



Disability Rights, HIV & AIDS in Eastern and Southern Africa

A review of international, regional and national commitments on disability rights in the context of HIV & AIDS in eastern and southern Africa

Final Report

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HEARD's Disability Initiative

This report has been developed through disability and HIV project at the Health Economics and HIV/AIDS Research Division's (HEARD). This initiative is a project of the HEARD's African Leadership Support Programme. The Disability Initiative is committed to advancing research and practical interventions in the field of HIV/AIDS and disability in eastern and southern Africa and contributes to this field by playing a leading role in advocacy and collaborating in empirical research on the topic.

For more information visit www.heard.org.za/african-leadership/disability

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Abbreviations

AU	African Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DHAT	Disability, HIV and AIDS Trust
DRC	Democratic Republic of Congo
ESA	Eastern and Southern Africa
HEARD	Health Economics and HIV/AIDS Research Division
NAP	National Action Plan
NSP	National Strategic Plan on HIV/AIDS
OAU	Organisation of African Unity
PWD	People with Disabilities
PLHIV	People living with HIV
SADC	Southern African Development Corporation
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
WHO	World Health Organisation

1. Introduction

The United Nations (UN) estimates that approximately 10% of the world's population is living with some form of disability, and that people with disabilities form the world's largest minority. (United Nations, 2006) Despite this, the human rights of people with disabilities have historically been marginalised in international human rights instruments. Prior to the recent development of the Convention on the Rights of Persons with Disabilities, 2006 (CRPD), the Convention on the Rights of the Child, 1989 (CRC) was the only binding international human rights treaty that specifically referred to disability, prohibiting discrimination against children with disabilities.

In contrast to the international covenants, the three core African human rights treaties¹ all contain provisions on disability which, although not as well developed as those in the CRPD, contain significant protection for persons with disabilities. Unfortunately, not all of these treaties have been ratified and all are currently poorly implemented (Martin, 2000, Viljoen, 2000).

People with disabilities have also been a marginalised population in international and national responses to HIV and AIDS (UNAIDS, 2009). Internationally, the link between human rights and HIV is well recognised – populations who experience inequality, prejudice, marginalisation and limits on their social, economic, cultural and other rights are at higher risk of HIV exposure and on whom the impact of HIV is greater (UNAIDS, 2006). Yet despite the international recognition of the human rights dimension of HIV, people with disabilities have not been routinely identified as a key population at higher risk of HIV exposure within country-level responses to HIV (Grant et al., 2009, UNAIDS, 2009, DHAT, 2007). Assumptions about their sexuality and their perceived low risk of exposure to HIV, as well as a limited understanding of the inaccessibility of existing health services for people with disabilities, has led to their exclusion from many national responses to the HIV epidemic (Groce, 2004, DHAT, 2007, Hanass-Hancock, 2009a, Hanass-Hancock and Nixon, 2009, Grant et al., 2009, UNAIDS, 2009).

This report reviews international, regional and national commitments relating to disability in 19 focus countries² in Eastern and Southern Africa (ESA). It examines the extent to which the 19 countries have ratified key international and regional conventions and have domesticated these obligations. The report aims to identify the extent to which domestication of these commitments protects people with disabilities in the context of HIV in ESA.

¹ The African Charter on Human and People's Rights, 1981, the Protocol to the African Charter on Human and People's Rights on the Women in Africa, 2003 and the African Charter on the Rights and Welfare of the Child, 1990.

² Angola, Botswana, Burundi, Democratic Republic of Congo (DRC), Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe.

1.1 Structure of the Report, Methodology and Limitations

The report is divided into three sections:

- The first section examines the CRPD and the three African Charters, and the extent to which they have been ratified by the focus countries. This section also briefly examines the Optional Protocol to the CRPD.
- The following section examines the extent to which international and regional conventions have been domesticated by the 19 focus countries, with particular respect to the rights of people with disabilities in the context of HIV.
- The final section sets out a number of recommendations to policy makers and civil society.

The methodology of the report consisted of a desk review of available documentation relating to disability and HIV in the region. Sources of information included general comments, observations and reports by treaty monitoring bodies; laws, regulations, plans and policies of focus countries; media articles, research undertaken by civil society and other secondary sources of documentation on disability and HIV rights.

Primary research was not conducted for this report, since the chosen methodology was dictated by time and resource constraints.

A key limitation of the report relates to the lack of information in the public domain, particularly with regard to measures taken by States to implement the CRPD as well as the three African human rights treaties and their reasons for failure to ratify, domesticate or implement the provisions, where applicable.

The CRPD obliges States to provide their first country progress report to the Committee on People with Disabilities within two years of ratification, and then every four years thereafter³. To date, none of the focus countries have submitted reports to the Committee and several countries are in fact not yet obliged to so. It was, therefore, not possible to use the country reports to ascertain what progress had been made in domesticating the provisions of CRPD.

Additionally, all three African human rights treaties require state parties to provide periodic progress reports to the treaty monitoring bodies. However, it was not possible to ascertain whether any of the focus countries had fulfilled their reporting requirements. As a result, information regarding the domestication of the provisions on disability within these treaties was unavailable.

³ Article 35.

Therefore, the report relies on the review of selected disability, HIV and anti-discrimination laws, policies and plans in the focus countries⁴.

A review of broader national laws and policies (e.g. employment, health and social assistance laws and policies) may reveal further protection of the rights of people with disabilities in each country; however a full review of all national laws in the 19 focus countries was beyond the scope of this report.

A further limitation is the unavailability of English documentation for the Francophone and Lusophone countries.

Finally, the report's findings are limited by the recent nature of the CRPD. Although the research found evidence of the domestication of disability rights within the focus countries, much of this pre-dated the ratification of the CRPD in each country.

Given the inability to verify findings by means of stakeholder interviews, stakeholders from focus countries are invited to submit any further information (e.g. recent disability and HIV legislation, policies or plans, as well as country progress reports on the CRPD) directly to HEARD for the purposes of updating the report in the future.

1.2 Background

1.2.1 The Rights of People with Disabilities

It has been argued that even though the core UN conventions⁵ other than the CRC do not explicitly address disability, protection for people with disabilities is implicit within the broader rights protection provided in these instruments (Canadian HIV/AIDS Legal Network, 2008, Africa Campaign on Disability and HIV & AIDS, 2008).

It is estimated that over 80% of people with disabilities live in the developing world (United Nations, 2006). In Africa, the regional human rights framework addresses disability more explicitly than the international framework. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

⁴ National constitutions, as well as recent national laws, are fairly accessible in electronic format. National policies and plans, on the other hand, appear to be less available online or electronically.

⁵ International Covenant on Civil and Political Rights, 1966, International Covenant on Economic Cultural and Social Rights, 1966, International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, 1984, Convention on the Elimination of All Forms of Discrimination Against Women, 1979, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, International Convention for the Protection of All Persons from Enforced Disappearance, 2006.

(‘the Maputo Protocol’) contains particularly important provisions relating to HIV, sexual violence and disability.

The UN declared the 1980s as the Decade of Disabled People and in 1987, a group of experts on disability and human rights recommended that an international convention be developed and adopted by the UN General Assembly. In 1993, the UN Standard Rules on the Equalization of Opportunities for People with Disabilities (‘the Standard Rules’) were developed. The Standard Rules were ground breaking in that they incorporated a social model of disability, and provided States with a strong moral and political commitment to take positive steps to equalise opportunities for people with disabilities. However, the Standard Rules are not binding on UN member States. Finally in 2001 the General Assembly appointed an ad hoc committee to consider proposals on a disability convention. The CRPD was adopted by the General Assembly in December 2006 and was opened for signature in March 2007. It came into force on 3 May 2008. It contains a broad and inclusive definition of disability and “marks a paradigm shift in attitudes and approaches to persons with disabilities” (United Nations, 2008). For the millions of people with disabilities around the world, who are “the most stigmatised, poorest and least educated citizens” (Shome and Tataryn, 2008), the Convention is finally a sign of hope.

