



**LNPWDB in the African Disability  
Protocol: Mapping the Issues and  
Reviewing the Evidence in Selected  
Countries in Africa**

**December  
2021**

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## Acknowledgement

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This research could not have been done without the valuable responses and views shared by our cherished respondents and members of Inclusion Africa in Ghana, Togo, Benin, Uganda, Tanzania, Zambia, and Zimbabwe. We are very grateful to all of them.

In addition, the research benefited extensively from the technical and financial support of LEV. We say Thank you to LEV for the support they gave us in all the stages of the research. Special thanks to Sune Barker (Head of International Programmes, LEV), Sonja Pelle Nielsen (Economy Department, LEV) and key representatives of Inclusion Ghana including Kofi Tibuahson (Monitoring, Evaluation and Learning Coordinator) and Joseph Nii Armah Allotey (Finance and Administration Manager).

We acknowledge the support of Inclusion Africa for their immense contribution towards the research. We want to appreciate Inclusion Ghana for the extraordinary administrative support they gave towards the exercise.

## Abbreviations and Acronyms

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ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immunodeficiency Syndrome
AU	African Union
AYC	African Youth Charter
CEDAW	Convention on the Elimination of Discrimination against Women
CRPD	Convention on the Rights of Persons with Disabilities
HIV	Human Immunodeficiency Virus
IA	Inclusion Africa
ICCPR	International Covenant on Economic, Social and Cultural Rights
IG	Inclusion Ghana
MPs	Members of Parliament
NGO	Non-Governmental Organisations
OPWDS	Organisation of Persons with Disabilities
OPWIDs	Organisation of Persons with Intellectual Disabilities
WHO	World Health Organisation

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## Executive summary

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The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (hereafter referred to as the African Disability Protocol), adopted on 30 January 2018, marks an important step towards recognising the equal dignity of persons with disabilities on the continent. The Protocol complements the African Charter on Human and Peoples' Rights (African Charter) which does not deal with the rights of persons with disabilities in any detail. Although the African Charter provides for the rights of all individuals, the particular vulnerabilities associated with disability required that a treaty dealing with these specific issues affecting persons with disabilities on the continent be adopted. The Protocol also complements the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and provides for the rights of persons with disabilities from an African perspective, taking into account the lived realities of persons with disabilities in the continent while maintaining the core values and principles as set out in the CRPD. Despite the positive intentions and rights guaranteed by the African Disability Protocol, its ratification by African countries remains a pressing challenge.

The present study assessing knowledge of the African Disability Protocol among OPWIDs, the extent to which the Protocol addresses the situation of persons with intellectual disabilities, barriers to its ratification, and effective measures to promote awareness and ratification of the Protocol. A qualitative approach was adopted, with the study purposively sampling key officials of Inclusion Africa (IA) Member Organisations in the following countries: Ghana, Togo, Benin, Uganda, Tanzania, Zambia and Zimbabwe. Data was collected using semi-structured interviews and subsequently analysed thematically. The results indicate that although the Protocol was recognised as timely and perceived to address the situation of persons with intellectual disabilities, there was however a low level of awareness or knowledge of detailed provisions as well as what distinguishes it from earlier human rights instruments such as the African Charter and specifically, the CRPD. The study identified the lack of political will, low awareness of the existence of the Protocol, inadequate resource allocation to promote ratification, low level of sensitisation on the added value of the Protocol, and prevailing negative cultural beliefs and perceptions of persons with intellectual disabilities as the main barriers to the Protocol's ratification. Within this context, the selected OPWIDs proposed awareness raising, building partnerships with CSOs and OPWIDs, lobbying and forming alliances with law makers as viable strategies to promote the Protocol's ratification.

## 1. Introduction

It is estimated that persons with disabilities constitute ten (10) percent of the total population of Africa.<sup>1</sup> However, the above cited figure does not sufficiently reflect the prevalence of disability in Africa, with suggestions that prevalence rates are possibly higher than reported due to the lack of comprehensive data on disability prevalence in Africa.<sup>2</sup> Nonetheless, compared to other regions of the world, a survey conducted by the World Health Organisation (WHO) reported the rate of disability for high income countries as approximately 11.8 percent, with low income countries reporting a disability prevalence of 18 percent.<sup>3</sup> Using the International Classification of Functionality mode, the above cited WHO survey also suggests that the prevalence of disability could be much higher in Africa than originally estimated.<sup>4</sup> Moreover, the United Nations Statistics Division Workshop Report on Africa indicated that the lack of accurate statistics on disability continues to obscure the situation pertaining to disability and the magnitude of the problem.<sup>5</sup> It further reports that the lack of relevant, accurate and useful statistics affects the ability of many countries in Africa to plan programmes for persons with disabilities.<sup>6</sup>

With regards to standard of living, a majority of persons with disabilities in Africa live in dire conditions.<sup>7</sup> Persons with disabilities are among the poorest of the poor in the region.<sup>8</sup> Persons with disabilities have limited access to education, employment, and general livelihood due to structural and other social barriers.<sup>9</sup> To put this into context, data obtained from the World Bank show that sub-Saharan Africa has one of the lowest regional gross per capita of \$1,176,<sup>10</sup> with 48.5 percent of the total population living on less than \$1.25 per day.<sup>11</sup> Against this backdrop and in light of the high

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<sup>1</sup> F Viljoen J Biegong The architecture for an African disability rights mechanism (2011) *The Secretariat of the African Decade of Persons with Disabilities, Pretoria.*

<sup>2</sup> S Mitra A Posarac B Vick *Disability and poverty in developing countries: A snapshot from the World Health Survey* (2011) World Bank.

<sup>3</sup> World Health Organization *World report on disability 2011* World Health Organization.

<sup>4</sup> ME Loeb AH Eide D Mont Approaching the measurement of disability prevalence: the case of Zambia (2008) *Alter* 2(1) 32-43.

<sup>5</sup> United Nations Statistics Division *Workshop on Disability Statistics for Africa* (2011) United Nations Statistics Division.

<sup>6</sup> United Nations Statistics Division (n 5).

<sup>7</sup> J Biegong The promotion and protection of disability rights in the African human rights system (2011) *Aspects of disability law in Africa* 53.

<sup>8</sup> Biegong (n 7).

<sup>9</sup> Biegong (n 7).

<sup>10</sup> World Bank *World development indicators* (2012) The World Bank.

<sup>11</sup> United Nations Development Programme UNDP in sub-Saharan Africa: Supporting a Region on the Move (2013) New York: United Nations Development Programme.

levels of stigmatisation, discrimination and lack of access to social services, persons with disabilities are more likely to be impoverished and are more vulnerable to exploitation, violence and harassment.<sup>12</sup> As a result, poverty is not only a challenge for persons with disabilities in Africa, but may also worsen their respective ailments.<sup>13</sup> Other contributing factors such as poor health, limited support facilities, high rates of disease, conflict, corruption, and political instability have combined to exacerbate the situation of persons with disabilities in Africa.<sup>14</sup>

The myriad challenges facing persons with disabilities in Africa necessitated the promulgation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (hereafter referred to as the African Disability Protocol).<sup>15</sup> Historically, human rights instruments included persons with disabilities by applying general human rights approaches or perspectives to persons with disabilities without recognising the specific challenges they face in the protection or enjoyment of their rights. The African Disability Protocol was intended to reflect regional realities on the lived situation of persons with disabilities.<sup>16</sup> It seeks to promote, protect and ensure the full and equal enjoyment of all human and peoples' rights by all persons with disabilities and to ensure respect for their inherent dignity.<sup>17</sup>

The Protocol is a major progress in advancing the dignity and rights of all persons with disabilities in Africa, particularly of women, girls, youth and older persons. Adopting an intersectional perspective, it is the first human rights treaty of its kind to elaborate on the specific provisions required to effectively address intersecting forms of human rights abuses facing persons with disabilities. While maintaining positive African values, the Protocol works to uphold the rights of persons with disabilities of all ages by designating specific articles to women and girls with disabilities, children with disabilities, youth with disabilities, and older persons with disabilities.<sup>18</sup> Moreover, the Protocol

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<sup>12</sup> C Lwanga-Ntale Chronic poverty and disability in Uganda. Paper presented at the International Conference: *Staying Poor: Chronic Poverty and Development Policy* held at the University of Manchester from 7-9 April 2003.

<sup>13</sup> Lwanga-Ntale (n 12).

<sup>14</sup> AS Susuman R Blignaut S Lougue Understanding issues of people living with disabilities in South Africa (2014) *Journal of Asian and African studies* 49(5) 559-569.

<sup>15</sup> Adopted by the Thirtieth Ordinary Session of the Assembly held in Addis Ababa Ethiopia on 29 January 2018.

<sup>16</sup> F Viljoen J Biegon The feasibility and desirability of an African disability rights treaty: further norm-elaboration or firmer norm-implementation? (2014) *South African Journal on Human Rights* 30(2) 345-365.

<sup>17</sup> Art 2 African Disability Protocol.

<sup>18</sup> Art 27-30 African Disability Protocol.



addresses African-specific concerns such as HIV/AIDS, harmful cultural practices, the rights of older persons with disabilities and youth with disabilities.<sup>19</sup>

However, despite the adoption of the African Disability Protocol on 29<sup>th</sup> January 2018, it has yet to be entered into force.<sup>20</sup> Indeed, only ten (10) African States have so far signed the Protocol, with one (1) having ratified it. Within this context, it could be argued that disability rights remain a challenge. The lack of regional progress regarding signing and ratifying the Protocol raises critical questions. For instance, how familiar are persons with intellectual disabilities and Organisations of Persons with Intellectual Disabilities (OPWIDs) with the African Disability Protocol? To what extent does the Protocol address the situation of persons with intellectual disabilities? What possible barriers are stalling African governments in assenting to the Protocol? What measures could facilitate awareness and ratification of the Protocol?

The present study addresses the above highlighted questions by critically assessing knowledge of the African Disability Protocol among OPWIDs, the extent to which the Protocol addresses the situation of persons with intellectual disabilities, barriers to its ratification, and effective measures to promote awareness and ratification of the Protocol. The study provides background knowledge on disability rights in Africa, and raising awareness among stakeholders in Africa specifically, persons with intellectual disabilities, Organisations of Persons with Intellectual Disabilities (OPWIDs), and relevant State institutions of the existence of the African Disability Protocol and the benefits of its ratification. It is also targeted at galvanising persons with disabilities in general and specifically those with intellectual disabilities, as well as human rights advocates, Civil Society Organisations (CSOs), OPWIDs, and OPWIDs through capacity building initiatives to advocate for the ratification of the African Disability Protocol by national governments.

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<sup>19</sup> D Olowu *The Regional System of Protection of Human Rights in Africa* (2016) In *Children's Rights in Africa* (pp. 23-42). Routledge.

<sup>20</sup> Y Basson The right to an adequate standard of living in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2019) *African Disability Rights Yearbook* 242-251.

## 2. Main Aim and Research Questions

### 2.1 Main Aim

Broadly, the study assessed knowledge of the African Disability Protocol and barriers to its ratification by African countries, obtaining key insights from Inclusion Africa member organisations in Ghana, Togo, Benin, Uganda, Tanzania, Zambia and Zimbabwe.

### 2.2 Research Questions

The study answered the following research questions:

- i. What is the level of knowledge among selected OPWIDs of regional human rights framework that guarantees the human rights and freedoms of persons with intellectual disabilities?
- ii. What is the added value of the African Disability Protocol to disability rights discourse in Africa?
- iii. What are the barriers to ratification of the Protocol by African countries?
- iv. What measures can be adopted to promote ratification of the Protocol?

