

THE FEASIBILITY AND DESIRABILITY OF AN AFRICAN DISABILITY RIGHTS TREATY: FURTHER NORM-ELABORATION OR FIRMER NORM-IMPLEMENTATION?

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ABSTRACT

The United Nations General Assembly in 2006 adopted the Convention on the Rights of Persons with Disabilities (CRPD), sparking debate in Africa about the desirability and feasibility of adopting an African pendant to this UN treaty. Two main rationales that support an 'African' treaty on the rights of persons with disabilities (PWDs) are examined in this article. The first is a process argument that contends that African participation in the elaboration of the CRPD was inadequate. The second, substantive argument suggests that the CRPD, itself, is defective, as it does not adequately address issues pertinent to and reflecting the life world of Africans with disabilities. Concluding that both rationales lack persuasive force, the authors identify two alternative courses of action. First, they argue that the CRPD should be prioritised and used to its fullest extent before attempts are made to elaborate parallel African standards to the CRPD. Among the measures to be prioritised are increased ratification, domestication, presentation of state and alternative civil society reports, and submission of individual complaints. Second, given that all African Union (AU) member states (except South Sudan) are party to the African Charter on Human and Peoples' Rights, they contend that the existing mechanisms under the African human rights system should first be fully exploited. Although the African human rights system may not have delivered sufficient results when it comes to PWDs, it has taken some tentative steps and has further unexplored potential. There is both a need and the potential for the regional system to play its part in advancing the rights of PWDs. In particular, the African Commission on Human and Peoples' Rights could draw inspiration from the recent adoption of its first General Comment (on art 14(1)(d) and (e) of the Women's Protocol) to spell out the implications of the African Charter for PWDs. Formulating a new treaty is a complex and time-consuming exercise that will further delay the effective implementation of states' obligations. However, if the option of an African-specific treaty gains wide support, it should take the form of a protocol to the African Charter, with the African Commission as monitoring mechanism, and not as a separate treaty with a self-standing treaty monitoring body.

Key words: disability, international law, treaty making

I INTRODUCTION

Persons with disabilities (PWDs) constitute about ten per cent of the world's population.¹ They are the poorest of the poor and have limited access to

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1 See generally the UN Enable website <www.un.org/disabilities>.

education and employment opportunities.² They experience multiple forms of discrimination, and often suffer severe forms of stigma and discrimination and other forms of social exclusion. Negative societal attitudes are exacerbated in situations of material deprivation. Children and women with disabilities are the most vulnerable amongst PWDs.³

Undoubtedly, the plight and the rights of PWDs have been and still are being negated or neglected in most parts of Africa. Very few states on the continent explicitly provide for constitutional protection on the grounds of disability,⁴ and have adopted either comprehensive legislation,⁵ or any other form of legislation on disability.⁶ Such a failure of domestic law underscores the potential importance of international human rights law in steering national responses in African states towards greater concern for PWDs. Indeed, international standards are more likely to have a significant impact in situations of major divergence between international and national standards.

At the global level, the United Nations General Assembly in 2006 adopted the Convention on the Rights of Persons with Disabilities (CRPD).⁷ By far the most expansive and authoritative exposition of the relevant rights and state obligations, the Convention became binding law on 3 May 2008. As of 9 June 2014, a total of 147 states were party to the Convention and 158 were signatory to it.⁸ With the adoption and entry into force of the CRPD, the rights of PWDs have received much more prominence than in the past. Its adoption and entry into force provide evidence of a widespread consensus about the importance of international (or supra-national) law in the efforts to improve the lives of PWDs. Although law, in whatever form, plays only a small part in these efforts, its role in providing a clear normative compass for developments

2 Department for International Development *Disability, Poverty and Development* (2000); A Elwan 'Poverty and Disability: A Survey of the Literature' 1999 <<http://www.worldbank.org/poverty/wdrpoverty/background/elwan.pdf>>.

3 See, for example, H Combrink 'The Hidden Ones: Children with Disabilities in Africa and the Right to Education' in J Sloth-Nielsen (ed) *Children's Rights in Africa A Legal Perspective* (2008) 299.

4 See, for example, Constitution of the Republic of Ghana (1992) art 17(3); Constitution of Kenya (2010) ss 27(4) & 54; Constitution of the Republic of Malawi (1994) s 20(1); Constitution of the Republic of Mozambique art 68; South African Constitution, 1996 ss 9(3) & 9(4); Constitution of the Republic of Uganda art 35.

5 See, for example, Ghana's The Disabled Persons Act 1993, as well as the Persons with Disability Act 715 of 2006; Kenya's Persons with Disabilities Act 14 of 2003; Madagascar's Loi no 97-044 sur les personnes handicapées; Malawi's Disabled Persons Act 48 of 1971; Mauritius's The Training and Employment of Disabled Persons Act 9 of 1996; Nigeria's Nigerians with Disabilities Decree 1993; Uganda's The Persons with Disabilities Act 2006; Zambia's The Persons with Disabilities Act 1996; Zimbabwe's Disabled Persons Act 1992.

6 See, for example, Ethiopia's A Proclamation Concerning the Rights of Persons with Disabilities to Employment, Proclamation n/ 101/1994 (1994); Namibia's Labour Act 6 of 1992; South Africa's Employment Equity Act 55 of 1998; Uganda's National Council for Disability Act 2003.

7 Convention on the Rights of Persons with Disabilities (adopted 13 December 1966, entered into force 3 May 2008) UNGA/61/106 2515 UNTS 3 (CRPD). For a general commentary on the CRPD, see G Quinn 'Disability and Human Rights: A New Field in the United Nations' in C Krause & M Scheinin (eds) *International Protection of Human Rights A Textbook* (2009) 247.

8 UN Treaty Collection, CRPD, Participants to the Convention <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=iv-15&chapter=4&lang=en>.

along this road, and its potential in strengthening government accountability, underline its significance.