1.2.2 HIV and Disability

The first writings about the interrelations of disability and HIV were published in the 1990s and tended to focus on whether HIV could be regarded as a disability⁶, and protecting people living with HIV under disability anti-discrimination legislation for the purposes of access to, *inter alia*, health care, insurance and employment (UNAIDS, 1996, De Bruyn, 1998). UNAIDS argued for the recognition of HIV as a disability in its 1996 statement on disability (UNAIDS, 1996). In 1998, in what was seen as a landmark judgement at the time, the United States Supreme Court found that a woman living with HIV was entitled to protection under the Americans with Disabilities Act.⁷

Much less attention was paid to whether people with disabilities were in fact vulnerable to HIV infection and what their needs were in relation to HIV-related services.

In 2004, with the results of the global survey on HIV and disability, the issue of HIV and disability was brought to the fore (Groce et al., 2006, Groce, 2004, Hanass-Hancock, 2009a, Hanass-Hancock and Nixon, 2009, Hanass-Hancock and Satande, 2010). However, there is still very little information regarding the number of people with disabilities who have HIV. Recent studies suggest that rates of HIV infection among hearing impaired and deaf people are similar to or higher than

⁶ For instance, due to the fact that HIV-related stigma and discrimination created barriers to the full participation of people living with HIV in society.

⁷ *Bragdon v Abbott* 524 U S 624 (1998)

those of the general population (Taegtmeyer et al., 2008, Touko, 2009, Touko, 2010). In South Africa, a recent national survey revealed that the prevalence rate among people with disabilities is higher than the national average (Shisana et al., 2009). The risk factors for people with disabilities have been described in many writings (Hanass-Hancock, 2009a, Hanass-Hancock and Nixon, 2009) and the UNAIDS Policy Brief on HIV and Disability (2009) summarised these as follows:

Persons with disabilities and risk of HIV exposure:

- *HIV risk behaviours*: persons with disabilities may engage in behaviours that place them at high risk of HIV exposure, such as unprotected sex and injecting drug use, for various reasons including due to insufficient access to HIV prevention and support services.
- *Sexual violence*: people with disabilities, particularly women and girls with disabilities face a higher risk of rape and sexual violence than able-bodied women, and have less access to justice.
- *Access to HIV education, information and prevention services*: existing services may not be appropriate for persons with disabilities or they may be turned away from services because they are perceived to be at a lower risk of transmission. It is particularly difficult for women and young persons with disabilities to access reproductive and sexual health care services.

Conversely, there is also a growing body of evidence available that HIV/AIDS may itself be a cause of cognitive and physical disability. Many people living with HIV are developing temporary, episodic or permanent disabilities during the course of their illness (Hanass-Hancock and Nixon, 2009, O'Brien et al., 2009, Myezwa et al., 2009). Increasing numbers of people living with HIV will require disability rights protection, assistance and rehabilitation in order to attain inclusion and participation in all aspects of daily life.

1.2.3 HIV, Disability and Women

Women and girls with disabilities are particularly vulnerable to discrimination and other violations of their human rights. This in turn may increase their vulnerability to HIV infection and may undermine their ability to access available HIV-related services. The UN recognises the intersection between gender and disability, stating that “[T]he consequences of deficiencies and disablement are particularly serious for women. There are a great many countries where women are subject to social, cultural and economic disadvantages which impede their access to ...health care, education, vocational training and employment. If, in addition, they are physically or mentally disabled, their chances of overcoming their disablement are diminished, which makes it all the more difficult for them to take part in community life.” (United Nations, 1982).

Research suggests that women and girls with disabilities are particularly vulnerable to sexual violence, and therefore at increased risk of HIV (Groce and Trasi, 2004, Hanass-Hancock, 2009b, Kvam, 2004, Kvam, Kvam and Braathen, 2006, Kvam and Braathen, 2008). Failure to address the risk of violence and to improve their access to key HIV and violence-related services will increase the numbers of women and girls with disabilities who have HIV.

1.2.4 National Responses to HIV and Disability

Despite the vulnerability of people with disabilities to HIV, a recent study examining the extent to which the national strategic plans on HIV and AIDS (NSPs) in ESA have addressed disability revealed that only a few have systematically included it in their national responses (Grant et al., 2009). Similar findings were made during a consultative four country workshop by the Disability HIV and AIDS Trust, which focused on Botswana, Malawi, Zambia and Zimbabwe. (DHAT, 2007).

A review of the NSPs of 18 focus countries of ESA (Grant et al., 2009) found that:

- All of the countries have multi-sectoral institutions to guide the national response to HIV, but only three countries (Rwanda, Seychelles and South Africa) specifically include people with disabilities on the co-ordinating structures.
- Although almost all countries identify and target key populations at higher risk of HIV exposure within their national response to HIV, less than half of the countries surveyed identify people with disabilities as a key population.
- All of the countries include strategies to protect and promote human rights in the context of HIV within their NSPs; however only three countries (Lesotho, South Africa and Swaziland) specifically include protection for the rights of people with disabilities.
- Only 50% of countries provide for HIV-related prevention services for people with disabilities, and fewer countries provide for treatment, care and impact mitigation services.
- Although all countries provide for monitoring and evaluation of HIV programmes, only three countries (Democratic Republic of Congo - DRC, Namibia and Swaziland) specifically refer to the collection of data on disability and HIV.

Many of the evaluated NSPs are being reviewed in the next couple of years, providing opportunities to advocate for improved inclusion of disability issues within the national framework on HIV, in terms of the obligation placed upon countries by the CRPD to integrate disability into all national laws, policies and programmes.

2. International and Regional Obligations on Disability and HIV

2.1 The Convention on the Rights of Persons with Disabilities

The CRPD is the first international treaty to comprehensively address the needs of persons with disabilities and it sets the global standard on disability rights. It goes beyond protecting people with disabilities from discrimination and focuses on the broad protection and promotion of all human rights integral to ensuring the full participation of people with disabilities in society. The CRPD does not strictly define disability, but bases its understanding on the social model of disability; the preamble recognises that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others”.

The CRPD affirms the right of all persons with disabilities to the full enjoyment of all their human rights and freedoms and pays particular attention to the human rights of women with disabilities. The preamble emphasises the need to integrate a gender perspective in all efforts to promote the rights of people with disabilities, while also recognising that women and girls with disabilities are at a higher risk of violence and abuse, both inside and outside the home. The Convention recognises that women and girls with disabilities face multiple forms of discrimination and obliges States to take steps to empower them⁸.

As already indicated, the CRPD does not explicitly refer to HIV or AIDS. However, many of the rights and key concepts within the CRPD are relevant to the protection of people with disabilities from HIV, as well as to the protection of the rights of people living with HIV who experience disablement⁹, either permanently, temporarily or episodically, as a result of their illness.

For example, the CRPD’s concept of “universal design”¹⁰ provides for the development of programmes, products and services that are accessible to all, including people with disabilities. By integrating this concept within HIV strategies, countries may increase access to HIV-related programmes, products and services, hereby reducing the vulnerability of people with disabilities to HIV and mitigating the

⁸ Article 6.

⁹ In terms of the social model of disability recognised by the CRPD, people living with HIV or AIDS who are impaired by virtue of HIV-related stigma, discrimination or barriers to participation in their environment will be protected by the CRPD. Additionally, the course of the disease may itself cause impairments and activity limitations.

¹⁰ Universal design is defined in Article 2 as “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”

impact of HIV on those affected. Likewise, the concept of “reasonable accommodation”¹¹ requires countries to make accommodation for people with disabilities in order to ensure their access to their rights, provided they do not impose “a disproportionate or undue burden”. Countries that provide reasonable accommodation for people with disabilities (for example, by accommodating people with disabilities in the workplace) reduce the marginalisation of people with disabilities, thereby arguably reducing their vulnerability to HIV as well as mitigating the impact of HIV on their lives.

