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## Africa at Crossroads: The United Nations Convention on the Rights of Persons with Disabilities

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# **AFRICA AT CROSSROADS: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES**

LOUIS O. OYARO \*

I. INTRODUCTION.....	348
II. BACKGROUND .....	351
A. DISABILITY TRENDS IN AFRICA .....	351
III. ASSESSING EXISTING AFRICAN REGIONAL HUMAN RIGHTS FRAMEWORK RELATED TO DISABILITY .....	353
A. LEGAL FRAMEWORK.....	353
B. INSTITUTIONAL FRAMEWORK.....	356
III. WHY THEN IS THERE A NEED FOR AN AFRICAN DISABILITY PROTOCOL?.....	360
IV. REASONS FOR PRIORITIZING OF THE CRPD .....	362
V. LESSONS FROM THE AFRICAN DECADE FOR PERSONS WITH DISABILITIES.....	369
VI. LESSONS FROM THE ORGANIZATION OF AMERICAN STATES .....	372
VIII. LESSONS FROM THE EUROPEAN UNION.....	374

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IX. CONCLUSION .....	376
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## I. INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) and its Optional Protocol were adopted by the U.N. General Assembly on December 13, 2006 and came into force on May 3, 2008.<sup>1</sup> This followed General Resolution 56/168 on December 1, 2001 that established an Ad Hoc Committee to consider proposals for a comprehensive and integral international convention to promote and protect the rights of persons with disabilities based on the holistic principles of social development, human rights, and non-discrimination.<sup>2</sup> The Committee held eight sessions in total, the last of which was on December 5, 2006 and completed the drafting process of the CRPD and its Optional Protocol, the first of its kind. On the first day of enactment, the Convention and its Optional Protocol garnered a record of eighty-two and forty-four signatories, respectively.<sup>3</sup> Currently, 147 U.N. member states have ratified the Convention. Of these, ninety-two States have signed the Optional Protocol.<sup>4</sup>

The CRPD was based on eight guiding principles: respect for inherent dignity and individual autonomy; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for the evolving capacities of children with disabilities; and respect for the right of

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1. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD]; *Landmark UN Treaty on Rights of Persons with Disabilities Enters into Force*, U.N. NEWS CENTRE (May 3, 2008), <http://www.un.org/apps/news/story.asp?NewsID=26554#VGzGqW1jJKl>.

2. See G.A. Res. 56/168, ¶ 1, U.N. Doc. A/RES/56/168 (Dec. 19, 2001).

3. Arlene S. Kanter, *The Promise and Challenges of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287, 288 (2007) [hereinafter Kanter, *Promise and Challenges of the CRPD*].

4. *CRPD and Optional Protocol Signatures and Ratifications*, UNITED NATIONS (July 8, 2014), <http://www.un.org/disabilities/documents/maps/enablemap.jpg>.

children with disabilities to preserve their identities.<sup>5</sup> The text of the Convention expanded the scope of the human rights based approach by explicitly applying it to persons with disabilities.<sup>6</sup> The Convention signaled a move away from the singular impairment based medical model toward an empowering, outward looking social model of disability.<sup>7</sup>

Meanwhile, during its first Ministerial Conference on Human Rights in May 2003, the African Union (“AU”) urged member states to develop a protocol on the rights of people with disabilities, among other matters.<sup>8</sup> Although it took awhile, the African Commission on Human and People’s Rights (“Commission”) transformed the Focal Point on the Rights of Older Persons into a combined Working Group on the Rights of Older Persons and People with Disability in its forty-fifth session in 2009. The Commission tasked the Working Group with drafting a concept paper to provide the group a basis for adopting a draft protocol on persons with disabilities.<sup>9</sup> The Working Group took it a step further and developed and released the Draft Protocol on Ageing and People with Disabilities for review in mid-2010.<sup>10</sup> Human rights experts and organizations such as the Disabled

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5. CRPD, *supra* note 1, pmb1.

6. See Aart Hendriks, *Selected Legislation and Jurisprudence: U.N. Convention on the Right of Persons with Disabilities*, 14 EUR. J. HEALTH L. 273, 277 (2007) (noting that the substantive provisions in the Convention adapted or repeated civil, political, economic, social, and cultural rights enumerated in other human rights treaties).

7. See Kanter, *Promise and Challenges of the CRPD*, *supra* note 3, at 291 (implying that the old medical model of disability resulted in the social stigmatization of persons with disabilities); see also Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 3 (2008) (discussing the Human Rights Commissioner’s claim that the CRPD departed from outdated views of persons with disabilities).

8. *Kigali Declaration, 2003*, AFRICAN COMM’N ON HUMAN & PEOPLES’ RIGHTS ¶ 20, <http://www.achpr.org/instruments/kigali/> (last visited Nov. 12, 2014) [hereinafter *Kigali Declaration*].

9. African Comm’n on Human and Peoples’ Rights, *Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on The Rights of Older Persons and People with Disabilities in Africa*, § a, Res. 45/143 (May 27, 2009), available at <http://www.achpr.org/sessions/45th/resolutions/143/?prn=1>.

10. SECRETARIAT OF THE AFRICAN DECADE OF PERSONS WITH DISABILITIES, *THE ARCHITECTURE FOR AN AFRICAN DISABILITY RIGHTS MECHANISM 2* (2013),

Persons Organizations (“DPOs”) immediately criticized the draft protocol for its non-inclusive conception.<sup>11</sup> As a result, the Working Group began seeking public comments for a new protocol.<sup>12</sup> Nonetheless, the Working Group initiated an Africa-specific protocol for persons with disabilities.<sup>13</sup> Thus, determining the best way to develop African regional disability rights is essential. Is the best solution to develop an African regional disability protocol or is it to prioritize the CRPD?

This article aims to consider the feasibility of developing an independent African disability protocol as compared to prioritizing the CRPD. First, to provide context, the article briefly discusses disability trends in Africa and assesses the sufficiency of the existing legal and institutional African human rights framework on disability. Second, this article critically examines the justifications for an Africa-specific disability protocol compared to the reasons for prioritizing the CRPD. Third, based on this comparison, this article recommends prioritizing the CRPD under the current circumstances. In its discussion, this article considers: how African states were involved in formulating the CRPD; the issues and concerns relating to human rights systems in Africa; issues relating to formulating treaties in Africa; and the efficiency or adequacy of African regional human rights institutions. It also draws comparative lessons from the African Decades for Persons with Disabilities, the Organization of

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available at <http://www.panusp.org/wp-content/uploads/2013/04/Architecture-for-an-African-Disability-Rights-Mechanism.pdf> [hereinafter THE ARCHITECTURE FOR AN AFRICAN DISABILITY RIGHTS MECHANISM].

11. See, e.g., *id.* (stating that the draft protocol was not the product of an “inclusive process” because many advocacy groups for persons with disabilities could not participate in drafting the protocol); Juliet Mureriwa, *Some Reflections on the Draft African Disability Protocol and Socio-Economic Justice for Persons with Disabilities*, 12 ESR REV., no. 3, 2011 at 1 (2011) (criticizing the draft protocol for being a weakened variant of other international disability treaties and accords).

12. See Tobias Pieter van Reenen & Helène Combrinck, *The U.N. Convention on the Rights of Persons with Disabilities in Africa: Progress After 5 Years*, 14 SUR – INT’L J. ON HUM RTS. 133, 141 (2011) (discussing how the original draft was withdrawn by 2011); *Comments Invited on Draft Protocol on the Rights of Persons with Disabilities in Africa*, AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS (March 14, 2014), <http://www.achpr.org/news/2014/04/d121>.

13. See, e.g., van Reenen & Combrinck, *supra* note 12, at 141 (noting that, as of 2011, the Working Group had withdrawn the draft protocol and had planned further consultation).

American States (“OAS”), and the European Union (“E.U.”).