The adoption of the CRPD sparked debate in Africa about the desirability and feasibility of adopting an African pendant to this UN treaty, along the lines of the African Charter on the Rights and Welfare of the Child (African Children's Charter), which was adopted in 1990 following the adoption of the UN Convention on the Rights of the Child (CRC) in 1989, and the Protocol to the African Charter on the Rights of Women in Africa (Women's Protocol), which was elaborated as a supplement to both the 1981 African Charter and the 1979 UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). This process was given political weight when the African Commission, prodded by civil society, in 2009 charged its reconstituted Working Group on the Rights of Older Persons and People with Disabilities in Africa to draft:

a concept paper for consideration by the African Commission on Human and Peoples' Rights (African Commission) that will serve as a basis for the adoption of the Draft Protocol on Ageing and People with Disabilities.⁹

In August 2009, the Working Group held an expert seminar on the rights of older persons and PWDs in Africa in Accra, Ghana. One of the draft instruments emerging from the seminar was the 'Draft Protocol on the Rights of People with Disabilities in Africa' or 'Accra Draft'.¹⁰ Progress towards the adoption of such an instrument has been slow. By 2011, the Working Group had found that there is a need for an African-specific Protocol on the Rights of Persons with Disabilities.¹¹ One of its members, who in 2013 became a member of the Commission itself, Lawrence Mute, prepared a 'Concept on the List of Issues to Guide Preparation of a Protocol on the Rights of Persons with Disabilities' and elaborated a 'Zero Draft' of the proposed Protocol.¹² By June 2014, a further iteration of a draft Protocol has been developed and was posted on the Commission's web site for comments.¹³

The main advantage of a specific treaty on the rights of PWDs in Africa lies in its capacity to provide more precise elaboration of the normative framework, thus ensuring that special attention is devoted to their specific needs. It would also provide clarity and focus by elaborating the precise content of the general disability provisions embodied under the UN treaty and the regional human

9 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, OAU doc ACHPR/Res143 (XXXXV) 09 (2009).

10 YKJYS Yuen 'Report of the Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities in Africa' 52nd ordinary session of the African Commission on Human and Peoples' Rights (9–22 October 2012) <<http://www.achpr.org/sessions/52nd/inter-session-activity-reports/older-disabled/>>.

11 Ibid para 8.

12 L Mute 'Concept on the List of Issues to Guide Preparation of a Protocol on the Rights of Persons with Disabilities' (24 August 2012) (Concept); and L Mute 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities' (28 April 2013) (Zero Draft).

13 See <<http://www.achpr.org/news/2014/04/d121>>.

rights treaties such as the African Charter, the Women's Protocol and the African Children's Charter. The process of drafting, adoption, ratification and domestication is also likely to galvanise action and to provide symbolic and substantive normative guidance to African states. However, despite the obvious merits of formulating and adopting an African-specific disability treaty, the exercise is not without its demerits. In the absence of a clear and substantive rationale for an African treaty, its effect may be to erode or otherwise undermine the full effect of the UN Convention.

This article examines two of the main rationales advanced in favour of adopting an 'African' treaty dealing with the rights of PWDs, namely, the contention that the process of adoption lacked African participation, and the argument that the CRPD does not adequately address issues pertinent to and reflecting the life world of Africans with disabilities. Concluding that both these rationales lack persuasive force, two alternative courses of action are discussed: prioritising the CRPD, and exploring the full potential of the existing African regional human rights system. In conclusion, some suggestions are made if the option of an African-specific treaty gains wide support.

II INTERROGATING THE RATIONALE FOR ADOPTING AN 'AFRICAN CRPD'

Two main rationales in favour of adopting such a treaty have been suggested and are examined here. The first is a process argument, contending that the process of adoption was flawed, as African participation in the elaboration of the CRPD was inadequate. The second is substantive, contending that the outcome of the process, the CRPD itself, is defective in that it does not adequately address issues pertinent to and reflecting the life world of Africans with disabilities.

(a) First rationale: African participation in the drafting of the CRPD

In the past, the lack of adequate involvement of African states in the formulation of global human rights treaties has prompted the formulation of a parallel treaty at regional level. The adoption of the African Children's Charter in 1990, hot on the heels of the 1989 CRC,¹⁴ in particular, is often attributed to Africa's insufficient involvement in the formulation of the CRC.¹⁵ Thoko Kaime has observed that '[a]lthough 11 seats had been allocated to African states, a very tiny proportion of this potential actually took part during the drafting process'.¹⁶

14 African Charter on the Rights and Welfare of the Child, OAU doc CAB/LEG/24.9/49 (1990) (African Children's Charter).

15 See, for example, F Viljoen 'Supra-national Human Rights Instruments for the Protection of Children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative & Int LJ of SA* 199, 205.

16 T Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (2009) 55.

The same cannot be said of Africa's involvement in the drafting process of the CRPD. African governmental delegations, national human rights institutions (NHRIs) and civil society were actively involved in the drafting process. Although the CRPD is a product of advocacy efforts dating back to the 1980s,¹⁷ the formal process of drafting the Convention was set in motion on 19 December 2001 when the UN General Assembly adopted resolution 56/168.¹⁸ This resolution established an Ad Hoc Committee tasked with the role of considering proposals for formulating a thematic treaty on the rights of PWDs. The Committee's membership was open to all members of the UN. It has been described as a 'truly ad hoc' committee since 'whatever state wanted to turn up could turn up'.¹⁹

In the execution of its mandate, the Committee held a total of eight sessions between 2002 and 2006. From the very first session, African state representatives attended and participated in the sessions. As Tunisia indicated in its initial report to the Committee on the Rights of Persons with Disabilities, it 'contributed effectively to the work of the UN Committee that drafted the Convention'.²⁰ The attendance of African states increased as the activities of the Committee gained momentum. At the first session, South Africa was elected as one of the three vice chairpersons of the Committee, a position it held throughout the life of the Committee.²¹ At the eighth and last session, in 2006, 23 African states participated.

During its second session, the Ad Hoc Committee decided to establish a Working Group that would prepare and present a draft text of the proposed convention. The Working Group was composed of 27 government representatives drawn from the five 'UN regions'. Asia and Africa had the largest numbers of representatives (seven each) in the Working Group, compared to between five or three representatives for the other UN regions. African states represented were: Cameroon, Comoros, Mali, Morocco, Sierra Leone, South Africa and Uganda. Apart from participating in the meetings of the Ad Hoc Committee and the Working Group, African states also participated in regional and sub-regional consultative conferences on the proposed convention. In May 2003, a region-wide conference was held in South Africa. A total of 48 African states attended the conference, the report

17 In the 1980s, Italy and Sweden advocated for the adoption of a Convention on the Elimination of All Forms of Discrimination against Disabled Persons. This proposal was declined in 1987 by the UN General Assembly.

18 Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities GA res 56/168, UN doc A/RES/56/168 (2001).

