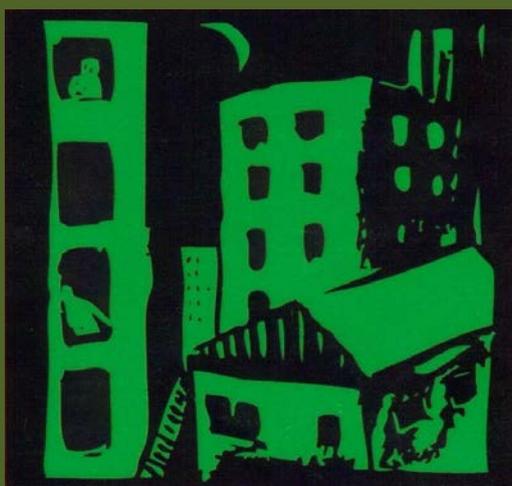


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## A Comparative analysis of the United Nations Convention on the Rights of Persons with Disability and the African Draft Protocol on the Rights of Persons with Disabilities

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### 1 INTRODUCTION

The focus of the article is to engage in a comparative analysis of the United Nations Convention on the Rights of Persons with Disability (CRPD) and the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (AfDP). The article adopts the four distinctions between rights which one writer, Frédérique Mégret has identified in the CRPD, for the comparative analysis.<sup>1</sup>

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<sup>1</sup> Others have come up with similar or other compartmentalisations. See, for example, Ribet B "Emergent disability and the limits of equality: a critical reading of the UN Convention on the Rights of Persons with Disabilities" (2011) 14 *Yale Human Rights & Development Law Journal*, 155. Also, see Harpur P & Stein AM, "Children with disabilities, human rights, and sustainable development" in Fenton-Glynn C (ed.), *Children's rights and sustainable development: implementing the UNCRC for future generations* (Cambridge: Cambridge University Press, (2017).

In his work, Mégret notes that the CRPD represents a major paradigm shift in the human rights discourse by focusing on “pluralization of human rights” which he defines as “the phenomenon whereby human rights, as law and ideology, has increasingly recognised the needs of specific groups or categories within humanity as worthy of a specific human rights protection”.<sup>2</sup> This claim, based on difference and pluralism, represents a “paradox” as well as a “tension” as it seeks to challenge the existing notion of using human rights as a value to promote sameness among, and unity of, human beings as well as equality and universality.<sup>3</sup> Therefore, the “pluralization” of the human rights project is portrayed as “delving deeply in issues of identity, survival, and dignity of particular groups”.<sup>4</sup>

Having so established the premise of his claim, Mégret goes on to say that the CRPD does “four things at once that prolong and attempt to make sense of the dialectics of rights and disability.”<sup>5</sup> First, through “affirmation”, that is, the Convention restates the applicability of existing human rights to persons with disability from an anti-discrimination perspective.<sup>6</sup> Secondly, through “reformulation” where the Convention “fundamentally enriches and modifies the content of existing rights when it comes to people with disability, often by thoroughly reformulating them.” Thirdly, that in some respects the Convention actually comes up with new categories of rights which significantly prolong a number of existing rights (“extension”). Finally, through “innovation,” where the Convention “comes very close to creating new rights, rights that inhere in the experience of disability and are arguably, at least in the particular form in which they are presented, specific to persons with disabilities”.<sup>7</sup> The focus of the article is to use the four distinctions between rights identified in the CRPD to test the extent to which the Draft AfDP matches these standards.

The work starts by delving into the history of disability rights promotion through the Organisation of African Unity (OAU) and their reflection, albeit piecemeal and largely reflecting the medical model, in various human rights/democracy treaties adopted through the OAU/African Union (AU) up until the time the Draft Protocol was produced. This is followed by the review of the four types of rights to see where the AfDP deviates from the CRPD, reproduces the same text, or modifies the CRPD to suit the peculiar African context. The final part of the article focusses on the novel elements in the African instrument which are not represented in the CRPD. It then makes some recommendations on how the African document can be modified in terms of content to fully meet the needs of persons with disability on the continent.

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<sup>2</sup> Mégret F “The Disabilities Convention: human rights of persons with disabilities or disability rights?” in (2008) 30 *Human Rights Quarterly*, 494, available at <http://ssrn.com/abstract=1267723> at 494 (accessed September 2017). See also, Palermo F “Legal solutions to complex societies: the law of diversity,” in Vieyetz EJR & Dunbar R (eds) *Human rights and diversity: new challenges for plural societies*, (2007) 63, available at <http://www.deusto-publicaciones.es/deusto/pdfs/hnet/hnet24.pdf> (accessed 7 September 2017)

<sup>3</sup> Mégret (2008) 495.

<sup>4</sup> Mégret (2008) 497.

<sup>5</sup> Mégret (2008) 499.

<sup>6</sup> Mégret (2008) 499.

<sup>7</sup> Mégret (2008) 499.

## 2 A HISTORICAL BACKGROUND OF DISABILITY RIGHTS IN AFRICA

The OAU, at its birth in 1963, placed focus and emphasis on what it considered as more pressing issues, that is, complete decolonization of the African continent and uniting States in Africa, abrogation of apartheid, consolidation of the fragile nation-State and promotion of rapid development. This approach led to a sidestepping of human rights, or at best only giving them perfunctory attention.<sup>8</sup> Consequently, as human rights in general were not given the attention they deserved, naturally the issue of persons with disability did not register at all on the OAU radar screen.

It was not until the late 1970s that the OAU began to make some efforts towards addressing disability issues on the continent, following the passage of UN General Assembly Resolution No 3447 (XXX)<sup>9</sup> relating to the Declaration of the Rights of the Disabled,<sup>10</sup> and, the UN General Assembly Resolution<sup>11</sup> calling for the declaration of the year 1981 as the International Year of the Disabled.

Yet, Africa's interest and concern for persons with disability started with a narrow focus on disability occasioned by the various liberation wars fought and still being fought on the continent at the time. Thus, in its resolution on the International Year of the Disabled,<sup>12</sup> the Council of Ministers of the OAU, indicated, among others, its conviction that "racist colonial wars and repressions are among the main reasons behind the increase of the number of the disabled" persons in Africa.<sup>13</sup> Also, at its Regional Seminar on the IYDP, the resolution passed, noted among others, that "the causes of disability are often imposed on Africa by external phenomena such as decolonization, struggles for liberation, aggression and socio-economic conditions resulting from an unjust international economic order."<sup>14</sup>

The IYDP proclaimed by the United Nations (UN) called for a plan of action with a focus on achieving equalisation of opportunities, rehabilitation and prevention of disabilities. Following that, the UN General Assembly adopted a Resolution<sup>15</sup> in 1983 which called for the establishment of the UN World Programme of Action concerning Disabled Persons (WPADP). The WPADP's objective was to promote effective measures for prevention of disability, rehabilitation and the realization of the goals of "full participation" of disabled persons in social life and development, and of "equality."<sup>16</sup> Subsequent to that, the International Decade of Disabled Persons (IDDP), which ran from 1983 to 1992, was proclaimed with the purpose of implementing the WPADP.

<sup>8</sup> Obaid E & Appiagyei-Atua K, "Human rights in Africa: a new perspective on linking the past to the present" (1996) 41 *McGill Law Journal* 819.

<sup>9</sup> Resolution of December 1975.

<sup>10</sup> No 31/82 of 13 December 1971.

<sup>11</sup> Resolution No 31/123.

<sup>12</sup> CM/Res 594 (xxx) 1978.