## II. BACKGROUND

### A. DISABILITY TRENDS IN AFRICA

The African Disability Architecture estimates that people with disabilities constitute about ten percent of Africa’s total population.<sup>14</sup> This figure, however, does not sufficiently reflect the prevalence of disability in the region, and evidence suggests that prevalence rates are higher than actually reported. Comprehensive statistics on the prevalence of disability in Africa are still small and growing.<sup>15</sup>

According to the 2011 World Health Organization survey, the rate of disability in high-income countries is approximately 11.8 percent compared to 18 percent for low-income countries.<sup>16</sup> The survey followed an International Classification of Functionality model to identify disability and its model survey of living conditions in Zambia suggests that the prevalence of disabilities could be much higher throughout Africa than originally estimated.<sup>17</sup> The survey was conducted from a representative sample of 28,010 individuals from nine provinces and over 5,000 households.<sup>18</sup> The survey concludes that 3,090 participants, representing eleven percent of the sample, had a disability.<sup>19</sup> This estimate reflected a significant disparity

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14. THE ARCHITECTURE FOR AN AFRICAN DISABILITY RIGHTS MECHANISM, *supra* note 10, at 11.

15. See Sophie Mitra et al., *Disability and Poverty in Developing Countries: A Snapshot from the World Health Survey* i, 4 (World Bank Soc. Protection & Labor, SP Discussion Paper No. 1109, 2011) (arguing that it is difficult to draw conclusions about any correlation between poverty and disability, as disabilities are not “readily identifiable attribute[s]” like gender or age, and thus defy easy study). *But see Disability News – Africa*, DISABLED WORLD, <http://www.disabled-world.com/news/africa/> (last visited Oct. 28, 2014) (noting that disabled people constitute ten percent of the general African population and as much as twenty percent of the poor).

16. WORLD HEALTH ORG. & WORLD BANK, WORLD REPORT ON DISABILITY 25, 27 (2011), available at [http://www.who.int/disabilities/world\\_report/2011/report.pdf](http://www.who.int/disabilities/world_report/2011/report.pdf) [hereinafter World Report on Disability].

17. See generally Mitchell E. Loeb et al., *Approaching the Measurement of Disability Prevalence: The Case of Zambia*, 2 EUR. J. OF DISABILITY RES. 32, 36-38 (2008) (discussing how different methods of evaluating the severity or presence of disabilities can have varying results).

18. *Id.* at 37.

19. *Id.*

between the model survey and the Zambia National Census in 2000, which adopted the classic impairment based model of identifying disability, that reported a 2.7 percent prevalence rate of persons with disabilities.<sup>20</sup> Loeb suggests that such narrow, limited, and inconsistent definitions of disability coupled with relatively poor methods of data collection explain some of the low trends of disability reporting in the region.<sup>21</sup> Moreover, according to a U.N. Statistics Division Workshop Report on Africa, accurate data is crucial for national disability programming.<sup>22</sup> The Report states, “[i]n general, lack of accurate statistics on disability continues to obscure the situation pertaining to disability and the magnitude of the problem . . . [and] [l]ack of relevant, accurate and useful statistics affects the ability of many countries in Africa to plan programmes for persons with disabilities.”<sup>23</sup>

In terms of living standards, a majority of persons with disabilities in Africa live in dire conditions.<sup>24</sup> The reality is that persons with disabilities in Southern Africa are among the “the poorest of the poor.”<sup>25</sup> Persons with disabilities have limited access to education, employment, and general livelihood because of structural and other social barriers.<sup>26</sup> To put this into context, the World Bank estimates that Sub-Saharan Africa has one of the lowest regional gross per capita of \$1,176,<sup>27</sup> with 48.5 percent of the population living on less

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20. *Id.* at 38.

21. *Id.* at 33 (“[The] variation [in prevalence rates] is the result of several mitigating factors, among them: the use of difference definitions of disability, different methodologies of data collection, and variation in the quality of the survey design.”).

22. See *Workshop on Disability Statistics for Africa*, UNITED NATIONS STATISTICS DIV. 5-6 (Sept. 10-14, 2001), [https://unstats.un.org/unsd/demographic/meetings/wshops/disab/Africa\\_rep.pdf](https://unstats.un.org/unsd/demographic/meetings/wshops/disab/Africa_rep.pdf). (arguing that a lack of accurate data prevents African nations from formulating and establishing institutional support for persons with disabilities).

23. *Id.*

24. See, e.g., Japhet Biegon, *The Promotion and Protection of Disability Rights in the African Human Rights System*, in ASPECTS OF DISABILITY LAW IN AFRICA 53, 53 (Ilze Grobbelaar-du Plessis & Tobias van Reenen eds., 2011) (discussing how persons with disabilities have limited access to education and employment and suffer stigmatization and discrimination).

25. *Id.* at 53.

26. *Id.* at xxv.

27. *World Development Indicators*, WORLD BANK 22 (2012), <http://data.worldbank.org/sites/default/files/wdi-2012-ebook.pdf>.

than \$1.25 a day.<sup>28</sup> Against this backdrop and in light of high levels of cultural stigmatization, persons with disabilities are more likely to become impoverished and are more vulnerable to exploitation, violation, and harassment.<sup>29</sup> As such, poverty is not merely a challenge for persons with disabilities, but may also exacerbate their respective maladies.<sup>30</sup> Other contributing factors like poor health, limited support facilities, high rates of disease, political instability, conflict, corruption, and a strong culture of dependency have combined to aggravate disability in the continent.<sup>31</sup>

### III. ASSESSING EXISTING AFRICAN REGIONAL HUMAN RIGHTS FRAMEWORK RELATED TO DISABILITY

#### A. LEGAL FRAMEWORK

Existing African human rights provisions on disability are not in one treaty but are scattered in general human rights treaties and specific treaties for particular groups where disability intersects. From the general human rights perspective, the African Charter is the primary African regional human rights instrument.<sup>32</sup> The Charter

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28. U.N. DEV. PROGRAMME, UNDP IN SUB-SAHARAN AFRICA: SUPPORTING A REGION ON THE MOVE 9 (2013), available at <http://www.er.undp.org/content/dam/eritrea/docs/UNDP%20Africa%20Brochure%202013%20En.pdf>.

29. See Charles Lwanga-Ntale, Chronic Poverty and Disability in Uganda 1 (Apr. 7, 2003) (unpublished article), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1322&context=gladnetcollect>.

30. See *id.* (discussing the dominant role the unskilled labor market plays in most African countries and demonstrating how persons with disabilities are almost necessarily precluded from finding employment).

31. See Sathiya Susuman, Renette Blignaut & Siaka Lougue, *Understanding Issues of People Living with Disabilities in South Africa*, 49 J. ASIAN & AFRICAN STUD. 559, 562-63 (2014) (using surveys of persons with disabilities in South Africa to show that such persons are more likely to suffer further illness and injury due in part to poor work and housing conditions); cf. Ermien van Pletzen, Margie Booyens & Theresa Lorenzo, *An Exploratory Analysis of Community-Based Disability Workers' Potential to Alleviate Poverty and Promote Social Inclusion of People with Disabilities in Three Southern African Countries*, 29 DISABILITY & SOC'Y 1524, 1535 (2014) (pointing out, that among community-based disability workers surveyed in several Southern African countries, there was an apparent institutional bias against promoting the social inclusion of persons with disabilities); WORLD REPORT ON DISABILITY, *supra* note 16, at 6 (highlighting the negative impact of cultural stereotypes and stigmas on disabled persons).

32. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M.

provides for universal human rights, and article 2 entitles every person to enjoy “the rights and freedoms recognized and guaranteed in the present Charter without distinction of any such kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or *other status*.”<sup>33</sup>

Though article 2 does not specifically mention disability, the inclusive nature of the text, by using the phrases “such as” and “other status,” suggests a more objective rather than subjective standard that includes disability. To promote a substantive approach to equality for persons with disabilities, the Charter provides for the universal right to the best attainable physical and mental health and special protections tailored to the specific “physical or moral needs” of the elderly and disabled.<sup>34</sup> Therefore, States are mandated to take positive steps to ensure persons with disabilities have the capacity to enjoy the rights guaranteed under the Charter.