19 Quinn (note 7 above) 256.

20 Initial Report submitted by Tunisia under art 35 of the CRPD UN doc CRPD/C/TUN/1 (2010) para 16.

21 Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Promotion and Protection of the Rights and Dignity of Persons with Disabilities A/57/357 (2002) para 4 <www.un.org/esa/socdev/enable/rights/adhoca57357e.htm>.

of which was submitted to the Ad Hoc Committee by South Africa,²² and tabled for discussion during the Committee's second session.²³ In October 2004, a sub-regional consultative conference for West Africa was held in Ouagadougou in Burkina Faso. The report of this conference was submitted to the Ad Hoc Committee by Burkina Faso,²⁴ and tabled for discussion during the Committee's fifth session.²⁵

Attendance of the sessions of both the Ad Hoc Committee and the Working Group was also open to intergovernmental organisations, NHRIs and non-governmental organisations (NGOs). During the fourth session of the Ad Hoc Committee, the African Union received a standing invitation to participate in the sessions and work of the Ad Hoc Committee as observers. NHRIs of Kenya, South Africa, Uganda, Morocco and Sierra Leone actively participated in and contributed to the work of the Ad Hoc Committee. Indeed, the South African Human Rights Commission (SAHRC) was the only NHRI that was a full member of the Working Group that prepared the draft convention that formed the basis for negotiation by member states. Moreover, in June 2003, African NHRIs held a regional conference on the promotion of the rights of PWDs. NHRIs from Kenya, Niger, Malawi, Mauritius, Rwanda, South Africa, Tanzania, Uganda and Zambia attended the workshop. The outcome of the workshop was a declaration containing a detailed list of conclusions and recommendations on the proposed convention on disability.²⁶ This declaration was forwarded to the Ad Hoc Committee during its second session.²⁷ A number of African NHRIs also attended and participated in the international conference on a disability convention for NHRIs from the Commonwealth and Asia Pacific region.

African-based NGOs, such as Sudan Association for Combating Landmines (JASMAR) and Amicale Marocaine des Handicapés, contributed to the substance of the Convention.²⁸ Although the CRPD's drafting process, particularly at the Ad Hoc Committee stage, has been hailed as the most

- 22 Note verbale dated 12 June 2003 from the Permanent Mission of South Africa to the UN addressed to the Secretary of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UN doc A/AC.265/CRP.11 (2003).
- 23 Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, second session of the Ad Hoc Committee, UN doc A/58/118 & Corr.1 para 9 (2003).
- 24 Note verbale dated 1 February 2005 from the Permanent Mission of Burkina Faso to the UN addressed to the secretariat, UN doc A/AC.265/2005/1 <www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5nbf-e.pdf>.
- 25 Report of the fifth session of the Ad Hoc Committee, UN doc A/AC.265/2005/2 para 8.
- 26 Final Declaration of the Regional Workshop on Promoting the Rights of Persons with Disabilities: Towards a New UN Convention (Final Declaration), Munyonyo, Kampala, Uganda (2003) <www.un.org/esa/socdev/enable/rights/contrib-uganda.htm>.
- 27 Second session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Persons with Disabilities, joint statement of National Human Rights (2003) <www.un.org/esa/socdev/enable/rights/contrib-jnhri.htm>.
- 28 For a list of NGOs that were registered to participate in the sessions of the Ad Hoc Committee see <www.un.org/esa/socdev/enable/rights/ahc8ngolistpart.htm>.

inclusive in the UN's history,²⁹ the participation of African-based NGOs was generally limited. The process was dominated by northern-based NGOs and particularly by members of the International Disability Alliance (IDA). According to Janet Lord, IDA not only took the majority of seats available for NGOs at the Ad Hoc Committee, but they also shaped the structure and operation of NGO dialogue.³⁰ Indeed, the majority of Africans who participated in the sessions of the Ad Hoc Committee did so in their capacity as representatives of international NGOs or Disabled People's Organisations (DPOs) such as Rehabilitation International, Disabled Peoples' International and World Blind Union.

The involvement of an African constituency in the formulation of the CRPD ensured that the African voice not only infiltrated the drafting process but it also found expression in the text of the CRPD. From the onset, African states agreed 'to work towards strengthening the African voice in the process and discussions leading up to the formulation of the Convention' and that their contribution to the convention would be 'strategic in nature, reflective of Africa's diversity, reflective of the disability movement's diversity and be premised on the principles of development, poverty reduction and a rights-based approach'.³¹ Proceeding from this premise, African states and non-state actors were keen to ensure that the link between poverty and disability, on the one hand, and development and disability, on the other, were clearly reflected in the proposed convention.

The report of the African Regional Consultative Conference held in South Africa in June 2003 observed that 'in the African context in particular, PWDs are amongst the poorest of the poor' and that 'disability issues have to be addressed in the context of poverty'.³² In addition to submitting the report of the conference to the Ad Hoc Committee, African states echoed its main thrusts on the floor of the Committee. South Africa emphasised that 'the interaction between poverty and disability cannot be overlooked and therefore the importance of addressing poverty eradication as both a means to prevent disability and to provide effective redress to persons with disabilities is crucial'.³³ Uganda equally stressed that poverty aggravated the poor living conditions of PWDs in developing countries.³⁴ Africa's position that disability should be addressed within the context of poverty and development is well

29 A Kanter 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse J of Int Law & Commerce* 287, 308.

30 J Lord 'Mirror, Mirror on the Wall: Voice Accountability and NGOs in Human Rights Standard Setting' (2004) 5 *Seton Hall J of Diplomacy & Int Relations* 93, 97.

31 Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Disability African Regional Consultative Conference final statement, UN doc A/AC.265/2003/CRP/11 (2003).

32 Ibid.

33 Statement by Ms Sebenzi Matsebula, Director Office on the Status of Persons with Disabilities in the Presidency, South Africa, during the second session of the Ad Hoc Committee, New York (16–27 June 2003) <<http://www.un.org/esa/socdev/enable/rights/contrib-safrica.htm>>.