## 3. African Human Rights Framework related to Disability

### 3.1 Legal framework

In Africa, existing human rights instruments 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 on Human and Peoples' Rights (Banjul Charter)<sup>21</sup> is the primary African regional human rights instrument. The Charter provides for universal human rights, and article 2 entitles every person to enjoy the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kinds such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>22</sup>

Although article 2 of the Banjul Charter 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 Banjul Charter provides for the universal right to the best attainable

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<sup>21</sup> Adopted by the Organization of African Unity (OAU) General Assembly CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 on 27 June 1981 and entered into force on 21 October 1986.

<sup>22</sup> Art 2 Banjul Charter.

physical and mental health and special protections tailored to the specific physical or moral needs of the elderly and disabled.<sup>23</sup> As a result, State parties are mandated to take positive steps to ensure that persons with disabilities have the capacity to enjoy the rights guaranteed under the Banjul Charter.

Article 66 of the Banjul Charter provides the legal basis for adopting protocols for fully realising human rights.<sup>24</sup> Based on this provision, the African Union (AU) proposed the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).<sup>25</sup> The AU adopted the Maputo Protocol in reaction to the inadequacies of its United Nations equivalent, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).<sup>26</sup> Evidently, unlike CEDAW, the Maputo Protocol specifically provides for the rights of women with disabilities. Specifically, 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>27</sup>*

The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>28</sup> is another example of a regional treaty addressing the rights of persons with disabilities. Article 13 of the ACRWC provides that State parties must provide special measures of protection for handicapped children.<sup>29</sup> The article requires appropriate measures to ensure promotion of dignity, self-reliance, and full participation in the society for handicapped children.<sup>30</sup> It also mandates accessibility in public places.

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<sup>23</sup> Art 16 Banjul Charter.

<sup>24</sup> Art 66 Banjul Charter.

<sup>25</sup> Adopted by the African Union (AU) General Assembly on 11 July 2003 and entered into force on 25 November 2005.

<sup>26</sup> LO Oyaro Africa at crossroads: The United Nations Convention on the rights of Persons with Disabilities (2015) *American University International Law Review* 30 347.

<sup>27</sup> Art 23 (a)(b) Maputo Protocol.

<sup>28</sup> Adopted by the Organization of African Unity (OAU) General Assembly CAB/LEG/24.9/49 on 01 July 1990 and entered into force 29 November 1999.

<sup>29</sup> Art 13 ACRWC.

<sup>30</sup> n 28.

Finally, the African Youth Charter (AYC)<sup>31</sup> includes provisions for persons with disabilities. Article 24(1) of the AYC provides that: “State parties recognise the right of mentally and physically challenged youth to special care”.<sup>32</sup> The provision seeks to ensure access to education, training, employment, sport, physical education and cultural and recreational activities, and just like the ACRWC, calls on State parties to improve accessibility.

Despite the provisions on disability, the African human rights instruments discussed above arguably adopt a rudimentary medical model approach to disability that singularly attributes disability to impairment without considering social and environmental factors. Using phrases such as “handicapped children” and “mentally and physically challenged youth” demonstrates this.<sup>33</sup> As a result, 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>34</sup> In this way, existing African regional human rights standards as prescribed in the CRPD that adopts a more social, rights-based approach to disability.

### **3.2 Institutional framework**

Institutionally, African human rights institutions may be divided into two categories: those aligned within the AU framework; and those created by treaties. With regard to the first category, the Constitutive Act<sup>35</sup> 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 Banjul Charter and other relevant instruments.”<sup>36</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>37</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

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<sup>31</sup> Adopted by the African Union (AU) General Assembly on 2 July 2006 and entered into force 8 August 2009.

<sup>32</sup> Art 24(1) African Youth Charter.

<sup>33</sup> Arts 13 & 14 ACRWC.

<sup>34</sup> LM Mute Concept on the List of Issues to Guide Preparation of a Protocol on the Rights of Persons with Disabilities in Africa (2012) Unpublished manuscript.

<sup>35</sup> Adopted by the Organisation of African Unity (OAU) General Assembly on 11 July 2000.

<sup>36</sup> Art 3 Constitutive Act of the African Union.

<sup>37</sup> TP van Reenen H Combrinck The UN convention on the rights of persons with disabilities in Africa: Progress after 5 years (2011) *Sur - International Journal on Human Rights* 14 133.

of the Continental Plan of Action for persons with disabilities; the AU 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>38</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 on Human and Peoples' Rights. All the above bodies have eleven members each and although they are financed by and ultimately report to the AU, they act independent of the AU. Whereas the African Commission and Committee on the Child are quasi-judicial bodies, the African Court on Human and People's Rights is a full judicial organ.<sup>39</sup> Unfortunately, between these judicial mechanisms, only the African Commission has heard a disability related matter: the case of *Purobit and Moore v The Gambia (Purobit Case)*.<sup>40</sup> The Committee on the Child and the African Court have done very little to discharge their roles under their respective treaties.<sup>41</sup> This may be partly because most States have not ratified the treaties and the few that have are not complying. Indeed, as of 18 June 2020, only thirty (30) countries out of fifty-four (54) African states have ratified the Protocol establishing the African Court on Human and People's Rights, and only eight (8) have ratified the Protocol on the Statute of the African Court of Justice and Human Rights.<sup>42</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>43</sup> This Working Group effectively developed the first draft of the regional disability protocol.<sup>44</sup> In terms of its guiding roles, the African Commission has not yet made a general comment on disability. The ineffectiveness of African treaty human rights organs has been

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<sup>38</sup> van Reenen Combrinck (n 37).

<sup>39</sup> Oyaró (n 26).

<sup>40</sup> Communication No 241/2001 *Purobit and Moore v The Gambia (Purobit case)*, views adopted on 29 May 2003 African Commission on Human and Peoples' Rights Sixteenth Activity Report 2002-2003, Annex VII.

<sup>41</sup> Biegon (n 7) para 69.

<sup>42</sup> African Commission on Human and Peoples' Rights *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights* (last visited 28 June 2021).

<sup>43</sup> African Commission 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* ACHPR/Res143(XXXXV).

<sup>44</sup> YKHYS Yuen Report of the Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities in Africa (2012).

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 incoherence, composed of institutions with overlapping and sometimes conflicting mandates and functions”,<sup>45</sup> with these institutions competing for limited AU resources and are often underfunded and understaffed.<sup>46</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>47</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 on Human and Peoples’ Rights and the African Court of Justice into one court. However, only eight (8) countries have ratified the protocol and it will not come into force unless fifteen (15) member states ratify it. 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. However, the adoption of the African Disability Protocol by the AU could serve as the bridge between African human rights institutions, national governments, civil society including organisations of persons with disabilities, and individuals including persons with disabilities and their families.

#### **4. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities**

The CRPD was written with major contributions from the African Union and African civil society.<sup>48</sup> In 2018, the AU remained concerned that there were not effective measures to ensure that the rights of persons with disabilities were being protected.<sup>49</sup> These concerns drove the AU to create the African Disability Protocol adopted on 29 January 2018. It is intended to complement the Banjul Charter and address the continued exclusion, harmful practices and discrimination affecting persons with

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<sup>45</sup> Biegon (n 7) para 70.

<sup>46</sup> Biegon (n 7).

<sup>47</sup> GM Wachira *African Court on Human and Peoples’ Rights: Ten years on and still no justice* (pp. 10-11) (2008). London: Minority Rights Group International.

<sup>48</sup> AU Advocacy Tool What’s new for African Women and Girls in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa.

<sup>49</sup> AU Advocacy Tool (n 48).

disabilities in Africa especially women, children, the youth and the elderly. The Protocol is the culmination of the African Union's focus on the rights of persons with disabilities which began in 1999 with the declaration of the African decade for persons with disabilities and the creation of a Working Group tasked with drafting the protocol. The protocol guarantees equal protection of economic, social, cultural, civil and political rights of individuals with "physical, mental, intellectual, developmental or sensory impairments."<sup>50</sup> More importantly, the African Disability Protocol also addresses issues faced by persons with disabilities in Africa such as increased rates of poverty, systemic discrimination, and risk of violence and abuse, particularly for those with albinism and women and girls with disabilities.

The text of the Protocol details the particular rights of persons with disabilities to life, liberty, security of person, freedom from harmful practices, protection in situations of risks, equal recognition before the law, access to justice, community living, accessibility, education, health, rehabilitation, work, adequate standard of living and social protection, participation in political and public life, self-representation, freedom of expression and opinion, participation in recreation and culture, and family in articles 5 to 26.<sup>51</sup> The Protocol also recognises the particular vulnerabilities and rights of women, children, youth and older persons with disabilities in articles 27 to 30.<sup>52</sup> Additionally, in article 5, the Protocol extends the rights to family and caregivers of persons with disabilities who may otherwise be subject to discrimination as a result of association.<sup>53</sup>

In addition to expanding on protections for persons with disabilities, it could be argued that the Protocol moves away from the medical model of disability and reaffirms the rights of persons with disabilities through a human rights-based approach. More than other regional human rights instruments, the Protocol adopts an intersectional approach to rights violations. Persons with disabilities are not a homogeneous group, and their challenges and rights violations vary drastically. The Protocol discusses the discrimination experienced by women with disabilities, older persons with disabilities, youth with disabilities and children with disabilities with a gender lens. With intersectionality being a vital concept to consider when working on upholding human rights, the Protocol further ensures the rights of individuals with intersecting identities such as gay, lesbian or

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<sup>50</sup> Art 7 African Disability Protocol.

<sup>51</sup> Art 5-26 African Disability Protocol.

<sup>52</sup> Art 27-30 African Disability Protocol.

<sup>53</sup> Art 5 African Disability Protocol.

bisexual persons with disabilities who are more at risk of human rights violations. The Protocol ensures that it applies an age and gender lens to people with disabilities to make sure that each unique individual's rights are effectively protected.

## 5. The Added Value of the African Disability Protocol

The African Disability Protocol largely guarantees and protects the rights of persons with disabilities in Africa. It provides clarity regarding the myriad of issues facing persons with disabilities as well as obligations on the part of State parties to ensure that persons with disabilities enjoy their rights on an equal basis with others. This section discusses the added value of the African Disability Protocol in addressing the situation of persons with disabilities in Africa. It highlights and discusses the distinguishing features or provisions of the Protocol that provide added guarantees of the rights of persons with disabilities in Africa.

### 5.1 Non-discrimination

The African Disability Protocol recognises and provides guarantees against discrimination on the basis of disability. In article 5(1), the Protocol stipulates that:

*“Every person with a disability shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the protocol without distinction of any kind on any ground including race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.”<sup>54</sup>*

Article 5(2) of the Protocol provides obligations on State parties to “*prohibit discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds*”.<sup>55</sup> It further charges State parties to take steps to ensure that specific measures as appropriate are provided to persons with disabilities in order to eliminate discrimination and such measures shall not be considered discrimination.<sup>56</sup> The Protocol also recognises the discrimination that individuals experience by being associated with a person with a disability. This includes family members, caregivers, or intermediaries. It is important to note that parents or siblings are often selected as the caregivers for persons with disabilities and as such, could be subject to discrimination by association.

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<sup>54</sup> Art 5(1) African Disability Protocol.

<sup>55</sup> Art 5 (2) (a) African Disability Protocol

<sup>56</sup> Art 5 (2) (b) African Disability Protocol.



Moreover, infanticide is a harmful practice in Africa, and parents/caregivers of children with disabilities can be pressured to kill their child with disability. If they do not, they can face discrimination because it is believed that the parent/caregiver is being punished or the child is cursed. Besides, discrimination by association can increase caregiver's risk of experiencing violence, discrimination, and exploitation and can increase their isolation from social, economic, and political opportunities. In response, the Protocol calls for "*effective and appropriate measures to protect the parents, children, spouses, other family members closely related to the persons with disabilities, caregivers or intermediaries from discrimination from their association with persons with disabilities.*"<sup>57</sup> By extending guarantees of human rights beyond persons with disabilities to include close associates, it could be argued that the African Disability Protocol adequately addresses the situation of persons with disabilities and their families with specific respect to ensuring non-discrimination.

