

# Article 12 of the Protocol on the Rights of Persons with Disabilities in Africa: A critical analysis

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## Abstract

*This contribution analyses Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (the Protocol). It examines the purpose, scope and contribution of this Article to the legal protection of persons with disabilities in armed conflict and its implementation. The analysis is divided into four parts. The first part will start by identifying and analysing the background to this provision, which provides specific protection to persons with disabilities in armed conflict. The second part will examine Article 12 in the light of other similar regional instruments and of the protection challenges that persons with disabilities face during conflict. This will highlight the specific nature of the Article's provisions, together with its shortcomings and its progressive aspects. Part three will look at the interaction between Article 12 and equivalent rules of international humanitarian law, and how Article 12 contributes to the development of legal protection for persons with disabilities in armed conflict. Finally, the fourth part will examine the challenges to*

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*the implementation of Article 12. It will also propose ways of overcoming those challenges and hence of enabling Article 12 to have its intended effect.*

**Keywords:** Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, persons with disabilities, African Union, international humanitarian law, international human rights law, implementation.

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## Introduction

Under Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, States must:

- a) Take specific measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, forced displacements, humanitarian emergencies and natural disasters;
- b) Ensure that persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre and post-conflict reconstruction and rehabilitation.<sup>1</sup>

The provisions of Article 12 apply specifically to situations of crisis, including armed conflict. They confer special protection on persons with disabilities who are suffering from the consequences of such situations, in the form of obligations imposed upon States. The present article provides an in-depth analysis of this provision and its application to situations of armed conflict. Specifically, this contribution will analyse the purpose and scope of Article 12. It will also analyse the contribution of that article to the legal protection of persons with disabilities in armed conflict and the challenges to its implementation. The analysis is divided into four parts.

The first will examine the reasons why a specific article setting out special protection for persons with disabilities who are suffering the effects of armed conflict was included in the Protocol on the Rights of Persons with Disabilities in Africa. It shall show that this was motivated by the desire of the African Union (AU) to improve the situation of persons with disabilities in armed conflict, in accordance with the AU's aim of promoting and protecting human rights.<sup>2</sup>

The second section will examine the position of Article 12 within the AU's legal framework protecting the victims of armed conflict. On the basis of a critical analysis, it will first show that Article 12 is somewhat brief, providing less protection

1 African Union (AU), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, 29 January 2018, Art. 12, available at: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (all internet references were accessed in October 2022).

2 See Constitutive Act of the African Union, 2158 UNTS 3, 11 July 2000 (entered into force 26 May 2001), available at: <https://au.int/en/constitutive-act>. Article 3(h) states that one of the objectives of the AU is to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments".

than equivalent provisions of humanitarian law contained in earlier regional instruments protecting other categories of vulnerable person. It will then argue that a systematic reading of Article 12 in conjunction with other regional instruments would nonetheless make it possible to overcome the shortcomings of this article, and thereby to provide adequate protection for persons with disabilities in armed conflicts in Africa.

Part three shall look at the interaction between Article 12 and the provisions of international humanitarian law (IHL) regarding the protection of persons with disabilities. It shall put forward two arguments. Firstly, Article 12 contributes to the development of the way in which disability is perceived, and to the definition of the term “persons with disabilities” in IHL. Secondly, Article 12 strengthens protection for persons with disabilities in armed conflict. Furthermore, Article 12, read in conjunction with the other relevant provisions of the Protocol, is consistent with IHL and does not call into question the coherence or integrity of that branch of law – and still less its universality.

Finally, the fourth part will consider the implementation of Article 12. It will identify the main factors that explain why very few States have so far ratified the Protocol containing this article, and will suggest ways of promoting its ratification. This section will also demonstrate the need to produce a “general comment” on Article 12 and to strengthen the capacity and coordination of national and regional mechanisms in order to achieve the objectives of that article.

## The rationale for Article 12

Armed conflicts remain a major social issue in Africa, even if their number has fallen over the years.<sup>3</sup> Persons with disabilities are among the hardest hit. Indeed, although there are no precise figures on the number of persons with disabilities affected by armed conflict in Africa,<sup>4</sup> there is no doubt that these persons are one of the main vulnerable groups suffering the consequences of armed conflict to a disproportionate degree – precisely because of their disabilities.<sup>5</sup> They encounter a

3 According to the database *The Rule of Law in Armed Conflict* (RULAC), no fewer than twenty armed conflicts are currently taking place in Africa. See Geneva Academy/RULAC, “Conflicts”, available at: [www.rulac.org/browse/conflicts](http://www.rulac.org/browse/conflicts).

4 The World Health Organization estimates that 15% of the world’s population is living with a disability, and that this percentage increases in crises, including armed conflicts. African countries experiencing conflict are no exception. For details, see World Health Organization, *Disability and Health*, 24 November 2021, available at: <https://reliefweb.int/report/democratic-republic-congo/prise-en-compte-des-personnes-handicap-es-dans-la-r-ponse>; Overseas Advising Group, Fonds humanitaire en République Démocratique du Congo and Handicap International, *Prise en compte des Personnes Handicapées dans la réponse humanitaire en RDC : Enquête CAP multisectorielle couplée avec les Questions du Washington Group, Rapport de synthèse, ReliefWeb*, 1 October 2021, available at: <https://reliefweb.int/report/democratic-republic-congo/prise-en-compte-des-personnes-handicap-es-dans-la-r-ponse>; Human Rights Watch, “South Sudan: People with Disabilities, Older People Face Danger”, 31 May 2017, available at: [www.hrw.org/news/2017/05/31/south-sudan-people-disabilities-older-people-face-danger](http://www.hrw.org/news/2017/05/31/south-sudan-people-disabilities-older-people-face-danger).

5 International Committee of the Red Cross (ICRC), “Violence in Congo’s Kasai Region Even Harder on Disabled People”, 1 December 2017, available at: [www.icrc.org/en/document/violence-congos-kasai-region-even-harder-disabled-people](http://www.icrc.org/en/document/violence-congos-kasai-region-even-harder-disabled-people).

range of protection challenges. In fact, the violence generated by armed conflict creates a multitude of risks, including targeted attacks on individuals, the presence of landmines and unexploded ordnance, disruption of food and water supplies and medical services, exposure to weather conditions and other types of trauma that can create or exacerbate psychosocial difficulties and disabilities.<sup>6</sup> Indiscriminate attacks and the use of explosive weapons in populated areas have even more disastrous consequences for persons with disabilities, who are often unable to flee the fighting.<sup>7</sup> Persons who are blind or visually impaired do not always have someone to help them flee. The same applies to persons with reduced mobility.<sup>8</sup> Persons with a hearing, developmental or intellectual disability are often unable to hear, know or understand what is going on during an attack. This may result in them being exposed to the worst of the violence, because they cannot keep up when it is time to escape. Their families cannot always wait for them or flee with them.<sup>9</sup> In addition, fleeing to an unknown destination may be dangerous for them. In Cameroon, for example, persons with disabilities often remain in their villages even during an attack, because of the risks inherent in fleeing to inaccessible terrain and of hindering their families' or neighbours' attempts to escape.<sup>10</sup> For those of them who succeed in fleeing armed conflict,<sup>11</sup> displacement is also a complicating factor that presents multiple threats to their physical and mental health and well-being, exacerbating their existing disabilities or causing secondary disability.<sup>12</sup> In fact, persons with disabilities are sometimes marginalized and denied basic services. Refugee and internally displaced person camps and settlements do not always have formal, comprehensive and inclusive procedures for identifying persons with disabilities and therefore cannot provide them with protection and essential services, such as shelter and medical care that

6 Janet E. Lord, *Desk Review on Humanitarian Action Inclusive of Persons with Disabilities*, Inter-Agency Standing Committee (IASC), 1 March 2018, available at: <https://interagencystandingcommittee.org/iasc-task-team-inclusion-persons-disabilities-humanitarian-action/documents/desk-review-humanitarian>.

7 *Ibid.*

8 See ICRC, above note 5, which points out that people with reduced mobility were the hardest hit by violence in Kasai Region, Democratic Republic of the Congo.

9 *Ibid.*

10 Human Rights Watch, "Cameroon: Make Humanitarian Response More Inclusive", 10 December 2019, available at: [www.hrw.org/news/2019/12/10/cameroon-make-humanitarian-response-more-inclusive](http://www.hrw.org/news/2019/12/10/cameroon-make-humanitarian-response-more-inclusive).

11 It is estimated that 9.3 million persons with disabilities have been forced to flee their homes, many of them because of armed conflict. The majority of them are in Africa, which has the highest percentages of refugees and internally displaced persons in the world. For details, see Human Rights Watch, "UN: War's Impact on People with Disabilities", 3 December 2018, available at: [www.hrw.org/news/2018/12/03/un-wars-impact-people-disabilities](http://www.hrw.org/news/2018/12/03/un-wars-impact-people-disabilities); Internal Displacement Monitoring Centre, *Global Report on Internal Displacement 2020*, April 2020, pp. 1–26, available at: [www.internal-displacement.org/global-report/grid2020/](http://www.internal-displacement.org/global-report/grid2020/).