34 Statement by Honourable James Mwandha Delegate of Uganda, second session of the Ad Hoc Committee New York (16–27 June 2003) <www.un.org/esa/socdev/enable/rights/contrib-uganda5.htm>.

captured in the preamble to the CRPD where member states emphasise ‘the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development’.³⁵ The preamble also expressly highlights the fact that the majority of PWDs live in conditions of poverty and as such, member states recognise the ‘critical need to address the negative impact of poverty on persons with disabilities’.³⁶ Specific provisions of the CRPD directly speak to the linkages between poverty, development and disability. These provisions include those on education,³⁷ health,³⁸ habilitation and rehabilitation,³⁹ work and employment,⁴⁰ and an adequate standard of living and social protection.⁴¹ The provision on ‘international cooperation’, which calls on states to ensure ‘international development programmes inclusive of and accessible to persons with disabilities’ and to facilitate capacity-building, has its roots in the importance attached by less developed countries (also in Africa) to North-South and South-South collaboration aimed at overcoming the challenges of unequal development.⁴²

(b) Second rationale: omission of African-specific preoccupations

Without a clear rationale identifying substantive weaknesses or omissions, the drafting and adopting of an African pendant to the CRPD would amount to an exercise in ‘re-inventing the wheel’. The UN Convention is (also) Africa’s treaty. All African states (apart from the Sahrawi Arab Democratic Republic) are members of the UN. The CRPD has indeed been ratified by 36 African states,⁴³ representing just about a quarter of the total State Parties. With the exception of Egypt and Mauritius, African states ratified the Convention without reservations. Moreover, of the 36 African states that have ratified the Convention, 21 have accepted the formal mechanism of allowing individual communications by ratifying the Optional Protocol thereto. Unless a clear and distinct African conceptualisation of disability is arrived at and used as the basis of a distinctly ‘African’ treaty, there seems to be little substantive reason to embark on drafting an African-specific treaty.

Serges Kamba has suggested four thematic areas in which the CRPD ‘failed to cover ... concerns of the African disability discourse’, namely by remaining silent on the issues of albinism and HIV/AIDS; its lack of clarity about specific harmful traditional practices affecting PWDs; and the need to supplement

35 CRPD Preamble para g.

36 Ibid Preamble para t.

37 Ibid art 24.

38 Ibid art 25.

39 Ibid art 26.

40 Ibid art 27.

41 Ibid art 28.

42 Ibid art 32; see also Mute ‘Concept’ (note 12 above) 17.

43 UN Treaty Collection, Status of the CRPD <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en>.

the individualism at the heart of the treaty with the African communal-based conception of society.⁴⁴ These concerns are now addressed.

It is indeed correct that some of these manifestations of disability include the prevalence of leprosy and leper colonies,⁴⁵ and albinism – in particular the cultural views of this phenomenon, leading for example to the killing of people with albinism for their body parts in Tanzania and other East African countries.⁴⁶ However, leprosy, in particular, is not unique to Africa. The question is whether the CRPD, through its relevant provisions, does not deal – at least implicitly – with these issues. While the need to make specific reference to these issues may be understandable, the Convention runs the risk of never being all-encompassing and inclusive, and thus being or becoming incomplete. Persons with albinism should find protection under the protective shield of the CRPD, on the basis of their ‘long-term sensory impairment’.⁴⁷ State Parties are under an obligation to combat stereotypes with respect to all disabilities;⁴⁸ and to ensure that the liberty and security of all PWDs are effectively protected and that they are free from exploitation and abuse.⁴⁹

While the HIV epidemic undoubtedly has its epicentre in sub-Saharan Africa,⁵⁰ it may be similarly asked what the explicit mention of HIV in the treaty would add in respect of states’ obligations. If regard is had to reports submitted by two countries in the region affected by HIV, Kenya and Uganda, it is apparent that the omission of HIV from the treaty did not inhibit the reporting states from raising the issue in a number of instances. The Kenyan report for example mentions measures taken that are responsive to the particular vulnerability to HIV of PWDs;⁵¹ the need to raise awareness about

44 S Kamba ‘A Call for a Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa’ (2013) 21 *African J of Int and Comparative Law* 219, 226–35.

45 Although great advances have been made in recent times, the worst affected countries (such as Madagascar, Mozambique and the DRC) are in Africa.

46 See, for example, UN Committee on Economic, Social and Cultural Rights ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights, Democratic Republic of the Congo’ UN doc E/C.12/COD/CO/4 (2009) para 19: ‘The Committee is concerned that the State party is not aware of the widespread discrimination against persons with albinism. The Committee also expresses deep concern that persons with albinism have been killed and their organs used or trafficked for witchcraft ceremonies. The Committee urged the State party as a matter of urgency to ensure the timely and efficient conduct of investigations and prosecution of those responsible for the killings and mutilation of persons with albinism. The Committee also urges the State party to apply itself to combating the discrimination against persons with albinism which takes place in the State party, and to this end, to establish close cooperation with and financially support the work of the associations promoting and protecting the rights of people with albinism, and conduct awareness-raising campaigns to combat superstitious beliefs which are detrimental to their well-being.’

47 CRPD art 1.

48 Ibid art 8.

49 Ibid arts 14 & 16.

50 NE Groce ‘HIV/AIDS and People with Disability’ (2003) 361 *The Lancet* 1401–2; NE Groce *Global Survey on HIV/AIDS and Disability* <<http://globalsurvey.med.yale.edu>>.

51 Kenya’s initial report submitted under art 35(1) of the UN Convention on the Rights of Persons with Disabilities, dated 31 August 2011 (advanced unedited version) para 87.

HIV among PWDs,⁵² and the specific concerns for the intersection between disability and HIV among children.⁵³

It is also correct that in some African cultures, disability is viewed very negatively. Some parts of the population may for example associate forms of mental disability with witchcraft. These attitudes may give rise to discriminatory practices harmful to PWDs in Africa. However, the CRPD requires states to ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’,⁵⁴ and to adopt ‘immediate, effective and appropriate measures’ to ‘combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life’.⁵⁵

It is also arguable that the role of the community (for example the extended family) in dealing with PWDs is more pronounced in Africa, thus necessitating the support of the relevant communities in supplementing the role of the state. However, a careful analysis of the CRPD reveals a strong rootedness in community. The state is, for example, required to take measures to ensure that integrated living – living in community rather than in isolation – is achieved;⁵⁶ and that community support services are provided in the community.⁵⁷ The best a treaty can do is impose obligations on the state to encourage and facilitate the meaningful integration of PWDs into communities; it is limited in its role of transforming or re-imagining communities. In any event, the reports by Uganda and Kenya reveal a strong emphasis on the role of community.⁵⁸

In addition, it may be contended that the CRPD should have articulated more strongly the particular challenges arising from the intersection of disability and being a refugee, internally displaced, a non-national or a member of a sexual minority group. During the drafting process of the CRPD, the African constituency was clear in its insistence that any treaty on the rights of persons with disabilities should reflect the fact that certain categories of PWDs such as women and children face multiple discrimination and that their situation should be specifically highlighted.⁵⁹ African NHRIs also stressed the same point.⁶⁰ In line with Africa’s position, the diversity of persons with disabilities is recognised in the CRPD.⁶¹ It singles out women and children with disabilities as particularly vulnerable groups amongst PWDs.⁶²

52 Ibid para 203.

53 Ibid para 267.

54 CRPD art 4(1)(b).

55 Ibid art 8(1)(b).

56 Ibid art 19.

57 Ibid art 19(c).

58 CRPD: Uganda’s Initial Status Report 2010, UN doc CRPD/C/UGA/1 <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/SPReports.aspx>>.

