1 at para. 2.

¹⁰⁴ *Ibid.* Princ. 1 at para. 3.

¹⁰⁵ *Ibid.* Princ. 7 at para. 1.

¹⁰⁶ *Ibid.* Princ. 11 at para. 1.

¹⁰⁷ Jennifer Fischer, "A Comparative Look at the Right to Refuse Treatment for Involuntarily Hospitalized Persons with a Mental Illness" (2006) 29 Hastings Int'l & Comp. L. Rev. 153 at 162 [Fischer].

the “treatment is in the best interest of the patient's health needs”¹⁰⁹ or “if a qualified mental health practitioner authorized by law determines that it is urgently necessary in order to prevent immediate or imminent harm to the patient or to other persons.”¹¹⁰ Although no sterilization measures can be carried out as treatment on persons with mental illness,¹¹¹ these persons can be subject to clinical trials or experimental treatment without their informed consent if an independent review board established specifically for this purpose approves such treatment.¹¹²

For these and other reasons, the *MI Principles* have been criticized for being discriminatory because other human beings are not subject to similar treatment during illness.¹¹³ Moreover, the *Principles* promote a paternalistic, bio-medical approach towards persons with mental disabilities rather than a human rights approach.¹¹⁴ Moreover, the fact that the *Principles* refer only to “patients” rather than to “people”¹¹⁵ and that they designate this disability as a mental illness is a reflection of the bio-medical model. The *MI Principles* can, however, still serve as valuable tools for identifying main minimum standards to protect persons with mental disabilities within domestic jurisdictions.¹¹⁶

¹⁰⁸ MI Principles, *supra* note 97, Princ. 11 at para. 4.

¹⁰⁹ *Ibid.* Princ. 11 at para. 6.

¹¹⁰ *Ibid.* Princ. 11 at para. 8.

¹¹¹ *Ibid.* Princ. 11 at para. 12. This protection is very important for many persons with mental illness throughout the world. Historically and even very recently, these people have been exposed to mandatory sterilization in state-run institutions in many countries.

¹¹² *Ibid.* Princ. 11 at para. 15.

¹¹³ Fischer, *supra* note 107 at 163-164.

¹¹⁴ Dhir, *supra* note 98 at 188.

¹¹⁵ Eric Rosenthal & Clarence J. Sundram, “International Human Rights in Mental Health Legislation” (2002) 21 N.Y.L. Sch. J. Int'l & Comp. L. 469 at 475.

¹¹⁶ *Ibid.*

Another category of non-binding international law that could be relevant in the context of disability is general comments and recommendations. The international human rights treaties have created treaty bodies for the purpose of monitoring their implementation. These bodies may make general comments or recommendations as guidelines or interpretations of the contents of the treaties. Although the comments and recommendations are not binding on state parties, they provide guidelines for interpreting and understanding the articles of the treaties.¹¹⁷

The most important of these comments, which is devoted entirely to disability, is *General Comment 5* made by the Committee on Economic, Social and Cultural Rights. With regards to the interpretation of the *ICESCR* provisions, it states that “the *Covenant* does not refer explicitly to persons with disabilities. Nevertheless, since the *Covenant's* provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the *Covenant*.”¹¹⁸ With respect to the grounds of discrimination listed in the treaty, the Committee further affirms that the interpretation of the

¹¹⁷ Quinn & Degener, “Building Bridges”, *supra* note 19 at 47.

¹¹⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with Disabilities*, 11th Session, 25/11/1994, HRI/GEN/1/Rev.7 at 25, at para. 5. The *ICESCR* does not establish a treaty body for the purpose of monitoring its implementation. However, it gives a general mandate to the Economic and Social Council. See: *ICESCR*, *supra* note 21, Art. 16. In 1978, the Council established a Sessional Working Group of Governmental Experts on the Implementation of the *ICESCR* to help with the consideration of reports submitted by states parties. In 1987, this Working Group became the Committee on Economic, Social and Cultural Rights. It consists of eighteen members. See: United Nations High Commissioner for Human Rights, “Monitoring implementation of the international human rights instruments: an overview of the current treaty body system” (Background conference document presented to the 5th Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 24 January-4 February 2005). This Committee monitors the implementation and progress of the provisions of the *ICESCR*.

phrase ‘other status’ should include discrimination on the basis of disability.¹¹⁹ Recognizing that persons with disabilities face various forms of discrimination in their daily lives¹²⁰ and emphasizing that women¹²¹ and children with disabilities¹²² are particularly vulnerable to discrimination, abuse and neglect, the Committee also asserts that measures taken to redress existing discrimination or to establish equitable opportunities for disabled persons should not be interpreted as discriminatory.¹²³ Overall, through its *General Comment 5*, the Committee has adopted a human rights approach towards persons with disabilities.¹²⁴

The other general comment relevant to the enhancement of a human rights approach to disability is the Human Rights Committee’s *General Comment No. 18* to the *ICCPR* regarding non-discrimination and equality.¹²⁵ Noting that the notion of equality does not necessarily connote formal equality¹²⁶, the Committee confirms that “the enjoyment of rights and freedoms on an equal footing [...] does not mean identical treatment in every instance.”¹²⁷ It further clarifies that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a

¹¹⁹ *Ibid.* at para. 5 of General Comment 5.

¹²⁰ *Ibid.* at para. 15.

¹²¹ *Ibid.* at para. 31.

¹²² *Ibid.* at para. 32.

¹²³ *Ibid.* at para. 18.

¹²⁴ Kanter, *supra* note 18 at 257.

¹²⁵ Degener, “International”, *supra* note 70 at 190. The Human Rights Committee is the body established by the *ICCPR* to oversee the implementation and observance of the rights provided in the Covenant. The Committee is composed of eighteen members. See *ICCPR*, *supra* note 21, Art. 28.

¹²⁶ *Ibid.*

¹²⁷ Human Rights Committee, *General Comment No. 18 to the ICCPR: Nondiscrimination*, 37th Sess. 10/11/1989, HRI/GEN/1/Rev.7 at 146 at para. 8 [*General Comment No.18*].

purpose which is legitimate under the *Covenant*.¹²⁸

A few months before the adoption of the *CRPD*, the Committee on the Rights of the Child also issued a very important comment, *General Comment No.9*, with respect to the rights of children with disabilities.¹²⁹ The Committee dedicated the entire comment to elaborating in detail how the provisions of the *CRC* should be interpreted and applied to the rights of children with disabilities in a comprehensive manner; recommendations and guidelines are forwarded to state parties in their efforts to implement the rights of children with disabilities under the *CRC*. Needless to say, the Committee has benefited from the draft text of the *CRPD*, which it has incorporated into the *General Comment*. It should be stated here once again that the *CRC* is the only international treaty that explicitly prohibits discrimination on the grounds of disability.¹³⁰

3.2.4. Concluding Remarks

Prior to the adoption of the *CRPD*, persons with disabilities were not accorded due legal protection and respect under the international human rights system. No specific international treaty explicitly recognized or protected their

¹²⁸ *Ibid.* at para. 13. It should be noted that the Human Rights Committee has not issued any general comments or recommendations pertaining to the ICCPR's application to persons with disabilities. However, its comment on non-discrimination and equality has relevance to and implications for the rights of persons with disabilities.

¹²⁹ Committee on the Rights of the Child, *General Comment No. 9: Rights of Children with Disabilities*, 43rd Session. 02/27/2007, CRC/C/GC/9, online: Office of the High Commissioner for Human Rights <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.GC.9.En?>](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.GC.9.En?>). The Committee on the Rights of the Child is the treaty body established under the *CRC* to monitor its implementation. It is composed of ten experts. See: *CRC*, *supra* note 38, Arts.43-45.

¹³⁰ *CRC*, *supra* note 38, Art.2(1).

rights. Despite their vulnerability to widespread discrimination, exclusion and marginalization throughout the world, the status of persons with disabilities was mainly characterized by legal uncertainties and insecurities. It is true that there are a number of declarations, resolutions and general comments germane to the rights of persons with disabilities. However, all of these instruments lack legal force. The universal application and concepts of non-discrimination and equality enshrined in the treaties could also be used with respect to the rights of persons with disabilities.¹³¹ However, experience over the past half century shows that the human rights treaties have been under-used in promoting and protecting the rights of persons with disabilities. The adoption of the *CRPD* in December of 2006 was a legal response to the existing uncertainties and insecurities of persons with disabilities at the international level.¹³²

3.3. Disability Protections under the Convention on the Rights of Persons with Disabilities: Towards Full Citizenship

3.3.1. Introduction

The *CRPD*, which was adopted by the UN General Assembly on December 13, 2006 and entered into force on May 3, 2008, was the first international human rights convention to specifically and explicitly recognize and protect the human rights of persons with disabilities. It provides a range of civil,

¹³¹ Waddington & Diller, *supra* note 56 at 270-271.

¹³² See discussion in Frédéric Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30: 2 Hum. Rts. Q. 494 at 499-502.

political, economic, social and cultural rights for disabled persons. It also sets out the general obligations of state parties in order to implement and realize the rights recognized in the *Convention*.¹³³ Moreover, the *CRPD* seeks to establish monitoring mechanisms at both the domestic and international levels to work on implementing and overseeing the *Convention*.¹³⁴ Pursuant to the *CRPD*, a Committee on the Rights of Persons with Disabilities was established to oversee its implementation.¹³⁵ Individual complaints can also be brought before the Committee against state parties that have ratified the *CRPD*'s *Optional Protocol*.¹³⁶ The *Convention* consists of fifty articles in total,¹³⁷ supplemented by the eighteen articles in the *Optional Protocol*.¹³⁸ This section discusses in detail the contents of the *CRPD* and its *Optional Protocol*, showing how they may ensure and promote the full citizenship of persons with disabilities and eliminate their prevailing exclusion and discrimination.

3.3.2. Definition of Disability

One of the core issues that raised considerable debate and discussion during the negotiation sessions of the Ad Hoc Committee was the definition of

¹³³ *Convention on the Rights of Persons with Disabilities*, adopted by General Assembly Resolution 61/106 on 13 December 2006 (entered into force 3 May 2008).[*CRPD*].

¹³⁴ *Ibid.* Arts.33-34.

¹³⁵ *Ibid.* Art.34 (1).

¹³⁶ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res. A/61/611 (2006), Art. 1(1) [*Optional Protocol*]

¹³⁷ *CRPD*, *supra* note 133.

¹³⁸ *Optional Protocol*, *supra* note 136.

disability.¹³⁹ Proponents of excluding a definition pointed out the complexity of the concept of disability and argued that providing a definition could result in the arbitrary exclusion of some groups of persons from coverage under the *Convention*. Supporters of including a definition, on the other hand, argued that excluding a definition from the *Convention* would leave loopholes for states to narrowly interpret the range of peoples covered, rendering the *Convention* meaningless.¹⁴⁰ Ultimately, no definition of disability was adopted in the *CRPD*.¹⁴¹

However, there are some statements that relate to the definition of disability in the Preamble and Purpose sections of the *Convention*.¹⁴² Article 1 states that those with long-term physical, mental, intellectual or sensory impairments whose participation in society may be affected are included as persons with disabilities. Although the list in this article is not exhaustive, this statement does not seem to include those who have short-term and temporary impairments. The Article includes persons whose inclusion in the category of disabled persons is obvious. However, paragraph E of the Preamble recognizes the complexity of the concept of disability and the fact that it is an evolving concept. The same paragraph of the *Convention* also recognizes that “disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society

¹³⁹ Arlene S. Kanter, “The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities” (2007) 34 Syracuse J. Int’l L. & Com. 287 at 291 [Kanter, “Promise”].

¹⁴⁰ Lawson, *supra* note 6 at 593.

¹⁴¹ Kanter, “Promise”, *supra* note 139 at 292.

¹⁴² Lawson, *supra* note 6 at 594-595.

on an equal basis with others.” This is a reflection of the social model, which sees disability primarily as a social construct.¹⁴³ It requires that states remove attitudinal and environmental barriers so that the full and effective participation of persons with disabilities in their societies is well ensured.¹⁴⁴ However, other scholars argue that it is difficult to construe the *CRPD* strictly according to the social model of disability since some of its articles also perpetuate the bio-medical model.¹⁴⁵ The *Convention* uses the term “persons with disabilities” when it conceptually means “persons with impairment.”¹⁴⁶

3.3.3. General Principles and Obligations under the Convention

Article 1 states that the purpose of the *CRPD* is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”¹⁴⁷ In other words, “the *Convention* aims to reach beyond traditional principles of equality and nondiscrimination to deal with the substance of the full range of economic, social, cultural, civil and political rights and their enjoyment by disabled people.”¹⁴⁸

Article 3 of the *CRPD* sets out the general principles upon which the

¹⁴³ Kanter, “Promise”, *supra* note 139 at 291-293.

¹⁴⁴ Tara J. Melish, “The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify” (2007) 14:2 Hum. Rts. Brief 37 at 44-45.

¹⁴⁵ Rosemary Kayess & Phillip French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities” (2008) 8 Hum. Rts. L. Rev. 1 at 21-22.

¹⁴⁶ *Ibid.* at 21.

¹⁴⁷ *CRPD*, *supra* note 133, Art.1.

obligations of state parties and the rights of persons with disabilities are based in the *Convention*. The first principle is the inherent dignity, autonomy and independence of individuals with disabilities.¹⁴⁹ The second principle is non-discrimination with respect to persons with disabilities.¹⁵⁰ This article also prohibits discrimination and unequal treatment among disabled persons by recognizing their differences as part of human diversity and humanity.¹⁵¹ Other ground-breaking principles incorporated in the *CRPD* are the full and effective participation and inclusion of persons with disabilities in their societies¹⁵² and their access to equal opportunities.¹⁵³ Paragraph F of Article 3 also recognizes the principle of accessibility,¹⁵⁴ which guarantees persons with disabilities access to the physical environment and to other facilities and services open to the public on an equal basis with others.¹⁵⁵ The last two principles of the *CRPD* are gender equality¹⁵⁶ and respect for the capacity of children with disabilities.¹⁵⁷ Although this article explicitly refers to women and children with disabilities, it does not mention racial equality or equality of older disabled persons.¹⁵⁸

With regards to general obligations, the *CRPD* imposes various significant obligations on state parties to ensure and promote the full realization of all human rights and fundamental freedoms recognized in the *CRPD* for all persons with

¹⁴⁸ Lawson, *supra* note 6 at 590.

¹⁴⁹ *CRPD*, *supra* note 133, Art. 3, para. A.

¹⁵⁰ *Ibid.* Art. 3, para. B.

¹⁵¹ *Ibid.* Art. 3, para. D, Preamble at para. I.

¹⁵² *Ibid.* Art. 3, para. C.

¹⁵³ *Ibid.* Art. 3, para. E.

¹⁵⁴ *Ibid.* Art. 3, para. F.

¹⁵⁵ *Ibid.* Art. 9(1).

¹⁵⁶ *Ibid.* Art. 3, para. G; Art. 6.

¹⁵⁷ *Ibid.* Art. 3, para. H; Art. 7.

disabilities, including women and children with disabilities, without discrimination.¹⁵⁹ Article 4 requires state parties to adopt all appropriate legislative, administrative and other measures for the implementation of the *CRPD* and to take into consideration the human rights of disabled persons in their policies and programs.¹⁶⁰ States also have the obligation “to refrain from engaging in any act or practice that is inconsistent with the [...] *Convention*, and to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.”¹⁶¹ The *CRPD* also requires state parties to promote and develop research on universally accessible goods, services and technologies, and to encourage the training of professionals working with persons with disabilities.¹⁶²

Accessibility is another very important obligation addressed in Article 9 of the *CRPD* as a supplement to the general obligations provided in Article 4. State parties agree to take appropriate measures to ensure persons with disabilities have access to the physical environment, transportation, and other facilities and services provided to the public on an equal basis with others.¹⁶³ Guaranteeing persons with disabilities equality rights regarding employment, education, and healthcare and other services available to the public would have less value without ensuring their access to such facilities and services. Article 8 of the *CRPD* also urges state parties to take appropriate measures to raise awareness and

¹⁵⁸ Lawson, *supra* note 6 at 591.

¹⁵⁹ *CRPD*, *supra* note 133, Arts. 4, 6 and 7.

¹⁶⁰ *Ibid.* Art. 4(1), paras. A-C.

¹⁶¹ *Ibid.* Art. 4(1), paras. D, E.

¹⁶² *Ibid.* Art. 4(1), paras. F-I.

¹⁶³ *Ibid.* Art. 9(1).

create positive images about persons with disabilities in their societies in order to facilitate their participation and inclusion.¹⁶⁴

3.3.4. The Rights of Persons with Disabilities under the Disability Convention

3.3.4.1. General Rights of Persons with Disabilities under the Convention

Equality Before the Law and Legal Capacity

Article 5 of the *CRPD* declares: “state parties recognize that all persons are equal before and under the law.”¹⁶⁵ Strengthening this idea, Article 12(1) also reaffirms that “persons with disabilities have the right to recognition anywhere as persons before the law.”¹⁶⁶ This recognition of the inherent dignity and humanity of persons with disabilities entitles them to equal protection and benefits of the law everywhere.¹⁶⁷ The recognition of the legal personality of persons with disabilities is reiterated in Article 12(2) by the affirmation that all persons with disabilities enjoy the same legal capacity as other human beings in all aspects of life¹⁶⁸ regardless of the severity of their disabilities. The legal capacity of persons with disabilities was one of the main issues hotly debated and deliberated during sessions of the Ad Hoc Committee and at the time of the *CRPD*’s adoption. The issue was whether legal capacity should mean the enjoyment or the exercise of

¹⁶⁴ *Ibid.* Art. 8.

¹⁶⁵ *Ibid.* Art. 5(1).

¹⁶⁶ *Ibid.* Art. 12(1).

¹⁶⁷ *Ibid.* Art. 5(1).

¹⁶⁸ *Ibid.* Art. 12(2).

rights, or both.¹⁶⁹ Article 12 should be interpreted to mean that if persons with disabilities are to be autonomous and independent, including being free to make their own decisions as recognized by the *CRPD*'s Preamble and principles, they should have the legal capacity not only to bear rights and entitlements as passive rights holders on an equal basis with other human beings, but also to exercise those rights and entitlements on an equal basis with other persons. Hence, disabled persons have the capacity not only as mere holders of rights, for example to inherit property, but also to actively enjoy and exercise their rights, for example to manage and control their financial affairs.¹⁷⁰ This interpretation is also mandated by the principles of equality and non-discrimination.¹⁷¹

Even in extreme instances of severe disabilities, such as severe mental disabilities, emphasis should be placed on supported decision making rather than on substitute decision making. Hence, state parties are obliged to take measures to support disabled persons in exercising their legal capacity.¹⁷² Article 13(1) of the *CRPD* also ensures disabled persons effective access to the justice system that would guarantee their exercise of the equal protections and benefits of the law.¹⁷³ Access to justice is a fundamental human right, the denial of which may result in the inability to seek remedies for violations of the other human rights before the justice system.¹⁷⁴

¹⁶⁹ Amita Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?" (2007) 34 *Syracuse J. Int'l L. & Com.* 429 at 452-456 [Dhanda].

¹⁷⁰ *CRPD*, *supra* note 133, Art. 12(5).

¹⁷¹ Dhanda, *supra* note 169 at 461.

¹⁷² Lawson, *supra* note 6 at 596-597.

¹⁷³ *CRPD*, *supra* note 133, Art. 13(1).

¹⁷⁴ Stephanie Ortoleva, "Inaccessible Justice: Human Rights, Persons with Disabilities and the

Another significant aspect of the principle of equality is its interpretation. As in the Human Rights Committee's *General Comment 18*, the *CRPD* states that the notion of equality does not necessarily mean identical treatment, but rather consideration of difference.¹⁷⁵ If persons with disabilities are to be autonomous and independent, to be full and effective participants in their societies, and to truly enjoy their human rights and fundamental freedoms, equal opportunities should be created for them beyond assuring identical treatment for everyone. The recognition that the denial of reasonable accommodations for persons with disabilities constitutes discrimination is the landmark innovation of the *CRPD*. In the history of international human rights treaties, this would ensure a leveling of the uneven playing field and the creation of equal opportunities for persons with disabilities in all aspects of life.¹⁷⁶ State parties are thus obliged to undertake all necessary measures to create equal opportunities for all persons with disabilities in order to enable them to enjoy all human rights and fundamental freedoms equally with others, free of discrimination.

The Right to Equal Opportunities, Non-discrimination and Reasonable Accommodation

Article 5(2) of the *CRPD* requires state parties to eliminate and prohibit any discrimination on the basis of disability.¹⁷⁷ It asserts that “discrimination against any person on the basis of disability is a violation of the inherent dignity

Legal System” (2011) 17 ILSAJICL 281 at 287-288.

¹⁷⁵ General Comment No. 18, *supra* note 127.

¹⁷⁶ *CRPD*, *supra* note 133, Art. 2.

and worth of the human person.”¹⁷⁸ Discrimination on the basis of disability is defined in the *CRPD* as:

[...] any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.¹⁷⁹

One great innovation of the *CRPD* is that it recognizes the failure to provide reasonable accommodation for persons with disabilities as discrimination. The right to reasonable accommodations is the tool for ensuring the independence and full participation of persons with disabilities and their enjoyment of all human rights and fundamental freedoms. Since neither disability nor persons with disabilities are defined in the *CRPD*, issues may arise as to who can claim protection from discrimination on the basis of disability. If the right to non-discrimination is to be fully achieved, even those who experience adverse treatment as a result of minor impairments or perceived disabilities should be entitled to such claims.¹⁸⁰

Article 2 of the *CRPD* defines reasonable accommodation as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with

¹⁷⁷ *Ibid.* Art. 5(2).

¹⁷⁸ *Ibid.* Preamble at para. H.

¹⁷⁹ *Ibid.* Art. 2.

¹⁸⁰ Tina Minkowitz, “The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions” (2007) 34 *Syracuse J. Int’l L. & Com.* 405 at 407-408.

disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”¹⁸¹ States should thus ensure that reasonable accommodation is provided¹⁸² to achieve non-discrimination and equality of all persons with disabilities in the enjoyment and exercise of the rights recognized in the *Convention*. These measures should not be temporary. They should not be discontinued, even when equality between disabled and non-disabled persons is achieved since these measures are necessary for the creation and maintenance of equal opportunities and for the elimination of the discrimination persons with disabilities may face in daily life.¹⁸³ The *CRPD* does not, however, elaborate possible factors to consider in determining how and to whom accommodations are disproportionate or burdensome. State parties must resolve such matters while appreciating particular circumstances. Thus, while the *CRPD* “requires all signatory States to introduce reasonable accommodation duties, their practical manifestations are likely to differ markedly from country to country.”¹⁸⁴

Reasonable accommodation differs from the specific measures state parties should take to accelerate or achieve de facto equality for disabled persons according to Article 5(4) of the *CRPD*.¹⁸⁵ These measures may include, for example, introducing quotas intended to increase the representation of disabled

¹⁸¹ *CRPD*, *supra* note 133, Art. 2.

¹⁸² *Ibid.* Art. 5(3).

¹⁸³ For a discussion on the concept of special measures that should be discontinued upon attainment of specific goals in international human rights instruments, see: United Nations High Commissioner for Human Rights, “The concept of ‘special’ measures in international human rights law” (Background conference document prepared for the 6th 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 in New York, 1-12 August 2005).

persons in the labor market.¹⁸⁶ The *CRPD* states that such measures should not be considered discrimination against other persons.¹⁸⁷ Although Article 5(4) sets no time limit for these measures, logically they should be terminated when the objective of ensuring equal treatment between disabled and non-disabled persons is met.¹⁸⁸ With respect to reasonable accommodation, however, states are obliged to take measures to the point of undue hardship. These measures are not subject to termination since they are tailored to the needs of each individual to eliminate any discrimination on the basis of disability.

Right of Access

The *CRPD* does not have a separate article dealing with the right of access. I would like to discuss it here as a general right, although the *Convention* raises it in many instances as a means of realizing a range of substantive rights recognized in the *Convention*. Besides recognizing the issue of accessibility as one of the core principles of the *CRPD*, the *Convention* devotes one whole article to specifying the obligations of state parties to ensure disabled persons access to

¹⁸⁴ Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Portland, OR: Hart Publishing, 2008) at 32.

¹⁸⁵ *CRPD*, *supra* note 133, Art. 5(4).

¹⁸⁶ Lawson, *supra* note 6 at 599.

¹⁸⁷ *CRPD*, *supra* note 133, Art. 5(4).

¹⁸⁸ The term “reasonable accommodation” is not used in the other international human rights treaties. However, other terms with the same effects have been employed in some treaties. For example, Art. 4(2) of *CEDAW* indicates that special measures that states adopt to protect maternity are not considered discrimination; such measures must not be discontinued even when equality of opportunity and treatment of women with men is achieved since maternity is a natural event that continues as long as human beings are alive. Also, Article 4(1) of *CEDAW* states that temporary special measures adopted by states to accelerate de facto equality of women with men should not

the physical environment, transportation and other facilities and services open to the public on an equal basis with others. At the other end of this general obligation is the right of access. It is logical to say that accommodations in this respect must be reasonable; however, they need not be addressed on an individual basis to meet individual needs. State parties should ensure that persons with disabilities as a category have access to environmental structures and public facilities and services. Article 4 of the *CRPD* also requires state parties to promote and develop universally accessible goods and services that would not need to be adapted for use by disabled persons.

Many of the substantive rights provided in the *CRPD* require accessibility if persons with disabilities are to meaningfully enjoy and exercise such rights without discrimination on an equal basis with others. For example, the right to education requires access to educational institutions and schools; the right to employment requires access to workplaces; and the right to health requires access to health care institutions and facilities. Also, the right to cultural life, recreation and sports requires that cultural materials, performance spaces and services be accessible to disabled persons. With respect to freedom of expression and opinion, Article 21 of the *CRPD* calls on state parties to take measures to identify and eliminate obstacles and barriers to accessing every type of information and communication so that disabled persons can receive and impart information through their chosen means of communication.

be regarded as discrimination; they should be discontinued when the objective of equality between men and women is fulfilled.

3.3.4.2. *Specific Rights of Disabled Persons under the Convention*

Introduction

The *CRPD* recognizes a vast range of specific rights for persons with disabilities without categorizing them into the traditional dichotomy of civil and political rights on the one hand, and economic, social and cultural rights on the other. Separating rights into this dichotomy is therefore extremely difficult.¹⁸⁹ Individual articles of the *CRPD* contain rights from both categories.¹⁹⁰ The *Convention* recognizes the indivisibility, interdependence and interconnectedness of all human rights and fundamental freedoms.¹⁹¹ It does not create hierarchies between rights.¹⁹² However, because of the nature of rights, a hierarchy in implementation is still maintained in the *CRPD* as in the traditional international human rights instruments.¹⁹³ State parties are obliged to immediately implement the civil and political rights of persons with disabilities on an equal basis with other human beings, without discrimination.¹⁹⁴ With respect to economic, social and cultural rights, state parties should ensure their progressive realization on an equal basis and without discrimination on the ground of disability subject to their maximum resources available.¹⁹⁵ It should, however, be noted that the *CRPD* also contains both immediate and progressive obligations to implement civil and political rights and economic, social and cultural rights simultaneously. For

¹⁸⁹ MacKay, *supra* note 10 at 330.

¹⁹⁰ *Ibid.*

¹⁹¹ *CRPD*, *supra* note 133, Preamble at para. C.

¹⁹² MacKay, *supra* note 10 at 330.

¹⁹³ *Ibid.*

¹⁹⁴ *CRPD*, *supra* note 133, Art. 4(1).

¹⁹⁵ *Ibid.* Art. 4(2).

example, the exclusion of persons with disabilities from mainstream education on account of disability can be eliminated immediately since it may not require significant resources.¹⁹⁶

Even when states have inadequate resources to meet their obligations, since persons with disabilities are global citizens and members of the international community, the international community should have an obligation and responsibility to assist in the realization of the universal human rights and fundamental freedoms of disabled persons.¹⁹⁷ Article 32 of the *CRPD* recognizes the importance of international cooperation,¹⁹⁸ but it does not go so far as to consider it an obligation.

I now turn to the specific rights of disabled persons under the *CRPD*. I use the traditional dichotomy for the sake of convenience.

Civil and Political Rights

Article 10 of the *CRPD* reaffirms that “every human being has the inherent right to life.”¹⁹⁹ The recognition of the inherent dignity of humanity will have a great impact on persons with disabilities, especially those with severe disabilities who in many countries have historically been subjected to

¹⁹⁶ Frédéric Mégret, “Disabilities Convention: Towards a Holistic Concept of Rights” (2008) 12: 2 Int’l J. Hum. Rts. 261 at 271-272 [Mégret].

¹⁹⁷ For a discussion of global citizenship, see: Ruth Lister, *Citizenship: Feminist Perspectives* (New York: New York University Press, 1997) at 57-60.

¹⁹⁸ *CRPD*, *supra* note 133, Art. 32.

¹⁹⁹ *Ibid.* Art. 10.

mistreatment and abuse causing death. State parties are also obliged to take all necessary measures to protect the life and safety of persons with disabilities even in high-risk situations, including armed conflicts, humanitarian emergencies and natural disasters.²⁰⁰

Another important right with respect to protecting the life, dignity and physical and mental integrity of disabled persons is provided in Article 15. This article ensures the freedom of persons with disabilities on an equal basis with others from torture or cruel, inhuman or degrading treatment or punishment, including medical and scientific experimentation without their free consent.²⁰¹ Persons with disabilities also enjoy liberty and security of the person on an equal basis with others. The *CRPD* affirms that a disability should not be used in determining deprivations of liberty and security of the person.²⁰² Moreover, Article 16 obliges state parties to take all necessary measures to ensure the freedom of persons with disabilities from all forms of exploitation, violence and abuse that may occur within or outside the home.²⁰³

The *CRPD* also recognizes the freedom of every disabled person to choose his or her own residence. It also guarantees the liberty of movement of persons with disabilities and the right to leave any country, including their own, on an equal basis with others. Persons with disabilities also have the right to acquire and change their nationality and to obtain, possess or utilize documents showing their

²⁰⁰ *Ibid.* Art. 11.

²⁰¹ *Ibid.* Art. 15(1).

²⁰² *Ibid.* Art. 14.

²⁰³ *Ibid.* Art. 16.

nationality on an equal basis with others; any deprivation of nationality or nationality documents shall not be based on disability.²⁰⁴

Article 21 of the *CRPD* recognizes the freedom of expression and opinion of persons with disabilities using whatever form, including sign language and other means of communication.²⁰⁵ Article 22 of the *Convention* also protects all disabled persons from arbitrary or unlawful interferences with their privacy, families, homes, correspondence and other types of communication.²⁰⁶ State parties have the obligation to “protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.”²⁰⁷

Article 29 of the *CRPD* also guarantees persons with disabilities enjoyment and participation in political and public life on an equal basis with others.²⁰⁸ More specifically, it recognizes their full and effective participation in public and political life by affirming the right and opportunity to vote by secret ballot without intimidation; the right to stand for public office through elections; the right to effectively hold public functions at all levels of government; the right to participate in the activities and administration of nongovernmental organizations, associations and political parties concerned with the public and political life of the country; and the right to form and join disability organizations

²⁰⁴ *Ibid.* Art. 18.

²⁰⁵ *Ibid.* Art. 21.

²⁰⁶ *Ibid.* Art. 22(1).

²⁰⁷ *Ibid.* Art. 22(2).

²⁰⁸ *Ibid.* Art. 29.

at local, national, regional and international levels.²⁰⁹

Economic, Social and Cultural Rights

Article 24 of the *CRPD* recognizes the right of persons with disabilities to education without discrimination on the basis of equal opportunity with others.²¹⁰

To realize this goal, state parties must ensure an inclusive education system at all levels as well as life-long learning aimed at developing the talents, creativity and physical and mental abilities of disabled persons to enable them to effectively participate in society. The *CRPD* also affirms that persons with disabilities shall not be excluded from the general education system on the basis of disability, and that reasonable accommodation shall be provided for them to access the education system.²¹¹

Article 27 of the *Convention* recognizes the right to work and employment for persons with disabilities, including those who acquire a disability in the course of employment, in a labor market that is open, inclusive and accessible to persons with disabilities without discrimination and on an equal basis with others.²¹² In particular, it prohibits discrimination on the basis of disability in all matters relating to “all forms of employment including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and

²⁰⁹ *Ibid.* Art. 29.

²¹⁰ *Ibid.* Art. 24(1).

²¹¹ *Ibid.* Art. 24.

²¹² *Ibid.* Art. 27.

healthy working conditions.”²¹³ It also protects “the rights of persons with disabilities, on an equal basis with others, to just and favorable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances”.²¹⁴ The *CRPD* ensures that persons with disabilities obtain reasonable accommodations in the workplace.²¹⁵

With respect to health, Article 25 of the *Convention* guarantees persons with disabilities “the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.”²¹⁶ Besides providing disabled persons with the same range, quality and standard of health care and programs as other persons, state parties are obliged to take all measures to provide disabled persons with special health services that are required due to their disabilities.²¹⁷ In order to attain and maintain the independence, full inclusion and participation of disabled persons in societies, state parties must provide and organize habitation and rehabilitation services and programs, particularly in the areas of health, education, employment and social services.²¹⁸

Article 28 of the *CRPD* also recognizes the right of persons with disabilities to an adequate standard of living and social protection, including food, clothing and housing. State parties are obliged to take the necessary steps to ensure disabled persons’ access to assistive devices, public housing programs and

²¹³ *Ibid.* Art. 27(1) (A).

²¹⁴ *Ibid.* Art. 27(1) (B).

²¹⁵ *Ibid.* Art. 27(1) (I).

²¹⁶ *Ibid.* Art. 25.

²¹⁷ *Ibid.* Art. 25 (A), (B).

other assistance for disability-related needs.²¹⁹ Article 30 of the *Convention* guarantees persons with disabilities the right to participate in cultural life, recreation, leisure and sports. In order to realize this right, state parties are required to take the necessary measures to ensure disabled persons' access to cultural materials and to cultural, sporting, recreation and tourism spaces.²²⁰

3.3.5. Monitoring and Enforcement Mechanisms under the Disability Convention and its Protocol

The *CRPD* establishes mechanisms to oversee its implementation at both national and international levels. At the national level, the *CRPD* requires state parties to assign one or more focal bodies to issues relating to its implementation.²²¹ It also requires state parties to establish independent mechanisms within their existing frameworks to promote and monitor the implementation of the *Convention*.²²² The *CRPD* also recognizes the role of civil societies, and in particular the roles of disabled persons' organizations and of persons with disabilities themselves, in the monitoring process.²²³

At the international level, Article 34(1) of the *CRPD* established a treaty body called the Committee on the Rights of Persons with Disabilities (hereinafter "the Committee").²²⁴ When the *Convention* came into effect, the Committee had

²¹⁸ *Ibid.* Art. 26.

²¹⁹ *Ibid.* Art. 28.

²²⁰ *Ibid.* Art. 30.

²²¹ *Ibid.* Art. 33(1).

²²² *Ibid.* Art. 33(2).

²²³ *Ibid.* Art. 33(3).

²²⁴ *Ibid.* Art.34(1).

twelve members; following an additional sixty ratifications and accessions, the Committee expanded its membership to its maximum size of eighteen.²²⁵ The *CRPD* is criticized for failing to require the representation of experts with disabilities on the Committee. The *Convention* simply urges state parties to give consideration to the participation of experts with disabilities in electing members of the Committee.²²⁶ This does not guarantee that experts with disabilities will become members of the Committee. This Committee, which deals with the rights of persons with disabilities, requires balanced gender representation but not the inclusion of persons with disabilities. This seems to reflect a paternalistic approach towards persons with disabilities and to assume that non-disabled persons always have more expertise and knowledge than persons with disabilities, even on matters affecting disabled persons.²²⁷ The Conference of States Parties to the *CRPD* elected the first twelve members of the Committee during its first session, which was held in New York on October 31 and November 3, 2008.²²⁸

Pursuant to the *Convention*, the principal mandate of the Committee is to consider reports from state parties to the *CRPD* on a four-year basis regarding measures they have adopted to implement the rights recognized in the *Convention*, and to make suggestions and general recommendations on the reports submitted.²²⁹ The Committee is required to report on its activities every two years

²²⁵ *Ibid.* Art. 34(2).

²²⁶ Justesen & Justesen, *supra* note 4 at 39.

²²⁷ *Ibid.*

²²⁸ UN Enable Conference of States Parties, *Information on the First Sess. of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities*, online: UN <<http://www.un.org/disabilities/default.asp?navid=19&pid=14>>.

²²⁹ *CRPD*, *supra* note 133, Arts. 35-36.

to the UN General Assembly and to the Economic and Social Council.²³⁰

The Committee also has other important mandates regarding states that ratify the *CRPD's Optional Protocol*. Under this *Protocol*, the Committee may receive and consider complaints submitted by or on behalf of individuals or groups of individuals who claim to be victims of violations of *CRPD* provisions by a state party to the *Protocol*.²³¹ In addition to violations of civil and political rights, complaints regarding violations of economic, social and cultural rights of disabled persons can now be instituted before the Committee; this recourse is not available under the *ICESCR*.

It is my contention that the justiciability of economic, social and cultural rights before the Committee creates an advantage for persons with disabilities compared to other members of society since this remedy is not open to all persons. On the other hand, once the Committee has developed enough jurisprudence on economic, social and cultural rights, it could inspire the formulation of an optional protocol to the *ICESCR* so as to empower the *ICESCR* Committee to consider complaints from individuals or groups regarding violations of economic, social and cultural rights. I also argue that the justiciability of economic, social and cultural rights under the *CRPD* could be followed in domestic jurisdictions since state parties are required under the *CRPD* to provide effective remedies for aggrieved individuals. At least cases of discrimination and inequality with respect to economic, social and cultural rights should be

²³⁰ *Ibid.* Art. 39.