Right in CRPD	Importance for disability and HIV	Example
Article 4 requires States to undertake or promote research and development of universally designed goods, services, equipment and facilities which require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.	States should research and develop universally designed HIV-related health goods, services, equipment and facilities in order to ensure they meet the specific needs of people with disabilities.	HIV testing and counselling services should be “universally designed” in order to ensure that they are able to meet the needs of people with physical, sensorial, intellectual and mental disabilities.
Article 5 protects the rights of all persons to equality, prohibits discrimination on the basis of disability, guarantees to persons with disabilities equal and effective legal protection against discrimination on all grounds and requires States to take measures to ensure reasonable accommodation for people with disabilities.	States should ensure equality and non-discrimination and should provide reasonable accommodation for people with disabilities to reduce vulnerability to HIV, ensure equal access to HIV-related services and to reduce HIV-related discrimination against those affected.	HIV laws and policies should identify people with disabilities as a key population at risk of HIV exposure, and provide for specific measures to ensure they have equal access (including through reasonable accommodation) to all HIV-related services.
Article 8 provides for States to take measures to raise awareness and foster respect for the rights of people with disabilities, and to combat stereotypes, prejudices and harmful practices relating to persons with disabilities.	States should take measures to raise awareness of and to combat stereotypes, prejudices and harmful practices against the rights of people with disabilities in the context of HIV.	HIV policies and plans should provide for training for health care workers to raise awareness of the rights of people with disabilities and to combat stereotypes (such as those relating to sexual inactivity) about people with disabilities). Special attention should be paid to ensuring that women with disabilities can access reproductive health services, including those related to HIV.
Article 9 promotes accessibility for	States should promote accessibility	HIV-related health care facilities

¹¹ Reasonable accommodation is defined in Article 2 as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

people with disabilities, and requires States Parties to take measures to ensure access to the physical environment, transportation, information and communications, and to facilities and services.	for people with disabilities to all services that reduce their vulnerability to HIV and mitigate the impact of HIV on their lives.	should make provision for ramps and wheelchair accommodation.
Article 12 provides people with disabilities with equal rights to recognition as persons with legal capacity before the law.	States should provide people with disabilities with legal capacity to participate in decisions that affect their health rights, where appropriate.	HIV laws should provide people with disabilities with legal capacity to consent to HIV testing and treatment services, where they have the capacity to do so.
Article 13 requires States Parties to ensure effective access to justice for people with disabilities.	States should ensure that people with disabilities have effective access to justice in the event of HIV-related human rights abuses.	HIV plans should incorporate HIV-related human rights awareness, education and training for people with disabilities. Legal services for people with HIV should be accessible to persons with disabilities.
Article 15 protects people with disabilities from cruel, inhuman or degrading treatment or punishment, including being subjected to medical or scientific experimentation without free consent. Article 17 protects their rights to physical and mental integrity.	States should protect people with disabilities from cruel, inhuman or degrading treatment or punishment in the context of HIV. States should protect people with disabilities from being subjected to HIV-related medical research and health services without free consent	HIV laws, policies and research guidelines should protect people with disabilities from coercive measures (such as forced sterilization) or from exploitative research.
Article 16 requires State Parties to take measures to protect people with disabilities from exploitation, violence and abuse.	States should protect people with disabilities from exploitation, violence and abuse that puts them at risk of HIV exposure, or that occurs as a result of their HIV or perceived HIV status.	Sexual offences laws should protect people with disabilities, particularly women, from sexual violence.
Article 22 protects people with disabilities from unlawful invasions of their right to privacy, including the privacy of personal, health and rehabilitation information.	States should ensure that people with disabilities have the right to confidentiality with regard to HIV.	HIV laws and policies should provide people with disabilities with the right to confidentiality with regard to HIV status.
Article 25 provides people with disabilities with the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.	States should provide people with disabilities with equal access to the highest attainable standard of health in the context of HIV.	HIV policies and plans should provide for non-discriminatory, accessible and appropriate HIV health services for people with disabilities, as well as services for people living with HIV who experience disablement.
Article 26 provides for State Parties to take appropriate measures to enable people with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability and full inclusion and participation in all aspects of life.	States should take measures to ensure that people with disabilities achieve full inclusion and participation in all aspects of life so as to reduce their vulnerability to HIV and to mitigate the impact of HIV and AIDS on their lives.	Social assistance laws should provide social assistance to people with disabilities to support the inclusion and participation of people with disabilities in all aspects of life, thereby reducing their marginalisation and vulnerability to HIV.
Article 27 recognises the rights of people with disabilities to work on an equal basis with others.	States should ensure that people with disabilities have the right to work on an equal basis with others so as to reduce their vulnerability to	Employment laws should protect the workplace rights and promote adaptations to the workplace for people with

	HIV and to mitigate the impact of HIV on those infected and affected.	disabilities; reducing economic vulnerability reduces vulnerability to, and mitigates the impact of HIV on people with disabilities.
Article 29 provides that State Parties guarantee to people with disabilities political rights to ensure that they can participate in political and public life.	States should guarantee people with disabilities the right to participate in the design, development, implementation and monitoring of national HIV programmes.	HIV policies and plans should provide for the participation of people with disabilities in the design, development, implementation, monitoring and evaluation of HIV programmes.
Article 30 requires State Parties to collect appropriate information, including statistical and research data to enable them to formulate and implement policies to give effect to the convention.	States should collect information and data on disability and HIV in order to ensure appropriate national responses to HIV.	Epidemiological surveillance should collect data on the numbers of people with disabilities living with and affected by HIV, the number of people with disabilities accessing HIV services and programmes, the number of people living with HIV who experience disablement etc.

More than half of the focus countries have already ratified the CRPD, with Zambia being the most recent in January 2010. Only three countries, Angola, Botswana and Zimbabwe, have not signed the CRPD. The remaining countries have all signalled their intention to be bound by the CRPD by signing it.

Table 2: Signature / Ratification of the CRPD, as of August 2010

Country	Signed	Ratified	Date of ratification
Angola	No	No	
Botswana	No	No	
Burundi	Yes	No	
DRC	Yes	No	
Kenya	Yes	Yes	19 May 2008
Lesotho	Yes	Yes	2 December 2008
Madagascar	Yes	No	
Malawi	Yes	Yes	27 December 2009
Mauritius	Yes	Yes	8 January 2010
Mozambique	Yes	No	
Namibia	Yes	Yes	4 December 2007
Rwanda	Yes	Yes	15 December 2008
Seychelles	Yes	Yes	2 October 2009
South Africa	Yes	Yes	30 November 2007
Swaziland	Yes	No	
Tanzania	Yes	Yes	10 November 2009
Uganda	Yes	Yes	25 November 2008
Zambia	Yes	Yes	1 February 2010
Zimbabwe	No	No	

2.2 Optional Protocol to the CRPD

The Optional Protocol creates a mechanism for individuals and organisations to bring complaints to the Committee on the Rights of Persons with Disabilities.¹² Countries that have ratified the Optional Protocol recognise the competence of the committee “to receive and consider communications”¹³ on alleged violations of the provisions of the CRPD by State parties. Individuals and organisations may take their complaints to the committee once they have exhausted all domestic remedies. The mechanism created by the Optional Protocol is an important adjunct to existing domestic remedies, and should enhance access to justice for people with disabilities.

Table 3: Signature / Ratification of the Optional Protocol as at August 2010

Country	Signed	Ratified
Angola	No	No
Botswana	No	No
Burundi	Yes	No
DRC	Yes	No
Kenya	No	No
Lesotho	No	No
Madagascar	Yes	No
Malawi	No	No

¹² The Committee is established by Article 34 of the CRPD.
¹³ Article 1.

Mauritius	Yes	No
Mozambique	No	No
Namibia	Yes	Yes
Rwanda	Yes	Yes
Seychelles	Yes	No
South Africa	Yes	Yes
Swaziland	Yes	No
Tanzania	Yes	Yes
Uganda	Yes	Yes
Zambia	Yes	No
Zimbabwe	No	No

2.3 Regional Commitments

Prior to the adoption of the CRPD, the African human rights framework went further than the international framework both in recognising the rights of persons with disabilities and including provisions that protected these rights.

The African Charter on Human and People's Rights does not explicitly recognise disability as a ground of discrimination, but it does contain recognition for the rights of "the disabled" and states that they are entitled to "special measures of protection"¹⁴. Both the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol)¹⁵ and the African Charter on the Rights and Welfare of the Child¹⁶ contain specific provisions relating to disability. The Maputo Protocol is a particularly important instrument as it contains a number of "global firsts" (Centre for Reproductive Rights, 2006), including provisions on HIV, access to abortion and protection from sexual violence. The Protocol is considered to be a milestone for the advancement of women's rights in Africa.