Article 66 of the Charter provides the legal basis for adopting protocols for fully realizing human rights.<sup>35</sup> Based on this provision, the AU proposed the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa.<sup>36</sup> The AU adopted this protocol in reaction to the inadequacies of its U.N. equivalent, the Convention on the Elimination of all Forms of Violation Against Women (“CEDAW”).<sup>37</sup> Conspicuously, unlike

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59 (1982) (entered into force Oct. 21, 1986).

33. *Id.* art. 2 (emphasis added).

34. *Id.* art. 16, 18(4).

35. *See id.* art. 66 (“Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.”).

36. *See* AFRICAN COMM’N ON HUMAN AND PEOPLES’ RIGHTS, PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA 1 (2003), available at [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf) [hereinafter PROTOCOL TO AFRICAN CHARTER ON RIGHTS OF WOMEN] (citing article 66 of the African Charter on Human and Peoples’ Rights as justifying the adoption of further protocols).

37. For example, scholars like Johanna Bond argue that many in Africa saw CEDAW as a remnant of colonial thinking. Bond argues that CEDAW lacked credibility because it gave little consideration to the traditional cultural roles women played in African societies. By comparison, the Protocol enjoyed a warmer reception, as it was seen as an instrument tailored for Africans by Africans. Johanna E. Bond, *Gender, Discourse, and Customary Law in Africa*, 83 S. CAL. L. REV. 509, 519-20, 539-40 (2010). *Contra* Biegon, *supra* note 24, at 64 (arguing the Protocol to African Charter on Rights of Women was not a direct response to

CEDAW, the African Women's Protocol specifically provides for the rights of women with disabilities.<sup>38</sup> Article 23(a) and (b) of the Protocol provides that state parties undertake to:

(a) 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; [and]

(b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.<sup>39</sup>

The African Charter on the Rights and Welfare of the Child is another example of a regional treaty addressing the rights of persons with disabilities. Article 13 provides that parties must provide "special measures of protection" for handicapped children.<sup>40</sup> The article requires appropriate measures to ensure promotion of dignity, self-reliance, and full participation in the society for handicapped children.<sup>41</sup> It also mandates accessibility in public places.<sup>42</sup>

Lastly, the African Youth Charter includes provisions for persons with disabilities. Article 24(1) of the Youth Charter provides that: "State Parties recognise the right of mentally and physically challenged youth to special care."<sup>43</sup> The provision seeks to ensure access to education, training, employment, sport, physical education and cultural and recreational activities and, just like the Charter on the Child, calls on state parties to improve accessibility.<sup>44</sup>

Despite the provisions on disability, the African treaties discussed above adopt, a rudimentary medical model approach to disability that

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CEDAWs insufficiencies, but rather a general remedy to the shortcomings of regional failures to protect women's rights).

38. PROTOCOL TO AFRICAN CHARTER ON RIGHTS OF WOMEN, *supra* note 36, art. 23.

39. *Id.*

40. African Charter on the Rights and Welfare of the Child, 1 AFR. Y.B INT'L L. 295, 299 (1993) [hereinafter African Charter on the Child].

41. *Id.*

42. *Id.* art. 13(3).

43. AFRICAN COMM'N ON HUMAN AND PEOPLES' RIGHTS, AFRICAN YOUTH CHARTER 18 (2009), available at [http://www.au.int/en/sites/default/files/AFRICAN\\_YOUTH\\_CHARTER.pdf](http://www.au.int/en/sites/default/files/AFRICAN_YOUTH_CHARTER.pdf).

44. *Id.* art. 24(a)-(b).

singularly attributes disability to impairment without considering social and environmental factors. Using phrases such as “handicapped children” and “mentally and physically challenged youths” demonstrate this.<sup>45</sup> Therefore, it is not surprising that the provisions vindicate solutions relating to “special care” and “special measures of protection” almost to the exclusion of inherent rights.<sup>46</sup> In this way, existing African regional instruments on disability fall short of international human rights standards as prescribed in the CRPD that adopt a more social, rights-based approach to disability.

### B. INSTITUTIONAL FRAMEWORK

Institutionally, African human rights institutions may be divided into two categories: first, those that are aligned within the AU framework and, second, those that are created by treaties. With respect to the first category, the Constitutive Act of the AU provides for the legitimacy of AU organs to advance human rights, where, among its objectives, it provides that member states shall “promote and protect human and people’s rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant instruments.”<sup>47</sup> As such, organs within the AU, such as the assembly of heads of state, the executive council, the pan African parliament, and specialized commissions are called upon, in their activities, and by their own volition, to meet their human rights objectives.<sup>48</sup> Notable examples of the AU participating in protecting the rights of persons with disabilities include: the recommendation of the proclamation of the first and second Africa decade for persons with disability; the First Ordinary AU Executive Council’s adoption of the Continental Plan of Action for persons with disabilities; the AU

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45. African Charter of the Child, *supra* note 40, arts. 13, 24.

46. LAWRENCE M. MUTE, CONCEPT ON THE LIST OF ISSUES TO GUIDE PREPARATION OF A PROTOCOL ON THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA 12 (Aug. 24, 2012) (unpublished manuscript) (describing how instruments promoting disabled persons’ rights emphasize protection measures following a charity model of disability); *see also* African Charter on Human and People’s Rights, *supra* note 32 at 67-68 (entering into force on October 21, 1986).

47. Constitutive Act of the African Union art. 3, July 11, 2000, 2158 U.N.T.S. 3.

48. *See, e.g.*, van Reenen & Combrinck, *supra* note 12, at 135 (discussing how the Constitutive Act guides the AU to build intergovernmental partnerships for protecting human rights).

Ministerial Conference recommendation for the development of an African Disability protocol; and the establishment of the Secretariat of the African Decade for Persons with Disabilities.<sup>49</sup>

Human rights institutions formed by treaties include: the African Commission, the Committee of Experts on the Rights and Welfare of the Child, and the African Court of Human Rights.<sup>50</sup> All the above bodies have eleven members and, although they are financed by and ultimately report to the AU, they act independent of the AU.<sup>51</sup> Whereas the African Commission and Committee on the Child are quasi-judicial bodies, the African Court of Human and People's Rights is a full judicial organ.<sup>52</sup> Unfortunately, between these judicial mechanisms, only the African Commission has heard a disability related matter: the case of *Purohit & Moore v. Gambia*.<sup>53</sup> The Committee on the Child and the African Court have done very little to discharge their roles under their respective treaties.<sup>54</sup> This may be

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49. See, e.g., *id.* at 138 (“The goal of the African Decade is the full participation, equality and empowerment of people with disabilities.”).

50. See African Charter on Human and People's Rights, *supra* note 32, at art. 30 (establishing the African Commission on Human and People's Rights); African Charter on the Child, *supra* note 40, at 306 (establishing the African Committee of Experts on the Rights and Welfare of the Child); Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court of Human and Peoples' Rights art. 1, 6 AFR. Y.B. INT'L L. 419 (1998) [hereinafter Protocol to the African Charter, Establishment] (establishing the African Court of Human and People's Rights).

51. Protocol to the African Charter, Establishment, *supra* note 50, at 422 (setting the limit of the African Court of Human and People's Rights at eleven judges); African Charter on Human and People's Rights, *supra* note 32, at art. 64.

52. Compare Protocol to the African Charter, Establishment, *supra* note 50, at 420, 425 (establishing the Court on Human and People's Rights, granting jurisdiction over all cases pertaining to the Charter, and providing the court the power to grant final judgments), with African Charter on Human and People's Rights, *supra* note 32, at art. 65 (empowering the Commission to present “rules” or “principles” with the purpose of “solving legal problems”).

53. *Purohit & Moore v. Gambia, African Commission on Human and People's Rights, Comm. No. 241/2001 (2003)*, AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS ¶¶ 3-4, [http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33\\_241\\_01\\_eng.pdf](http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf) (last visited Nov. 10, 2014) [hereinafter *Purhohit & Moore v. Gambia*] (ruling that the Lunatics Detention Act of Gambia that legalized the arrest, detention, and forced treatment of persons declared to be of unsound mind was contrary to the provisions of the African Charter).