²³¹ *Optional Protocol*, *supra* note 136, Art.1(1).

justiciable before domestic courts.

The *Optional Protocol* to the *CRPD* also provides the Committee with the competence to inquire into allegations of grave or systematic violations of the rights of disabled persons recognized in the *CRPD* by a state party to the *Protocol*.²³² The inquiry procedure may include visits to the territory in question with the state's consent.²³³ However, state parties to the *Protocol* can refuse to recognize the Committee's competence in this regard.²³⁴

The Conference of States Parties is the other monitoring mechanism established by the *CRPD*.²³⁵ It consists of a periodic meeting of state parties to the *Convention*. Meetings are convened by the UN Secretary General every two years or upon the decision of the Conference of States Parties.²³⁶ These meetings can entail consideration of any matter with regards to the implementation of the provisions of the *CRPD*.²³⁷ Scholars have noted that this is “unique among core human rights conventions. While previous human rights conventions reference meetings of states parties, these mechanisms are intended to be used for limited purposes pertaining to the election of Committee members or amendments and not for the broader purpose envisioned by the drafters of the *CRPD*.”²³⁸

²³² *Ibid.* Art. 6(1).

²³³ *Ibid.* Art. 6(2).

²³⁴ *Ibid.* Art. 8.

²³⁵ *CRPD*, *supra* note 133, Art. 40.

²³⁶ *Ibid.* Art. 40(2).

²³⁷ *Ibid.* Art. 40(1).

²³⁸ Michael Ashley Stein & Janet E. Lord, “Monitoring the Convention on the Rights of Persons

3.4. Conclusion

After half a century of neglect by the UN and the international community in failing to adopt a specific international human rights treaty on the rights of persons with disabilities, the UN General Assembly adopted the *CRPD* on December 13, 2006. It was the first international human rights treaty of the 21st century.²³⁹ The *CRPD* came into effect on May 3, 2008 after being ratified by twenty states. This *Convention* is of paramount significance to the hundreds of millions of persons with disabilities throughout the world.²⁴⁰ For the first time, the *CRPD* specifically and explicitly recognizes and protects the rights of persons with disabilities as “human rights”, and it guarantees a range of civil, political, economic, social and cultural rights of disabled persons.²⁴¹ This reflects a shift to the human rights notion of disability, which treats persons with disabilities as right-holders. This trend had been evolving very slowly for three decades prior to the adoption of the *CRPD*. As Frédéric Mégret argues, although the *CRPD* is a treaty on the rights of persons with disabilities and not on the entire human species, “the *Convention* may be in a better position to recapture the sense of unity and interdependence of rights which otherwise seems to elude the human rights project.”²⁴²

Within domestic jurisdictions, state parties are required to adopt legislative and administrative measures to implement the rights guaranteed under the *CRPD*.

with Disabilities: Innovations, Lost Opportunities, and Future Potential” (2010) 32:3 Hum. Rts. Q. 689 at 699-700.

²³⁹ Mackay, *supra* note 10 at 323.

²⁴⁰ Kanter, “Promise”, *supra* note 139 at 287-288.

²⁴¹ *CRPD*, *supra* note 133.

Since the *Convention* has entered into force, state parties are expected to develop laws and policies to ensure the non-discrimination and equal treatment of persons with disabilities and to fully realize the rights contained in the *CRPD* within their territorial boundaries. The *Convention* recognizes that the failure to provide reasonable accommodations to persons with disabilities constitutes “discrimination”; this is by far the *CRPD*’s greatest contribution to ensuring that persons with disabilities function as citizens and full members of their societies.²⁴³ The mechanisms provided in the *CRPD* to oversee and implement its provisions can play a great role in ensuring its implementation if they are given all the resources, means and attention available in order to function at national and international levels.²⁴⁴

²⁴² Mégret, *supra* note 196 at 276.

²⁴³ *CRPD*, *supra* note 133, Art. 2.

²⁴⁴ *Ibid.* Arts. 33 and following.

CHAPTER FOUR:

DISABILITY LAW IN AFRICA: REGIONAL DEVELOPMENTS

4.1. Introduction

This chapter examines and evaluates the treatment, rights and legal guarantees available to persons with disabilities under the current framework of the African regional human rights instruments. It also looks at the monitoring and enforcement mechanisms created by the African regional human rights system in the context of persons with disabilities. Throughout this chapter, I argue that the existing regional legal framework in Africa does not encompass adequate legal protections and guarantees to safeguard the human rights of persons with disabilities. Disability issues and rights in these instruments are often framed by the individual/bio-medical model of disability, which does not portray persons with disabilities as full citizens and bearers of human rights. Although there has been a shift towards a human rights approach, this shift is occurring slowly and it is not consistently reflected in human rights instruments.¹ To address this inadequacy, I suggest that the African Union (AU) amend the *African Charter on Human and Peoples' Rights (ACHPR)* and adopt a separate and specific convention or protocol on the rights of persons with disabilities in Africa.

¹ Helène Combrinck & Tobias Pieter Van Reenen, "The UN Convention on the Rights of Persons with Disabilities in Africa: Progress After 5 Years" (2011) 8:14 SUR-Int'l J. Hu. Rts 132 at 142, online: SUR

4.2. Evaluating the Rights of Persons with Disabilities under the Current African Human Rights Instruments

4.2.1. Introduction

In the past, the concept of human rights was used by Africans as a great tool to free themselves from the rule of colonialism during the struggle for African states' independence.² Although the newly independent states incorporated human rights principles into their national constitutions, it did not take them long to detract from and oppress their people 'en mass'. The Organization of the African Unity (OAU), an association of the then independent African states, was established in May of 1963 through the adoption of the *ACHPR*.³ As one scholar pointed out, "the protection of individual human rights against government abuse was not the motivating impulse behind the *Charter*. Rather, inspired by the anti-colonial struggles of the 1950s, the Organization was dedicated primarily to the eradication of colonialism and the condemnation of abuse of the rights of Africans by non-Africans, such as in the case of apartheid."⁴

Thus, it is obvious that the protection of human rights in the *ACHPR* was insufficient and that human rights were not one of the primary concerns of the

<http://www.surjournal.org/eng/conteudos/getArtigo14.php?artigo=14.artigo_07.htm>
[Combrinck & Van Reenen].

² El-Obaid Ahmed El-Obaid & Kwadwo Appiagyei-Atuua, "Human Rights in Africa: A New Perspective on Linking the Past to the Present" (1996) 41 McGill L.J. 819 at 823-824 [El-Obaid & Appiagyei-Atuua].

³ Curtis F.J. Doebbler, "A Complex Ambiguity: The Relationship Between the African Commission on Human and Peoples' Rights and Other African Union Initiatives Affecting Respect for Human Rights" (2003) 13 Transnat'l L. & Contemp. Probs. 7 at 9 [Doebbler].

⁴ Nsongurua J. Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late Than Never" (2000) 3 Yale Hum. Rts. & Dev. L.J. 45 at 55 [Udombana, "Toward the African Court"].

OAU during that time.⁵ In fact, African leaders used the organization as a shield against criticism of domestic human rights violations by their peers and other human rights organizations⁶ by heavily relying on the principles of non-interference, state sovereignty and territorial integrity in the *ACHPR*.⁷ Sadly, leaders alleged to have committed outrageous human rights violations against their own populations were elected on several occasions to chair the OAU.⁸

The growth and evolution of the African regional human rights system is a recent phenomenon compared to the regional human rights systems of Europe and the Americas.⁹ The African system came into formal existence through normative and institutional developments in the 1980's with the adoption of the *ACHPR* and the establishment of the African Commission on Human and Peoples' Rights.¹⁰ To complement these developments, the OAU and then the AU (which formally replaced the OAU in July 2002)¹¹ adopted and established other human rights instruments and institutions, including: the *African Charter on the Rights and*

⁵ Doebller, *supra* note 3 at 9. See also: Combrinck & Van Reenen, *supra* note 1 at 135.

⁶ Nsongurua J. Udombana, "Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter" (2004) 40 Stan. J. Int'l L. 105 at 106 [Udombana, "Between Promise"].

⁷ *Charter of the Organization of African Unity*, signed by heads of African states and governments in Addis-Ababa, Ethiopia on 25 May 1963 (entered into force 13 September 1963), Art.3, online: Africa-Union.org <http://www.africa-union.org/root/au/Documents/Treaties/text/OAU_Charter_1963.pdf>, [OAU Charter].

⁸ Udombana, "Toward the African Court", *supra* note 4 at 56-58.

⁹ The regional human rights systems of Europe and the Americas were established in 1950 and 1948 respectively.

¹⁰ *African Charter on Human and Peoples' Rights*, adopted by the 18th Annual Summit of the Assembly of the Heads of State and Government of the OAU in Nairobi, Kenya on 27 June 1981 (entered into force 21 October 1986), online: Africa-Union.org <http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf> [ACHPR]. Article 30 of this *Charter* establishes the African Commission on Human and Peoples' Rights.

¹¹ Vincent O. Nmehielle, "The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?" (2003) 7 Sing. J. Int'l & Comp. L. 412 at 415 [Nmehielle].

Welfare of the Child (ACRWC),¹² the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*,¹³ the *Convention for the Protection and Assistance of Internally Displaced Persons in Africa*,¹⁴ and the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*.¹⁵

The African Committee of Experts on the Rights and Welfare of the Child was set up by the ACRWC,¹⁶ and the African Court on Human and Peoples' Rights was established by the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*.¹⁷ It should be noted that the regional instrument dealing with refugee problems in Africa, the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*,¹⁸ was adopted by the OAU in the late 1960's, prior

¹² *African Charter on the Rights and Welfare of the Child*, adopted in Addis Ababa, Ethiopia on 11 July 1990 (entered into force 29 November 1999), online: Africa-Union.org <http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf> [ACRWC].

¹³ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted by the 2nd Ordinary Session of the Assembly of the AU in Maputo, Mozambique on 11 July 2003 (entered into force 25 November 2005), online: Africa-Union.org <<http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>> [ACHPR Women's Protocol].

¹⁴ *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, adopted in Kampala, Uganda on 22 October 2009 (not yet entered into force), online: Africa-Union.org <<http://www.africa-union.org/root/au/Conferences/2009/october/pa/summit/doc/Convention%20on%20IDPs%20%28Eng%29%20-%20Final.doc>> [AU Displaced Persons Convention].

¹⁵ *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, adopted in Ouagadougou, Burkina Faso on 9 June 1998 (entered into force 25 January 2004), online: Africa-Union.org <http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf> [ACHPR Court Protocol].

¹⁶ ACRWC, *supra* note 12, Art.32. The provisions following Art.32 describe the composition, election, terms of office and mandates of the Committee.

¹⁷ ACHPR Court Protocol, *supra* note 15.

¹⁸ *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, adopted in Addis Ababa, Ethiopia on 10 September 1969 (entered into force 20 June 1974), online: Africa-Union.org <<http://www.africa-union.org>>

to the aforementioned human rights developments. The following sub-sections examine how the African regional human rights system treats the rights of persons with disabilities.

4.2.2. The Rights and Guarantees of Persons with Disabilities in Africa: An Evaluation of the Human Rights Instruments

4.2.2.1. Instruments Establishing the Organization of African Unity (OAU) and the African Union (AU)

The OAU Charter

The *OAU Charter* established the Organization of African Unity in 1963.¹⁹ This *Charter* has been inoperative since the OAU reorganized itself into the AU by adopting the *Constitutive Act of the AU*.²⁰ The following discussion on the *OAU Charter* therefore merely has historical relevance.²¹

The *OAU Charter* does not specifically mention the concept of ‘human rights’. The purposes and governing principles of the organization essentially focus on protecting and respecting the sovereignty, territorial integrity and

[union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf](http://untreaty.un.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf)
> [*OAU Refugee Convention*].

¹⁹ *OAU Charter*, *supra* note 7.

²⁰ *Constitutive Act of the African Union*, adopted by the Assembly of the Heads of State and Government of the Organization of African Unity (OAU) in Lomé, Togo on 11 July 2000 (entered into force 26 May 2001), Art.33, online: UN Treaty Collection <http://untreaty.un.org/unts/144078_158780/11/3/3871.pdf> [*AU Constitutive Act*].

²¹ Treaty-based bodies such as commissions and committees, as well as treaties, Conventions, Protocols and other agreements adopted and established by the OAU will remain functional unless the AU replaces them with new ones.

independence of states.²² However, without mentioning the idea of ‘human rights’, the *OAU Charter*’s Preamble notes that the signatory states reaffirm their adherence to the principles enshrined in the *UN Charter* and the *Universal Declaration of Human Rights*.²³ Furthermore, the *OAU Charter* notes that the African leaders were “conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.”²⁴

Thus, the guarantees and protections of human rights of African people under the *OAU Charter* - let alone the rights of persons with disabilities - are by implication merely vague and weak.²⁵ Nevertheless, the *OAU Charter*’s Preamble recognizes that exploiting natural and human resources for the total advancement of the African peoples in all areas of human endeavor is the responsibility of African leaders.²⁶ This could be used to argue for the advancement of the rights of persons with disabilities in Africa. That is to say, African states have the responsibility to advance or improve the well-being of persons with disabilities by using their available resources since persons with disabilities are also part of society. However, such a guarantee or protection is vague and indirect.

²² *OAU Charter*, *supra* note 7, Arts.2 & 3.

²³ *Ibid.* Preamble.

²⁴ *Ibid.*

²⁵ El-Obaid & Appiagyei-Atuua, *supra* note 2 at 827.

²⁶ *OAU Charter*, *supra* note 7, Preamble.

The Constitutive Act of the AU

The *Constitutive Act of the AU* is an agreement of African leaders that established the AU by dissolving the OAU.²⁷ It was adopted in July of 2000 by the Assembly of the Heads of State and Government of member states of the OAU, and it entered into force in May of 2001.²⁸

The *Constitutive Act* went much further than the *OAU Charter* in providing guarantees and protections of human rights in general, and of the rights of persons with disabilities in particular. The *Act's* Preamble affirms that African leaders are committed and determined “to promote and protect human and people’s rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law”²⁹ in Africa. Article 3 of the *Act* states that one of the main objectives of the AU is to “promote and protect human and people’s rights in accordance with the [ACHPR] and other relevant human rights instruments.”³⁰ Article 4 of the *Act* reiterates that “respect for democratic principles, human rights, and the rule of law and good governance”³¹ is one of the key guiding principles of the organization in performing its functions.

Unseen in the history of the OAU and unparalleled in the *OAU Charter*, the *Constitutive Act* goes even further by unequivocally recognizing the “right of

²⁷ *AU Constitutive Act*, *supra* note 20.

²⁸ African Union, *List of Countries which have Signed, Ratified/Acceded to the Constitutive Act of the African Union*, online: Africa-Union.org <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/Constitutive%20Act%20of%20the%20African%20Union.pdf>.

²⁹ *AU Constitutive Act*, *supra* note 20, Preamble.

³⁰ *Ibid.* Art. 3, Para. H.

³¹ *Ibid.* Art. 4.

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.”³² One author describes this right of intervention of the Union as a fundamental departure from the principles of non-interference and state sovereignty of the *OAU Charter*.³³ However, the *Constitutive Act* fails to explain how such a right may be exercised, other than indicating that it must be pursuant to a decision of the AU’s Assembly.³⁴ It does not explicitly provide for the use of force in such circumstances either by the Organization or the member states. Military sanctions are not listed as a possible measure under Article 23 of the *Constitutive Act*, which provides for sanctions by the AU.³⁵

There seems to have been an implicit understanding in adopting the *Constitutive Act* that a state with alleged grave human rights violations should request the AU’s intervention; this would not usually occur unless the grave human rights violations had taken place in circumstances for which the state was not responsible. Article 8(2) of the recent *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, which was adopted by the AU in October 2009, states that the “African Union shall respect the right of States Parties to request intervention from the Union in order to restore peace and security in accordance with Article 4(j) of the [AU] *Constitutive Act*.”³⁶ However, this provision only binds the states that ratify and accede to this

³² *Ibid.*

³³ Abdulqawi Yusuf, “Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action” (2003) 11 Afr. Y.B. Int’l L. 3 at 3 [Yusuf].

³⁴ *AU Constitutive Act*, *supra* note 20, Art. 4.

³⁵ *Ibid.* Art. 23.

³⁶ *AU Displaced Persons Convention*, *supra* note 14, Art. 8(2).

new convention, and only in situations of internal displacement.

Others argue that the AU's right of intervention does not require the consent of the state concerned, and that it is necessarily exercised through military force. They argue that the establishment of an African standby force under the act setting up the Peace and Security Council of the AU³⁷ implies the authorization of the use of force under the *AU Constitutive Act*, which the AU always intended to prevent the recurrence of grave human rights violations in Africa such as the 1994 Rwanda genocide.³⁸ If this is the intention of the *Constitutive Act*, the AU's right of intervention using force must be authorized by the UN Security Council; enforcement measures such as using military action to intervene in a state by regional arrangements or agencies should not be exercised without the authorization of the Security Council.³⁹

In addition to the AU's staunch affirmation and determination to promote and protect the human rights of all Africans, the *Constitutive Act* also specifies that the AU can coordinate and formulate "policies relating to the disabled and the handicapped" through its Executive Council.⁴⁰ The mention of disability policy and the disabled in the AU's establishing agreement is a big step forward in comparison to the OAU in terms of laying down grounds for protecting disability

³⁷ *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, adopted in Durban, South Africa on 9 July 2002 (entered into force on 26 December 2003), Art. 13, online: Africa-union.org <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol_peace%20and%20security.pdf> [*Peace Council Protocol*].

³⁸ Martin Kunschak, "African Union and the Right to Intervention: Is There a Need for UN Security Council Authorization" (2006) 31 S. Afr. Y.B. Int'l L. 195. See also: Yusuf, *supra* note 33.

³⁹ *Charter of the United Nations*, signed in San Francisco on 26 June 1945, 59 Stat. 1031, T.S.

rights in Africa. However, unfortunately “disability policies” refer to social security policies rather than human rights. Another shortcoming of the *Constitutive Act* is that although Article 14 establishes several technical committees,⁴¹ it fails to establish a body or technical committee relating to either human rights⁴² or disability rights. Since the AU can restructure the established committees or create new committees as needed, taking into account the importance of human rights in general and of disability issues in particular, it should use its power to establish such committees.⁴³

It should be noted here that an African human rights institution called the African Commission on Human and Peoples’ Rights was established within the OAU by the *ACHPR* of 1981. This institution is still operative despite the dissolution of the OAU since it is a treaty-based body.⁴⁴

4.2.2.2. The African Charter on Human and Peoples’ Rights (ACHPR) of 1981

The *African Charter on Human and Peoples’ Rights (ACHPR)* was adopted by the OAU’s Assembly during its 18th Ordinary Session in 1981, and it

993, 3 Bevans 1153 (entered into force 24 October 1945), Art.53.

⁴⁰ *AU Constitutive Act*, *supra* note 20, Art. 13.

⁴¹ Kithure Kindiki, “Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal” (2003) 3 Afr. Hum. Rts. L.J. 97 at 101. On page 102, the author suggests that in the absence of any permanent body relating to human rights, the AU should use the established Economic, Social and Cultural Council for this purpose, drawing lessons from the experience of this UN institution.

⁴² Nmehielle, *supra* note 11 at 436.

⁴³ *AU Constitutive Act*, *supra* note 20, Art. 14.

⁴⁴ *ACHPR*, *supra* note 10, Art. 30 and following.

came into force in 1986.⁴⁵ The *ACHPR* aims to promote and protect the rights and freedoms of African people by recognizing the corresponding obligations and duties of individuals, families, communities and the state.⁴⁶ Since persons with disabilities are also members of the African community, the *ACHPR* and the guarantees and protections contained within it apply equally to persons with disabilities.

Article 2 of the *ACHPR* states that “every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present *Charter* without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.”⁴⁷ The phrase “every individual” in that article and throughout the *Charter* clearly signifies that the rights and freedoms recognized under the *ACHPR* are for all human beings, including persons with disabilities.⁴⁸ Articles 3 and 19 of the *ACHPR* reinforce the equal application of the *Charter*’s provisions to all individuals, declaring that all individuals and peoples are equal before the law and are entitled to the equal protection of the law.⁴⁹

However, the list of prohibited grounds for distinction or discrimination that follows the entitlements under Article 2 constitutes the key obstacle to the

⁴⁵ African Union, *List of Countries which have Signed, Ratified/Acceded to the ACHPR*, online: Africa-union.org <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>.

⁴⁶ *ACHPR*, *supra* note 10.

⁴⁷ *Ibid.* Art. 2.

⁴⁸ Japhet Biegon, “The Promotion and Protection of Disability Rights in the African Human Rights System” in Ilze Grobbelaar-du Plessis & Tobias van Reenen, eds., *Aspects of Disability Law in Africa* (Pretoria, South Africa: Pretoria University Law Press, 2011) 53 at 62 [Biegon].

equal application of the *ACHPR*'s provisions to persons with disabilities. The list in Article 2 does not clearly mention disability or any related term describing disability as a prohibited ground for distinction or discrimination.⁵⁰ Although the interpretation of the phrase "any status" may include disability, this inclusion is entirely dependent on the interpreter's understanding of and attitudes towards disability and the rights of persons with disabilities. As a result, the equal application of the rights and freedoms recognized under the *ACHPR* to persons with disabilities is weak and inadequate. In my opinion, the recognition and protection of the human rights and fundamental freedoms of persons with disabilities should not depend on an inclusive interpretation, especially when such rights and freedoms are explicitly provided to other groups of individuals and to the general population.

Despite this problem of interpretation, the *ACHPR* stipulates many human rights and fundamental freedoms that are very important for persons with disabilities. It affirms that every individual is entitled to the right to life and dignity, and to liberty and security of the person.⁵¹ The *ACHPR* also recognizes that every individual is entitled to freedom of conscience, religion and expression of opinion; freedom of assembly and association; freedom of movement and residence; and the right to free participation in government.⁵² Moreover, the *ACHPR* stipulates that every individual has the right to property, work and

⁴⁹ *ACHPR*, *supra* note 10, Arts. 3 & 19.

⁵⁰ Combrinck & Van Reenen, *supra* note 1 at 137.

⁵¹ *ACHPR*, *supra* note 10, Arts. 4-6.

⁵² *Ibid.* Arts. 8-13.

education.⁵³

Another article of the *ACHPR* that is germane to persons with disabilities is Article 16, which states that “every individual shall have the right to enjoy the best attainable state of physical and mental health.”⁵⁴ This may help ensure the provision of necessary medical care and treatment to persons with disabilities and help prevent future disability. Article 13 of the *ACHPR* also provides for the right of equal access to public property and services, which can eliminate many of the challenges that persons with disabilities face in all aspects of life.⁵⁵ For instance, public hospitals, offices, work-places, schools, roads, transportation, and other facilities and services have to be equally accessible to persons with disabilities; this can help ensure their rights to the best attainable health-care and education, and other related rights.

In terms of disability-specific rights under the *ACHPR*, Article 18(4) is the only provision that deals specifically with the rights of persons with disabilities. It states that “the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.” This phrase is vague and reinforces the individual/medical model of disability, which sees persons with disabilities as recipients of social welfare, care and rehabilitation services rather than as holders of human rights.⁵⁶ The phrase “physical and moral needs” may simply be interpreted as meaning the measures aimed at rehabilitating the

⁵³ *Ibid.* Arts. 14-15 & 17.

⁵⁴ *Ibid.* Art. 16(1).

⁵⁵ *Ibid.* Art. 13.

⁵⁶ For a detailed discussion on the individual/bio-medical model of disability, see the sub-section examining disability models in Chapter 2 of this thesis.

disabled. “Physical and moral needs” do not fully encompass all the human rights and fundamental freedoms that persons with disabilities should enjoy in all spheres of life. Thus, the *ACHPR* does not really adopt a human rights approach to disability and persons with disabilities.

Further reflecting the rehabilitative approach to disability, in 1985 the AU’s predecessor, the OAU, adopted the *Agreement for the Establishment of an African Rehabilitation Institute* (ARI) with the goal of taking steps to prevent disability and rehabilitate disabled persons in Africa.⁵⁷ The *Agreement* came into force six years later, and the ARI is still rendering its services.⁵⁸ According to the *Agreement*, the objectives of the ARI include:

[...] develop[ing] a unified approach for promoting the development of prevention and rehabilitation services; creat[ing] facilities to satisfy the needs of handicapped Africans [...]; promot[ing] the development of rehabilitation centers in all the countries of the African continent [...]; creat[ing] favorable conditions for inter-African co-operation and mutual assistance as part of rehabilitation [...]; provid[ing] an appropriate framework for the establishment and launching of training and research programs in the field of rehabilitation [...]; and organiz[ing] special projects in the field of rehabilitation and disability prevention [...].⁵⁹

The text of this *Agreement* does not express the needs of persons with

⁵⁷ *Agreement for the Establishment of an African Rehabilitation Institute*, adopted in Addis Ababa, Ethiopia on 17 July 1985 (entered into force 2 December 1991), online: Africa-union.org <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/African_Rehabilitation_Institute.pdf> [ARI *Agreement*].

⁵⁸ African Union, *List of Countries which have Signed, Ratified/Acceded to the ARI Agreement*, online: Africa-union.org <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Rehabilitation%20Institute.pdf>.

⁵⁹ *ARI Agreement*, *supra* note 57, Art. II.

disabilities in terms of human rights or rights perspectives.⁶⁰

Article 18(3) of the *ACHPR* requires state parties to ensure the elimination of all discrimination against women and to fulfill their rights recognized under international conventions and declarations.⁶¹ The *ACHPR* does not explicitly or implicitly recognize that persons with disabilities face discrimination, prejudices and neglect in their daily lives. The right to special measures of protection as guaranteed under Article 18(4) is not adequate to fully recognize and protect the human rights and fundamental freedoms of persons with disabilities in Africa. Nevertheless, considering that the *ACHPR* was adopted in 1981, its explicit treatment of persons with disabilities in terms of entitling them to “special measures of protection in keeping with their physical or moral needs” was a commendable initiative. The *ACHPR* was a pioneer among international and regional conventions that specifically deal with the rights of persons with disabilities.

4.2.2.3. The African Charter on the Rights and Welfare of the Child (ACRWC) of 1990

The *African Charter on the Rights and Welfare of the Child (ACRWC)* is a specific convention at the regional level in Africa that deals with a particular group of persons: children. It was adopted by the OAU in July of 1990 and

⁶⁰ *Ibid.* Full text.

⁶¹ *ACHPR*, *supra* note 10, Art. 18(3).

entered into force in November of 1999.⁶² The *ACRWC* aims to recognize, protect and promote the human rights and fundamental freedoms of African children, including children with disabilities. The general provisions of this *Charter* that apply to all children apply equally to children with disabilities.⁶³

Article 3 of the *ACRWC* provides that: “Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this *Charter* irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”⁶⁴ The phrase “every child” in this article also refers to children with disabilities; hence, children with disabilities are entitled to the rights and freedoms provided under the *ACRWC*. However, as in Article 2 of the *ACHPR*, the *ACRWC* fails to mention disability or any other terminology describing disability as a prohibited ground for discrimination among the list of factors in Article 3. On the other hand, the phrase “other status” can be interpreted to include disability; discrimination on the ground of disability is thus prohibited under the *ACRWC*.⁶⁵

Many of the human rights and fundamental freedoms stipulated for all children in Africa under the *ACRWC* are also very significant for children with disabilities. The *ACRWC* affirms that every child, including a child with a

⁶² African Union, *List of Countries which have Signed, Ratified/Acceded to the ACRWC*, online: Africa-union.org <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>.

⁶³ *ACRWC*, *supra* note 12.

⁶⁴ *Ibid.* Art. 3.

⁶⁵ For a similar discussion, see the section above that examines the interpretation of Article 2 of the

disability, has the inherent right to life; children may not be sentenced to death under any circumstances for any crime.⁶⁶ The *Charter* also guarantees all children the right to have a name and acquire a nationality; freedom of expression of opinions; freedom of association and assembly; and freedom of thought, conscience and religion.⁶⁷ The *ACRWC* also recognizes that every child has the right to the best attainable health-care, to education, to rest and leisure, and to participate freely in cultural and artistic life.⁶⁸ Moreover, it provides all children with legal protections against child abuse; torture and inhumane treatment; sexual exploitation and abuse; sale, trafficking and abduction; recruitment as a soldier and direct involvement in hostilities and armed conflicts; all forms of economic exploitation; and harmful social and cultural practices and customs affecting their welfare, dignity and development.⁶⁹

In comparison with the *ACHPR*, the *ACRWC* goes quite far in recognizing and protecting disability rights and in shifting the approach to disability, although its scope is limited to children with disabilities. The *ACRWC*'s provision dealing with the rights of children with disabilities is more detailed in terms of its coverage, and it treats disability rights more from a human rights perspective.⁷⁰ Similar to Article 18(4) of the *ACHPR*, Article 13(1) of the *ACRWC* stipulates that "every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs

ACHPR.

⁶⁶ *ACRWC*, *supra* note 12, Art. 5.

⁶⁷ *Ibid.* Arts. 6-9.

⁶⁸ *Ibid.* Arts. 14, 11 & 12.

⁶⁹ *Ibid.* Arts. 16, 27, 29, 22, 15 & 21.

⁷⁰ Biegon, *supra* note 48 at 63.

[...].”⁷¹ Unlike the *ACHPR*, however, the *ACRWC* requires that the special measures ensure and promote the disabled child’s dignity, self-reliance and active participation in the community.⁷² This is very important since it obliges state parties to take every possible measure to satisfy the physical and moral needs of disabled children in a way that would respect and protect their human rights. Again though the problem lies with the interpretation of the phrase “physical and moral needs”. If it is interpreted to mean only the measures required to rehabilitate the disabled child, the anticipated measures would not go far enough to protect the human rights of the child. The *ACRWC* also requires that states give assistance to disabled children and their care-givers commensurate to the needs of each child.⁷³ This right to assistance is, however, subject to the availability of resources.⁷⁴

Subject to available resources, state parties must also “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/her cultural and moral development.”⁷⁵ Under the *ACRWC*, state parties are obliged to take special measures to ensure equal access to education not only for children with disabilities, but also for female, gifted and disadvantaged children.⁷⁶ The *ACRWC* also requires state parties to progressively provide disabled children with easy

⁷¹ *ACRWC*, *supra* note 12, Art. 13(1).

⁷² *Ibid.* Art. 13(1).

⁷³ *Ibid.* Art. 13(2).

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* Art. 11(3) E.

movement and access to public highways, buildings and other places, taking into account available resources.⁷⁷ This duty to create easy movement and access to public places is subject to a strange and unnecessary restriction: the disabled child's desire for access must be legitimate.⁷⁸ This criterion is added to the requirement of the availability of resources, which mandates that the right be implemented progressively.⁷⁹

4.2.2.4. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (ACHPR Women's Protocol) of 2003

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (ACHPR Women's Protocol)* is another regional convention that deals with a specific group of persons: women. It was adopted by the Assembly of the AU in July of 2003 and entered into force in November of 2005.⁸⁰ The *ACHPR Women's Protocol* aims to recognize, protect and promote the human rights and fundamental freedoms of women and girls in Africa by making state parties undertake to eliminate all forms of discrimination, harmful practices and violence against women and girls that negatively affect their

⁷⁷ *Ibid.* Art. 13(3).

⁷⁸ *Ibid.*

⁷⁹ Helene Combrinck, "The Hidden Ones: Children with Disabilities in Africa and the Right to Education" in Julia Sloth-Nielsen, ed., *Children's Rights in Africa: A Legal Perspective* (Aldershot, England: Ashgate Publishing Ltd, 2008) 299 at 311 [Combrinck, "The Hidden Ones"].

⁸⁰ African Union, *List of Countries which have Signed, Ratified/Accessed to the Protocol to the ACHPR on the Rights of Women in Africa*, online: Africa-union.org <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/Protocol%20on%20the%20Rights%20of%20Women.pdf>.

fundamental rights and freedoms.⁸¹ While the protections ensured under the *Protocol* are aimed at women and girls, the *Protocol* also provides special protections to disadvantaged groups within this category, such as widows, elderly women, women in distress and women with disabilities.⁸²

Without listing the ordinary prohibited factors for discrimination, the *Protocol* prohibits “any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life”⁸³. It staunchly affirms that women and men are equal before the law and have equal protection and benefit of the law.⁸⁴ The *Protocol* therefore hardly gives rise to problems of interpretation as to its equal application to women with disabilities.

The *ACHPR Women’s Protocol* recognizes that every woman has the right to dignity and respect as a person, and has the right to life, integrity and security of the person.⁸⁵ It also condemns and prohibits all forms of exploitation; cruel, inhumane or degrading punishment and treatment; all forms of violence, including unwanted or forced sex; all medical or scientific experiments without their informed consent; and harmful practices against women.⁸⁶ Noting that the minimum age for marriage is 18, the *Protocol* recognizes that women are equal partners in marriage and have the same rights as men in case of separation,

⁸¹ *ACHPR Women’s Protocol*, *supra* note 13.

⁸² *Ibid.* Arts. 20-24.

⁸³ *Ibid.* Art. 1.

⁸⁴ *Ibid.* Art. 8.

⁸⁵ *Ibid.* Arts. 3-4.

divorce or marriage annulment.⁸⁷ It also affirms that women have the right to participate in the political and decision-making process, and have the right to education and training; employment; health, including sexual and reproductive health; food security; and adequate housing.⁸⁸

In addition to the general provisions that apply to all women, including women with disabilities, the *Protocol* also contains a specific provision that provides special protection for the rights of women with disabilities. According to Article 23 of the *ACHPR Women's Protocol*, state parties should “ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making [...]”⁸⁹ Here, the phrase “physical and moral needs” that appears in the *ACHPR* and the *ACRWC* is replaced by the phrase “physical, economic, and social needs”.

Although this *Protocol* covers a wider array of disabled people's needs, this coverage is not sufficient to protect all the human rights and fundamental freedoms of women with disabilities; certain needs such as civil, political and cultural needs are left off the list. The fulfillment of the physical, economic and social needs of women with disabilities under the *ACHPR Women's Protocol* has a very limited scope in the sense that it is only to facilitate women with

⁸⁶ *Ibid.* Arts. 3-5.

⁸⁷ *Ibid.* Arts. 6-7.

⁸⁸ *Ibid.* Arts. 9 & 12-16.

⁸⁹ *Ibid.* Art. 23.

disabilities' access to employment, professional and vocational training, and participation in decision-making. It might be argued here that, as is clear from the provision quoted above, state parties are obliged to ensure protection of women with disabilities, and they are therefore required to recognize and protect the human rights of women with disabilities in all spheres of life. Nevertheless, I argue that such protection is vague and weak. Had the *Protocol* been meant to provide stronger protection, it would have clearly expressed this. For example, with respect to widows, the *Protocol* stipulates that "State parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of [...] provisions [listed in this Article]." ⁹⁰

Article 23 of the *ACHPR Women's Protocol* also stipulates that state parties should "ensure the rights of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity." ⁹¹ The *Protocol* is the first African regional convention to clearly recognize that women with disabilities should not be discriminated against on the ground of disability and that they have the right to be treated with dignity. However, this essential protection is only mentioned with reference to "freedom from violence", as if violence is the only problem women with disabilities face in their daily lives. Thus, the *Protocol* fails to extend this important protection to all spheres of life for women with disabilities, and it falls short in guaranteeing and protecting their human rights and fundamental freedoms. Unlike the *ACHPR* and the *ACRWC*, the *Women's Protocol* uses the

⁹⁰ *Ibid.* Art. 20.

description “women with disabilities” rather than “the disabled”; this may signify an adoption of a human rights approach to disability and persons with disabilities. On the other hand, the *Protocol* fails to lay down adequate guarantees and protections of the human rights of women with disabilities.

4.2.2.5. Conventions Relating to Refugees and Internally Displaced Persons in Africa

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) of 1969

The *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention)* of 1969 is the first African regional treaty by the OAU that deals with a specific group of individuals: refugees in Africa. It seeks to alleviate the problems and suffering of refugees and to provide them with a better life and future in Africa by adopting a humanitarian approach.⁹²

The Preamble of the *Convention* affirms that human beings have the right to enjoy fundamental rights and freedoms without discrimination.⁹³ The *Convention* further stipulates that it should be applied to all refugees without discrimination as to race, religion, and nationality, membership of a particular social group or political opinions.⁹⁴ Although disability is not mentioned in the list, “membership of a particular social group” includes persons with disabilities,

⁹¹ *Ibid.* Art. 23.

⁹² *OAU Refugee Convention*, *supra* note 18, in particular the Preamble (1-2).

⁹³ *Ibid.* Preamble (6).

⁹⁴ *Ibid.* Art. IV.

among others. However, arguments may arise as to whether disability - and thus persons with disabilities - may constitute an identity or a particular social group. It is my belief that disability can create a sense of identity, and that persons who are disabled associate themselves or feel a sense of belonging with the group of persons with disabilities within their society.⁹⁵

I argue that the same interpretation applies to the phrase “membership of a particular social group” in the *Convention*’s refugee definition. A refugee is defined as a person who resides outside of his/her country of origin or nationality for fear of persecution by his/her country of origin or nationality because of race, religion, nationality, membership of a particular social group or political opinion; or who is compelled to leave his/her country of origin or nationality due to disturbance of public order either in part or the whole of his country of origin or nationality; and for any such reasons, is unable or unwilling to return.⁹⁶ Refugees with disabilities in particular face discrimination, prejudice, neglect and maltreatment, and are exposed to worse situations because of their disabilities. Their applications for asylum get rejected by hosting states in many instances based, for example, on the perception that persons with disabilities could not possibly be exposed to persecution and that they would become a burden on society.