59 Matsebula (note 33 above).

60 Final Declaration (note 26 above).

61 Preamble paras i, p, q & r.

62 CRPD arts 6 & 7.

III ALTERNATIVES TO THE ADOPTION OF AN 'AFRICAN CRPD'

(a) Prioritising the CRPD

Before attempting to elaborate parallel African standards or responses to the CRPD, this extensive treaty should be used to its fullest extent to ensure that its goals are accomplished on African soil.⁶³ The advantage of this option above others is that the UN treaty has already been debated, elaborated and adopted. The major strength of the CRPD lies in the timing of its adoption – it establishes an undeniable reality that has to be accounted for before alternatives are explored. Energy should thus be focused on the implementation of its substantive rights, and on the process of domestic articulation and 'indigenisation' of its content. Against this background, a six-fold set of priority actions for African states and other stakeholders in Africa in respect of CRPD may be identified.

First, African states, that have not yet done so, should ratify the CRPD and the Optional Protocol thereto. States and civil society organisations should ensure that a national debate is launched to reflect on the costs and benefits of possible ratification. This deliberative process may, in itself, foreground the necessity to improve the protection of PWDs. Civil society should therefore urge states to do so, emphasising that the CRPD's 'general principles' are widely accepted and uncontroversial. Even if not all African states ratify the CRPD, past experience indicates that the likelihood of African states ratifying a UN treaty is greater than them ratifying a parallel African treaty. By 31 December 2013,⁶⁴ 51 African states were party to CEDAW (albeit sometimes with reservations), while only 36 had become party to the African Women's Protocol; and while 52 of 54 African states had become party to the CRC, 47 of them had ratified or acceded to the African Children's Charter. Although the Convention imposes some specific obligations on states, mostly incorporating the needs of persons with disabilities into previously existing treaties, the detailed measures to be adopted are left largely to the discretion of states.⁶⁵ In respect of any particular substantive obstacle to ratification, the possibility of entering a reservation should be investigated – provided such a reservation is still compatible with the object and purpose of the Convention.⁶⁶ So far, only two African states have resorted to the possibility of entering reservations, which is allowed under art 46 of the CRPD.

Second, in State Parties to the CRPD, the national debate should focus on the extent to which the Convention has already been given domestic effect.⁶⁷ This process should include persons with disabilities in law and policy assessment

63 It should be added that there is also a UN Special Rapporteur on Disability, tasked to monitor the implementation of the UN Standard Rules for the Equalization of Opportunities of Persons with Disabilities.

64 For the status of ratification of all UN treaties see <<https://treaties.un.org/Home.aspx>>; and for all AU treaties see <<http://www.au.int/en/treaties>>.

65 CRPD art 4.

66 Ibid art 46.

67 See, for example, Declaration on the Workshop on Monitoring the Rights of Persons with Disabilities in Africa in Kigali, Rwanda (24 January – 2 February 2011).

and revision. A first step is the domestication of the Convention into national law, either through piecemeal (*ad hoc*) reform of existing laws, or the adoption of a comprehensive ‘omnibus’ disability law.⁶⁸ Subsequent steps to ensure the *de facto* realisation of these rights are equally important if not more so than ‘formal’ domestication. State Parties should also review existing laws and policies, and bring them into line with the CRPD provisions. Because the CRPD touches upon such a wide range of topics, there is almost no sphere of life that will remain untouched. To ensure the optimal implementation of the CRPD provisions at the national level, each ratifying state should articulate, elaborate and adopt country-specific norms. It is thus clear that the dichotomy norm-implementation/norm-elaboration is an oversimplification. At the national level, elaboration is often a constituent part of the process of effective implementation and norm-realisation.

Third, State Parties should nominate suitable nationals to ensure that Africa is represented competently in the CRPD Committee. At the national level, civil society should lobby states to support this process. At the moment, there are three Africans among the 18 members of the CRPD Committee (from Tunisia, Kenya and Uganda). The extent of African representation is more limited than in many of the other UN human rights treaty bodies,⁶⁹ and should be rectified in future elections.

Fourth, State Parties should submit state reports. So far, only Ethiopia, Kenya, Mauritius, Morocco, Tunisia and Uganda have submitted their initial reports to the CRPD Committee. It is striking that experts from these countries are members of the CRPD Committee. Once reports have been examined, the concluding observations issued by the CRPD Committee should guide domestic action. At the national level, NGOs should submit ‘shadow reports’ and monitor the process of domestic implementation of the concluding observations. The first (and as yet only African) state report to be considered was that of Tunisia. Remarkably, the government delegation presented its initial report in April 2011, only a few months after the democratic revolution of January 2011. In its Concluding Observations, the CRPD Committee underlined the peculiarities of the situation of PWDs in Tunisia, noting that the political uncertainty of the transitional period presented a ‘unique opportunity’ for PWDs to ‘take part in the building of a new country’, in particular through their inclusion in the process of drafting a new Constitution.⁷⁰ The Committee further viewed favourably Tunisia’s adoption of a Law on the Advancement and Protection of Persons with Disabilities, and its efforts to ‘support the employment’ of PWDs in the civil service. However, a number of issues of specific relevance

68 In theory, at least, in states following a ‘monist’ tradition, the Convention becomes automatically incorporated into domestic law, allowing for its provisions to be applied by courts.

69 There are, for example, six African members on the 18-member Human Rights Committee; five African members out of a total of 18 on the CRC Committee; five out of 18 on the CERD Committee; and five out of 14 on the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).