54. See Biegon, *supra* note 24, at 69 (“The African Children's Committee and the African Court have just recently started to operate and they have, as such, done little to discharge their overall mandate let alone focus on disability rights.”).

partly because most States have not ratified the treaties and the few that have are not complying. Indeed, as of January 2015, only twenty-seven countries out of fifty-four African states have ratified the Protocol establishing the African Court of Human and Peoples' Rights, only sixteen have ratified the Protocol on the Statute of the African Court of Justice and only five have ratified the Protocol on the Statute of the African Court of Justice and Human Rights.<sup>55</sup>

Despite existing for over twenty-eight years and playing a comparatively large role in regional human rights, the African Commission only recently started to include disability in its agenda. In 2009, the African Commission established a working group for older persons that was later amended to include persons with disability.<sup>56</sup> This development was a result of the Ministerial Conference's recommendation to develop a regional protocol for persons with disability and the elderly.<sup>57</sup> This Working Group effectively developed the first draft of the regional disability protocol.<sup>58</sup> Despite the draft not seeing the light of day, the working group is currently drafting another protocol.<sup>59</sup> In terms of its guiding roles, the African Commission has not yet made a general comment

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55. *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, <http://www.achpr.org/instruments/court-establishment/ratification/> (last visited Nov. 16, 2014).

56. African Comm'n on Human & Peoples' Rights, *Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa*, at 2, ACHPR/Res143(XXXV)09 (May 13-27, 2009), available at <http://old.achpr.org/english/resolutions/Resolution%20on%20WGOP.pdf>; see also YEUNG KAM JOHN YEUNG SIK YUEN, REPORT OF THE CHAIRPERSON OF THE WORKING GROUP ON THE RIGHTS OF OLDER PERSONS AND PEOPLE WITH DISABILITIES IN AFRICA 3 (2012), available at [http://www.achpr.org/files/sessions/52nd/inter-act-reps/179/activity\\_report\\_older\\_persons\\_eng.pdf](http://www.achpr.org/files/sessions/52nd/inter-act-reps/179/activity_report_older_persons_eng.pdf) (discussing how the working group discovered that it needed an explicit Protocol uniquely focused on the rights of persons with disabilities).

57. See *Kigali Declaration*, *supra* note 8, at ¶ 20 (including the development of a specific protocol aimed at protecting the disabled and elderly as part of a larger human rights regime).

58. YUEN, *supra* note 56, at 3.

59. See *Comments Invited on Draft Protocol on the Rights of Persons with Disabilities in Africa*, *supra* note 12 (indicating that the AU is currently accepting public comments on the most recent iteration of the protocol on the rights of persons with disabilities and the elderly).

on disability.<sup>60</sup> In addition, the Commission has been silent on enforcing member states' reporting obligations under article 18 of the African Charter on the Protection of Persons with Disabilities.<sup>61</sup>

The ineffectiveness of African treaty human rights organs has been compounded by persistent lack of institutional coordination, proliferation, limited financing, and human resource incapacities. A recent report described the general African human rights institutional framework as "a system lacking in coherence, composed of institutions with overlapping and sometimes conflicting mandates and functions."<sup>62</sup> These institutions compete for limited AU resources and are often "underfunded and understaffed."<sup>63</sup>

To overcome weaknesses in structure and substance of human rights for persons with disabilities, the political will of African states and the AU as a whole is key. Unfortunately, current efforts have yet to acquire regional momentum.<sup>64</sup> For example, in 2008, the Protocol of the African Court of Human Rights and Justice was adopted to improve coordination and reduce costs by amalgamating the African Court of Human and People's Rights and the African Court of Justice into one court; however, only five countries have ratified the protocol and it will not come into force unless fifteen ratify it.<sup>65</sup>

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60. See *Purhohit & Moore v. Gambia*, *supra* note 53 (commenting that the term "disability" can have a wide range of meanings); Biegon, *supra* note 24, at 163 (asserting that there is no generally accepted definition of "disability").

61. See Biegon, *supra* note 24 at 70 (noting that many African states have not upheld their obligations under article 18(4)).

62. *Id.* at 69.

63. *Id.*

64. See GEORGE MUKUNDI WACHIRA, MINORITY RIGHTS GRP. INT'L, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: TEN YEARS ON AND STILL NO JUSTICE 11, 15 (2008), available at <http://www.refworld.org/pdfid/48e4763c2.pdf> (discussing how problems like bureaucratic inefficiency and institutional competition between courts undermined some African regional human rights courts).

65. *List of Countries which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights*, AFRICAN UNION (Mar. 1, 2013), <http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf>; see also WACHIRA, *supra* note 64, at 15 (discussing how other regional courts like the Court of Justice of the Economic Community of West African States, East African Court of Justice, and Tribunal of Southern African Development Community are hobbled by jurisdictional overlap).

The combination of these factors has worked to undermine the functioning and efficiency of the AU human rights institutional framework. In terms of disability, the fact that only one related case has been handled is a testament to the low awareness of existing institutions and their role in disability human rights. Also, the isolated drafting of the first disability protocol by the African Commission Working Group may illustrate the bridge between African human rights institutions, disabled people's organizations, civil society, States, and individuals, including disabled persons.

### III. WHY THEN IS THERE A NEED FOR AN AFRICAN DISABILITY PROTOCOL?

The main argument for adopting the African Protocol is that disability rights in Africa should be seen through an African-specific context. The protocol should address concerns, such as poverty, HIV/AIDS, conflicts, resource scarcity, and low levels of development, all of which are pervasive in the region. During the AU Ministerial Conference in Kigali, member states reiterated that HIV/AIDS, malaria, and tuberculosis constitute an obstacle in enjoying economic, social, and cultural rights.<sup>66</sup> As a result, member states tasked the African Commission to devise a disability protocol for protecting persons with disabilities in Africa.<sup>67</sup> The Conference also called on States to undertake steps to prevent armed conflict and to provide programs for persons with disabilities in armed conflict.<sup>68</sup>

The African states' contribution during the CRPD Ad Hoc Committee sessions illustrates the regional concerns outlined above. During the negotiations, African states, as a group and individually, advanced concerns relating to: the discrimination of persons with disabilities; the intersection between poverty and discrimination; the effect of harmful traditional practices; the role of families and caretakers; abduction during conflict; forced abortions; sign

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66. See *Kigali Declaration*, *supra* note 8, at ¶¶ 21-22 (voicing concern over the infection rate of HIV/AIDS and affirming that it is a human rights imperative to combat the disease from further spreading).

67. *Id.* ¶ 20.

68. See *id.* ¶¶ 1, 6, 11, 17 (noting that other specific regional human rights related issues that the Conference highlighted as needing human rights interventions included: genocide, forced displacement and refugees, and limited resources of the AU).

language; children with disabilities; the need for international cooperation; availability and affordability of assistive devices; the remodeling of existing buildings and structures to suit persons with disabilities; rehabilitation of persons with disabilities in confinement; and the importance of community-based rehabilitation.<sup>69</sup> The final text of the CRPD addressed some of these concerns and left out or was silent on others.<sup>70</sup> For that reason, an African regional treaty is key to addressing these specific issues.

Indeed, previous examples of adopting African specific instruments in the face of existing international conventions galvanized the call for an independent African Protocol on disability. The AU modeled the African Charter on the Rights and Welfare of the Child (“African Charter on the Child”) after the U.N. Convention on the Rights of the Child (“CRC”).<sup>71</sup> The African Charter on the Child was a reaction to the CRC failing to address specific needs and interests of children in Africa.<sup>72</sup> The African Charter on the Child address concerns and include provisions that did not appear in the CRC, such as the effect of harmful social and cultural practices

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69. Cf. *Comments Invited on Draft Protocol on the Rights of Persons with Disabilities in Africa*, *supra* note 12 (listing the various provisions the drafters implicitly felt necessary to include even in light of the CRPD).

70. See THE ARCHITECTURE FOR AN AFRICAN DISABILITY RIGHTS MECHANISM, *supra* note 10, at 19 (discussing how language that would frame rights as entitling persons to particular legal classifications rather than directly to engage in certain acts); MUTE, *supra* note 46, 14-18 (excluding issues relating to the family and caretakers to persons with disabilities); cf. THOKO KAIME, THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD: A SOCIO-LEGAL PERSPECTIVE 2-3 (2009) (arguing, that in the case of the U.N. Convention on the Rights of the Child, the drafting process ignored African concerns).