<sup>13</sup> CM/Res 594 (xxx) 1978 para 2.

<sup>14</sup> Resolution on the Conclusions and Recommendations of the Regional Seminar on the International Year of Disabled Persons (3(111) E/CN.1V785 E/CN.U/AMSA/III/Rpt CM/1095(XXXVI)/AMSA/III/Rpt 23 para 9.

<sup>15</sup> Resolution A/RES/38/28.

<sup>16</sup> Paragraph 7 of the Resolution.

As part of Africa's activities to celebrate the IYDP, at its third conference held in Addis Ababa, Ethiopia, in October 1980, the African Ministers of Social Affairs addressed the disability issue and adopted the final report of the IYDP preparatory meetings held previously in Addis Ababa.<sup>17</sup> The OAU Labour Commission on the IYDP, also adopted in April 1981 a resolution, all aimed at addressing the disability issue in Africa.<sup>18</sup>

This was followed by a meeting of the OAU Council of Ministers in 1981, at which it also adopted a resolution on the Problem of Disabled Persons<sup>19</sup> and recommended the establishment of an African Rehabilitation Institute (ARI). The International Labour Organisation (ILO) supported this resolution and efforts toward the setting up of the ARI as well as the strengthening of the existing centres for the treatment, re-education and socio-economic rehabilitation of disabled persons. Another resolution<sup>20</sup> was issued by the Council of Ministers which was subsequently endorsed by the Assembly of Heads of State and Government at its Eighteenth Ordinary Session held in Nairobi, Kenya, in June 1981.

At that same session, the Assembly adopted the African Charter on Human and Peoples' Rights (ACHPR). Unfortunately, however, the birth of the ACHPR only provided terse attention to disability issues as expressed in article 18(4) of the Charter as follows: "The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs."<sup>21</sup> Like the international bill of rights, the non-discrimination provision in the ACHPR did not specifically include disability as a basis for discrimination.<sup>22</sup>

Ultimately, the Agreement for the Establishment of the African Rehabilitation Institute (ARI) was adopted in 1985 and came into force in 1991 leading to the establishment of the ARI in Harare, Zimbabwe, and the strengthening of existing centres for the treatment, re-education and socio-economic rehabilitation of disabled persons. The ARI is now established as a specialised agency of the OAU with its headquarters now in South Africa. The ARI was established with the goal of "developing a unified approach for promoting the development of prevention and rehabilitation services; and creating facilities to satisfy the needs of handicapped Africans who, because of their disability, find it difficult to adapt themselves to the rapidly changing world".<sup>23</sup>

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<sup>17</sup> United Nations. Economic Commission for Africa; Organization of African Unity (1980-12). Report of the third conference of African Ministers of Social Affairs. Addis Ababa, available at <http://hdl.handle.net/10855/15083> (accessed 2 July 2017).

<sup>18</sup> LC/Res 63 (V) Annex (IV).

<sup>19</sup> Resolution CM/Res.834 (XXXVI).

<sup>20</sup> Resolution on Disabled Persons, Resolution CM/Res.875 (XXXVII).

<sup>21</sup> See also para 2 of the Preamble to the Draft Protocol which recognises this provision: "Further considering that Art 18 (4) of the African Charter provides that persons with disabilities shall have the right to special measures of protection in keeping with their physical or moral needs".

<sup>22</sup> It stipulates: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."

<sup>23</sup> Article II of the Agreement for the Establishment of the African Rehabilitation Institute (1985).

The decision to proclaim the African Decade for Disabled People was the result of a recommendation by the Labour and Social Affairs Commission of the OAU made during its 22nd session at Windhoek (19-24 April 1999) and proclaimed by the OAU Assembly of Heads of State and Government during its 35th Session held in Algiers, Algeria in July 1999. The formal Declaration to support the Decade was subsequently adopted by the 36th Session of the Assembly of Heads of State and Government in Lomé, Togo, in July 2000.

The proclamation came up with the Continental Plan of Action (CPA) for the African Decade of Persons with Disabilities (APDP), with the aim of implementing “priority activities on disability during the African Decade of Persons with Disabilities (1999-2009).”<sup>24</sup>

During the first Decade, the Disability Secretariat, among others, prioritised the facilitation of partnerships throughout society and assisting the most vulnerable groups<sup>25</sup> to have a voice. It also launched the African Campaign on Disability and HIV/AIDS to mainstream disability in AIDS services and response programmes.<sup>26</sup>

The general assessment of the first ADPD was that it was a failure.<sup>27</sup> Among others, the IDDP failed to realize its core objectives in Africa because, according to Oyaro, African States did not show the needed interest which would have captured the attention of donors and other international aid agencies to provide support.<sup>28</sup> Subsequent to that poor experience, pressure was brought to bear on the OAU, especially by organisations of persons with disability, for the declaration of the second decade which runs from 2010 to 2019.

## 2.1 Make-up provisions

Realising the short comings in the ACHPR, the OAU initiated piecemeal steps towards the realisation of the rights of persons with disability by inserting provisions on disability into the subsequent human rights treaties which it negotiated for adoption and implementation. The first treaty to be subjected to this process was the African Charter on the Rights and Welfare of the Child which was adopted by the OAU in 1990 and entered into force in 1999. Article 13 of the Charter provides for “handicapped children” by guaranteeing a mentally or physically disabled child the right to “special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community”.

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<sup>24</sup> Paragraph 1 of the Preamble to the Continental Plan of Action for the African Decade of Persons with Disabilities.

<sup>25</sup> Such as, persons with intellectual disabilities, persons who are deaf-blind and those with albinism.

<sup>26</sup> Sarr A & Dube K “Second African Decade of Persons with Disabilities” (nd), available at <http://www.fmreview.org/disability-and-displacement/aida-sarr-and-kudakwashe-dube.html> (accessed 13 July 2017).

<sup>27</sup> Oyaro LO, “Africa at crossroads: the united nations convention on the rights of persons with disabilities”(2015) 30 Issue (2) *American University International Law Review* 347.

<sup>28</sup> Oyaro (2015) 371.

The Charter also places a duty on States Parties to ensure, subject to availability of resources, “effective access to training, preparation for employment and recreation opportunities ...”.<sup>29</sup> Finally, the Charter provides for movement of people and access to public highway buildings.<sup>30</sup>

Secondly, in 2003, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) was adopted by the AU at its second summit in Maputo, Mozambique, and came into force two years later. Article 23 of the Protocol affirms special protection for women with disabilities by placing a responsibility on States Parties to ensure the protection of women with disabilities and “to facilitate their access to employment, professional and vocational training as well as their participation in decision-making” and to ensure their “freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity”.

Thirdly, there is the African Youth Charter (AYC) which was adopted in 2006 and entered into force in 2009. Article 15(4) of the Charter recognizes disability as a ground for discrimination with respect to ensuring equal access to employment and equal work or equal value of work. In addition, in Article 16 (n) the AYC stipulates that States Parties shall “provide technical and financial support to build the institutional capacity of youth organisations to address public health concerns including issues concerning youth with disabilities.”

Fourthly, the African Charter on Democracy, Elections and Governance (ACDEG) was adopted in 2007, entering into force in 2012. Article 8(2) thereof provides that “States Parties shall adopt legislative and administrative measures to guarantee the rights of marginalized and vulnerable social groups, including people with disabilities”.

Finally, the 2009 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa which entered into force in 2012 also gives space for the rights of persons with disability. Article 9(2)(c) stipulates that States Parties shall “provide special protection for and assistance to internally displaced persons with special needs, including ... persons with disabilities...”