70 Committee on the Rights of Persons with Disabilities ‘Concluding Observations on the Initial Report of Tunisia’ UN doc CRPD/C/TUN/CO/1 (2011) paras 7 & 10.

to Tunisia emerged from the examination, such as the importance attached to obtaining a ‘disability card’, which persons with psychosocial or intellectual disabilities have difficulties obtaining. Cultural stereotyping and negative attitudes lead to the invisibility or ‘concealment’ of women with disabilities (WWDs) in Tunisian society. Accepting that this problem requires a long-term solution, the Committee called for education and awareness-raising to combat these perceptions. Improved data collection, disaggregated by sex, is also suggested as a way of both enhancing the visibility of WWDs and improving state reporting.

In the fifth place, and provided that domestic remedies have been exhausted (if required), individuals in states that have ratified the Optional Protocol should submit communications for adjudication to the CRPD Committee. By 9 June 2014, no communication had been submitted against any African State Party.

Finally, in respect of resources, African countries under resource constraints should make full use of the possibility to request support from donors to facilitate the implementation of the CRPD.⁷¹

(b) Fully exploiting or exploring the existing mechanisms under the African human rights system

Sight should not be lost that the UN treaties complement protection at the regional level. The question therefore arises to what extent the existing African regional human rights system actually and potentially protects PWDs. It should also be taken into account that not all African states are party to the CRPD, and are unlikely to become parties, while all are party to the African Charter. There is thus a need for the regional system to play its part in advancing the rights of PWDs. Although the African human rights system may not have delivered sufficient results when it comes to PWDs, it has taken some tentative steps and has further unexplored potential.⁷² In particular, a legal framework (albeit a fragmented one) and a range of mechanisms are in place, and can be exploited to the benefit of PWDs. It is argued that before embarking on the elaborate and burdensome process of drafting an African-specific set of standards, focus should be given to the possibilities available under the current system.

The example of how indigenous peoples’ rights have been advanced in the African regional human rights system provides a compelling precedent.⁷³ Notwithstanding the fact that ‘indigenous peoples’ are not explicitly mentioned anywhere in the Charter, and despite the contentious and contested nature of

71 Art 32.

72 For a comprehensive discussion of the promotion and protection of disability rights under the African human rights system, see J Biegon ‘The Promotion and Protection of Disability Rights in the African Human Rights System’ in T van Reenen & IG du Plessis (eds) *Aspects of Disability Law in Africa* (2011) 53.

73 For an elaboration of this argument, see F Viljoen *International Human Rights Law in Africa* (2012) 232, 287.

the concept of indigenesness in Africa, the African Commission has become an important champion for the rights of indigenous peoples in Africa. Over a decade or so, indigenous peoples' organisations have in great numbers obtained observer status with the Commission, allowing them to occupy this important supra-national deliberative space and to further their agenda internationally. Overcoming initial resistance, the Commission established the Working Group on Indigenous Populations/Communities in Africa, adopted a report in which the presence and rights on indigenous peoples in Africa were unequivocally accepted, confronted states with issues of indigenous peoples' marginalisation when examining state reports, and decided communications in their favour. Similarly, PWDs and those advocating for their rights should explore the opportunities provided by these spaces and procedures. Given the general acceptance of the importance of the rights of PWDs (among Commissioners and civil society), the likelihood of a favourable reception is greater than it had been when those advocating for indigenous peoples' rights embarked on their attempts within the African human rights system.

At the regional level, the three core treaties, the African Charter, African Children's Charter, and African Women's Protocol, all implicitly include persons with disabilities within their ambit.⁷⁴ All the rights embodied in these treaties are guaranteed to PWDs in the same way that they are guaranteed to all other persons. The African Charter guarantees rights to 'every individual', 'every human being', 'every citizen', and 'all peoples'. Clearly, the use of these expressions includes PWDs within their scope. Similarly, the rights enumerated in the other treaties are respectively available to all children and women, including those with disabilities. Some rights under these treaties are potentially more relevant than others, such as the right to the 'best attainable state of physical and mental health' in art 16 of the African Charter. The practice of the UN Committee on Economic, Social and Cultural Rights is instructive in this regard, in that it has expressed concern about issues pertaining to disability – also in respect of African states – despite the founding text not containing any explicit provision on the rights of PWDs.⁷⁵

In addition to leaving the door open to PWDs to invoke any of the rights under the four treaties, the rights of PWDs have been given explicit mention under each of them. Article 18 of the African Charter provides as follows: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.' While the inclusion of these groups is a positive step, the formulation of the provision also set the

74 See also the African Youth Charter (2006) art 24; African Charter on Democracy, Elections and Governance (2007) arts 8(2), 31 & 43; and African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009) art 9(2)(c).

75 In respect of the second to fourth report of the Democratic Republic of Congo, UN doc E/C 12/COD/CO/4 (2009), the Committee noted with concern that in 'the absence of appropriate social services, most adults with disabilities have to resort to begging and their children are excluded from access to education and health care' (para 8), and urged the state to 'adopt comprehensive anti-discrimination legislation that provides persons with disabilities with judicial and social-policy programmes which enable them to live an integrated, self-determined and independent life'.

tone for the conflation of the 'aged' and 'disabled' in the African human rights system. Although old age may often coincide with disability, disability has no necessary link to the ageing process. Disability may obviously manifest at any age. In many instances, physical disability (such as amputation) occurs later in life, due to accidents or, as has been the case too often in Africa, involvement in or falling victim to conflict. Illness leading to disability may also develop at any phase of a person's life. Reflective of the lack of awareness at the time in Africa, but also globally, the non-discrimination provision in art 2 of the African Charter does not include 'disability' as an explicit ground for non-discrimination. However, the list is non-exhaustive, as the phrases 'without distinction of any kind' and 'or other status' indicate. In at least one subsequent finding, the Commission clarified that 'disability' is one of these 'other factors', and is thus to be understood as a ground for non-discrimination under the African Charter.⁷⁶

The African Children's Charter builds upon and goes further than the African Charter in its scope of protection of disability rights. Under art 13(1) of the Children's Charter, a child with disabilities has the right to special measures of protection. The special measures of protection that the state is obliged to take under art 13(2), subject to availability of resources, include providing effective access to training, preparation for employment, and recreation opportunities. These activities should be conducted in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.