71. See African Charter on the Child, *supra* note 40, pmb. (reaffirming the rights of children as articulated by CRC); see also, e.g., Michael L. Perlin, “Yonder Stands Your Orphan with His Gun”: *The International Human Right and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH. L. REV. 301, 323 (2013) (pointing out that the African Charter on the Child and CRC both prohibit applying capital punishment to minors). See generally Convention on the Rights of the Child, G.A. Res. 44/25, pmb., U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC] (declaring that States should treat children in a way that comports with the U.N. Charter and that signatories should provide all “necessary protection and assistance” such that minors can become fully involved in society upon reaching adulthood).

72. Cf. KAIME, *supra* note 70, at 2-3 (arguing that the CRC is steeped in an overly “Western” perspective that marginalizes African culture, prompting the AU to adopt the more culturally sensitive African Charter on the Child).

against children, and illustrate the specificity of certain African concerns.<sup>73</sup> In addition, the wording of the provisions related to the role of parents, children in armed conflict, and treatment of child refugees in the African instrument has a practical application to human rights in an African setting.<sup>74</sup>

Based on the forgoing reasons, a specially doctored regional instrument would address unique regional issues and reaffirm the commitment to promoting human rights for a group that has historically faced and continues to face extreme discrimination and violation. According to Lawrence Mute, a member of the African Commission Working Group on the Rights of Older Persons and Persons with Disabilities, litigating and lobbying on the rights of persons with disabilities would be easier if Africa has its own instrument on the rights of persons with disabilities.<sup>75</sup>

#### IV. REASONS FOR PRIORITIZING OF THE CRPD

Despite the position above, it is crucial not to downplay the role of African states in the CRPD drafting process. African states, individually and as a group, were actively engaged from the onset. The Ad Hoc Committee was established to lead discussions for developing the CRPD and held eight inclusive and interactive sessions. For example, during the first session, a South African delegate was elected as one of the three vice chairpersons of the Committee, a position she held throughout the life of the

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73. Compare African Charter on the Child, *supra* note 40, at art. 21 (“State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child”), with KAIME, *supra* note 70 (arguing that the CRC is insensitive to cultural considerations). *But see* CRC, *supra* note 71, art. 30 (“[A] child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess or practice his or her own religion”).

74. *Cf.* Convention on the Elimination of all Forms of Discrimination against Women, G.A. Res. 34/180, *pmb.*, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) (focusing on eliminating all forms discrimination against women and adopting the convention to address Africa-specific concerns much like the African Charter on the Child).

75. MUTE, *supra* note 46; *see also* Comments Invited on Draft Protocol on the Rights of Persons with Disabilities in Africa, *supra* note 12 (articulating a regional protocol for protecting the rights of persons with disabilities in Africa).

Committee.<sup>76</sup> In the second session, the Ad Hoc Committee established a Working Group composed of twenty-seven government representatives that would develop the foundational texts for CRPD's negotiations.<sup>77</sup> This Working Group consisted of seven African countries: Cameroun, Comoros, Mali, Morocco, Sierra Leone, South Africa, and Uganda.<sup>78</sup> Africa has one of the most representatives in this working group with seven representatives.<sup>79</sup>

Throughout the drafting process, the Ad Hoc Committee adopted an open-ended method by welcoming contributions, concerns, and comments from other member states, regional representatives, national human rights institutions, and disability civil society organizations.<sup>80</sup> In October 2004, to advance African concerns, members consulted other sub-regional members in Burkina Faso to establish a collective position on issues to present during the Committee sessions.<sup>81</sup> Burkina Faso submitted this report to the Ad Hoc Committee to discuss during its fifth session.<sup>82</sup> Individual African states were also able to raise country specific concerns during the Committee sessions.<sup>83</sup> As a result, the Convention

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76. THE ARCHITECTURE FOR AN AFRICAN DISABILITY RIGHTS MECHANISM, *supra* note 10, at 14.

77. *Id.*

78. *Id.* at 16.

79. *Id.* at 14 (noting that Asia also has seven representatives in the Working Group).

80. See U.N. Secretary-General, *Final Report 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 on its eighth session*, ¶ 2, transmitted by Note of the Secretary-General, U.N. Doc. A/61/611 (Dec. 6, 2006) (establishing the drafting group, in part, to reconcile six competing translations of the Convention and its Optional Protocol, for ensuring and maintaining harmony in its interpretation).

81. See *Daily Summary of Discussion at the Third Session 4 June 2004*, UNITED NATIONS (June 4, 2004), <http://www.un.org/esa/socdev/enable/rights/ahc3sum4june.htm>.

82. Permanent Mission of Burkina Faso to the United Nations, *Summary Proceedings of the Subregional Consultation on the Draft Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Held at Ouagadougou from 27 to 29 October 2004*, 1, U.N. Doc. A/AC.265/2005/1 (Feb. 1, 2005).

83. See *Daily Summary of Discussion at the Third Session 4 June 2004*, UNITED NATIONS (June 4, 2004), <http://www.un.org/esa/socdev/enable/rights/ahc3sum4june.htm> (hearing the opinions of South Africa, Sierra Leone, Burkina Faso, Eritrea, Zambia, and other African countries with regards to the CRPD draft).

reflected a host of African issues that were raised during discussions in its final text.<sup>84</sup> Therefore, arguing that international instruments insufficiently address African-specific because of low participation and inclusion of African states fails to justify adopting an independent regional disability treaty. The CRPD drafting process was “the most inclusive in [the United Nation]’s history” and African regional issues were fully articulated, unlike any other convention.<sup>85</sup>

CRPD provisions did not include all the African concerns. Issues, such as the impact of HIV/AIDS, malaria, and harmful cultural practices on persons with disabilities, were left out of the final text.<sup>86</sup> Nonetheless, the fact that the CRPD does not address such concerns does not mean it is inadequate and cannot justify an independent parallel regional treaty.<sup>87</sup> The CRPD sets standards and marks a significant shift in approaching disability from an impairment-based focus to an outward looking societal model. Its provisions have the potential to comprehensively realize human rights for persons with disabilities. In addition, the two main institutions created by the Convention—Conference of State Parties and the Committee on the Rights of Persons with Disabilities—provide a mechanism to clarify, expand, and create regional- and state- specific compliance guidelines for the CRPD.<sup>88</sup>

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84. See MUTE, *supra* note 46, at 14-18 (describing the positions articulated by African states during the Ad Hoc Committee: Uganda raised the protection of persons with disabilities during armed conflict and humanitarian emergencies; Sierra Leone raised the provision on children with disabilities; and Uganda raised the protection of persons with disabilities from forced abortion); van Reenen & Combrinck, *supra* note 12, at 142-43 (stating that, while the overall framework of the CRPD was not suited to the interests of African nations, the CRPD clearly reflects the interests of various African delegates who sought to protect the rights of persons with disabilities by tying such protections to measures to ameliorate poverty).

85. Kanter, *Promise and Challenges of the CRPD*, *supra* note 3, at 294.

86. Sharon Peake, *Meeting Report of the International Policy Dialogue on HIV/AIDS and Disability*, 12 J. INT'L AIDS SOC'Y 27, 28 (2009).

87. See *id.* at 28 (noting that while the CRPD does not explicitly capture the problem of HIV/AIDS infections among persons with disabilities, it is reasonable to read article 25(a) as reaching that condition as it “[p]rovides[s] ersons with disabilities with same range, quality and standard of free or affordable health care and programees as provided to other persons, including in the *areas of sexual and reproduction health*”) (emphasis added).