## **5.2 Women and girls with disabilities**

The Protocol is ground-breaking because it explicitly lists the specific rights of African women and girls with disabilities. The Convention on the Elimination of Discrimination Against Women (CEDAW), while monumental in protecting the rights of women in general, does not explicitly mention women or girls with disabilities at all. The Convention on the Rights of Persons with Disabilities (CRPD) generally applies the rights of persons with disabilities to women and girls with disabilities in Article 6 but does not go into specific provisions. In addition, the Maputo Protocol protects some rights of African women with disabilities in article 23 but fails to provide guarantees of the rights of girls with disabilities.

However, the African Disability Protocol protects both women and girls with disabilities in a localized context by devoting article 27 to them, listing twelve provisions that protect them. The following provisions from the African Disability Protocol are either indirectly and vaguely applied to women and girls with disabilities or not mentioned at all in the Maputo Protocol, CEDAW, or the CRPD:

- i. Inclusion of women with disabilities in mainstream women's organizations and programs.
- ii. Equal participation of women with disabilities in sports and culture.
- iii. Protection from sexual and gender-based violence.
- iv. The right for women with disabilities to retain and control their fertility and not be sterilized without their consent.

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<sup>57</sup> Art 5 (2) (c) African Disability Protocol.

- v. Integration of disability inclusive gender perspectives in policies, legislation, plans, programs, budgets, and activities in all spheres that affect women with disabilities.

Furthermore, it is important to emphasize the intersectional approach in the Protocol. By specifying women with disabilities in the Preamble, articles 4 and 27, the Protocol recognizes that people with disabilities are not a homogeneous group, and that women with disabilities are disproportionately affected by violence and in unique ways. By including provisions that protect them specifically, it could be argued that the Protocol adequately addresses the situation of women with disabilities by demonstrating an understanding of the particular discrimination and violence that women with disabilities face.

Specifically on girls with disabilities, girls with disabilities who experience age, gender, and disability-related discrimination, are particularly invisible in international treaties.<sup>58</sup> The Convention on the Elimination of Discrimination Against Women (CEDAW) in Article 10 mentions girls in general once “in context of female drop-out rates”,<sup>59</sup> with the Convention on the Rights of Persons with Disabilities (CRPD) mentioning girls with disabilities three times: twice to acknowledge the risk of girls with disabilities experiencing violence in the Convention’s preamble and in article 6(1);<sup>60</sup> and once to protect the access of girls with disabilities to social and poverty programs in Article 28 (b) of the Convention.<sup>61</sup>

However, girls with disabilities are mentioned an unprecedented six times in the African Disability Protocol, demonstrating a clear prioritization for the differentiation of the terms “women” and “girls.” The vulnerability of girls with disabilities is acknowledged in the Protocol’s Preamble, and they are included in four provisions in article 27: State parties ensuring that women and girls with disabilities have full enjoyment of human and peoples’ rights on an equal basis with others;<sup>62</sup> the participation of women and girls with disabilities in social, economic and political decision making and activities;<sup>63</sup> the protection of women and girls with disabilities from discrimination based on disability and enjoy the right to be treated with dignity;<sup>64</sup> and the development and implementation of specific measures to facilitate full and equal participation of women and girls with disabilities in sports, culture and

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<sup>58</sup> AU Advocacy Tool (n 48).

<sup>59</sup> Art 10 (f) CEDAW.

<sup>60</sup> Preamble & Art 6 (1) CRPD.

<sup>61</sup> Art 28 (b) CRPD.

<sup>62</sup> Art 27 African Disability Protocol.

<sup>63</sup> Art 27 (a) African Disability Protocol.

<sup>64</sup> Art 27 (d) African Disability Protocol.

technology.<sup>65</sup> Additionally, article 28 of the Protocol calls for the provision of children with disabilities, disability, age and gender-appropriate assistance to realize their rights. The reference to children with disabilities could be interpreted to include girls with disabilities, and describes the inclusive nature of the African Disability Protocol in addressing the situation of persons with disabilities in Africa.

### **5.3 Youth with disabilities**

The African Disability Protocol is differentiated from other regional human rights instruments such as the Banjul Charter, the Maputo Protocol and the African Youth Charter because it provides extensive and explicit guarantees of the rights of youth with disabilities in Africa. The African Youth Charter, in its definitions, defines youth or young people as referring to every person between the ages of 15 and 35 years. Arguably, this definition could be said to be inclusive of persons with disabilities between the ages of 15 and 35, with the African Disability Protocol also adopting the same definition of youth. Among other human rights, the African Youth Charter in Article 2 guarantees that *“every young person shall be entitled to the enjoyments of the rights and freedoms recognised and guaranteed in the Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”*<sup>66</sup> It is worth noting that the above provision of article 2 regarding non-discrimination against youth does not explicitly mention youth with disabilities, and could provide grounds for discrimination against youth with disabilities.

The African Youth Charter tries to atone for this by providing specific guarantees of the rights and freedoms of mentally and physically challenged youth in article 24. In article 24, the African Youth Charter charges State parties to *“recognise the right of mentally and physically challenged youth to special care and shall ensure that they have equal and effective access to education, training, healthcare services, employment, sport, physical education, and cultural and recreational activities.”*<sup>67</sup> It further obliges State parties to work towards eliminating obstacles that could have negative implications for the integration of physically and mentally challenged youth into society including the provision of appropriate infrastructure and services to facilitate the mobility of youth with disabilities.<sup>68</sup>

Although the above provisions of the African Youth Charter is noteworthy in terms of protecting and promoting the rights and freedoms of youth with disabilities, there are however some challenges

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<sup>65</sup> Art 27 (i) African Disability Protocol.

<sup>66</sup> Art 2 African Youth Charter.

<sup>67</sup> Art 24(1) African Youth Charter.

<sup>68</sup> Art 24(2) African Youth Charter.

related to article 24 of the Charter. To begin with, arguments could be raised to the effect that article 24 of the African Youth Charter is not inclusive of all categories of disability as it only mentions youth with physical and mental challenges. In addition, the terminology used ‘physical and mental challenged’ arguably draws its roots from the medical model of disability and connotes shortcomings, incapacity or the inability of youth with disabilities to accomplish productive activities. Moreover, the guarantees of human rights stipulated in article 24 of the African Youth Charter are limited in scope as mention is made only of the right of youth with physical and mental challenges to equal and effective access to education, training, healthcare services, employment, sports, physical education, cultural and recreational activities.

The African Disability Protocol, on the other hand, goes a step further by expanding the rights of youth with disabilities as well as State obligations to protect, promote and ensure the full and equal enjoyment of the rights of youth with disabilities. Specifically, in article 29, the African Disability Protocol charges State parties to ensure that youth with disabilities enjoy fully and on an equal basis human and peoples’ rights on an equal basis with other youth.<sup>69</sup> It further obliges State parties to take policy, legislative, administrative and other measures to ensure that all the rights of youth with disabilities are fully respected, including by promoting full, inclusive and accessible education for youth with disabilities.<sup>70</sup> This provision of the African Disability Protocol is distinguished from the African Youth Charter as it makes provision for inclusive education, thus requiring the provision of reasonable education and adjustments in pedagogical approaches to ensure that all youth with disabilities realise their educational goals. The African Disability Protocol is further distinguished from regional human rights instruments to the extent that it promotes the inclusion of youth with disabilities in mainstream youth organisations, programmes, including training for leadership and governance skills for their participation in national, regional and international levels.<sup>71</sup>

Other features that set the African Disability Protocol apart are State party obligations to promote training and access to information, communication and technology for youth with disabilities;<sup>72</sup> develop programmes to overcome social and economic isolation, and removing systemic barriers in the labour market for youth with disabilities;<sup>73</sup> ensure access to credit facilities for youth with

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<sup>69</sup> Art 29(1) African Disability Protocol.

<sup>70</sup> Art 29(2) (a) African Disability Protocol.

<sup>71</sup> Art 29(2) (b) African Disability Protocol.

<sup>72</sup> Art 29(2) (d) African Disability Protocol.

<sup>73</sup> Art 29(2) (e) African Disability Protocol.

disabilities; promote sexual and reproductive health education for youth with disabilities;<sup>74</sup> and promoting the participation of youth with disabilities in political decision-making and activities.<sup>75</sup> The above highlighted guarantees of the rights of youth with disabilities thus provide an indication of the added value of the African Disability Protocol to existing regional human rights framework for disability inclusion.

#### **5.4 Older persons with disabilities**

Globally, older persons with disabilities face discriminatory laws, denial of legal capacity and institutionalization.<sup>76</sup> These are human rights violations at a massive scale, which are however regarded as normal social practices due to deeply-rooted stigma and social misconceptions.<sup>77</sup> Their normalization fuels a circle of discrimination and exclusion in which hundreds of millions of people in a vulnerable situation are entrapped. Being old and with a disability often results in discrimination and specific human rights violations. This is due to the combined effect of ageism and ableism: two common forms of social bias that see older persons and persons with disabilities as naturally deserving less rights and agency.<sup>78</sup> At the intersection of these and multiple other forms of discrimination based on gender, ethnicity and other factors, older persons with disabilities are among the marginalized globally. They are often denied their autonomy, and their role in the community is dismissed as irrelevant and burdensome.

The rights of older persons have not received the same attention and recognition in international human rights law as other groups, including persons with disabilities.<sup>79</sup> While in principle, from a non-discriminatory perspective, the core human rights instruments apply on an equal basis to older persons, there is no explicit reference to the rights of older people or protection against age discrimination in any of the existing instruments, with the exception of the Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The international legal framework is significantly

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<sup>74</sup> Art 29(2) (f) African Disability Protocol.

<sup>75</sup> Art 29(2) (i) African Disability Protocol.

<sup>76</sup> M Priestley Adults only disability social policy and the life course (2000) *Journal of Social Policy* vol 29 No 3 pp. 421–439.

<sup>77</sup> Priestley (n 76).

<sup>78</sup> A Zbyszewska An intersectional approach to age discrimination in the European Union Bridging dignity and distribution in M Ronnmar A Numhauser-Henning *Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and Beyond* (2015) pp 141–163.

<sup>79</sup> United Nations General Assembly Report of the Special Rapporteur on the rights of persons with disabilities A/74/186.

underused to advance the human rights of older persons. Moreover, although the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women have issued general comments on the rights of older persons,<sup>80</sup> references to older persons, including older persons with disabilities, in the concluding observations of human rights bodies and universal periodic review recommendations are particularly scarce.<sup>81</sup>

At the regional level, in principle, human rights frameworks Africa such as the Banjul Charter, and the Maputo Protocol generally apply to older persons with disabilities. Indeed, it could be argued that any reference to human rights of all persons should include older persons with disabilities. However, such earlier regional human rights instruments do not make specific references or provision for the rights and freedoms of older persons with disabilities. This has often stirred debate regarding whether older persons with disabilities are enjoined to enjoy fully and on an equal basis with others, the rights and freedoms guaranteed in regional human rights instruments. In some cases, the absence of specific references to older persons with disabilities in regional human rights instruments has been used as the basis to exclude or deny older persons with disabilities access to essential social services such as healthcare and support services in the community.

The African Disability Protocol therefore represents a shining light as it clearly details the rights of older persons with disabilities in Africa. In article 30, the Protocol details duties of State parties to ensure that older persons with disabilities have full enjoyment of human and peoples' rights on an equal basis with other older persons.<sup>82</sup> Article 30 of the Protocol further charges State parties to ensure that the rights of older persons with disabilities are fully protected by taking policy, legislative and other measures to ensure that older persons with disabilities, on an equal basis with others, access social protection programmes.<sup>83</sup> The Protocol further provides guarantees of the rights of older persons with disabilities in Africa by tasking State parties to ensure that legal, policy and other measures adopted take account of age and gender-related aspects of disability in programming and resourcing;<sup>84</sup> that older persons with disabilities exercise their legal capacity on an equal basis with

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<sup>80</sup> Committee on Economic Social and Cultural Rights, general comment No. 6 (1995) on the economic social and cultural rights of older persons; and Committee on the Elimination of Discrimination against Women general recommendation No. 27.