12 See United Nations (UN) General Assembly, World Programme of Action Concerning Disabled Persons, Report of the Secretary-General, UN Doc. A/37/351, 15 September 1982, Annex, Section VIII, Recommendation 1 (IV), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N82/238/48/PDF/N8223848.pdf?OpenElement>; and Corrigendum, UN Doc. A/37/351/Add.1/Corr.1, 22 October 1982, available at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/37/351/Add.1/Corr.1&Lang=E>.

are accessible and appropriate to their needs.<sup>13</sup> In Cameroon, the Central African Republic and South Sudan, persons with disabilities who have managed to reach internally displaced person or refugee camps often encounter barriers to obtaining food and medical care, and to using sanitary facilities.<sup>14</sup>

Besides, children with disabilities, women with disabilities and elderly persons with disabilities are exposed to disproportionate risk and may become even more vulnerable. Those of them living in communal accommodation, in hostels or psychiatric institutions form easy targets and may be used as human shields or taken hostage.<sup>15</sup> Children with disabilities may have their education disrupted, have no access to humanitarian aid and services and suffer lasting psychological harm. Conflict can worsen poverty for them and their families, affecting their ability to meet basic needs, let alone get assistive devices or rehabilitation.<sup>16</sup> Women and girls with disabilities are exposed to sexual violence and rape and, consequently, to sexually transmitted infections.<sup>17</sup> Their vulnerability to sexual violence, rape and sexually transmitted infections is aggravated by the belief that sex with persons with disabilities will cure AIDS – presumably an even more twisted version of the so-called “virgin cure” that is grounded on the common misconception that persons with disabilities are not sexually active and therefore have to be virgins.<sup>18</sup>

Given the consequences of armed conflict for persons with disabilities, it was important for the AU – in line with its objective of promoting and protecting human rights – to provide specific and adequate protection for persons with disabilities during armed conflict. Reflections in this regard began in the late 1990s, leading to the proclamation of the period 1999–2009 as the African Decade for Persons with Disabilities.<sup>19</sup> This was a regional initiative to further equalization of opportunities as well as to promote and protect the human rights of persons with disabilities.<sup>20</sup> Then, in 2003, the AU officially requested its Member States to adopt a protocol that would provide adequate protection for

13 UN Office of the High Commissioner for Human Rights, “Migrants and Refugees with Disabilities Must be Priority in New Global Compact on Migration – UN Experts”, Press Release, 12 April 2017, available at: [www.ohchr.org/en/press-releases/2017/04/migrants-and-refugees-disabilities-must-be-priority-new-global-compact](http://www.ohchr.org/en/press-releases/2017/04/migrants-and-refugees-disabilities-must-be-priority-new-global-compact); Human Rights Watch, *One Billion Forgotten: Protecting the Human Rights of Persons with Disabilities*, 2011, pp. 11–12, available at: [www.hrw.org/sites/default/files/related\\_material/2014%20disabilities\\_program\\_low.pdf](http://www.hrw.org/sites/default/files/related_material/2014%20disabilities_program_low.pdf).

14 Human Rights Watch, above note 11.

15 *Ibid.*

16 Human Rights Watch, “UN: High Risk in Conflicts for Children with Disabilities”, 2 February 2022, available at: [www.hrw.org/news/2022/02/02/un-high-risk-conflicts-children-disabilities](http://www.hrw.org/news/2022/02/02/un-high-risk-conflicts-children-disabilities).

17 Serges Alain Djoyou Kamga, “A Call for a Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa”, *African Journal of International and Comparative Law*, Vol. 21, No. 2, p. 222.

18 *Ibid.*

19 See OAU Secretary, General Report CM/2112 (LXX), adopted by the 23rd session of the Labour and Social Affairs Commission meeting in Algiers, Algeria, 12–13 April 2000, and endorsed by the 72nd session of the OAU Council of Ministers and 36th Assembly of Heads of State and Government, respectively, meeting in Lomé, Togo, 6–8 July 2000, Decision CM/Dec.535 (LXXII) Rev.1.

20 *Ibid.* For further details, see also UN Enable, *African Decade of Disabled Persons (2000–2009)*, 2003, available at: [www.un.org/esa/socdev/enable/disafriquadecade.htm#\\_edn50](http://www.un.org/esa/socdev/enable/disafriquadecade.htm#_edn50).

persons with disabilities. This took place at the first Organisation of African Unity (OAU) Ministerial Conference on Human Rights,<sup>21</sup> which resulted in the Kigali Declaration.<sup>22</sup> Noting the plight of persons with disabilities in Africa,<sup>23</sup> the participants at the Ministerial Conference called on Member States to “develop a Protocol on the protection of the rights of persons with disabilities and the elderly”.<sup>24</sup> In 2009, in response to that call, the African Commission on Human and Peoples’ Rights (ACHPR) set up a Working Group on the Rights of Older Persons and People with Disabilities.<sup>25</sup> The mandate of the Working Group included drafting a concept paper to serve as a basis for a draft protocol on persons with disabilities.<sup>26</sup> In accordance with that mandate, the Working Group submitted a draft protocol on the rights of persons with disabilities in November 2009, for consideration and adoption by the political bodies of the AU. This was the “Accra Draft”.<sup>27</sup> However, that draft encountered severe criticism from disability rights organizations, academic circles and national human rights organizations. Those bodies argued that the draft did not pay adequate attention to the socio-economic rights of persons with disabilities, did not cover the questions of albinism and disability, was silent on the effects of harmful traditional practices and did not underline the double discrimination suffered by women with disabilities.<sup>28</sup> They maintained that these flaws were due to the fact that the drafting of the protocol had not been preceded by an adequate process of conceptual and analytical reflection involving them.<sup>29</sup> In response to this criticism, the ACHPR enlarged the Working Group by appointing three additional experts on issues related to persons with disabilities and elderly people.<sup>30</sup> Following a series of consultations involving the relevant bodies, and bearing in mind the concerns that African States had expressed during drafting of

21 This conference took place in Kigali, Rwanda, on 8 May 2003.

22 AU, Kigali Declaration, 8 May 2003, available at: [www.achpr.org/legalinstruments/detail?id=39](http://www.achpr.org/legalinstruments/detail?id=39).

23 *Ibid.*, para. 19.

24 *Ibid.*, para. 20.

25 African Commission on Human and Peoples’ Rights (ACHPR), Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa – ACHPR/Res.143(XXXV)09, 27 May 2009, para. (a), available at: [www.achpr.org/sessions/resolutions?id=228](http://www.achpr.org/sessions/resolutions?id=228).

26 *Ibid.*, para. (a) i–iii.

27 See, for example, S. A. D. Kamga, above note 17, pp. 223–4.

28 *Ibid.*, p. 224.

29 *Ibid.*; Japhet Biegon, “The Promotion and Protection of Disability Rights in the African Human Rights system”, in Ilze Grobbelaar-du Plessis and Tobias van Reenen (eds), *Aspects of Disability Law in Africa*, Pretoria University Law Press, Pretoria, 2011, available at: [www.pulp.up.ac.za/edited-collections/aspects-of-disability-law-in-africa](http://www.pulp.up.ac.za/edited-collections/aspects-of-disability-law-in-africa); Juliet Mureriwa, “Some Reflections on the Draft African Disability Protocol and Socio-Economic Justice for Persons with Disabilities”, *Economic and Social Rights Review*, Vol. 12, No. 3, 2011, p. 3; Hélène Combrinck and Lawrence M. Mute, “Developments Regarding Disability Rights During 2013: The African Charter and African Commission on Human and Peoples’ Rights”, *African Disability Rights Yearbook*, Vol. 2, 2014, p. 313.

30 ACHPR, Resolution to Increase Members of the Working Group on Older Persons and People with Disabilities in Africa – ACHPR/Res.170(XLVIII)10, 24 November 2010, available at: [www.achpr.org/sessions/resolutions?id=344](http://www.achpr.org/sessions/resolutions?id=344).

the Convention on the Rights of Persons with Disabilities (CRPD),<sup>31</sup> the expanded Working Group drafted a technical document, in the form of a concept note, to serve as the basis for producing a new draft protocol on the rights of persons with disabilities.<sup>32</sup> It contained a list of protection topics and issues that a future protocol should cover. A draft protocol was produced on the basis of that document in 2014.<sup>33</sup> Proposals for modification were collected from various bodies, leading to the Protocol on the Rights of Persons with Disabilities in Africa.<sup>34</sup>

The publicly available May 2012 version of the concept note did not mention the protection of persons with disabilities in armed conflict as a topic to include in the draft Protocol. However, the report of the Working Group chairperson, produced in October (four months later), contained a point indicating that this topic had been included in a later version of the concept note or had at least been taken into account during discussions concerning the Protocol. In that report, Working Group chairperson Commissioner Yeung Kam John Yeung Sik Yuen stated:

The Working Group finds that there is a need for an African specific Protocol on the Rights of Persons with Disabilities. Almost 80 per cent of persons with disabilities live in developing countries. In Africa a growing number of persons are added to the list of persons with disabilities due to different socio-economic factors, including the *consequences of war*, poverty, diseases, ageing, malnutrition, natural calamities and disasters and accidents.<sup>35</sup>

This statement indicates that the effect of armed conflict on persons with disabilities was among the reasons for producing the Protocol and, in particular, for including an article aimed at improving their plight in such situations. It is important to stress that the African community had already addressed the protection of persons with disabilities in armed conflict when drafting the CRPD. Starting in 2003, at the regional workshop to formulate proposals for the CRPD, national African human rights organizations and civil society bodies had expressly recommended the inclusion in the CRPD of a provision related to the protection of the rights of persons with disabilities in armed conflict. The final declaration produced at the conclusion of this work stated that “the Convention should recognize the vulnerability of persons with disabilities in situations of crisis such as conflict and

31 Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3, 6 December 2006 (entered into force 3 May 2008), available at: [www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html](http://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html).

32 Lawrence Mute, *Concept on the List of Issues to Guide Preparation of a Protocol on the Rights of Persons with Disabilities in Africa, Revised Draft as of 3 May 2012*, available at: <https://blindsa.org.za/wp-content/uploads/2018/02/IDEA-PAPER-ON-THE-LIST-OF-ISSUES-TO-GUIDE-PREPARATION-OF-A-PROTOCOL-ON-T...doc>.

33 ACHPR, “Comments Invited on Draft Protocol on the Rights of Persons with Disabilities in Africa”, March 2014, available at: [www.achpr.org/news/viewdetail?id=129](http://www.achpr.org/news/viewdetail?id=129).