88. See CRPD, *supra* note 1, arts. 34(1), 34(4), 35(2), 37(1) (establishing the “Committee on the Rights of Persons with Disabilities” to formulate and disseminate compliance guidelines for signatories and basing these guidelines on

Following the adoption of the CRPD and its Optional Protocol, African states unanimously responded positively. On the first day the instruments were open for signature, sixteen African states signed the Convention and ten African states signed the Optional Protocol.<sup>89</sup> Currently, forty-three of the fifty-five African states have signed the CRPD.<sup>90</sup> Of the fifty-four African states, thirty-three have ratified the Convention<sup>91</sup> and twenty-three have signed the Optional Protocol.<sup>92</sup> On the other hand, African state' response to ratifying regional human rights instruments has been glacial.<sup>93</sup> For instance, despite the Ad Hoc Committee urging States that these treaties were important and required immediate ratification, the African Charter on the Rights and Welfare of a Child, which was adopted in 1990, only came into force in November 1999,<sup>94</sup> the African Charter adopted in 1981 only came into force in 1986, the Protocol for the Establishment of the African Court of Human Rights adopted in 1998 only came into force in 2004, and the Protocol to the Establishment of an African Court of Human and People's Rights and Justice that was adopted in 2008 is yet to come into force five

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feedback and information provided by signatories to the CRPD).

89. See *Convention and Optional Protocol Signatures*, UNITED NATIONS, <http://www.un.org/disabilities/countries>.

asp?id=166 (last visited Oct. 28, 2014) (listing the countries that have ratified the CRPD and the dates they have done so); *Signatories of the Convention on the Rights of Persons with Disabilities*, UNITED NATIONS, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en) (last visited Oct. 28, 2014) (listing the signatures from Algeria, Cape Verde, Republic of the Congo, Ethiopia, Gabon, Ghana, Kenya, Liberia, Morocco, Mozambique, Niger, Nigeria, Sierra Leone, South Africa, Sudan, Tunisia, Tanzania, and Uganda).

90. *Convention and Optional Protocol Signatures*, *supra* note 89 (noting that the following African states have not signed the CRPD: Angola, Botswana, Eritrea, Lesotho, Mauritania, Rwanda, São Tomé and Príncipe, Somalia, South Sudan, and Zimbabwe).

91. *Id.* (providing that the following African states did not ratify the CRPD: Botswana, Cameroon, Central African Republic, Chad, Comoros, Eritrea, Gambia, Libya, Madagascar, São Tomé and Príncipe, Somalia, and South Sudan).

92. *Id.* (listing the countries that have not signed the Optional Protocol: Angola, Botswana, Cape Verde, Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Kenya, Lesotho, Libya, Malawi, Mauritania, Morocco, Mozambique, Rwanda, São Tomé and Príncipe, Somalia, South Sudan, Sudan, Tanzania, and Zimbabwe).

93. *Id.*

94. See African Charter on the Child, *supra* note 40, at 295.

years later.<sup>95</sup> These examples demonstrate that drafting a new protocol addressing this issue is likely to delay human rights for persons with disabilities in Africa.<sup>96</sup> Worse still, it is likely to take away the focus and momentum that the CRPD has already realized, as regional initiatives may distract African states that are yet to ratify the U.N. Convention.<sup>97</sup>

Consider the fact that the Conference that conceived of developing an African disability protocol was adopted before the first session of the U.N. Ad Hoc Committee and before the CRPD came into force. As such, concerns expressed in that Conference may have been clarified during CRPD negotiations, which were—unlike any other convention—inclusive in African representation, its issues, and its process. In December 2001, Mexico proposed that the General Assembly establish an Ad Hoc Committee to consider proposals for an international convention on disability, and Mexico's proposal may have influenced the African Conference in 2002, which called for developing an independent disability treaty. This is speculation, at best. What is clear though is that the African Ministerial Conference's proposal came at a time when no international instrument specifically related to disability existed.<sup>98</sup> Since the CRPD entered into force and given its unprecedented inclusive formulation and unanimous ratification, it may be prudent to use mechanisms within the CRPD to address some of the African

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95. African Charter on Human and Peoples' Rights, *supra* note 32, at 245; *see also* Protocol to the African Charter, Establishment, *supra* note 50, at 89 (noting that the treaty, adopted in 1998, would come into force after fifteen different states ratified the protocol).

96. *See, e.g.*, Gerard Quinn, *The United Nations Convention on Rights of Persons with Disabilities: Toward a New International Politics of Disability*, 15 TEX. J. C.L. & C.R. 33, 37 (2009) (postulating that the social marginalization of persons with disabilities makes advocacy on their part extremely difficult).

97. *See* van Reenen & Combrinck, *supra* note 13, at 153 (arguing that historically, regional efforts in Africa to protect the rights of persons with disabilities have thus far only amounted to "benign neglect").

98. *See* Michael Waterstone, *Foreword: The Significance of the United Nations Convention on the Rights of Persons with Disabilities*, 33 LOY. L.A. INT'L & COMP. L. REV. 1, 1-2 (2010) ("Despite arguably being the world's largest minority group, international human rights law has not paid sufficient attention to people with disabilities. Before the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), none of the preceding seven legally enforceable United Nations human rights treaties explicitly protected people with disabilities.").

concerns instead of developing an Africa-specific disability protocol<sup>99</sup>

Another potential point of concern is that the Ministerial Conference adopted the resolution to develop a “protocol” under the African Charter. This proposed protocol initially aimed to protect “the rights of people with disabilities and the elderly.”<sup>100</sup> This creates a few key concerns. First, the protocol would not be an independent treaty but a protocol under the African Charter.<sup>101</sup> As such, under the current structure, its monitoring and implementation would be within the purview of the African Commission, a general human rights body.<sup>102</sup> As discussed earlier, institutions outside of the African Union have performed abysmally in promoting the rights of persons with disabilities, as evidenced by their inactivity towards disability and a regionally low human rights standard for disability. Additionally, the Commission is over-stretched and under-financed to address all human rights guaranteed under the Charter, let alone protect the rights of the entire African continent.<sup>103</sup>

Second, state application of any potential protocol would have to be consistent with the Charter.<sup>104</sup> As discussed earlier, the Charter

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99. See Esmé Grant & Rhonda Neuhaus, *Liberty and Justice for All: The Convention on the Rights of Persons with Disabilities*, 19 ILSA J. INT’L & COMP. L. 347, 351 (2013) (arguing that a crucial component of the CRPD is its Article 34 Committee, an advisory body that disseminates technical information that many countries otherwise would not have access to); Quinn, *supra* note 96, at 37 (claiming that other attempts to ensure the rights of persons with disabilities are fatally flawed by failing to account for the fact that societies often marginalize such people and that the CRPD is unique in addressing this particular problem).

100. *Kigali Declaration*, *supra* note 8, ¶¶ 19-20; African Union Ministerial Conference on Human Rights, May 8, 2003, available at <http://www.achpr.org/instruments/kigali/>.

101. See FATSIAH OUGUERGOUZ, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA* 791 (Hal Sutcliffe trans., 2003) (explaining how the 1998 Ouagadougou Protocol – which established the African Court – is an example of how the African Charter is an evolving instrument).

102. See African Charter on Human and People’s Rights, *supra* note 32, at art. 68 (“Special protocols may, if necessary, supplement the provisions of the present Charter.”).

103. See WACHIRA, *supra* note 64, at 14 (asserting the AU is attempting to consolidate the African Court on Human and Peoples’ Rights and the African Court of Justice to better manage available resources).

104. At the very least, the draft protocol’s current language leaves an open question about whether the medical model the Charter implicitly endorses would

and other African regional human rights instruments problematically adopt a charity medical-based view of disability. For example, article 18(4) of the African Charter provides that “[t]he aged and the disabled shall also have the right to special measures of protection in keeping with their physical and moral needs.”<sup>105</sup> Against this backdrop, it is difficult to envisage a proper and acceptable human rights standard for persons with disabilities under the African Charter, without proposing amendments to its provisions.<sup>106</sup>

Third, the proposal for a protocol under the African Charter reawakens the debate on the visibility of persons with disabilities in international instruments. Focusing on the rights of both the elderly and persons with disabilities would only further blur the purposes of the CRPD. Although the rights of these two groups were eventually separated following the advice of the Working Group on the Elderly and Disabled Persons for individual treaties for both groups, there is still unabated concern about whether African standards adequately articulate a human rights approach to disability.<sup>107</sup> It is therefore crucial that African States prioritize the CRPD to benefit from and realize regional standardization with international disability human rights. This will improve understanding and better inform how to

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control. *Compare* Vienna Convention on the Law of Treaties art. 30(2), May 23, 1969, 1155 U.N.T.S. 331 (“When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”), *with Comments Invited on Draft Protocol on the Rights of Persons with Disabilities in Africa*, *supra* note 12, art. 27 (forbidding the Protocol from affecting “provisions” of the international or domestic laws of potential parties if such laws are “more conducive or favorable” to the rights of persons with disabilities and referring all questions of interpretation to the African Commission pursuant to article 24 of the African Charter). *See generally* African Charter on Human and Peoples’ Rights, *supra* note 32, art. 45 (authorizing the African Commission on Human and Peoples’ Rights to take measures aimed at ensuring the rights of parties’ citizenry, as defined by the Charter, including interpreting all provisions of the Charter).