<sup>81</sup> See [www.upr-info.org/database/statistics/](http://www.upr-info.org/database/statistics/)

<sup>82</sup> Art 30(1) African Disability Protocol.

<sup>83</sup> Art 30(2) (a) African Disability Protocol.

<sup>84</sup> Art 30(2) (b) African Disability Protocol.

others, and that appropriate safeguards are put in place to provide older persons with disabilities with the needed support to exercise their legal capacity.<sup>85</sup>

Article 30 of the African Disability Protocol contains additional guarantees to ensure that older persons with disabilities have access to appropriate services that respond to their needs within the community;<sup>86</sup> and protection against neglect, violence, including violence on the basis of accusations or perceptions of witchcraft.<sup>87</sup> Considering that older persons in Africa are often subject to accusations of witchcraft, the above provision is that the African Disability Protocol is particularly significant as it recognises the peculiar challenges facing older persons with disabilities in Africa (such as accusations of witchcraft), and thus ensures protection against violence based on such accusations. Finally, the Protocol provides guarantees of the health of older persons with disabilities especially by obliging State parties to undertake policy, legislative and other measures to ensure access to appropriate sexual and reproductive health information and services.<sup>88</sup> This means that any policy, law or other measures adopted by the State party in furtherance of the right to health and particularly sexual and reproductive health, must be inclusive of older persons with disabilities. This highlights the added value of the African Disability Protocol towards furthering disability rights in Africa.

### **5.5 Harmful practices**

While the CRPD encourages raising awareness to stop harmful practices related to persons with disabilities, including women, girls, and boys with disabilities, it does not adequately cover concerns of the African disability discourse by remaining silent on harmful practices such as the situation of persons with albinism, and its lack of clarity regarding harmful traditional practices affecting persons with disabilities in Africa.<sup>89</sup> The African Disability Protocol is however monumental because it elaborates on harmful practices and puts them into the African context. The Protocol defines harmful practices in Article 1 to include behavior, attitudes and practices based on tradition, culture, religion, superstition or other reasons, which violates human rights and fundamental freedoms of persons with disabilities or creates discrimination.<sup>90</sup> Arguably, this definition is broad enough to include all harmful practices, but the Protocol provides further elaboration on harmful practices in article 11 to specifically

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<sup>85</sup> Art 30(2) (c) African Disability Protocol.

<sup>86</sup> Art 30(2) (d) African Disability Protocol.

<sup>87</sup> Art 30(2) (e) African Disability Protocol.

<sup>88</sup> Art 30(2) (f) African Disability Protocol.

<sup>89</sup> S Kamga 'A Call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 219 226–35.

<sup>90</sup> Art 1 African Disability Protocol.

include witchcraft, abandonment, concealment, ritual killings, or the association of disability with omens.<sup>91</sup>

Specifically on ritual killings, some of the manifestations of disability in Africa include the prevalence of leprosy and albinism, and in particular the cultural views of such phenomena, leading to the killing of persons with albinism and leprosy for their body parts in Tanzania and other East African countries.<sup>92</sup> Moreover, in some African cultures, disability continues to be viewed very negatively, with some cultures and societies associating forms of mental disability with witchcraft, thus resulting in the killing of such persons with mental disabilities.<sup>93</sup> This is an area that distinguishes the African Disability Protocol from other international and regional human rights instruments such as the CRPD, and the Banjul Charter, as it elaborates on what constitutes ritual killing and provides guarantees against such practices. In article 1, the Protocol defines ritual killing to mean the killing of persons motivated by cultural, religious or superstitious beliefs that the use of a body or a body part has medicinal value, possesses supernatural powers and brings good luck, prosperity and protection to the killer.<sup>94</sup>

Article 11 of the Protocol further discourages stereotypical views of the capabilities, appearance or behaviour of persons with disabilities, as well as the use of derogatory language against persons with disabilities.<sup>95</sup> Moreover, throughout the Protocol, people with disabilities in general (article 10(c)), women with disabilities (article 27(k)), and children with disabilities (article 28(i)) are protected from forced or coerced sterilization. To this extent, it could be argued that the African Disability Protocol provides additional clarity regarding harmful practices that constitute violations of the rights of persons with disabilities in Africa.

## **5.6 Prevention of sexual and gender based violence**

In Africa, it is estimated that 45.6% of women of age 15 and above have reported intimate partner violence and/or non-partner sexual violence<sup>96</sup>. Of women with disabilities, it is estimated that 83% will be sexually abused in their lifetime<sup>97</sup>. Despite other actions that have been taken to control violence against women in Africa, the African Union remains “concerned at the human rights

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<sup>91</sup> Art 11 African Disability Protocol.

<sup>92</sup> Viljoen Biegon (n 16).

<sup>93</sup> Viljoen Biegon (n 16).

<sup>94</sup> Art 1 African Disability Protocol.

<sup>95</sup> Art 11(2) African Disability Protocol.

<sup>96</sup> World Health Organisation Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence (2013) World Health Organization.

<sup>97</sup> D Rajan *Violence against Women with Disabilities* (2004) The Roeher Institute Canada.



violations, systemic discrimination, social exclusion and prejudice within political, social and economic spheres that persons with disabilities continue to experience.”<sup>98</sup>

Under the African Disability Protocol, African persons with disabilities particularly women and girls with disabilities are protected from sexual and gender based violence in article 27,<sup>99</sup> adding additional framework for countries to establish laws, policies, and programs protecting women with disabilities from sexual and gender based violence.<sup>100</sup> Article 13 of the Protocol also guarantees African persons with disabilities the right to access justice on an equal basis as others.<sup>101</sup> The same article 13 also provides for customary law to be inclusive of persons with disabilities, and not to be “*used to deny persons with disabilities their right to access appropriate and effective justice*”.<sup>102</sup>

Moreover, article 7 of the Protocol discusses the issue of legal capacity by guaranteeing persons with disabilities the right to legal capacity on an equal basis with others in all aspects of life,<sup>103</sup> whereas Article 17 addresses the issue of consent and supported decision making. Specifically, the Protocol in Article 17 obliges State parties to take appropriate and effective measures to ensure that all health services are provided on the basis of free, prior and informed consent.<sup>104</sup> It further charges State parties to adopt necessary and effective measures to ensure that persons with disabilities are provided with support in making health decisions when needed.<sup>105</sup> In addition, the Protocol in article 13, highlights the need for law enforcement to be properly trained to engage and ensure the rights of persons with disabilities.<sup>106</sup> All of these articles together contribute to enhancing access to justice for persons with disabilities, to fighting impunity and empowering persons with disabilities especially women and girls with disabilities – all elements that are essential to the prevention of violence against persons with disabilities.

## 5.7 Self-representation

A key provision of the African Disability Protocol that distinguishes it from other regional and international human rights instruments is the right to self-representation of persons with disabilities.

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<sup>98</sup> Preamble of African Disability Protocol.

<sup>99</sup> Art 27 (j) African Disability Protocol.

<sup>100</sup> Art 27 (l) African Disability Protocol.

<sup>101</sup> Art 13 (1) African Disability Protocol.

<sup>102</sup> Art 13 (2) African Disability Protocol.

<sup>103</sup> Art 7 (2) (a) African Disability Protocol.

<sup>104</sup> Art 17 (2) (d) African Disability Protocol.

<sup>105</sup> Art 17 (2) (g) African Disability Protocol.

<sup>106</sup> Art 13 (3) African Disability Protocol.

The CRPD in article 29 guarantees the right of persons with disabilities to participate in political and public life.<sup>107</sup> This extends to their participation in non-governmental organisations and associations concerned with the public and political life of the country,<sup>108</sup> as well as forming and joining organisations of persons with disabilities to represent persons with disabilities at international, regional and local levels.<sup>109</sup> The Banjul Charter is less specific regarding the participation of persons with disabilities in public life, as it only stipulates the right of every individual to free association,<sup>110</sup> and to assemble freely with others.<sup>111</sup>

The African Disability Protocol, on the other hand, provides extensive guarantees of the right of persons with disabilities to self-representation. In article 22, the Protocol clearly stipulates that State parties recognise and facilitate the right of persons with disabilities to represent themselves in all spheres of life.<sup>112</sup> This includes enabling persons with disabilities to form and participate in the activities of organisations of and for persons with disabilities at national, regional and international levels.<sup>113</sup> Article 22 also includes guarantees for persons with disabilities to build relationships and networks at national, regional and international levels;<sup>114</sup> to form and participate in the activities of non-governmental organisations and other associations;<sup>115</sup> as well as to effectively advocate for their rights and full inclusion in society.<sup>116</sup>

In addition, the right to self-representation, as stipulated in article 22 of the Protocol, extends to persons with disabilities gaining and enhancing their capacities, knowledge and skills to enable them effectively articulate and engage on issues of disability including through direct collaboration with organisations for persons with disabilities as well as academic institutions and other organisations.<sup>117</sup> Finally, by self-representation, State parties are tasked with promoting an environment that enables persons with disabilities to be actively consulted and involved in the development and

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<sup>107</sup> Art 29 (a) CRPD.

<sup>108</sup> Art 29 (b) (i) CRPD.

<sup>109</sup> Art 29 (b) (ii) CRPD.

<sup>110</sup> Art 10 (1) Banjul Charter.

<sup>111</sup> Art 11 Banjul Charter.

<sup>112</sup> Art 22 African Disability Protocol.

<sup>113</sup> Art 22 (a) African Disability Protocol.

<sup>114</sup> Art 22 (b) African Disability Protocol.

<sup>115</sup> Art 22 (c) African Disability Protocol.

<sup>116</sup> Art 22 (d) African Disability Protocol.

<sup>117</sup> Art 22 (e) African Disability Protocol.

implementation of all legislation, policies, programmes and budgets that impact them as persons with disabilities.<sup>118</sup>

### **5.8 Right to political participation**

The right to political participation of persons with disabilities is another area that the African Disability Protocol distinguishes itself from other disability-specific human rights instruments particularly the CRPD. In Article 21(1), the African Disability Protocol details the right of every person with a disability to participate in political and public life,<sup>119</sup> with Article 21(2) clearly indicating State party obligations to take all appropriate policy, legislative and other measures to ensure this right, on the basis of equality, including undertaking or facilitating systematic and comprehensive civic education, encouraging the effective participation of persons with disabilities in political and public life including as members of political parties, electors and holders of political and public office, as well as putting in place reasonable accommodation and other support measures to enable their full and effective participation in political and public life.<sup>120</sup>

Similarly, the CRPD in Article 29 clearly stipulates the right of persons with disabilities to enjoy political rights and the opportunity to enjoy them on an equal basis with others, with State parties obliged to undertake measures to ensure that persons with disabilities can effectively and fully participate in political and public life directly or through freely chosen representatives, ensuring that voting procedures, facilities and materials are appropriate and accessible, and ensuring secret balloting.<sup>121</sup> Article 29 of the CRPD further guarantees the right of persons with disabilities to participate in non-governmental organisations and organisations concerned with the political and public life of a country, as well as forming and joining organisations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.<sup>122</sup>

However, what distinguishes the African Disability Protocol from the CRPD is the additional State party obligation to repeal or amend laws that on the basis of disability restrict the right of persons with disabilities to vote, stand for or remain in public office. As such, at the national level, if there are any laws that restrict the participation in political and public life, it is required that such laws are amended or repealed. In Africa, the Constitutions of some countries still contain restrictive

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<sup>118</sup> Art 22 (f) African Disability Protocol.

<sup>119</sup> Art 21(1) African Disability Protocol.

<sup>120</sup> Art 21(2) African Disability Protocol.

<sup>121</sup> Art 29 CRPD.