34 *Ibid.*

35 Yeung Kam John Yeung Sik Yuen, *Report of the Chairperson of the Working Group on The Rights of Older Persons and People with Disabilities in Africa*, Yamoussoukro, Côte d’Ivoire, October 2012, available at: [www.achpr.org/public/Document/file/English/activy\\_report\\_older\\_persons\\_eng.pdf](http://www.achpr.org/public/Document/file/English/activy_report_older_persons_eng.pdf) (emphasis added).



natural disasters”.<sup>36</sup> The African States took this recommendation into account and promoted it widely in drafting the CRPD. For example, the African group recommended that the following general provision be included in the Convention:

[...] States Parties undertake to:

establish credible and effective structures to oversee implementation and monitoring; to ensure a barrier free society through the establishment of an effective enabling environment; to provide particular protection and support for persons with disabilities who are vulnerable on account of situations such as *conflict* and natural disasters or because of their status as children, women and persons living with HIV/AIDS.<sup>37</sup>

The protection of persons with disabilities in armed conflict had clearly been a constant concern for the African States. It was this concern that motivated the inclusion of Article 12 in the Protocol. By doing so, the AU was putting into practice its commitment to promote and protect human rights. This commitment is not restricted to particular circumstances. It is relevant at all times, including during armed conflict. Furthermore, the guarantees of treatment referred to in the expression “human rights” are not limited to those set out in international human rights law.<sup>38</sup> They also include guarantees related to humanitarian law, i.e. those guarantees intended to address the problems that arise during armed conflict. This interpretation is based on the fact that, in addition to the Protocol on the Rights of Persons with Disabilities, many other AU human rights instruments contain provisions of humanitarian law, i.e. provisions specifically applicable to situations of armed conflict. These include the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Protocol on the Rights of Women),<sup>39</sup> the African Charter on the Rights

36 Secretariat of African National Institutions, *Regional Workshop on Promoting the Rights of People with Disabilities: Towards a New UN Convention – Final Declaration*, Munyonyo-Kampala, Uganda, 6 June 2003, para. 30, available at: [www.un.org/esa/socdev/enable/rights/contrib-uganda.htm](http://www.un.org/esa/socdev/enable/rights/contrib-uganda.htm).

37 UN Enable, Ad Hoc Committee, *Proposed Modifications by Governments, Seventh Session*, 2005, Art. 4, para. 6, available at: [www.un.org/esa/socdev/enable/rights/ahc7african.htm](http://www.un.org/esa/socdev/enable/rights/ahc7african.htm) (emphasis added). See also, for other examples of contributions from Africa regarding this topic, Kenya, *Position of Kenya on Draft Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 10 January 2006 and 7 October 2005, available at: [www.un.org/esa/socdev/enable/rights/ahc7kenya.htm](http://www.un.org/esa/socdev/enable/rights/ahc7kenya.htm). It is also worth mentioning the addition of the words “in particular during armed conflicts and foreign occupation” to the end of para. (u) of the preamble to the CRPD at the initiative of the Arab Group, of which several African States are members. For details regarding that contribution, see Ad Hoc Committee on Convention on Persons with Disabilities, “Ad Hoc Committee Agrees on New UN Convention to Protect Disabled Persons’ Rights”, Press Release, UN Doc. SOC/4716, 28 August 2006, available at: <https://unis.unvienna.org/unis/en/pressrels/2006/soc4716.html>. For further details on this subject, see Arlene S. Kanter, “The Promise and Challenge of the United Nations Convention on the Right of Persons with Disabilities”, *Syracuse Journal of International Law and Commerce*, Vol. 34, 2007, pp. 300–1.

38 ICRC, “Quelle différence y a-t-il entre le droit humanitaire et le droit des droits de l’homme?”, 1 January 2004, available at: [www.icrc.org/fr/doc/resources/documents/misc/5qlbu7.htm](http://www.icrc.org/fr/doc/resources/documents/misc/5qlbu7.htm).

39 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July 2003 (entered into force 25 November 2005), Art. 11, available at: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>.



and Welfare of the Child (African Charter on the Rights of the Child),<sup>40</sup> the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)<sup>41</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons).<sup>42</sup> As emphasized in the various reports on governance in Africa produced by the AU,<sup>43</sup> these instruments – which contain provisions specifically applicable in armed conflict – were drafted with the objective of promoting and protecting human rights as set out in the Constitutive Act of the AU. In the case of the Protocol on the Rights of Persons with Disabilities, it was therefore a matter of continuity for the AU to provide specific protection for these categories of persons, as had been done in other legal instruments for other particularly vulnerable categories of person. The protection of persons with disabilities conferred by the Protocol would have been incomplete if the issue of protecting them during armed conflict had not been taken into account.

## The position of Article 12 within the AU's legal framework protecting the victims of armed conflict

By comparison with other regional provisions protecting especially vulnerable people in armed conflict, Article 12 is very brief and contains very little protection in itself. However, its deficiencies are compensated for by other regional rules enacted previously.

### Article 12 contains fewer protections than other regional human rights instruments

Article 12 is the shortest article related to the protection of vulnerable people in any AU instrument. It is also the shortest of all the substantive articles in the same Protocol. It consists of just one paragraph, divided into two sub-paragraphs. In turn, each sub-paragraph consists of a single sentence, scarcely three lines in

40 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/153/Rev2, July 1990 (entered into force 29 November 1999), Arts 22 and 23, available at: <https://au.int/en/treaties/african-charter-rights-and-welfare-child>.

41 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 52 ILM 400, 23 October 2009 (entered into force 6 December 2012), Arts 4, 7, etc., available at: <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>.

42 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons, 31 January 2016, Art. 12, available at: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons>.

43 See African Peer Review Mechanism, *The Africa Governance Report: Promoting African Union Shared Values*, January 2019, p. 25, available at: <https://au.int/en/documents/20190118/africa-governance-report-promoting-african-union-shared-values>; *The Africa Governance Report: Promoting African Union Shared Values*, December 2019, p. 27, available at: <https://au.int/en/documents/20191218/africa-governance-report-promoting-african-union-shared-values>.

length. Article 11 of the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa contains four substantive paragraphs. Article 10 of the same protocol contains two further paragraphs addressing the protection of women in conflict. Articles 22 and 23 of the African Charter on the Rights and Welfare of the Child, which address the protection of children in conflict, contain two and three more paragraphs, respectively, than Article 12 of the Protocol on the Rights of Persons with Disabilities. The Kampala Convention contains several articles devoted to the protection of people displaced within their countries as a result of armed conflict.<sup>44</sup>

Article 12 is also the least explicit and least comprehensive in the protection it provides of all the provisions in the same protocol and elsewhere related to other categories of particularly vulnerable person. Unlike the other regional provisions protecting especially vulnerable people in armed conflict, Article 12 does not have a counterpart in the preamble setting out the reasons for its adoption. It is somewhat surprising that the preamble to the Protocol does not reflect the many challenges to the protection of persons with disabilities in armed conflict. And yet, several African States were involved in drafting paragraph 4 of the preamble to the CRPD.<sup>45</sup> That paragraph recalls the plight of persons with disabilities in armed conflict and can be linked to Article 11 of the CRPD, concerning the protection of persons with disabilities in armed conflict. As the *travaux préparatoires* of the Protocol are not publicly available, it is difficult to establish the reason for omitting all mention of persons with disabilities in armed conflict from the preamble. It is also impossible to establish whether such wording appeared in an earlier draft of the Protocol but was later removed. The 2014 draft on the ACHPR website, which precedes the final version, makes no reference to armed conflict in its preamble.<sup>46</sup> Mentioning armed conflict in the preamble, as do other similar AU instruments and the CRPD, would have provided an additional means of interpreting Article 12.<sup>47</sup> As it is, the preamble does not help us interpret Article 12 or assess that article in depth, especially as regards IHL.

Besides, with the exception of “situations of risk”, none of the terms used in Article 12 are defined in Article 1 of the Protocol. That article contains a long list of definitions, but the terms “protection”, “safety”, “consult” and “participate”, which lie at the heart of Article 12, are absent. They are therefore left open to interpretation. This could lead to divergent interpretations, preventing harmonious application of Article 12.

44 See, in particular, Kampala Convention, Arts 3–7.

45 For details, see above note 37.

46 ACHPR, above note 33.

47 Regarding the value of a preamble in interpreting a treaty, see, *inter alia*, Quôc Dinh Nguyễn, Patrick Daillier and Alain Pellet, *Droit international public*, 7th ed., L.G.D.J., Paris, 2002, p. 131; Mustafa Kamil Yasseen, “L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”, in *Recueil des cours de l’Académie de droit international*, Vol. 51, 1976; Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), available at: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en), Art. 31, which begins “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *preamble* and annexes: [...]” (emphasis added).

Furthermore, Article 12 contains only two specific protective measures. Firstly, it requires States to “take specific measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict”. Secondly, it requires them to “ensure that persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre and post-conflict reconstruction and rehabilitation”. We shall return to the interpretation and analysis of the provisions of Article 12 later in the present contribution. However, we should point out at this stage that the regional instruments mentioned above provide greater protection for the vulnerable people to whom they apply. They are more generous in terms of specific protective measures.

Moreover, Article 12 makes no reference to IHL, or to any obligation to “respect and ensure respect for” that branch of law. This is unfortunate, considering the fact that IHL is the legal framework applicable to some situations that Article 12 sets out to address. Here again, there is a considerable difference between this Protocol and the human rights instruments that preceded it. In addition to a number of specific IHL provisions, the African Charter on the Rights of the Child, the Protocol on the Rights of Women and the Kampala Convention all contain numerous references to IHL and its provisions. These references to and reaffirmations of existing IHL are very important. They are not stylistic flourishes or empty phrases. On the contrary, they bear witness to the commitment of the AU and its Member States to the fundamental provisions of IHL. It would have been useful to reaffirm certain provisions of IHL regarding persons with disabilities in Article 12, to not only reiterate Africa’s commitment to pre-existing IHL, but also to emphasize that Article 12 is a continuation of a pre-existing regime for the protection of people in armed conflict.

The first paragraph of Article 12 requires States to “take specific measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict”, but without saying what specific measures should be taken or even providing an indicative list of such measures.