These efforts, however, largely copied the medical model, compelling Oyaro to conclude

“Despite the provisions on disability, the African treaties discussed above 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 youths” demonstrate this. Therefore, it is not surprising that the provisions vindicate solutions relating to “special care” and “special measures of protection” almost to the exclusion of inherent rights. In this way, existing African regional instruments on disability fall short of international human rights standards as prescribed in the CRPD that adopt a more social, rights-based approach to disability”.<sup>31</sup>

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<sup>29</sup> Article 13(2) of the African Charter on the Rights and Welfare of the Child.

<sup>30</sup> Article 13(3) of the African Charter on the Rights and Welfare of the Child.

<sup>31</sup> Oyaro LO (2015) 355-356.

## 2.2 Steps towards an African Draft Protocol

The UN General Assembly adopted the CRPD on 13 December 2006 during the sixty-first session of the General Assembly.<sup>32</sup> It was subsequently opened for signature in March 2007 and came into force in May 2008 (in accordance with Articles 42 and 45(1) of the CRPD, respectively).<sup>33</sup>

Following that, the ADPD was proclaimed in 2010, which triggered more focused debate on negotiating an African charter for persons with disability. However, the debate was affected by whether there was the need to have an African-specific convention or for Africa to just work with the CRPD. In the end, the former position prevailed.<sup>34</sup>

As is typical for the development of regional human rights instruments, the main reason for proposing the adoption of the AfDP was to enable Africa to capture and incorporate some peculiar concerns that persons with disabilities in Africa face, and thereby provide context to disability rights in Africa. These were the issues that the African group called for inclusion during the negotiations for the CRPD but which could not find their way into the CRPD. These issues, therefore, formed the basis for developing the AfDP. They include poverty, HIV/AIDS, conflicts, resource scarcity, and low levels of development.<sup>35</sup> Other context-specific African issues albinism and the communitarian context of African societies.

The work by the African Commission on Human and People's Rights to develop the African Disability Protocol first started with the establishment of a Focal Point on the Rights of Older Persons.<sup>36</sup> This was later transformed into a combined Working Group on the Rights of Older Persons and People with Disability at its forty-fifth session in 2009.

The Commission tasked the Working Group to draft a concept paper which would form the basis for adopting a draft protocol on persons with disabilities, *inter alia*.<sup>37</sup> However, the Working Group took it a step further and developed and released the Draft Protocol on Ageing and People with Disabilities for review in mid-2010. This move was criticised for its non-inclusive approach which most importantly sidelined organisations of persons with disabilities. As a result, the Working Group began seeking public comments for a new protocol, resulting in the present draft. Thus, subsequent attempts at drafting the AfDP were broad-based and inclusive of disability groups. The next section of the article is to analyse the rights provisions in the new draft in

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<sup>32</sup> Through UNGA resolution A/RES/61/106.

<sup>33</sup> The CRPD has 175 Parties, including the EU and 160 Signatories.

<sup>34</sup> Kamga, SAD "A call for a protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa" (2013), available at [https://repository.up.ac.za/bitstream/handle/2263/41818/DjoyouKamga\\_Call\\_2013.pdf?sequence=3](https://repository.up.ac.za/bitstream/handle/2263/41818/DjoyouKamga_Call_2013.pdf?sequence=3) (accessed 20 February 2018).

<sup>35</sup> Kamga (2013).

<sup>36</sup> Established through the adoption of Resolution 118 at the 42<sup>nd</sup> Ordinary Session held in Brazzaville, Republic of Congo from 15-28 November 2007.

<sup>37</sup> Resolution 143 of the 45<sup>th</sup> Ordinary Session (Banjul, The Gambia – May 2009).

comparison with the CRPD.

### 3 COMPARATIVE ANALYSIS OF THE AfDP AND THE CRPD

The pluralisation formula discussed above rests on the contention that the existing general human rights framework [founded on the international bill of rights – the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)] – only seeks to promote formal or *de jure* equality for persons with disability (and, indeed, other marginalised entities) which ends up perpetuating distinction and inequality between mainstream and marginalised groups. It is to resolve this impasse that the human rights project has sought to introduce specialised treaties, such as the CRPD, which recognise the difference and pluralism approach, as the gateway to eventuate *de facto* or substantive sameness and equality.<sup>38</sup> Hoover also contributes to this debate by contending that the world is a reflection of “deep pluralism” where values are subjected to constant and regular review and contestation, for example, through the actions of social movements which result in redefining the contours of human rights.<sup>39</sup>

Analysis in this section of the four distinctions between rights identified in the CRPD by Mégret is founded on the pluralisation project. As the analysis will show, of these distinctions, only one relates to a “type” of right. The others refer to the type of actors involved, the “intensity” of the right, and the modes of implementation.<sup>40</sup>

#### 3.1 Disability Rights “as Human Rights” (Affirmation Rights)

On the first cohort of rights identified by Mégret, he contends that the CRPD does “restate the applicability of existing human rights to persons with disability from an anti-discrimination perspective”<sup>41</sup> – to end discrimination and promote equality between able-bodied persons and persons with disability. In other words, the CRPD is affirming the “right to have rights” for persons with disability. In support, reference is made to, for example, Articles 1 and 4(1) of the CRPD which emphasise “the *full* and equal enjoyment of *all* ...” and the “*full* realization of *all*” human rights and fundamental freedoms for all persons with disabilities.

Following the trend set by formulators of human rights to cater for the needs of marginalised groups, not all rights recognised in the international bill of rights, especially civil and political rights, are provided for in the CRPD. Examples are: Articles 9 (arbitrary arrest, detention or exile); Article 10 (fair and public hearing by an independent and impartial tribunal); Article 11 (presumption of innocence until proved

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<sup>38</sup> See also Lord JE & Stein MA, “Social rights and the relational value of the rights to participate in sport, recreation, and play” (2009) 27 *Boston University International Law Journal* 249.

<sup>39</sup> Hoover J *Reconstructing human rights: a pragmatist and pluralist inquiry into global ethics* (Oxford: Oxford University Press, 2016)

<sup>40</sup> The author is grateful to one of the reviewers for this comment.

<sup>41</sup> Mégret (2008) 499.

guilty and non-retroactivity of laws); Article 14 (right to seek asylum); Article 18 (freedom of thought, conscience, religion); Article 20 (freedom of peaceful assembly and association). Though absent, these missing rights can be inferred from the following rights which are recognised in the CRPD, such as access to justice, right to nationality and freedom of movement, freedom of expression and access to information, self-representation<sup>42</sup>, and participation.<sup>43</sup>

In light of the above, the use of “full realisation of all rights and fundamental freedoms” in the CRPD serves as an omnibus clause to cover any likely gaps, similar to the term “other status” in the discrimination clause. However, the AfDP is devoid of the word “all” in seeking to affirm the rights for persons with disability. Thus, by reference to a similar provision in the Draft Protocol, Article 2 on General Obligations, for example, provides:

States Parties shall take appropriate and effective measures, including policy, legislative, administrative, institutional and budgetary steps, to ensure, protect and promote the rights and dignity of persons with disabilities, without discrimination on the basis of disability, including by

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Furthermore, the CRPD “recognizes” or “reaffirms” the “usual” rights. Thus, for example, the CRPD stipulates, “States Parties *reaffirm* that every human being has the inherent right to life ...”[emphasis added].<sup>44</sup> However, the Draft Protocol does not follow that pattern. It simply states the rights as they are and as found in all regular human rights treaties. For example, the right to life provision states: “Every person with a disability has the inherent right to life and integrity.” The strength of the CRPD approach over that of the AfDP is that the reaffirmation indicates “a more fundamental, principled and performative push”<sup>45</sup> to make it clear that all existing rights are applicable to persons with disabilities as well.