The *OAU Refugee Convention* provides all refugees with rights only with respect to refugee/asylum and repatriation. It requires that refugee hosting states

⁹⁵ For further discussion about disability and identity, see the sub-section on the Universal Model of Disability in Chapter 2 of this thesis.

“use their best endeavors consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.” It also provides that “no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened [...]”⁹⁷ Even after refugees enter the territories of hosting states, the *Convention* stipulates that “no refugee shall be repatriated against his will”⁹⁸ to his/her country of origin or nationality. Moreover, refugees who legally remain in the territory of refugee hosting states are entitled to travel documents in order to move out of the territories of the hosting states.⁹⁹

The Preamble of the *Refugee Convention* makes reference to the principle enshrined in the *UN Charter* and in the *Universal Declaration of Human Rights (UDHR)* that “human beings shall enjoy fundamental rights and freedoms without discrimination”.¹⁰⁰ However, the *Convention* does not lay down in detail the basic human rights and fundamental freedoms that all refugees, including persons with disabilities, should be entitled to in refugee hosting states. One reason for this could be that, as its title may imply, the *Convention* is only meant to deal with specific issues, not with the human rights of refugees in Africa.¹⁰¹ Thus, it is hard to claim that this *Convention* is really a refugee human rights’ treaty. An

⁹⁶ *OAU Refugee Convention*, *supra* note 18, Art. I (1-2).

⁹⁷ *Ibid.* Art. II(3).

⁹⁸ *Ibid.* Art. V(1).

⁹⁹ *Ibid.* Art. VI(1).

¹⁰⁰ *Ibid.* Preamble (6).

¹⁰¹ *Ibid.* Full text.

amendment or an additional treaty are needed at a regional level to fully promote and protect the human rights and fundamental freedoms of refugees in Africa.

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (AU Displaced Persons Convention) of 2009

The *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (AU Displaced Persons Convention)* was adopted in October of 2009. It is the first binding regional and international instrument that specifically deals with the human rights and fundamental freedoms of internally displaced persons.¹⁰² It is also the most recent and the most detailed African treaty devoted to the rights of a specific group: internally displaced persons. This *Convention* aims to protect, respect and fulfill the human rights of internally displaced persons in Africa with the view of preventing internal displacements and providing protection and assistance for internally displaced persons.¹⁰³

Recognizing the principles of non-discrimination, equality and equal protection of the law, the *Convention* affirms that the AU is committed to respect, protect and fulfil the human rights and fundamental freedoms of internally displaced persons without any kind of discrimination.¹⁰⁴ In particular, internally displaced persons are protected from discrimination “in the enjoyment of any

¹⁰² *AU Displaced Persons Convention*, *supra* note 14.

¹⁰³ *Ibid.*

rights or freedoms on the grounds that they are internally displaced persons.”¹⁰⁵ Other than the factor of internal displacement,¹⁰⁶ the usual list of prohibited grounds for discrimination is not provided in this *Convention*. However, I believe the phrase “without discrimination of any kind” that appears throughout the *Convention*¹⁰⁷ covers all the prohibited grounds, including disability, that fit with the current anti-discrimination criteria and their interpretations in international agreements. Therefore, the rights and freedoms guaranteed under this *Convention* apply equally to persons with disabilities. A specific provision of *Displaced Persons Convention* also recognizes and protects the rights of certain categories of persons with special needs, including persons with disabilities. It requires that state parties “provide special protection for and assistance to internally displaced persons with special needs [...]”¹⁰⁸

Among the many rights and freedoms guaranteed under this *Convention*, the following are worth mentioning. Internally displaced persons are protected from:

[...] genocide, crimes against humanity, war crimes and other violations of international humanitarian law [...]; arbitrary killing, summary execution, arbitrary detention, abduction, enforced disappearance or torture and other forms of cruel, inhuman or degrading treatment or punishment; sexual and gender based violence in all its forms, notably rape, enforced prostitution, sexual exploitation and harmful practices, slavery, recruitment of children and their use in hostilities, forced labour and human trafficking and

¹⁰⁴ *Ibid.* Art. 3(1)(D), Art. 5(1) & Preamble.

¹⁰⁵ *Ibid.* Art. 9(1)(A).

¹⁰⁶ *Ibid.* Art. 9(1).

¹⁰⁷ *Ibid.* See, for example: Art. 3(1)(D), Art. 5(1) & Preamble.

¹⁰⁸ *Ibid.* Art. 9(2)(C).

smuggling; and starvation.¹⁰⁹

State parties are also obliged to “provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services [...]”.¹¹⁰

With the aim of preventing internal displacement, the *Convention* also stipulates that persons should not be subjected to arbitrary displacement.¹¹¹

4.2.2.6. *The African Youth Charter of 2006*

The *African Youth Charter*, which was adopted by the AU in July of 2006, is another African regional convention that deals with the rights of a specific category of persons: youth.¹¹² According to this *Charter*, youth includes all persons between the ages of fifteen and thirty-five.¹¹³ The *African Youth Charter* aims to promote and protect basic human rights and fundamental freedoms of youth in Africa. It protects the rights to property, education and employment; to the best attainable health care; to a standard of living and to be free from hunger;

¹⁰⁹ *Ibid.* Art. 9(1)(B-E).

¹¹⁰ *Ibid.* Art. 9(2)(B).

¹¹¹ *Ibid.* Art. 4(4).

¹¹² *African Youth Charter*, adopted by the 7th Ordinary Session of the Assembly of the Heads of State and Government of the AU in Banjul, the Gambia on 2 July 2006 (entered into force 8 August 2009), online: CHR.UP.AC.za http://www.chr.up.ac.za/hr_docs/documents/African_Youth_Charter.pdf > [African Youth Charter].

¹¹³ *Ibid.* Definitions.

to rest and leisure; and to participation in all spheres of society.¹¹⁴ It also recognizes freedom of movement; freedom of expression of ideas and opinions; freedom to seek, receive and disseminate information and ideas of all kinds; freedom of association and assembly; freedom of thought, conscience and religion; and protection of private life of the youth.¹¹⁵

Despite being adopted in 2006, at a time when much progress had been made in understanding human rights protections in general and protections of persons with disabilities in particular throughout the world and in Africa, the *Youth Charter* adopted the old, traditional way of protecting against discrimination, which does not expressly include disability among the prohibited grounds. The *Charter* states that “every young person shall be entitled to the enjoyments of the rights and freedoms recognized and guaranteed in this *Charter* irrespective of their race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”¹¹⁶ Thus, the equal application to and protection of persons with disabilities under this *Charter* would depend on the same kind of interpretation discussed in the previous sections with regards to the phrases “every person”, “all persons” and “other status”. Moreover, the equal application of the rights and freedoms provided under this *Charter* to all youth, including persons with disabilities, without discrimination of any kind can be implied from the Preamble, which strongly affirms “the inherent dignity and inalienable rights afforded to all

¹¹⁴ *Ibid.* Arts. 9, 13, 15-16, 14, 22, & 11.

¹¹⁵ *Ibid.* Arts. 3-7.

¹¹⁶ *Ibid.* Art. 2(1).

members of the human family as set out in the [UDHR] (1948), the [ICCPR] (1976) and the [ICESCR] (1976), and articulated for the African peoples through the [ACHPR] (1986).”¹¹⁷

Another discrimination provision of the *Youth Charter* lists disability among the prohibited grounds for discrimination.¹¹⁸ It affirms that states should “ensure equal access to employment and equal pay for equal work or equal value of work and offer protection against discrimination regardless of ethnicity, race, gender, disability, religion, and political, social, cultural or economic background.”¹¹⁹ This is a very positive development in that it provides persons with disabilities with explicit protection against discrimination in Africa. However, it does not mean that discrimination on the basis of disability is expressly prohibited under this *Charter* because this anti-discrimination clause only pertains to one particular right - the right to employment - as if discrimination against persons with disabilities only takes place in the area of employment. Moreover, I believe that the phrase “youth with special needs” in the *Charter*’s Preamble, which mentions certain groups such as displaced persons and refugees but not persons with disabilities, may reduce the visibility of persons with disabilities from the bigger picture of the *Charter*, although this phrase may include several categories such as women, children, refugees and of course persons with disabilities.¹²⁰

¹¹⁷ *Ibid.* Preamble.

¹¹⁸ *Ibid.* Art. 15(4)(A).

¹¹⁹ *Ibid.* Art. 15(4).

¹²⁰ *Ibid.* Preamble.

The *African Youth Charter* is another African regional treaty that has a separate provision that specifically addresses the rights of persons with disabilities.¹²¹ Article 24 affirms the right of youth with disabilities to special care.¹²² It also stipulates that state parties “shall ensure that they have equal and effective access to education, training, health care services, employment, sport, physical education and cultural and recreational activities.”¹²³ It further requires state parties to “work 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.”¹²⁴

This provision of the *Charter* goes further than the other African human rights instruments in protecting an array of fundamental rights for youth with disabilities. However, this coverage still does not fully address all the rights. Moreover, it fails to recognize problems that persons with disabilities encounter in all spheres of life due to disability-based discrimination. Rather, it refers to them as obstacles with negative implications for the full integration into society; but such obstacles do not necessarily imply discrimination in any way.¹²⁵ The fact that Article 24 of the *Charter* begins with a statement that ensures “the right of the mentally and physically challenged youth to special care” also shadows the other stipulated fundamental rights following it.¹²⁶ The phrase “the right to special

¹²¹ *Ibid.* Art. 24.

¹²² *Ibid.* Art. 24(1).

¹²³ *Ibid.*

¹²⁴ *Ibid.* Art. 24(2).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* Art. 24(1).

care” indicates the attitude that considers persons with disabilities as care recipients rather than as holders of human rights.¹²⁷ Moreover, Article 24 of the *Youth Charter* adopts the terminology “mentally and physically challenged youth” to describe youth with disabilities,¹²⁸ which “puts emphasis on the impairment of the individual and may thus be understood as being derogatory.”¹²⁹ This terminology is not commonly used in legal instruments.¹³⁰ Different terminology is used in another article, which makes a passing reference to “youth with disabilities” in terms of providing technical and financial support to address their health issues;¹³¹ this seems to convey a different message or refer to a totally different group of youth.

4.2.2.7. The African Charter on Democracy, Elections and Governance (Democracy Charter) of 2007

The *African Charter on Democracy, Elections and Governance (Democracy Charter)*, another specific African regional convention, was adopted by the AU in January of 2007.¹³² It deals with a specific set of human rights of the general population rather than with the rights of particular groups of persons. The

¹²⁷ For a detailed discussion on the attitude of disability and care/charity, see the sub-section on the individual/bio-medical model of disability in Chapter 2 of this thesis.

¹²⁸ *African Youth Charter*, *supra* note 112, Art. 24.

¹²⁹ Biegon, *supra* note 49 at 65.

¹³⁰ In the sub-section on the disability language problem in Chapter 1 of this thesis, I argued that the terminology “mentally and physically challenged persons” does not necessarily only refer to persons with disabilities; it may also refer to other groups with physical or mental weaknesses.

¹³¹ *African Youth Charter*, *supra* note 112, Art. 16(2)(N).

¹³² *African Charter on Democracy, Elections, and Governance*, adopted by the 8th Ordinary Session of the Assembly of the Heads of State and Government of the AU in Addis Ababa, Ethiopia on 30 January 2007 (not yet entered into force), online: Africa-union.org <<http://www.africa-union.org>>

Democracy Charter aims to promote state parties' commitment, observance and adherence to respect for human rights; the values and principles of democracy, the rule of law and good governance; the holding of regular, transparent, free and fair elections; peaceful transfer of government power; and independence of the judiciary.¹³³ In order to achieve these objectives, the *Charter* imposes many obligations on state parties.

State parties are obliged to “ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility.”¹³⁴ They are also obliged to “entrench the principle of the supremacy of the constitution in the political organization of the State”¹³⁵ and to “take all appropriate measures to ensure constitutional rule, particularly constitutional transfer of power.”¹³⁶ States “undertake to implement programs and carry out activities designed to promote democratic principles and practices as well as consolidate a culture of democracy and peace”¹³⁷ and to “establish public institutions that promote and support democracy and constitutional order.”¹³⁸ They also commit themselves to “strive to institutionalize good political governance through: accountable, efficient and effective public administration; strengthening the functioning and effectiveness of parliaments; and an

union.org/root/AU/Documents/Treaties/text/Charter%20on%20Democracy.pdf>

[*Democracy Charter*].

¹³³ *Ibid.* Art. 2.

¹³⁴ *Ibid.* Art. 6.

¹³⁵ *Ibid.* Art. 10(1).

¹³⁶ *Ibid.* Art. 5.

¹³⁷ *Ibid.* Art. 12.

¹³⁸ *Ibid.* Art. 15(1).

independent judiciary.”¹³⁹ Recognizing “popular participation through universal suffrage as the inalienable right of the people”,¹⁴⁰ the *Charter* requires “state parties [to] re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union’s *Declaration on the Principles Governing Democratic Elections in Africa*.”¹⁴¹

In terms of rights of persons with disabilities, the *Democracy Charter* obliges state parties to adopt legislative and administrative measures to guarantee the rights of people with disabilities, among the particular groups included.¹⁴² It also requires state parties to “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.”¹⁴³ In other words, state parties are obliged to eliminate all forms of discrimination, including those due to disability. The phrase “any other form of intolerance” could be interpreted liberally to also cover disability, which would strengthen the protection of persons with disabilities under the *Charter*. State parties are also obliged to “protect the right to equality before the law and equal protection by the law.”¹⁴⁴

However, the *Charter* fails to explicitly include disability among the priorities for action by state parties, which can make people with disabilities less visible in terms of targeted measures that state parties may take or adopt. Nonetheless, the *Democracy Charter* mentions the need to involve persons with

¹³⁹ *Ibid.* Art. 32.

¹⁴⁰ *Ibid.* Art. 4(2).

¹⁴¹ *Ibid.* Art. 17.

¹⁴² *Ibid.* Art. 8(2).

¹⁴³ *Ibid.* Art. 8(1).

disabilities in some specific measures and programs state parties may undertake. With regards to governance processes, the *Charter* requires state parties to “promote participation of social groups with special needs, including the Youth and people with disabilities.”¹⁴⁵ In terms of education, it also requires state parties to work hard towards providing “free and compulsory basic education to all, especially girls, rural inhabitants, minorities, people with disabilities and other marginalized social groups.”¹⁴⁶

4.2.2.8. Other Regional Declarations, Resolutions and Communication Decisions

In addition to these African regional conventions, there are other significant declarations, resolutions and communication decisions adopted by the OAU/AU and the African Commission on Human and Peoples’ Rights that are pertinent to disability rights in Africa. It should be noted here that such instruments do not bind African states. This section discusses these declarations and resolutions.

The Grand Bay Mauritius Declaration and Plan of Action (Grand Bay Declaration) of 1999

Grand Bay Mauritius Declaration and Plan of Action (Grand Bay

¹⁴⁴ *Ibid.* Art. 10(3).

¹⁴⁵ *Ibid.* Art. 31(1).

¹⁴⁶ *Ibid.* Art. 43(1).

Declaration) is the result of the 1999 first OAU Ministerial Conference on Human Rights in Africa.¹⁴⁷ Recognizing that “the promotion and protection of human rights is a matter of priority for Africa”,¹⁴⁸ this *Declaration* strongly “affirms the principle that human rights are universal, indivisible, interdependent and inter-related and urges governments, in their policies, to give parity to economic, social and cultural rights as well as civil and political rights.”¹⁴⁹ Moreover, the *Grand Bay Declaration* urges African states “to formulate and adopt national action plans for the promotion and protection of human rights”¹⁵⁰ and “to establish national human rights institutions and to provide them with adequate financial resources and ensure their independence.”¹⁵¹

With respect to disability rights, the *Grand Bay Declaration* observes that African states do not always respect and protect the rights of people with disabilities and people with HIV/AIDS; it thus urges states to make efforts to fully respect their rights.¹⁵² Despite the non-binding nature of the *Declaration*, the use of the terminology “people with disabilities” and the call on African states to fully respect the rights of persons with disabilities was a very big development in fostering the promotion and protection of disability rights in Africa.

¹⁴⁷ *Grand Bay Mauritius Declaration and Plan of Action*, adopted by the 1st OAU Ministerial Conference on Human Rights in Africa in Grand Bay, Mauritius on 16 April 1999, online: Africa-online.org <http://www.africa-union.org/Official_documents/Decisions_Declarations/GrandBay%20Declaration.pdf> [Grand Bay Declaration].

¹⁴⁸ *Ibid.* Preamble.

¹⁴⁹ *Ibid.* at para. 1.

¹⁵⁰ *Ibid.* at para. 28.

The *Kigali Declaration* of 2003

The *Kigali Declaration* is another non-binding African declaration. It resulted from the 2003 first AU Ministerial Conference on Human Rights in Africa, a follow-up to the *Grand Bay Declaration* of 1999.¹⁵³ Like the *Grand Bay Declaration*, the *Kigali Declaration* recognizes that the respect of human rights is a very necessary condition for the maintenance of peace and security and sustainable development.¹⁵⁴ It also strongly “reaffirms the principle that all human rights are universal, indivisible, inter-dependent and inter-related.”¹⁵⁵ The *Kigali Declaration* calls upon the AU “member states and regional institutions to accord the same importance to economic, social and cultural rights and civil and political rights, and apply, at all levels, a rights-based approach to policy, program planning, implementation and evaluation.”¹⁵⁶

The *Kigali Declaration* also contains some significant statements concerning the rights of persons with disabilities. It calls on AU member states to provide protection for civilian populations, such as persons with disabilities, in situations of armed conflict.¹⁵⁷ However, this protection is limited in scope since it applies only in armed conflict situations.¹⁵⁸ The *Declaration* also “notes with

¹⁵¹ *Ibid.* at para. 15.

¹⁵² *Ibid.* at para. 7.

¹⁵³ *Kigali Declaration*, adopted by the 1st AU Ministerial Conference on Human Rights in Africa in Kigali, Rwanda on 8 May 2003 and endorsed by the AU Executive Council by Dec. EX/CL/46 (III) in July 2003, online: Africa-union.org <http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/x/KIGALI%20DECLARATION%20as%20adopted%20in%20Kigali.pdf>.

¹⁵⁴ *Ibid.* Preamble.

¹⁵⁵ *Ibid.* at para. 1.

¹⁵⁶ *Ibid.* at para. 4.

¹⁵⁷ *Ibid.* at para. 17.

¹⁵⁸ *Ibid.*

great concern the plight of the vulnerable groups including persons with disability in general [...].”¹⁵⁹ Referring to these plights instead of to the fundamental rights and freedoms of persons with disabilities¹⁶⁰ may indicate the *Declaration*’s failure to recognize the plight of persons with disabilities as a human rights issue. I also argue that the *Declaration*’s call upon the AU “member states to provide adequate support to the African Rehabilitation Institute (ARI)”¹⁶¹ may imply that the focus of the AU member states is on rehabilitating persons with disabilities rather than on adopting a rights-based approach to disability issues. Moreover, the full text of the *Declaration* does not urge the AU member states to provide sufficient guarantees and protections for the rights of persons with disabilities.¹⁶²

Regardless of the aforementioned arguments, the *Kigali Declaration* embodies a very important statement with respect to the future prospects of disability rights at the regional level in Africa. It urges the AU “member states to develop a Protocol on the protection of the rights of people with disabilities and the elderly.”¹⁶³ It is my hope that the prospective protocol will stipulate sufficient guarantees and protections for the human rights of persons with disabilities in Africa by adopting a human rights approach to disability.

¹⁵⁹ *Ibid.* at para. 19.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* Full text.

¹⁶³ *Ibid.* at para. 20.

*The Declaration of the African Decade of Disabled Persons 1999-2009
(Decade Declaration) of 1999*

Upon the recommendation of the OAU Labor and Social Affairs Commission of April 1999, in July of 1999 the OAU proclaimed the period between 1999 and 2009 as the African Decade of Disabled Persons with the goal of promoting the equality, full participation and empowerment of persons with disabilities in Africa.¹⁶⁴ The *Declaration of the African Decade of Disabled Persons 1999-2009 (Decade Declaration)* urges member states to study the situation of persons with disabilities with the aim of adopting measures to promote their equality, full participation and empowerment.¹⁶⁵ The following are among the main measures recommended in the *Declaration*:

[...] to formulate and implement national policies and programs to foster participation of persons with disabilities in economic and social development; to undertake measures to improve persons with disabilities' access to rehabilitation, education, training and employment, cultural and sports activities and the physical environment; to promote positive attitudes and images towards persons with disabilities; establish and strengthen national coordinating committees on matters of disability that have adequate and effective representation of persons with disabilities and their organizations;¹⁶⁶ [...] and to consult with persons with disabilities in all matters that are of concern to them with the aim of using their expertise and experience.¹⁶⁷

The *Decade Declaration* also “urges all concerned specialized agencies and

¹⁶⁴ *Declaration of the African Decade of Disabled Persons 1999-2009*, recommended by the OAU Labor and Social Affairs Commission during its 22nd Session in Windhoek, Namibia in April 1999, adopted by the 35th Ordinary Session of the Assembly of the OAU in Algiers, Algeria in July 1999, and formally endorsed by the 36th Ordinary Session of the OAU Assembly in Lome, Togo in July 2000 [*Decade Declaration*].

¹⁶⁵ *Ibid.* at para. 2.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.* at para. 8.

bodies of the United Nations system to undertake an examination of their ongoing programs and projects in the African continent with a view to integrating disability concerns into their work programs systematically [...].”¹⁶⁸ The *Declaration* also requests the Secretary General of the OAU/AU to report to the Assembly of the Organization on progress in implementing the African Decade every two years until the end of the Decade.¹⁶⁹

In July of 2002, the OAU/AU adopted the *Continental Action Plan for the African Decade of Persons with Disabilities (Decade Action Plan)*, which contains detailed objectives, measures and strategies for implementing the African Decade.¹⁷⁰ This *Action Plan* is discussed in detail in the ensuing sub-section. The African Decade of Disabled Persons ended in December of 2009. At their Windhoek conference on October 31, 2008, the ministers of the AU member states in charge of social development resolved to extend the African Decade of Persons with Disabilities from 2010 to December 2019.¹⁷¹ This extension will allow for the expansion and full implementation of the Decade’s activities and programs throughout Africa. The ministers also called for an evaluation of the implementation of the completed African Decade and its *Action Plan*, and for

¹⁶⁸ *Ibid.* at para. 3.

¹⁶⁹ *Ibid.* at para. 7.

¹⁷⁰ *Continental Action Plan for the African Decade of Persons with Disabilities 1999-2009*, adopted by the 37th Session of the OAU Assembly of Heads of State and Government in Pretoria, South Africa in July 2002, online: Africa-union.org <<http://www.africa-union.org/child/Decade%20Plan%20of%20Action%20-Final.pdf>> [*Decade Action Plan*].

¹⁷¹ *Windhoek Declaration on Social Development*, adopted by the 1st AU Conference of Ministers of member states in charge of social development in Windhoek, Namibia on 31 October 2008, at para. 6, online: Africandecade.org <<http://www.africandecade.org/document-repository/Windhoek%20Declaration%20on%20social%20Development.pdf>>.

restructuring the African Rehabilitation Institute (ARI).¹⁷²

The *Decade Declaration* is not binding on OAU/AU member states since it is merely a declaration. Nevertheless, it is one of the most relevant African instruments on the rights of persons with disabilities. The purpose and objective of the *Declaration* - promoting equality, full participation and empowerment of persons with disabilities - is a very commendable initiative that may lead to the provision of adequate guarantees and protections for the human rights and freedoms of persons with disabilities in Africa. However, the realization of this objective is not supported by detailed provisions containing all the human rights and fundamental freedoms of persons with disabilities, including civil, political, economic, social and cultural rights. It seems that the *Declaration* does not see disability rights from a human rights perspective, and thus does not clearly affirm disability rights as human rights. For instance, in terms of the formulation of policies and programs, emphasis is placed on economic and social development instead of on all spheres that promote equality, full participation and empowerment of persons with disabilities.¹⁷³ Although the *Declaration* recommends measures for action, they are not adequate or very detailed.¹⁷⁴

¹⁷² *Ibid.* at para. 6.

¹⁷³ *Decade Declaration*, *supra* note 164 at para. 2.

¹⁷⁴ *Ibid.* Full text.

The Continental Action Plan for the African Decade of Persons with Disabilities of 2002

The responsibility for organizing the African Decade was given to the African Rehabilitation Institute (ARI), an OAU regional institution established in Harare, Zimbabwe.¹⁷⁵ In collaboration with the ARI and other regional organizations of persons with disabilities, the OAU organized the Pan-African Conference on the African Decade of Disabled Persons from February 4-7, 2002 in Addis Ababa, Ethiopia to consider a plan of action for the Decade. At the end of the conference, the participants adopted a draft action plan, which was then submitted to the Labor and Social Affairs Commission at its 25th session in April of 2002 for further consideration.¹⁷⁶ The *Continental Action Plan for the African Decade of Persons with Disabilities (Decade Action Plan)* was officially adopted by the 38th Ordinary Session of the Assembly of the OAU/AU in Durban, South Africa in July of 2002.¹⁷⁷

The goal of the *Action Plan* was primarily to serve as a guideline for member states in the formulation of disability-related national programs and to provide mechanisms for implementing the objectives of the African Decade by setting out priority activities on disability for the period between 1999 and 2009.¹⁷⁸ The *Action Plan* is the most important instrument of the OAU/AU in the context of disability rights in Africa. Unlike the *Decade Declaration*, the *Decade Action Plan* clearly recognizes disability rights as human rights, and thus provides

¹⁷⁵ *Ibid.* at para. 14.

¹⁷⁶ UN Enable, *Regional Observances, African Decade of Disabled Persons (2000-2009)*, online: UN Enable <<http://www.un.org/esa/socdev/enable/disafricadecade.htm>>.

for the promotion and protection of disability human rights as one of the objectives of the African Decade.¹⁷⁹ In addition to the measures recommended to African states under the *Declaration*, the *Action Plan* also urges African states to take some other important measures that can promote the rights and freedoms of persons with disabilities in Africa.

At the regional level, the *Action Plan* calls upon African states to develop a separate African convention on the promotion and protection of the rights of persons with disabilities in Africa.¹⁸⁰ The development of this African regional convention is very important; it will fill in the large gap that currently exists in the binding regional human rights instruments. However, no convention was developed by the end of the African Decade in December of 2009. The *Action Plan* also calls on the OAU to appoint a Special Rapporteur on Disability to implement and monitor the African Decade.¹⁸¹ However, the appointment of this Special Rapporteur did not materialize until the end of the African Decade. In May of 2009, the African Commission on Human and Peoples' Rights established a Working Group on the Rights of Older Persons and People with Disabilities in Africa for a mandate of two years with the goal of conducting comparative research and developing a concept paper on the human rights of older persons and persons with disabilities in Africa.¹⁸²

¹⁷⁷ *Decade Action Plan*, *supra* note 170, Preface.

¹⁷⁸ *Ibid.* Preamble.

¹⁷⁹ *Ibid.* at para. 33.

¹⁸⁰ *Ibid.* at para. 34(A).

¹⁸¹ *Ibid.* at para. 40.

¹⁸² *Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa*,

With respect to the role of persons with disabilities, the *Decade Action Plan* calls upon OAU/AU member states to “establish a panel of experts with a majority of people with disabilities, nominated by [Disabled Persons’ Organizations (DPOs)], to serve as advisors to ARI’s technical team.”¹⁸³ This recognizes the importance of the involvement of persons with disabilities in all matters that concern them. Moreover, the Action Plan calls upon African states to “set up a special fund to facilitate the implementation of Decade activities, and make resources available to ARI and DPOs at continental, regional, national and local levels, for the coordination and successful implementation of the Decade activities.”¹⁸⁴

At the national level, the *Action Plan* urges African states to observe all OAU and UN human rights instruments in order to promote and protect the rights of persons with disabilities; to mainstream disability issues into their political, economic and social policies, programs and activities; and to use the UN *Standard Rules* as a basis for their policies and legislation to protect the interests of persons with disabilities.¹⁸⁵ The *Plan* also urges African states “to formulate and implement national policies, programs and legislation to promote the full and equal participation of persons with disabilities”,¹⁸⁶ such as reviewing and modifying all existing legislation that negatively affects disability rights;

ACHPR/Res.143 (XXXXV) 09, adopted by the African Commission on Human and Peoples’ Rights during its 45th Ordinary Session in Banjul, the Gambia on 27 May 2009, online: ACHPR.ORG <<http://www.achpr.org/english/resolutions/Resolution%20on%20WGOP.pdf>> [ACHPR, Res.143]. Also see the discussion of this resolution in the sub-section below.

¹⁸³ *Decade Action Plan*, *supra* note 170 at para. 40.

¹⁸⁴ *Ibid.* at para. 38(A).

¹⁸⁵ *Ibid.* at para. 17.

¹⁸⁶ *Ibid.* at para. 19.

developing and enacting disability-related legislation; incorporating a non-discrimination clause on the ground of disability into the provisions of their national constitutions; and establishing parliamentary committees on disability.¹⁸⁷

With the goal of facilitating the implementation of the African Decade of Disabled Persons and its *Action Plan*, the Disability African Regional Consultative Conference of May 2003 in Johannesburg, South Africa gave the South African Disability Movement and the Government of South Africa the responsibility of establishing the Secretariat of the African Decade of Persons with Disabilities (Secretariat). The Secretariat opened its office in Cape Town, South Africa in 2004, and it began opening regional branches in 2006.¹⁸⁸ The Secretariat aims to help establish and strengthen national structures called Decade Steering Committees that will work towards integrating disability and persons with disabilities into mainstream national policies and programs; assist the most vulnerable disability groups to build strong regional disabled persons' organizations (DPOs); develop leadership skills of DPOs, and particularly those of under-represented and disadvantaged disabled persons; advocate and raise awareness about the situation of persons with disabilities, disability issues and rights among persons with disabilities as well as the general population; conduct research on disability issues in collaboration with universities and research institutions; and organize efforts and resources for disability programs and

¹⁸⁷ *Ibid.* at para. 20.

¹⁸⁸ Ebrima Dibbasey, "Strengthening the Disabled", Interview of Arne Nylund (Operational Manager of the Secretariat of the African Decade of People with Disability), *FOROYAA Newspaper/All Africa Global Media* via COMTEX (1 November 2007), online: All Africa <<http://allafrica.com/>>.

activities in Africa.¹⁸⁹ By November of 2008, the Secretariat had begun Decade activities in twenty-one African countries.¹⁹⁰ It received observer status before the African Commission on Human and Peoples' Rights during the Commission's 48th Ordinary Session, which took place in Banjule, the Gambia from November 10-24, 2010.¹⁹¹ This enabled the Secretariat to bring cases on human rights violations of persons with disabilities in Africa before the African Court or the Court of Justice.¹⁹²

The African Decade of Disabled Persons and its *Action Plan* ended in December of 2009. Although an evaluation of its successes and failures has not yet been undertaken, the first three to four years of the Decade elapsed before the *Action Plan* was developed and the Secretariat was established.¹⁹³ However, the extension of the African Decade will hopefully enable the expansion and implementation of its activities and programs throughout Africa in the coming decade.

The Windhoek Declaration on Social Development (2008)

In addition to extending the African Decade, the *Windhoek Declaration on*

¹⁸⁹ *Ibid.*

¹⁹⁰ Secretariat of the African Decade of Persons with Disabilities, "Editorial" (2008) 3 *Human Rights Africa Quarterly Newsletter*.

¹⁹¹ African Commission on Human and Peoples' Rights, *Final Communiqué*, 48th Ordinary Session of the African Commission on Human and Peoples' Rights in Banjule, the Gambia from 10-24 November 2010, at para. 41 [*Final Communiqué*]. By November 2010, 418 NGOs had obtained observer status before the Commission.

¹⁹² For a detailed discussion on the capacity of NGOs to lodge cases before African human rights institutions, see the discussion below on the African Court on Human and Peoples' Rights, the African Court of Justice, and the African Court of Justice and Human Rights.

Social Development contains some important affirmations and resolutions on the rights of persons with disabilities. This *Declaration* notes that persons with disabilities, along with other vulnerable groups, are exposed to marginalization and exclusion, as well as to challenges caused by chronic poverty, violence, human rights violations, inadequate access to social services and basic income, prevalent social disparities and other social injustices.¹⁹⁴ It reaffirms the AU member states' commitment to promoting human rights and improving the quality and standard of living of their citizens, including persons with disabilities.¹⁹⁵ The *Declaration* further recognizes "the need to develop and implement social policies that combine social integration, economic growth, social protection, respect for human rights and fundamental freedoms, respect for diversity and participation."¹⁹⁶ The *Windhoek Declaration* specifically reaffirms the AU member states' commitment to "empowering and providing persons with disabilities with equal opportunities; safeguarding their rights and enlisting their participation and mainstreaming them in all development programs",¹⁹⁷ as well as their commitment to implementing the priority strategies and activities of the *Decade Action Plan*.¹⁹⁸

It is very significant that the *Windhoek Declaration* specifically mentions the rights of persons with disabilities and recognizes the prevalent marginalization and exclusion of persons with disabilities, along with other vulnerable groups,

¹⁹³ Combrinck, "The Hidden Ones", *supra* note 79 at 312.

¹⁹⁴ *Ibid.* Preamble.

¹⁹⁵ *Ibid.* at para. 1.

¹⁹⁶ *Ibid.* Preamble.

¹⁹⁷ *Ibid.* at para. 5(x).

¹⁹⁸ *Ibid.* at para. 7.

throughout Africa. The *Declaration* clarifies that “the social development program of the AU Commission is based on a human-centered approach seeking to promote human rights and dignity, promote employment, alleviate poverty and improve access to social services.”¹⁹⁹ Nevertheless, it is my belief that the treatment and handling of persons with disabilities and their rights under the category of “social development” reinforces the understanding of disability and the rights of persons with disabilities as issues of social development rather than human rights.

Resolutions and Communication Decisions of the African Commission on Human and Peoples’ Rights

In addition to these human rights instruments adopted by the OAU/AU, the African Commission on Human and Peoples’ Rights (African Commission) has also adopted two resolutions and a communication decision that are germane to the rights of persons with disabilities in Africa. The following discussion gives an extensive account of these developments.²⁰⁰

African Commission Resolution ACHPR/Res.118 (XXXXII) 07 of November 2007 and Resolution ACHPR/Res.143 (XXXXV) 09 of May 2009

During its 42nd Ordinary Session of November 2007, the African

¹⁹⁹ *Ibid.* Preamble.

²⁰⁰ The African Commission on Human and Peoples’ Rights is the institution established by the *African Charter on Human and Peoples’ Rights (ACHPR)* to enforce and monitor the

Commission established the Focal Point on the Rights of Older Persons in Africa.

It appointed two commissioners to organize the Focal Point.²⁰¹ Under *Resolution*

ACHPR/Res.118 (XXXXII) 07, the Focal Point is mandated:

[...] to liaise with the African Union Commission to convene an experts Meeting composed of Members of the African Commission on Human and Peoples' Rights, experts from the African Union member states and civil society organizations, with a view to drafting a Protocol to the *African Charter* on the Rights of Older Persons in Africa [...]; to follow up with the African Union Commission, with a view to securing the resources required to enable the elaboration of the said Protocol; [and] to spearhead the process of drafting the Protocol for submission to the AU Policy Organs for consideration and adoption as soon as possible.²⁰²

After the Focal Point was established, a consultative meeting was held in Mauritius from October 2-3, 2008.²⁰³ It was noted during the meeting that “disabled persons suffer from discrimination based on society's prejudice and ignorance, and they often do not enjoy the same opportunities as other persons.”²⁰⁴ It was also noted that “persons with disabilities are entitled to exercise their civil, political, social, economic and cultural rights on an equal basis with others.”²⁰⁵ The meeting therefore recommended that the African Commission set up a Working Group on the Rights of Older Persons and Persons

implementation of its provisions.

²⁰¹ *Resolution on the Establishment and Appointment of a Focal Point on the Rights of Older Persons in Africa*, ACHPR/Res.118 (XXXXII) 07, adopted by the African Commission on Human and Peoples' Rights during its 42nd Ordinary Session in Brazzaville, Congo on 28 November 2007, online:

<http://www.achpr.org/english/resolutions/resolution118_en.htm> [ACHPR, Res.118].

²⁰² *Ibid.*

²⁰³ Commissioner Y. K. J. Yeung Sik Yuen, *Commissioner's Intersession Activity Report*, 45th Ordinary Session, November 2008-May 2009, at para. 6, online: ACHPR.ORG <<http://www.achpr.org/sessions/45th/intersession-activity-reports/yeung-kam-john-yeung-sik-yuen/>> [Activity Report, May 2009]

²⁰⁴ *Ibid.* at para. 4.

²⁰⁵ *Ibid.*

with Disabilities in Africa.²⁰⁶

Two and half years after the Focal Point was established, upon recommendation of the Focal Point, the African Commission adopted *ACHPR/Res.143* during its 45th Ordinary Session in May of 2009 to transform the Focal Point into a Working Group on The Rights of Older Persons and People with Disabilities in Africa. The Commission appointed five members to the Working Group.²⁰⁷ During its 48th Ordinary Session in November of 2010, the Commission resolved to increase the members of the Working Group to eight.²⁰⁸ The Working Group is mandated for a two-year period²⁰⁹ to perform the following tasks and responsibilities:

- i) Hold comprehensive brainstorming sessions to articulate the rights of older persons and people with disabilities; ii) Draft a Concept Paper for consideration by the African Commission that will serve as a basis for the adoption of the Draft Protocol on Ageing and People with Disabilities; iii) Facilitate and expedite comparative research on the various aspects of human rights of older persons and people with disabilities on the continent, including their socio-economic rights; iv) Collect data on older persons and people with disabilities to ensure proper mainstreaming of their rights in the policies and development programs of Member States; v) Identify good practices to be replicated in Member States; and vi) Submit a detailed Report to the African Commission at each Ordinary Session.²¹⁰

The Working Group submitted a report on its activities between May and

²⁰⁶ *Ibid.* at para.6.