105. African Charter on Human and Peoples’ Rights, *supra* note 32, art. 62.

106. Based on the distinction the Charter draws between adopting additional protocols and amending the Charter itself, it may be inferred that the Charter was meant to control any subsequent protocols. *See id.* art. 68 (requiring a simple majority to amend the Charter, after the OAU’s Secretary gives notice to all parties to the Convention and the Commission).

107. *See* THE ARCHITECTURE FOR AN AFRICAN DISABILITY RIGHTS MECHANISM, *supra* note 10, at 10 (indicating that the Working Group advised abandoning future work on a regional disability treaty until participants undertook steps to further include persons with disabilities in the process).

engage with persons with disabilities.

## V. LESSONS FROM THE AFRICAN DECADE FOR PERSONS WITH DISABILITIES

During the 35th session of the then Organization of African Unity Assembly of Heads of State and Government in Algeria in July 1999, the period of 1999-2009 was declared the African Decade for Disabled Persons (“Decade”).<sup>108</sup> The Organization of African Unity (now the AU) Labor and Social Affairs Commission recommended marking that period the Decade and based the concept on the U.N. Decade for Disabled Persons of 1983 to 1992. The success of the U.N. Decade was “more pronounced in the northern hemisphere than elsewhere,”<sup>109</sup> and thus a specific African decade was required.<sup>110</sup>

The Decade aimed to: encourage developing policies and programs that enable the full participation of persons with disabilities; support community-based service delivery for persons with disabilities; foster behavior change in favor of disabled persons; alleviate poverty among persons with disabilities; and implement the U.N. Standard Rules on the Equalization of Opportunities for Person with Disabilities.<sup>111</sup> The African Rehabilitation Institute (“ARI”) based in Harare, Zimbabwe was established to coordinate implementing the objectives of the Decade among member states, DPOs, and international development agencies.<sup>112</sup> In May 2003, after the Continental Plan of Action was adopted, the Secretariat of the African Decade for Persons with Disabilities was established as a technical disability body to realize the Continental Plan of Action and assist the ARI in fulfilling the objectives of the African Decade.<sup>113</sup>

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108. Exec. Council of the African Union, *Regulation*, art. 7, EC/AU/AEC/Regl. (I) (July 10, 2002).

109. HISAYO KATSUI, *DISABILITIES, HUMAN RIGHTS AND INTERNATIONAL COOPERATION: HUMAN RIGHTS-BASED APPROACH AND LIVED EXPERIENCES OF UGANDAN WOMEN WITH DISABILITIES* 118 (2012).

110. *Id.*

111. AFRICAN UNION, *CONTINENTAL PLAN OF ACTION FOR THE AFRICAN DECADE OF PERSONS WITH DISABILITIES* 8 (1999).

112. Org. of African Unity [OAU], *Agreement for the Establishment of the African Rehabilitation Institute (ARI)*, art. 1, OAU Doc. CM/Res.943 (XL) (1984).

113. SECRETARIAT OF THE AFRICAN DECADE OF PERSONS WITH DISABILITIES, *WHAT IS THE AFRICAN DECADE?* 1 (2010).



Despite being a landmark initiative, the Decade failed to realize its core objectives due to financial, coordination, and human resource challenges. African states failed to contribute to sustaining the objectives of the Decade and it failed to capture the attention of donors and other international aid agencies to garner external support.<sup>114</sup> Charged with monitoring the Decade's implementation, the ARI was once again too stretched to cover the entire region. In 2010, the ARI was shut down indefinitely after massive financial and human resource irregularities were discovered.<sup>115</sup> Whether the ARI will continue to play an active role in monitoring the rights of persons with disabilities in Africa is unclear.

The Secretariat for the African Decade for Persons with Disabilities is monitoring and coordinating the second African Decade for Persons with Disabilities. The Secretariat is currently based in Pretoria, South Africa with one regional office in Dakar, Senegal.<sup>116</sup> Just like the ARI, the Secretariat faces similar challenges with States not complying in implementing the Continental Plan of Action and coordinating challenges given the financial and human resource constraints.<sup>117</sup> Nonetheless, the Secretariat has spearheaded numerous initiatives to improve coordination and achieve the objectives of the second decade. The Secretariat is a member of the AU Working Group of Older Persons and Persons with Disabilities and has full observer status in the African Commission.<sup>118</sup> In reference to a regional disability protocol, the Secretariat developed the Architecture for an African Disability Rights Mechanism in

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114. van Reenen & Combrinck, *supra* note 12, at 138-39 (arguing that the lack of financial contributions inhibited the planning of the Decade and necessitated expanding it).

115. *Zimbabwe-Based African Union Body Closes*, PANAPRESS (Dec. 20, 2010), <http://www.panapress.com/Zimbabwe-based-African-Union-body-closes—12-747361-20-lang2-index.html>.

116. See DEJO OLOWU, AN INTEGRATIVE APPROACH TO HUMAN DEVELOPMENT IN AFRICA 48 (2009).

117. Shuaib Chalklen, Leslie Swartz & Brian Watermeyer, *Establishing the Secretariat of the African Decade for Persons with Disabilities*, in *DISABILITY AND SOCIAL CHANGE: A SOUTH AFRICAN AGENDA* 93, 95- 97 (Brian Watermeyer et al. eds., 2006) available at <http://www.hsrcpress.ac.za/product.php?productid=2151&freedownload=1>.

118. *Role of the Secretariat*, SECRETARIAT OF THE AFRICAN DECADE OF PERSONS WITH DISABILITIES, <http://african-decade.co.za/role-of-the-secretariat/> (last visited Oct. 29, 2014).

2011. A key recommendation of the report is that African states individually and the AU collectively should prioritize implementing the CRPD over developing a regional disability protocol.<sup>119</sup>

## VI. LESSONS FROM THE ORGANIZATION OF AMERICAN STATES

The Organization of American States was the only regional body that had a disability treaty in force before the CRPD was introduced. The Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (“CIADDIS”) was adopted on June 7, 1999 and came into force on September 14, 2001.<sup>120</sup> Out of the thirty-five countries that make up the OAS, nineteen have so far ratified the CIADDIS.<sup>121</sup>

In terms of content, the CIADDIS is a small treaty with only fourteen articles. As the name suggests, the CIADDIS’s main objective is “to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society.”<sup>122</sup> Despite its human rights provisions, the CIADDIS adopts a relatively low standard in recognizing and protecting persons with disabilities.<sup>123</sup> The definition of disability is too similar to the medical model in its definition of disability.<sup>124</sup> Indeed, the

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119. See THE ARCHITECTURE FOR AN AFRICAN DISABILITY RIGHTS MECHANISM, *supra* note 10, at 12 (justifying their recommendation that CRPD be given priority, in part, because African concerns have already been aired in the drafting of the CRPD, and further implying that the United Nations satisfactorily addressed those concerns, which may be demonstrated by several African states ratifying the CRPD).

120. Rodrigo Jimenez, *The Americans with Disabilities Act and its Impact on International and Latin-American Law*, 52 ALA. L. REV. 419, 420 (2000); Francisco J. Bariffi, *Human Rights and Disability: Reinterpreting Disability Within the OAS in the Light of the CRPD* 1 (Ctr. for Human Rights Research & Educ., Nat’l Univ. of Mar del Plata, 2011).