The relevance of the restatement of these universal rights for persons with disability is that their entitlement to these rights did not start with the adoption of the CRPD but goes back to the origins of disability. Yet, for centuries, due to religio-cultural and other belief systems which do not find any basis in science and respect for humanity, the identity of persons with disability were socially (re)constructed as “sub-humans”. This (re)constructed image of disability was imposed on persons with disability as the norm, thereby forcing them to internalise and accept such categorisation that they do not belong to mainstream society. Hence, in the past, they have become victims of genocide and eugenism,<sup>46</sup> and, in the African context, witchcraft, albinism – ritual sacrifice, killing and objects of ridicule and exploitation.<sup>47</sup> Mired in that

<sup>42</sup> In the case of the AfDP, Art 18 thereof.

<sup>43</sup> See details below.

<sup>44</sup> Article 10 CRPD.

<sup>45</sup> Megret (2008) 500.

<sup>46</sup> Megret (2008) 500.

<sup>47</sup> Groce N & McGeown J, “Witchcraft, wealth and disability: reinterpretation of a folk belief in contemporary urban Africa”, 2013 Working Paper Series No 30, available at <https://www.ucl.ac.uk/leonard-cheshire-research/research/publications/documents/working-papers/wp-30.pdf> (accessed 10 September 2017).

belief is the individual model which is underpinned by the notion that the best that society can do for persons with disability is to medically “refix” them to become “normal.”<sup>48</sup> Having fought back and dismantled the restrictive and abusive medical model, the social/rights model makes the unequivocal statement that persons with disabilities, as human beings like any other, are entitled to sameness and equality and therefore the same general rights that all other human beings are entitled to. In additions, to achieve this objective, there is the need for persons with disability to enjoy some specialised rights to address the years of discrimination perpetrated against them in order to attain substantive equality, not just formal or *de jure* equality.<sup>49</sup> Therefore, the restatement is to make this truth obvious and unequivocal.

Also, Mégret contends that international human rights instruments have traditionally not done as much as they could to make differential treatment of persons with disabilities “a clear-cut case of discrimination”.<sup>50</sup> Therefore, the ICCPR, for example, did not include disability among the enumerated grounds for discrimination. The same is the case in the ACHPR where disability is not explicitly listed as a ground for discrimination. It took the boldness of the African Commission, in the landmark *Purohit and Moore v The Gambia* for it to decide that “other status” covers persons with disability.<sup>51</sup>

In spite of its shortfalls under this rubric of rights, the Draft Protocol makes copious references to the fact that persons with disabilities are entitled to enjoy the enumerated rights “on an equal basis with others”. There are about 25 references to that phrase throughout the AfDP while 35 are identified in the CRPD. This phrase seeks to emphasise the relevance of equality and non-discrimination which are the twin pillars of the CRPD.<sup>52</sup>

The “reaffirmed” or “recognised” rights in the AfDP are the right to life,<sup>53</sup> equal recognition before the law,<sup>54</sup> right to liberty, security of person and freedom from torture or cruel, inhuman or degrading treatment or punishment;<sup>55</sup> right to family,<sup>56</sup> right to education,<sup>57</sup> right to highest attainable standard of health,<sup>58</sup> right to work,<sup>59</sup> right to adequate standard of living and right to social protection,<sup>60</sup> right to participate

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<sup>48</sup> Oliver M *Social work with disabled people* (Basingstoke: MacMillan, 1983); and, Barnes C (ed) *Making our own choices: independent living, personal assistance, and disabled people* (Belper: British Council of Disabled People, (1993).

<sup>49</sup> Refer to the other rights below.

<sup>50</sup> Mégret (2008) 501.

<sup>51</sup> African Commission Communication 241/01.

<sup>52</sup> Mégret (2008) 501.

<sup>53</sup> Article 4 CRPD.

<sup>54</sup> Article 8 CRPD.

<sup>55</sup> Article 5 CRPD.

<sup>56</sup> Article 21 CRPD.

<sup>57</sup> Article 12 CRPD.

<sup>58</sup> Article 13 CRPD.

<sup>59</sup> Article 15 CRPD.

<sup>60</sup> Article 16 CRPD.

in sports, recreation and culture,<sup>61</sup> equality and non-discrimination,<sup>62</sup> right to participate in political and public life,<sup>63</sup> and right to freedom of expression and opinion and access to information.<sup>64</sup>

### 3.2 Disability Rights as Human Rights “with a Difference” (“Reformulation Rights”)

Here, the CRPD outlines some key characteristics of the rights it issues in a way and manner that are not otherwise specified in the major international human rights instruments, that is, by bringing “substantial extra semantic texture to certain rights, by clarifying the way they are to apply to persons with disabilities.”<sup>65</sup>

Under this description, access to rights of persons with disability are implicitly highlighted and woven into the definition of those rights, so as to leave no doubt regarding their exact scope. This is to ensure that the rights of persons with disabilities do not remain “an abstraction”.<sup>66</sup>

It is noted that though the first global human rights document, the UDHR, combined both economic, social and cultural rights with civil and political rights and proclaimed their indivisibility, interrelatedness and universality, the two generations of rights were grouped separately in that document. Afterwards, the two international covenants came to draw the generations of rights even further apart. However, later human rights treaties specifically designed for marginalised groups have sought to bring the two generations of rights back together in the same treaty. Examples are the International Convention for the Elimination of All Forms of Racial Discrimination<sup>67</sup> and the Convention on the Rights of the Child.<sup>68</sup>

Yet, these later documents only returned to the days of the UDHR by simply creating a “loose alliance” between the two generations of rights. The CRPD, however, seeks to affirm, reformulate, extend or innovate the existing rights by merging or forging a closer alliance between economic, social and cultural rights and civil and political rights within the “new right” created. It does so by spelling out in detail measures that need to be taken (by States mainly as the primary duty-bearers) to operationalise and facilitate the enjoyment of that right. Those “more energetic”<sup>69</sup> measures involve the application of economic, social and cultural rights steps embodied in the duty to fulfil the enjoyment of these rights.

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<sup>61</sup> Article 20 CRPD.

<sup>62</sup> Article 3 CRPD.

<sup>63</sup> Article 17 CRPD.

<sup>64</sup> Article 19 CRPD.

<sup>65</sup> Mégret (2008) 503.

<sup>66</sup> Mégret (2008) 504.

<sup>67</sup> Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965 and entered into force 4 January 1969, in accordance with Art 19.

<sup>68</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 1989 and entered into force September 1990, in accordance with Art 49.

<sup>69</sup> Mégret (2008) 505.