The Maputo Protocol on disability, HIV and the rights of women:

- Article 4(2)(a) obliges States to protect women from unwanted and forced sex;
- Article 14 states that women have the right to protect themselves and to be protected from HIV.¹⁷
- Article 23 explicitly recognises the right of women with disabilities to dignity and to live lives free from violence and discrimination. It places an obligation on States to protect the rights of women with disabilities and to take special 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."

Table 4: Ratification of the African Human Rights Instruments as at August 2010

¹⁴ Article 18(4).

¹⁵ Article 13

¹⁶ Article 13

¹⁷ The Maputo Protocol is the first international and regional instrument to refer directly to HIV.

Countries	African Charter on Human and People's Rights	African Charter on the Rights and Welfare of the Child	Maputo Protocol
Angola	March 1990	April 1992	No
Botswana	July 1986	No	No
Burundi	July 1989	June 2004	No
DRC	July 1987	No	No
Kenya	January 1992	August 2000	No
Lesotho	February 1992	October 1999	October 2004
Madagascar	March 1992	No	No
Malawi	November 1989	November 1999	May 2005
Mauritius	June 1992	February 1992	No
Mozambique	February 1989	December 1998	December 2005
Namibia	July 1992	No	August 2004
Rwanda	July 1993	No	June 2004
Seychelles	April 1993	February 1992	March 2006
South Africa	July 1996	January 2000	December 2004
Swaziland	September 1995	No	No
Tanzania	February 1984	No	March 2007
Uganda	May 1986	October 1994	No
Zambia	June 1984	No	May 2006
Zimbabwe	May 1986	February 1995	No

All 19 focus countries have ratified the African Charter on Human and People's Rights. Unfortunately, a significant number have not ratified either the African Charter on the Rights and Welfare of the Child or the Maputo Protocol.

The SADC Protocol on Gender and Development (2008) also contains provisions on both HIV and disability. The Protocol was adopted by 14 SADC countries¹⁸ on 17 August 2008 and is now binding on them. Article 9 states that all countries must adopt legislation and related measures to protect people with disabilities. The SADC Protocol also contains references to HIV and the specific vulnerabilities of women and girls, and States are obliged to adopt gender sensitive strategies to prevent new infections and to ensure universal access to treatment by 2015.¹⁹ The Protocol also contains extensive provisions on gender based violence.²⁰

¹⁸ Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe

¹⁹ Article 27

²⁰ Article 20

2.4 Regional Initiatives

The UN Decade on Disabled People ended in 1992. According to the Secretariat for the African Decade on Persons with Disabilities, reflections on the success of this initiative suggested that Africans with disabilities had not benefited from the work done during the 10 years. After much advocacy by disability rights activists, the Labour and Social Affairs Commission of the Organisation of African Unity (OAU)²¹ recommended that a decade on disability be declared by the OAU. The recommendation was adopted by the OAU Assembly of Heads of State and Governments in July 1999, and 1999-2009 was declared to be the African Decade for Disabled Persons. The OAU resolution proclaiming the decade urged all countries to formulate policies and programmes to ensure the full participation and empowerment of people with disabilities, including developing legislation to promote equality and to prohibit discrimination against people with disabilities (OAU, 2000).

The Continental Plan of Action was developed to implement priority activities during the decade. The Plan was endorsed by the OAU Council of Ministers in Durban 2002, and subsequently by the Executive Council of the African Union (AU). In 2009, the African Decade was extended to 2019.

A further regional initiative of importance is the Africa Campaign on Disability and HIV/AIDS, launched in 2007, which brings together disabled people's and AIDS organisations to work towards the integration of disability rights within HIV policies and programmes in Africa. The Second Meeting of the Africa Campaign led to the development and signing of the Kampala Declaration on HIV, 2008, which calls on States (and other regional actors) to take measures to integrate HIV into all aspects of the response to HIV (Africa Campaign on Disability and HIV and AIDS, 2008).

3. Domestication of the CPRD

This section examines the extent to which the 19 focus countries that have ratified²² the relevant international and regional conventions, have taken steps to domesticate²³ their provisions. Table 5 below sets out how domestication may occur and which approach has been adopted by the focus countries, where this information was available.

²¹ The OAU was replaced by the African Union (AU) in 2001.

²² Ratification is the process whereby countries signal their intention to be bound by the treaty.

²³ Domestication refers to the obligation on countries, once they have ratified an international convention, to implement its substantive provisions within their domestic laws. Countries must furthermore fulfil the country reporting requirements - all conventions require countries to submit regular progress reports, setting out what steps they are taking to realise the rights for their citizens.

Table 5: Dualist vs. Monist Approach to Domestication²⁴

Dualist	Monist
<p>Treaties and covenants do not form part of the domestic law until national legislation has been enacted incorporating the provisions into domestic law.</p> <ul style="list-style-type: none"> • Angola • Botswana • Kenya • Lesotho • Malawi • South Africa • Swaziland • Tanzania • Uganda • Zambia • Zimbabwe 	<p>Treaties and conventions become directly applicable once ratified and no additional national legislation is required.</p> <ul style="list-style-type: none"> • Namibia • Madagascar • Mozambique • Rwanda

Since most countries follow a dualist approach to domestication of the CRPD, the report analyses national laws, policies and plans to determine the extent to which key rights in the context of disability and HIV have been domesticated. In particular, it looks at:

- The constitution
- Anti-discrimination legislation
- National policies and plans on disability / HIV²⁵

The CPRD is a relatively new convention, only coming into force in May 2008. Of the 19 focus countries that have ratified it, the majority did so in 2008 and 2009, with Zambia most recently in January 2010. The CPRD obliges States to provide regular progress reports to the Committee on People with Disabilities and to submit their first country progress reports within two years of ratification.²⁶ These reports are the most accurate source of information regarding the domestication of the Conventions. To date, none of the focus countries have submitted reports to the Committee, and several countries are in fact not yet obliged to so. It was, therefore, not possible to use the country reports to ascertain what progress has been made in domesticating the provisions of CRPD.

The African conventions also require countries to submit periodic progress reports. Unfortunately no information could be obtained from the countries on how

²⁴ No information available on Burundi, the DRC, Mauritius, Mozambique, Seychelles and Uganda.

²⁵ As set out in section 1.1, the research was unable to include an analysis of broader legislation (such as health law, employment law, social assistance law), given the time and resource constraints. A broader analysis of *all* legislation in each country that may protect the rights of people with disabilities should be considered in the future.

²⁶ Article 36.

they were domesticating these conventions as many countries fail to meet their obligations to report regularly to the treaty monitoring bodies.

The information contained in Table 5 has, therefore, been extracted directly from laws, policies, plans and research reports from the countries themselves.

3.1 Findings

Table 6: Domestication of International & Regional Obligations on Disability Relevant to Protecting Rights in the Context of HIV

Country	Constitution	National legislation (anti-discrimatory legislation, disability legislation, HIV legislation)	National Policy (disability, HIV)	National Plan (disability, HIV)
Angola	<u>Constitutional Law of the Republic of Angola 1992</u> Prohibits discrimination on the grounds of disability and provides that the State must promote measures to ensure that all citizens have access to health and medical care, including disability care. Special provision is made for those mentally and physically disabled as a result of war.	<u>Law 8/04 on HIV and AIDS (2004)</u> does not mention disability, but it does contain a provision on non-discrimination, and provides for various rights of people living with HIV (e.g. health care, information, privacy, education and work).		<u>Plano Estratico Nacional (NSP)</u> does not mention disability
Botswana	<u>Constitution of Botswana 1996</u> Provisions relating to the protection of fundamental freedoms and non-discrimination do not refer to disability		<u>National Policy on Care for People with Disabilities 1996</u> does not mention HIV <u>Botswana National HIV/AIDS Policy</u> does not mention disability.	<u>2nd National Strategic Framework for HIV and AIDS 2010 – 2016</u> does not mention disability
Burundi	<u>Constitution Interimaire Post-transition de la Republique du Burundi, 2004</u> Article 22 provides for non-discrimination on various grounds including disability and HIV/AIDS	<u>Law 1/018 on the Legal Protection of People Infected with HIV and of People Suffering from AIDS, 2005</u> does not include protection for the rights of people with disabilities.	<u>National HIV/AIDS Policy</u> does not include provision for people with disabilities	
DRC	<u>Constitution de la Republique Democratique du Congo 2006</u> Article 49 provides for - special measures to protect the rights and needs of people with disabilities - the participation of people with disabilities, and - the development of laws to	<u>Loi No 08/011 du 14 Juillet 2008 Portant protection des droits des personnes vivant avec le VIH/SIDA et des personnes affectees</u> provides for the rights of people affected by HIV, but does not mention disability.		<u>Plan Strategique National de lute contre le SIDA 2010 - 2014 (NSP)</u> - recognises people with disabilities as a key population, and - recognises the need to collect data on disability and HIV.