<sup>122</sup> Art 29 CRPD.

provisions with regards to political participation, with such provisions often interpreted to include persons with disabilities particularly those with intellectual disabilities. For instance, the 1992 Constitution of Ghana in Article 42 prohibits persons considered to be of “unsound mind” from registering and voting during elections.<sup>123</sup> The Constitution of Kenya in Article 83 also contains a similar provision prohibiting individuals considered to be of “unsound mind” from registering as a voter during elections or referenda.<sup>124</sup> At the national level, this constitutional provision has often been interpreted to include persons with intellectual disabilities, thus resulting in numerous instances of their denial from registering and voting during general elections, in fulfilment of their political rights. This highlights the need for African countries to ratify the African Disability Protocol as it obliges State parties to repeal the above highlighted restrictive features of their national constitutions and other laws on political participation.

## **5.9 Individual redress**

Under the Banjul Charter, individuals and non-governmental organizations may, under certain conditions, bring a case of a breach of human rights directly before the African Court on Human and Peoples' Rights (hereafter referred to as the African Court) or indirectly through the African Commission on Human and Peoples' Rights.<sup>125</sup> Article 66 of the Banjul Charter provides for additional Protocols to supplement the Charter which are considered “additions” to the Charter if State parties ratify these protocols.<sup>126</sup> Essentially, if fifteen (15) State parties ratify the African Disability Protocol, it will become effective for every State party to it. This will automatically make it possible for individuals and organizations to submit communications to the Commission to denounce violations of their rights by a State party to the Protocol.<sup>127</sup> Similarly, ratification of the African Disability Protocol will automatically grant the African Court, jurisdiction over cases regarding the interpretation and application of the Protocol, in States having accepted its competency.<sup>128</sup> Arguably, this is a distinguishing feature of the African Disability Protocol, which makes its ratification even more important towards addressing the situation of persons with disabilities in Africa.

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<sup>123</sup> Art 42 Constitution of Ghana 1992.

<sup>124</sup> Art 83 Constitution of Kenya 2010.

<sup>125</sup> AU Advocacy Tool (n 48).

<sup>126</sup> Art 66 Banjul Charter.

<sup>127</sup> AU Advocacy Tool (n 48).

<sup>128</sup> AU Advocacy Tool (n 48).

### **5.10 The right to live in the community**

The African Disability Protocol is further distinguished from the CRPD as it emphasises the right of persons with disabilities to live in the community rather than independent living as stipulated by the CRPD. In Article 24, the African Disability Protocol clearly stipulates the right of persons with disabilities to live in the community with choices on an equal basis with others, whereas Article 19 of the CRPD emphasises the right of persons with disabilities to live independently and be included in the community. The African Disability Protocol's emphasis of community living draws in Article 24 draws on African traditional or cultural belief in *Ubuntu* – an African view that grounds societies that embraces communal ways of living. The concept of Ubuntu means that one is not considered a human being unless one is concerned about the well-being of other people.<sup>129</sup> One of the main characteristics of Ubuntu is communality or communal well-being.<sup>130</sup> Within this context, Ubuntu would mean that persons with disabilities participate meaningfully in all community activities including birth celebrations, initiation ceremonies, weddings, all forms of traditional dances, choosing marriage partners, becoming parents and grandparents. It also includes the participation of persons with disabilities in governance as well as having their views respected in the community. This highlights the added value of the African Disability Protocol in promoting the inclusion of persons with disabilities in African society.

In furtherance of community living of persons with disabilities, the African Disability Protocol in Article 14(f) stipulates State party obligations to take effective and appropriate measures to ensure that community living centres organized or established by persons with disabilities are supported to provide training, peer support, personal assistance services and other support services to persons with disabilities.<sup>131</sup> The above provision of the African Disability Protocol represents an added feature that the CRPD does not provide for, towards promoting community living of persons with disabilities in Africa.

### **5.11 Employment quota**

The African Disability Protocol, in Article 19 guarantees the right of persons with disabilities to decent work, to just and favorable conditions of work, protection against employment, exploitation,

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<sup>129</sup> SA Ngubane-Mokiwa *Ubuntu considered in light of exclusion of people with disabilities* (2018) *African Journal of Disability* 7(1) 1-7.

<sup>130</sup> Ngubane-Mokiwa (n 129).

<sup>131</sup> Art 14(f) African Disability Protocol.

and forced or compulsory labour.<sup>132</sup> It further prohibits discrimination on the basis of disability in all forms of employment. Similarly, the CRPD in Article 27 stipulates the right of persons with disabilities to work on an equal basis with others including the right to the opportunity to gain a living by work freely chosen or accepted in the labour market, and to work environments that are open, inclusive and accessible to persons with disabilities.<sup>133</sup>

Although both human rights instruments are significant in terms of promoting the right to work and employment of persons with disabilities, the African Disability Protocol is however distinguished from the CRPD as it introduces State party obligations to employ persons with disabilities in the public sector, including by reserving and enforcing minimum job-quotas for employees with disabilities. Job quotas achieve the effect of making it mandatory for public sector Organisations to employ the services of persons with disabilities, thus providing them opportunities to improve their standard of living, access to essential social services, and inclusion in African society.

#### **5.12 Customary laws and access to justice**

The African Disability Protocol is further distinguished from the CRPD in the area of access to justice for persons with disabilities. Both the African Disability Protocol and the CRPD in Article 13 respectively contain State party obligations to ensure effective access to justice for persons with disabilities on an equal basis with others, including the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and in-direct participants, including as witnesses in all legal proceedings, including at investigative and other preliminary stages. However, in Article 13(2), the African Disability Protocol contains additional State party obligations to take reasonable steps to ensure that customary law processes are inclusive and should not be used to deny persons with disabilities, such as victims of rape, their right to access appropriate and effective justice. By recognizing customary law processes in justice administration in African countries, the Protocol protects persons with disabilities from being discriminated against or denied access to justice. This highlights the added value of the African Disability Protocol with regards to access to justice for persons with disabilities.

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<sup>132</sup> Art 19 African Disability Protocol.

<sup>133</sup> Art 27 CRPD.

### **5.13 Freedom from torture or cruel, inhuman or degrading treatment or punishment**

The African Disability Protocol in Article 10, similar to Article 15 of the CRPD, stipulates the right of persons with disabilities to the respect of his or her inherent dignity and to be free from torture or cruel, inhuman or degrading treatment, slavery, forced labour or unlawful punishment. It further captures State party obligations to adopt appropriate and effective measures to ensure that persons with disabilities, on an equal basis with others, are not subjected without their free, prior and informed consent to medical or scientific experimentation or intervention. However, what distinguishes the African Disability Protocol from the CRPD is the State party obligation in Article 10(c) to ensure that persons with disabilities are not subjected to sterilization or any other invasive procedure without their free, prior and informed consent.

The provisions of Article 10(c) of the African Disability Protocol is timely considering that forced sterilization of persons with disabilities particularly those with intellectual disabilities is pervasive on the African continent. For instance, in South Africa, 152 sterilisations were performed at Pretoria's HF Verwoerd Hospital since the adoption of the country's Abortion and Sterilisation Act No.2 in 1975. The Act authorized sterilization of women with severe intellectual disability, provided the procedure was performed in a State hospital, certified by 2 medical practitioners and the parent/guardian providing consent. However, per Article 10(c) of the African Disability Protocol, the above instance of sterilization carried out in South Africa constitutes a clear violation of the right of persons with intellectual disabilities especially as it was carried out without their free, prior and informed. This highlights the added value of the Protocol and the need for African countries to sign and ratify it to protect persons with disabilities from forced sterilization and other forms of torture or cruel, inhuman or degrading treatment in Africa.

### **5.14 Habilitation and rehabilitation**

The added value of the African Disability Protocol is also reflected in the area of habilitation and rehabilitation. Similar to Article 26 of the CRPD, Article 18 of the Protocol highlights State party obligations to take effective and appropriate measures to enable persons 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.<sup>134</sup> However, the Protocol goes a step further by obliging African countries that sign and ratify it to develop, adopt and implement standards, including

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<sup>134</sup> Art 18 African Disability Protocol.

regulations on accessibility and universal design, suitable to local conditions. This is a significant addition as such standards, regulations and universal design will improve the accessibility of persons with disabilities to the physical environment.

### **5.15 Persons with disabilities as duty bearers**

The African Disability Protocol is distinguished from the CRPD as gives recognition to persons with disabilities as duty bearers. Specifically, Article 31(1) of the Protocol obliges State parties to recognise that persons with disabilities have duties on an equal basis with other persons. As such, persons with disabilities are to be rendered the forms of assistance and support, including reasonable accommodation required to perform such duties.<sup>135</sup> The above provision of the African Disability Protocol provides opportunities for persons with disabilities to represent themselves in national development discourses that shape policy and programme design and implementation, rather than through Organisations of Persons with Disabilities.

### **5.16 The right to hold identities (Article 7(2)(f))**

Finally, the added value of the African Disability Protocol is manifested in the Article 7 on the right of persons with disabilities to equal recognition before the law. Although the CRPD equally guarantees the right to equal recognition of persons with disabilities, The African Disability Protocol, in Article 7(2) (f), goes a step further by mandating countries that sign and ratify it to take all appropriate and effective measures to ensure that persons with disabilities have the equal right to hold documents of identity and other documents that may enable them exercise their right to legal capacity.<sup>136</sup> The above provision of the Protocol is particularly welcome particularly as many African countries continue to deny persons with disabilities opportunities to register and hold national identity cards such as passports and birth certificates that will enable them access critical social services such as healthcare or vote during national elections. For instance, in Ghana, persons with intellectual disabilities continue to be denied the right to register, and vote during election, a clear denial of their legal capacity and right to political participation, per Article 7(2) (f) of the African Disability Protocol.

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<sup>135</sup> Art 31(1) African Disability Protocol.

<sup>136</sup> Art 7(2) (f) African Disability Protocol.



## 6. Challenges to Regional Assent of African Disability Protocol

Literature on the challenges to regional assent or ratification of African human rights instruments specifically the African Disability Protocol is very limited. However, literature on why States ratify or refrain from ratifying international human rights treaties could serve as background knowledge on the possible challenges or reluctance on the part of African countries to sign and ratify the African Disability Protocol.

### 6.1 Enforcement ability

The enforcement ability of States constitute a key determinant of whether it will ratify a treaty or not. That is, whether a State ratifies a treaty is in a large part dependent on how well the State expects to enforce or comply with that treaty within its borders once they join.<sup>137</sup> States tend to make ratification decisions based on the goal of avoiding changes in domestic behaviour. For instance, States with less democratic institutions will be no less likely to commit to human rights treaties if they have poor human rights records, because there is little prospect that the treaties will be enforced. Conversely, States with more democratic institutions will be less likely to commit to human rights treaties if they have poor human rights records precisely because treaties are likely to lead to changes in behaviour.<sup>138</sup>

The argument above brings up concerns over whether such behaviours by States are best serving the protection of human rights. That is, if the goal of States is to avoid domestic changes in behaviour, how then will human rights treaties which aim to improve upon States' rights practices achieve their goal? Moreover, democracies tend not to ratify because they already guarantee a high level of human rights protections to their citizens.<sup>139</sup> However, when ratification trends are studied, this is not always the case as the vast majority of democracies tend to ratify the core United Nations human rights treaties. In effect, the opportunity to improve is always present when it comes to human rights practices, and should guide the decision of States to ratify.

### 6.2 Type of government

The literature suggests the type of government plays a significant role in terms of ratification of international human rights instruments. Democratizing States have the most incentive to ratify, while

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<sup>137</sup> OA Hathaway Why do countries commit to human rights treaties? (2007) *The Journal of Conflict Resolution* 51 (4) 588-621.

<sup>138</sup> Hathaway (n 137).