²⁰⁷ *ACHPR, Res.143, supra* note 182.

²⁰⁸ *Resolution to Increase Members of the Working Group on Older Persons and People With Disabilities in Africa, ACHPR/Res.170 (XLVIII) 2010*, adopted by the African Commission on Human and Peoples' Rights during its 48th Ordinary Session in Banjule, the Gambia on 24 November 2010, online: ACHPR.ORG

<http://www.achpr.org/english/resolutions/Resolution170_en.htm> [*ACHPR, Res.170*].

²⁰⁹ *ACHPR, Res.143, supra* note 182 at para. A.

²¹⁰ *Ibid.* at para. A.

November, 2009.²¹¹ Although *Resolution 143* requires the Working Group to develop a draft protocol on the rights of the older persons and persons with disabilities in Africa, in its Report the Working Group referred to its mandate as “draft[ing] the proposed Protocol on Ageing, while incorporating the rights of People with Disabilities in Africa.”²¹² This statement may imply that the Working Group gave secondary importance to the rights of persons with disabilities in Africa after the rights of older persons, since the focus of the proposed draft protocol would be on older persons rather than on both categories of persons as stipulated in the *Resolution*.²¹³ From August 26-28, 2009, the Working Group conducted an expert seminar in Accra, Ghana to initiate the process of developing a draft protocol on the rights of older persons and peoples with disabilities in Africa.²¹⁴ At the end of the seminar, the experts developed two separate draft protocols: one on the rights of older persons in Africa and another on the rights of peoples with disabilities in Africa. The Group transferred these protocols to the Secretariat of the African Commission for further consideration.²¹⁵ The development of these draft protocols is very significant as it will ultimately lead to the adoption of the protocols by the Assembly of the AU, and thereby to the recognition, promotion and protection of the rights of persons with disabilities in Africa, at least as far as the regional legal framework is concerned. In the meantime, the Working Group on the Rights of Older Persons and People with

²¹¹ Commissioner Y. K. J. Yeung Sik Yuen, *Commissioner’s Intersession Activity Report - Activities as Working Group Chairperson*, 46th Ordinary Session, May-November 2009, online: ACHPR.ORG <http://www.achpr.org/files/sessions/46th/inter-act-reps/129/achpr46_specmec_older_actrep_2009_eng.pdf> [Activity Report, Nov. 2009].

²¹² *Ibid.* at para. 8.

²¹³ ACHPR, *Res.143*, *supra* note 182, Full text.

²¹⁴ *Activity Report*, Nov. 2009, *supra* note 211 at paras.15-16.

disabilities in Africa has been urging AU member states to effectively protect the rights of persons with disabilities and to adopt and implement policies and legislation towards this end.²¹⁶

Communication Decision: Purohit and Moore v. The Gambia (2003)

The only disability-related communication received and decided by the African Commission on Human and Peoples' Rights is *Purohit and Moore v. The Gambia*. This was a complaint regarding the violation of the rights of people with mental illness in an institutional setting by the Government of the Gambia.²¹⁷

In March of 2001, mental health advocates Ms. H. Purohit and Mr. P. Moore submitted a complaint to the Secretariat of the African Commission on behalf of existing and future mental health patients detained at Campama, a Psychiatric Unit of the Royal Victoria Hospital in the Republic of the Gambia, under the country's mental health law, the *Lunatics Detention Act (LDA)*. They alleged that the Government of the Gambia violated Articles 2; 3; 5; 7(1)(a) and (c); 13(1); 16; and 18(4) of the *African Charter on Human and Peoples' Rights (ACHPR)*. They complained that the Gambia's mental health legislation, the *LDA*, violates mental health patients' dignity and right to health. They also alleged that the *LDA* does not contain provisions for review or appeal of detention orders or

²¹⁵ *Ibid.* at para. 18.

²¹⁶ *Ibid.* at para. 36.

²¹⁷ *Purohit and Moore v. The Gambia*, African Commission on Human and Peoples' Rights, Comm. No. 241/2001 (2003), 33rd Ordinary Session of the African Commission held from 15-29 May 2003 in Niamey, Niger, online: UMN.EDU

provide remedies for wrongful detention, diagnosis or treatment. They complained of the *LDA*'s failure to provide legal aid for mental health patients to challenge decisions rendered before the country's courts. They alleged that under the *LDA*, mental health patients do not have the right or opportunity to be heard or represented before or after decisions regarding institutionalization. Moreover, they claimed that mental health patients are not allowed to vote.²¹⁸

With regards to the complaint on the violation of the right to health as provided in Articles 16 and 18(4) of the *ACHPR*,²¹⁹ the African Commission found the Government of the Gambia to be in violation of these *Charter* provisions. According to the Commission, "the scheme of the *LDA* is lacking in terms of therapeutic objectives as well as provision of matching resources and programs of treatment of persons with mental disabilities",²²⁰ and it thus fails to meet the requirements of the *Charter*.²²¹ Underscoring that "enjoyment of the human right to health [...] is crucial to the realization of all the other fundamental human rights and freedoms",²²² the African Commission stated that:

[...] as a result of their condition and by virtue of their disabilities, mental health patients should be accorded special treatment which would enable them not only [to] attain but also [to] sustain their optimum level of independence and performance in keeping with Article 18(4) of the *African Charter* and the standards [...] defined in the *Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care*.²²³

<<http://www1.umn.edu/humanrts/africa/comcases/241-2001.html>> [*Purohit*].

²¹⁸ *Ibid.* at paras. 1-8, 26, 30, 59, 69, 73 & 77.

²¹⁹ *Ibid.* at para. 77.

²²⁰ *Ibid.* at para. 83.

²²¹ *Ibid.* at para. 83.

²²² *Ibid.* at para. 80.

²²³ *Ibid.* at para. 81.

As for the allegation regarding the violation of the dignity of mental health patients under Article 5 of the *ACHPR*, the Commission found the terminology employed in the *LDA* to describe people with mental illness, such as “lunatics and idiots”, to be clearly dehumanizing and degrading to the dignity of persons with mental illness; this law was therefore found to violate Article 5 of the *Charter*.²²⁴

With respect to the allegation regarding the fact that mental health patients are not given the opportunity to be heard or represented before or after their detention, the Commission found the Government of the Gambia to be in violation of Article 7(1)(a) and (c) of the *ACHPR*²²⁵ since the *LDA* does not contain any provision for appeals or reviews of decisions, or any remedies.²²⁶

As for the related allegation regarding the fact that the *LDA* does not provide for the review or appeal of detention orders, provide any remedies for wrongful detention, diagnosis or treatment, or provide legal aid to challenge any decision before the courts of the country,²²⁷ the African Commission found the Government of the Gambia to be in violation of Articles 2 and 3 of the *ACHPR*.²²⁸ The Government of the Gambia argued that legal provisions and procedures in the country’s national laws are available to all persons, including mental health patients; mental health patients therefore have the right to bring actions seeking remedies under tort provisions for false imprisonment or negligence, or under the country’s *Constitution* in a constitutional court by

²²⁴ *Ibid.* at para. 59.

²²⁵ *Ibid.* at para. 69.

²²⁶ *Ibid.* at para. 71.

²²⁷ *Ibid.* at paras. 26 & 30.

²²⁸ *Ibid.* at para. 54.

claiming deprivation of their freedom of movement.²²⁹ However, the Government admitted that no legal aid is available to vulnerable groups to access the courts, other than to those charged with capital offences.²³⁰

The Commission ruled that even though the Gambia's legal system provides procedures for seeking remedies before the national courts, these procedures are only available to those who can afford to pay for legal services.²³¹ The Commission concluded that since most mental health patients are poor, they cannot have realistic and effective remedies under the existing procedures in the absence of legal aid.²³² The Commission found the failure to provide legal aid to persons with mental illness to be a violation of the anti-discrimination and equal protection of the law provisions in Articles 2 and 3 of the *ACHPR*.²³³

With respect to the alleged failure to enable mental health patients to enjoy and exercise their civic rights under the *LDA*, in particular their right to vote,²³⁴ the African Commission found the Government of the Gambia to be in violation of Article 13(1) of the *ACHPR*.²³⁵ The Government admitted that mental health patients are not allowed to vote since they allegedly don't have the ability to make informed choices regarding who to vote for.²³⁶ However, the Commission clarified in its decision that "the right provided for under Article 13(1) of the *African Charter* is extended to 'every citizen' and its denial can only be justified

²²⁹ *Ibid.* at paras. 28-29 & 50-51.

²³⁰ *Ibid.* at paras. 34 & 52.

²³¹ *Ibid.* at para. 36.

²³² *Ibid.* at paras. 37-38.

²³³ *Ibid.* at para. 54.

²³⁴ *Ibid.* at para. 73.

²³⁵ *Ibid.* at para. 76.

by reason of legal incapacity or lack of citizenship of a particular State. Legal incapacity may not necessarily mean mental incapacity.”²³⁷ As a justification for denying a right under Article 13(1),²³⁸ legal incapacity “should be based on objective and reasonable criteria established by law.”²³⁹ The Commission ruled that “besides the view held by the Respondent State questioning the mental ability of mentally disabled patients to make informed choices in relation to their civic duties and obligations, it is very clear that there are no objective bases within the legal system of the Respondent State to exclude mentally disabled persons from political participation.”²⁴⁰

In conclusion, the Commission found the Republic of The Gambia to be in violation of Articles 2; 3; 5; 7(1)(a) and (c); 13(1); 16; and 18(4) of the *ACHPR*. The Commission strongly urged the Government of The Gambia to:

- a) Repeal the *Lunatics Detention Act* and replace it with a new legislative regime for mental health in The Gambia compatible with the [ACHPR] and *International Standards and Norms* for the protection of mentally ill or disabled persons as soon as possible;
- b) Pending (a), create an expert body to review the cases of all persons detained under the *Lunatics Detention Act* and make appropriate recommendations for their treatment or release; [and]
- c) Provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia.²⁴¹

The importance of this communication to the rights of all persons with disabilities is paramount since it very clearly articulated the rights of persons with disabilities, which are left weak and inadequate under the *ACHPR*, and it analyzed

²³⁶ *Ibid.* at para. 74.

²³⁷ *Ibid.* at para. 75.

²³⁸ *Ibid.*

²³⁹ *Ibid.* at para. 76.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.* at para. 85.

their situation and rights from a strong human rights perspective. The African Commission strongly reaffirmed that persons with disabilities in general, and those with mental illness in particular, are entitled to the same human rights and fundamental freedoms as others.²⁴² For instance, with respect to the right to health, the Commission stated that people with mental illness are entitled to special care and treatment that will enable them to “attain and sustain [an] optimum level of independence and performance.”²⁴³ However, a decision by the African Commission regarding communications against a state is only a recommendation; it does not bind African states, and compliance depends on the political will of the state in question. The African Commission may, nevertheless, use the principles, rules and jurisprudence developed in previous cases when considering communications submitted in the future.²⁴⁴

4.3. Enforcement and Monitoring Mechanisms in the Context of Persons with Disabilities under the African Human Rights Instruments

The different African regional human rights instruments provide various enforcement and monitoring mechanisms for the implementation of their provisions. Some instruments establish new treaty-bodies. For example, the *ACHPR* established the African Commission on Human and Peoples’ Rights, and the *ACRWC* provides for the establishment of the Experts Committee on the Rights of the Child. Other instruments give the responsibility of monitoring and

²⁴² Biegon, *supra* note 48 at 70-71.

²⁴³ Purohit, *supra* note 217 at para. 81.

enforcement to established institutions. For example, the *African Youth Charter* bestows this responsibility upon the AU Commission. Still other instruments provide for mixed jurisdictions, which means that more than one institution has the responsibility of enforcement and monitoring. The following sections discuss these mechanisms without engaging in a detailed examination of their strong and weak features.

4.3.1. The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights was established within the OAU/AU under Article 30 of the *ACHPR* with the goal of promoting and protecting human and peoples' rights in Africa.²⁴⁵ The Commission began functioning in 1987. It is seated in Banjul, the Gambia.²⁴⁶ The Commission is composed of "eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights".²⁴⁷ Members should be nationals of state parties to the *ACHPR*,²⁴⁸ and "the Commission [should] not include more than one national of the same State."²⁴⁹ Members of the Commission are elected by secret ballot by the Assembly of the OAU/AU from

²⁴⁴ *ACHPR*, *supra* note 10, Art. 61.

²⁴⁵ *Ibid.* Art. 30.

²⁴⁶ Udombana, "Between Promise", *supra* note 6 at 119.

²⁴⁷ *ACHPR*, *supra* note 10, Art. 31(1).

²⁴⁸ *Ibid.* Art. 34.

²⁴⁹ *Ibid.* Art. 32.

among persons nominated by state parties to the *ACHPR*.²⁵⁰ Members hold office for a six-year period and can be elected to serve for a second term.²⁵¹

The Commission is mandated to promote and protect human and peoples' rights in Africa and to interpret the provisions of the *ACHPR* upon request.²⁵² With the goal of promoting human and peoples' rights, it may:

a) [...] collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments; b) [...] formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation; [and] c) Cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.²⁵³

The Commission may consider interstate communications regarding allegations of violations of the *ACHPR* provided that domestic remedies have been exhausted or unduly prolonged.²⁵⁴ However, "for all practical purposes, the inter-state mechanism has remained dormant. African states have thus generally shied away from accusing one another of violations, being reluctant to attract reprisal complaints."²⁵⁵ To date, only one interstate communication has been submitted to the Commission, in response to which the Commission issued its

²⁵⁰ *Ibid.* Art. 33.

²⁵¹ *Ibid.* Art. 36.

²⁵² *Ibid.* Art. 45.

²⁵³ *Ibid.* Art. 45(1).

²⁵⁴ *Ibid.* Arts. 49-50.

²⁵⁵ Dejo Olowu, "The Regional System of Protection of Human Rights in Africa" in Julia Sloth-Nielsen, ed., *Children's Rights in Africa: A Legal Perspective* (Aldershot, England: Ashgate

recommendations in May of 2003.²⁵⁶

The provisions of the *ACHPR* do not clearly state that individuals or Non-Governmental Organizations (NGOs) can submit communications to the Commission against state parties.²⁵⁷ Nevertheless, the Commission empowered itself to consider communications from individuals and NGOs against state parties regarding violations of the *ACHPR* by interpreting the phrase “communications other than those of state parties” under Article 55(1) to mean communications from individuals and NGOs.²⁵⁸ As a result, the Commission has already forwarded its recommendations on dozens of communications presented by individuals and NGOs. Among these was the disability-related communication, *Purohit and Moore v. The Gambia*, which was discussed in the previous section.²⁵⁹ Under Article 56 of the *ACHPR*, such communications are required: to indicate their authors; not to contain insulting or disparaging language against the state concerned or the OAU/AU; to be submitted after exhausting domestic recourses for remedies or after domestic procedures for remedies have been

Publishing Ltd, 2008) 13 at 21.

²⁵⁶ *D. R. Congo v. Burundi, Rwanda and Uganda*, African Commission on Human and Peoples’ Rights, Communication No. 227/99 (2003), online: UMN.EDU <<http://www1.umn.edu/humanrts/africa/comcases/227-99.html>>. In this Communication, the Government of the Democratic Republic of Congo alleges that the armed forces of the governments of Burundi, Uganda and Rwanda have committed grave and massive violations of human and peoples’ rights in the Congolese provinces where there have been rebel activities since August 2, 1998. During its 33rd Ordinary Session in Niamey, Niger, the African Commission found that the three countries were in violation of the provisions of the *ACHPR* and accordingly urged them to abide by their obligations under African and international laws, withdraw their armed forces from the territory of Congo and pay adequate reparations to the complainant.

²⁵⁷ For a discussion on the African Commission’s mandate to consider individual communications, see: Chidi Anselm Odinkalu, “The Individual Complaints Procedures of the African Commission on Peoples’ Rights: A Preliminary Assessment” (1998) 8 *Transnat’l L. & Contemp. Probs.* 359 at 371-374 [Odinkalu].

²⁵⁸ *ACHPR*, *supra* note 10, Art. 55(1).

²⁵⁹ For more details, see the section discussing *Purohit and Moore v. The Gambia*, *supra* note 217 and the accompanying text.

unduly prolonged; to be submitted within a reasonable period of time from the point at which domestic recourses have been exhausted; and not to be in regards to cases settled by the states involved pursuant to regional and international laws.²⁶⁰ Article 55 of the *ACHPR* also imposes another strange condition on such communications: the African Commission must decide to consider such communications by a simple majority vote of its members.²⁶¹ It is not very clear whether such a decision is regarding the criteria enumerated under Article 56 of the *ACHPR* for consideration by the Commission. If the condition under Article 55 of the *ACHPR* constitutes an additional criterion, consideration of communications from individuals and NGOs would really depend on the whims and wishes of the Commission members.²⁶²

The Commission also has the mandate of receiving and considering reports from state parties on legislative and other measures taken with the goal of implementing the rights and freedoms recognized under the *ACHPR*. State parties to the *ACHPR* are obliged to submit reports to the Commission every two years.²⁶³ The rate of states' full compliance with this obligation is, however, very disappointing. For instance, by August of 2009, out of the fifty-three African states, thirty had submitted only one or no reports, twelve had never submitted a report, and fifteen had submitted one report, including two or more overdue periodic reports.²⁶⁴ State parties to the *ACHPR* should be serious about fulfilling

²⁶⁰ *ACHPR*, *supra* note 10, Art. 56.

²⁶¹ *Ibid.* Art. 55(2).

²⁶² Odinkalu, *supra* note 257, at 371-374.

²⁶³ *ACHPR*, *supra* note 10, Art. 62.

²⁶⁴ African Commission on Human and Peoples' Rights, *Submission of States Periodic Reports*, online: ACHPR.ORG <<http://www.achpr.org/>>.

their obligations under the *Charter* and should make efforts to submit the required reports on time.

The *ACHPR* stipulates that all measures undertaken by the Commission in accordance with the provisions of the *Charter* should be held in confidence until the Assembly of the OAU/AU decides otherwise.²⁶⁵ The *ACHPR* also requires the Commission to submit a report of its activities to each Ordinary Session of the Assembly of the OAU/AU.²⁶⁶ The Commission publishes the report of its measures and activities upon the consideration and decision of the Assembly of the OAU/AU.²⁶⁷

4.3.2. *The African Court on Human and Peoples' Rights*

When the *ACHPR* established the African Commission in the 1980's, it did not opt for the establishment of an African Court. Almost two decades later, however, the *Protocol to the ACHPR on the Establishment of the African Court on Human and Peoples' Rights (ACHPR Court Protocol)* was adopted in 1998 with the goal of establishing a court within the OAU/AU to complement the protective functions and enhance the efficiency of the Commission.²⁶⁸ The African Court is comprised of "eleven judges, nationals of Member States of the OAU (AU), elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and

²⁶⁵ *ACHPR*, *supra* note 10, Art. 59(1).

²⁶⁶ *Ibid.* Art. 54.

experience in the field of human and peoples' rights".²⁶⁹ There should not be more than one judge from a single state at any given time.²⁷⁰ The judges of the Court are elected by secret ballot by the Assembly of the OAU/AU from among the candidates nominated by the state parties to the *Protocol*.²⁷¹ In electing the judges, the Assembly of the OAU/AU has the responsibility of ensuring that the main regions of Africa, the principal legal traditions and both genders are adequately represented.²⁷² The judges of the African Court hold office for a six-year period and may be reelected for a second term.²⁷³

The African Court has both adjudicatory and advisory jurisdictions.²⁷⁴ With regards to its adjudicatory jurisdiction, the *Protocol* states that it has jurisdiction over "all cases and disputes submitted to it concerning the interpretation and application of [the *ACHPR*, the *ACHPR Court Protocol*] and any other relevant Human Rights instrument ratified by the States concerned."²⁷⁵ With respect to the Court's advisory jurisdiction, the *Protocol* stipulates that: "At the request of a Member State of the OAU (AU), the OAU (AU), any of its organs, or any African organization recognized by the OAU (AU), the Court may provide an opinion on any legal matter relating to the *Charter* or any other relevant human rights instruments, provided that the subject matter of the opinion

²⁶⁷ *Ibid.* Art. 59 (2-3).

²⁶⁸ *ACHPR Court Protocol*, *supra* note 15.

²⁶⁹ *Ibid.* Art. 11(1).

²⁷⁰ *Ibid.* Art. 11(2).

²⁷¹ *Ibid.* Arts. 12(1) & 14(1).

²⁷² *Ibid.* Art. 14(2-3).

²⁷³ *Ibid.* Art. 15(1).

²⁷⁴ *Ibid.* Arts. 3-4.

²⁷⁵ *Ibid.* Art. 3(1).

is not related to a matter being examined by the Commission.”²⁷⁶

In terms of access, the *Protocol* provides a list of institutions that are entitled to bring cases before the Court. The African Commission; the State Party that lodged a complaint with the Commission; the State Party against which the complaint was lodged; the State Party whose citizen is a victim of [a] human rights violation; as well as African Intergovernmental Organizations have the right to bring cases before the Court.²⁷⁷ However, individuals and NGOs with observer status before the Commission are entitled to submit cases to the Court only if the state party against whom a case is submitted makes a declaration, when ratifying the *Protocol* or thereafter, accepting the competence of the African Court to receive and consider cases from individuals and NGOs.²⁷⁸ To date, only four African states (Burkina Faso, Mali, Malawi and Tanzania) have made such declarations.²⁷⁹

The Court cannot play much of a role in protecting human rights and freedoms in Africa if individuals and NGOS do not have automatic access to the Court to bring cases against states. Since individuals are the subjects of states’ violations of human rights and freedoms, individuals and NGOs are the most likely to bring cases before regional and international institutions. Although states whose citizens are subjected to human rights violations are entitled to access the Court,²⁸⁰ one cannot expect states to bring cases on behalf of their citizens where

²⁷⁶ *Ibid.* Art. 4(1).

²⁷⁷ *Ibid.* Art. 5(1).

²⁷⁸ *Ibid.* Arts. 34(6) & 5(3).

²⁷⁹ *Final Communiqué*, *supra* note 191 at para. 25.

²⁸⁰ *ACHPR Court Protocol*, *supra* note 15, Art. 5(1)(d).

they themselves are the perpetrators of human rights violations. In most instances, it is also unlikely that the Commission or the African Inter-Governmental Organizations who have the right to access to the Court would submit cases to the Court.²⁸¹

Proceedings before the Court are public unless the Court decides otherwise.²⁸² In its judgments, the Court may order appropriate measures, including awarding compensation, if it finds that human and peoples' rights have been violated. The judgment of the Court is final and parties to the dispute must comply with it. The Council of Ministers of the OAU (the Executive Council of the AU) monitors state parties' compliance with the Court's judgments.²⁸³ However, the *ACHPR Court Protocol* does not clearly stipulate that the Assembly of the OAU/AU can impose sanctions on non-complying states.²⁸⁴ The *Protocol* also requires the Court to annually report on its activities to the Assembly of the OAU/AU.²⁸⁵

Two years after the *ACHPR Court Protocol* entered into force, the first judges of the Court were elected in January of 2006. They were sworn in to assume the duties of office in July of 2006 during the 7th Ordinary Session of the Assembly of the AU in Banjul, the Gambia. Soon afterwards, the Court launched its activities. It is now permanently seated in Arusha, Tanzania.²⁸⁶

²⁸¹ *Ibid.* Art. 5(1)(a) & (e).

²⁸² *Ibid.* Art. 10(1).

²⁸³ *Ibid.* Arts. 27-30.

²⁸⁴ *Ibid.* Arts. 27-30.

²⁸⁵ *Ibid.* Art. 31.

²⁸⁶ African Union Executive Council, *Report of the African Court on Human and Peoples' Rights*,

4.3.3. The African Court of Justice and Human Rights (JHR Court)

Parallel to these developments, the *Constitutive Act of the AU* established the Court of Justice of the African Union as one of the main organs of the Union.²⁸⁷ For this purpose, the AU adopted the *Protocol of the Court of Justice of the African Union* defining the composition, powers, and functions of the Court in July of 2003. This *Protocol* entered into force in February of 2009.²⁸⁸ In the meantime, the AU decided to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into a single court.²⁸⁹ Accordingly, it adopted the *Protocol on the Statute of the African Court of Justice and Human Rights* in July of 2008 (*JHR Court Protocol*).²⁹⁰ This *Protocol* merged the African Court on Human and Peoples' Rights and the Court of Justice of the AU to form the African Court of Justice and Human Rights of the African Union (JHR Court) as the principal judicial organ of the Union, replacing the protocols establishing the two separate courts.²⁹¹ When the new JHR Court begins

EX.CL/445 (XIII), 13th Ordinary Session in Sharm El-Sheikh, Egypt on 24-28 June 2008, at para.

1.

²⁸⁷ *AU Constitutive Act*, *supra* note 20, Art. 18.

²⁸⁸ *Protocol of the Court of Justice of the African Union*, adopted by the Assembly of the AU in Maputo, Mozambique on 11 July 2003 (entered into force 11 February 2009), online: Africa-union.org

http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf [Court of Justice Protocol].

²⁸⁹ *Decisions Assembly/AU/Dec.45 (III)* and *Assembly/AU/Dec.83 (V)* of the Assembly of the Union, adopted at its 3rd Ordinary Session in Addis Ababa, Ethiopia on 6-8 July 2004 and at its 5th Ordinary Session in Sirte, Libya on 4-5 July 2005.

²⁹⁰ *Protocol on the Statute of African Court of Justice and Human Rights*, adopted by the 11th Ordinary Session of the Assembly of the Union in Sharm El-Sheikh, Egypt on 1 July 2008, Arts. 1-2, online: African-court.org http://www.african-court.org/fileadmin/documents/Court/Statute%20ACJHR/ACJHR_Protocol.pdf [JHR Court Protocol].

²⁹¹ *Ibid.* Arts. 1-2.

its operations, all cases concerning human and peoples' rights will be heard by its Human Rights Section.²⁹² Cases pending before the African Court on Human and Peoples' Rights will be transferred to the Human Rights Section of the JHR Court on the understanding that they will be dealt with in accordance with the *ACHPR Court Protocol*.²⁹³ The judges of the African Court on Human and Peoples' Rights will remain in office until the newly elected judges of the JHR Court take an oath to assume their offices.²⁹⁴ The permanent seat of the new Court will be in Arusha, Tanzania.²⁹⁵

The JHR Court is comprised of sixteen judges who are nationals of State Parties to the *JHR Court Protocol*; the Court "shall not, at any one time, have more than one judge from a single Member State."²⁹⁶ The Court has two sections: the General Affairs Section and the Human Rights Section, each of which is composed of eight judges.²⁹⁷ The judges of the Court are "elected by a secret ballot by the Executive Council of the AU and appointed by the Assembly of the AU [...] from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurist-consults of recognized competence and experience in

²⁹² *Statute of the African Court of Justice and Human Rights of the AU*, annexed to the *Protocol on the Statute of the African Court of Justice and Human Rights*, adopted by the 11th Ordinary Session of the Assembly of the Union in Sharm El-Sheikh, Egypt on 1 July 2008, Art. 17(2), online: African-court.org <http://www.african-court.org/fileadmin/documents/Court/Statute%20ACJHR/ACJHR_Protocol.pdf> [*JHR Court Statute*].

²⁹³ *JHR Court Protocol*, *supra* note 290, Art. 5.

²⁹⁴ *Ibid.* Art. 4.

²⁹⁵ *JHR Court Statute*, *supra* note 292, Art. 25(1).

²⁹⁶ *Ibid.* Art. 3(1-2).

²⁹⁷ *Ibid.* Art. 16.

international law and/or, human rights law.”²⁹⁸ The judges of the Human Rights Section should have competence and experience in human rights law, while the judges of the General Affairs Section should have competence and experience in international law.²⁹⁹ The judges serve for a six-year period and may be reelected for a second term.³⁰⁰ Out of the sixteen judges, only the President and Vice-President serve on a full-time basis.³⁰¹

Like the African Court on Human and Peoples’ Rights, the JHR Court also has both adjudicative and advisory jurisdictions.³⁰² With regards to its adjudicative jurisdiction, it has jurisdiction over all cases filed before it in accordance with the provisions of the *JHR Court Statute* which relate to the interpretation and application of African regional treaties, multilateral/bilateral state agreements and issues of international law.³⁰³ With respect to access, like the *Protocol* establishing the African Court on Human and Peoples’ Rights, the right of individuals and NGOs to submit cases before the JHR Court is not automatic. State parties to the *JHR Court Protocol* must first make a declaration accepting the Court’s competence to receive and consider cases from individuals and NGOs.³⁰⁴ This condition will extensively restrict individuals’ and NGOs’ access to the Court since states seldom make such declarations.

Moreover, unlike the *ACHPR Court Protocol* establishing the African

²⁹⁸ *Ibid.* Arts. 7(1) & 4.

²⁹⁹ *Ibid.* Art. 6.

³⁰⁰ *Ibid.* Art. 8(1).

³⁰¹ *Ibid.* Art. 8(4).

³⁰² *Ibid.* Arts. 28 & 53.

³⁰³ *Ibid.* Art. 28.

³⁰⁴ *JHR Court Protocol*, *supra* note 290, Art. 8(3).

Court on Human and Peoples' Rights, the way this condition is written in the *JHR Court Protocol* may also create additional restrictions and obstacles to individuals and NGOs. Article 8(3) of the *JHR Court Protocol* states: "Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30(f) involving a State which has not made such a declaration."³⁰⁵ The phrase "involving a State which has not made such a declaration" complicates matters since it assumes that two states are necessarily involved in every legal dispute. It seems that individual citizens or NGOs from the same state may not have access to the JHR Court to submit cases on human rights violations by their own states. The phrase implies the involvement of two states at the same time: the state making the declaration accepting the competence of the Court, and the state that has not made such a declaration. Article 8(3) of the *JHR Court Protocol* would apply in situations where individuals or NGOs of the state party that has not made a declaration would like to submit a case before the JHR Court against another state party who has made a declaration under Article 8(3) of the *Protocol*. When individuals and NGOs cannot access the JHR Court to bring cases against their own states, their only recourse is to go through their national human rights institutions or the African Commission. However, this recourse would still depend on the screening schemes of these institutions.

All proceedings before the JHR Court are public unless the Court decides

³⁰⁵ *Ibid.* Art. 8(3).

otherwise.³⁰⁶ The Court may, “if it considers that there was a violation of a human or peoples’ right, order any appropriate measures in order to remedy the situation, including granting fair compensation.”³⁰⁷ Judgments of the JHR Court are final, but they only bind the parties to the dispute. Parties are expected to comply with JHR Court judgments and must execute the judgments accordingly.³⁰⁸ Unlike in the *ACHPR Court Protocol*, when the JHR Court refers a case of non-compliance with a judgment to the Assembly of the AU, the Assembly may impose sanctions on a state party pursuant to Article 23 of the *Constitutive Act of the AU*.³⁰⁹ The *JHR Court Statute* also requires the JHR Court to submit a yearly report of its activities to the Assembly of the AU.³¹⁰

The other jurisdiction of the JHR Court is to render advisory opinions. The Court may render opinions on any issue of law at the request of any organ of the AU as authorized by the Assembly of the AU. However, it may not give an advisory opinion on any case pending before the African Commission on Human and Peoples’ Rights or the African Committee of Experts on the Rights and Welfare of the Child.³¹¹ The *JHR Court Statute* does not expressly permit state parties to the *JHR Court Protocol* or African Inter-Governmental Organizations to request an advisory opinion from the JHR Court on any legal question. At the same time though, it requires notice of the request to be served on states and

³⁰⁶ *JHR Court Statute*, *supra* note 292, Art. 39.

³⁰⁷ *Ibid.* Art. 45.

³⁰⁸ *Ibid.* Art. 46(1-3).

³⁰⁹ *Ibid.* Art. 46(4-5).

³¹⁰ *Ibid.* Art. 57.

³¹¹ *Ibid.* Art. 53(1 & 3).

organs that are entitled to appear before the Court.³¹²

The JHR Court, with its sixteen judges (among which only two function on a full-time basis), is not expected to be in a position to efficiently handle all disputes, including those on human and peoples' rights, throughout Africa.³¹³ Thus, it is necessary for all the judges to function on a full-time basis. It is also my opinion that the incorporation of the African Court on Human and Peoples' Rights into the JHR Court may make the focus and attention on human rights disputes in Africa less visible.

4.3.4. The African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child (Child Committee) is the monitoring and enforcement mechanism established within the OAU/AU by the *African Charter on the Rights and Welfare of the Child (ACRWC)*.³¹⁴ "The Committee comprises of eleven members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child [...]. [It] shall not include more than one national of the same State."³¹⁵ The members of the Committee should be nationals of the state parties to the *ACRWC*; they are elected by the Assembly of the OAU/AU from among the candidates nominated by the state parties to the *ACRWC*.³¹⁶ Members hold office

³¹² *Ibid.* Arts. 53-54.

³¹³ *Ibid.* Art. 8(4).

³¹⁴ *ACRWC*, *supra* note 12, Art. 32.

³¹⁵ *Ibid.* Art. 33(1 & 3).

³¹⁶ *Ibid.* Arts. 35 & 34.

for a five-year period and are not entitled to be reelected.³¹⁷

The Child Committee is mandated to perform the following functions:

a) to promote and protect the rights enshrined in [the *ACRWC*]; b) to monitor the implementation and ensure protection of the rights enshrined in [the *ACRWC*]; and c) to interpret the provisions of the [ACRWC] at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.³¹⁸

The *ACRWC* obliges state parties to submit a report to the Committee through the Secretary General of the OAU/AU every three years regarding the measures taken and the progress made towards implementing the rights guaranteed under the *ACRWC*.³¹⁹ The Committee may also receive and consider “communications, from any person, group or non-governmental organization recognized by the Organization of African Unity (AU), by a Member State, or the United Nations relating to any matter covered by [the *ACRWC*].”³²⁰ The Committee considers the submitted communications in confidence.³²¹ Unlike the *ACHPR Court Protocol* and the *JHR Court Protocol*,³²² the *ACRWC* does not restrict access to the Committee; in particular, it does not restrict access by individuals and NGOs.³²³ This is very significant in encouraging individuals and NGOs to submit communications to the Committee regarding violations of the

³¹⁷ *Ibid.* Art. 37(1).

³¹⁸ *Ibid.* Art. 42.

³¹⁹ *Ibid.* Art. 43(1).

³²⁰ *Ibid.* Art. 44(1).

³²¹ *Ibid.* Art. 44(2).

³²² See the discussions above on the *ACHPR Court Protocol*, the *JHR Court Protocol* and the *JHR Court Statute*.

³²³ *ACRWC*, *supra* note 12, Art. 44(1).

rights of children recognized in the *ACRWC*.

In studying the reports submitted by state parties or in considering communications presented, the Child Committee may undertake an investigation or request any information from state parties regarding the measures taken to implement the *ACRWC*. The Committee has the obligation to submit a report on its activities to the Assembly of the OAU/AU every two years. Upon the Assembly's consideration, the Committee must publish its reports for public distribution.³²⁴

4.3.5. Additional Functions of Existing Institutions under Other Human Rights Instruments

Instead of establishing new structures, some African regional human rights conventions opted to give the responsibility of enforcing and monitoring the implementation and application of their provisions to established institutions such as the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and the African Union Commission. The following regional agreements adopted this trend.

The *Protocol to the ACHPR on the Rights of Women in Africa*, for instance, bestowed this mandate on two institutions: the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. The *Protocol* requires state parties to submit periodic reports to the

³²⁴ *Ibid.* Art. 45(1-3).

African Commission on the legislative and other measures taken to implement the provisions of the *Protocol*.³²⁵ The *ACHPR Women's Protocol* stipulates that “the African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this *Protocol*.”³²⁶ Until the African Court is established, this mandate is given to the African Commission.³²⁷

The *AU Convention on Protection and Assistance of Internally-Displaced Persons in Africa* also followed this trend. However, it also established a newly structured institution, a Conference of State Parties facilitated by the AU. It established this Conference with the goal of monitoring and reviewing the implementation of the *Displaced Persons Convention*. With regards to state reporting, it requires state parties to submit a report to the African Commission on Human and Peoples' Rights on the legislative and other measures undertaken to implement the provisions of the *Convention*.³²⁸ It notes that internally displaced persons have the right to bring petitions before the Commission, the JHR Court or any other international body.³²⁹ Disputes between state parties on the interpretation and application of the provisions of the *Convention* should be settled amicably by direct consultation; if they cannot be settled, they may be referred to the JHR Court. As this Court is not yet functional, a transitional

³²⁵ *ACHPR Women's Protocol*, *supra* note 13, Art. 26.

³²⁶ *Ibid.* Art. 27.

³²⁷ *Ibid.* Art. 32.

³²⁸ *AU Displaced Persons Convention*, *supra* note 14, Art. 14(1, 3 & 4).