The second paragraph, on the participation of persons with disabilities in post-conflict reconstruction, is no more explicit than the first. For instance, it does not contain an indicative list of the measures that States could take to ensure the participation of persons with disabilities in post-conflict reconstruction. As the *travaux préparatoires* of Article 12 are not publicly available, it is difficult to establish the reasons that motivated the drafters to formulate such a brief article. They might have been motivated by a concern not to be too extensive and not to use a rigid or very specific formulation that would have left little room for evolutionary interpretation or of which the interpretation would have created controversy. Such reasons have frequently been put forward in other contexts.<sup>48</sup> Be

48 The ICRC commentary on Article 1 indicates, for instance, that the drafters of the four Geneva Conventions had agreed to adopt a very general formulation as regards the general obligation to “ensure respect for” IHL. This comment shows that the very general formulation used admits of a broad, evolutive interpretation of this provision. In particular, it allows the introduction of an external dimension to the obligation to ensure respect for the Conventions, i.e. the obligation on the States to

that as it may, the drafters could have expanded Article 12 by referring to armed conflict in the preamble to the Protocol and by setting out broader, more detailed and non-exhaustive provisions addressing the specific protection problems faced by persons with disabilities in Africa. Such provisions would have been far from useless. They would have been an excellent means of addressing any gaps in universal IHL, or could have added detail and specific types of protection that universal IHL does not contain.

Instruments providing protection of a general nature already exist, and protect all victims of armed conflict, including persons with disabilities. This is especially the case with the Fourth Geneva Convention and Additional Protocol I.<sup>49</sup> The purpose of specific instruments, such as the Protocol on the Rights of Persons with Disabilities in Africa, is to extend this general protection by adding protection that addresses the vulnerability and difficulties to which people are exposed in particular situations. Indeed, this would appear to be the aim of Article 66 of the African Charter on Human and Peoples' Rights, from which the Protocol on the Rights of Persons with Disabilities in Africa draws its legal justification. This article stipulates that "Special protocols or agreements may, if necessary, supplement the provisions of the present Charter." Commenting on this provision, Kobila rightly points out that it is fundamentally a progressive stipulation, which contains the means of taking into account developments likely to enhance the African regional mechanism for the promotion and protection of human rights.<sup>50</sup> The abuses and difficulties faced by persons with disabilities in armed conflict in Africa were widely documented long before drafting of the Protocol on the Rights of Persons with Disabilities was completed.<sup>51</sup> This being so, the drafters of the Protocol on the Rights of Persons with Disabilities in Africa could have included more specific provisions protecting

ensure respect for the Conventions not only by their own populations, but also by others. See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Cambridge University Press, Cambridge, 2016, paras 155–7, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

49 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

50 James Mouangue Kobila, "Article 66", in Maurice Kamto (ed.), *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme : Commentaire article par article*, Bruylant, Brussels, 2011, pp. 1981–2.

51 See, for example, Tami Tamashiro, *Impact of Conflict on Children's Health and Disability*, UNESCO, 2010, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000190712>. See the travaux préparatoires of the CRPD, in particular the discussion regarding protection of persons with disabilities during armed conflict. On this topic, see, *inter alia*, UN Enable, *Daily Summary related to Draft Article 8: Right to Life*, prepared by Landmine Survivors Network, Vol. 3, No. 7, 13 January 2004, available at: [www.un.org/esa/socdev/enable/rights/wgsuma8.htm](http://www.un.org/esa/socdev/enable/rights/wgsuma8.htm); UN Human Rights Commission, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, submitted in accordance with Commission Resolution 2002/31, paras 59, 65 and 67, UN Doc. E/CN.4/2003/58, 13 February 2003, available at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=E/CN.4/2003/58&Lang=E>; Thomas Plümper and Eric Neumayer, "The Unequal Burden of War: The Effect of Armed Conflict on the Gender Gap in Life Expectancy", *International Organization*, Vol. 60, No. 3, 2006, pp. 723–4.

persons with disabilities against such specific violations, while of course including more general provisions to prevent any restrictive interpretation. This would have provided a means of condemning some of these violations. That is the approach taken in many instruments that have a general field of personal application, such as the Fourth Geneva Convention, Article 27, paragraph 2, and Additional Protocol I, Article 76, paragraph 1 which provide for detailed and specific protection measures for women. It has been argued that those provisions were included in response to certain practices and some of the worst abuses suffered by countless women of all ages during the Second World War – rape in occupied territories, forced prostitution, mutilation and many other kinds of brutality.<sup>52</sup>

Article 12 applies equally to international armed conflict and to non-international armed conflict. Neither this article nor any other in the Protocol contains any provision restricting application to a specific type of armed conflict. However, the words “States Parties” in the formulation of the obligations does indicate that these provisions are only binding on States. This is rather unfortunate, given that non-State armed groups are among the main protagonists of non-international armed conflict and the large number of violations of the rights of persons with disabilities that such groups commit.<sup>53</sup> The fact that Article 12 makes no mention of the requirement for these groups to accord certain fundamental guarantees to persons with disabilities is no doubt intentional, and probably stems from a desire on the part of the drafters to avoid the risk of any reference to non-State armed groups being interpreted as some kind of legal recognition, or of such provisions being used to attack the sovereignty and territorial integrity of a State. Yet, ensuring effective protection for persons with disabilities requires one to recognize that the vast majority of armed conflicts on the African continent are non-international armed conflicts to which such groups are party, and that it is therefore equally important to reaffirm their international obligations to protect persons with disabilities. If Article 12(a) had reaffirmed – even in generic form – the obligations that also apply to armed groups, that would not have constituted legitimization of those groups, as the protection of persons with disabilities in a non-international armed conflict is a responsibility that falls equally on States and armed groups. The drafters of Article 12 could have at least reiterated the duty of armed groups to respect persons with disabilities during armed conflict, while at the same time making it clear that provisions regarding armed groups had no bearing on their legal status.<sup>54</sup>

52 See, for example, Claude Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Dordrecht, 1987, pp. 916–17, para. 3152; Françoise Krill, “La protection de la femme dans le droit international humanitaire”, *Revue Internationale de la Croix-Rouge*, Vol. 67, No. 756, 1985, p. 347.

53 The vast majority of armed conflicts in progress on the African continent in which atrocities are committed against civilians – including people with disabilities – are non-international in nature. For further details, see RULAC, above note 3. For some examples of violations committed against persons with disabilities, see, for example, Human Rights Watch, “Central African Republic: People With Disabilities Left Behind”, 28 April 2015, available at: [www.hrw.org/news/2015/04/28/central-african-republic-people-disabilities-left-behind](http://www.hrw.org/news/2015/04/28/central-african-republic-people-disabilities-left-behind); Human Rights Watch, above note 4.

54 See Article 3(4) common to the four Geneva Conventions.

## Complementarity between Article 12 and other regional provisions of humanitarian law

Despite the gaps described above, one should emphasize that Article 12 is not the only legal framework that specifically addresses the protection of persons with disabilities in armed conflict. AU instruments include several other provisions that complement the legal framework created by Article 12. These include the African Charter on the Rights and Welfare of the Child, of which Article 22 reads as follows:

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.
2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situation of internal armed conflicts, tension and strife.

The provisions do not in any way restrict their application to a specific category of child. One can therefore argue that they apply to all children affected by armed conflict, including children with disabilities. This interpretation is supported by the General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child: *Children in Situations of Conflict*, of which the purpose is to facilitate implementation of Article 22. This General Comment contains references to persons with disabilities, indicating that the scope of Article 22 extends to these categories of vulnerable child.<sup>55</sup> Paragraph 65 of this General Comment stipulates that:

[...] the protection against torture or cruel, inhuman and degrading treatment should be interpreted to include rape and sexual violence [...] Emphasis has to be placed on incidences where the child who has suffered the abuse is suffering from a disability.

Likewise, the provisions of Article 11 of the Protocol on the Rights of Women that protect women in armed conflict also apply to women with disabilities. Again, this article does not restrict its own scope of application.

Furthermore, the Kampala Convention, in its provisions concerning armed conflicts,<sup>56</sup> specifically stipulates that States Parties must “[p]rovide special protection for and assistance to internally displaced persons with special needs,

55 African Committee of Experts on the Rights and Welfare of the Child (ACRWC), *General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child: Children in Situations of Conflict*, September 2020, paras 32 and 65.

56 For an analysis of these provisions, see Steve Tiwa Fomekong, “Reflections on Humanitarian Law Dimensions of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa”, *African Yearbook on International Humanitarian Law*, Vol. 2020, No. 1, 2020.

including separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly, and *persons with disabilities* or with communicable diseases”.<sup>57</sup> The Kampala Convention therefore provides specific protection for displaced persons with disabilities. Furthermore, Article 7, paragraph 5 of the Convention prohibits members of armed groups from:

- a) Carrying out arbitrary displacement;
- b) Hampering the provision of protection and assistance to internally displaced persons under any circumstances;
- c) Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family;
- d) Restricting the freedom of movement of internally displaced persons within and outside their areas of residence;
- e) Recruiting children or requiring or permitting them to take part in hostilities under any circumstances;
- f) Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children;
- g) Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons.

These provisions applicable to armed groups protect all persons displaced as a result of armed conflict, including those with disabilities. Furthermore, while they apply only to persons with disabilities who have suffered forced displacement as a result of conflict, those provisions do partially compensate for the absence of any reference to the obligations of armed groups in Article 12.

In addition to these legally binding instruments, the AU’s legal framework includes numerous soft law provisions that reaffirm the duties of both States and armed groups to respect and protect civilians during armed conflict. For instance, the Common African Position on Humanitarian Effectiveness stipulates that:

The protection and assistance of vulnerable groups, specifically women, children, the elderly and *persons with disabilities* in humanitarian crises situations need to be at the centre of the humanitarian action. Humanitarian assistance should pay particular attention to their specific needs.<sup>58</sup>

Likewise, the African Union Policy Guideline on the Role of the African Standby Force in Humanitarian Action and Natural Disaster Support incorporates the concepts of a gender dimension and the needs of vulnerable people. It stipulates that “all activities must take into account the gender dimension of humanitarian action; and also include vulnerable persons such as the elderly and persons with

57 Kampala Convention, Art. 9.2(c) (emphasis added).

58 AU, *Common African Position on Humanitarian Effectiveness*, 2016, available at: [www.tralac.org/images/docs/9719/common-african-position-cap-on-humanitarian-effectiveness-may-2016.pdf](http://www.tralac.org/images/docs/9719/common-african-position-cap-on-humanitarian-effectiveness-may-2016.pdf) (emphasis added).



disabilities considerations”.<sup>59</sup> Taken together, these rules complement and strengthen those set out in Article 12 regarding persons with disabilities in armed conflict.