	provide for these rights.			No further provision is made for HIV-related health care specifically for people with disabilities.
Kenya	<p><u>Constitution of Kenya, 1963</u> protects the right to equality and non-discrimination but does not include disability as a ground for non-discrimination.</p> <p>Proposals for amendments to the Constitution include a detailed provision on equality and non-discrimination for people with disabilities.</p>	<p><u>Persons with Disabilities Act 2003</u> includes:</p> <ul style="list-style-type: none"> - the right to non-discrimination in <i>inter alia</i> health and employment - the right to a barrier-free and accessible environment - access to justice for people with disabilities - access to means of communication for people with disabilities - the establishment of the National Council to work with the Ministry of Health to ensure access to health care for people with disabilities - penalties for various contraventions of the act - provision for the National Council for Persons with Disabilities to ask the Attorney-General to take appropriate legal action in the case of discrimination <p><u>HIV and AIDS Prevention and Control Act 2006</u> provides only for proxy consent to HIV testing and other health care services in the case of people with disabilities who lack the capacity to provide individual consent</p>	<p><u>Draft National Policy on Disability, 2005</u></p> <p>The policy is based on the principles of equalisation of opportunities, a human rights approach to the disability agenda, mainstreaming of disability, accessibility for people with disabilities and respect for gender issues. It provides for:</p> <ul style="list-style-type: none"> - awareness and education - rehabilitation services - training - economic empowerment - health and HIV/AIDS services - social support - participation - transport - information and communication - registration - research - protection and Legal Services - providing for organisations for people with disabilities <p><i>The policy specifically mentions issues around HIV and disability</i></p>	<p><u>Strategic Plan on Disability 2006 – 2009</u></p> <p>The Plan provides for the functioning and the strategic objectives of the National Council for Persons with Disabilities, in terms of the powers granted to it in the disability legislation, to provide, promote, regulate and co-ordinate services for people with disabilities.</p> <p><u>National Strategic Plan on HIV/AIDS 2005/6 – 2009/10</u> makes no mention of disability.</p>
Lesotho	<p><u>Constitution of Lesotho, 1993</u> protects the right to equality and non-discrimination on various grounds, but does not include disability as a listed ground (although does protect discrimination based on 'other status').</p>	<p><u>Draft Lesotho AIDS Bill, 2008</u> makes no mention of HIV and disability.</p>	<p><u>National HIV and AIDS Policy 2006</u></p> <ul style="list-style-type: none"> - identifies people with disabilities as a key target group - provides for equal access to HIV services and information for people with disabilities. 	<p><u>National Strategic Plan on HIV & AIDS 2006 – 2011 (NSP)</u></p> <ul style="list-style-type: none"> - identifies people with disabilities as a vulnerable group - provides for the inclusion of people with disabilities in the design and development of

				targeted HIV health care - aims to ensure legal protection for PLHIV and vulnerable groups - provides for prevention, treatment, care and impact mitigation services for people with disabilities
Madagascar	<u>Constitution of the Republic of Madagascar, 1992</u> provides for the right to equality and non-discrimination, but does not specifically mention disability as a ground for non-discrimination. It does provide that the State must assist those people who cannot work as a result of “physical or mental inaptitude”. ²⁷	<u>Loi No 97-044 Sur Les Personnes Handicapées</u> provides for the rights of people with disabilities to, <i>inter alia</i> : - health care and rehabilitative services - education - employment - accessibility - non-discrimination <u>Loi No 2005-040 Sur La Lute Contre Le VIH/SIDA et la Protection des Personnes Vivant Avec Le VIH/SIDA</u> provides for the rights of people living with HIV, but makes no specific mention of disability		<u>Plan d’action de Madagascar pour une lutte efficace contre le VIH/SIDA 2007-2011 (NSP)</u> recognises people with disabilities as a key population at higher risk of HIV exposure. However, the NSP makes no further specific provision for the HIV-related health care needs of people with disabilities.
Malawi	<u>Constitution of the Republic of Malawi, 1994</u> Protection of the rights of “the disabled” are included in the fundamental principles and include support for greater access to public places, fair opportunities in employment and full participation in society; discrimination on the grounds of disability is also prohibited. The Constitution also provides that legislation may be passed to address inequalities and prohibit discrimination.	<u>Handicapped Persons Act 48 of 1971</u> provides for people with disabilities in various ways including - the improvement of care, assistance and education of persons with disabilities - the inspection of facilities providing services to people with disabilities by public officers. The Act creates offences for preventing inspections or failing to register facilities providing services for people with disabilities.	<u>National HIV/AIDS Policy 2003</u> recognises that discrimination, including on the grounds of disability increases vulnerability to HIV. People with disabilities are listed as a vulnerable group and the policy provides that all responses to HIV must include disability. Key principles include: - Accessible and appropriate HIV-related health care services for people with disabilities and - Participation of people with disabilities in all decision making structures.	<u>National HIV/AIDS Action Framework 2005-2009</u> does not include reference to disability.
Mauritius	<u>Constitution of Mauritius 1968</u>	<u>Equal Opportunities Act, 2005</u> prohibits		<u>National Multi-Sectoral HIV</u>

²⁷

Article 30.

	does not refer to disability	<p>discrimination on the grounds of a person's 'status'. Disability is recognised as a protected 'status'. The Act prohibits unlawful discrimination, including in employment, education and in the provision of goods, services or facilities.</p> <p>It also provides for support to people with disabilities in lodging a discrimination-related complaint and creates offences relating to the victimisation of persons who bring complaints in terms of the Act.</p> <p><u>Training and Employment of Disabled Persons Act 1996</u></p> <ul style="list-style-type: none"> - prohibits discrimination on the grounds of disability in employment - creates the Training and Employment of Disabled Persons Board. The board has the task to prevent discrimination against persons with disabilities. 		<u>and AIDS Strategic Framework 2007-2011</u> does not recognise disability as an issue.
Mozambique	<u>Constitution of the Republic of Mozambique, 2005</u> states that people with disabilities have a right to enjoy all the rights in the Constitution except those that their disability prevents them from enjoying and gives them a right to assistance from the State.	<u>Draft Bill on Defending Human Rights and the Fight Against the Stigmatisation and Discrimination of People Living with HIV or AIDS of Mozambique, 2008</u> does not include disability.	<u>National Disability Policy, Resolution 20/99 of 23rd June 1999</u> provides for the active participation of people with disabilities in society without discrimination, including the right to <ul style="list-style-type: none"> - education - employment - health - social protection. 	<u>National Plan of Action for Disability 2006 – 2010</u> seeks to protect the rights of people with disabilities. It includes a recognition of the links between HIV and disability, and provides for measures to mitigate the impact of HIV upon people with disabilities through access to HIV-related health care services.
Namibia	<u>Constitution of Namibia 1990</u> does not make reference to disability.	<u>National Council on Disability Act 2004</u> The Council has a range of functions, including:	<u>National Policy on Disability 2004</u> is based on a social model of disability, and promotes the	<u>Third Medium-Term Plan on HIV/AIDS 2004-2009</u> - recognises people with