This mixed model was suggested by the ICESCR but it did not go far enough until the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) came to adopt and strengthen it through the “appropriate measures” approach to rights implementation. The weakness with the “appropriate measures” in the context of the CEDAW, however, is that they were not always or “overly specified”.<sup>70</sup> To correct this “historical failure,” the CRPD, according to Mégret, “breaks that conceptual barrier by “getting its hands dirty” as it were, with the details of how the rights of persons with disabilities are to be implemented.<sup>71</sup>

Examples of some of these “more energetic” political, economic and social reform models include the obligation placed on States to “enable” or “facilitate” the exercise and enjoyment of rights formulated for enjoyment by persons with disability. There are references to programmatic duties such as “taking appropriate measures,” or “adopt[ing] immediate, effective and appropriate measures”, etc. An example is found in Article 9 on accessibility which states:

“1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.”<sup>72</sup>

While independent living falls largely in the domain of civil and political rights, “participate fully in all aspects of life” embodies both generations of rights. Moreover, the means to enable the enjoyment of these rights by persons with disability involves “appropriate measures” which are economic, social and cultural rights-induced.<sup>73</sup>

In the AfDP, similar provisions are provided, for example, by reference to Article 2 on General Obligations:

States Parties shall take appropriate and effective measures, including policy, legislative, administrative, institutional and budgetary steps, to ensure, protect and promote the rights and dignity of persons with disabilities, without discrimination on the basis of disability, including by:

- a. *Adopting appropriate measures* for the implementation of the rights recognised in the present Protocol;
- b. *Mainstreaming* disability in policies, legislation, development plans, programmes and activities and in all other spheres of life;
- c. *Providing in their constitutions and other legislative instruments and taking other measures to modify* or abolish existing policies, laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
- d. *Modifying, outlawing, criminalising or campaigning against*, as appropriate, any harmful practice applied to persons with disabilities ...[emphasis added].

<sup>70</sup> Mégret (2008) 505.

<sup>71</sup> Mégret (2008) 505.

<sup>72</sup> Attention to the role of technology in this context has been given to these rights. See Harpur P, *Discrimination, copyright and equality: opening the ebook for the print disabled* (Cambridge: Cambridge University Press (2017), ch2.

<sup>73</sup> Langford M “The justiciability of social rights: from practice to theory,” in Langford M (ed) *Social rights jurisprudence: emerging trends in international and comparative law* (Cambridge: Cambridge University Press, 2008) 1&3

Another example from the AfDP is found in Article 4 on the right to life which is to be attained for persons with disability through, among others, provision of “services, facilities and devices to enable them to live with dignity and to realise fully their right to life”.<sup>74</sup>

All these measures point to the overwhelming emphasis on economic, social and cultural rights as the corrective right designed to right the wrongs of the past, create a level playing field, and facilitate the process towards the realization of substantive equality for persons with disability. Indeed, that is the only way that *de jure* equality will become relevant to persons with disabilities. Therefore, the CRPD lays emphasis on the third duty on States, the duty to fulfil, which is interpreted as the duty to adopt appropriate measures towards the full realisation of economic, social and cultural rights.<sup>75</sup> However, with respect to the CRPD and AfDP, the duties inherent in “fulfil” are stretched further as the only process available to enable the realisation of the specialised rights recognised for persons with disability. Through this means, it is expected that rights can be enjoyed by persons with disability to enable the realisation of potentials, the utilisation of capacities and performance of duties that will lead to the meeting of needs and the attainment of development.

Most of these provisions are also stipulated in the AfDP. Generally, the “reformulation rights” covered under the AfDP have more detailed content than under the CRPD. An example is equal recognition before the law provided under article 8 of the AfDP. Compared to the CRPD, some of the novel elements embodied in this Article include the provision that the duty to respect this right extends to “non-State actors and other individuals”.<sup>76</sup> This element establishes the horizontal relationship (between the person with disability and the duty-bearer) which is critical to disability rights discourse and praxis as in most cases the perpetrator is an individual, including family members.<sup>77</sup>

Article 5 of the AfDP is also novel in the sense that it combines both a right and a freedom into one and extends to other elements, such as, protection against “sterilisation or any other invasive procedure without their free, prior and informed consent”.<sup>78</sup> The Article also seeks to protect persons with disability against exploitation, violence and abuse. However, in the CRPD, protection against exploitation, violence and abuse is formulated as a “new” right on its own and given detailed expatiation, though “reasonable accommodation” is not mentioned.

Also, in the case of the right to freedom of expression and opinion and access to information, the AfDP adds this provision:

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<sup>74</sup> Article 4(2)(b) of the CRPD.

<sup>75</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, available at <https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural>, accessed 13 July 2017)

<sup>76</sup> Article 8(3)(a) of the AfDP.

<sup>77</sup> Stone-MacDonald A, “Cultural Beliefs about Disability in Practice: Experiences at a Special School in Tanzania” in (2012) Vol. 59 Issue 4 *International Journal of Disability, Development and Education* , 393.

<sup>78</sup> Article (2)(e) of the AfDP.

“Ensuring that persons with visual impairments or with other print disabilities have effective access to published works including by using information and communication technologies and by making changes as appropriate to the international copyright system”.<sup>79</sup>

Additionally, one can reference the AfDP provision on access to justice (Article 9), which also adds some elements considered progressive, such as the inclusion of gender to procedural and age-appropriate accommodation in the delivery of justice. The same Article also calls for the abolition of traditional forms of justice to protect the right of persons with disabilities to access “appropriate and effective justice.” Finally, the provision demands the provision of legal assistance, including legal aid, to persons with disabilities.

The Article 21 on the right to family, however, falls rather short of the provision in the CRPD. One significant gap in the AfDP is the prevention against “concealment, abandonment, neglect and segregation of children with disabilities.” This is a practice that is rather common in the African system.<sup>80</sup> Additionally, in the African context, the right to work, the right to join labour and trade unions and exercise labour and trade union rights on an equal basis with all others is absent.<sup>81</sup>

Among the “reformulation rights” are equal recognition before the law,<sup>82</sup> liberty and security of person,<sup>83</sup> freedom from torture or cruel, inhuman or degrading treatment or punishment,<sup>84</sup> freedom of expression and opinion, and access to information,<sup>85</sup> respect for privacy,<sup>86</sup> and respect for home and the family.<sup>87</sup>

A right which the AfDP is completely silent on is the right to privacy of persons with disability.<sup>88</sup> Yet, this is a right which has been systemically abused in the African context as the person with disability is deemed to be lacking capacity many areas, which accounts for their submission to prayer camps for treatment where many rights violations against persons with disability are recorded.<sup>89</sup>

### 3.3 Disability Rights as Human Rights “Plus” (“Extension Rights”)

With respect to the third category of rights, Mégret describes them as follows:

“Rights that have typically not been highlighted as such in the main international human rights instruments, even though they may draw on existing rights. These rights are not entirely new and indeed are probably rights of all human beings, but the particular circumstances of disability

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<sup>79</sup> Article 19(2)(d).

<sup>80</sup> Munyi CW, “Past and Present Perceptions Towards Disability: A Historical Perspective,” in (2012) Vol. 32, No. 2 *Disability Studies Quarterly* 32; also, Ngalomba S and Harpur P (2016) at 1.

<sup>81</sup> Article 15 of the AfDP

<sup>82</sup> Article 12 AfDP.

<sup>83</sup> Article 14 AfDP.

<sup>84</sup> Article 15 AfDP.

<sup>85</sup> Article 21 AfDP.

<sup>86</sup> Article 22 AfDP.

<sup>87</sup> Article 23 AfDP.

<sup>88</sup> The only instance where privacy is mentioned in the AfDP is in article 27 on Statistics and Data.