In the African Women's Protocol, art 23 has been devoted to the 'special protection of women with disabilities'. States Parties undertake to ensure the protection of women with disabilities and to take specific measures to facilitate their access to employment, professional and vocational training as well as their participation in decision-making.⁷⁷ States are further required to ensure women with disabilities are not discriminated against on the basis of disability, are free from violence, and are treated with dignity.⁷⁸

Anchored on the legal framework discussed above are a number of institutional mechanisms that can be used to protect and promote the rights of PWDs. At the regional level, there are three human rights bodies that are responsible for monitoring compliance with human rights standards on the continent: the African Commission, African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), and the African Court on Human and Peoples' Rights (African Court). Four avenues through which the rights of PWDs may be advanced are here explored: the state-reporting procedure, complaints, special procedures, and the adoption of resolutions or general comments.

The state-reporting procedure enables treaty bodies to inquire about state's implementation of the rights of PWDs. Under the African Charter, State

76 *Purohit v Gambia* (2003) AHRLR 96 (ACHPR 2003).

77 Women's Protocol art 23(a).

78 *Ibid* art 23(b).

Parties have undertaken to submit, every two years, reports on the legislative and other measures that they have taken to apply the Charter rights. In respect to the implementation of the rights of PWDs, the African Commission's 1998 Guidelines on State Reporting contain the following question to which states must respond: 'What is the state doing to improve the condition of the following groups mentioned in the Charter: (a) women; (b) children; and (c) the disabled?'.⁷⁹ So far, state responses to this question range from cursory references to legislative measures for the protection of PWDs to no reference at all. Detailed discussion on the special measures taken to protect PWDs is absent in the majority of the state reports. Thus far, the Commission's concluding observations have not at all addressed issues of disability. As the focus of examination and concluding observations by the Commission largely reflects the issues covered by its special mechanisms, the enlargement of PWDs membership on the Working Group on Older Persons and People with Disabilities in 2011 may see a more pronounced engagement with issues pertaining to disability.

The Africa Children's Charter requires states to submit reports on progress within two years of ratifying the treaty and thereafter every three years.⁸⁰ The Guidelines for Initial Reports under the Children's Charter specifically require states to report on particular aspects concerning children with disabilities.⁸¹ The Committee examined the first batch of state reports in 2008. Reporting on children with disabilities in accordance with the Guidelines is not yet uniform and systematic. Initial reports of three East African countries illustrate this point. Kenya's report has a section dedicated to children with disabilities.⁸² The report gave information on the legal and policy framework, context and implementation, constraints and recommendations. Statistical data was also provided on the number of children with disabilities in the country, and their access to both mainstream and special schools. The report of Tanzania similarly devoted a section on children with disabilities under which it enumerated the legal, policy and institutional framework for their protection.⁸³ Annexed to the report is a table of statistical information on the nature of disabilities suffered by children.⁸⁴ The report, however, does not indicate the factors and difficulties encountered in implementing disability rights. The report of Uganda omits to include a section on children with disabilities as

79 Guidelines for National Periodic Reports under the African Charter (1989) para 5.

80 Africa Children's Charter art 43(1).

81 African Committee of Experts on the Rights and Welfare of the Child pursuant to the provision of art 43 of the African Charter on the Rights and Welfare of the Child Guidelines for Initial Reports of States Parties, OAU doc Cmttee/ACRWC/2 II. Rev 2, sec VII (2003).

82 Initial Report of the Republic of Kenya to the African Union on the Implementation of the African Charter on the Rights and Welfare of the Child 2003–2007 (2008) 50–4.

83 The United Republic of Tanzania Ministry of Community Development Gender and Children in collaboration with Ministry of Labour Youth Women and Children Development 'Initial Tanzania Report to the African Committee of Experts on the African Charter on the Rights and Welfare of the Child' (2006) 30.

84 Ibid Annexure 5 table (b).

required by the Guidelines.⁸⁵ Instead, it mentions children with disabilities under two thematic clusters: non-discrimination and education.⁸⁶ The adoption of concluding observations or recommendations by the Committee regarding implementation of disability rights is also inconsistent.

The African Commission and the African Children's Committee are mandated to receive and take decisions on communications alleging violation of rights under the African Charter and its Protocol on the Rights of Women, and the African Children's Charter. While the African Children's Committee has as yet decided only one communication, the African Commission has innovatively used this mechanism to protect, elaborate, and expand the Charter rights.

Thus far, the African Commission has decided only a single case alleging the violation of the rights of PWDs: *Purohit v The Gambia*.⁸⁷ This case concerned the automatic and indefinite institutionalisation of persons with mental disabilities under the Gambian Lunatics Detention Act (LDA). The complainants alleged that the law and practice constituted discrimination on the basis of disability. In its decision, the Commission affirmed disability as a prohibited ground of discrimination notwithstanding its omission from art 2 of the African Charter.⁸⁸ The Commission reaffirmed that all human beings regardless of their mental capabilities or disabilities are entitled to be treated with dignity.⁸⁹ As such, reference to persons with mental disabilities as 'lunatics' and 'idiots' under the LDA was found to be both dehumanising and an insult to their dignity.⁹⁰ The Commission also held that persons with mental disabilities are entitled to participate in electoral processes of states in which they are citizens. It stated that the right to political participation under the African Charter is extended to 'every citizen' and its denial can only be justified by reason of legal incapacity that may not necessarily mean mental incapacity. Finally, the Commission observed that states should take concrete and targeted steps to ensure the right to health is guaranteed to everyone, including PWDs. The *Purohit* case shows that there is great potential for expanding the broad provisions of the African Charter and similar treaties to benefit PWDs through the communications procedure. Despite this potential, the communications procedure has not been adequately used by particularly PWDs and DPOs.

In both its state-reporting procedure and when deciding communications the Commission should rely on the CRPD and the jurisprudence of the CRPD Committee as a source to guide the interpretation and implementation of the provisions of African treaties. This can be done on the strength of the Charter's injunction to the Commission to 'draw inspiration' from international human

85 Uganda Ministry of Gender, Labour, and Social Development 'Implementation of the African Charter on the Rights and Welfare of the Child: Uganda Country Report' (2007).

86 *Ibid* ss IV & VII.

87 Note 76 above.

88 *Ibid* para 61.

89 *Ibid* para 57.

90 *Ibid* para 59.

rights law,⁹¹ and on the basis that the CRPD constitutes global and regional common ground, given the extent of its acceptance world-wide and in Africa.