## Interaction between Article 12 and the provisions of IHL regarding the protection of persons with disabilities

Persons with disabilities are protected by IHL. In addition to the general protection afforded to persons not or no longer taking part in hostilities,<sup>60</sup> they also benefit from certain specific safeguards set out in the small number of provisions contained in the main instruments of IHL.<sup>61</sup> In addition, certain arms treaties contain specific guarantees regarding assistance to persons who have become disabled as a result of the weapons that these treaties regulate.<sup>62</sup>

Article 12 strengthens the protection that IHL offers persons with disabilities. The terms used in that article, and the definition of “persons with disabilities” it contains also contribute to developments in the perception of disability and the definition of “persons with disabilities”.

### Developments in the perception of disability and the definition of “persons with disabilities”

A survey of IHL provisions providing specific guarantees regarding persons with disabilities reveals that they are referred to using such terms as “the infirm”,<sup>63</sup> “cases of mental disease”<sup>64</sup> or “the blind”.<sup>65</sup> This terminology originates in the socio-historical context obtained when the Geneva Conventions and their Additional Protocols were written. Today they are seen as outdated and as

59 AU, *African Union Policy Guideline on the Role of the African Standby Force in Humanitarian Action and Natural Disaster Support*, 2016, available at: [www.peaceau.org/uploads/01-asf-in-hands-guidelines.pdf](http://www.peaceau.org/uploads/01-asf-in-hands-guidelines.pdf).

60 For a brief outline of the general protection to which such persons are entitled, see, for example, Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, April 2019, pp. 57–73, available at: [www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202014-interactive.pdf](http://www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202014-interactive.pdf). See also ICRC, “How Law Protects Persons with Disabilities in Armed Conflict”, 13 December 2017, available at: [www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict](http://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict).

61 See, for example, GC IV, Art. 30; and AP I, Arts 17 and 70. For an overview of this special protection, see, for example, A. Priddy, *ibid.*; and ICRC, *ibid.*

62 See, for example, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 211, 18 September 1997 (entered into force 1 March 1999), Art. 6, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVI-5&chapter=26&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en); Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V), 1342 UNTS 137, 28 November 2003 (entered into force 12 November 2006), Art. 8, para. 2, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVI-2-d&chapter=26&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-2-d&chapter=26&clang=_en).

63 GC IV, Art. 17.

64 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 30.

65 *Ibid.*

presenting a less than positive image of persons with disabilities. As Priddy points out in *Disability and Armed Conflict*,

such language is now recognized as not being in conformity with a person's human dignity and, therefore, the human rights-based approach. Instead, when using language related to disability, the person should come before the impairment, as it is not the impairment that defines them.<sup>66</sup>

One should not underestimate the impact of terminology on persons with disabilities. It can feed and reinforce negative and discriminatory attitudes.<sup>67</sup>

Following in the footsteps of the CRPD, the Protocol departs from the terminology that the main IHL treaties use when referring to persons with disabilities. It simply refers to them as “persons with disabilities”, whom it defines as persons who have “physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others”.<sup>68</sup> The Protocol is thus a continuation of efforts to promote, through language and other means, a more positive image of persons with disabilities in all circumstances, including in times of armed conflict. It aims to promote a contemporary and evolving interpretation of the terms used in the Geneva Conventions and their Additional Protocols. In the words of Priddy, therefore, “terminology such as ‘the infirm’ should be read as ‘a person with a disability’, ‘cases of mental disease’ should be read as ‘persons with psychosocial or intellectual disabilities’ and ‘the blind’ as ‘persons with visual impairments’”.

IHL defines persons with disabilities primarily in terms of medical needs.<sup>69</sup> The definition of “persons with disabilities” in the Protocol goes beyond persons whose disability requires special and urgent medical attention to encompass those with a disability requiring other forms of assistance and protection. This includes persons with hearing disabilities who are unable to follow radio messages, persons with reduced mobility and those with intellectual disabilities who are unable to follow complex instructions,<sup>70</sup> for example in the distribution of humanitarian assistance or in warnings of an impending attack. This definition makes it possible to enlarge the circle of people eligible for specific protection during armed conflict on the grounds of disability. It also contributes to raising awareness and understanding on disability. Consequently, the broad definition of “persons with disabilities” in the Protocol could be interpreted as an obligation to address the specific needs faced by everyone with a disability (as far as possible), not just those whose disability means that they need immediate medical

66 See A. Priddy, above note 60, p. 53.

67 *Ibid.*

68 AU, Protocol on the Rights of Persons with Disabilities in Africa, above note 1, Art. 1.

69 See A. Priddy, above note 60, p. 19. See also Janet E. Lord, “Persons with Disabilities in International Humanitarian Law”, in Michael Gill and Cathy J. Schlund-Vials (eds), *Disability, Human Rights and the Limits of Humanitarianism*, Routledge, London, 2015, p. 160.

70 See, also, J. Lord, *ibid.*, p. 160.

assistance. In other words, the diversity of persons with disabilities should be taken into account as much as possible in the provision of humanitarian protection and assistance. The Protocol sets out a number of measures that make it possible to achieve this aim.

### The strengthening of special protection for persons with disabilities

Article 12 complements and strengthens IHL provisions. As the safety and protection of persons with disabilities during armed conflict are guaranteed by the general rules of IHL, this Article could be understood to imply that States must interpret and apply these general provisions of IHL in such a way as to address the specific needs of persons with disabilities. In that sense, it helps to clarify IHL and to facilitate its application in a manner that takes account of the protection and assistance needs of persons with disabilities. The implementation of such a provision would imply, *inter alia*, that such realistic measures must be taken as ensuring that warnings of an impending attack<sup>71</sup> are easily accessible to persons with visual or hearing impairments. This could include, where possible, distributing leaflets in Braille, or ensuring that the transmission of such warnings on television is accompanied by a translation into sign language. This would help ensure that the principle of precaution is observed in a manner that takes account of the specific needs of persons with disabilities. As regards the distribution of humanitarian aid, this would involve, for instance, giving priority to persons who, because of their disability, cannot queue for long periods to receive basic necessities.

However, in order to ensure that the needs of persons with disabilities are adequately addressed, it is important to ensure at the outset that members of the armed forces, armed groups, humanitarian professionals and even populations are adequately trained and sensitized regarding the rights of persons with disabilities, and on the specific challenges they face during armed conflict. To achieve this, it is essential to consult persons with disabilities themselves. This is specifically provided for in Article 12(b) of the Protocol, which requires States to “ensure that persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre and post-conflict reconstruction and rehabilitation”.<sup>72</sup> This provision is progressive and important in a number of ways. It is part of the international community’s efforts to ensure the full and effective participation of persons with disabilities in all aspects of society. This started in 2006 with the CRDP, which enshrines the principles of inclusion and participation.<sup>73</sup> It continued in 2015 with the 2030 Agenda for Sustainable Development and the Sendai Framework for Action on Disaster Risk Reduction, which affirm the principle that no one should be left behind and call

71 The obligation to give advance warning of attacks that may affect the civilian population is set out in AP I, Art. 57.2(c), for instance.

72 AU, Protocol on the Rights of Persons with Disabilities in Africa, above note 1, Art. 12(b).

73 CRPD, Art. 19.

for the participation of all citizens, in all segments of society.<sup>74</sup> The World Humanitarian Summit 2016 and the resulting Charter on Inclusion of Persons with Disabilities in Humanitarian Action reaffirm these principles. In this Charter, States and other actors undertake to empower persons with disabilities and promote universally accessible response, recovery, rehabilitation and reconstruction.<sup>75</sup> Article 12(b) therefore reflects Africa's willingness to sustain this global political commitment and lead efforts to move towards its effectiveness.

Moreover, this provision is innovative in that it is the first international legal provision that explicitly requires States to consult and ensure the participation of persons with disabilities in all aspects of the planning, implementation and monitoring of post-conflict reconstruction and rehabilitation. The CRDP, in particular its Article 11 on situations of risk and humanitarian emergencies, makes no such specific provision. Nor is there a similar provision in the Charter on Inclusion of Persons with Disabilities in Humanitarian Action. While the Charter does recognize the need to take account of the potential of persons with disabilities, it is not as explicit as Article 12(b). Moreover, unlike Article 12(b), which is a binding provision, the corresponding provisions of the Charter are non-binding.

Furthermore, Article 12(b) is not limited to the weakness or vulnerability of persons with disabilities. It also recognizes their abilities, their potential and their aptitude to contribute to post-conflict reconstruction and development. This provision, which is not found in any international legal instrument, makes persons with disabilities not just objects of pity or passive victims in need of protection and assistance, but actors in improving their own situation.<sup>76</sup> To better understand the specific protection and assistance needs of persons with disabilities in times of conflict and to provide adequate solutions, it is essential to consult and involve them through their representative organizations at all levels of humanitarian assistance.<sup>77</sup>

Paragraph (b) establishes the need to ensure the participation of persons with disabilities in two specific areas: reconstruction and rehabilitation. These two areas lie at the heart of AU post-conflict reconstruction policy. According to the *African Post-Conflict Reconstruction Policy Framework*, reconstruction is “the long term process of rebuilding the political, security, social and economic

74 See UN, *The Sustainable Development Agenda*, available at: [www.un.org/sustainabledevelopment/development-agenda/](http://www.un.org/sustainabledevelopment/development-agenda/); UN Office for Disaster Risk Reduction, *Sendai Framework for Disaster Risk Reduction 2015–2030*, available at: [www.preventionweb.net/sendai-framework/sendai-framework-for-disaster-risk-reduction](http://www.preventionweb.net/sendai-framework/sendai-framework-for-disaster-risk-reduction).

75 The resulting Charter on Inclusion of Persons with Disabilities in Humanitarian Action reaffirms these principles. See, for example, para. 1.6 of the Charter, available at: <https://humanitariananddisabilitycharter.org/>.