³²⁹ *Ibid.* Art. 20(3).

mandate has been given to the Conference of State parties.³³⁰

The *African Youth Charter* is another example. This instrument gives the Commission of the African Union the responsibility of ensuring that state parties respect and fulfill their *Charter* commitments and duties towards achieving youth rights.³³¹

Another African regional treaty, the *African Charter on Democracy, Elections and Governance (Democracy Charter)* also gives the Commission of the African Union the responsibility of monitoring its application. It requires the AU Commission to serve as “the central coordinating structure for the implementation of the *Charter* [...] [The Commission should] coordinate evaluation on implementation of the *Charter* with other key organs of the Union [...]”³³² The *Democracy Charter* also requires the AU Commission to “develop benchmarks for implementation of the commitments and principles of this *Charter* and evaluate compliance by State Parties, [and] establish a framework for cooperation with Regional Economic Communities on the implementation of the principles of the *Charter*.”³³³ State parties are also obliged to submit a report to the AU Commission every two years on legislative and other measures taken to implement the *Charter*.³³⁴ The *Charter* also stipulates that the Assembly and the Peace and Security Council of the AU may impose appropriate measures on state

³³⁰ *Ibid.* Art. 22.

³³¹ *African Youth Charter*, *supra* note 112, Art. 28.

³³² *Democracy Charter*, *supra* note 132, Art. 45(a) & (c)).

³³³ *Ibid.* Arts. 44(2)(A)(a) & 44(2)(B).

³³⁴ *Ibid.* Art. 49(1).

parties that violate the *Charter*'s provisions.³³⁵

4.3.6. *Enforcement and Monitoring Mechanisms Relating to Disability Rights*

As the previous sections illustrate, there is no specific regional convention on the rights of persons with disabilities in Africa. However, there are some non-binding declarations and resolutions on disability rights that provide for mechanisms here and there.

The African Rehabilitation Institute (ARI) was established in 1985 with the goal of preventing disability and rehabilitating disabled persons in Africa.³³⁶ The *Continental Action Plan of the African Decade for Persons with Disabilities* recommended that the ARI's administrative and technical capacity be strengthened to coordinate and monitor the activities of the *Action Plan*. It also recommended that the OAU/AU appoint a Special Rapporteur on disability with the goal of ensuring the implementation, monitoring and reporting of the activities of the African Decade.³³⁷ The *Declaration of the African Decade for Disabled Persons (1999-2009)* and its *Action Plan* also requested that the Secretary General of the OAU/AU report to the Assembly of the Organization every two years on progress regarding the implementation of the Decade and its *Action Plan*.³³⁸ The Secretariat for the Decade was also established to facilitate and coordinate the

³³⁵ *Ibid.* Art. 46.

³³⁶ See the discussion on the establishment and functions of the ARI, *supra*.

³³⁷ *Decade Action Plan*, *supra* note 170 at para. 40.

³³⁸ *Decade Declaration*, *supra* note 164 at para. 7; *Decade Action Plan*, *supra* note 170 at para. 40.

Decade's implementation.³³⁹

At the national level, the *Decade Action Plan* recommended that member states of the OAU/AU establish national coordinating committees that include persons with disabilities and their organizations as members. It also requested that member states submit reports on their implementation of the *Action Plan*, although no time frame was provided for these submissions.³⁴⁰

In general, it seems that the ARI will be the main mechanism for monitoring and implementing the African Decade and its *Action Plan* until a Special Rapporteur on disability is appointed. The discussion above shows that several mechanisms are provided here and there, with mandates and functions that overlap and that lack central coordinating structures. It should be noted that these mechanisms, which may seem like functional enforcement mechanisms, are not mandated to confidently or publicly monitor violations of the rights of persons with disabilities, and they cannot pass binding resolutions or declarations.

Currently in Africa there is neither a legally-binding disability-specific instrument nor a specific treaty body charged with monitoring violations of the rights of persons with disabilities. The only option available to individuals with disabilities, DPOs and their advocates is to use existing enforcement and monitoring mechanisms. For instance, they may submit communications to the African Commission on Human and Peoples' Rights, to the African Child

³³⁹ See the discussion on the establishment and functions of the Secretariat of the African Decade for Persons with Disabilities, *supra*.

³⁴⁰ *Decade Action Plan*, *supra* note 170 at para. 40.

Committee or even to the African Court when rights and freedoms are violated under the respective treaties. They may also lobby states, or established monitoring institutions may request that in preparing their periodic reports, states include information on disability and disability rights in the legislative and other measures undertaken in their national affairs.³⁴¹

4.4. Does Africa need a Specific Regional Convention on the Rights of Persons with Disabilities?

As noted above, Africa lacks a disability-specific regional treaty, and the existing African regional human rights instruments do not adequately recognize, respect and protect the human rights of persons with disabilities in Africa.³⁴² Not only are existing normative disability rights and standards in the region scattered across multiple instruments, but the African regional human rights system has also adopted mixed approaches to disability and afforded diverse scopes of protection to the rights of persons with disabilities.³⁴³ Other than one communication decided by the African Commission,³⁴⁴ the existing regional African human rights system has been underused in promoting, protecting and advancing the rights of persons with disabilities on the Continent.³⁴⁵ Africa also lacks a specific regional body mandated to monitor and document violations of

³⁴¹ Angelo Buhle Dube, *Protection of the Rights of Persons Living with Disabilities under the African Human Rights System* (LL.M. Thesis, University of Pretoria, 2007) at 48, online: UP Space Institutional Repository <<http://repository.up.ac.za/handle/2263/5441>> [Dube].

³⁴² See the discussion on the existing African regional human rights instruments in sub-section 5.2 of this chapter.

³⁴³ Biegon, *supra* note 48 at 67.

³⁴⁴ Purohit, *supra* note 217.

³⁴⁵ Biegon, *supra* note 48 at 54.

the rights of persons with disabilities.³⁴⁶ These shortcomings in the African regional human rights system underpin my argument that in addition to making amendments to the anti-discrimination provisions of the existing regional human rights instruments (mainly the *ACHPR*) to include disability among the prohibited grounds for discrimination, Africa really needs to adopt a comprehensive regional disability convention or protocol. A comprehensive disability rights convention, with or without its own separate monitoring body, should be developed as soon as possible with the goal of recognizing, protecting and promoting the human rights and fundamental freedoms of persons with disabilities at a regional level in Africa. My argument is the following:

1. As discussed above, there are numerous legally-binding regional agreements in Africa that promote and protect the rights of various categories of persons, such as children, women, refugees and internally-displaced persons.³⁴⁷ However, persons with disabilities are marginalized and excluded from specific treaty protections. Persons with disabilities are therefore not in a position to get the attention of the special enforcement and monitoring mechanisms that specific treaties may establish. Thus, compared with other disadvantaged groups, persons with disabilities are at a legal disadvantage in the African regional human rights system. There is no satisfying justification for the legal exclusion and

³⁴⁶ See the discussion of the human rights enforcement mechanisms in Africa in sub-section 5.3 of this chapter.

³⁴⁷ See the discussion evaluating the existing African regional human rights instruments, *supra*. See also: Gerard Quinn & Theresia Degener, "Expanding the system: The debate about a disability-specific convention" in Gerard Quinn, et al. eds., *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) 293 at 293 [Quinn & Degener]. Although the discussion in this article is regarding international human rights instruments, the arguments

marginalization of persons with disabilities, when other disadvantaged groups are given due recognition, respect and protection under the regional framework in Africa.³⁴⁸

It might be argued that the African regional human rights instruments contain general provisions that may apply equally to persons with disabilities, and that their rights are therefore duly respected, recognized and protected.³⁴⁹ It might further be argued that the specific regional treaties also stipulate special and specific legal protections and guarantees in relation to the rights of persons with disabilities. In addition, there are specific declarations and resolutions that provide for the rights of persons with disabilities in Africa. This is all true. However, as I argued in the previous section, the guarantees and protections of the rights of persons with disabilities in the current regional legal framework are inadequate, weak and vague. Although the rights of persons with disabilities are addressed in greater detail in some instances, such as in the African Decade of Disabled Persons and its *Action Plan*, these non-binding instruments are merely a collection of aspirations.³⁵⁰

2. It might also be argued that the *Convention on the Rights of Persons with Disabilities (CRPD)* is adequate to promote and protect disability rights around the world, including in Africa. The *CRPD* and other international human

also apply to the African regional human rights system.

³⁴⁸ See the discussion evaluating the existing African regional human rights instruments, *supra*.

³⁴⁹ Dube, *supra* note 341 at 42-43. Also see the discussion of the African human rights instruments, *supra*.

rights instruments may be used as interpretive tools or guidelines to elaborate the specific rights of persons with disabilities in Africa. One could therefore argue that it is not important to adopt a regional disability convention on the Continent.³⁵¹ However, the adoption of a regional convention would not negate the international *Convention*. Rather, it would complement the *CRPD* and enhance its implementation and application by states within their territories by establishing additional mechanisms at the regional level. Furthermore, the adoption of general regional or international treaties has not barred the adoption of treaties on other categories of disadvantaged persons such as women, children and refugees in Africa or at the international level. So why shouldn't a specific convention or protocol on the rights of persons with disabilities be adopted at a regional level in Africa? It is true that adopting a regional or international human rights instrument is a very long process, and that it is not a panacea by itself for remedying problems in Africa.³⁵² However, there is no justification for refusing to adopt an instrument merely due to the amount of time it might require. Although a legal instrument is not a panacea, it is the first step in addressing legal problems.

3. In a similar vein, it could be argued that the African Commission on Human and Peoples' Rights can be seized to consider matters involving violations of the *CRPD*. Articles 60 and 61 of the *ACHPR* allow the Commission to draw inspiration from and consider all relevant international and regional human rights

³⁵⁰ See the discussion evaluating the existing African regional human rights instruments, *supra*.

³⁵¹ Biegon, *supra* note 48 at 78-79.

instruments, including customs, general principles, legal precedence and doctrine.³⁵³ However, this assumes that the states involved have ratified, acceded to or adhered to the applicable and relevant laws.³⁵⁴ When a state has not ratified a treaty, such as the *CRPD*, the provisions of that treaty cannot be applied in a binding sense.

4. Another possible argument against the adoption of a disability-specific regional convention or protocol in Africa is that the establishment of a disability monitoring body could further stretch African resources that are already overstretched. It could also duplicate and overlap with the mandates and functions of existing monitoring institutions, such as the African Commission, the African Child Committee and the African Court, which can be seized with matters regarding disability and persons with disabilities.³⁵⁵ Although funding is the main problem of all African institutions, I believe that African member states could be required to contribute more or find alternative sources of funding. Moreover, it is not justifiable to use financial constraints as a reason for marginalizing and excluding persons with disabilities from legal protection while other disadvantaged groups are provided with specific legal protections and guarantees.

As for the duplication and overlap of mandates and functions, I argue that the establishment of specific bodies, such as the Child Committee, can provide

³⁵² Dube, *supra* note 341 at 44-45.

³⁵³ *Ibid.* at 44 & 46.

³⁵⁴ *ACHPR*, *supra* note 10, Arts. 60-61.

³⁵⁵ Dube, *supra* note 341 at 45.

special attention and a sense of priority to specific groups, and may also lighten the load of the main institution, the African Commission on Human and Peoples' Rights. The Commission is mandated with general affairs, addresses many competing issues and undertakes its activities with very few full-time members. Moreover, specific bodies have been established alongside the main institution for other disadvantaged groups. In extreme cases, in order to tackle funding shortages, the model adopted by the *ACHPR Women's Protocol* could be followed.³⁵⁶ For example, instead of establishing a new monitoring body, this mandate could be given to established treaty-bodies; institutional changes could be made to ensure that some members of these institutions have expertise in disability rights, or to ensure representation of individuals with disabilities in these institutions.

5. The adoption of a regional convention or protocol on disability could also be useful in addressing local problems and concerns that may not be incorporated in international instruments. It could engender opportunities for Africans to adopt local solutions for local problems and concerns. Thomas Ong'olo of the African Decade Secretariat criticized the discussions during the negotiation and drafting process of the *CRPD* by saying the following:

The benchmark of the discussions in New York has been set by the rich. Sometimes the discussions may be around issues that are simply not relevant to most Africans, such as choice of services. Choosing the type of accessible transport you want to use or the

³⁵⁶ *ACHPR Women's Protocol*, *supra* note 13, Arts. 26 and following.

exact time of pickup by that transport of your choice, is not an issue in developing countries. The main African issue is around basic survival.³⁵⁷

6. Adopting a regional convention or protocol specifically on disability could also increase the likelihood that African states would comply with their obligations under the regional instruments. States would be more pressured through the regional disability instrument, its enforcement and monitoring mechanisms and institutions to adopt legislative, administrative, judicial and other measures with the goal of respecting and protecting the rights of persons with disabilities in their domestic jurisdictions. Moreover, states would feel very connected to a regional instrument; this could enhance compliance with obligations in the regional instrument and by extension, the international instrument.

7. Having a regional disability-specific convention or protocol in Africa could also help persons with disabilities become more visible.³⁵⁸ Persons with disabilities, DPOs and other human rights advocates would not only have access to, but also be more encouraged to use a regional disability convention and disability-related monitoring bodies to seek redresses that they could not obtain from national jurisdictions when disability rights are violated.

³⁵⁷ Lina Lindblom, "United Nations Recognizes Disability Rights: Africa Responds" *Pambazuka News* (5 September 2006), online: Rolling Rains Report <<http://www.rollingrains.com/archives/001192.html>>.

8. Adopting a regional disability-specific convention or protocol would enhance and promote awareness about the situation and human rights of persons with disabilities at both the national and regional levels. From a close proximity, it would remind states that they should adopt measures aimed at mainstreaming disability rights into all sectors of societal activities. Moreover, since disability-specific laws provide for detailed disability rights and obligations of state parties and other organizations, persons with disabilities, DPOs and society as a whole would be sensitized and become aware of specific disability rights. The instruments could serve as tools for raising awareness about these rights.

4.5. Conclusion

The discussion in this chapter evaluated the adequacy and effectiveness of the legal protections and guarantees provided under the African regional human rights instruments with regards to the human rights and citizenship rights of persons with disabilities. It concluded that the existing African regional human rights instruments do not provide adequate and effective legal protections and guarantees for ensuring and protecting the human rights of persons with disabilities in Africa. Disability issues and rights in the Continent's human rights instruments are often grounded in the individual/bio-medical model of disability, which does not portray persons with disabilities as bearers of human rights. Moreover, the existing human rights system has been underused in promoting,

³⁵⁸ Quinn & Degener, *supra* note 347 at 294-295. Although the discussion here is with regards to

protecting and advancing the rights of persons with disabilities on the Continent. I therefore argue that Africa needs to adopt a comprehensive regional disability convention or protocol. This human rights instrument would contribute to recognizing, protecting and promoting the full citizenship of persons with disabilities at the regional level in Africa.

However, in order to be meaningful and to live up to expectations in terms of improving the living standards of persons with disabilities and ensuring their full citizenship, international and regional disability rights instruments - and human rights instruments for that matter - must be implemented on the ground at a national level. The next chapter therefore examines national legal frameworks in Africa with regards to the promotion and protection of the rights of persons with disabilities. Based on general trends and a relatively thorough examination of one national legal framework, the next chapter evaluates the effectiveness and adequacy of existing national legal frameworks in promoting the dignity and equal worth, autonomy and social inclusion of persons with disabilities, and in ensuring their full membership and citizenship.

international disability-specific law, it is also valid with regards to regional treaties.

CHAPTER FIVE:

NATIONAL LEGAL FRAMEWORKS FOR THE PROTECTION OF THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA: FOCUS ON ERITREA

5.1. Introduction

As outlined in Chapter two and throughout this thesis, governments have a critical role to play in ensuring the inclusion and participation of persons with disabilities as citizens and full members of society.¹ States need to undertake appropriate constitutional and legislative reforms that conform to internationally recognized human rights norms and standards with the goal of achieving the full citizenship and human rights of persons with disabilities. They also need to implement and translate those disability-friendly laws, be they national or international, into practice on the ground to realize the effective social inclusion and participation, and the equal worth, dignity and independence of persons with disabilities.² Therefore, I take the discussion in this chapter to the national level and examine what African states have done to ensure the full citizenship of persons with disabilities within their territorial limits. I argue that although there has been a gradual shift to a human rights approach, many African states still frame disability issues and rights in their domestic legal frameworks using the individual/bio-medical model of disability, which sees persons with disabilities as objects of charity, care, assistance and rehabilitation services rather than as

¹ For a detailed discussion on the responsibility of states, see sub-section 2.3 of Chapter 2 of this thesis.

holders of human rights. Thus, persons with disabilities continue to be denied adequate legal protections and guarantees to secure their human rights and fundamental freedoms as citizens.

This chapter looks at the protection of the rights of persons with disabilities under national legal frameworks in the African context. The first section examines the approaches of African states either in incorporating or transforming the regional and international human rights instruments into their domestic legal systems. It discusses how the *Convention on the Rights of Persons with Disabilities (CRPD)* and other disability-related instruments may impact the development and reformulation of domestic law pertaining to disability and the rights of persons with disabilities. The following section considers the constitutional and legislative responses to the problems of persons with disabilities at a national level by discussing some examples from African states. The next section addresses some of the challenges in advancing disability rights through state-based law reform. The last section of this chapter examines in detail how Eritrea's legal framework treats the rights of persons with disabilities. In light of prevailing social, economic and political realities, I evaluate whether Eritrea has taken adequate legal measures to ensure the full citizenship and human rights of persons with disabilities.

² *Ibid.*

5.2. The Process of Internalizing Regional and International Human Rights Instruments into National Legal Frameworks

According to Professor Frans Viljoen, “The ultimate test of international human rights law is the extent to which it takes root at the national level, and its ability to flourish in the soil of states and to bear fruit in the lives of people.”³ The reason for this, as Professor Henry Steiner reminds us, is that “human rights violations occur within a state, rather than on the high seas or in outer space outside the jurisdiction of any one state.”⁴ Regional and international human rights instruments thus seek to require states to fulfill their obligations and adopt legislative and other measures to effectively implement the human rights and freedoms recognized by the instruments, since ultimately “effective protection must come from within the state.”⁵ In other words, the ultimate benefactors of human rights instruments are individuals, not states; it therefore follows that international human rights laws must be effectively implemented on the ground at the national level. The application and implementation of regional and international human rights instruments is therefore seminal not only in making remedies and recourses available to individuals at both regional and international levels of enforcement and monitoring, but also in giving effect to the human rights and freedoms recognized by the instruments, at least as minimum standards to be achieved at the level of national legal systems.⁶

³ Frans Viljoen, *International Human Rights Law in Africa* (New York: Oxford University Press, 2007) at 529.

⁴ Henry J. Steiner, et al., *International Human Rights in Context: Law, Politics, Morals* 3d ed. (New York: Oxford University Press, 2007) at 1087 [Steiner].

⁵ *Ibid.*

⁶ United Nations, *International Norms and Standards Relating to Disability: Part I. National*

To achieve the latter purpose in particular, beyond signing and ratifying international human rights instruments, states are expected to make their constitutional and statutory provisions consistent with international norms and standards or to incorporate the international norms and standards into their domestic legal systems. National judges and administrators may then base their decisions upon them.⁷ States can make international law part of their national legal systems either by explicit reference or by reception.⁸ This process of internalization may take different forms and may depend on states' theoretical approaches to the relationship between international law and municipal law, and on the nature and type of the regional/international law in question.⁹

States adhering to the monist theory believe that "international law is directly applicable in the national legal order. There is no need for any domestic implementing legislation; international law is immediately applicable within national legal systems."¹⁰ According to this theory, "as soon as a state has ratified or acceded to an international agreement, that international law becomes national law."¹¹ For monists, international law and municipal law are part of a single legal order in which the former is superior to the latter.¹² Most civil law African

Frameworks for the Protection of the Rights of Disabled Persons, online: UN Enable <<http://www.un.org/esa/socdev/enable/comp100.htm>> [UN International Norms].

⁷ Steiner, *supra* note 4 at 1087 & 1095-1096.

⁸ Frans Viljoen, "Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa" (1999) 43 Afr. L. J. 1 at 1.

⁹ Tijanyana Maluwa, "Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey" (1998) 23 S. Afr. Y.B. Int'l L. 45 [Maluwa, "Incorporation"].

¹⁰ Richard Frimpong Oppong, "Re-imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa" (2007) Fordham Int'l L. J. 296 at 297 [Oppong].

¹¹ UN International Norms, *supra* note 6, at Sub-section 1.4.

¹² Oppong, *supra* note 10.

countries, such as Algeria, Benin, Burkina Faso and Ethiopia subscribe to the monist theory.¹³

In states adhering to the dualist theory, on the other hand, 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 rule into a national one.”¹⁴ In other words, a state’s ratification of an international agreement does not in and of itself bring about the incorporation or transformation of the international law into the ratifying state’s national law.¹⁵ Thus for dualists, international law and municipal law are distinct and separate legal spheres that are both supreme in their own orders and therefore each have supremacy and primacy over the other in their respective spheres.¹⁶ Most common law African countries, such as Ghana, Uganda, South Africa and Malawi follow the dualist theory.¹⁷

Regardless of these theoretical distinctions, however, many states have put provisions in their national constitutions regarding the place and role of international law, in particular international treaties and agreements, within their domestic jurisdictions.¹⁸ Thus, consideration of monist and dualist theoretical

¹³ Maluwa, “Incorporation”, *supra* note 9 at 52-57. See also: Helène Combrinck & Tobias Pieter Van Reenen, “The UN Convention on the Rights of Persons with Disabilities in Africa: Progress After 5 Years” (2011) 8:14 SUR-Int’l J. Hu. Rts 132 at 145, online: <http://www.surjournal.org/eng/conteudos/getArtigo14.php?artigo=14,artigo_07.htm> [Combrinck & Van Reenen].

¹⁴ Oppong, *supra* note 10 at 297-298.

¹⁵ UN International Standards, *supra* note 6 at Sub-sections 1.4 & 1.7.

¹⁶ Tiyanjana Maluwa, *International Law in Post-Colonial Africa* (The Hague: Kluwer Law International, 1999) at 35 [Maluwa, “International”].

¹⁷ Maluwa, “Incorporation”, *supra* note 9 at 51-52 & 56. See also: Combrinck & Van Reenen, *supra* note 13.

¹⁸ Oppong, *supra* note 10 at 296-299 & 322.

distinctions becomes relevant and necessary only where no statutory or constitutional provision exists with regards to the incorporation of international laws or the status and role of customary international laws within national legal systems.¹⁹ In most African states, the status of customary international law within the municipal legal system is resolved “on the basis of a consideration of the competing theories relating to the relationship between international law and municipal law, there being no constitutional provisions to provide guidance on the matter.”²⁰

Where international human rights laws are incorporated into domestic legal systems, national judges, administrators, lawyers and individual litigants may invoke the relevant international law provisions in judicial, quasi-judicial and administrative decisions.²¹ Moreover, even where international human rights laws are not part of national legal systems, international human rights law provisions may serve as a tool of interpretation in explicating and clarifying national statutory and constitutional provisions.²² One significant problem, however, is that those involved in the decision-making process within states are not, in most instances, conversant in the substantive contents of international human rights law.²³

¹⁹ Maluwa, “International”, *supra* note 16 at 35.

²⁰ *Ibid.* at 31.

²¹ Janet E. Lord & Michael Ashley Stein, “The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities” (2008) 83 Wash. L. Rev. 449 at 472-474 [Lord & Stein].

²² Oppong, *supra* note 10 at 313-317.

²³ In the context of Eritrea’s judiciary, see: Daniel Rezene Mekonnen, *Transitional Justice: Framing a Model for Eritrea* (LL.D. Thesis, Faculty of Law, University of the Free State, Republic of South Africa, 2008) at 71-73, online:

Needless to say, persons with disabilities may not fully benefit from the mere adoption of regional and international disability rights laws unless states take legislative, administrative, judicial and other measures with the goal of implementing and translating the human rights and freedoms of persons with disabilities recognized in international disability laws on the ground within their domestic jurisdictions.²⁴ As of October 11, 2010, nineteen African countries had ratified the *CRPD*; thus, they are expected to implement and give effect to the provisions of the *Convention* within their territories.²⁵ The following sub-section captures the legislative responses of African states with regards to disability issues and to problems of persons with disabilities in their national spheres. The legal responses discussed below are not necessarily the outcome of *CRPD* ratifications. There has, however, been a noticeable difference in the general understanding of the need to protect the rights of persons with disabilities in Africa before, during and after the adoption of the *CRPD*.

5.3. Constitutional and Legislative Responses to Problems of Persons with Disabilities in Selected African Countries

In her global comparative study of disability anti-discrimination laws, Professor Theresia Degener observed that states' legislative responses to problems

<<http://www.google.ca/url?sa=t&source=web&cd=6&ved=0CDkQFjAF&url=http%3A%2F%2Ftd.uovs.ac.za%2FETD-db%2Ftheses%2Favailable%2Fetd-04082009-144225%2Funrestricted%2FMekonnenDR.pdf&ei=UyCRRvVGeLf0QHN1qRB&usg=AFQjCNGaBGB0gTD-ar5F8R3NDcxVJ1K6Kw>> [Mekonnen].

²⁴ Lord & Stein, *supra* note 21.

²⁵ UN Enable, *Convention and Optional Protocol Signatures and Ratifications*, online: UN Enable <<http://www.un.org/disabilities/countries.asp?navid=12&pid=166>>.

of persons with disabilities are situated in different legal contexts: in constitutional, civil, criminal and social welfare laws, or in a combination of two or more of these legal approaches.²⁶ The following discussion draws from Professor Degener's examination of these approaches.²⁷

5.3.1. *The Constitutional Law Approach*

Several African states, such as Kenya; Rwanda; Swaziland; South Africa; Uganda; Eritrea; Malawi; the Gambia; and Ghana have taken the constitutional law approach. They have disability-related provisions in their national constitutions. Rwanda, Eritrea and South Africa simply list disability in the category of prohibited grounds for discrimination in the general anti-discrimination clauses of their constitutions.²⁸ Other constitutions list disability among the prohibited factors for discrimination in its restricted sense. For instance, the *Constitution of Zimbabwe* lists physical disability in its anti-discrimination clause, thus excluding mental and sensory disabilities.²⁹ Other states, such as Kenya, Uganda and Swaziland, have detailed provisions on the rights of persons with disabilities in their constitutions in addition to general anti-discrimination clauses.³⁰ For instance, the *Ugandan Constitution of 1995*

²⁶ Theresia Degener, "Disability Discrimination Law: A Global Comparative Approach" in Anna Lawson & Caroline Gooding, eds., *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 87 at 91-100 [Degener].

²⁷ For a detailed discussion, see: *Ibid.* at 91-101.

²⁸ State of Eritrea, *Constitution of the State of Eritrea*, ratified by the Eritrean Constituent Assembly on 23 May 1997, Art. 14(2) [*Eritrean Constitution*].

²⁹ *Constitution of Zimbabwe of 1979*, as amended up to 14 September 2005, s. 29(2-3).

³⁰ See, for example, the full text of the *Ugandan Constitution of 1995* [*Uganda Constitution*].

prohibits discrimination on the ground of disability, among other factors;³¹ it provides that “persons with disabilities have a right to respect and human dignity and the State and society shall take appropriate measures to ensure that they realize their full mental and physical potential.”³² It further declares that “the State shall take affirmative action in favor of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.”³³

While not providing a general anti-discrimination clause that may include disability, other African countries prohibit discrimination on the ground of disability only in specific areas, mainly in employment. For instance, the *Constitution of Malawi of 1994* provides that “Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular on the basis of gender, disability or race.”³⁴ Besides this specific prohibition of discrimination on the ground of disability, the Government of Malawi has chosen to deal with specific aspects of disability as principles of state policy. The Government has progressively adopted and implemented legislation and policy to promote the welfare of the disabled.³⁵ Similarly, the *Sudan Interim-Constitution Draft* of March 2005 prohibits discrimination specifically with regards to the right to education, although it does not list disability among the prohibited grounds for discrimination in its general

³¹ *Ibid.* Art. 21(2).

³² *Ibid.* Art. 35(1).

³³ *Ibid.* Art. 32(1).

³⁴ *Constitution of Malawi of 16 May 1994*, Art. 31(3) [*Malawi Constitution*].

³⁵ *Ibid.* Sec. 13(G). For more details, see the discussion below on directive principles of state/public policy.

clause.³⁶ It further states that persons with disabilities are “entitled to enjoy all the rights and freedoms set out in this *Constitution* [...]”.³⁷

While excluding disability from their general anti-discrimination clauses, some constitutions offer a wider scope of disability rights protection that includes health services, employment and education,³⁸ or they adopt other disability rights, such as freedom from exploitation, access to public places and the right to live with family or foster parents.³⁹ For example, the 1997 *Constitution of the Gambia* states that “The right of the disabled and handicapped to respect and human dignity shall be recognized by the State and society. Disabled persons shall be entitled to protection against exploitation and to protection against discrimination, in particular as regards access to health services, education and employment.”⁴⁰ The *Constitution of Mozambique* also affirms that the guaranteed constitutional rights apply to disabled citizens, without including disability among the prohibited grounds for discrimination. It states that “Disabled citizens shall enjoy fully the rights enshrined in the *Constitution* and shall be subject to the same duties, except those which their disability prevents them from exercising or fulfilling.”⁴¹ The *Sudanese Constitution* contains a similar provision entitling persons with disabilities to the rights and freedoms stipulated in the *Constitution*.⁴²

³⁶ *Sudan Interim-Constitution Draft*, March 2005, Art. 44.

³⁷ *Ibid.* Art. 45.

³⁸ *Constitution of the Gambia of 1997*, Art. 31(1-2) [*Gambia Constitution*].

³⁹ *Constitution of the Republic of Ghana of 1992*, Art. 29 [*Ghana Constitution*].

⁴⁰ *Gambia Constitution*, *supra* note 38, Art. 31(1-2).

⁴¹ *Constitution of Mozambique of 1990*, as amended in 2005, Art. 37 [*Mozambique Constitution*].

⁴² *Sudan Interim-Constitution Draft*, *supra* note 36, Art. 45.

Some African countries, including Cape Verde,⁴³ Congo,⁴⁴ Madagascar,⁴⁵ the Gambia,⁴⁶ Ghana⁴⁷ and Ethiopia⁴⁸ provide similar protections for persons with disabilities in their constitutions, although they do not seem to recognize the prevalence of discrimination against persons with disabilities in their societies. For example, the 1992 *Constitution of Congo* stipulates that “aged or handicapped persons shall have the right to specific measures of protection coinciding with their physical and moral needs.”⁴⁹ Other countries, such as Angola⁵⁰ and Mozambique,⁵¹ provide special constitutional protection for a particular group of disabled individuals: those who were disabled during civil armed conflicts or liberation wars.⁵² Such provisions are discriminatory, at least in the sense that they totally exclude other disabled persons from protection.

While excluding disability from the list of prohibited discrimination factors, the constitutions of other countries, such as Lesotho, Malawi, and Sierra Leone, have disability-related provisions as mere aspirations and principles of state policy that cannot be enforced in any court of law. The 1991 *Constitution of*

⁴³ *Constitution of the Republic of Cape Verde*, adopted in 1992 and substantially amended in November 1999, Art. 72. Disability and disabled persons are also mentioned along with other categories of persons in Arts. 58-59 & 67.

⁴⁴ *Constitution of the Congo*, adopted on 15 March 1992, Art. 34(3) [*Congo Constitution*].

⁴⁵ *Constitution of the Republic of Madagascar*, adopted on 19 August 1992, Art. 30.

⁴⁶ *Gambia Constitution*, *supra* note 38, Art. 31.

⁴⁷ *Ghana Constitution*, *supra* note 39, Art. 29.

⁴⁸ *Constitution of the Federal Democratic Republic of Ethiopia*, adopted on 8 December 1994 and promulgated on 21 August 1995, Art. 41(5).

⁴⁹ *Congo Constitution*, *supra* note 44, Art. 34(3).

⁵⁰ *Constitution of the Republic of Angola* of August 1992, Art. 48.

⁵¹ *Mozambique Constitution*, *supra* note 41, Arts. 15-16.

⁵² For instance, the *Mozambique Constitution* states in Articles 15-16: “The State shall ensure the special protection of those who were disabled in the national liberation struggle, as well as the orphans and other dependents of those who died in this cause. [...] The State shall ensure special protection to those who were disabled during the armed conflict that ended with the signing of the *General Peace Agreement* in 1992, as well as the orphans and other direct dependents. The State shall likewise protect those who have been disabled in the performance of public service or a

Sierra Leone, for instance, seeks to promote and safeguard the care and welfare of the disabled and their rights in secure educational facilities, but since these rights are provided as mere directive principles, they are non-justiciable.⁵³ Similarly, the *Lesotho Constitution of 1993* affirms that principles of public policy are not enforceable before any court and are subject to the economic development of the country, and it puts the constitutional provision relating to disabled persons in this unenforceable category.⁵⁴ Article 33 of the *Constitution* states: “With a view to ensuring the rehabilitation, training and social resettlement of disabled persons, Lesotho shall adopt policies designed to provide for training facilities, including specialized institutions, public or private; and place disabled persons in employment and encourage employers to admit disabled persons to employment.”⁵⁵

The 1994 *Malawian Constitution* also considers disability issues to be matters of state policy that should be implemented progressively. It provides that: “The State shall actively promote the welfare and development of the disabled people by progressively adopting and implementing policies and legislation aimed at supporting the disabled through greater access to public places; fair opportunities in employment; and the fullest possible participation in all spheres of Malawian society.”⁵⁶ Other constitutions are unclear about the enforceability of certain disability rights. The *Swaziland Constitution* of 2005, for example, puts

humanitarian act.”

⁵³ *Constitution of Sierra Leone of 1991*, Sec. 8(3)(F), Sec. 9(1)(B) & Sec. 14.

⁵⁴ *Constitution of Lesotho of 1993*, Art. 25 & 33 [*Lesotho Constitution*].

⁵⁵ *Ibid.* Art. 33.

⁵⁶ *Malawi Constitution*, *supra* note 34, Sec. 13(G).

persons with disabilities' right to "respect and human dignity" as both an enforceable right and a principle of state policy.⁵⁷

Some constitutions also provide for quota schemes in the area of political representation and participation. The *Constitution of Kenya*, for example, affirms in principle that at least 5% of the elective and appointive bodies should be persons with disabilities.⁵⁸ However, the realization of this objective is progressive.⁵⁹ Similarly, the *Constitution of Uganda* requires that parliament consist of a certain number of representatives of disabled people "as determined by Parliament."⁶⁰ Likewise, the *Constitution of Malawi* has a provision on including representatives of persons with disabilities in the Senate.⁶¹ Other Constitutions deal specifically with Sign language and other communication tools of persons with disabilities. The *Kenyan Constitution*, for example, confirms the right of persons with disabilities to use Sign language, Braille or other means of communication, and requires the state to promote their use and development.⁶² The *South African Constitution* contains a similar objective on the use and development of Sign language.⁶³

In contrast to constitutional guarantees that seek to accommodate persons with disabilities, in some countries constitutional provisions are discriminatory on their face. For instance, the 1993 *Lesotho Constitution* requires that any member

⁵⁷ *Swaziland Constitution of 2005*, Arts. 30 & 60.

⁵⁸ *Constitution of Kenya*, Sec. 54(2) [*Kenya Constitution*].

⁵⁹ *Ibid.* Sec. 54(2).

⁶⁰ *Uganda Constitution*, *supra* note 30, Art. 78(1).

⁶¹ *Malawi Constitution*, *supra* note 34, Sec. 68.

⁶² *Kenya Constitution*, *supra* note 58, Sec. 54(1)(D) & Sec. 7(3)(B).

⁶³ *Constitution of the Republic of South Africa 1996*, Sec. 6(5).

of Parliament be “able to speak and, unless incapacitated by blindness or other physical cause, to read and write either the Sesotho or English languages well enough to take an active part in the proceedings of the Senate.”⁶⁴

Some African countries that specifically include disability among the prohibited grounds for discrimination in their constitutions have chosen to adopt comprehensive legislation rather than specific legislation on disability. In this way, they seek to achieve equity by promoting equal opportunity and fair treatment through the elimination of discrimination and the implementation of affirmative action measures to redress the disadvantages experienced by designated groups. South Africa is the best example of this.

The Government of South Africa enacted several laws for this purpose, including the *Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act)* of February 2000 and the *Employment Equity Act* of May 1998.⁶⁵ A few years later, Esthe Muller, a South African attorney and wheelchair user, instituted a very interesting complaint before the Equality Court of South Africa under the *Equality Act* against the departments of Justice and Public Works, alleging that court houses in South Africa were inaccessible to people who use wheelchairs.⁶⁶ As Stephanie Ortoleva explained the outcome:

In September 2004, the South African Equality Court reached a final settlement in which the two government departments admitted that they had failed to provide proper wheelchair access and that

⁶⁴ *Lesotho Constitution*, *supra* note 54, Art. 58(1)(B).

⁶⁵ See the full text of the South African legislation: *Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 & Employment Equity Act of 1998*.

⁶⁶ Stephanie Ortoleva, “Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System” (2011) 17 ILSAJICL 281 at 305-306 [Ortoleva].

this was a form of unfair discrimination against Ms. Muller and other people with similar accessibility needs. The departments committed to a plan to ensure that all court buildings throughout the country would be made accessible within three years.⁶⁷

In another recent disability case in South Africa in December of 2010, the Equality Court of Witbank District found that a “school unfairly discriminated against [a student who uses a wheelchair] by failing to take the necessary steps to accommodate her.”⁶⁸ The student, Chelsea, had complained about her refused readmission to the St Thomas Aquinas Private School and about the inaccessibility of classrooms, toilets and washbasins at the school. The Court noted that although the school took measures to accommodate Chelsea, such as giving her wheelchair, putting all her classes on the ground level, allocating her a toilet and granting her bursaries, these measures were inadequate and Chelsea continued to experience problems at the school.⁶⁹ The Court determined that the private school should not have refused Chelsea readmission on the ground of her physical disability. It ordered the school to take reasonable steps to remove all obstacles and to ensure access to all classrooms, toilets and washbasins for those who use wheelchairs, not only for Chelsea’s benefit, but also for the benefit of people with such physical disabilities in the future.⁷⁰

Other countries, such as Uganda,⁷¹ Nigeria,⁷² Kenya,⁷³ Zambia⁷⁴ and

⁶⁷ *Ibid.* at 306.