121. *Signatories and Ratifications: A-65: Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities*, ORG. OF AM. STATES, <http://www.oas.org/juridico/english/sigs/a-65.html> (last visited Oct. 29, 2014).

122. Org. of Am. States [OAS], *Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities*, art. 2, OAS Doc. AG/Res. 1608 (XXIX-O/99) (June 7, 1999).

123. See *id.* art. 1 (defining a disability as “a physical, mental, or sensory impairment” which “limit” an individual’s capacity).

124. Bariffi, *supra* note 120, at 11; see also Kristin Booth Glen, *Changing*

CIADDIS single discrimination approach is too narrow and cannot provide a comprehensive guarantee for human rights by itself.<sup>125</sup>

A more fundamental concern is that, currently, twenty-six OAS states have ratified the CRPD,<sup>126</sup> whereas only nineteen have ratified the CIADDIS.<sup>127</sup> This scenario has created a legal interpretation dilemma related to implementing the CIADDIS and the CRPD. Can the two treaties coexist? Is the dual and equal application of the two treaties possible? Which treaty should States that have signed the CIADDIS and CRPD prioritize? In the event of conflict, which treaty supersedes the other? Can international law sufficiently address these questions?<sup>128</sup> With that said, state parties are obligated to commit and be bound by the provisions of treaties that they freely enter into under the Vienna Convention on the Law of Treaties; otherwise, international law would be irrelevant.<sup>129</sup>

Indeed, in October 2010, the Committee to the CIADDIS met to resolve the diverging interpretations of legal capacity of persons with disabilities in article 1(2)(b) of the CIADDIS and article 12 of the CRPD.<sup>130</sup> The Committee acknowledged that CIADDIS was contrary

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*Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 137-38 (2012) (stating that the CRPD is the first disability treaty explicitly adopting a human rights approach to persons with disabilities, implicitly discounting the IACD). *But see* Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L & COM. 241, 260 (2003) (arguing that the recent Inter-American Commission on Human Rights decision in *Victor Rosario Congo v. Ecuador* suggests that Latin American jurisprudence is beginning to adopt a human rights centered approach to disability instead of a medical model based approach).

125. *See supra* note 124 and accompanying text.

126. *Convention and Optional Protocol Signatures*, *supra* note 89.

127. *Signatories and Ratifications: A-65 Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities*, *supra* note 121.

128. *See* Vienna Convention on the Law of Treaties, *supra* note 104, art. 30 (establishing that when parties signify which treaty controls, their intent is honored, but in the absence of express intent, subsequent instruments take precedence of prior documents).

129. *See* Vienna Convention on the Law of Treaties, *supra* note 104, art. 26 (invoking the doctrine of *pacta sunt servanda* to require states to perform their treaty obligations in good faith).

130. *See* OAS, *Third Special Meeting of the Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities (CEDDIS): Final Report*, at 5, OEA/Ser.L/XXIV.3.3, CEDDIS/doc.6 (III-E/13) (Jan. 10, 2014) (“The meeting reviewed the principle approaches taken to follow up on both the

to the CRPD and international standards of human rights on matters such as “legal autonomy” and “independent life of this population.”<sup>131</sup> The Committee concluded that, to safeguard human rights for persons with disabilities, the CIADDIS article must be reinterpreted in light of the “new paradigm” set forth in the CRPD.<sup>132</sup>

This OAS experience illustrates sound practical lessons that the AU can learn from and avoid. Though the CIADDIS was adopted before the CRPD, issues relating to human rights standards and dual application persist.<sup>133</sup> The robust recognition of the CRPD by African states and other U.N. members illustrates the extent of its acceptance as an international standard for human rights for persons with disabilities. Adopting another specific regional treaties may unnecessarily duplicate and complicate enforcing the human rights for persons with disabilities

### VIII. LESSONS FROM THE EUROPEAN UNION

The European Union (“E.U.”) submitted its CRPD ratification instrument on December 23, 2010. This was possible because article 44 of the CRPD allows regional bodies that are competent in matters related to disability to sign and ratify the Convention. Since it is a new trend, whether regional bodies signing and ratifying the CRPD will have an impact is unclear.<sup>134</sup> But, what is clear is that the E.U. is now mandated to develop its legislations and policies in line with the

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[United Nations] and OAS conventions and technical documents, as well as the proposals presented by Chile.”).

131. *See id.* at 50 (stating that, at the Third Special Meeting on CIADDIS, delegates agreed the Convention needed to be amended to conform with the CRPD’s provisions relating to individual autonomy and social inclusion).

132. *See id.* at 5 (reasoning that a primary deficiency of Latin American treatment of persons with disabilities was that States emphasized determining whether such persons was legal incompetent, as compared to the CRPD’s approach that focused on enhancing the autonomy of persons with disabilities).

133. *See id.* at 9 (discussing how OAS states have not been able to resolve their disagreement over whether current domestic practices comport with the CRPD).

134. *See CRPD, supra* note 1, art. 44 (sanctioning “regional integration organizations” under the CRPD for the purpose of easing compliance); *see also* Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: A New Era or False Dawn?*, 34 SYRACUSE J. INT’L L. & COM. 563, 618 (2007) (arguing that successful implementation of the CRPD will require diligent oversight by the United Nations and other States to ensure individual countries adhere to the CRPD’s spirit).



this scenario illustrates why the Council of Europe's purely human rights institutions have been comparatively less successful in realizing its objectives as compared to the E.U., which has more bite.

However, unlike its European counterpart, the African Union has no exclusive or partial competences conferred to it by member states. In its founding Charter, the Organization of African Union was simply established to "coordinate and harmonize" the general policies of member states against the backdrop of colonialism.<sup>139</sup> The later Constitutive Act, which established the AU from what was the OAU, also reflects the same principles, such as promoting cooperation and solidarity amidst absolute sovereignty of States.<sup>140</sup> Nonetheless, the E.U.'s approach to the CRPD offers lessons, options, and opportunities for the AU and other regional blocks to explore in realizing human rights. An innovative option is key to reaffirming regional commitment to international human rights standards.

## IX. CONCLUSION

Currently, the best option for the AU is to invest in prioritizing the CRPD. Issues relating to low prioritization, limited resource allocation, non-compliance, coordination, proliferation of organs, relatively low human rights standards and, as a result, weak enforcement mechanisms must be addressed before adopting an independent disability protocol. Failing to address these matter explain why the aims of Africa's regional human rights treaties, institutions, and systems are not yet fully achieved. Lessons from the OAS and the E.U.'s innovative approach provide good examples to consider.

Consequently, persons with disabilities stand to benefit much more from prioritizing the CRPD rather than hurriedly rushing to

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PROBS. 211, 242 (2003) (positing that the efficacy of African regional human rights organizations is impaired by a lack of coordination and political obstructionism). *But see* David Gartner, *Transnational Rights Enforcement*, 31 BERKELEY J. INT'L L. 1, 28-29 (2013) (asserting that regional African human rights courts have been more aggressive than domestic courts in interpreting treaty obligations).

139. Charter of the Organization of African Unity art. 2, May 25, 1963, 479 U.N.T.S. 39.

140. Constitutive Act of the African Union, *supra* note 47, arts. 3(a)-(b), (k)-(l).

develop a regional disability protocol.<sup>141</sup> Revising the AU human rights system is long overdue. Without delving into exultation of the United Nations, structures under the United Nations are relatively more human rights sensitive and have better established institutions to guarantee rights.<sup>142</sup> Nonetheless, reforms must strengthen the Committee on the Rights of Persons with Disabilities to enable it to sufficiently meet its global obligations under the CRPD.

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141. See Quinn, *supra* note 96, at 39 (arguing that the CRPD will force nations to formulate policy on rights for disabled persons).

142. See Off. of the High Comm. for Human Rights, *The United Nations Human Rights System: How to Make it Work for You*, 1, U.N. Doc. UNCTAD/NGLS/2008/2 (Aug. 2008) (pointing out that the “promotion and protection of human rights” is one of the United Nations’ primary goals).