<sup>139</sup> EM Hafner-Burton ED Mansfield JC Pevehouse Human rights institutions, sovereignty costs and democratization (2015) *British Journal of Political Science* 45(1) 1-27.

autocracies and democracies have few incentives to ratify. Democratizing states tend to ratify international human rights treaties because these treaties provide them with a platform to solidify liberal policies and show the rest of the international community their future intentions to uphold these liberal policies.<sup>140</sup> As such, for a democratizing country, ratifying a human rights treaty means making a promise to the rest of the international community that they will behave democratically in the future. Emerging democracies gain most from an external mechanism to help guide domestic policy because they have the strongest incentive to demonstrate that they intend to act democratically in the future, including a declaration to protect human rights.<sup>141</sup>

While emerging democracies tend to have the most to gain from ratifying a treaty,<sup>142</sup> consolidated democracies gain less and tend to be more hesitant to ratify. This is because established democracies already demonstrate respect for human rights, they are generally reluctant to bear the sovereignty costs of entering human rights institutions.<sup>143</sup> Notably, this assertion claims that a respect for human rights is already implied in a democracy. That is, by nature of being a democracy, it is implied that such States already demonstrate respect for human rights. Indeed, unlike democratizing States, established democracies have less of a need to demonstrate their intentions to the international community by ratifying a human rights treaty. However, in reality, a lot more democracies ratify international human rights treaties. For instance, in the case of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), only one established democracy has refrained from ratification – the United States of America. As such, the logic that democracies do not need to ratify human rights treaties because they already adequately demonstrate respect for human rights is moot.

Furthermore, the literature suggests that autocracies are the least likely to ratify human rights treaties. Their human rights abuses, in tandem with the small chance that the treaty will actually be enforced, means they will eschew treaties with higher sovereignty costs and instead prefer ones with lower costs.<sup>144</sup> Also, autocracies have fewer and much more highly restricted non-governmental organisations (NGOs) inside the State that can contest human rights abuses and pressure the government into ratifying a human rights treaty, presenting an even slimmer chance of ratification of

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<sup>140</sup> EM Hafner-Burton *Making human rights a reality* (2013) Princeton University Press.

<sup>141</sup> Hafner-Burton (n 125).

<sup>142</sup> Hafner-Burton Mansfield Pevehouse (n 124).

<sup>143</sup> Hafner-Burton (n 125).

<sup>144</sup> Hafner-Burton (n 125).

international human rights instruments. From the literature, it can be deduced that the type of government in place plays a significant role in determining ratification of international human rights instruments, with emerging and established democracies more likely to sign and ratify international human rights instruments, than autocratic governments. Could it therefore be the case that the type of government and the extent of adherence to democratic principles by African countries could be a factor stalling regional assent of the African Disability Protocol?

### **6.3 Political will**

A major challenge to the ratification of international human rights instruments is precisely that they relate to human rights. Considerable evidence exists to the effect that resistance to human rights treaties in general arises from fear that eventually such treaties would touch upon and deal with the situation of marginalised groups in society. In some instances, there is the fear that ratification of any human rights treaty may serve as a precedent for ratification of treaties which have been concluded and signed, but yet to be submitted to national parliaments for ratification.<sup>145</sup> For instance, in the United States of America, the Convention on the Elimination of All Forms of Racial Discrimination was concluded and signed by the United States of America but not submitted to the Senate for ratification. The clearest expression of the lack of political will was that of Secretary Dulles who indicated that:

*“The United States of America should favour methods of persuasion, education and example rather than formal undertakings which commit one part of the world to impose its particular social and moral standards upon another part of the world community which has different standards. We do not ourselves look upon a treaty as the means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty to which the United Nations has been delegated since its inception.”<sup>146</sup>*

From the above excerpt, it is apparent that in the political context of the United States of America, there is a serious question of the existence of a national and political will to deal affirmatively with human rights in either the domestic or international context. It could therefore be the case that other countries share similar reluctance to sign and ratify international human rights treaties due to fear of social and moral standards from other contexts being imposed on them. Similarly, such reluctance or the absence of political will to ratify treaties could be due to the lack of desire to address certain

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<sup>145</sup> EP Deutsch International Human Rights Covenants (1968) *American Bar Association Journal* vol. 54 238-245.

<sup>146</sup> Hearings, Sub-committee, Senate Judiciary Committee, 83rd Congress, 1st Session, 824 (1953).

human rights violations or restrictive aspects of constitutional and other legal provisions that promote human rights violations in the national context.

#### **6.4 Issue of legality**

The literature also highlights the scope of treaty making power as a major challenge to the ratification of international human rights instruments. It has generally been asserted that this power is subject to two limitations: first, the subject matter of the treaty must relate to a matter of international concern,<sup>147</sup> and secondly, the matter of international concern must be a subject within the powers delegated to federal or local governments.<sup>148</sup> Human rights are matters of international concern because they have in fact been the subject of serious negotiations between nations. Certainly the human rights provisions of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights, all attest to the fact that human rights are a matter of international concern.

An examination of any agenda of the General Assembly will further demonstrate that concern of nations with the subject matter of human rights. Whether such concern is "proper" on the part of States may well relate to the second of the constitutional limitations on the treaty-making power. Generally, it has been asserted that the treaty-making power does not extend to that which is forbidden to federal or local governments.<sup>149</sup> Consequently, it could be argued that matters exclusively within the domain of the several states cannot properly be the subject of treaties. However, there are certain rights specified in international human rights treaties which raise substantial ratification problems for States, not because of problems of allocation of powers between the State and federal or local governments, but because of substantial questions as to whether the rights are within the competence of government at all. For instance, the specification of the rights of all peoples to self-determination and permanent sovereignty over natural resources in the ICCPR are within this class.<sup>150</sup> Such lack of clarity could therefore result in reluctance on the part of States to ratify international human rights instruments.

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<sup>147</sup> CE Hughs Proceedings American Society of International Law 194 196 (1929).

<sup>148</sup> Department of State Circular No. 175 (Dec. 13, 1955).

<sup>149</sup> CC Ferguson The United Nations Human Rights Covenants: Problems of Ratification and Implementation *Proceedings of the American Society of International Law at its Annual Meeting* (1921-1969) Vol. 62 (APRIL 25-27 1968) pp. 83-96.

<sup>150</sup> Art 1 & 2 ICCPR.

## 7. Methodology

The study adopted a qualitative approach. With regards to the target population, the study purposively sample the following Inclusion Africa (IA) Member Organisations: Inclusion Ghana (Ghana); Association des Parents et Amis des Personnes Encéphalopathes (APAPE- Togo); La Chrysalide (Benin); Uganda Parents of Persons with Intellectual Disabilities (UPPID-Uganda); the Tanzania Association for Mentally Handicapped (TAMH); the Zambia Association for Children and Adults with Learning Disabilities (ZACALD); and the Zimbabwe Parents of Handicapped Children Association (ZPHCA). Subsequently, key officials of the above highlighted Member Organisations were purposively selected for the study based on their key insights on issues affecting persons with intellectual disabilities in the selected countries of the study.

Data collection entailed the use of semi-structured interviews. In-depth interviews were held with study participants from all seven (7) member organisations selected for the study. In addition, a desk review of literature on the extent to which the Protocol addresses the situation of persons with disabilities in Africa, and barriers to ratification of regional and international human rights instruments was conducted. This was useful towards supporting qualitative data obtained from study participants.

With regards to data analysis, qualitative data gathered through semi-structured interviews were transcribed, followed by primary and secondary coding to identify themes relevant to the study. These were then abstracted and used to support and triangulate the study findings. The study also adopted measures to ensure that it complied with the ethics of research particularly anonymity and confidentiality, and informed consent. Specifically, study participants were informed of the purpose of the study, with participation also being on voluntary basis. Moreover, study participants were assured of confidentiality by removing personal identifiers in the summary data.

## 8. The Evidence

This section presents the results of the study. As a recap, the study sought to establish the knowledge of key officials of OPWIDs and persons with intellectual disabilities on African regional human rights instruments that guarantee the rights and freedoms of persons with intellectual disabilities and their families. It also establishes the added value of the African Disability Protocol, the barriers to the Protocol's ratification by national governments of African countries, and the role of OPWIDs in promoting its ratification. The results are organised under the following sub-headings.

## 8.1 Knowledge of African human rights framework on disability

The gradual acknowledgment of disability rights in the African human rights system should be seen against the background of two parallel historical trajectories. On the one hand, there was the growing recognition internationally of disability as a compelling human rights concern; on the other, the slow shift of the Organisation of African Unity (OAU) towards a human rights orientation.<sup>151</sup> Considering that the African Charter was drafted and adopted at the beginning of the 1980s, this historical perspective assists towards understanding why this foundational document contains limited references to disability.<sup>152</sup>

However, since the 2000s, the main African instruments adopted, specifically the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African Youth Charter, the African Charter on Democracy, and Elections and Governance, and AU Convention for the Protection and Assistance of Internally Displaced Persons, all contain disability-related provisions. While the above cited regional human rights instruments have attracted some criticism in respect of their limited scope and occasionally unwieldy formulation, they do provide 'an evolving convergence as to the standards to be achieved' by States in respect of the promotion and protection of disability rights in Africa.

Disability rights in Africa was further enhanced following the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) in 2018 by the African Union. As such, it is imperative that CSOs, OPWDs, OPWIDs and persons with intellectual disabilities in Africa have knowledge of the African human rights framework as it relates to disability, to enhance advocacy for the full inclusion of persons with intellectual disabilities and their families in African society. This section presents the findings regarding the level of knowledge of key officials of selected OPWIDs on the African human rights framework on disability.

In Ghana, the findings indicate a low level of knowledge of African regional human rights framework on disability. Although, study participants indicated being aware of the existence of the African

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<sup>151</sup> J Biegon 'The promotion and protection of disability rights in the African human rights system' in I Grobbelaar-Du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 56-57.

<sup>152</sup> A Bruce G Quinn T Degener C Burke S Quinlivan J Castellino U Kilkelly *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) United Nations Press.

Charter on Human and Peoples' Rights (Banjul Charter), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African Charter on the Rights and the Welfare of the Child (African Children's Charter), the African Youth Charter, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol), their knowledge of the specific provisions of the above highlighted regional human rights instruments, besides the African Disability Protocol, was however limited. Knowledge of the Protocol was obtained from literature searches on the internet and capacity building programmes/short courses taken online from the Centre for Human Rights, University of Pretoria.

Similar findings were established in Uganda, and Zambia where study participants indicated being unfamiliar with the human rights provisions in Banjul Charter, Maputo, Protocol, the African Children's Charter, the African Youth Charter and the African Disability Protocol. However, in Togo, Benin, Tanzania and Zimbabwe, the results suggest a good level of awareness of the African human rights framework that the present study focused on. In Zimbabwe, such knowledge was obtained from publications of the African Union, the government of Zimbabwe, and other Civil Society Organisations. In Togo, Benin and Tanzania, study participants shared that their awareness of regional human rights framework was gained from capacity building programmes focused on disability rights as well as key literature searches conducted as key officials of APAPE, La Chrysalide and TAMH respectively, in a bid to raise awareness and advocate for the rights and full inclusion of persons with intellectual disabilities and their families.

Specifically on the African Disability Protocol, study participants across all seven (7) countries of the present study concurred that the Protocol is necessary as it complements the Convention on the Rights of Persons with Disabilities (CRPD) and provides adequate guarantees the rights of persons with disabilities including those with intellectual disabilities on the African continent. However, key officials of the selected OPWIDs could not elicit the distinguishing features of the African Disability Protocol. Moreover, in all the selected countries, the study found no knowledge of the regional institutional framework that advances human rights in Africa, specifically the African Commission on Human and Peoples' Rights, the Committee of Experts on the Rights and Welfare of the Child, and the African Court on Human and Peoples' Rights. As such, study participants shared that it is difficult to ascertain whether the regional institutional framework that advances human rights is inclusive of persons with intellectual disabilities.