76 This formulation is partly taken from ICRC, above note 60, p. 7.

77 See also Women's Refugee Commission, *Disability Inclusion: Translating Policy into Practice in Humanitarian Action*, 18 February 2014, available at: [www.womensrefugeecommission.org/research-resources/disability-inclusion-translating-policy-into-practice-in-humanitarian-action/](http://www.womensrefugeecommission.org/research-resources/disability-inclusion-translating-policy-into-practice-in-humanitarian-action/); UNICEF, *Including Children with Disabilities in Humanitarian Action*, 2017, available at: [https://resourcecentre.savethechildren.net/pdf/unicef\\_wash\\_english.pdf](https://resourcecentre.savethechildren.net/pdf/unicef_wash_english.pdf); IASC, *Guidelines: Inclusion of Persons with Disabilities in Humanitarian Action*, July 2019, available at: [www.coordinationsud.org/wp-content/uploads/IASC-Guidelines-on-the-Inclusion-of-Persons-with-Disabilities-in-Humanitarian-Action-2019.pdf](http://www.coordinationsud.org/wp-content/uploads/IASC-Guidelines-on-the-Inclusion-of-Persons-with-Disabilities-in-Humanitarian-Action-2019.pdf).

dimensions of a society emerging from conflict by addressing the root causes of the conflict”.<sup>78</sup> The same document defines rehabilitation as “action aimed at reconstructing and rehabilitating infrastructure that can save or support livelihoods. It overlaps with emergency relief and is typically targeted for achievement within the first two years after the conflict has ended.”<sup>79</sup> In essence, it is a set of measures that aim to stabilize a post-conflict society to prevent it from relapsing into conflict. According to David and Schmitt:

The end of a conflict does not always mean the beginning of peace. Infrastructure is often shattered, many people have been forcibly displaced and abused in various ways, confidence in public institutions is at a low ebb and the economy needs to be rebuilt. Without reform and support, societies and States may continue to suffer the consequences of armed violence for a long time. The challenge – and the difficulty – of post-conflict reconstruction and rehabilitation is to stabilize a society so that it does not slip back into conflict.<sup>80</sup>

Measures that can be taken include reform of public institutions and the security sector, the drafting of a new constitution and the implementation of compensatory or restorative justice measures.<sup>81</sup> Article 12(b) requires that “persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre- and post-conflict reconstruction and rehabilitation”. They must therefore be involved at all stages of the process and must not be left behind under any circumstances. It is essential that persons with disabilities participate in reconstruction and rehabilitation. Changes in political and institutional culture are among the most difficult aspects of any societal transformation, requiring changes in behaviour, expectations and norms.<sup>82</sup> These kinds of societal change require long-term strategies involving broad segments of society, including persons with disabilities who, as observers agree, have significant capabilities.<sup>83</sup> Both the literature and case studies suggest that participatory or representative reconstruction processes can provide a forum for negotiating solutions to the divisive issues that led to the violence, can play a reconciliatory and healing role through social dialogue and can support sustainable peace by forging a consensual vision for the future of the

78 NEPAD, *African Post-Conflict Reconstruction Policy Framework*, June 2005, available at: <https://sarpn.org/documents/d0001357/index.php>.

79 *Ibid.*

80 Charles-Philippe David and Olivier Schmitt, “La reconstruction post-conflit”, in *La Guerre et la paix : Approches et enjeux de la sécurité et de la stratégie*, Presses de Sciences Po, Paris, 2020, p. 401.

81 *Ibid.*, pp. 401 ff.

82 *Ibid.*, p. 401.

83 *Ibid.*, p. 403. Stephanie Ortoleva, “Women with Disabilities: The Forgotten Peace Builders”, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 33, 2010; Pearl Praise Gottschalk, “How Are We in This World Now? Examining the Experiences of Persons Disabled by War in the Peace Processes of Sierra Leone”, Master’s Dissertation, University of Victoria, 2007, available at: <https://dspace.library.uvic.ca/handle/1828/299?show=full>; World Institute on Disability, *The Involvement of Persons with Disabilities in Conflict Resolution and Peacebuilding Efforts: Inclusion of Persons with Disabilities (PWD) as Part of the Solution in the Post-Conflict Arena*, August 2014, available at: [www.usip.org/sites/default/files/WID\\_Disability\\_Inclusive\\_Peacebuilding\\_Process%20.pdf](http://www.usip.org/sites/default/files/WID_Disability_Inclusive_Peacebuilding_Process%20.pdf).

State.<sup>84</sup> In particular, David and Schmitt argue that broad consultations that included all segments of society, including persons with disabilities, led to public support for the constitutions of Kenya, Rwanda, South Africa and Uganda.<sup>85</sup> By contrast, in Nigeria for example, the constitutional process undertaken after a crisis was rejected because it was insufficiently participatory.<sup>86</sup>

While this provision is important and progressive, it does have some flaws. It requires and recognizes the participation of persons with disabilities in reconstruction and rehabilitation efforts, but makes no reference to their participation in humanitarian operations, or in humanitarian action for victims of armed conflict. In view of the fact that this provision deals with situations of risk, it is somewhat surprising that it only mentions participation in efforts to escape from the situation and makes no mention of efforts to manage the situation itself. As the *travaux préparatoires* of this specific provision are not publicly available, it is difficult to understand why the drafters did not specifically include the obligation to ensure the participation of persons with disabilities in efforts to assist those affected. However, this is not a fatal flaw. The right or duty of solidarity towards those in need is anchored in AU law.<sup>87</sup> Such a prerogative or duty is essentially grounded in African traditions and in the modes of social organization in traditional and contemporary Africa. These are based on a communal structure<sup>88</sup> and impose a set of obligations on each individual, not only to their community in general, but also to each member of that community.<sup>89</sup> It may deduce that this duty of solidarity towards others requires each individual to do whatever they can to help those affected by an armed conflict. This customary duty of solidarity is reflected in various AU legal instruments, in particular African regional human rights instruments, which are unique in that they explicitly impose duties on all individuals, including persons with disabilities.<sup>90</sup> It is also clearly expressed in the African Youth Charter, which stipulates that States must “Mobilise youth for [...] bringing help to refugees and

84 C.-P. David and O. Schmitt, above note 80, p. 403.

85 *Ibid.*, pp. 401–3.

86 *Ibid.*, p. 403. Vivien Hart, “Constitution-Making and the Transformation of Conflict”, *Peace & Change*, Vol. 26, No. 2, 2001.

87 For details in this regard, see Steve Tiwa Fomekong, “La contribution de l’Union africaine au droit international humanitaire”, Thèse de doctorat, Université Laval, Québec, 2020, pp. 137–40; Mohammed Abdelwahab Bekhechi, “Article 27 §1”, in M. Kamto (ed.), above note 50, pp. 681–5.

88 See Fatsah Ougergouz, *La Charte africaine des droits de l’homme et des peuples : Une approche juridique des droits de l’homme entre tradition et modernité*, 1st ed., Collection : Publications de l’Institut universitaire de hautes études internationales, Presses Universitaires de France, Geneva and Paris, 1993, pp. 8 ff and 233–54.

89 See, *inter alia*, *ibid.*, p. 233; Mutoy Mubiala, *Le Système régional africain de protection des droits de l’homme*, Collection Organisation internationale et relations internationales, Bruylant, Brussels, 2005, pp. 5–8 and 34–5; Michel-Cyr Djiena Wembou and Daouda Fall, *Droit international humanitaire : Théorie générale et réalités africaines*, Collection Logiques Juridiques, L’Harmattan, Paris, 2000, pp. 303 ff; Kéba M’Baye, “Human Rights in Africa”, in Karel Vasak (ed.), *The International Dimensions of Human Rights*, Vol. 2, UNESCO, Paris, 1982, p. 589.

90 Regarding this particularity of the African Charter on Human and Peoples’ Rights, see, *inter alia*, F. Ougergouz, above note 88, pp. 233–54; Kéba M’Baye, *Les droits de l’homme en Afrique*, Editions A. Pedone, Paris, 1992, pp. 49 ff; Alain Didier Olinga, “Article 29, alinéas 2 à 8”, in M. Kamto (ed.), above note 50, pp. 738–48.

war victims”.<sup>91</sup> It is worth noting that the word “youth” in this provision is not defined in any way that might limit its scope. It can therefore be argued that it is equally applicable to young persons with disabilities. This provision, although it relates primarily to young people, i.e. those between the ages of 15 and 35 years,<sup>92</sup> supports, reinforces and informs the customary obligation/prerogative of solidarity towards victims of conflict that exists among African civilian populations. Furthermore, by interpreting the Protocol in a systematic manner, it can be argued that it implicitly enshrines the right of persons with disabilities to participate in humanitarian work through Article 3(c), which stipulates that the provisions of the Protocol – and hence also those of Article 12 – must be interpreted and applied in accordance with, *inter alia*, the principle of “full and effective participation and inclusion in society”. This provision is broadly formulated to include all aspects of society, including humanitarian activities. Moreover, the interpretation suggested here would be in line with the Charter on Inclusion of Persons with Disabilities in Humanitarian Action, which encourages the full and effective participation of persons with disabilities in humanitarian programmes.<sup>93</sup>

Also, Article 12(b) requires States to ensure that persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre- and post-conflict reconstruction and rehabilitation. As noted above, reconstruction and rehabilitation are measures undertaken in the aftermath of armed conflict, not beforehand. Did the drafters of the Protocol also want to explicitly recognize and enshrine the right of persons with disabilities to participate in measures to prevent the outbreak of conflict, or to prevent existing disputes from escalating into conflict, and to limit the progression of conflict when it does occur? One is tempted to reply in the affirmative, given that one of the basic objectives of the AU is to promote peace, security and stability on the African continent.<sup>94</sup> Some commentators describe this mandate as “the *raison d’être* of the organization”.<sup>95</sup> Furthermore, some of the AU instruments that preceded the Protocol also enshrine the right of certain categories of person, including persons with disabilities, to participate in peace efforts and the prevention of armed conflict. This is the case for Article 10 of the Protocol on the Rights of Women and Article 17 of the African Youth Charter. That could be used to interpret Article 12(b) as enshrining the right of persons with disabilities to participate in efforts to prevent armed conflict.

The Protocol contains a safeguard clause regarding protective measures under international law for persons with disabilities, including IHL. Article 36,

91 African Youth Charter, 2 July 2006 (entered into force 8 August 2009), Art. 17(f), available at: <https://au.int/fr/treaties/african-youth-charter>.