		<ul style="list-style-type: none"> - taking steps to improve the situation of persons with disabilities in Namibia - monitoring the implementation of, and reviewing the National Policy on Disability - comment on proposed legislation which may affect persons with disabilities - holding public hearings to gather information about people with disabilities. <p>The Act creates offences relating to failure to assist in hearings related to disability, or to obstruct the Council in its duties.</p>	<p>full social integration of persons with disabilities. It focuses specifically on women, children, the elderly and rural people with disabilities. It does not mention HIV and AIDS.</p> <p><u>National Policy on HIV/AIDS 2007</u> includes people with disabilities as a vulnerable group and states that HIV-related prevention information and education must be tailored to meeting the needs of people with disabilities.</p>	<p>disabilities as a vulnerable group</p> <ul style="list-style-type: none"> - provides for targeted prevention services for people with disabilities - provides for impact mitigation services, including social assistance, for people with disabilities affected by HIV.
Rwanda	<u>Constitution of the Republic of Rwanda, 1993</u> prohibits discrimination on the grounds of physical and mental disabilities.		<u>National Policy on HIV and AIDS 2007</u> makes no mention of disability.	<u>National Strategic Plan on HIV/AIDS 2009-2012 (NSP)</u> – provides for <ul style="list-style-type: none"> - the involvement of people with disabilities in the national multi-sectoral structures - targeted prevention services for people with disabilities - indicators for monitoring and evaluation of targeted prevention services
Seychelles	<u>Constitution of the Republic of Seychelles, 1993</u> provides for equality and non-discrimination, without specifying grounds for non-discrimination. It also makes provision for special protection for people with disabilities, including “improving the quality of life and for the welfare and maintenance of people with disabilities”	<u>National Council for Disabled Persons Act 1994</u> establishes the National Council whose functions include, <i>inter alia</i> : <ul style="list-style-type: none"> - promoting and developing services and programmes for rehabilitation and employment of people with disabilities - providing employment for people with disabilities - providing for care and assistance for people with disabilities <p><i>The Act is based on a ‘medical’ model of disability</i></p>		<u>National HIV and AIDS Strategic Plan 2005-2009 (NSP)</u> includes people with disabilities on the national, multi-sectoral framework to respond to HIV. However, there is no other mention of disability and HIV within the plan itself.
South Africa	<u>Constitution of the Republic of</u>	<u>Promotion of Equality and Prevention of</u>		<u>White Paper on an Integrated</u>

	<p><u>South Africa Act, 1996</u> prohibits discrimination on the grounds of disability.</p>	<p><u>Unfair Discrimination Act 2000</u> prohibits disability-related discrimination including</p> <ul style="list-style-type: none"> - denying enabling or supportive facilities to people with disabilities - contravening regulations governing environmental accessibility - failing to reasonably accommodate / remove barriers for people with disabilities. <p>It also provides for special measures to promote equality such as:</p> <ul style="list-style-type: none"> - monitoring discrimination on disability - reviewing laws, policies and practices to eliminate discrimination. <p>Chapter 4 of the Act creates a specialised Equality Court to hear complaints relating to discrimination, including in relation to disability.</p>		<p><u>National Disability Strategy 1997</u> aims to mainstream disability within all government plans and programmes, to guarantee equal rights to people with disabilities.</p> <p><u>SANAC Disability Sector HIV and AIDS, STI National Strategic Implementation Plan 2009-2010</u> sets out a strategic framework for the provision of HIV-related prevention, treatment, care and support, research and monitoring. It also provides for rights protection for people with disabilities.</p> <p><u>HIV and AIDS & STI Strategic Plan for South Africa 2007-2011 (NSP)</u></p> <ul style="list-style-type: none"> - recognises people with disabilities as vulnerable - recognises the disabling impact of HIV and AIDS - provides for participation - protects human rights and - provides for HIV prevention, treatment, care and support services for people with disabilities
Swaziland	<p><u>The Constitution of the Kingdom of Swaziland Act, 2005</u> prohibits discrimination on the grounds of disability and makes provision for appropriate measures (including legislation) to allow people with disabilities to achieve their full mental and physical potential</p>		<p><u>National Multi-Sectoral HIV/AIDS Policy 2006</u> recognises people with disabilities as a vulnerable group, and provides for the need to protect and empower people with disabilities in order to minimise the impact of HIV on</p>	<p><u>Second National Multi-Sectoral HIV and AIDS Strategic Plan 2006-2008</u></p> <ul style="list-style-type: none"> - recognises people with disabilities as vulnerable - provides for measures to protect the rights of people with disabilities, and

			them.	- provides for impact mitigation services (eg. psycho-social support) for people with disabilities.
Tanzania	<u>The Constitution of the United Republic of Tanzania 1996</u> does not refer to disability.	<p><u>Disabled Persons Care and Maintenance Act 1982</u> does not contain provisions on discrimination. It provides for care for persons with disabilities.</p> <p><u>Disabled Persons Employment Act 1982</u> provides for disability rights in employment. It:</p> <ul style="list-style-type: none"> - establishes a National Advisory Council to advise the minister on matters relating to disability and employment - creates a register for people with disabilities. - obliges employers to offer employment to a number of persons with disabilities (determined by the government) who are registered - creates offences for the contravention of the provisions of the Act. <p><u>HIV and AIDS Prevention and Control Act, 2008</u> provides for the rights of people living with HIV, but makes no mention of disability.</p>	<u>National Policy on Disability 2004</u> recognizes the need to provide HIV-related services to people with disabilities. These include ensuring that HIV awareness programmes are accessible to people with disabilities.	<u>National Multi-Sectoral Strategic Framework on HIV/AIDS 2003-2007(NSP)</u>
Uganda	<u>Constitution of the Republic of Uganda 1995</u>	<p><u>National Council for Disability Act 2003</u> creates and mandates the Council to advise on disability issues to all sectors</p> <p><u>Persons with Disabilities Act, 2006</u> protects people with disabilities from discrimination and promotes equal opportunities for people with disabilities</p>		<u>National HIV and AIDS Strategic Plan 2007/8 – 2011/12 (NSP)</u>
	- prohibits discrimination on the grounds of disability			- identifies people with disabilities as a key population at higher risk of HIV exposure
	- obliges the state to take appropriate measures and enact laws to allow persons with disabilities to realise their full potential.			- promotes rights protection for vulnerable groups
				- provides for HIV prevention and impact mitigation services for people with disabilities.

Zambia	<u>Constitution of Zambia 1991</u> Does not refer to disability	<u>Persons with Disabilities Act 1996</u> - prohibits discrimination on the grounds of disability especially in the education and employment sectors. - establishes the Zambian Agency for Persons with Disabilities - provides that contravention of the provisions of the Act amounts to an offence and can result in payment of a fine or a term of imprisonment	<u>National HIV/STI/TB Policy 2005</u> recognises people with disabilities as a vulnerable group. The policy provides for: -free access to VCT for people with disabilities, and - inclusion of people with disabilities in all HIV-related interventions. It furthermore provides that steps should be taken to integrate the HIV/AIDS/STIs/TB services required by persons with different abilities into existing health and social welfare services.	<u>National HIV and AIDS Strategic Framework 2006-2010 (NSP)</u> refers to the need to provide health and social services for people with disabilities.
Zimbabwe	<u>Constitution of Zimbabwe, 2000</u> provides for equality and non-discrimination on various grounds, but does not include disability as a prohibited ground for non-discrimination.	<u>Disabled Persons Act 1992</u> aims to provide for: - equality and equal opportunities for people with disabilities - prohibition of discrimination against people with disabilities - measures to promote the welfare and rehabilitation of people with disabilities - measures to promote employment and income generation for people with disabilities - equal access to all premises, services and amenities available to the public. It creates offences and penalties for discrimination against people with disabilities, or for denying access to or failing to provide accessible premises, services, amenities or facilities for people with disabilities.	<u>National Policy on HIV/AIDS for Zimbabwe, 1999</u> makes no mention of disability and HIV.	<u>National HIV and AIDS Strategic Plan 2006-2010 (NSP)</u> - recognises people with disabilities as a vulnerable group - provides HIV prevention services for people with disabilities.

3.2 Analysis of Findings

Although the CRPD has only recently come into force, and it is premature to assess the extent to which its provisions have been domesticated and implemented, it is clear that many African countries have, for some time, been concerned about the rights of people with disabilities. The declaration of the African Decade, and its recent extension, suggests a genuine commitment to advancing the human rights of people with disabilities. The research found definite indications of protection for the rights of people with disabilities, pre-dating the CRPD, within law, policy and plans in ESA, including protection of key rights important for disability, HIV and AIDS.