<sup>89</sup> Barriga SR “The (in)human dimension of Ghana’s prayer camps”, available at [www.hrw.org](http://www.hrw.org) (accessed July 22, 2017).

have made it necessary to incorporate them in the Convention almost as novel and separate categories, rather than simply variations on existing themes.”<sup>90</sup>

These rights display more sensitivity to issues of structural power and oppression than the mainstream human rights framework has typically done.”<sup>91</sup>

Two examples are referred to in this category. First, Article 16 on the right to “freedom from exploitation, violence and abuse.” This right is inferred from other different rights and freedoms, such as “right to life, liberty and security of person,”<sup>73</sup> as well as probably freedom from torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, among others. However, all these rights are also protected independently in the CRPD. Therefore, this “right plus” is seen as adding something to the existing register of rights.<sup>92</sup> Yet, there is no right in international human rights instruments that expressly recognizes this right verbatim; hence, the recognition as an “extension right.”

This approach adopted to formulate the “extension rights” is akin to the “soft law” model which is a progressive development of existing rules or norms through their reformulation and tightening of identified loopholes to make them more precise in their application.<sup>93</sup>

However, this formula is not applied in the African document, where the rights referred to above are grouped together: right to liberty, security of person and freedom from torture or cruel, inhuman or degrading treatment or punishment.<sup>94</sup> Therefore, in that respect, it is difficult to consider the right to protection against exploitation, violence and abuse as coming under a reformulated right in the AfDP.

The second example is with respect to the “right to participation”, embodied in the CRPD’s reference to “full and effective participation and inclusion in society”.<sup>95</sup> This idea is promoted as one of the CRPD’s “general principles” (Article 3(a)) rather than a right *per se*. However, overall, it comes close to emerging as a right, having been recognized in two existing rights, participation in political public life<sup>96</sup> and participation in cultural life, recreation, leisure and sports.<sup>97</sup>

In the African context, both rights are also recognized – the right to participate in political and public life in Article 17, and the right to participate in sports, recreation and culture in Article 20. In the former, there is reference to reasonable accommodation to promote secrecy of ballot, which is not captured in the CRPD. However, the CRPD also

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<sup>90</sup> Megret (2008) 507.

<sup>91</sup> Megret (2008) 507.

<sup>92</sup> Megret (2008) 508.

<sup>93</sup> Riphagen W “From soft law to *ius cogens* and back,” (1987) 17 *Victoria University of Wellington Law Review* 81; Boyle AE “Some reflections on the relationship of treaties and soft law.” (1999) 48 *International and Comparative Law Quarterly* 901.

<sup>94</sup> Article 5 of the AfDP.

<sup>95</sup> Article 3(c) of the CRPD. See Charlton JI *Nothing About Us Without Us. Disability Oppression and Empowerment* (Berkeley, CA: University of California Press, 1998); and, Driedger D *The Last Civil Rights Movement: Disabled Peoples' International* (Hurst & Co., 1989).

<sup>96</sup> Article 29.

<sup>97</sup> Article 30.

recognizes the right to participate in political and public life which extends to involvement in non-governmental activities as well,<sup>98</sup> which is absent in the AfDP.

However, the AfDP creates a different Article embodying the right to self-representation which recognises the right to participation:

“States Parties shall recognise and facilitate the right of persons with disabilities to represent themselves in all spheres of life, including by promoting an environment that enables persons with disabilities to:

- a. Form and participate in the activities of organisations of and for persons with disabilities;
- b. Form and participate in the activities of nongovernmental organisations and other associations”.<sup>99</sup>

With respect to the right to participate in sports, recreation and culture, a unique and very relevant provision in the AfDP is found in Article 20(2)(h) which focuses on “[d]iscouraging negative representations and stereotyping of persons with disabilities in both traditional and modern cultural activities and through the media”. This provision touches on stigmatisation which is a major barrier that persons with disability face in African society, if not anywhere else.<sup>100</sup>

In the context of the AfDP, “participation” is mentioned only once in the Preamble to that document, paragraph 3 thereof thus “acknowledging further, the importance of full and effective participation and inclusion of persons with disabilities in society”. Very closely related to this notion of participation is the right to “live in the community,” another “new right” that is not protected in any existing international human rights instruments.<sup>101</sup>

The AfDP provides in Article 10 thereof the “the right to live in the community” to cover “the right to live in the community with choices equal to others.” The responsibilities placed on a State to ensure the realisation of this right includes the duty to guarantee that: persons with disabilities have the opportunity to choose their place of residence and where and with whom they live; access to a range of in-home, residential and other community support services; personal mobility with the greatest possible independence; community-based rehabilitation services; community living centres; and, that community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.<sup>102</sup>

### **3.4 Disability Rights as (Human) Rights Inherent to Persons with Disabilities (“Innovation Rights”)**

Here, the CRPD, in the words of Mégret goes “further than merely extending existing rights, and that it comes very close to either creating new rights, or formulating rights in

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<sup>98</sup> Article 29(b)(i).

<sup>99</sup> Article 18 of the AfDP.

<sup>100</sup> Lord and Stein (2009) at 249.

<sup>101</sup> Megret (2008) 510.

<sup>102</sup> Article 10 AfDP.

the context of disability that have never been framed as such”.<sup>103</sup> The most conspicuous example Mégret cites is the concept of autonomy for persons with disability.<sup>104</sup>

Further, it is stated that support for persons with disability should respect “the rights, will and preferences of persons with disabilities and does not amount to substituted decision-making”.<sup>105</sup>

Although not defined in the CRPD, Mégret refers to autonomy as “the ability of persons with disabilities to do things on their own without the assistance of others” which is linked to the right to be “free to make one’s own choices” as well as “independence.”<sup>106</sup> Respect for the autonomy of persons with disabilities is presented in various provisions of the CRPD, reflected, inter alia, in “personal mobility” and “accessibility,” “right to live independently,” the goal of measures of “habilitation and rehabilitation.”<sup>107</sup> Most importantly, autonomy is reflected in Article 12 which recognises the principle of persons with disabilities’ legal capacity, in what Mégret asserts is one of the Convention’s “greatest advances” because it comes as a sort of “legal culmination of the recognition of autonomy”.<sup>108</sup> With respect to the right to equal recognition before the law, the fact that it is considered as a non-derogable right points to its poignant importance in the CRPD.<sup>109</sup>

The other right that the CRPD talks about as falling under this category of rights is access to justice which provides for persons with disability an “effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages”.<sup>110</sup> Though not directly provided for in the ICCPR, it is reflected in the following rights that are found under the ICCPR but not in the CRPD: arbitrary arrest, detention or exile; fair and public hearing by an independent and impartial tribunal; presumption of innocence until proved guilty and non-retroactivity of laws.

Similar provisions on autonomy are found in the AfDP, though not as many as one finds in the CRPD. For example, paragraph 9 of the Preamble to the AfDP “acknowledges that persons with disabilities have inherent dignity and individual autonomy including the freedom to make one’s own choices”. Also, Article 10 (2); “personal mobility with the greatest possible independence” and Article 8 (3)(b): “persons with disabilities are provided with the support they may require in enjoying their legal capacity, and that such support respects the rights, will and preferences of persons with disabilities and does not amount to substituted decision-making”.

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<sup>103</sup> Mégret (2008) 511.

<sup>104</sup> Mégret (2008) 512.

<sup>105</sup> Article 8(3)(b) AfDP.

<sup>106</sup> Mégret (2008) 512.

<sup>107</sup> Mégret (2008) 512.

<sup>108</sup> Mégret (2008) 512.

<sup>109</sup> See General Comment 1 on the CRPD.

<sup>110</sup> General Comment 1 on the CRPD.