92 See *ibid.*, preamble, para. 23.

93 See Charter on Inclusion of Persons with Disabilities in Humanitarian Action, above note 75, para. 1.2.

94 Constitutive Act of the African Union, above note 2, Art. 3(f).

95 Ademola Abass and Mashood A. Baderin, “Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union”, *Netherlands International Law Review*, Vol. 49, No. 1, 2002, p. 5.



paragraph 1, stipulates that “No provision in this Protocol shall be interpreted as derogating from the principles and values contained in other relevant instruments for the realisation of the rights of Persons with Disabilities in Africa.” And “no provision” obviously includes Article 12. It can therefore be deduced that in the event of a conflict of rules or interpretation that would alter or diminish the protection offered by the main universal IHL instruments, the regional norm should always be set aside in favour of the international norm. Moreover, no provisions in the Protocol are contrary to IHL rules protecting persons with disabilities. This means that none of its provisions endanger the integrity of universal IHL treaties. Article 12 is therefore complementary to the international standards and only aims to strengthen the protection that those standards provide for persons with disabilities in armed conflict.

## The challenges to implementation of Article 12

The following discussion attempts to identify the main challenges to the rapid ratification of the Protocol containing Article 12 and formulates some possible means of overcoming them. It also looks at measures to promote compliance with Article 12.

### Promoting ratification of the Protocol on the Rights of Persons with Disabilities in Africa

It is widely recognized that a treaty, no matter how relevant, is nothing more than a piece of paper if the provisions it contains are not implemented by those responsible for them. “A legal norm is alive and its history does not end after its birth.”<sup>96</sup> Once it has been adopted, it must be implemented if its aims and objectives are to be achieved.

Although it was adopted on 29 January 2018, the Protocol on the Rights of Persons with Disabilities in Africa has not yet entered into force. Article 38, paragraph 1 of the Protocol stipulates that it will enter into force following ratification by fifteen States. However, as of 28 March 2022 – more than two years after it was adopted – the Protocol had only been ratified by three States.<sup>97</sup> Until it enters into force, the provisions of the Protocol – including those of Article 12 – will not be binding. At the current rate of ratification, it will take many years before it starts to have effect. It has taken four years for three States to ratify the Protocol. If ratification continues at that speed, it might take another sixteen years to gather the twelve ratifications needed in order for the Protocol to

96 Loïc Robert, “La contribution de l’Union européenne au droit international des droits de l’homme”, Thesis, Université Jean Moulin Lyon 3, 2014, p. 10 (our translation).

97 AU, *List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa*, 28 March 2022, available at: [https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL\\_TO\\_THE\\_AFRICAN\\_CHARTER\\_ON\\_HUMAN\\_AND\\_PEOPLESaEUtm\\_RIGHTS\\_ON\\_THE\\_RI\\_.pdf](https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESaEUtm_RIGHTS_ON_THE_RI_.pdf).

come into force. This would mean it coming into force in 2038, a delay of twenty years. That is very slow. In the meantime, persons with disabilities will continue to suffer the consequences of armed conflict, without enjoying the protection they are entitled to under Article 12. This is not an isolated case, and it comes as no surprise. Many AU instruments have taken a decade to come into force. However, the African States were quick to ratify the CRPD. It was signed by sixteen States on the day of its adoption, and when it entered into force it had been ratified by six.<sup>98</sup> To date, fifty-one African States out of fifty-four have ratified it.<sup>99</sup>

So why do the African nations prefer the universal Convention to the regional Protocol? The reasons for ratifying an international treaty – or not – are not always clear.<sup>100</sup> States rarely give their reasons. Nevertheless, a number of clues can be used to identify the main reasons why States have been slow to ratify this protocol.

A State will only ratify a treaty if it will be to their advantage in economic, political or other ways, or if a more powerful State or group of States can pressure it into doing so, e.g. through offering advantages or rewards, or by imposing economic or military sanctions for failure to ratify.<sup>101</sup> AU Member States are sometimes more inclined to ratify United Nations (UN) treaties than the equivalent AU instruments that cover virtually the same topics.<sup>102</sup> A State may wish to appear cooperative internationally for political reasons, or to cultivate a certain international reputation – to be popular with other States. Where there is both a regional and an international treaty on the same subject, a State may decide to ratify only one, to avoid taking on additional legal obligations. This might go some way towards explaining why a number of States party to the CRPD have not yet ratified the Protocol on the Rights of Persons with Disabilities in Africa. Ratification of the Protocol may also be delayed by other factors. These may include lack of political will, lack of capacity and means to ensure effective and efficient implementation of the obligations under the Protocol, delays in parliamentary committees considering and passing legislation authorizing their plenipotentiaries to ratify the Protocol, political instability resulting in changes of government or frequent ministerial reshuffles that delay domestic implementation of pre-ratification measures, political and even ideological differences within cohabitation governments or the non-existence of parliamentary bodies following unconstitutional political changes.<sup>103</sup>

98 For details, see UN Treaty Collection, Status of Convention on the Rights of Persons with Disabilities, available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-15&chapter=4&clang=.en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=.en).

99 *Ibid.*

100 Sridi Sitaraman, *State Participation in International Treaty Regimes*, Ashgate Publishing Company, Abingdon, 2009, p. 5.

101 See Andrew Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press, Oxford, 2008, pp. 119–81; Robert O. Keohane, “Realism, Neorealism and the Study of World Politics”, in Robert O. Keohane (ed.), *Neorealism and its Critics*, Columbia University Press, New York, 1986, pp. 7–8.

102 See also Tiyanjana Maluwa, “Ratification of African Union Treaties by Member States: Law, Policy and Practice”, *Melbourne Journal of International Law*, Vol. 13, No. 2, 2012, p. 12.

103 See also AU, Introductory Note of the Chairperson of the Commission to the Annual Report on the Activities of the African Union and its Organs, AU Doc. EX.CL/1061(XXXII), 2018, p. 40, available at:

To achieve the aims of Article 12, it will be necessary to encourage ratification of the Protocol. Three solutions are proposed. Firstly, the AU should pass resolutions, decisions and policies encouraging States to ratify the Protocol. The AU has already done this in the past.<sup>104</sup> Progress with ratification of AU treaties remains slow, indicating that this approach has had limited success. However, if the Assembly of Heads of State and Government, the Executive Council and the Pan-African Parliament were each to pass a resolution urgently calling on Member States to ratify the Protocol on the Rights of Persons with Disabilities and adequately monitor the implementation of these resolutions, this could do something to get things moving.

To ensure implementation of initiatives and decisions, the AU Assembly sometimes selects heads of State and government to act as AU champions to publicize these initiatives and decisions at continental and international levels, and to garner the necessary support to ensure their implementation by all Member States.<sup>105</sup> To ensure the effective dissemination and implementation of the resolutions suggested here, the AU would do well to appoint the President of Kenya as its champion. Kenya is one of three States to have ratified the Protocol on the Rights of Persons with Disabilities in Africa.<sup>106</sup> Kenya also played a leading role in the CRDP negotiations.<sup>107</sup> This State has also taken some steps to include specific provisions related to persons with disabilities in its national legislation, including its Constitution.<sup>108</sup> Kenya would therefore enjoy a degree of legitimacy in promoting the implementation of resolutions encouraging ratification of the Protocol.

Secondly, drafting a model law for implementation of the Protocol could also serve to promote it and encourage ratification. The difficulty of taking national implementation measures often delays ratification of a treaty. Implementing this Protocol will require States to enact legislation and undertake other organizational measures. For instance, Article 4 of the Protocol, and Article 34, paragraph 2, require States to enact national legislation for the

[https://archives.au.int/bitstream/handle/123456789/8422/EX%20CL%201061%20XXXII%20INTR\\_E.pdf?sequence=2&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/8422/EX%20CL%201061%20XXXII%20INTR_E.pdf?sequence=2&isAllowed=y).

104 See, for example, AU Executive Council, Fourteenth Ordinary Session, Decision on the Status of Signature and Ratification of OAU/AU Treaties and the Harmonization of Ratification Procedures, AU Doc. EX.CL/Dec.459(XIV), January 2009; and Decision on the AU 2009 Calendar of Meetings, Doc. EX.CL/453(XIV), AU Doc. EX.CL/458(XIV), January 2009, both available at: <https://au.int/en/decisions-42>; AU Executive Council, Twenty-first Ordinary Session, Decision on the Status of Signature and Ratification of OAU/AU Treaties, Doc. EX.CL/728(XXI), AU Doc. EX.CL/Dec.705(XXI), July 2012, available at: [https://au.int/sites/default/files/decisions/9652-ex\\_cl\\_dec\\_696-725\\_xxi\\_e\\_final.pdf](https://au.int/sites/default/files/decisions/9652-ex_cl_dec_696-725_xxi_e_final.pdf); Report on the Status of OAU/AU Treaties (as at 11 July 2012), AU Doc. EX.CL/728(XXI), July 2012, available at: [www.peaceau.org/en/resource/91-organ-executive-council](http://www.peaceau.org/en/resource/91-organ-executive-council).

105 African Union Commission and New Zealand Ministry of Foreign Affairs and Trade/Manatū Aorere, *African Union Handbook 2020*, 7th ed., Addis Ababa, 2020, p. 38, available at: <https://au.int/en/handbook>.

106 Kenya ratified the Protocol on 15 November 2021. See AU, above note 97.

107 See, for example, UN Enable, Ad Hoc Committee, above note 37; *Position of Kenya*, above note 37.

108 For details, see, *inter alia*, Lorenzo Wakefield and Nkatha Murungi, "Domesticating International Standards of Education for Children with Intellectual Disabilities: A Case Study of Kenya and South Africa", in I. Grobbelaar-du Plessis and T. van Reenen (eds), above note 29; C.-P. David and O. Schmitt, above note 80, pp. 403 ff.

implementation of the obligations that it sets out, establish or designate national mechanisms to coordinate and monitor the implementation of the rights of persons with disabilities and render their courts competent to sanction breaches of the Convention. However, States may lack the competence and capacity to develop and implement such measures. These problems delay the ratification of certain treaties. Ratification campaigns conducted by non-governmental organizations in Africa have revealed that some parliaments are reluctant to authorize the ratification of certain treaties “due to misconceptions, or a lack of appreciation of the legal and political importance of the treaty, arising from the failure or inability of the bureaucrats in the relevant government department to provide the necessary technical advice”.<sup>109</sup> The drafting of a model law by the African Union’s African Commission on International Law, which States could use to draft domestic legislative and institutional measures to implement the Protocol, and in particular Article 12, could help to overcome such difficulties. This in turn could encourage States to ratify the Protocol. The AU has already produced model laws for treaties, including the African Model Anti-Terrorism Law<sup>110</sup> and the Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa.<sup>111</sup> The AU should, therefore, continue such efforts and draft other African model laws with regard to implementation of the Protocol on the Rights of Persons with Disabilities, in particular Article 12.