3.2.1 Sources of disability rights protection

Domestication of disability rights was found in:

- *National constitutions containing a Bill of Rights*: More than half of the countries surveyed contain provisions relating to disability in their constitutions. These provisions are largely located in equality and non-discrimination clauses within the constitutions, in terms of which discrimination is prohibited on a range of grounds, including disability.

Good Practice Examples

The Constitution of the Republic of Malawi, 1994 provides as follows:

“Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.” (Sections 20(1) and (2)).

Section 13(g) says:

“The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals: ... to support the disabled through:

- (i) greater access to public places;
- (ii) fair opportunities in employment; and
- (iii) the fullest possible participation in all spheres of Malawian society.”

The Burundi Interim Constitution, 2004 provides, in Article 13, for non-discrimination on various grounds, including that of disability, as well as that of HIV and AIDS.

- *National anti-discrimination legislation:* The research found general anti-discrimination legislation in two countries, namely Mauritius and South Africa. This legislation contains detailed protection and provision for special measures to achieve equal rights for, *inter alia*, people with disabilities.

Good Practice Examples

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 in South Africa contains extensive protection for the rights of people with disabilities.

Section 9 provides that:

“...(N)o person may unfairly discriminate against any person on the ground of disability, including:

- a) Denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- b) Contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
- c) Failing to eliminate obstacles that unfairly limit or restrict people with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.”

Section 28 sets out special measures to promote equality with regard to race, gender and disability and provides for:

- Discrimination on the grounds of race, gender or disability to be an aggravating factor in sentencing
- Reporting by the Human Rights Commission on discrimination and disability
- Creating an obligation on the State and all persons to eliminate discrimination on the grounds of race, gender and disability (e.g. by reviewing discriminatory laws, policies and practices; by enacting appropriate non-discriminatory laws, policies and codes of good practice; by adopting action plans to promote and achieve equality and by prioritising the elimination of discrimination on the basis of race, gender and disability).

Chapter 4 of the Act creates a specialised Equality Court to hear complaints relating to unfair discrimination in terms of the Act.

The Equal Opportunities Act, 2005 in Mauritius aims to promote equal opportunities between persons of different sex, race, marital status, religion, origin and disability.

The Act prohibits various forms of discrimination on the basis of disability, including

- Discrimination in employment (Section 7)
- Discrimination in education (Section 13)
- Discrimination in the provision of goods, services or facilities (Section 14).

The Act furthermore creates two complaints mechanisms for hearing of discrimination-related complaints, namely the Equal Opportunities Commission (Part VII) and the Equal Opportunities Tribunal (Part VIII), as well as penal provisions (Part IX).

Section 27(1) provides that:

“where a person is unable to lodge a complaint under this Act because of a disability, he may authorise another person to act on his behalf in relation to the complaint.”

- *National disability legislation:* Despite the CRPD being a recent convention, the research nevertheless found evidence of dedicated disability legislation in a surprising number of countries²⁸, aimed at protecting the rights of people with disabilities to equality and non-discrimination and providing for their welfare. Much of this legislation pre-dates the CRPD, and suggests an existing preoccupation by African governments with disability related concerns²⁹.

Good Practice Examples

The Persons with Disabilities Act, 2003 in Kenya aims to, *inter alia*, provide for the rights and rehabilitation of people with disabilities, to achieve equalisation of opportunities for people with disabilities and to establish the National Council for Persons with Disabilities.

Section 11 provides that:

“the Government shall take steps to the maximum of its available resources with a view to achieving the full realization of the rights of persons with disabilities set out in this Part.”

Section 20 provides for access to health care for people with disabilities:

²⁸ The research found dedicated disability legislation in 9 of the 19 countries surveyed. It is possible that other countries have disability legislation, or draft legislation that is not available electronically. Furthermore, although a complete review of all national legislation was beyond the scope of the report, the research nevertheless found evidence of disability rights protection in broader national legislation relating to, *inter alia*, employment, social assistance, health and education in some countries.

²⁹ Tanzania and Malawi enacted their legislation in 1982 and 1971 respectively.

“The Council shall be represented in the implementation of the national health programme under the Ministry responsible for health for the purpose of

- a) prevention of disability;
- b) early identification of disability;
- c) early rehabilitation of persons with disabilities;
- d) enabling persons with disabilities to receive free rehabilitation and medical services in public and privately owned health institutions;
- e) availing essential health services to persons with disabilities at an affordable cost;
- f) availing field medical personnel to local health institutions for the benefit of persons with disabilities; and
- g) prompt attendance by medical personnel to persons with disabilities.”

The Disabled Persons Act, 1992 in Zimbabwe makes provision for the welfare and rehabilitation of people with disabilities.

The Act provides for

- the creation of a Director for Disabled Persons' Affairs
- the establishment of a National Disability Board
- the rights of people with disabilities.

Section 8(1) provides that

“No disabled person shall, on the ground of disability alone, be denied –

- a) admission into any premises to which members of the public are ordinarily admitted; or
- b) the provision of any service or amenity ordinarily provided to members of the public.”

The Board is given the functions and power to achieve equal opportunities for people with disabilities such as:

- supporting people with disabilities to live independent lives
- providing for the welfare and rehabilitation (in accordance with international commitments) of people with disabilities
- prohibiting discrimination against people with disabilities
- encouraging employment and income generation, and
- co-ordinating services for people with disabilities.

- *Disability policies and plans:* In contrast to disability legislation, the research found limited evidence of disability policies and plans in ESA. However, where these were found, they provided detailed measures to protect and promote the rights of people with disabilities including, in a few cases, recognition of the rights of people with disabilities in the context of HIV/AIDS.

The National Policy on Disability 2004 of Tanzania explicitly recognizes the intersection of HIV/AIDS and disability.

The policy states that:

- People with disabilities are sexually active and therefore at risk of HIV infection;
- People with disabilities have not been included in awareness campaigns on HIV and they have not been able to access appropriate information.

The policy makes provision for the creation of a mechanism to ensure that public awareness programmes on HIV/AIDS are accessible to persons with disabilities.

- *HIV policies and plans:* All of the countries in ESA have national strategic plans on HIV. National HIV policies were also found in some countries. A number of national HIV plans and policies tend to recognise people with disabilities as a key population at higher risk of HIV exposure³⁰, and countries make varying provisions for HIV-related health care for people with disabilities³¹.

The National HIV and AIDS Policy, 2006 in Lesotho recognises the need to target key populations in the national response to HIV and AIDS, including people with disabilities. It provides for equal access to services and information on HIV for people with disabilities.

Section 5.10 dealing with Impact Mitigation provides as follows:

“People with disabilities are disadvantaged because they frequently have limited access to formal education, and also often experience lack of opportunities for informal education. Without education, they become more vulnerable to abuse, physical, psychological, and/or sexual.

5.10.1 Rationale: Persons with disabilities commonly suffer discrimination and limited access to services and information and are more vulnerable to the impact of HIV than able-bodied individuals.

5.10.2 Objective: To ensure free access to services and information on HIV and AIDS to all disabled individuals based on the level of incapacitation

5.10.3 Policy Statements: Government shall do the following:

³⁰ Interestingly, however, recent national HIV-specific legislation in various countries in ESA make no provision for disability. In fact, section 3 of the HIV and AIDS Act 2006 in Mauritius specifically provides that HIV and AIDS is *not* a disability.

³¹ For more information on the integration of disability in NSPs in Eastern and Southern Africa, see Grant et. al., 2009.

- a) Ensure that HIV-related prevention information, education, treatment, care and support strategies and materials are tailor-made for, and accessible to people with disabilities
- b) Ensure protection of all disabled persons from abuse that leads to increased risk of contracting HIV
- c) Ensure that all responses to HIV consider the implications for people with disabilities and plan for more effective responses based on models of national and international best practice.”

The National Multi-sectoral HIV and AIDS Policy, 2006 in Swaziland specifically recognises people with disabilities as a vulnerable population in need of impact mitigation measures.

Section 2.3 provides as follows:

“The AIDS epidemic continues to have a devastating impact on individuals, families, communities and the nation at large. These include increased morbidity and mortality, decline in productivity, increase in the number of orphans and vulnerable children and other vulnerable populations. This policy recognises that the protection and empowerment of PLWHA and other vulnerable populations is critical to efforts that seek to minimize the impact of the epidemic. Vulnerable populations include women, children, orphans, widows, widowers, youth, the poor, sex workers, inmates, and persons with disabilities. These are persons most likely to be exposed to HIV and suffer disproportionately from the negative consequences of HIV and AIDS. Other issues addressed include counselling and emotional care for HIV infected and affected persons and protection of employees in the workplace.”