⁶⁸ Mpumalanga Equality Court Judgment: Disability Rights (December 2010) at 5, online: South African Human Rights Commission: <<http://www.sahrc.org.za/home/21/files/MPL%20Judgement.pdf>>.

⁶⁹ *Ibid.* at 2-4.

⁷⁰ *Ibid.* at 6.

⁷¹ Uganda, *Persons with Disabilities Act*, 2006 [*Uganda Disabilities Act*].

⁷² Nigeria, *Nigerians with Disability Decree*, 1993, online: DigitalCommons@ILR:

Zimbabwe,⁷⁵ have opted to enact specific legislation on disability. Among these laws, the Ugandan and Nigerian statutes are by far the most comprehensive in providing a plethora of rights for persons with disabilities.⁷⁶ Other countries have scattered provisions on disability in different areas of law. However, most African countries do not offer adequate legal protections and guarantees to ensure the fundamental human rights and freedoms of persons with disabilities.

Generally, the constitution is the supreme law of a state within its domestic jurisdiction, and legislation and regulations are thus required to be consistent and in conformity with its provisions.⁷⁷ From this perspective, “constitutional provisions send out an important message regarding the status of people with disabilities within the national legal order and seek to guarantee that other laws as well as policies are in conformity with the constitution.”⁷⁸ However, including disability-related provisions in constitutions as mere directive principles of state policy instead of in the sections dealing with enforceable human rights and freedoms may imply that disability rights are not human rights. It minimizes the role of the constitution, unless these principles are supported by strong disability legislation that ensures and safeguards the fundamental human rights of

<<http://digitalcommons.ilr.cornell.edu/gladnetcollect/133>> [Nigeria Disability Decree].

⁷³ Kenya, *Persons with Disabilities Act*, Act No. 14 of 2003, Commencement 16 June 2004, Sec: 22, 23, 24, 35(1), 35(2), 39 and 40, Commencement 1 January 2010), online: <www.KenyaLaw.org> [Kenya Disabilities Act].

⁷⁴ Zambia, *Persons with Disabilities Act*, 1996 [Zambia Disabilities Act].

⁷⁵ Zimbabwe, *Disabled Persons Act*, 1992 [Zimbabwe Disabled Act].

⁷⁶ See the full text of *Uganda Disabilities Act*, *supra* note 71 and *Nigeria Disability Decree*, *supra* note 72.

⁷⁷ Landmine Survivors Network, *A Human Rights-Based Approach to Disability: The Legal Framework for Survivor Assistance in 24 States Parties* (2007) at 15, online: LSN <<http://www.survivorcorps.org/PDFs/Advocacy/SurvAssist24.pdf>> [LSN].

⁷⁸ International Labor Organization, *Achieving Equal Employment Opportunities for People with Disabilities through Legislation: Guidelines*, (Geneva: ILO, 2007) at 9-10.

persons with disabilities.⁷⁹ Moreover, constitutions should not exclude disability from the prohibited factors for discrimination since this may imply that discrimination on the ground of disability is permitted or tolerated.⁸⁰ Constitutions should recognize that accommodating persons with disabilities in order to ensure legal protections and fulfill their needs, including taking affirmative action subject to undue hardship limitations, is primarily the duty and responsibility of the state. Of course, general protections in national constitutions also apply directly or indirectly to persons with disabilities, since these provisions govern the rights of all persons, including persons with disabilities.⁸¹

5.3.2. *The Civil Rights Approach*

A number of African countries, such as Ethiopia; Ghana; Kenya; Madagascar; Mauritius; Namibia; Nigeria; Uganda; Zambia and Zimbabwe have adopted a civil rights approach to deal with disability discrimination. Most of their legislative initiatives focus mainly on employment-related discrimination against persons with disabilities.⁸² For instance, Ethiopia enacted legislation in 1994

⁷⁹ Angelo Buhle Dube, *Forced Evictions and Disability Rights in Africa* (September 2008) at Sec.10, online: NYU Law Global <http://www.nyulawglobal.org/globalex/Forced_Evictions_Disability_Rights_Africa.htm>.

⁸⁰ Many states in Africa, including Algeria; Angola; Benin; Botswana; Cameroon; Central Africa Republic; Cape Verde; Congo; Ethiopia; Egypt; Ghana; the Gambia; Libya; Madagascar; Malawi; Mauritania; Morocco; Namibia; and Sierra Leone have not put disability among the prohibited grounds for discrimination in the general anti-discrimination clause of their national constitutions.

⁸¹ See also a summary of the International Disability Rights Monitor (IDRM) report on the application and relevance of constitutional provisions to persons with disabilities from more than 30 countries in Sub-Sahara Africa: International Disability Rights Monitor, *2003 IDRM Compendium Report: Sub-Saharan Africa*, online: IDEAnet <<http://www.ideanet.org/content.cfm?id=5B5F77>>.

⁸² Degener, *supra* note 26 at 96-97.

specifically on persons with disabilities' right to employment.⁸³ On the other hand, the *Zambian Persons with Disabilities Act* of 1996 adopted a general definition of discrimination on the ground of disability. According to this *Act*:

[...] discrimination means (a) treating a person with a disability less favorably from a person without a disability; (b) treating a person with a disability less favorably from another person with a disability; (c) requiring a person with a disability to comply with a requirement or condition which persons without a disability may have an advantage over; or (d) not providing different services or conditions required for that disability.⁸⁴

In terms of its application, it seems that only employers and learning institutions are prohibited from discriminating against persons with disabilities in the areas of employment and education.⁸⁵

Compared to other disability enactments in Africa, the Ugandan and Nigerian laws are by far the most comprehensive; they give legal protection and security to the general human rights of persons with disabilities rather than focusing on their welfare and rehabilitation. For example, the main objectives of the *Ugandan Persons with Disabilities Act* of 2006 are to eliminate all forms of discrimination against persons with disabilities, and to promote and develop equal opportunities for persons with disabilities and the participation of persons with disabilities in all aspects of life as equal citizens.⁸⁶ The *Act* has detailed provisions regarding an array of rights for persons with disabilities in Uganda. It prohibits

⁸³ Ethiopia, *Proclamation Concerning the Rights of Disabled Persons to Employment*, Proclamation N° 101/1994, 26 August 1994, online: DigitalCommons@ILR: <<http://digitalcommons.ilr.cornell.edu/gladnetcollect/94>> [Ethiopia Proclamation].

⁸⁴ *Zambia Disabilities Act*, *supra* note 74, Sec. 19.

⁸⁵ *Ibid.* Secs. 20-21.

⁸⁶ *Uganda Disabilities Act*, *supra* note 71, Sec. 3.

discrimination mainly in the areas of education, employment and the provision of goods and services.⁸⁷ The *Nigerians with Disabilities Decree* of 1993 also provides a wide array of legal protections for Nigerians with disabilities. It provides rights and privileges to: health services; education, vocational rehabilitation and employment; housing; accessibility of public institutions and facilities and public and private sports institutions; accessibility of polling places; transportation; supportive social services; telecommunications; free assembly and association; the right to vote; and legal services.⁸⁸

Some of the disability legislation enacted by African states provides quota schemes for employing persons with disabilities, tax rebates for those who employ a certain number of persons with disabilities or for owners who incur expenses for making their public premises or services accessible to persons with disabilities. For example, the *Nigerians with Disabilities Decree* of 1993 stipulates that: “all employers of labor shall reserve for the disabled not less than 10% of the work force.”⁸⁹ Similarly, the 1996 *Mauritius Training and Employment of Disabled Persons Act* obliges employers to employ a certain number of disabled persons as determined in a schedule.⁹⁰ The *Uganda Persons with Disabilities Act* of 2006 states that the quota of persons with disabilities in the workforce should be determined in consultation with employers’ organizations.⁹¹ The *Zambian Persons with Disabilities Act* of 1996 entitles

⁸⁷ *Ibid.*

⁸⁸ *Nigeria Disability Decree*, *supra* note 72, Secs. 4-14.

⁸⁹ *Ibid.* Sec. 6(2).

⁹⁰ Mauritius, *Training and Employment of Disabled Persons Act 1996*, Sec. 13, online: Disability Rights Education and Defense Fund <www.dredf.org> [*Mauritius Training Act*].

⁹¹ *Uganda Disabilities Act*, *supra* note 71, Sec. 13.

anyone who employs at least three persons with disabilities to a tax rebate.⁹²

Many of the states with specific disability legislation have established national bodies with the goal of implementing their provisions, formulating relevant measures and policies, and coordinating services rendered to persons with disabilities. For instance, the *Persons with Disabilities Act* of Kenya established the National Council for Persons with Disabilities.⁹³ Similarly, Nigeria and Zambia respectively provide for the establishment of the National Commission for People with Disabilities⁹⁴ and the Zambia Agency for Persons with Disabilities.⁹⁵ Moreover, a few of these African states provide for the establishment of a special fund to benefit persons with disabilities. Kenya, for example, established the National Development Fund for Persons with Disabilities.⁹⁶

All of these specific disability laws provide legal definitions of disability or of persons with disabilities, or both. Most define disability or persons with disabilities from the perspective of the individual/bio-medical model. They focus mainly on the impairment of body parts resulting in either functional limitations or adverse limitations in economic, social and environmental participation. The *Nigerians with Disabilities Decree*, for example, defines a disabled person as:

[...] a person who has received a preliminary or permanent certificate of disability to have a condition which is expected to continue permanently or for a considerable length of time which

⁹² *Zambia Disabilities Act*, *supra* note 74, Sec. 24.

⁹³ *Kenya Disabilities Act*, *supra* note 73, Sec. 3.

⁹⁴ *Nigeria Disability Decree*, *supra* note 72.

⁹⁵ *Zambia Disabilities Act*, *supra* note 74, Sec. 3.

⁹⁶ *Kenya Disabilities Act*, *supra* note 73, Sec. 32.

can reasonably be expected to limit the person's functional ability substantially, but not limited to seeing, hearing, thinking, ambulating, climbing, descending, lifting, grasping, rising, any related function or any limitation due to weakness or significantly decreased endurance so that he cannot perform his everyday routine, living and working without significantly increased hardship and vulnerability to everyday obstacles and hazards.⁹⁷

Similarly, the *Zambian Persons with Disabilities Act* defines disability as:

[...] any restriction resulting from an impairment or inability to perform any activity in the manner or within the range considered normal for a human being, and would or would not entail the use of supportive or therapeutic devices and auxiliary aids, interpreters, white cane, reading assistants, hearing aids, guide dogs or any other trained animals trained for that purpose.⁹⁸

The *Kenyan Persons with Disabilities Act* defines disability as “a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.”⁹⁹ Others define disability both in terms of the impairments and the functional limitations of the impairments. For instance, the *Ethiopian Proclamation on the Rights of Disabled Persons to Employment* of 1994 defines a disabled person as “a person who is unable to see, hear or speak or suffering from injuries to his limbs or from mental retardation, [and] does not include persons who are alcoholics, drug addicts and those with psychological problems due to socially deviant behaviors.”¹⁰⁰ From the above, the definition in the *Nigerian Decree* is so detailed that the disability has to be a condition

⁹⁷ *Nigeria Disability Decree*, *supra* note 72, Sec.3.

⁹⁸ *Zambia Disabilities Act*, *supra* note 74, Sec.2.

⁹⁹ *Kenya Disabilities Act*, *supra* note 73, Sec.2.

¹⁰⁰ *Ethiopia Proclamation*, *supra* note 83, Sec. 2(1).

substantially limiting functional ability permanently or for a considerable period of time, and should be verified by a medical certificate.¹⁰¹

On the other hand, the Ugandan *Persons with Disabilities Act* of 2006 adopts a definition of disability that incorporates elements of the social model. It acknowledges that environmental factors are among the causes of disability. The *Act* defines disability as “a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation.”¹⁰²

5.3.3. *The Criminal Law Approach*

In the criminal law context, discrimination against persons with disabilities is regarded as a criminal offence punishable with fines or imprisonment. To constitute an offence, one has to prove the criminal state of mind of the wrongdoer. Prohibited discrimination usually covers areas of employment and the provision of goods and services to the public.¹⁰³ Some African states that have adopted civil rights laws on disability, such as Mauritius, Zambia and Zimbabwe, also provide for criminal and administrative penalties for discrimination against persons with disabilities.¹⁰⁴ For instance, the *Training and Employment of Disabled Persons Act 1996* of Mauritius stipulates that discrimination against a person with a disability is an offence punishable with a

¹⁰¹ *Nigeria Disability Decree*, *supra* note 72, Sec.3.

¹⁰² *Uganda Disabilities Act*, *supra* note 71, Sec.2.

fine not exceeding 4000 rupees or with imprisonment not exceeding six months.¹⁰⁵ The Zimbabwe *Disabled Persons Act* of 1992 states that discrimination on the ground of disability in matters of access to public premises, the provision of public services and employment is an offence punishable with a fine not exceeding \$4000 or with imprisonment not exceeding one year, or both subject to certain conditions mentioned in the *Act*.¹⁰⁶ Similarly, the Zambian *Persons with Disabilities Act* stipulates in a general sense that “any person who contravenes any provision of this *Act* for which no specific penalty is provided shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding 5000 penalty units or to imprisonment for a term not exceeding three years or to both.”¹⁰⁷

5.3.4. The Social Welfare Approach

Other states have adopted the social welfare approach, which consists of anti-discrimination provisions along with provisions for disability prevention and rehabilitation. This is the traditional approach that sees persons with disabilities as recipients of welfare and social services.¹⁰⁸ The *Libya Law of 1981 on Disabled Persons* is one example that focuses on rendering assistance, care and

¹⁰³ Degener, *supra* note 26 at 91-92.

¹⁰⁴ *Ibid.* at 92.

¹⁰⁵ *Mauritius Training Act*, *supra* note 90, Sec. 18.

¹⁰⁶ *Zimbabwe Disabled Act*, *supra* note 75, Sec. 10.

¹⁰⁷ *Zambia Disabilities Act*, *supra* note 74, Sec. 32.

¹⁰⁸ Degener, *supra* note 26 at 98-100.

rehabilitation services to disabled persons.¹⁰⁹ As discussed above, most of the states that have incorporated disability-related provisions in their constitutions, other than including disability in their general anti-discrimination clauses, more or less reflect the social welfare approach since they emphasize rehabilitation, care and assistance for persons with disabilities.¹¹⁰ Constitutional frameworks may perpetuate the negative attitudes, stereotypes and legislative and policy implications of the bio-medical approach to disability if they exclude disability from their anti-discrimination and equality provisions and opt to provide assistance, rehabilitation services and special measures for persons with disabilities without articulating their needs from a human rights perspective.¹¹¹

5.4. Challenges to Implementing Disability-Related Laws in Africa

International and national disability laws that respect, recognize and protect the human rights of persons with disabilities must be effectively implemented in order to positively impact the lives of persons with disabilities. However, implementing disability laws in most African states involves a multitude of challenges.

One of the many challenges is the absence of effective rule of law and democratic governance. Many African states suffer from abusive and authoritarian regimes that contribute to the absence of a strong rule of law and a

¹⁰⁹ Libya, *Libya Law of 1981 on Disabled Persons*, online: DigitalCommons@ILR <<http://digitalcommons.ilr.cornell.edu/gladnetcollect/121>>.

general lack of good and democratic governance.¹¹² Jan Stromsem, a researcher at the Management Systems International (MSI), noted that forty-one out of forty-eight Sub-Saharan African countries scored less than 50% in the comparative country ranking in the World Bank's 2007 rule of law indicator.¹¹³ Almost half of all African countries (twenty-five) also scored less than 50% in the rule of law indicator of the 2011 Mo Ibrahim African Governance Index.¹¹⁴ In this context, implementing laws that aim to ensure and protect the human rights of individuals, including persons with disabilities, remains an abstract idea.

Another challenge for the implementation of laws is the political instability, civil wars, armed conflicts and violence that many African states are plunged into and ravaged by.¹¹⁵ Serious human rights violations in a number of African states today are attributable to such events.¹¹⁶

The lack of political will of government authorities is another challenge in both formulating and implementing disability laws. Since implementing disability

¹¹⁰ See the discussion above on the constitutional law response to disability rights.

¹¹¹ LSN, *supra* note 77 at 15.

¹¹² Said Adejumobi, "Africa and the Challenges of Democracy and Good Governance in the 21st Century" (Addis Ababa, 2000), online: <<http://www.danquahinstitute.org/docs/unpan008483.pdf>>. See also: Paul Collier, "International Political Economy: Some African Applications" (Paper prepared for the AERC, Centre for the Study of African Economies, Department of Economics, Oxford University, May 2006), online: <<http://users.ox.ac.uk/~econpco/research/pdfs/AERCPlenary-InternationalPoliticalEconomy-AfricanApps.pdf>>.

¹¹³ Jan Stromsem, "Africa Regional Rule of Law Status Review" (Report prepared for the United States Agency for International Development by Management Systems International, 30 April 2009) at 1, online: USAID <http://pdf.usaid.gov/pdf_docs/PNADO804.pdf>.

¹¹⁴ Mo Ibrahim Foundation, *2011 Ibrahim Index of African Governance: Summary* (Swindon, England: Mo Ibrahim Foundation, 2011), online: Mo Ibrahim Foundation <http://www.moibrahimfoundation.org/en/media/get/20111003_ENG2011-IIAG-SummaryReport-sml.pdf>.

¹¹⁵ Jan Stromsem, *supra* note 113.

¹¹⁶ Ifeonu Eberachi, "Armed Conflicts in Africa and Western Complicity: A Disincentive for African Union's Cooperation with the ICC" (2009) 3 Afr. J. Legal Stud. 53 at 54 & 75.

laws requires huge financial resources, even states with strong rule of law and good democratic governance may lack the political will and be reluctant to implement disability laws.¹¹⁷

Another challenge African states encounter in implementing disability laws is a dire lack of financial resources.¹¹⁸ Almost all African countries are developing countries that suffer from poverty and poor economic growth; they do not have ample financial resources at their disposal to advance sound social policy that enhances the interests of vulnerable and marginalized groups in society, including persons with disabilities.¹¹⁹ To make matters worse, the widespread corruption and administrative weaknesses throughout the Continent diminish countries' already scarce financial resources.¹²⁰ African states need to address these and other problems that affect the availability of financial resources. Moreover, the international community, in particular the affluent states, should assist developing states in their endeavors to implement disability laws through international cooperation. Although the primary responsibility for enabling persons with disabilities to function as citizens and full members of their societies

¹¹⁷ Arlene S. Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities" (2007) 34 Syracuse J. Int'l L. & Com. 287 at 314.

¹¹⁸ Tobias van Reenen & Hélène Combrinck, "International Financial Institutions and the Attainment of the UN Millennium Development Goals in Africa with Specific Reference to Persons with Disabilities" in Ilze Grobbelaar-du Plessis & Tobias van Reenen, eds., *Aspects of Disability Law in Africa* (Pretoria, South Africa: Pretoria University Law Press, 2011) 197 at 198-199.

¹¹⁹ Michael Ashley Stein & Janet E. Lord, "Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential" (2010) 32:3 Hum. Rts. Q. 689 at 711-713.

¹²⁰ Gbenga Lawal, "Corruption and Development in Africa: Challenges for Political and Economic Change" (2007) 2: 1 Humanity & Social Sciences Journal at 3-5, online: [idosi.org <http://www.idosi.org/hssj/hssj2\(1\)07/1.pdf>](http://www.idosi.org/hssj/hssj2(1)07/1.pdf). See also: Thomas R. Snider & Won Kidane, "Combating Corruption through International Law in Africa: A Comparative Analysis" (2007) 40 Cornell Int'l L.J. 691 at 692-693 & 695-696.

lies with individual states, the international community should bear this responsibility when states have patent difficulties realizing this objective.¹²¹

Another challenge is that individuals involved in policy and law formulation and implementation lack understanding about disability and persons with disabilities. If the individuals who implement disability laws, such as parliamentarians, administrators, judges, lawyers and disability advocates, do not have an understanding of and commitment to disability human rights, appropriate and disability-friendly constitutional and legislative reforms will be impossible to achieve. Implementing such laws in a way that ensures and protects the human rights of persons with disabilities would also be a very difficult and challenging task. Having good laws on paper does not and cannot in and of itself ensure and protect the human rights of persons with disabilities. Individuals' understanding of and attitude towards disability and persons with disabilities thus needs to change to conform to a disability human rights perspective. This will not only help bring about constitutional and legislative reforms at the national level to conform with the provisions of the *CRPD* and other international human rights norms and standards, but it will also help to translate disability human rights into real and meaningful rights on the ground.¹²²

Another related challenge in implementing disability laws in Africa is the attitude and understanding of the general population with respect to disability and

¹²¹ For a detailed discussion on the responsibility of the international community to assist developing states, see sub-section 2.3 of Chapter 2 of this thesis, which deals with citizenship perspectives on disability rights.

¹²² Lord & Stein, *supra* note 21 at 467-469.

persons with disabilities. One of the main causes of the exclusion, marginalization and discrimination experienced by persons with disabilities is society's cultural and religious attitudes towards persons with disabilities.¹²³ Public education campaigns therefore need to be conducted to raise awareness about disability-related issues and promote the human rights of persons with disabilities in society.¹²⁴ Moreover, human rights themes or courses, including training on disability rights, need to be incorporated into educational curricula to raise awareness about and promote human rights in general and disability rights in particular among the public.

Persons with disabilities' attitudes towards and understandings of themselves and their disabilities may also affect the formulation and the degree and extent of the implementation of disability laws. Persons with disabilities should persistently and tirelessly advocate for the respect, recognition and protection of their fundamental rights. A 2006 survey conducted in Zimbabwe by Progressio Zimbabwe showed that persons with disabilities were generally ignorant of their rights under the country's legislation due to limited exposure and education.¹²⁵ Persons with disabilities should be aware of their human rights and should make their voices heard.¹²⁶ As Stephanie Ortoleva noted, persons with disabilities "cannot seek remedies for injustice when they do not know what their

¹²³ Japhet Biegon, "The Promotion and Protection of Disability Rights in the African Human Rights System" in Ilze Grobbelaar-du Plessis & Tobias van Reenen, eds., *Aspects of Disability Law in Africa* (Pretoria, South Africa: Pretoria University Law Press, 2011) 53 at 83.

¹²⁴ Lord & Stein, *supra* note 21 at 475-477.

¹²⁵ Tsitsi Choruma, *The Forgotten Tribe: People with Disabilities in Zimbabwe* (London: Progressio, 2007) at 11, online: Progressio <<http://www.progressio.org.uk/sites/default/files/Forgotten-tribe.pdf>>.

¹²⁶ Lord & Stein, *supra* note 21 at 468-469.

rights and entitlements are under the law.”¹²⁷ Furthermore, disabled persons’ organizations (DOPs) should strengthen their capacity to advocate for the protection and promotion of the human rights of persons with disabilities. They should also build strong coalitions of diverse DOPs and establish links with other civil society organizations to enhance their capacity to advocate for the protection and promotion of human rights in general and of disability rights in particular.¹²⁸

It is with these many challenges in mind that I now turn to examine more closely the rights of persons with disabilities in Eritrea.

5.5. Law and Persons with Disabilities in Eritrea: A Case Study

5.5.1. Introduction

In this section, I examine the rights of persons with disabilities under the Eritrean legal system. I explore the customary, constitutional and legislative rights of persons with disabilities. I argue that the country has taken inadequate legislative and administrative measures to achieve the full citizenship and human rights of persons with disabilities.

Eritrea is a small country situated along the Red Sea coast in the Horn of Africa. It measures approximately 125,000 square kilometers, bordering Sudan to the north and west, Ethiopia to the south, Djibouti to the south-east and the Red

¹²⁷ Ortoleva, *supra* note 66 at 299.

¹²⁸ Lord & Stein, *supra* note 21 at 468-469.

Sea to the east.¹²⁹ Eritrea became a sovereign state on May 24, 1993 after having held a successful UN monitored referendum in April of 1993, in which 99.8% of the population voted for independence.¹³⁰ This ended the successive colonial domination of the territory, which began in January of 1890 with the declaration of the occupied land as an Italian colony given the name Eritrea.¹³¹

Eritrea is now home to nine ethnic groups, which are often called nationalities: Tigrigna; Tigre; Saho; Afar; Bilen; Kunama; Nara; Hidareb; and Rashaida. Tigrigna and Tigre constitute around 80% of the total population, and the rest are minority groups, at least in terms of their numerical representation.¹³² Although a census has never been conducted, the 2011 Human Development Index (HDI) of the UN Development Program (UNDP) estimated Eritrea's population to be 5 415 300.¹³³ The HDI estimated life expectancy at birth in Eritrea to be 61.6 years, and under-five mortality rate per thousand live births to be fifty-five.¹³⁴ Roughly 78% of the total population lives in rural areas¹³⁵ and

¹²⁹ Amanuel Mehreteab, *Reintegrating Returnees And Ex-Fighters In The Process Of Reconstruction In Post-Conflict Eritrea* (Ph.D. Thesis, Institute for Politics and International Studies, School of Social Science and Law, University of Leeds, December 2000) at 1, online: IFAANET <www.ifaanet.org/publication/PhThesis.pdf>.

¹³⁰ Kjetil Tronvoll, *The Lasting Struggle for Freedom in Eritrea: Human Rights and Political Development, 1991-2009* (Oslo: HBO AS, Haugesund, 2009) at 25.

¹³¹ Yohannes Gebremedhin, *The Challenges of a Society in Transition: Legal Development in Eritrea* (Trenton, NJ; Asmara, Eritrea: Red Sea Press, 2004) at 15 & 21 [Gebremedhin].

¹³² Chefena Hailemariam, *Language and Education in Eritrea: A Case Study of Language Diversity, Policy and Practice* (Amsterdam: Aksant Academic, 2002) at 73-77 [Hailemariam].

¹³³ UNDP, "Human Development Index: Eritrea 2011" in the *UNDP's International Human Development Indicators: Eritrea 2011*, online: UNDP <http://hdrstats.undp.org/en/countries/profiles/display_xls_output.cfm?country_iso3=ERI&lang=en> [HDI].

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* The 2011 Human Development Index puts the urban population in Eritrea at 22.1% of the total population. www.aaa.com

depends on agriculture.¹³⁶ The country's gross national income per capita is estimated as \$536. Overall, the 2011 HDI ranked Eritrea 177 out of 187 countries and territories.¹³⁷ Studies conducted by the Eritrean Government in 2003 showed that 66% of the Eritrean population suffered from poverty, among which 37% lived in extreme poverty.¹³⁸

As in most African countries, the human rights situation in Eritrea is alarming, and it is deteriorating. Countless excesses by government officials have been documented by international and non-governmental organizations and by the human rights community. Individuals lack security and risk being imprisoned, tortured, harassed or disappeared for unknown and capricious reasons.¹³⁹ Having dissenting political opinions within the country is unthinkable. Individuals can only enjoy and practice religions approved by the Government.¹⁴⁰ Privately-owned newspapers and mass media are currently totally banned.¹⁴¹ Even worse, individuals lack legal recourses for violations of their human rights and freedoms since there is no strong, functional and independent judicial system.¹⁴²

The Eritrean one-party government does not tolerate the establishment of

¹³⁶ Hailemariam, *supra* note 132 at 70-71.

¹³⁷ HDI, *supra* note 133.

¹³⁸ Government of the State of Eritrea, *Interim Poverty Reduction Strategy Paper*, Asmara (April 2004) at 5-7.

¹³⁹ Human Rights Watch, *Service for Life: State Repression and Indefinite Conscription in Eritrea* (New York: Human Rights Watch, 2009) at 24-64, online: Human Rights Watch <http://www.hrw.org/sites/default/files/reports/eritrea0409web_0.pdf> [Human Rights Watch].

¹⁴⁰ Mekonnen, *supra* note 23 at 122-127.

¹⁴¹ Human Rights Watch, *supra* note 139 at 24-64.

¹⁴² Kidane Mengisteab & Okbazghi Yohannes, *Anatomy of an African Tragedy: Political, Economic and Foreign Policy Crisis in Post-Independence Eritrea* (Trenton, NJ: Red Sea Press, 2005) at 153 [Mengisteab & Yohannes]. For a detailed account of human rights violations in Eritrea, see: Mekonnen, *supra* note 23 at 101-145.

multi-parties and democratic institutions.¹⁴³ It has not yet implemented the *Constitution*, although the *Constitution* was ratified in May of 1997 by an Assembly of Constituents established for that specific purpose.¹⁴⁴ Elections have been postponed indefinitely, except those for village and regional assemblies. The country therefore does not have a functional National Assembly; very often laws are enacted by the Executive branch (i.e. the Cabinet) of the Government.¹⁴⁵ The country has no national human rights body, and local and international non-governmental organizations (NGOs) are not allowed by law to function and undertake activities relating to human rights.¹⁴⁶

5.5.2. *Persons with Disabilities in Eritrea: A Background Snapshot*

As in many African countries, respect for and the protection of the rights of persons with disabilities under the Eritrean legal system is inadequate. Persons with disabilities experience a greater degree of exclusion, marginalization and discrimination in their daily lives. They lack access to legal rights and they do not receive very basic social services. Persons with disabilities and their families are

¹⁴³ Mekonnen, *supra* note 23 at 54-64.

¹⁴⁴ Mengisteab & Yohannes, *supra* note 142 at 131. The Constituent Assembly was established pursuant to the *Constituent Assembly Proclamation #92/1996* that was enacted on December 27, 1996. Despite its failure to implement the 1997 Constitution, the Eritrean Government continues to cite provisions from the *Constitution* to show that it lives up to its purpose and spirit. See for example: Government of the State of Eritrea, *National Report on the Universal Periodic Review*, submitted during the 6th Session of the Working Group on the Universal Periodic Review of the Human Rights Council, Geneva, 30 November-11 December 2009, online: <http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A_HRC_WG6_6_ERI_2_E.pdf> [*Eritrea UPR Report*].

¹⁴⁵ Gebremedhin, *supra* note 131 at 135-136.

¹⁴⁶ For a detailed account of human rights violations in Eritrea, see also: Kjetil Tronvoll, *supra* note 130.

left to deal with their problems on their own. Cultural and religious practices in Eritrean society contribute to the negative attitudes, stereotypes, benign neglect, exclusion and discrimination experienced by persons with disabilities.¹⁴⁷

The World Health Organization (WHO) and the World Bank estimate that about 15% of the 6.9 billion world population in 2010 had moderate or severe disabilities.¹⁴⁸ Accordingly, out of the 5.4 million population of Eritrea, around 800 000 live with either moderate or severe disabilities.¹⁴⁹ However, the Ministry of Labor and Human Welfare of the State of Eritrea puts the number of persons with disabilities in Eritrea at 150 000,¹⁵⁰ many of whom are victims of landmines and wars in the thirty-year struggle for independence between 1961 and 1991 and in the Eritro-Ethiopian border conflict of 1998-2000.¹⁵¹ A landmine impact survey of 2004 identified 481 communities with some level of landmine contamination, and estimated that approximately 20% of the total population of the country resides in landmine-impacted communities.¹⁵²

¹⁴⁷ Mohammed S. Hussain, "Rights and Dignity of Persons with Disabilities in Eritrea" (2002) PL WebJour 3, online: http://www.ebc-india.com/practicallawyer/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=736 [Hussain].

¹⁴⁸ World Health Organization & World Bank, *World Report on Disability 2011* (Geneva: World Health Organization, 2011) at xi & 29, online: WHO <http://www.who.int/disabilities/world_report/2011/en/index.html> [WHO World Report].

¹⁴⁹ I calculated this figure by taking the UNDP's HDI estimate of the country's total population and the WHO and World Bank's estimate of the percentage of persons with disabilities in the world.

¹⁵⁰ Landmine and Cluster Munitions Monitor, *Eritrea: Landmine Monitor Report 2007*, online: The-monitor.org <<http://www.the-monitor.org/lm/2007/eritrea.html>>.

¹⁵¹ *Eritrea UPR Report*, *supra* note 144 at para. 67.

¹⁵² Robert Keeley & Tesfay Haile, *Independent Final Evaluation of the Eritrean Mine Action Capacity Building Programme 2002-2006* (Evaluation Report, 10 June 2008) at 1.

5.5.3. Treatment of Persons with Disabilities under Eritrean Customary Laws

The Eritrean legal system opted to abrogate customary laws. The application and relevance of customary laws in Eritrea therefore depends on the extent of their incorporation into existing laws.¹⁵³ Despite their abrogation, however, many of the customary rules continue to govern some aspects of individual and community life.¹⁵⁴ With the creation of community courts under *Proclamation No 132/2003*, the Eritrean Government has tolerated the use and application of customary laws in resolving disputes and litigation through customary-based schemes of compromises and mediation by community courts. Although the community courts are not officially permitted to apply and interpret customary laws under the *Proclamation*, they continue to do so.¹⁵⁵ It is therefore important to examine how disabled individuals were treated when these customary laws were in full operation prior to the imposition of state law. Moreover, customary laws have continued to play a role in reinforcing and molding the culture, attitudes and understandings of society towards persons with disabilities.

¹⁵³ Government of the State of Eritrea, *Transitional Civil Code of Eritrea*, as amended by the law reform proclamation No.1/1991 (1991). Article 3347 of this *Code* repealed all customary rules, save those incorporated into the law [*Eritrean Transitional Civil Code*]. This Article states: “Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for [in] this code shall be repealed by this code.”

¹⁵⁴ Gebre H. Tesfagiorgis, “Customary Laws in Eritrea” in Tesfa G. Gebremedhin & Gebre H. Tesfagiorgis, eds., *Traditions of Eritrea: Linking the Past to the Future* (Trenton, NJ: Red Sea Press, 2008) 1 at 2-3 [Tefagiorgis]. It should be noted that Sheri’a law and customary laws are not of the same category; the former is religion-based while the latter are rules from traditions, practices and customs.

¹⁵⁵ Senai W. Andemariam, *Ensuring Access to Justice Through Community Courts in Eritrea* (International Development Law Organization, Traditional Justice: Practitioners’ Perspectives Working Paper Series, Paper No. 3, 2011) at 11, online: IDLO <<http://www.idlo.int/english/Resources/publications/Pages/Details.aspx?ItemsID=260>>.

Dr. Gebre Hiwet Tesfagiorgis noted that “Eritrea has a rich tradition of customary laws” covering various socio-cultural and geographical areas.¹⁵⁶ Customary laws are claimed to have been in operation since the 15th century and passed through generations by oral tradition until most of them were put into writing in the first half of the 20th century. Customary laws were essentially community-based, governing inhabitants of many villages descending from a common ancestry.¹⁵⁷ Dr. Tesfagiorgis remarked that there is no comprehensive list of all the customary laws in Eritrea.¹⁵⁸ However, M. Guadagni, an Italian scholar, has made a list of fourteen customary laws that were in force in various Eritrean villages.¹⁵⁹ My discussion here is limited to only three of these laws that were prevalent in the Tigrigna-speaking population of the Eritrean highlands. These are: the *Adghene-Tegeleba Customary Law*,¹⁶⁰ the *Adkeme-Melga Customary Law*¹⁶¹ and the *Logo-Chiwa Customary Law*.¹⁶²

These customary laws do not contain provisions that explicitly discriminate against disabled persons. However, they do not guarantee their rights and they contain few specific provisions on disability. The failure to mention disability could be interpreted either to include or exclude disabled persons from enjoying rights. The situation under the village land tenure system in the Eritrean

¹⁵⁶ Tesfagiorgis, *supra* note 154 at 2.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* at 4.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Adghene-Tegeleba Customary Law*, drafted in 1943 and published in 1945. (Customary law of the larger part of the former Province of Akeleguzay) [*Adghene-Tegeleba Law*].

¹⁶¹ *Adkeme-Melga Customary Law*, revised in 1944. (Customary law of the former province of Seraye) [*Adkeme-Melga Law*].

¹⁶² *Logo-Chiwa Customary Law*, drafted in 1943 and published in 1946. (Customary law of parts of the former provinces of Hamasien and Seraye) [*Logo-Chiwa Law*].

highlands provides a useful example. Under this system, males had to marry and establish a household in order to receive land from the village either for housing or farming purposes. Farming land was distributed periodically to qualified villagers.¹⁶³ Thus, disabled individuals were entitled to land rights on an equal basis with non-disabled individuals as long as they married and established a household.¹⁶⁴ As an exception to the general rule, orphans and widows could receive land without fulfilling the marriage and household establishment requirements.¹⁶⁵ Despite the likelihood that disabled persons would remain unmarried due to negative attitudes and stereotypes,¹⁶⁶ they were not mentioned under this exception.

One of the only mentions of disabled individuals in the customary laws was in regards to murder. When a murder took place, “blood money” (i.e. monetary compensation) or “vengeance by blood feud” (i.e. killing) were the remedies available to the victim’s family or clan members. If a blood feud remedy was sought, the family or clan members would kill the murderer, or if the murderer could not be found, kill any of his male relatives. However, disabled persons could not be targeted for killing.¹⁶⁷ The customary laws thus seemed to give special protection to disabled persons by prohibiting others from targeting them. I would argue, however, that this measure was not a protective right; rather,

¹⁶³ *Adghene-Tegeleba Law*, *supra* note 160, Arts. 236-242.

¹⁶⁴ Ministry of Labor and Human Welfare of the State of Eritrea, *Draft National Policy of Persons with Disabilities in Eritrea* (September 1999) at 2, Sec.1 Intro. [*Eritrea Draft Policy*]. This draft has never been adopted as an official policy.