The limited knowledge of the legal and institutional framework of human rights at the African regional level among the selected OPWIDs could have negative implications in terms of the advancement of disability rights in the selected countries of this study. Specifically, awareness raising and advocacy could become problematic as key officials of OPWIDs are not aware of existing human rights framework and opportunities to seek redress at the regional level, following violations of the rights and freedoms of persons with intellectual disabilities and their families.

## **8.2 The added value of the African Disability Protocol**

The African Disability Protocol largely guarantees and protects the rights of persons with disabilities in Africa. It provides clarity regarding the myriad of issues facing persons with disabilities as well as obligations on the part of State parties to ensure that persons with disabilities enjoy their rights on an equal basis with others. This section presents findings related to the added value of the African Disability Protocol in addressing the situation of persons with disabilities in Africa. It seeks to establish the perspectives of key officials of the selected OPWIDs in Ghana, Togo, Benin, Uganda, Tanzania, Zambia, and Zimbabwe regarding the distinguishing features of the African Disability Protocol, which informs the need for the national governments of African countries to as a matter of urgency, sign and ratify the Protocol.

Generally, as reported in the previous section, key officials of the Uganda Parents of Persons with Intellectual Disabilities (UPPID-Uganda), and the Zambia Association for Children and Adults with Learning Disabilities (ZACALD) reported no knowledge of the African Disability Protocol, as well as its provisions on the rights of persons with disabilities including persons with intellectual disabilities. Consequently, no perspectives were provided with regards to the added value or the distinguishing features of the African Disability Protocol in advancing the rights of persons with intellectual disabilities in the region.

However, in Ghana, Togo, Benin, Tanzania and Zimbabwe, the results show considerable knowledge of the added value of the African Disability Protocol in advancing the rights of persons with intellectual disabilities on the continent. Study participants shared that the Protocol provides adequate guarantees of equality and non-discrimination to persons with intellectual disabilities and their families by clearly outlining State party obligations to ensure equality and non-discrimination. The findings also indicate that the Protocol is considered to provide adequate guarantees of the rights of children with disabilities in Africa as it clearly stipulates their human rights particularly the right to life, education, health, and social protection.



However, there was limited knowledge regarding guarantees provided in the Protocol against discrimination on the basis of association with a person with disability including those with intellectual disabilities, such as family members, caregivers, or intermediaries; the rights of women and girls with disabilities; youth with disabilities; and other specialized protections such as freedom from torture and forced sterilization; the right to hold identities; the right to habilitation and rehabilitation; persons with disabilities as duty bearers in the implementation and monitoring of the Protocol; and reserving and enforcing minimum job quotas for employees with disabilities. Moreover, the selected OPWIDs in Ghana, Uganda, Tanzania, Zambia and Zimbabwe have not carried out awareness creation or advocacy work to promote ratification of the Protocol due to limited knowledge of the added value of the Protocol, funding challenges and lack of political will to promote its ratification. However, in Togo and Benin, key officials of APAPE and La Chrysalide indicated that they periodically conduct awareness campaigns on the Protocol, with La Chrysalide forming part of the Committee set up to promote ratification of the Protocol in Benin.

The findings of the study with regards to the added value of the African Disability Protocol highlight the need for increased sensitization and/or capacity building of Inclusion Africa's Member Organisations and OPWIDs in general on the human rights provisions of the African Disability Protocol, as well as its added value that differentiates it from other regional and international human rights instruments such as the Banjul Charter, Maputo Protocol, the African Youth Charter, the African Children's Charter, and the CRPD. This could in turn boost Organizational capacity to undertake advocacy work and engage relevant duty bearers or social service providers to promote the human rights and full inclusion of persons with intellectual disabilities and their families in society.

### **8.3 Challenges to ratification of the African Disability Protocol**

In this section, the perceived challenges to regional ratification of the African Disability Protocol by national governments. The results highlight the lack of political will; low awareness of the existence of the African Disability Protocol among legislators, CSOs, OPWIDs, OPWIDs, and persons with intellectual disabilities; lack of resource allocation to accelerate the Protocol's ratification; and low level of sensitisation and advocacy on the added value of the Protocol as key challenges or barriers to its ratification by the national governments of Ghana, Togo, Benin, Uganda, Tanzania, Zambia and Zimbabwe. The above challenges are elaborated on in the following sub-sections.

### **8.3.1 Lack of political will**

The results highlight several challenges to the ratification of the African Disability Protocol by the governments of Ghana, Togo, Benin, Uganda, Tanzania, Zambia and Zimbabwe. Specifically, study participants shared that political will when it comes to disability rights remains low in the selected countries, despite some positive measures adopted to promote the rights of persons with disabilities. Notwithstanding, successive governments have consistently relegated issues affecting persons with disabilities to the periphery. It therefore comes as no surprise that there is little conversation not only on the African Disability Protocol, but also the need for its ratification in furtherance of the rights of persons with disabilities including those with intellectual disabilities and their families.

### **8.3.2 Low awareness of the existence of the African Disability Protocol**

In addition, the study established low awareness of the existence of the African Disability Protocol among legislators, CSOs, OPWDs and persons with disabilities including those with intellectual disabilities as a key barrier or challenge to its ratification by the government of the selected countries. Indeed, the CRPD remains the main human rights instrument that is championed or heralded as promoting the rights of persons with disabilities. As such, CSOs, OPWDs and OPWIDs often make reference to the CRPD in their advocacy work on the rights of persons with disabilities including those with intellectual disabilities. Study participants shared that this has resulted in limited conversation on the African Disability Protocol – a situation which means that persons with disabilities have limited knowledge of the rights stipulated in the Protocol as well as its added value in promoting disability rights in Africa. Moreover, the study gathered that the lack of awareness or limited knowledge of the African Disability Protocol has culminated in the lack of advocacy or engagement with legislators at the National Parliaments of the selected countries of the study on the need to ratify the Protocol as well as ensure that domestic laws and policies are in tune with regional and international standards on disability rights.

### **8.3.3 Inadequate resource allocation to promote ratification**

The study further identified the lack of resource allocation to facilitate the assent or ratification of the African Disability Protocol as a key factor accounting for the slow pace of ratification. Study participants across the seven (7) Inclusion Africa Member Organisations of this study highlighted reluctance on the part of their respective national government to commit resources, although limited, to ratify the Protocol as ratification automatically comes with State party obligations to ensure the realisation of the rights of persons with disabilities including those with intellectual disabilities. For

instance, in Ghana, it was gathered that disability issues remain on the fringes of national development. As such, it is very unlikely that the little resources particularly financial and human will be dedicated to promoting the ratification of the African Disability Protocol.

The study further established that part of the challenge of resource allocation is the requirement of Article 4 of the Protocol which stipulates that State parties take appropriate and effective measures including policy, legislative, administrative, and institutional measures to ensure, respect, promote, protect and fulfil the rights and dignity of persons with disabilities, without discrimination on the basis of disability, and Article 4(i) which requires national governments to put in place adequate resources including budget allocations to ensure the full implementation of the Protocol. In Togo and Benin, study participants shared that national governments' reliance on external funding (aid) in a context of limited domestic revenue has culminated in disability rights being relegated to the background. As such, ratifying the African Disability Protocol is not prioritised by their respective national governments, partly informed by the perception that the concerns and human rights of persons with disabilities including those with intellectual disabilities are already addressed by the CRPD.

#### **8.3.4 Low level of sensitisation and advocacy on the added value of the Protocol**

The results highlight low level of sensitisation and advocacy on the part of OPWIDs in the selected countries of this study as a key challenge to the ratification of the African Disability Protocol. This was mainly attributed to limited knowledge among staff of OPWIDs on the detailed provisions or rights captured in the Protocol, as well as its added value in terms of promoting the rights of persons with disabilities particularly those with intellectual disabilities in Africa. In addition, study participants highlighted limited funding/budgetary allocation to promote awareness of the African Disability Protocol among duty bearers, legislators and policy makers at the national level as a further reason for the low level of sensitisation and advocacy on the added value of the Protocol and the need to ensure its ratification.

In all seven (7) Inclusion Africa Member Organisations, key officials also highlighted the challenge in securing donor funding to initiate awareness and advocacy campaigns on the added value of the Protocol and promote its ratification. Also, funds for already existing projects are meagre and did not have components for awareness and advocacy on the African Disability Protocol. This makes it difficult to conduct awareness creation across radio, television and other media, as well as lobby, and engage relevant stakeholders such as Members of Parliament, and national government officials on

the need to sign and ratify the African Disability Protocol towards promoting the rights of persons with disabilities including those with intellectual disabilities in Ghana, Togo, Benin, Uganda, Tanzania, Zambia and Zimbabwe.

### **8.3.5 Prevailing negative cultural beliefs**

Negative cultural beliefs surrounding disability in general and specifically intellectual disability was found to be a factor contributing to the slow pace of ratification of the African Disability Protocol. In Ghana, study participants shared that negative cultural beliefs of persons with intellectual disabilities as evil spirits and “nsuoba” (river children) remain prevalent in Ghanaian society. This often results in situations where persons with intellectual disabilities are “escorted to the bush” (killed), with others also facing stigma, multiple forms of discrimination and abuse. Similar sentiments were shared by study participants in Zambia and Zimbabwe where the predominant cultural beliefs surrounding intellectual disability are myths of them being cursed, with family and community members often discriminating against persons with intellectual disabilities. In Uganda and Tanzania, the study found that intellectual disability is considered to be the product of witchcraft, a sign of bad omen to families where they belong, and is also associated with family planning methods. In Benin, the prevailing cultural belief or perception of persons with intellectual disabilities are myths of them being “spirits”, thus making it necessary for parents/caregivers to return them to the spirit world. In Togo, persons with intellectual disabilities are perceived as “gods” or “deities” to whom it is important to make sacrifices or venerated. There are other perceptions of them as curses from the gods, and a disgrace to families which results in them being hidden from the public eye.

Surrounded by such cultural beliefs and perceptions, study participants highlighted the challenge facing OPWIDs in changing the above highlighted negative cultural beliefs and perceptions held by community members concerning persons with intellectual disabilities. Moreover, the study established that considering that government officials, Members of Parliament and representatives of other institutions tasked with initiating steps towards ratification and domestication of human rights instruments are the product of society, the lack of ratification of the African Disability Protocol by national governments was perceived to be attributable to the above highlighted cultural beliefs, perceptions and stigma associated with disability and intellectual disability to be specific. According to study participants, it is not expected that law makers will ratify the Protocol as their thoughts, beliefs and actions are possibly shaped by their environment which is characterised by negative

cultural beliefs and lack of recognition of the rights of persons with disabilities including those with intellectual disabilities.

#### **8.4 Measures to promote the Protocol's ratification**

The study established the lack of political will, low awareness of the existence of the African Disability Protocol, inadequate resource allocation to promote disability rights and the Protocol's ratification, low level of sensitisation on the added value of the Protocol, and prevailing negative cultural beliefs and perceptions of persons with disabilities including those with intellectual disabilities as the main challenges to regional ratification of the African Disability Protocol by national governments of African countries that are party to the Banjul Charter. It is therefore imperative that CSOs, OPWDs, OPWIDs, and human rights advocate adopt effective measures to promote the ratification of the Protocol by African countries due to its added value in promoting the rights and full inclusion of persons with disabilities including those with intellectual disabilities in Africa. This section presents country-specific proposals by Inclusion Africa Member Organisations to promote ratification of the African Disability Protocol.

##### **8.4.1 Ghana**

In Ghana, the study established the need to increase awareness of intellectual disability, the capabilities and the rights of persons with disabilities including those with intellectual disabilities as a key starting point towards possible ratification of the African Disability Protocol. Study participants indicated the need for OPWIDs to step up awareness campaigns on intellectual disability and disability rights through channels such as radio and television programmes, public forums, and workshops towards improving perceptions of persons with intellectual disabilities, while dispelling stigma and multiple forms of discrimination against them in Ghanaian society. With such improved perception regarding disability and intellectual disability, family and community members, traditional authorities, and duty bearers could then be in a position to promote or advocate for the rights and full inclusion of persons with intellectual disabilities, which includes pressuring government to sign and ratify the African Disability Protocol.