The National Plan of Action for Disability 2006 -2010 for Mozambique was developed to operationalise the government’s commitment to protect and promote the rights of persons with disabilities and as part of Mozambique’s commitment to realize the African Decade for Persons with Disabilities. The plan acknowledges the exclusion of persons with disabilities from both poverty alleviation and HIV programmes and seeks to address these exclusions.

With regard to HIV, the plan envisages mitigating the impact of HIV and AIDS on persons with disabilities through the provision of medical assistance. It also makes provision for training persons with disabilities as peer educators as part of prevention programmes for people with disabilities.

3.2.2 Key Rights Domesticated Within National Laws, Policies and Plans

Key rights protection found in countries that have domesticated disability rights included the following:

- *The right to equality and non-discrimination:* Provision for equality and non-discrimination is the primary disability rights protection found in countries. Given the recognised links between HIV and human rights, and the impact of HIV and AIDS on those with limited access to basic human rights, equality protection is fundamental for people with disabilities in the context of HIV.
- *The right to care, including health care:* Disability law and policy in ESA tends to make provision for the care and welfare of people with disabilities, and frequently makes specific reference to the provision of health care and social assistance for people with disabilities. Disability and HIV policies and plans in some countries refer more specifically to the need for HIV-related prevention, treatment, care and impact mitigation services for people with disabilities.
- *The right to employment:* A number of disability laws and policies³² in ESA focus on protecting and promoting the rights of people with disabilities within the employment context³³. Protecting employment rights promotes economic and social empowerment, which serves to reduce vulnerability to HIV. Employment-related discrimination is also a key issue for people affected by HIV, and loss of employment has serious economic ramifications for those affected by HIV/AIDS.
- *The right to participation:* Disability laws and policies in the countries surveyed commonly further provide for the rights of people with disabilities to participation. Participation in the design, development, implementation and monitoring and evaluation of the national response to HIV is vital to ensure appropriate and accessible services for people with disabilities.
- *Legal protections and penalties:* Almost all of the disability-related laws found in ESA contain penalties for failing to comply with the provisions of the legislation, and in some cases these include the criminalisation of conduct that discriminates against persons with disabilities. While these measures are important to protect and promote the rights of persons with disabilities, as indicated below, there are questions regarding the extent to which persons with disabilities are able to access courts in order to enforce their rights.

³² Although beyond the scope of this report, a number of countries also have employment equity legislation that protects the rights of people with disabilities.

³³ Additionally, the right to education is also protected in various countries.

3.2.3 Key Gaps and Weaknesses

Whilst the general protection afforded to people with disabilities is important, it is inadequate to ensure the full protection of the human rights of people with disabilities in the context of HIV. This is particularly so given the vulnerability of people with disabilities to HIV, as well as the 'double-discrimination' faced by people with disabilities who are also affected by HIV/AIDS. Key gaps and weaknesses in the domestication of disability rights in ESA include the following:

- *Limited obligations to ensure the availability and accessibility of specialised goods, services and facilities:* Key concepts included and defined in the CRPD, such as those of "universal design", "reasonable accommodation" and "accessibility", may provide helpful guidance to States on the implementation of disability rights. They could potentially be valuable principles for the integration of disability within responses to HIV. However, the research found limited reference to concepts such as "accessibility" and "reasonable accommodation" within current national disability laws, policies and plans, and no reference to the concept of "universal design". Without domestication of these key rights and concepts, practical implementation of disability rights within HIV programmes may be limited.
- *Limited provision for access to information and communication:* Information, education and media is a vital component of HIV prevention programmes, and is particularly important for people with disabilities for whom existing HIV-related communication programmes may be inaccessible. Yet the research found limited provision for the right to accessible information and means of communication for people with disabilities.
- *Limited provision for access to justice:* Due to the high levels of discrimination against people with disabilities and against people living with HIV or AIDS, provision for access to justice is a major concern. The creation of strong legal frameworks is inadequate to protect rights, and needs to be coupled with access to justice and enforcement measures. However, national disability law and policy in ESA makes limited reference to access to justice issues in the context of disability.
- *Limited provision for data collection:* Data collection on disability, including disability and HIV, is one of the more serious challenges to responding adequately to the needs of people with disabilities. Very few countries refer to the need to collect data and information on aspects of disability. Failure to include this key right within national law and policy may contribute to the continued invisibility of people with disabilities in the context of HIV/AIDS.
- *Limited recognition of the gender dimensions of disability:* Finally, gender rights are a critical component of disability rights, and particularly so within the context of HIV/AIDS. Disability law and policy makes little reference to the specific need to protect and provide for the rights of women and girls within disability-related protection.

4. Conclusions and Recommendations

Although the CRPD does not explicitly address HIV, it still provides important opportunities to address the vulnerability of people with disabilities to HIV infection. Given that the CRPD is a new convention, and countries are just beginning to consider how to domesticate its provisions, this provides a window of opportunity to ensure that laws, policies and plans recognise and address the HIV-related needs and rights of people with disabilities.

All three of the African human rights charters contain provisions on disability which can be used to protect rights relating to disability and HIV. It is, therefore, important not only that those countries that have not yet ratified them, do so immediately, but also that their provisions are adequately implemented. The Maputo Protocol is a particularly important tool to protect the rights of women and girls with disabilities, as it contains broad provisions on reproductive health, HIV and gender based violence, and it places specific obligations on governments to take steps to protect these rights. The links between sexual violence and HIV have been recognised for some time. Increasingly, the link between reproductive rights and HIV have also become clear. Without protection of their human rights, including their reproductive rights, the ability of women with disabilities to protect themselves from HIV infection will inevitably be significantly limited: they may not have access to adequate and accessible information about HIV and available services or their access to adequate and accessible health care to prevent and treat HIV and AIDS may be limited.

A number of countries in ESA show evidence of disability rights protection within their national constitutional framework and also within dedicated disability laws and policies, protecting against discrimination. Additionally, a number of HIV and AIDS plans in the region are beginning to reflect people with disabilities as a vulnerable population. However, it is critical that countries review their existing legislative and policy framework to ensure that it is consistent with the provisions of the CRPD and, furthermore, that they ensure that these rights are translated into meaningful rights and responses in relation to HIV and AIDS.

4.1 Recommendations

Implementation by Duty Bearers

- Immediately ratify the Convention on the Rights of Persons with Disabilities
- Ratify the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, if this has not yet been done. This Protocol contains the most explicit articulation of women's rights, including provisions protecting women from HIV and women with disabilities.
- Ratify the African Charter on the Rights and Welfare of the Child.

- Take all necessary steps to domesticate international and regional commitments relating to disability.
- Work towards the main streaming of disability in all Millennium Development Goals processes.
- Develop implementation strategies to support the implementation of international and regional commitments by all key sectors.

Research and Awareness-Raising

- Develop a clearer understanding of the inter-relationships between HIV and disability, including disability and vulnerability to HIV, incidence and prevalence of HIV among people with disabilities, the impact of HIV on people with disabilities, the disabling impact of HIV and other inter-relationships.
- Increase awareness of the links between disability and HIV, and how the domestication of international and regional commitments can protect people with disabilities in the context of HIV and AIDS.
- Advocate for integration of disability and HIV issues in national law, policies and plans relevant to disability and HIV, including those that impact on women with disabilities.
- Promote research on all aspects of disability, HIV and AIDS.
- Advocate for implementation of existing laws, policies and plans that facilitate the participation and representation of people with disabilities, including through the provision of accessible information.
- Collate and disseminate good practices on disability, HIV and AIDS in ESA.

Enforcement and Accountability

- Advocate for increased transparency and accountability at national level on international and regional commitments, including plans and timetables for ratification, progress towards full domestication and details of reports and reporting requirements to treaty monitoring bodies. Advocate for stronger penalties within disability legislation.
- Advocate for enhanced access to legal support services for persons with disabilities to ensure that they are able to claim and enforce their rights.

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