Thirdly, civil society can play a role in encouraging States to ratify the Protocol. This is particularly true of disability rights organizations, academia and national human rights organizations. These bodies could alert governments to the importance of ratifying the Protocol, e.g. by organizing workshops and issuing declarations on issues related to persons with disabilities. Civil society organizations could also run advocacy campaigns for ratification of the Protocol. These could use various media channels and social media. In short, the aim would be to exploit all the possibilities offered by the new information and communication technologies to promote ratification of the Protocol. It is worth noting the exceptional efforts of the Centre for Human Rights at the University of Pretoria. During 2022, the Centre has held a number of events such as webinars on ratification of the Protocol.<sup>112</sup> It has also published numerous calls for ratification on Twitter. One of their recent tweets: “The African Disability

109 See Tiyanjana Maluwa, “Beyond Rhetoric: Commitment to and Ratification of African Human Rights and Human Rights-Related Treaties”, in Tiyanjana Maluwa (ed.), *Law, Politics and Rights: Essays in Memory of Kader Asmal*, Martinus Nijhoff Publishers, Leiden and Boston, 2013, p. 83.

110 For details, see AU, The African Model Anti-Terrorism Law, 8 December 2015, available at: [www.peaceau.org/en/article/the-african-model-anti-terrorism-law-1](http://www.peaceau.org/en/article/the-african-model-anti-terrorism-law-1).

111 AU, Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa, April 2018, adopted by the Assembly of the African Union at its 30th Ordinary Session, 22–29 January 2018, Addis Ababa, Ethiopia, available at: [www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=5aeb398e4](http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=5aeb398e4).

112 See, for example, Centre for Human Rights, #RatifyADRP: Call on African Leaders to Ratify the African Disability Rights Protocol, available at: [www.chr.up.ac.za/ratifyadrp-about](http://www.chr.up.ac.za/ratifyadrp-about); Centre for Human Rights, Webinar Invitation: Ratification of the African Disability Rights Protocol, 7 July 2022, available at: [www.chr.up.ac.za/latest-news/3095-webinar-invitation-ratification-of-the-african-disability-rights-protocol](http://www.chr.up.ac.za/latest-news/3095-webinar-invitation-ratification-of-the-african-disability-rights-protocol).

Protocol complements the African Charter and addresses harmful practices affecting persons with disabilities. AU Member States are encouraged to ratify this instrument so as fully address harmful practises against persons with disabilities. #RatifyADRP".<sup>113</sup> This is an example for other African civil society organizations to follow.

## Promoting compliance with Article 12

Once the Protocol enters into force, the AU should promote and widely publicize the protective measures provided for in Article 12 and monitor its implementation. In armed conflict – and in particular in the conduct of hostilities (targeting and the selection of methods and means of warfare) – States and non-State armed groups do not always comply with their obligations under IHL and international human rights law to protect persons with disabilities.<sup>114</sup> As Priddy points out, this is due in part to ignorance of the legal framework protecting persons with disabilities and lack of international pressure to comply.<sup>115</sup> This highlights the importance of publicizing the measures that Article 12 requires, and encouraging compliance with them.

The ACHPR, which is the main implementing body of the Protocol, should play a major role in this regard.<sup>116</sup> Article 34, paragraph 1 of the Protocol stipulates that:

States Parties shall ensure the implementation of this Protocol, and shall indicate in their periodic reports submitted to the African Commission in accordance with Article 62 of the African Charter, the legislative and other measures undertaken for the full realisation of the rights recognized in this Protocol.

Clearly, this includes those set out in Article 12. Under Article 62 to which this provision refers, the ACHPR is the body competent to receive and analyse these reports. It can therefore be argued that the African Commission has the mandate to interpret and monitor compliance with the provisions of Article 12.<sup>117</sup> These reports must be submitted every two years once the Protocol enters into force for the country concerned.<sup>118</sup>

The African Committee of Experts on the Rights and Welfare of the Child does not have as explicit a mandate to monitor compliance with Article 12. However, under its mandate to promote and protect the rights of the child,<sup>119</sup> it could play an important role in promoting and monitoring the rights of persons

113 See the Centre's tweet of 5 July 2022, available at: [https://twitter.com/CHR\\_HumanRights/status/1544275455758503937](https://twitter.com/CHR_HumanRights/status/1544275455758503937).

114 See A. Priddy, above note 60.

115 *Ibid.*, p. 6.

116 AU, Protocol on the Rights of Persons with Disabilities in Africa, above note 1, Art. 34.

117 *Ibid.*, Art. 34, paras 3 and 4.

118 *Ibid.*

119 African Charter on the Rights and Welfare of the Child, Art. 43.

with disabilities in armed conflict. In so doing, it would be acting in accordance with Article 22 of the African Charter on the Rights and Welfare of the Child which, as mentioned above, also protects children during armed conflict. That Committee has already addressed the monitoring of implementation of Article 22 in the context of the review of implementation reports submitted to it by certain States, in particular States involved in armed conflict.<sup>120</sup> However, the information that States provided in these reports did not include measures taken to ensure the protection of persons with disabilities in armed conflict. Nor did the questions posed by the Committee to these States when reviewing these reports address the protection of children with disabilities.<sup>121</sup> This could indicate that the Committee's work does not yet take sufficient account of the situation of children with disabilities in areas affected by armed conflict. The African Committee of Experts should therefore encourage States to include measures taken to ensure the promotion of the rights and protection of children with disabilities in armed conflict in their reporting of measures undertaken to implement Article 22.

The African Court on Human and Peoples' Rights could also play a major role in the implementation of Article 12. Article 34, paragraph 5 of the Protocol states: "[in] accordance with Articles 5 and 34(6) of the Protocol Establishing the African Court, the African Court on Human and Peoples' Rights shall have the mandate to hear disputes arising from the application or implementation of this Protocol." That clearly includes matters relating to Article 12. It would therefore be competent to apply the Protocol, including Article 12. However, for the Court to rule on compliance with this provision, it is essential that competent persons and entities who consider that there has been a violation of the protections it provides refer the matter to the Court. The African Court on Human and Peoples' Rights does not have the power of self-referral. Hence it is important to step up dissemination and promotion of Article 12, so that people are aware of the protection due to them under this article and can bring cases before the competent authorities if they feel that these protections have been violated.

Furthermore, in order to increase knowledge of Article 12 and promote compliance with it, a general comment on this article should be produced and widely disseminated. This would follow the example of the African Committee of Experts on the Rights and Welfare of the Child, which in 2021 produced a general

120 This applies in particular to Uganda and Sudan. See Ministry of Gender, Labour and Social Development of Uganda, *Implementation of the African Charter on the Rights and Welfare of the Child in Uganda, 2007, Initial Report Submitted by Uganda to the African Committee of Experts on the Rights and Welfare of the Child*, November 2007; The National Council for Child Welfare of The Republic of the Sudan, *Sudan's Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child, 2010, Initial Report Submitted by Sudan to the African Committee of Experts on the Rights and Welfare of the Child*, November 2010.

121 See the reports in above note 120. See also, respectively, the concluding observations of the Committee on these reports: ACRWC, *Recommendations and Observations sent to the Government of the Republic of Uganda by the African Committee of Experts on the Rights and Welfare of the Child on the Initial Implementation Report of the African Charter of the Rights and Welfare of the Child*, 2010; ACRWC, *Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of the Sudan on the Initial Report on Implementation of the African Charter on the Rights and Welfare of the Child*, 2013.

comment on Article 22 of the eponymous Charter on the protection of children in armed conflict. Drafting of this general comment should be undertaken by the Working Group, under the guidance of the ACHPR. The aim of the general comment would be to help States fulfil their obligations under Article 12. It would contain a detailed explanation of the provisions set out in the article and practical advice on effective implementation. This would help to increase awareness of Article 12 and improve knowledge of the protection it provides. Ultimately, this would make the provision easier to understand and implement. The general comment could also facilitate incorporation of the guarantees and protections in these provisions into national legislation, military manuals and the policies and practices of governments, national courts and other bodies.

## Conclusion

The aim of this contribution was to analyse Article 12 of the Protocol on the Rights of Persons with Disabilities in Africa, examining its purpose, its scope, its contribution to the legal protection of persons with disabilities in armed conflict and its implementation. It reveals that the drafting of Article 12 must have been motivated by a desire to improve the precarious situation of persons with disabilities in armed conflict in Africa. Brief though they are, the provisions of Article 12 complement the universal rules of IHL, enabling that body of law to offer solutions commensurate with the humanitarian problems faced by persons with disabilities in armed conflict. Full compliance with and effective implementation of this article would therefore improve the situation of persons with disabilities in armed conflict. There is therefore an urgent need to accelerate ratification of this article and to promote compliance with it. This means that African States that have not yet ratified the Protocol on the Rights of Persons with Disabilities should take the necessary steps to accede to it as soon as possible. States should also take the necessary steps to incorporate the provisions of the Protocol, including those relating to Article 12, into their national legislations. Similarly, as required by the Protocol, States must submit regular reports to the ACHPR and the African Peer Review Mechanism on measures taken to give effect to the provisions of Article 12, thereby improving the situation of persons with disabilities in armed conflict. This is fundamental to the exchange of good practice in this area, the identification of challenges to the implementation of Article 12 and the identification of solutions to overcome them. Finally, it is important that the protections set out in Article 12 be promoted and disseminated as widely as possible on the African continent. Knowledge of these protections could promote respect for them.