### 3.5 Novel Elements in the AfDP

Apart from the rights discussed above which are reflected in the AfDP, there are also some novel elements which are totally absent in the CRPD. The first is the reference to harmful practices in Article 6, which identifies certain cultural practices as promoting or perpetuating violation of the rights of persons with disability. These include witchcraft, abandonment, concealment, ritual killings or the association of disability with omens.<sup>111</sup> Article 6 also refers to “stereotyped views on the capabilities, appearance or behaviour of persons with disabilities”, and the “use of derogatory language against persons with disabilities”, all of which the State is enjoined to prohibit.<sup>112</sup> Finally, the Article asks for the offer of “appropriate support and assistance to victims of harmful practices.”<sup>113</sup>

These practices are indeed common occurrences which end up discriminating and stigmatising persons with disability. Names such as “crocodile skin”, “Chinese”, “strange skinned people” are used to refer to persons with albinism.<sup>114</sup> For being “abnormal”, persons with disability are subjected to various forms of ordeal which article 6 rightly recognises. It is in this connection that the constitutions of some African countries, while recognising the right to one’s culture, also prohibit harmful cultural practices, with Ghana being a good example.<sup>115</sup>

The second is youth with disabilities, provided for under Article 24 of the AfDP. The Article, among others, provides for the promotion of “full, inclusive and accessible education for youth with disabilities.” The other, for older persons under Article 25, also provides, inter alia, for equal access to social protection programmes, such as protection against violence, including violence on the basis of accusations or perceptions of witchcraft; and access to appropriate sexual and reproductive health information and services. However, it is important to issue a caveat that older persons also feature in the CRPD but not under a separate Article on their own.<sup>116</sup>

The third is the introduction of duties on persons with disability “on an equal basis with others as elaborated in the African Charter.”<sup>117</sup> Further, Article 26(2) provides that “States Parties shall ensure that persons with disabilities are rendered the forms of assistance and support, including reasonable accommodations, which they may require in performance of such duties”.

This provision on duties is as important as it is controversial. It is a carry-away from the mother treaty which sparked a lot of controversy when it was adopted in 1981,

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<sup>111</sup> Article 6(1) AfDP.

<sup>112</sup> Art 6(2) AfDP.

<sup>113</sup> Art 6(3) AfDP.

<sup>114</sup> Stone-MacDonald (2012) 88.

<sup>115</sup> See Arts 26(2) and 272(c) of the Fourth Republican Constitution of Ghana.

<sup>116</sup> See for example, article 25(b) health and article 28(4)(b) on adequate standard of living and social protection.

<sup>117</sup> The ACHPR has 3 articles on duties: Articles 27, 28 and 29.

especially because of the lack of clarity it initially posed on the relationship between rights and duties.<sup>118</sup>

The relevance of the duty element in the AfDP is that it helps to move the African document away from the medical model where persons with disability are seen as “charity cases” who cannot take care of themselves and therefore are subject to the mercy of the able-bodied. Thus, placing duties on persons with disability confirms that they possess capacity and agency, which when facilitated by the appropriate rights ambience,<sup>119</sup> will enable them to contribute to their own self-development as well as community development.<sup>120</sup> It is in this context that part of Article 6 of the AfDP becomes relevant here, as it refers to doing away with “stereotyped views on the capabilities ...” of persons with disability. Therefore, if they are not able to perform their duties, then it is attributable to the barriers placed in their way. In other words, persons with disability are rather disabled from performing their duties by the barriers placed in their way.

The controversial aspect of the duties provision, on the other hand, is that for some persons with disability, the mere provision of assistive devices and reasonable accommodation will not be enough to equip them to perform duties “on an equal basis with others”. Therefore, that provision needs to clarify and indicate that duties should be subject to the type and degree of disability one lives with.

Fourthly, the AfDP bundles some rights together. An example is portrayed in Article 5 which groups the “right to liberty [and] security of the person” with “freedom from torture or cruel, inhuman or degrading treatment or punishment”. This arrangement, though, is problematic. Apart from their verbosity, the “new rights” created are confusing since they combine a right and a freedom. This seems to be the first of its kind in any human rights treaty. In view of the fact that a right and a freedom mean different things, it is not appropriate to bunch them together to create a new right.

Hohfeld draws a distinction between a right and a privilege in the sense that, while a right carries with it a correlative duty, a privilege (freedom or liberty) does not have a correlative duty compelling someone to respect same.<sup>121</sup> In the case of *R.v. Zundel*, the Court of Appeal of Ottawa explained:

“When determining the limits of freedom of expression, a distinction must be drawn at the outset between ‘rights’ and ‘freedoms’. A ‘right’ is defined positively as what one can do. A ‘freedom’, on the other hand, is defined by determining first the area which is regulated. The freedom is then what exists in the *unregulated area* - a sphere of activity within which all acts are permissible. It is a residual area in which, all acts are free of specific legal regulation and the individual is free to choose. The regulated area will include restrictions for purposes of decency and public order, and specifically with respect to the freedom of expression, prohibition concerning criminal libel and sedition.”<sup>122</sup>

<sup>118</sup> Obaid and Appiagyei-Atua K (1996) at 12.

<sup>119</sup> As provided under article 26(2).

<sup>120</sup> Appiagyei-Atua K “Contribution of Akan Philosophy to the Conceptualisation of African Notions of Rights,” (July 2000) *Constitutional and International Law Journal of Southern Africa*, 165.

<sup>121</sup> Radin M “A restatement of Hohfeld” (1938) 51 *Harvard Law Review* 1114; and Stone R “An analysis of Hohfeld” (1963) 48 *Minnesota Law Review* 313.

<sup>122</sup> [1987] 35 DLR (4th) 334 at 359-360, 31 CCC (3ed) 97 at 118-119.

The recommended option is for the two values to be separated, as is the case in the CRPD. A related example is in Article 4 on “right to life” but which extends to integrity in the provision itself. While it is possible to mix up the two into one right, it is out of place to see “integrity” not included in the designation of the right.

Another point worth noting in passing is that while the CRPD describes persons with disability as those who have four types of “long-term” impairments, that is, physical, mental, intellectual or sensory, the AfDP deletes “long-term” in describing the impairments, which means that any impairment, no matter how temporary, will qualify as a disability from the African perspective. The application of this interpretation will put a greater burden on governments to meet. Further, the AfDP includes “developmental” impairment. The CRPD also makes us aware that disability is an “evolving concept”,<sup>123</sup> while the AfDP seems to be fixed in its meaning.

### 3.6 Missing Elements

Apart from the substantive rights some of which are missing in each other, the AfDP misses some elements which are featured in the CRPD. Mention of two of them will suffice. First, the CRPD re-emphasises the fact that some rights are to be realized immediately and others progressively, subject to availability of resources.<sup>124</sup>

The CRPD copies the ICESCR approach by making the point that the progressive realisation of economic, social and cultural rights also emphasises the fact that there are five areas where States Parties are obliged to take immediate steps, irrespective of the resources they have, to implement the Covenant. These are in the areas of elimination of discrimination; economic, social and cultural rights not subject to progressive realization; obligation to “take steps”; non-retrogressive measures; and minimum core obligations. The AfDP, on the other hand, follows in the footsteps of the mother document, the ACHPR, by not making such necessary distinction between immediate and progressive realisation throughout the document.

Secondly, there is an absence of a general principles section in the African instrument, unlike the case with the CRPD. General principles form a substratum of human rights law and international law which are usually incorporated in treaties as a guide to their application or interpretation.<sup>125</sup> It can embody the object and purpose of a treaty. Their absence in the AfDP therefore limits the effectiveness of the draft document to provide a guide for the relevant stakeholders.