¹⁶⁵ For example, the *Logo-Chiwa Law*, *supra* note 162, Art. 14, provides land rights to orphans.

¹⁶⁶ *Eritrea Draft Policy*, *supra* note 164.

¹⁶⁷ Lyda Favali & Roy Pateman, *Blood, Land, and Sex: Legal and Political Pluralism in Eritrea* (Indianapolis: Indiana University Press, 2003) at 83 [Favali & Pateman].

it arose from society's belief and understanding that disabled persons were of a lower value, worth and dignity than non-disabled persons, and that killing a disabled person therefore would not satisfy the victim's relatives. On the other hand, when the murderer was a mentally disabled person, as in the *Logo-Chiwa Customary Law*, much weight was given to protecting the safety of the community and the relatives of the "insane" murderer. The *Logo-Chiwa Law* stated that an insane individual who killed another person should be hanged unless he was pardoned by the family members of the victim. If the insane murderer was pardoned, he should be chained up to prevent him from killing another person.¹⁶⁸ It also stipulated that the family or clan members of the victim could not go after family members or relatives of the insane murderer for vengeance. If they did so, they would be liable to double penalties: both to blood feud and monetary compensation.¹⁶⁹

The other context in which disability is mentioned is in Sheri'a Law, although Sheri'a Law was and is not customary law. In areas where Sheri'a Law is applied, mainly in the lowlands of the country,¹⁷⁰ one of the common ways of terminating a marriage was for the husband to repudiate the wife (Talaq) for any reason. The wife was entitled to ask for a divorce before a judge (Qadi) in very limited circumstances, among which were the husband's impotence, lunacy or chronic disease.¹⁷¹

¹⁶⁸ *Logo-Chiwa Law*, *supra* note 162, Art. 11.

¹⁶⁹ *Ibid.*

¹⁷⁰ Tesfagiorgis, *supra* note 154 at 3.

¹⁷¹ Favali & Pateman, *supra* note 167 at 177.

In regards to other social services, such as care, support and assistance for disabled individuals in traditional communities, the responsibility was left almost entirely with the individual's family.¹⁷² The family had the moral and legal obligation to fulfill the basic necessities of the person with the disability, such as providing food, clothing and shelter.¹⁷³ The *Adkeme-Melga Customary Law*, for instance, imposed the responsibility of taking care of and feeding a mentally disabled person on his family.¹⁷⁴ In some instances, these responsibilities meant that families would resort to confining family members with mental disabilities in the home, or even chaining them. Customary laws generally focused on compensating victims for bodily injuries and impairments.¹⁷⁵ They provided little or no rights-based protection to persons with disabilities. If they mentioned disability or disabled persons from a rights perspective, it was more or less with respect to protecting the disabled from insults; some customary laws stipulated a certain amount of money as compensation when this protection was breached. For example, under the *Adkeme-Melga Customary Law*, insulting or calling a person insane or an idiot was prohibited, and the wrong-doer was required to compensate the victim.¹⁷⁶

The community and its religious institutions provided care, support and assistance for disabled individuals only on compassionate and religious grounds.

¹⁷² Hussain, *supra* note 147.

¹⁷³ *Eritrea Draft Policy*, *supra* note 164 at 3, Sec.1 Intro.

¹⁷⁴ *Adkeme-Melga Law*, *supra* note 161 at 5. Since this Code was not structured very well (i.e. it was not organized into chapters and articles), citations of this *Customary Law* refer to page numbers.

¹⁷⁵ See, for instance, the *Adghene-Tegeleba Law*, *supra* note 160, Art. 140. See also: *Logo-Chiwa Law*, *supra* note 162, Art. 70.

¹⁷⁶ *Adkeme-Melga Law*, *supra* note 161 at 48.

Religious institutions, such as the monasteries, often provided food, clothing, shelter and other services to disabled individuals throughout their lives.¹⁷⁷ Various traditional healing services and practices such as prayers, holy water, herbs, exorcism of demons, witchery and amulets were also available from the community with the goal of curing mental disorders and other ailments, although most of these practices would not be supported by modern science.¹⁷⁸ In traditional communities before or during the Italian colonization, the education that was available was religious; educated individuals with disabilities therefore had the chance to serve as priests and religious teachers.

5.5.4. The Rights of Persons with Disabilities under Eritrean Laws

After the *de facto* independence of the country was achieved in 1991, the Eritrean Government immediately adopted Ethiopian laws with some amendments.¹⁷⁹ It subsequently enacted diverse proclamations and regulations. This discussion is limited to a number of thematic areas that specifically concern persons with disabilities. Throughout this discussion, I also refer to germane provisions of the ratified *Eritrean Constitution* of 1997, which has not yet entered into force after almost fifteen years. However, the Eritrean Government often makes references to the provisions of this unimplemented *Constitution* in its

¹⁷⁷ *Eritrea Draft Policy*, *supra* note 164 at 4, Sec. 1 Intro.

¹⁷⁸ Andemariam Gebremichael, "Traditional Health Practices in Eritrea" in Tesfa G. Gebremedhin & Gebre H. Tesfagiorgis, eds., *Traditions of Eritrea: Linking the Past to the Future* (Trenton, NJ: Red Sea Press, 2008) 101 at 124-128.

¹⁷⁹ The various amendments to the Ethiopian laws were published in the *Negarit Gazette*, Vol. 1 of 1991.

reports and activities.¹⁸⁰

5.5.4.1. General Rights

The most pertinent provision in Eritrean laws regarding the rights of persons with disabilities is Article 14 of the 1997 ratified *Constitution*.¹⁸¹ This provision declares the equality of all persons before the law.¹⁸² The recognition of the right to human dignity under Article 16 of the *Constitution* also ensures that all human beings are treated equally and with respect.¹⁸³ More importantly, it expressly prohibits disability-based discrimination in order to achieve equality for all, including persons with disabilities; it lists disability among the prohibited grounds for discrimination.¹⁸⁴ The *Constitution* also gives individuals the right to seek administrative redress if their rights and interests are violated or threatened.¹⁸⁵

Moreover, the *Constitution* seeks to ensure “its citizens broad and active participation in all political, economic, social and cultural life of the country.”¹⁸⁶ The inclusion of diversity as one of the guiding principles of the *Constitution* may promote the rights and interests of persons with disabilities in Eritrea since diversity in a society cannot be promoted and sustained by excluding disabled

¹⁸⁰ See, for example, *Eritrea UPR Report*, *supra* note 151.

¹⁸¹ *Eritrean Constitution*, *supra* note 28, Art. 14.

¹⁸² *Ibid.* Art. 14(1).

¹⁸³ *Ibid.* Art. 16(1).

¹⁸⁴ *Ibid.* Art. 14(2).

¹⁸⁵ *Ibid.* Art. 24(2).

¹⁸⁶ *Ibid.* Art. 7(1).

individuals.¹⁸⁷ Article 14 of the *Constitution* gives the National Assembly the power to enact laws with the goal of eliminating inequalities in society.¹⁸⁸ Although affirmative action, reasonable accommodation and special remedial measures are not mentioned in this provision, these types of initiatives could be implemented to eliminate inequalities. Although the specific reference to disability as a ground for discrimination is positive, the failure to provide a definition of discrimination and the possibility of not considering the failure to provide reasonable accommodations as discrimination could limit the application of the *Constitution*'s anti-discrimination clause.

The rights to equality and non-discrimination are some of the few fundamental rights and freedoms under the *Constitution* that may not be limited “in the interests of national security, public safety or the economic well-being of the country, health or morals, for the prevention of public disorder or crime or for the protection of the rights and freedoms of others”;¹⁸⁹ these rights may not be suspended even if a state of emergency is declared.¹⁹⁰ However, the application and interpretation of the rights to equality and non-discrimination is not clear in the context of the other fundamental rights that can be limited or suspended under the *Constitution*.

¹⁸⁷ *Ibid.* Art. 6(1).

¹⁸⁸ *Ibid.* Art. 14(3).

¹⁸⁹ *Ibid.* Art. 26(1) & (3).

¹⁹⁰ *Ibid.* Art. 27(5)(a).

5.5.4.2. *Civil and Political Rights*

The 1997 *Eritrean Constitution* provides a number of civil and political rights to all citizens/persons, which includes persons with disabilities. It guarantees fundamental rights, such as the right not to be tortured; the right not to be deprived of life and liberty without due process of law; the right not to be arrested or detained except in accordance with due process of law; the right to a fair, speedy and public hearing by a court of law; the right to appeal; the right to privacy; the right to property; the right to freedom of thought, conscience, belief, speech and expression; and the right to practice any religion.¹⁹¹ Other than those in the public domain, similar guarantees and protections are also provided under the *Transitional Civil Code* in the law governing relations between and among individual citizens.¹⁹² This discussion focuses only on selected rights.

The Right to Assemble and Freedom of Association

The *Constitution* provides for “the right to assemble and demonstrate peaceably together with others.”¹⁹³ However, this provision - or the whole *Constitution* for that matter - does not clearly stipulate the right of citizens to organize themselves into political parties and to join the party of their choice. Moreover, the *Transitional Civil Code* contains provisions which can adversely affect the rights of citizens to assemble and form associations. For instance, the

¹⁹¹ *Ibid.* Arts. 15-19 & 23.

¹⁹² *Eritrean Transitional Civil Code*, *supra* note 153, Arts. 8-26.

Code establishes an Office of Associations at the Ministry of Interior to supervise and control the establishment and activities of associations.¹⁹⁴ Associations must inform the Office in advance whenever they hold general meetings,¹⁹⁵ and the Office may be represented by an observer at these meetings.¹⁹⁶ Even worse, the Office may prescribe any measure regarding the manner and times of convocation, the order of the day and the holding of meetings.¹⁹⁷ Within months of any general meeting, Associations should also inform and transmit information to the Office about all decisions made.¹⁹⁸ As one scholar pointed out, “This obviously affects the independence of associations to conduct their affairs free from any interference.”¹⁹⁹

Like other citizens, persons with disabilities have no liberty to establish associations of their choice and preference. If individuals seek to establish new or alternative associations, Government authorities advise them to stick with the existing institutions, as though associations had to exist only as single entities. There are four associations of persons with disabilities in Eritrea: the Eritrean National Association of the Blind, the Association of the Deaf, the Association of the Diabetics and the Association of the Eritrean War-Disabled Fighters.²⁰⁰ There is no unifying umbrella organization of all associations of persons with disabilities in the country. Besides the War-Disabled Fighters Association, which was formed

¹⁹³ *Eritrean Constitution*, *supra* note 28, Art. 19(5).

¹⁹⁴ *Eritrean Transitional Civil Code*, *supra* note 153, Art. 468.

¹⁹⁵ *Ibid.* Art. 473(1).

¹⁹⁶ *Ibid.* Art. 473(2).

¹⁹⁷ *Ibid.* Art. 473(3).

¹⁹⁸ *Ibid.* Art. 474.

¹⁹⁹ Gebremedhin, *supra* note 131 at 91.

²⁰⁰ *Eritrea UPR Report*, *supra* note 151 at para. 15.

and is extensively funded by the Government, the other associations are weak and do little to advocate for the rights and freedoms of their members. They do not have the capacity and expertise to undertake research on disability with the goal of initiating and lobbying for law and policy reforms. These associations mainly focus on rendering assistance and rehabilitation services to their members.

The Right to Vote and the Right to Stand for Election

The *Constitution* also recognizes the equal opportunity of all citizens - without distinction - to participate in any position of leadership as a guiding principle of the state.²⁰¹ Thus, the right to vote and to be a candidate in an election is stipulated under the *Constitution* as one of the fundamental rights and freedoms of all citizens.²⁰² Nonetheless, the *Constitution* leaves an election law to determine the requirements for enjoying and exercising this right.²⁰³ However, no national election law has been enacted by the Government to date. The only election law adopted was in regards to elections for regional assemblies.²⁰⁴ Under this law, physical or mental disability is not mentioned among the criteria that disqualify a person to be a candidate for an election. This is a positive development that puts persons with disabilities on an equal footing with other individuals in terms of standing for elections.²⁰⁵ However, this trend is not

²⁰¹ *Eritrean Constitution*, *supra* note 28, Art. 7(4).

²⁰² *Ibid.* Arts. 20 & 30(1).

²⁰³ *Ibid.* Arts. 20 & 30(2).

²⁰⁴ *Proclamation on the Election for Regional Assemblies*, Proclamation No. 140/2004 [*Regional Assemblies Proclamation*].

²⁰⁵ *Ibid.* Art. 4.

followed in the *Proclamation on the Establishment of Community Courts*, which provides for judges to be elected.²⁰⁶ Under this *Proclamation*, a citizen with chronic mental problems is barred from standing for election.²⁰⁷

Similarly, the *Proclamation on the Election for Regional Assemblies* excludes persons with mental impairments from exercising the right to vote.²⁰⁸ It does not even take into consideration the degree and severity of their impairments; in other words, the exclusion is absolute. This is really a setback in terms of realizing the rights of persons with mental disabilities. After all, voting in an election does not necessarily involve a rational choice in which voters weigh all the pros and cons of the election campaigns, candidates or parties. All citizens, including those with mental impairments, should have the right to vote.²⁰⁹ The other disability rights issue dealt with in the *Proclamation* pertains to election facilities. The *Proclamation* states that blind and other disabled persons may be accompanied by a person of their choice during the voting process.²¹⁰ This is very important in the sense that it enhances the independence and self-determination of persons with disabilities. However, it fails to deal with the accessibility of polling

²⁰⁶ *Proclamation on the Establishment of Community Courts*, Proclamation No. 132/2003. The community courts are situated at the bottom of the country's judicial hierarchy. According to this law, each community court consists of three judges. Unlike the judges of the ordinary courts who are appointed by the Executive branch of the Government, the judges of the community courts are elected directly by their respective qualified community members. Elections are conducted every two years.

²⁰⁷ *Ibid.* Art. 4.

²⁰⁸ *Regional Assemblies Proclamation*, *supra* note 204, Art. 5(2).

²⁰⁹ With regards to the right of people with mental disabilities to vote, see: *Purohit and Moore v. The Gambia*, African Commission on Human and Peoples' Rights, Comm. No. 241/2001 (2003), 33rd Ordinary Session of the African Commission held from 15-29 May 2003 in Niamey, Niger at paras. 73-76, online: UMN.EDU <<http://www1.umn.edu/humanrts/africa/comcases/241-2001.html>> [*Purohit*]. In this communication, the African Commission affirmed that excluding persons with mental disabilities from the right to vote means denying their right to political participation, and that it is not based on objective and reasonable criterion.

stations and election materials.

The Right to Nationality/Citizenship

The other fundamental right that may affect the lives of persons with disabilities is the right to nationality/citizenship. Although the right to nationality is not listed among the fundamental rights and freedoms of individuals under the *Eritrean Constitution*, the *Constitution* stipulates that any person born of either an Eritrean father or mother is an Eritrean citizen by birth.²¹¹ It also states that foreigners can acquire Eritrean nationality according to law through the process of naturalization.²¹² The 1991 Eritrean *Nationality Proclamation* regulates the conditions and modes for the acquisition and loss of Eritrean citizenship.²¹³ This *Proclamation* contains a discriminatory provision that contravenes the “equality and non-discrimination stipulation” of the *Constitution* with regards to the rights of persons with disabilities.²¹⁴ This provision states that persons seeking Eritrean nationality through naturalization should not become a burden on Eritrean society and must be able to support themselves and their families,²¹⁵ and that such persons must be “free of any of the mental or physical handicaps.”²¹⁶ This is clear

²¹⁰ *Regional Assemblies Proclamation*, *supra* note 204, Art. 12(G)(1).

²¹¹ *Eritrean Constitution*, *supra* note 28, Art. 3(1).

²¹² *Ibid.* Art. 3(2).

²¹³ Provisional Government of Eritrea, *Nationality Proclamation*, Proclamation No. 21/1992 [*Eritrean Nationality Proclamation*].

²¹⁴ Open Society Justice Initiative, *Discrimination in Access to Nationality* (Statement submitted for consideration by the United Nations Human Rights Council at its 6th Session on the occasion of its Universal Periodic Review of Eritrea from 30 November-11 December 2009), April 2009 at paras. 9 & 18 [Open Society].

²¹⁵ *Eritrean Nationality Proclamation*, *supra* note 213, Art. 4(2)(D).

²¹⁶ *Ibid.*

discrimination against persons with disabilities under the *Constitution*, and it is incompatible with the country's human rights obligations.²¹⁷

The Right to Property

The right to property is also a fundamental right guaranteed by the *Eritrean Constitution*.²¹⁸ What interests me here in the context of disability rights is the entitlement to land rights. As Article 23 of the *Constitution* stipulates²¹⁹ and the 1994 *Land Proclamation* reiterates²²⁰ that all land within Eritrea is under state ownership; individuals therefore have lesser rights than ownership.²²¹ In other words, individuals may have only a usufruct, a lease or other similar rights over land.²²² Pursuant to the *Land Proclamation*, land is allotted on an individual basis.²²³ The establishment of a household or marriage is not a requirement for entitlement. Hence, persons with disabilities are entitled to land rights even if they remain unmarried as long as they satisfy the other criteria of the *Proclamation*.²²⁴

Nevertheless, the criterion for land entitlement stipulated under *Legal Notice No. 31/1997* may negatively impact the realization of disability rights to

²¹⁷ Open Society, *supra* note 214.

²¹⁸ *Eritrean Constitution*, *supra* note 28, Art. 23(1).

²¹⁹ *Ibid.* Art. 23(2).

²²⁰ *Land Proclamation of Eritrea*, Proclamation No. 58/1994, Art. 3(1) [*Eritrean Land Proclamation*].

²²¹ *Ibid.* Art. 4(1). Individuals have usufruct rights over land.

²²² *Ibid.* Art. 3(3).

²²³ *Ibid.* Art. 15.

²²⁴ Pursuant to Articles 7, 6(2) & 1 of the *Proclamation*, to be entitled to land for farming purposes, for example, the individual must be an Eritrean citizen; attain the age of majority; be a permanent resident of the village in question; and should sustain his/her livelihood on land.

land. This *Notice* requires individuals to fulfill their national duties.²²⁵ The phrase “national duties” is often interpreted to mean national service, which many persons with disabilities may not be able to undertake. Persons with disabilities may be unfit for military training due to their physical or mental conditions, and most of them lack a profession to render service due to the dire lack of opportunities for employment and professional or vocational training. In the absence of exceptions to the stated criterion, persons with disabilities may encounter difficulties in asserting and exercising their rights to land.

In fact, the *National Service Proclamation* of 1995 requires all adult citizens between the ages of eighteen and forty to render compulsory national service that includes six months of military training and twelve months of service in military duties or national development activities.²²⁶ The *Proclamation* exempts individuals with disabilities, including those with mental illness, from national service or part of the military training; it requires them to render service in their professions for the whole duration if they are exempted only from military training.²²⁷ The conflict between the two laws may, however, be resolved by rules of statutory interpretation which state that the provision of the law that is higher in the hierarchy prevails over the provision of the law that is lower. Thus, the provision of the *National Service Proclamation*, which was promulgated by the National Assembly, prevails over the provision of the *Regulation*, which was

²²⁵ Ministry of Land, Water and Environment of Eritrea, *Eritrean Legal Notice No. 31/1997 to Provide for the Procedure of Allocation and Administration of Land*, Art. 3(10) [*Eritrean Land Notice*].

²²⁶ Government of the State of Eritrea, *National Service Proclamation*, Proclamation No. 82/1995, 23 October 1995, Art. 8, online: UNHCR <<http://www.unhcr.org/refworld/docid/3dd8d3af4.html>>.

enacted by the Ministry of Land, Water and Environment.²²⁸

The failure to mention disability in the list of prohibited grounds for discrimination for land entitlements under the *Land Proclamation* may constitute an additional challenge for persons with disabilities.²²⁹ Moreover, with the exception of land allotted for commercial or industrial purposes, the *Proclamation* seeks to make all allotted land an equal standard size throughout the nation.²³⁰ Although this ensures the equal treatment of all with regards to land allotted for agricultural purposes, it does not respond to the specific needs of certain groups of individuals, such as persons with disabilities and older people without children who may need more land to sustain themselves and their families. After being allotted land, most persons with disabilities end up hiring people to work on their land due to their disabilities, and this may in turn increase their production costs.

Likewise, land, and particular farming land in particular, is allocated to individuals by drawing lots. Although this may be an assertion of the equal treatment of all, it may disregard the needs of persons with disabilities, thereby exacerbating their hardships since the allocated farming land might be situated very far from the habitation of persons with disabilities. Also, when there is a shortage of land during land distribution, the *Proclamation* authorizes the Land Distributing Body to set forth a list of priorities for allotment.²³¹ However, it fails to provide detailed criteria for determining these priorities. Thus, the inclusion of

²²⁷ *Ibid.* Arts. 13 & 15.

²²⁸ For a detailed statutory interpretation, see: George Krzeczunowicz, “Statutory Interpretation in Ethiopia” 1: 2 J. Eth. L. 315-323.

²²⁹ *Eritrean Land Proclamation*, *supra* note 220, Arts. 4(4), 6(8) & 11(3).

disability among the criteria may simply depend on the discretion of the Land Distributing Body.

The Right to Legal Capacity

Another right that may affect the enjoyment and exercise of a number of other rights and may greatly impact the lives of persons with disabilities is the right to legal capacity. The concept of legal capacity “logically presupposes the capability to be a potential holder of rights and obligations, but also entails the capacity to exercise these rights and to undertake these duties by way of one’s own conduct.”²³² Thus, as soon as humans are born, they are endowed with rights and obligations that they are presumed capable of exercising. In other words, incapacity or the inability of a human person to exercise rights and duties is an exception to the rule, and it is not absolute; the law provides for incapacity and defines the types and degrees of incapacity.²³³ “Legal capacity is fundamental to human ‘personhood’ and freedom. It protects the dignity of persons as well as their autonomy, their ability to take charge of their own lives and to make their own decisions.”²³⁴ Incapacity, on the other hand, is an exclusion scheme that intends to

²³⁰ *Ibid.* Art. 11(1-2); *Eritrean Land Notice*, *supra* note 225, Art. 3(9).

²³¹ *Eritrean Land Proclamation*, *supra* note 220, Arts. 7(5) & 14(1-2).

²³² United Nations High Commissioner for Human Rights, “Legal Capacity” (Background conference document prepared for the 6th 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 in New York, 1-12 August 2005 at 1, online: UN <<http://www.un.org/esa/socdev/enable/rights/documents/ahc6ohchrlegalcap.doc>>).

²³³ Jacques Vanderlinden, *The Law of Physical Persons (Art. 1-393): Commentaries upon the Ethiopian Civil Code* (Addis Ababa, Ethiopia: Faculty of Law, Haile Sellassie I University, 1969) at 59 [Vanderlinden].

²³⁴ European Group of National Human Rights Institutions, “Amicus Curiae - Rights of a Person

deprive individuals of their rights.²³⁵ There is an assumption that disability in general and intellectual disability in particular implies incapacity. Incapacitating persons with disabilities is believed to protect rather than to deny and deprive them of their rights and interests.²³⁶ Recognizing the legal capacity of persons with disabilities by law on an equal basis with others in all aspects of life, and thereby rejecting the categorical assumption that disability means a lack of capacity, is therefore necessary to ensure that persons with disabilities hold and exercise their human rights and freedoms as human beings.²³⁷

The *Eritrean Transitional Civil Code* of 1991 recognizes that the presumed capacity of all human beings is the norm by stating that every human person is capable of performing all acts of civil life.²³⁸ The *Code* uses incapacity and disability interchangeably to denote the incapability to perform the acts of civil life.²³⁹ In another instance, however, the *Code* equates disability with infirmity (i.e. a physical condition), excluding mental conditions.²⁴⁰ Moreover, although the phrases “disabled persons” or “persons with disabilities” are not employed in this Title, other insulting and degrading terminologies, such as “the insane”, “the infirm”, “the blind”, “the deaf” and “the mute” are used to denote

with Intellectual Disabilities” on the case *European Court of Human Rights: D.D. v Lithuania* (Amicus Brief in the European Court of Human Rights, submitted to the Court on 22 April 2008) at 1, online:

<http://www.ihrc.ie/download/doc/european_group_nhris_third_party_intervention_d.d._v_lithuania.doc> [European Group].

²³⁵ Amita Dhanda, “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?” (2007) 34 *Syracuse J. Int’l L. & Com.* 429 at 460 [Dhanda].

²³⁶ *European Group*, *supra* note 234 at 1.

²³⁷ *Ibid.* at 1-2.

²³⁸ *Eritrean Transitional Civil Code*, *supra* note 153, Art. 192 (1991). The Eritrean Provisional Government, the Government of that period, adopted this *Transitional Code* by making amendments to the 1960 *Civil Code of Ethiopia*.

²³⁹ *Ibid.* Arts. 192, 193 & 196.

physical or mental conditions that may give rise to incapacity (i.e. disability).²⁴¹

One of the categories recognized by the *Transitional Civil Code of Eritrea* is persons with mental conditions or infirmities on whom a court declares a judicial interdiction (i.e. a judgment of incapacity).²⁴² In elaborating the instances that may give rise to incapacity under the law, Article 193 of the *Code* mentions mental conditions, but not physical conditions.²⁴³ This could be interpreted as meaning that physical conditions may not be a basis for pronouncing a judicial interdiction under the *Code*. However, Article 351 provides that a judicial interdiction may be pronounced in the event of permanent disability, here referring to infirmity (i.e. a physical condition).²⁴⁴ According to Article 340 of the *Code*, infirm persons include the blind, the deaf, the mute and any persons with other physical infirmities.²⁴⁵ The law stipulates that the court may declare a judicial interdiction of the person due to either a mental condition or a permanent infirmity when the health and interests of that person so require, or when the interests of his/her presumptive heirs so demand.²⁴⁶

There is no justifiable reason to pronounce an interdiction on the grounds of a permanent infirmity, since a physical impairment that does not severely impact one's mental state may not affect one's appreciation and understanding of things and events. Such pronouncements arise from the assumption that people

²⁴⁰ *Ibid.* Arts. 340 & 351(3).

²⁴¹ *Ibid.* Arts. 339-340.

²⁴² *Ibid.* Arts. 193 & 351.

²⁴³ *Ibid.* Art. 193.

²⁴⁴ *Ibid.* Art. 351.

²⁴⁵ *Ibid.* Art. 340.

²⁴⁶ *Ibid.* Art. 351.

with permanent infirmities, such as the blind, the deaf and the mute, are unable to govern themselves or administer their property due to their permanent infirmity.²⁴⁷ Furthermore, it is not clear from the wording of the Article whose interests should prevail in the event of a conflict: the interests of the person with the mental condition/infirmity or the interests of his/her presumptive heirs. Given the prevalent stereotypes and negative attitudes towards persons with disabilities, it is very likely that the dignity and independent decision-making power of persons with disabilities on personal matters would be jeopardized by the interests of their heirs.

Also, although the court may, during the interdiction pronouncement or even afterwards, determine the acts that the interdicted person may perform,²⁴⁸ the limitation of the autonomy, self-determination and freedom of the person (i.e. the incapacity) under the law is almost complete. The interdicted person may not marry without the court's authorization, cannot request a divorce without his/her guardian's consent, cannot disown a child without the court's approval, and cannot write a will.²⁴⁹ Furthermore, he/she may not refuse to submit to a medical or surgical examination or treatment unless his/her guardian agrees.²⁵⁰ I therefore argue that the legal scheme of judicial interdiction, a court's judgment of incapacity as provided for under the *Code*, disempowers and deprives persons with disabilities of their fundamental human rights and freedoms, including their

²⁴⁷ Article 340 of the *Transitional Civil Code* reiterates this kind of assumption, although it is presented with the goal of giving legal protection. If people with physical disabilities, such as the blind or the deaf, would like someone to act on their behalf, they may delegate or write power of attorney for that purpose.

²⁴⁸ *Eritrean Transitional Civil Code*, *supra* note 153, Art. 371.

²⁴⁹ *Ibid.* Arts. 368-372.

autonomy and self-determination with regards to their daily lives, by placing them under the overly broad protection and control of the court, guardian, tutor or family council.²⁵¹ Persons with disabilities, including those with severe mental disabilities, should be assisted in their decision-making rather than having others make judgments on their behalf.”²⁵²

On the other hand, persons with mental conditions or infirmities who are not interdicted by the court maintain their capacity to perform acts of civil life without restriction.²⁵³ Nevertheless, the law treats them slightly differently depending on whether their condition or infirmity is notorious or apparent.²⁵⁴ If it is not notorious or apparent, they are able to perform all acts of civil life without any account of the condition or infirmity; if they wish to claim that their consent for acts is vitiated due to their condition or infirmity, they must prove it.²⁵⁵ If a person’s mental condition or infirmity is notorious or apparent, they can exercise their rights without restrictions, however there is a presumption that the acts they perform are defective.²⁵⁶ Generally, the law’s approach to persons with disabilities who are not judicially interdicted maintains their full capacity to enjoy and exercise their rights and freedoms, which in turn promotes their

²⁵⁰ *Ibid.* Art. 20(3).

²⁵¹ *Ibid.* Arts. 351-379 (provisions on “judicial interdiction”).

²⁵² European Group, *supra* note 234 at 3.

²⁵³ Vanderlinden, *supra* note 233 at 65.

²⁵⁴ Articles 341-342 of the *Transitional Civil Code* provide a definition of notorious insane persons: “A person shall be deemed by law to be notoriously insane where by reason of his mental condition, he is an inmate of a hospital or of an institution for insane persons or of a nursing home, for the time for which he remains an inmate. // In communes of less than two thousand inhabitants, the insanity of a person shall be deemed to be notorious, where the family of that person, or those with whom he lives, keep over him a watch required by his mental condition, and where his liberty of moving about is, for that reason, restricted by those who are around him.”

²⁵⁵ *Eritrean Transitional Civil Code*, *supra* note 153, Art. 347(2).

²⁵⁶ *Ibid.* Art. 344(1).

independence, self-determination, will and preferences. Moreover, “the recognition of full legal capacity of all persons with disability”,²⁵⁷ “including those who require more intensive support”,²⁵⁸ “is mandated by the demands of equality and non-discrimination.”²⁵⁹

5.5.4.3. *Economic, Social and Cultural Rights*

Article 21 of the *Eritrean Constitution* covers the economic, social and cultural rights of individuals.²⁶⁰ Although the Article does not make specific reference to the rights to employment, education, health, culture or other social services, it guarantees that all citizens have the right of equal access to such publicly funded services. The realization and implementation of these rights is nevertheless progressive, since it depends on the availability of resources in the country.²⁶¹

The Right to Employment

As stated above, the right to employment is not explicitly mentioned in the *Constitution*. However, the *Constitution* stipulates that “every citizen shall have the right to participate freely in any economic activity and to engage in any lawful

²⁵⁷ Dhanda, *supra* note 235 at 461.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Eritrean Constitution*, *supra* note 28, Art. 21.

²⁶¹ *Ibid.* Art. 21(1).

business.”²⁶² This seems to convey a limited right to citizens, including persons with disabilities, in that it seeks to secure the free participation or engagement in self-employing economic activities. This guarantee may have little impact on the lives of persons with disabilities, the majority of whom do not have the resources to be self-employed due to the lack of opportunities for education and training. However, since discrimination on the ground of disability is prohibited under Article 14 of the *Constitution*, discrimination in employment in general and against persons with disabilities in particular is not permitted.²⁶³ Thus, persons with disabilities have a broad constitutional tool to fight against discrimination on the ground of disability in their search for and maintenance of employment, at least in the public domain.²⁶⁴

The other legislation dealing with employment-related rights is the *Labor Proclamation* of 2001.²⁶⁵ Article 64(1) of the *Proclamation* prohibits discrimination against persons with disabilities with regards to opportunities or treatment in employment and wages.²⁶⁶ Article 64(2) also gives persons with disabilities the right to seek administrative redress if they are discriminated against solely on the basis of disability; if such discrimination is proven, an order can be issued either to employ the individual in question or to pay them the wages

²⁶² *Ibid.* Art. 21(3).

²⁶³ *Ibid.* Art. 14(2).

²⁶⁴ *Ibid.*

²⁶⁵ *Labor Proclamation*, Proclamation No.118/2001, Vol.10/2001 No.5, (2001) [*Eritrean Labor Proclamation*]. Pursuant to Article 3(1) of the *Proclamation*, contracts of employment of members of the civil service and of the military, police and security forces, judges and prosecutors and persons holding managerial positions are not regulated by this *Proclamation*.

²⁶⁶ *Ibid.* Art. 64(1).

that are due.²⁶⁷ This prohibition is so general that it should cover the working conditions of all employer/employee relationships as defined in Article 3(10) of the *Labor Proclamation*. However, the *Proclamation* does not specifically incorporate special measures that employers should undertake to meet the needs of persons with disabilities. On the other hand, in addition to prohibiting discrimination against women on account of sex, the *Proclamation* provides detailed entitlements with regards to working conditions for pregnant women, such as working hours, over-time, assignment, reinstatement and other leave-related benefits that should be introduced in connection with pregnancy.²⁶⁸

Moreover, since the *Labor Proclamation* governs the rights and obligations of employees and employers only after an employer/employee relationship is established, the anti-discrimination provision may not apply to cases of disability discrimination prior to securing employment or during the selection and recruitment process.²⁶⁹ On the other hand, it may be argued that the *Proclamation* anticipates the application of the anti-discrimination provision even to instances of discrimination during the recruitment process, since it makes an indirect reference to that period in the order that the Minister of Labor and Human Welfare may issue in favor of aggrieved persons with disabilities: an employer can be ordered to employ the disabled person for the job.²⁷⁰ It is known that “negative attitudes of employers, [the] unsuitability of examination techniques

²⁶⁷ *Ibid.* Art. 64(2).

²⁶⁸ *Ibid.* Art. 65(1) & 66-67.

²⁶⁹ Isaias Yemane, *Beyond Affirmative Action: Guaranteeing Equality of Opportunity For the Disabled In Employment Through Assistive Technology* (LL.B. Paper, Faculty of Law, University of Asmara, February 2006) at Sec. 2.2.2.1 [unpublished] [Yemane].

²⁷⁰ *Eritrean Labor Proclamation*, *supra* note 265, Art. 64(2).

(i.e. [the] absence of devices for presenting interviews in formats accessible to persons with various disabilities) and environmental/architectural constraints are some of the factors that hamper the disabled from gaining employment.”²⁷¹

With respect to other accommodations, the *Labor Proclamation* obliges employers to supply employees with all the necessary tools and raw materials to perform the work.²⁷² This is important in the context of persons with disabilities. Arguably, the reasonable accommodations that persons with disabilities may require to perform a given task, such as providing technological equipment, adapting working conditions, and even modifying the work place, could fall under this obligation. However, the interpretation of this obligation could favor the tools needed by the general population of the institution. In a related matter, Article 63 of the *Proclamation* takes a positive step by imposing some responsibilities in rendering services to persons with disabilities, although they are not related to the provision of the necessary tools for work. Article 63 stipulates that the Ministry of Labor and Human Welfare and the associations of employees and employers have the “responsibility to broaden the work and vocational training opportunities of the disabled.”²⁷³ It is lamentable, however, that the *Proclamation* is silent with regards to the possible positive measures that employers should take either to employ or maintain persons with disabilities.

When employees sustain injuries during or in connection with work, the *Proclamation* imposes some responsibilities on the employer. For instance, the

²⁷¹ Yemane, *supra* note 269.

²⁷² *Eritrean Labor Proclamation*, *supra* note 265, Art. 20(2).

employer is obliged to cover expenses for purchasing “any necessary prosthetic or orthopedic appliances.”²⁷⁴ However, employees who sustain their disabilities outside of the scope of their work duties or before signing the contract of employment are not entitled to such appliances since the disability must be work-related.²⁷⁵ If the employment injury results in a permanent disability, the disabled employee is entitled to disability compensation; recipients of disability compensation are exempted from paying any kind of tax on the compensation received.²⁷⁶ Here, permanent disability is equated with a total inability to work.²⁷⁷ Pursuant to the *Proclamation*, the amount of the disability compensation is calculated as follows: “(a) where the injury sustained by an employee is permanent total disablement, a sum equal to six times his annual wages; and (b) where the injury sustained by an employee is permanent partial disablement, a sum equal to the percentile of disablement multiplied by six times his annual wages.”²⁷⁸

The Right to Health and Rehabilitation Services

As indicated above, the right to health is also among the social services that the *Constitution of Eritrea* obliges the Government to gradually fulfill.²⁷⁹ The *Macro Policy* of 1994 envisages the establishment of a public health care system

²⁷³ *Ibid.* Art. 63.

²⁷⁴ *Ibid.* Art. 76.

²⁷⁵ *Ibid.* Arts. 3(30) & 70-72.

²⁷⁶ *Ibid.* Arts. 78(1)(B) & 83.

²⁷⁷ *Ibid.* See, for example, the assumption stated in Art. 82(2).

²⁷⁸ *Ibid.* Art. 81(3).

that the general population, including persons with disabilities, can easily access and afford.²⁸⁰ “The right to health does not mean the right to be healthy. Rather, it embodies the notion of the highest attainable standard of health.”²⁸¹ It is “a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.”²⁸² In the context of persons with disabilities, guaranteeing equal access to such services is of paramount importance because very often health care institutions give much more attention and treatment to non-disabled persons since they assume that caring for and treating those with disabilities, especially severe disabilities, is a waste of resources.

Persons with mental disabilities suffer the most from the negative attitudes and stereotypes of health care providers in particular, and of society in general, towards disability.²⁸³ There is only one neuro-psychiatric hospital and one community residential facility for people with chronic mental illness in the Eritrea, both of which are situated in the capital city of Asmara.²⁸⁴ This affects the accessibility of these services for many persons with mental illness outside of the

²⁷⁹ *Eritrean Constitution*, *supra* note 28, Art. 23(1).