In addition, key officials of Inclusion Ghana highlighted the need to collaborate with other Civil Society Organisations and Organisations of Persons with Disabilities such as the Ghana Federation of Disability Organisations, Ghana Blind Union, Ghana Society for the Physically Disabled, and Ghana Association of Persons with Albinism to identify key advocacy areas and engage government

agencies and Parliament on the added value of the Protocol and the need to ratify it, in order to promote the rights and full inclusion of persons with intellectual disabilities.

Moreover, study participants indicated that establishing alliances with Members of Parliament with considerable interest in disability-inclusion constitutes a crucial strategy towards promoting the ratification of the Protocol by Ghana. Where such allies (MPs) are identified and engaged on the added value of the Protocol, they could then initiate a debate on the floor of Parliament of Ghana on the Protocol and the benefits of ratification.

Finally, the study identified the periodic publication of articles in print and electronic media as a viable way of drawing public attention, that of legislators and national government on the plight of persons with intellectual disabilities, how the African Disability Protocol addresses the situation of persons with intellectual disabilities, and how it is differentiated from other human rights instruments particularly the CRPD. Such publications should further make calls for the ratification of the African Disability Protocol by the government of Ghana, as it seeks to provide for the rights of persons with disabilities from an African perspective, taking into account the lived realities of persons with disabilities in the continent while maintaining the core values and principles as set out in the CRPD.

#### **8.4.2 Togo**

Although the government of Togo has signed the African Disability Protocol, it has yet to ratify it. Within this context, key officials of APAPE who participated in this study proposed some measures to promote awareness and subsequent ratification of the African Disability Protocol by the government of Togo. These include community sensitisation, radio and television discussions on the need to dispel negative perception, stigma and discrimination against persons with intellectual disabilities, as well as capacity building programmes for staff of APAPE and duty bearers on the added value of the African Disability Protocol. This would then put them in a position to advocate for the rights of persons with disabilities including those with intellectual disabilities and more importantly, the ratification of the Protocol. The findings also indicate lobbying and presenting petitions to the national parliament as a strategy to drive home the message of disability rights and possibly achieve ratification

#### **8.4.3 Benin**

In Benin, the study established that processes are already in place to sign and possibly ratify the African Disability Protocol by the government through national Parliament. Crucially, study

participants noted that Organisations of Persons with Disabilities are immersed in consultative meetings and discussion with government agencies and law makers geared towards ratifying the Protocol. Key Officials of La Chrysalide shared that the Organisation is part of the Committee set up by the national government working towards the ratification of the Protocol. Despite this, it was reported that more awareness and advocacy campaigns focused on the message of disability-inclusion and the added value of the African Disability Protocol are required highlight to speed up deliberations or discussions intended to ratify the Protocol as well as bring domestic legislation in line with core regional and international human rights instruments.

#### **8.4.4 Uganda**

The results indicate that not much has been done by UPPID as an Organisation in terms of promoting awareness and ratification of the African Disability Protocol by the government of Uganda. Key Officials of UPPID however indicated that they will commence community sensitisation and advocacy campaigns on the added value of the African Disability Protocol and the need to ratify it by the government of Uganda. Study participants further highlighted the need for partnership or collaboration with other stakeholders including OPWDs and CSOs to promote awareness of the Protocol and its ratification by the government. Finally, lobbying was identified as a useful strategy to ensure that the Protocol is ratified by law makers in Uganda.

#### **8.4.5 Tanzania**

In Tanzania, key officials of TAMH suggested lobbying the Government Ministry that deals with disability matters, as well as Members of Parliament on the need to recognise the African Disability Protocol and subsequently ratify it to promote disability-inclusion. They further indicated the need to visit the Parliament of Tanzania and present the case (ratification) to the Minister Responsible for Disability in Parliament to initiate ratification processes, to ensure that persons with disabilities including those with intellectual disabilities enjoy the rights, freedoms and duties that the African Disability Protocol spells out.

#### **8.4.6 Zambia**

In Zambia, key Officials of ZACALD agreed that much needed to be done to achieve ratification of the African Disability Protocol. Specifically, it was reported that securing political will constitutes the main factor to achieving ratification of the Protocol. Study participants shared that political will could be attained through lobbying law makers and government officials on the need to address human rights violations facing persons with intellectual disabilities in Zambia by ratifying the African

Disability Protocol to complement domestic legal and policy framework, as well as regional and international human rights treaties that the country has already signed and ratified.

The study also established awareness raising and/or sensitisation through various forums such as print and electronic media as a way of courting public attention, law makers and national government on the situation of persons with intellectual disabilities in Zambia, their capabilities and human rights, the added value of the African Disability Protocol, and the need to ensure its ratification by the national Parliament.

#### **8.4.7 Zimbabwe**

To promote ratification of the African Disability Protocol in Zimbabwe, key officials of ZPHCA interviewed for the study highlighted the need for sensitisation meetings with law makers, duty bearers and the public on the need to dispel negative perception, stigma and discrimination towards persons with disabilities including those with intellectual disabilities, as well as the benefits of ratification to the State and especially persons with intellectual disabilities and their families.

Also, study participants identified the need to hold consultative meetings with target beneficiaries of the African Disability Protocol, which is persons with disabilities including those with intellectual disabilities in Zimbabwe, to have their views on the Protocol, prior to its ratification by the national government. Through this, it is possible to gauge their perspectives on how the Protocol guarantees their rights and freedoms, with such perspectives subsequently incorporated into advocacy campaigns by ZHPCA to ensure that the national Parliament of Zimbabwe ratifies it.

## **9. Conclusion**

The African Disability Protocol is the legal framework based on which member states of the African Union are expected to formulate disability laws and policies to promote the rights of persons with intellectual disabilities in Africa. It is unique to the continent and takes African practices and concerns into consideration so that the lives of persons with disabilities improve. The Protocol also tackles the ingrained issues of disability discrimination so that persons with intellectual disabilities can access education, healthcare, employment and other social services on an equal basis with others. It addresses and encompasses specific issues facing persons with intellectual disabilities in Africa such as customs, traditional beliefs, harmful practices and the role of the family, caregivers and the community. However, despite the adoption of the Protocol by the African Union in 2018, the study established limited awareness or knowledge among most OPWIDs and persons with intellectual



disabilities regarding the human rights guaranteed in the Protocol, as well as its added value in terms of promoting disability-inclusion in Africa. The study identified the lack of political will, low awareness of the existence of the African Disability Protocol, inadequate resource allocation to promote disability rights and the Protocol's ratification, low level of sensitisation on the added value of the Protocol, and prevailing negative cultural beliefs and perceptions of persons with disabilities including those with intellectual disabilities as the main challenges to regional ratification of the African Disability Protocol by national governments of African countries that are party to the Banjul Charter. The challenges to regional ratification of the Protocol highlights the need for urgent and effective measures by national governments and OPWIDs including awareness raising on disability rights and the Protocol; building partnerships with CSOs and OPWDs to advocate for ratification; and lobbying and forming alliances with law makers to facilitate debate in national Parliament towards gaining the needed support or political will to ratify the African Disability Protocol.

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## Annex 1: Interview Guide for OPWDs

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### Introduction

This interview guide seeks to ascertain the knowledge of key officials of Organisations of Persons with Disabilities (OPWDs) regarding African legal and institutional framework related to disability. It also seeks to establish awareness of the specific rights of persons with disabilities as stipulated in the African Disability Protocol and the extent to which the Protocol addresses the situation of persons with disabilities in Africa. Finally, the interview guide solicits information regarding challenges to the regional assent of the Protocol. Overall, the findings are intended to galvanise persons with disabilities and OPWDs through awareness and capacity building initiatives to advocate for the ratification of the Protocol by national governments. Participation in this interview is voluntary. As such, participants are at liberty to withdraw at any stage if so desired. Thank you!

### Section A: Knowledge of African legal and institutional framework on disability

1. Are you aware of the following African legal/human rights instruments that guarantee the rights of persons with disabilities?
  - i. The African Charter on Human and Peoples’ Rights (Banjul Charter) Yes  No
  - ii. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) Yes  No
  - iii. The African Charter on the Rights and Welfare of the Child (Children’s Charter) Yes  No
  - iv. The African Youth Charter Yes  No
  - v. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) Yes  No
2. What is your source of information on the above highlighted regional human rights instruments?  
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3. Do you consider the above highlighted regional human rights instruments to provide adequate guarantees of human rights and freedoms of persons with disabilities in Africa?  
Yes  No  Don’t know 
  - (a) If yes, how?  
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(b) If no, what aspects do the above highlighted regional human rights instruments not capture?

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4. Do you consider the ratification of African Disability Protocol as necessary, considering the ratification of the CRPD by your government which also guarantees the rights of persons with disabilities? Yes  No  Don't know

If yes, why?

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If no, why not?

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5. What are the distinguishing features (in terms of human rights and freedoms) of the African Disability Protocol as the standalone regional human rights treaty on disability rights in Africa?

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6. Have the provisions of the African Disability Protocol informed any awareness creation and advocacy on the human rights of persons with disabilities? Yes  No  Don't know

If yes, how?

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If no, why not?

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7. Are you aware of the following African institutional framework that advance human rights?

i. African Commission on Human and Peoples' Rights? Yes  No

- ii. Committee of Experts on the Rights and Welfare of the Child? Yes  No
- iii. The African Court on Human and Peoples' Rights? Yes  No

8. What is your source of information on the regional institutional frameworks that advance human rights?

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9. Do you consider the regional institutional framework that advance human rights to be inclusive of persons with disabilities in Africa? Yes  No  Don't know

If yes, how?

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If no, why not?

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**Section B: The Added Value of the African Disability Protocol**

10. Do you consider the African Disability Protocol to provide adequate guarantees of equality and non-discrimination to persons with disabilities and their families? Yes

No  Don't know

If yes, how

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If no, why not?

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11. Do you consider the Protocol to provide adequate guarantees of the rights of women and girls with disabilities in Africa? Yes  No  Don't know

If yes, how?



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If no, why not?

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12. Do you consider the Protocol to provide adequate guarantees of the rights of children with disabilities in Africa? Yes  No  Don't know

If yes, how?

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If no, why not?

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13. Do you consider the Protocol to provide adequate guarantees of the rights of youth with disabilities in Africa? Yes  No  Don't know

If yes, how?

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If no, why not?

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14. Do you consider the Protocol to provide adequate guarantees of the rights of older persons with disabilities in Africa? Yes  No  Don't know

If yes, how?

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If no, why not?

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15. What aspects of human rights and freedoms of persons with disabilities does the African Disability Protocol not adequately address?

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16. Has your Organisation facilitated or participated in any programs/campaigns to promote awareness and advocate for the ratification of the African Disability Protocol? Yes  No

If yes, what were the successes of such programs or campaigns?

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What challenges were encountered?

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17. Has your Organisation played any role(s) in promoting awareness and advocacy on the African Disability Protocol? Yes  No

If yes, what role has your Organisations played?

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If no, what do you consider to be the reasons for the lack of awareness and advocacy campaigns by your Organisation on the Protocol?

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**Section C: Challenges to regional assent of the African Disability Protocol**

18. What do you consider to be the main challenges related to the ratification of the African Disability Protocol by the government of your country?

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19. Do you consider CSOs and especially OPWDs to have adequate access or engagement with national government and parliament to ratify the Protocol? Yes  No

If yes, how have CSOs and especially OPWDs engaged with national government and parliament to ratify the African Disability Protocol?

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If no, why not?

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20. What measures can be adopted to ensure ratification of the Protocol by African States?

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