It may be argued that the general principles are embedded in the Preamble to the African document as the latter refers to such concepts as participation and inclusion of persons with disabilities in society; the diversity of persons with disabilities; the value of persons with disabilities; the relationship between disability and poverty; concerns about human rights violations, systemic discrimination, social exclusion and

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<sup>123</sup> Paragraph (e) in the Preamble to the Convention.

<sup>124</sup> Article 4 (2) CRPD.

<sup>125</sup> See <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/general-principles-relevant-to-international-law> (accessed 22 August 2017).

prejudice; harmful practices that persons with disabilities, in particular persons with albinism, often experience; and, the multiple forms of discrimination, high levels of poverty and the great risk of violence, exploitation, neglect and abuse that women and girls with disabilities face. This said, however, general principles are different from the preamble to a treaty. The CRPD makes that clear by incorporating both.

It is also worthy of note that while the CRPD links the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development, the AfDP does not. This is rather surprising considering that Africans were the first to recognize the right to development in a human rights treaty. Moreover, the African document seeks to draw a link between disability and poverty. Therefore, if a correlation between the violation of the rights of persons with disability and poverty is established, it stands to reason that there is a link between respect for the rights of persons with disability and sustainable development. That is the essence of the relevance of duties because the performance of duties is to lead to the attainment of sustainable holistic development. Therefore, the proper linkages between poverty, development and duties need to be established in the AfDP.

Additionally, the AfDP does not recognise “freedom of movement and nationality,” unlike the CRPD.<sup>126</sup> The right to a nationality is of paramount importance to the realization of other fundamental human rights.<sup>127</sup> Individuals who lack a nationality or an effective citizenship are among the world’s most vulnerable to human rights violations. Persons with disability look to nationality and citizenship in the context of assuring themselves of their right to self-determination,<sup>128</sup> participation<sup>129</sup> and contribution.<sup>130</sup> Therefore, to fail to recognise that in a treaty to promote disability rights is a serious omission.

### 3.7 Verbatim adoption of CRPD Texts

In some key respects, the AfDP adopts verbatim some provisions of the CRPD. This is very visible, for instance, in the definition section. Among others, consider the definition of discrimination by comparing article 1(b) of the AfDP with Article 2 of the CRPD. The only “difference” between the two definitions is in the last sentence where the AfDP repeats “Discrimination on the basis of disability” while the CRPD, having already referred to “discrimination on the basis of disability” uses “it” in place of the extended phrase. Obviously, the language in the CRPD seems to read better. However, to make a

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<sup>126</sup> Article 18 CRPD.

<sup>127</sup> Weis P *Nationality and statelessness in international law* 2nd rev ed (Dordrecht:Kluwer Academic Publishers Group. 1979 29–61. Also, *Trop v Dulles* 356 US 86 at 101-102 (1958).

<sup>128</sup> That is, including independent living and capacity for free choice and autonomy.

<sup>129</sup> In the context of social exclusion, republican concept of political and community participation

<sup>130</sup> With reference to economic and social life as well as responsibilities and reciprocity, and with debates on the limits to social rights: Morris J “Citizenship and disabled people: a scoping paper,” prepared for the Disability Rights Commission, UK (2005), available at [http://enil.eu/wp-content/uploads/2012/07/Citizenship-and-disabled-people\\_A-scoping-paper-prepared-for-the-Disability-Rights-Commission\\_2005.pdf](http://enil.eu/wp-content/uploads/2012/07/Citizenship-and-disabled-people_A-scoping-paper-prepared-for-the-Disability-Rights-Commission_2005.pdf) (accessed 7 October 2017).

difference, the African document commits to a kind of grammatical error by repeating the terminology unnecessarily.

A similar style is adopted in copying the definition of “universal design” where the “difference” lies in the last paragraph. While the CRPD adopts two sentences and starts the second by repeating “universal design”, the AfDP combines the two sentences into one and avoids a repetition of “universal design.”<sup>131</sup>

One may also refer to Article 3(1) of the African document on equality and non-discrimination where it adopts verbatim the provisions of Article 5(2) of the CRPD save for the deletion of “all” before discrimination. Another example is “reasonable accommodation” where the African document verbatim reproduces the CRPD.

In other instances, some clauses are relocated under a different set of rights. Thus, for example, instead of recognising equality before the law for persons with disability under the Article on equality and non-discrimination, the African document cuts that provision out and relocates it under Article 8 on “equal recognition before the law.”

#### **4 CONCLUSION AND RECOMMENDATIONS**

The article has sought to undertake a comparative analysis of the CRPD and the AfDP, using Megret’s work on the CRPD which identifies four types of rights in the CRPD. These are “affirmation rights,” “reformulation rights,” “extension rights” and “innovation rights.” After a careful analysis, the article concludes that the AfDP also adopts the four criteria identified in the CRPD.

However, at the same time, the article identified situations in which the African document introduces new “rights” that are not found in the CRPD. These are a reflection of Africa’s cultural, historical and developmental circumstances. They include references to harmful practices in Article 6, such as witchcraft, abandonment, concealment, ritual killings or the association of disability with omens. The others are provisions for youth with disabilities (Article 24) and adults with disabilities (Article 25). There is also the element of duties under Article 26 of the AfDP. These represent progressive innovations in the bid to better promote disability rights in Africa, judging from where we started.

At the same time, the article identified some gaps in the African system which are not covered in the CRPD. These include the lack of a distinction between rights that are to be enjoyed immediately and others that are to be enjoyed progressively, subject to availability of resources. Another is the absence of a general principles section in the AfDP. Furthermore, the drafters of the AfDP should adopt a richer reformulation of the rights of persons with disability in Africa for example, in the definition section.

All said and done, the article brings into the discussion the poor signing, ratification, domestication and implementation record by African States of African

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<sup>131</sup> Art 1(k) and Art 2 AfDP and CRPD, respectively.

treaties<sup>132</sup> In the case of the CRPD, all but 12 countries in Africa have ratified the Convention. Of the remaining 12, 10 have signed and only 2 have not signed, ratified or acceded to the CRPD. The commitments made in these treaties have resulted, one way or the other, in the recognition of the rights of persons with disability in the constitutions of 32 African countries. 16 have also enacted legislation to promote the rights of persons with disability, either on its own or as enabling legislation to the constitutional provisions affecting persons with disability. The rest have specific references in their general laws that touch on disability rights. However, even in countries with specific disability legislation, provisions are generally framed and do not meet the international minimum threshold.<sup>133</sup> Thus, the gap between international commitments made to promote, protect and fulfill disability rights on the one hand, and national legislation on the other to domesticate and operationalize the international commitments remains huge.

Therefore, to opt for a new Protocol to add to the responsibilities placed on African States is an onerous one. To ensure that the protocol will live up to the billing, it is proposed that, the African Commission on Human and Peoples' Rights designs innovative ways to make the Protocol, for example, self-executory upon ratification or accession. This approach, for example, will help deal with the problem of complex constitutional and legislative procedures for ratification of treaties which exist in some African States. At the same time, civil society should be made aware of the treaty and be empowered to put the necessary pressures on governments to fulfil their obligations to persons with disability. Also, when the treaty becomes applicable within the domestic setting, civil society should be able to review State budgets and make sure that the allocation for disability programme is adequate, subject to availability of resources, and that it gets to the target groups and individuals.

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<sup>132</sup> Maluwa T "Ratification of African Union Treaties by member states: law, policy and practice," (2012) 13 *Melbourne Journal of International Law* 1.

<sup>133</sup> A good example is Ghana's Disability Act.