²⁸⁰ Government of Eritrea, *Macro Policy* (November 1994) at 11, Sec. 3.

²⁸¹ LSN, *supra* note 77 at 24.

²⁸² *Ibid.* As quoted from the *General Comment No. 14 of the Committee on Social, Economic, and Cultural Rights* concerning the right to health.

²⁸³ The 2006 WHO report on the Eritrean mental health system shows that patients with mental illness suffer from inhumane conditions at the country’s only mental hospital due to poor treatment by the caregivers. However, it attributes this problem to poor staff training and to the lack of positive examples from other similar institutions. For details, see: World Health Organization, *WHO-AIMS Report on Mental Health System in Eritrea*, (Asmara, Eritrea: WHO and Ministry of Health, 2006), online: <http://www.who.int/mental_health/eritrea_who_aims_report2.pdf> [WHO-AIMS Report].

²⁸⁴ Yohannes Ghebrat, et al., “Bottlenecks in the Provision of Quality Mental Health Services in Eritrea”, *Journal of Eritrean Medical Association*, online:

capital.²⁸⁵ There is no mental health legislation that regulates the admission, detention and release of patients with mental illness to and from these institutions.²⁸⁶ Thus, decisions on these matters depend on the discretion and whims of the institution managers. A WHO-AIMS study showed that 36% of admissions to the mental health hospital are involuntary, and that over 20% of the patients in the hospital are secluded or physically restrained.²⁸⁷

Although there has never been a study on the human rights situation of persons with mental illness within mental institutions in Eritrea, the 2006 WHO report showed that patients with mental illness suffer from inhumane conditions and human rights violations in the country's mental hospital. About one third or more of patients are chained to their beds by their ankles, some of them for many years.²⁸⁸ Thus, one can imagine the extent of the unreported human rights violations and abuses people with mental illness may experience in their daily lives within and outside of mental institutions. Despite these conditions, however, all patients with mental illness receive essential psychotropic medicine free of charge, although the supply and distribution of this medicine is inadequate and very limited.²⁸⁹

With regards to offenders with mental illness known as “irresponsible persons” and “persons with a limited responsibility”, the *Transitional Penal Code*

<<http://ajol.info/index.php/jema/article/view/49621>> [Ghebrat].

²⁸⁵ WHO-AIMS Report, *supra* note 283 at 2-3 & 16-17.

²⁸⁶ Ghebrat, *supra* note 284.

²⁸⁷ WHO-AIMS Report, *supra* note 283 at 8-10.

²⁸⁸ *Ibid.* at 2-3 & 18.

²⁸⁹ Ghebrat, *supra* note 284.

of Eritrea contains provisions concerning their detention and treatment.²⁹⁰ Since these persons come before the court on criminal charges, the law authorizes the court to order their confinement in a suitable institution provided that “the offender, by reason of his condition, is a threat to public safety or order, or if he proves to be dangerous to the persons living with him.”²⁹¹ If the court thinks the person needs treatment for his/her mental condition, the court may order such treatment at the place of confinement or at any other appropriate institution.²⁹² The confinement or treatment is indefinite; the court reviews its decision every two years.²⁹³ The degree of control and release of the individual in question totally depends on the court’s assessment of all the relevant circumstances effecting the confinement or treatment. Thus, the person may not refuse confinement or treatment.

Where no offence or charge is involved but where a court passes a judgment of interdiction regarding the capacity of the person with mental illness or permanent infirmity, the interdicted person may not refuse to undergo any medical examination or treatment. Decisions on such matters are entirely left to the guardian of the interdicted individual.²⁹⁴

The provision of rehabilitation services to persons with disabilities is also essential since these services help enhance and promote their maximum independence and social inclusion in all aspects of life, as well as their physical,

²⁹⁰ *Transitional Penal Code of Eritrea*, as amended in 1991, Arts. 133-137. This *Code* was adopted in 1991, with slight amendments to the 1957 *Ethiopian Penal Code*.

²⁹¹ *Ibid.* Art. 134(1).

²⁹² *Ibid.* Arts. 134(2) & 135.

²⁹³ *Ibid.* Art. 136.

mental, social and vocational abilities. Rehabilitation services refer not only to medical rehabilitation, but also to services relevant to employment, education, accessibility of the environment and other social services.²⁹⁵ Persons with disabilities in Eritrea very often suffer from inadequate rehabilitation services. There are only three orthopedic workshops in the country, which are located in the towns of Keren, Asab and Asmara. These workshops do not satisfy the needs of persons with disabilities since they produce only a small quantity and limited kinds of orthopedic devices.²⁹⁶

In 2004, the Ministry of Finance of the Eritrean Government issued a regulation entitled *Goods for the Disabled Government Assistance Regulations* with the goal of providing government assistance to persons with disabilities with respect to customs duties on imported goods specifically designed for their use.²⁹⁷ The *Regulations* do not exempt the goods from customs duties. Rather, they seek to give full or partial assistance²⁹⁸ in the sense that one ministry or department of the Government would pay the determined amount of the reduced import tariff to another department. The amount of the assistance is determined at the discretion of the authorities; this process is susceptible to abuse, and it may create unnecessary bureaucratic obstacles to receiving goods on time. Persons with disabilities should be involved and consulted regarding the goods to be included in the list. The list of goods qualified for government assistance under the

²⁹⁴ *Eritrean Transitional Civil Code*, *supra* note 153, Art. 20(3).

²⁹⁵ LSN, *supra* note 77 at 25.

²⁹⁶ Yemane, *supra* note 269 at Secs. 2.1 & 2.2.2.2.

²⁹⁷ Ministry of Finance of the State of Eritrea, *Goods for the Disabled Government Assistance Regulations*, Legal Notice No. 82/2004 (23 February 2004).

²⁹⁸ *Ibid.* Art. 2.

Regulations already excludes some essential goods for the disabled, such as white canes and talking watches. However, the *Regulations* give the Ministry of Labor and Human Welfare the power to add any other goods that are intended specifically for use by the disabled.²⁹⁹

In 1994, the Eritrean Government introduced a community-based rehabilitation (CBR) program in two sub-regions as a pilot project. It has gradually implemented the program in fifty sub-regions, covering 93% of the country's territory.³⁰⁰ The CBR programs aim to render rehabilitation services to persons with disabilities by involving their families and communities and by mobilizing community resources.³⁰¹ An evaluation of the CBR program in Eritrea, which was conducted by SINTEF Health Research in 2004, showed that the program had a positive impact in terms of changing negative attitudes towards persons with disabilities, increasing consciousness about disability and the rights of persons with disabilities, and mobilizing community resources to benefit persons with disabilities.³⁰²

The Right to Education

The *Eritrean Constitution* of 1997 obliges the State to make education

²⁹⁹ *Ibid.* Art. 2(8).

³⁰⁰ Eritrea UPR Report, *supra* note 151 at paras. 69-70.

³⁰¹ *Ibid.* at para. 68.

³⁰² Lisbet Grut et al., *More of the Same and Try Something New: Evaluation of the Community Based Rehabilitation Program in Eritrea*, INTEF Health Research Report (Oslo: Atlas Alliance, 2004) at 8, 11 & 15-16, online: NORAD <<http://www.norad.no/en/tools-and-publications/publications/publication?key=117308>>.

available to all citizens and to ensure the right of equal access to publicly funded educational services within the limits of its resources.³⁰³ The implementation of the right to education of persons with disabilities in Eritrea will be challenging. The realization and expansion of this right to all persons with disabilities may depend on ensuring easy access to educational materials and information, educational institutions and transportation facilities, which are currently not adequately available in Eritrea. Although no data is available on the percentage of persons with disabilities enrolled in school, they are believed to be one of the least educated groups in the country. Even in the general population, not more than 50% of Eritrean children had completed their elementary education by 2007, although this rate had increased by more than 65% from almost fifteen years earlier.³⁰⁴ The magnifying effect of such low enrollment rates of persons with disabilities is high rates of unemployment and poverty. For instance, out of the 10 000 registered members of the Eritrean National Association for the Blind (NAB), only around eighty people with vision impairment (which represents 0.8% of the total registered members) are employed in governmental and non-governmental organizations after having completed their tertiary level of education.³⁰⁵

There are three special education elementary institutions for persons with

³⁰³ *Eritrean Constitution*, *supra* note 28, Art. 23(1).

³⁰⁴ Eritrea UPR Report, *supra* note 151 at para. 30.

³⁰⁵ Kesete Ghebrehiwet, "A Platform to Empower the Visually Challenged", Ministry of Information (9 October 2010), online: Shabait.com <<http://www.shabait.com/articles/nation-building/3281-a-platform-to-empower-the-visually-challenged>>. Note the discrepancy in the number of registered members of the Association as reported in the news posted on 7 November 2011 on the Eritrean Ministry of Information website, Shabait.com <<http://www.shabait.com/news/local-news/7485-efforts-underway-to-upgrade-capacity-of-the-blind>>, according to which there are just over 3 000 registered members in the Association. If this figure is correct, the percentage of employed people with vision impairment would be 2.6%, which

disabilities in Eritrea: a school for the blind in Asmara and schools for the deaf in Asmara and Keren. The former is funded and administered mainly by the Government, and the latter are essentially funded by the Evangelical Church.³⁰⁶ The Ministry of Education of Eritrea is also reported to have opened a special elementary school for people with autism and Down syndrome in Asmara as of 2005.³⁰⁷ The Ministry planned to create similar institutions in the five regular schools by constructing classrooms specifically designed for this purpose, side-by-side with the mainstream classes.³⁰⁸

After completing their studies at the special elementary schools, students with disabilities are integrated into mainstream educational institutions with little or no resources allocated to meet their particular needs. They are expected to adapt themselves to their environments.³⁰⁹ Mr. Ogbamichael Tewolde, the chairman of the Eritrean National Association of the Deaf, noted that the integration of students with hearing impairments into the mainstream schools without providing them with the necessary resources usually results in high drop-outs rates.³¹⁰

is still extremely alarming.

³⁰⁶ Hussain, *supra* note 147.

³⁰⁷ Senait Habtu, a Voice of America reporter for the Tigrigna radio program, reported on the opening of a special school for people with autism and Down syndrome in Eritrea on a show that aired on 16 December 2010. According to the report, Medeber elementary school provides services to forty-two students.

³⁰⁸ *Ibid.*

³⁰⁹ I myself was integrated into mainstream classes after having completed my elementary studies. All my friends passed through this same process.

³¹⁰ Eritrean Ministry of Information, News Release (4 November 2011), online: Shabait.com <<http://www.shabait.com/news/local-news/7457-role-of-general-public-in-encouraging-deaf-nationals-pursue-higher-education-described-vital>>.

The Right to Social Security

As one of its national development objectives, the Government of Eritrea aims to establish “an effective social welfare and safety net system” in the country.³¹¹ The *Eritrean Constitution* of 1997 also obliges the Government to “secure, within available means, the social welfare of all citizens and particularly those disadvantaged.”³¹² However, the Government has not yet enacted any law on social welfare that applies to all citizens to respond to their dire needs. Nevertheless, a few legislative initiatives have emerged that provide some sort of benefit payment or compensation to specific categories of persons. For instance, *Proclamation No. 146/2005* establishes pension rights to regular employees in the civil service and their beneficiaries.³¹³ This pension plan entails contributions by both employees and employers;³¹⁴ it gives monthly benefits to civil servant employees in their old age in the event of permanent or total disability, or to their beneficiaries in the event of death.³¹⁵ Persons who are not regular (i.e. full-time) employees in the civil service are outside the scope of this *Proclamation*.³¹⁶ Thus, unemployed persons with disabilities - which constitute the majority of the disabled population - do not have pension rights in their old age since the pension plan is essentially based on contributions.

³¹¹ *Macro Policy of 1994*, Sec. 3 at 11.

³¹² *Eritrean Constitution*, *supra* note 28, Art. 21(2).

³¹³ *Proclamation to Determine the Rights and Obligations of Employees, Beneficiaries and the Employer under the Public Sector Pension Fund*, Proclamation NO.146/2005, (26 August 2005, entered into force on 1 January 2004, the day on which Public Sector Pension Fund contribution collection commenced).

³¹⁴ *Ibid.* Arts. 5-6.

³¹⁵ *Ibid.* Art. 10.

³¹⁶ *Ibid.* Art. 3.

Soon after the country's liberation, the Government enacted legislation to collect money through taxation with the goal of supporting "war disabled fighters", poor families of "war disabled fighters" and martyrs, and those disabled by natural causes.³¹⁷ The legislation requires all individuals to pay 2% of their monthly income into the fund.³¹⁸ The *Martyrs' Survivors Benefit Proclamation* was subsequently enacted.³¹⁹ It gives tax-free benefit payments on a lump sum or monthly basis to the survivors (i.e. spouse, children under thirty and parents) of martyrs who lost their lives for the country's liberation or in defense of sovereignty.³²⁰ The payment is a fixed amount per martyr; it is not subject to change based on the needs or number of survivors.³²¹ Similarly, the Government gives monthly benefit payments to sustain the lives of those disabled in the wars for the nation's liberation or in defense of sovereignty.³²² Those who were very severely disabled in the wars are put in care-giving institutions.³²³ Persons whose disabilities are attributable to other causes are excluded from the payment plan and are left without any form of financial support.³²⁴

Although it is not a social welfare or security scheme, in my opinion the most effective means of security available to the majority of citizens in Eritrea,

³¹⁷ Provisional Government of Eritrea, *Proclamation to Collect Rehabilitation Tax to Support 'War-Disabled Fighters', Poor Families of 'War-Disabled Fighters' and Martyrs, and Members of the Society Disabled by Natural Causes*, Proclamation No. 17/1991 (Vol. 3, 10 December 1991 as amended by Proclamation No. 66/1994, Vol. 4, No. 31, December 1994).

³¹⁸ *Ibid.*, Art. 2.

³¹⁹ *Eritrea's Martyrs' Survivors Benefit Proclamation*, No. 137/2003, 10 December 2003.

³²⁰ *Ibid.*

³²¹ *Ibid.* Arts. 4 & 6.

³²² I could not trace this *Proclamation*. However, it is a known fact that 'war-disabled fighters' in Eritrea receive monthly payments from the Government.

³²³ There are institutions that only provide care for 'war-disabled fighters'. There is one such centre in Asmara (the capital city) and another in May-Habar town.

³²⁴ Many of my friends who do not have any means of supporting themselves are not receiving

including persons with disabilities, is the land entitlement for agricultural purposes provided under the *Land Proclamation* of 1994.³²⁵ In fact, the degree of security provided may depend on the amount of rainfall, the quality of the seeds, the use of fertilizers and the availability of labor, among other factors. However, citizens residing in towns who do not have any means of ensuring their livelihoods are not entitled to such rights; according to the *Land Proclamation*, only citizens who permanently reside in rural areas and whose livelihoods depend on agriculture are entitled to land allotments for farming purposes.³²⁶

Access to the Built Environment

Making physical and environmental structures accessible to persons with disabilities ensures and promotes their equal opportunities and participation and greatly enhances the realization of their rights to health, education, employment, leisure and cultural activities, and other social services. Currently, there is no regulation governing the construction of buildings in the country that takes into account the needs and concerns of persons with disabilities. The existing regulation was enacted in 1938 during the period of Italian colonialism.³²⁷ Thus, the need to revise this regulation is urgent. In practice though, at least in the country's capital, efforts are being made to require newly constructed public and private business buildings to install ramps to enable access by wheel-chair users.

such monthly payments from the Government.

³²⁵ *Eritrean Land Proclamation*, *supra* note 220, Arts. 4(2), 6 & 11.

³²⁶ *Ibid.* Arts. 6(2) & 11(1).

³²⁷ Yemane, *supra* note 269 at sub-sec. 2.2.2.2.

Efforts are also being made to ensure that newly constructed buildings with more than four stories install elevators to facilitate easy access.³²⁸ In general, access to physical and environmental structures, especially in the suburbs and rural areas, will likely remain a big challenge for persons with disabilities in Eritrea for a long time to come.

5.5.5. The Scope of Eritrea's Obligations under International Human Rights Instruments

Eritrea is obliged to abide by the provisions of the international and regional human rights treaties and agreements that it ratifies or to which it accedes. It also has the obligation to respect and honor international human rights laws that have attained the status of customary international laws.³²⁹ Although Eritrea has ratified or acceded to the majority of the core international and regional human rights treaties, it has not yet ratified or acceded to a number of key treaties, including the *CRPD*; the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*; the *Convention for the Protection of All Persons from Enforced Disappearance*; the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; the *Protocol to the African Charter on the Rights of Women in*

³²⁸ *Ibid.*

³²⁹ For a discussion of Eritrea's obligations under international human rights instruments, see: Mekonnen, *supra* note 23 at 70-78.

Africa; and other optional protocols.³³⁰

Eritrea should ratify or accede to the remaining international human rights instruments, including to the *CRPD*. It should also take legislative and administrative measures to bring its national laws into conformity with the international human rights instruments. More importantly, it should strive and commit itself to implementing and translating the provisions of the international human rights instruments into reality while ensuring, respecting and protecting the human rights and fundamental freedoms of all its inhabitants, including persons with disabilities. As the current actions and behavior of the incumbent Eritrean Government show, the country has fallen short of expectations in terms of meeting constitutional and international human rights standards.

³³⁰ As indicated in Eritrea's national UPR Report, *supra* note 151, the State of Eritrea has ratified or acceded to the following international and regional human rights instruments: (a) *ICESCR* (Accession: 17 April 2001); (b) *ICCPR* (Accession: 17 April 2001); (c) *CEDAW* (Accession: 2 September 1995); (d) *CRC* (Ratification: 21 July 1994); (e) *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (Accession: 16 February 2005); (f) *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and Declaration in relation to article 3 of the Optional Protocol* (Accession: 16 February 2005); (g) *ICERD* (Accession: 31 July 2001); (h) *ACHPR* (Accession: 14 January 1999); and (i) *ACRWC* (Accession: 22 December 1999).

Labour: (a) *ILO Convention against Forced Labour (No.29)* (Ratification: 15 October 1999); (b) *ILO Convention concerning the Abolition of Forced Labour (No.105)* (Ratification: 15 October 1999); (c) *ILO Convention on Equal Remuneration (No.100)* (Ratification: 15 October 1999); (d) *ILO Convention on the Minimum Age (No.138)* (Ratification: 15 October 1999); (e) *ILO Convention on Freedom of Association and Protection of the Right to Organize (No.87)* (Ratification: 15 October 1999); (f) *ILO Convention on the Right to Organize and Collective Bargaining (No.98)* (Ratification: 15 October 1999); and (g) *ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No.111)* (Ratification: 15 October 1999).

Humanitarian: (a) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Accession: 29 July 2000); (b) *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* (Accession: 29 July 2000); (c) *Geneva Convention relative of the Treatment of Prisoners of War* (Accession: 29 July 2000); and (d) *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Accession: 29 July 2000).

5.5.6. Conclusion

Persons with disabilities in Eritrea are discriminated against and excluded from mainstream society, and they do not receive adequate attention and social services. The cultural and religious traditions of the society have hugely contributed to the prevalence of prejudices, negative attitudes and bias against persons with disabilities. This examination of the Eritrean legal framework showed that the country has not undertaken sufficient legislative and administrative measures to ensure the full citizenship and human rights of persons with disabilities. Although the inclusion of disability among the prohibited grounds for discrimination under the country's 1997 *Constitution* was a praiseworthy initiative, the *Constitution* is not yet in force fifteen years after its ratification. Moreover, Eritrea has not yet adopted either a disability policy or comprehensive disability legislation that responds to the rights and needs of persons with disabilities. The scattered disability-related provisions in various national laws do not ensure the full citizenship or recognize and protect the human rights of persons with disabilities. At the international level, the country has not yet moved towards ratifying the *CRPD* or its *Optional Protocol*. From both theoretical and practical standpoints, Eritrea has lagged behind in taking measures with the goal of ensuring and protecting the citizenship and human rights of persons with disabilities.

5.6. Conclusion

The discussion in this chapter provided a general overview of the legal protections and guarantees available to persons with disabilities at the national level in Africa, and examined the Eritrean legal system in greater depth as an example of a national legal framework. It examined the role and effectiveness of the legal approaches of African states to address the problems and concerns of persons with disabilities, and it assessed whether such measures are capable of ensuring the full membership and citizenship of persons with disabilities.

As outlined above, in addressing the problems of persons with disabilities, African states have taken one or a combination of four legal approaches: the constitutional, civil rights, criminal and social welfare models. Disability issues and rights are framed in many African states from the perspective of the individual/bio-medical model of disability, which sees persons with disabilities as objects of charity, care, assistance and rehabilitation services. To date, many African states have failed to enact enforceable human rights for persons with disabilities and have not endeavored to realize the full citizenship of persons with disabilities. The examination of the Eritrean legal framework also showed that the country has undertaken insufficient legislative and administrative measures to attain the full citizenship and human rights of persons with disabilities.

The discussion also looked into a number of challenges African states, including Eritrea, may encounter either in formulating or implementing disability-related laws within their territorial boundaries. Among the principal challenges

are the following: the absence of effective rule of law and good democratic governance; the lack of political will; the dire lack of financial resources; the prevalence of corruption and mal-practices of administration; the lack of awareness and understanding of administrators, parliamentarians, judges, lawyers, human rights advocates and the general public on disability and disability human rights issues; the inadequate understanding and awareness of persons with disabilities themselves on disability-related issues; and the insufficient strength and capacity of organizations of persons with disabilities. States need to take all the necessary steps to address and minimize the effects of these challenges.

Although the mere adoption of laws is not a panacea for healing all disability-related social ills, adopting appropriate disability legislation or undertaking appropriate legal reforms is the first step in addressing the human rights concerns of persons with disabilities. The primary responsibility for ensuring the full membership and citizenship of persons with disabilities in their societies should lie with states. Otherwise, the failure to reasonably accommodate persons with disabilities would simply allow discrimination, exclusion and marginalization to continue unabated. This is unfair, and it violates the rights of persons with disabilities who represent a significant proportion of the world's population.

CHAPTER SIX:

CONCLUSION

This thesis has evaluated the status of the rights of persons with disabilities in the African context. Drawing on international human rights developments, I have assessed whether existing regional and national legal frameworks in Africa are adequate to ensure the full citizenship rights of persons with disabilities. In doing so, I used the concept of citizenship to justify and advocate for the protection and promotion of the rights of persons with disabilities. I maintain that the discrimination against and exclusion of persons with disabilities from mainstream society will not be eliminated unless these persons are reasonably accommodated. Such accommodation is critical to ensure inclusion and participation and to meet the needs of persons with disabilities in all circumstances with the objective of recognizing their full citizenship status and securing their dignity, equal worth and independence in society.

As noted at the outset of this thesis, more than 80 million persons with disabilities live in Africa. They are in great measure subjected to exclusion, discrimination, prejudice, bias and negative attitudes because of their disabilities or perceived disabilities in their civil, political, economic, social and cultural lives. Many of them do not participate in society as full members, are relegated to second degree citizenship status, and are denied their human rights and

fundamental freedoms.¹

A central argument of this thesis has been that the concept of citizenship provides the most promising approach for establishing the responsibility to dismantle the barriers persons with disabilities encounter in their daily lives.² The other existing disability models focus mainly on locating or defining disability. They establish the responsibility of removing the limitations associated with disability based on theories of disability location or on the identification of the disabled group as a minority.³

Understood as an individual's full membership status to a socio-political community, be it to the state, to the international community or to any other socio-political community, the concept of citizenship embodies a range of rights and responsibilities that are created because of this relationship. The special relationship created by citizenship bestows a responsibility upon the socio-political community when persons lose their functional capacity, which may greatly affect their daily activities and diminish their citizenship role and participation. The community and primarily the state should have the responsibility of assisting in promoting the full membership and independence of these individuals in society or of taking every possible measure to help them move towards attaining full citizenship and independence.⁴

¹ For additional information on the African context, see the discussion in sub-section 1.2 of this thesis.

² For more discussion on this topic, see sub-section 2.4 of this thesis.

³ For details on the disability models, see the discussion in sub-section 2.3 of this thesis.

⁴ See also the discussion in Carlos A. Ball, "Autonomy, Justice, and Disability" (2000) 47 UCLA L. Rev. 599 at 635-650.

The global interpretation of citizenship also seeks to enhance international cooperation among members of the international community and to impose responsibilities on wealthier states towards states that lack the resources to translate economic, social and cultural rights into effective citizenship rights.⁵ The responsibility to require international/state cooperation with the goal of redistributing resources from the more affluent to the less affluent states would greatly contribute to translating the economic, social and cultural rights of persons with disabilities in poor countries into a reality.

Approaching disability from a full citizenship perspective helps meet the needs of persons with disabilities in all aspects of life by imposing the duty to accommodate primarily on the state, unless the required accommodation is unreasonable or imposes undue hardship. Subject to reasonable limits, the accommodations and other services provided to individuals with disabilities should be geared towards making them participate independently and meaningfully as full members and citizens of society. The failure to reasonably accommodate persons with disabilities will simply perpetuate their exclusion, marginalization and relegation to second class citizenship in society.⁶ Thus, recognizing the failure to provide reasonable accommodations to persons with disabilities in all circumstances as a form of prohibited discrimination is necessary to enable persons with disabilities to function as full citizens.

⁵ Ruth Lister, *Citizenship: Feminist Perspectives* (New York: New York University Press, 1997) at 9.

⁶ See the discussion in: Fay Faraday, "Access to Social Programs: Substantive Equality under the Charter of Rights" (2006) 21 Nat'l J. Const. L. 111 at 124-125.

The adoption of the *Convention on the Rights of Persons with Disabilities* (*CRPD*) in December of 2006, which subsequently entered into force on May 3, 2008, was a legal response to the uncertainties and insecurities persons with disabilities faced at the international level.⁷ The *CRPD* is of paramount significance to the hundreds of millions of persons with disabilities throughout the world. For the first time, the *CRPD* specifically and explicitly recognizes and protects the rights of persons with disabilities as “human rights” and guarantees a range of civil, political, economic, social and cultural rights of disabled persons. This has marked a shift to the human rights notion of disability, which treats persons with disabilities as rights-holders and advances their citizenship status.⁸

As outlined in Chapter Three, the *CRPD* obliges state parties to adopt legislative and administrative measures to implement the rights guaranteed under the *Convention*, to ensure the non-discrimination and equal treatment of persons with disabilities and to fully realize the rights contained in the *Convention*.⁹ The *CRPD*’s recognition that the failure to provide reasonable accommodations to persons with disabilities constitutes “discrimination” is one of the *Convention*’s principal protections, which can ensure the functioning of persons with disabilities as full members and citizens of their societies.¹⁰

Nevertheless, if the *CRPD* is to bring about positive and meaningful changes in the lives of persons with disabilities residing in various regions of the

⁷ See the full text of the *Convention on the Rights of Persons with Disabilities*, adopted by General Assembly Resolution 61/106 on 13 December 2006 (entered into force 3 May 2008), online: UN Enable <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>> [*CRPD*]

⁸ *Ibid.* Full text.

⁹ For the detailed provisions, see *ibid.* Arts. 4-30.

world, appropriate legal frameworks and mechanisms should be available at the regional and national levels to enhance the effective implementation of international laws. Regional legal frameworks and mechanisms would provide the opportunity to address and focus on regional problems and concerns of persons with disabilities that may not receive much attention or be prioritized under international laws.

Regarding regional disability law developments in Africa, this thesis concluded that the African regional human rights instruments do not provide adequate and effective legal protections and guarantees to ensure and protect the human rights of persons with disabilities.¹¹

The *Constitutive Act of the AU* affirms the promotion and protection of the human rights of all Africans. Nevertheless, with regards to disability issues, the *Act* mentions policies for the “disabled and the handicapped” in reference to social security policies rather than human rights.¹²

The *African Charter on Human and Peoples’ Rights (ACHPR)* of 1981 also guarantees all individuals equal protection of the law and non-discrimination.¹³ However, the list of prohibited grounds for distinction or

¹⁰ *Ibid.* Art. 2.

¹¹ For more discussion on regional legal developments in Africa, see Chapter 5 of this thesis.

¹² See the full text of the *Constitutive Act of the African Union*, adopted by the Assembly of the Heads of State and Government of the Organization of African Unity (OAU) in Lomé, Togo on 11 July 2000 (entered into force 26 May 2001), Art.33, online: UN Treaty Collection <http://untreaty.un.org/unts/144078_158780/11/3/3871.pdf> [*AU Constitutive Act*].

¹³ See the *African Charter on Human and Peoples’ Rights*, adopted by the 18th Annual Summit of the Assembly of the Heads of State and Government of the OAU in Nairobi, Kenya on 27 June 1981 (entered into force 21 October 1986), online: Africa-Union.org <http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf> [*ACHPR*].

discrimination under the *Charter* does not explicitly mention disability or any related terminology describing disability. In terms of specific disability rights, Article 18(4) of the *ACHPR* states that “the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”¹⁴ The phrase “special measures of protection in keeping with their physical or moral needs” is vague, and it reinforces the attitude of the individual/medical model of disability. Thus, the *ACHPR* does not really adopt a human rights approach to disability and persons with disabilities. The equal application of the rights and freedoms recognized under the *Charter* for persons with disabilities is weak and prone to subjective interpretation.

Similarly, the general provisions of the 1990 *African Charter on the Rights and Welfare of the Child (ACRWC)* also apply equally to children with disabilities. However, like the *ACHPR*, neither disability nor any other terminology describing disability is listed as a prohibited ground for discrimination in the *ACRWC*.¹⁵ In comparison with the *ACHPR*, the *ACRWC* goes far in recognizing and protecting disability rights and in shifting the approach to disability, but its scope is limited to children with disabilities. The provision dealing with the rights of children with disabilities under the *ACRWC* is more detailed in terms of its coverage and protection.

The 2003 *Protocol to the African Charter on Human and Peoples’ Rights*

¹⁴ *Ibid.* Art. 18(4).

¹⁵ See the *African Charter on the Rights and Welfare of the Child*, adopted in Addis Ababa, Ethiopia on 11 July 1990 (entered into force 29 November 1999), online: Africa-Union.org <http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20TH

on the Rights of Women in Africa (ACHPR Women's Protocol) also provides some special protections for women with disabilities.¹⁶ Article 23 of the *Protocol* seeks to guarantee the protection of women with disabilities by obliging State parties to take specific measures commensurate with women's physical, economic and social needs.¹⁷ Although this *Protocol* covers a wider range of disabled persons' needs, its coverage is not sufficient to protect all the human rights and fundamental freedoms of women with disabilities.

By far the most significant legal developments in the area of disability rights at the regional level in Africa are found in non-binding instruments. The *Declaration on the African Decade for Disabled Persons* and its *Continental Action Plan* stand out for viewing disability rights from a human rights perspective.¹⁸ Moreover, the African Commission elaborated in detail the human rights of persons with disabilities in its decision regarding the only disability-related communication in the region, *Purohit and Moore v. The Gambia*.¹⁹ The

[E%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf](#)> [ACRWC].

¹⁶ See the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted by the 2nd Ordinary Session of the Assembly of the AU in Maputo, Mozambique on 11 July 2003 (entered into force 25 November 2005), Art.23, online: Africa-Union.org <<http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>> [ACHPR Women's Protocol].

¹⁷ *Ibid.*

¹⁸ See the *Declaration of the African Decade of Disabled Persons 1999-2009*, recommended by the OAU Labor and Social Affairs Commission during its 22nd Session in Windhoek, Namibia in April 1999, adopted by the 35th Ordinary Session of the Assembly of the OAU in Algiers, Algeria in July 1999, and formally endorsed by the 36th Ordinary Session of the OAU Assembly in Lome, Togo in July 2000 [*Decade Declaration*]. See also the *Continental Action Plan for the African Decade of Persons with Disabilities 1999-2009*, adopted by the 37th Session of the OAU Assembly of Heads of State and Government in Pretoria, South Africa in July 2002, online: Africa-union.org <<http://www.africa-union.org/child/Decade%20Plan%20of%20Action%20-Final.pdf>> [*Decade Action Plan*].

¹⁹ *Purohit and Moore v. The Gambia*, African Commission on Human and Peoples' Rights, Comm. No. 241/2001 (2003), 33rd Ordinary Session of the African Commission held from 15-29 May 2003 in Niamey, Niger, online: UMN.EDU

importance of this communication to the rights of all persons with disabilities is paramount; this decision clearly articulated the rights of persons with disabilities, which were left weak and inadequate under the African *Charter*, and it analyzed their situation and rights from a human rights perspective.²⁰

Overall, the guarantees and protections provided to persons with disabilities under the African regional human rights system continue to be inadequate in protecting, respecting and fulfilling the human rights of persons with disabilities. These protections fail to secure the full dignity, independence and participation of persons with disabilities in society. In addition to the inadequacies of the existing regional human rights instruments, Africa lacks a disability-specific regional treaty. It also lacks a specific African regional body mandated to monitor violations of the rights of persons with disabilities. Thus, I argue that Africa really needs to adopt a comprehensive regional disability convention or protocol with the goal of recognizing, protecting and promoting the human rights and fundamental freedoms of persons with disabilities at a regional level. Moreover, it is imperative to make amendments to the anti-discrimination provisions of the current regional human rights instruments, in particular the *ACHPR*, to include disability among the prohibited grounds for discrimination.

The mere adoption of international and regional disability conventions does not and cannot provide a remedy for the problems of persons with disabilities unless these initiatives are supported and implemented by national

<<http://www1.umn.edu/humanrts/africa/comcases/241-2001.html>> [Purohit]..

²⁰ *Ibid.* Full text.

legal frameworks and mechanisms. Since individuals are the ultimate benefactors of international and regional human rights instruments, international human rights laws must be effectively implemented on the ground at the national level. Otherwise, the effective protection of the human rights and fundamental freedoms of individuals may not be realized.²¹ Thus, if meaningful changes are to occur in the lives of persons with disabilities that would ensure their social inclusion and participation, equal worth and dignity and independence, international disability laws must be implemented effectively. States must adopt appropriate constitutional, legislative, administrative and other reforms to bring their national laws and practices into conformity with the international human rights norms and standards relating to persons with disabilities.

In addressing the problems of persons with disabilities, African states have taken one or a combination of the four legal approaches outlined in Chapter Five: the constitutional, civil rights, criminal and social welfare models.²² Although there has been a gradual shift to a human rights approach, many African states still frame disability issues and rights in their domestic legal frameworks from the perspective of the individual/bio-medical model of disability, which sees persons with disabilities as objects of charity, care, assistance and rehabilitation services rather than as holders of human rights. To date, many African states have not enacted enforceable human rights mechanisms for persons with disabilities and

²¹ Henry J. Steiner, et al., *International Human Rights in Context: Law, Politics, Morals*, 3rd ed. (New York: Oxford University Press, 2007) at 1087.

²² For a detailed discussion on the constitutional and legal approaches undertaken by African states, see sub-section 5.3 of this thesis.

have not endeavored to realize the full citizenship of persons with disabilities.²³

African states may encounter a number of challenges either in formulating or implementing disability-related laws within their territorial boundaries. Among the principal challenges are the following: the absence of effective rule of law and good democratic governance; the lack of political will; the dire lack of financial resources; the prevalence of corruption and bad administrative practices; the lack of awareness and understanding of administrators, parliamentarians, judges, lawyers, human rights advocates and the general public on issues of disability and disability human rights; the inadequate understanding and awareness of persons with disabilities themselves on disability-related issues; and the insufficient strength and capacity of organizations of persons with disabilities.²⁴ While addressing and minimizing the effects of these challenges, adopting appropriate disability legislation or undertaking appropriate legal reforms is the first step in addressing the human rights concerns of persons with disabilities.

To illustrate the importance of implementation at the national level, this thesis examined Eritrea as a case study. In doing so, it became evident that there have been insufficient legislative and administrative measures and initiatives to secure the full citizenship and human rights of persons with disabilities in Eritrea. The inclusion of disability among the prohibited factors for discrimination in the country's 1997 *Constitution* was a positive development. However, the implementation of the *Constitution* has been deferred indefinitely. Moreover, the

²³ For a detailed discussion, see Chapter 5 of this thesis.

²⁴ For more information on the challenges African states may encounter in implementing

country has not yet adopted either a disability policy or comprehensive disability legislation to address the rights and issues of persons with disabilities. The scattered disability-related provisions in Eritrea's various national laws are also insufficient to ensure full citizenship and do not recognize and protect the human rights of persons with disabilities. At the international level, the country has not yet signed the *CRPD* or its *Optional Protocol*. From both legal and practical standpoints, Eritrea has not taken adequate measures to ensure and protect the citizenship and human rights of persons with disabilities.²⁵

In conclusion, as I have acknowledged throughout the thesis, the mere adoption of laws is not a panacea for healing disability-related social ills. Even when appropriate disability law reforms have been introduced, states may still encounter a number of challenges to implementing those laws on the ground. Nevertheless, adopting appropriate disability rights legislation or reforming existing laws to incorporate disability human rights is an important first step. It should also be noted that due to the special relationship citizenship creates between individuals and socio-political communities, and in particular between individuals and the state, states should bear the primary responsibility for ensuring the full membership and citizenship of persons with disabilities in their societies by taking measures to either reduce or eliminate the barriers to their inclusion and participation. Otherwise, the discrimination, exclusion and marginalization experienced by persons with disabilities will continue unabated for a long time to come. This is not only unfair and violates the rights of persons with disabilities; it

international and national disability laws, see sub-section 5.4 of this thesis.

is also bad social policy.

²⁵ For a detailed discussion of the Eritrean context, see sub-section 5.5 of this thesis.

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