On the basis of the wide substantive scope of the jurisdiction of the African Human Rights Court, which extends to all (and not only ‘African’) relevant international human rights treaties,⁹² the court apparently has the competence to directly apply the CRPD. The African system could thus play a role in giving regional application to the detailed set of norms in the CRPD. This would imply that litigants may bring complaints to the African Court (directly, or via the African Commission) based on violations of the CRPD against State Parties to that treaty. A wiser (and more likely) approach may be to base such a case on the violation of an African treaty, but to draw interpretive guidance from the CRPD. Similar to the Commission, the court may then have reference to the CRPD as a guide to interpreting the relevant African instruments.⁹³

The African Commission has established several thematic mechanisms to focus on specific areas of concern in Africa. These mechanisms take the form of special rapporteurs, working groups and committees. Initially, in 2007, the Commission established a focal point on Older Persons.⁹⁴ Its mandate was extended to include the issue of PWDs when the focal point was transformed into a working group (the Working Group on Older Persons and People with Disabilities) in 2009.⁹⁵ After it had been decided, in 2010, to expand the membership of the Working Group to ensure adequate representation of PWDs, two members from the PWDs community were elected in 2011.⁹⁶ The establishment of the Working Group is the major step thus far taken by the African Commission in relation to turning its attention to PWDs. However, the down-side of this development is that the issue of PWDs’ rights is conjoined to that of the aged, creating the impression that disability is understood as an aspect of ageing, rather than as the multi-faceted issue it is.

The adoption of resolutions on thematic, administrative and country-specific situations has become an important means by which the African Commission discharges its promotional mandate. The Commission has particularly used thematic resolutions to elaborate the broad, and sometimes vague, provisions of the African Charter. The Commission’s competence to adopt such resolutions stems from art 45(1)(b) of the African Charter, which empowers the Commission to ‘formulate and lay down principles and rules’ to guide national legislation. In this sense, thematic resolutions play a similar role to the general comments or recommendations of the UN human rights treaty bodies.

91 CRPD art 60.

92 See Protocol on the Statute of the African Court of Justice and Human Rights (2008) (African Court Protocol) art 3(1).

93 African Children’s Charter arts 60 & 61.

94 Resolution on the Establishment and Appointment of a Focal Point on the Rights of Older Persons in Africa, OAU doc ACHPR/Res 118(XXXII)07 (2007).

95 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, OAU doc ACHPR/Res.143(XXXV)09 (2009).

96 See final communiqué of the 49th ordinary session of the African Commission on Human and Peoples’ Rights, held in Banjul, the Gambia (28 April – 12 May 2011).

Using thematic resolutions, the Commission has in the past elaborated on the precise content of Charter rights including the right to a fair trial, freedom of expression, and freedom from torture. Such an expansion could take the form of a general comment-style ‘resolution’ or a set of guidelines, similar to the ‘Principles on Freedom of Expression’ or the ‘Principles and Guidelines on the Right to a Fair Trial’, and may go a long way towards foregrounding the peculiar circumstances and subjective realities of PWDs in Africa. Recently, the Commission, for the first time, adopted a General Comment (on art 14(1) (d) and (e) of the Women’s Protocol).⁹⁷ The Commission may build on this tentative precedent by adopting a General Comment spelling out the specific implications of the African Charter for persons with disabilities, or it may choose to revert to the adoption of a thematic resolution or set of ‘guiding principles’.

The African Children’s Committee could also adopt a general comment focusing particularly on children with disabilities. Like the Commission, the African Children’s Committee may formulate and lay down principles and rules with the aim of protecting and promoting the rights of children in Africa.⁹⁸ Indeed, the rules of the procedure of the Committee expressly provide that the Committee may adopt general comments.⁹⁹

The CEDAW Committee and the Committee on Economic, Social and Cultural Rights have adopted General Comments even in the absence of particular treaty provisions dealing with disability rights. Unlike the African Women’s Protocol, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and CEDAW do not have a specific provision dedicated to women with disabilities. To fill this normative gap, the CEDAW Committee adopted General Recommendation 18 on ‘disabled women’.¹⁰⁰ The General Recommendation expressed its concern about the situation of women with disabilities whom it recognised suffer from double discrimination. It called on State Parties to provide information on women with disabilities in their periodic reports, and on measures they have taken to deal with their particular situation. In similar vein, the CESCR Committee adopted General Comment 5 on ‘Persons with Disabilities’.¹⁰¹

97 General Comment on art 14(1)(d) & (e) of the Women’s Protocol, adopted at the African Commission on Human and Peoples’ Rights 52nd session (9–22 October 2012); see E Durojaye ‘The Approaches of the African Commission to the Right to Health under the African Charter’ (2013) 17 *Law, Democracy & Development* 393, 413 <<http://www.idd.org.za/by-type/refereed-articles/170-articles-2014-special-issue/411-the-approaches-of-the-african-commission-to-the-right-to-health-under-the-african-charter-p-393.html>>.

98 African Children’s Charter art 42(a)(ii).

99 Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child, rule 65.

100 General recommendations made by the Committee on the Elimination of Discrimination against Women <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom18>>.

101 UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment 5 ‘Persons with Disabilities’ UN Doc E/1995/22 (1994) <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument)>.

By their very nature and by being products of treaty bodies, the formulation and adoption of resolutions do not pose the same challenges as the formulation and adoption of treaties. Rather than formulating a new treaty, the Commission should develop resolutions or guidelines on disability rights, placing and highlighting the most pertinent concerns as adjunct to or supplementing art 18(4) of the Charter and art 23 of the Women's Protocol. The African Children's Committee should also adopt a general comment to supplement art 13 of the Children's Charter. Speaking to the detail of norms to be adopted at the national level, these guidelines should be of great assistance in the elaboration of domestic legislative and policy measures.

IV CONCLUSION

This article poses the question of what form international law should take to best address the neglect of the rights of PWDs in African states. It argues that the rationale for a separate African treaty on the rights of PWDs is questionable. Two, more feasible, alternatives operating in parallel – fully exploring the potential of the CRPD and of the existing African human rights system – are suggested.

The first of these, the prioritisation of the UN treaty, is a given for states that have become party to the CRPD. State Parties and civil society have to take this treaty seriously and make the most of its potential. The need for domestication as a localised form of norm elaboration underlines the link between standard-setting and implementation. Much energy has gone into the elaboration of this treaty, and it stands as an undeniable beacon of the international community's increasing concerns for PWDs. As its extensive provisions are, in the main, broad enough to address the concerns of African PWDs, immediate efforts should be directed at exploring the potential of this global instrument to the fullest extent possible.

The second option is already evolving: the effective and meaningful 'mainstreaming' of disability rights into the existing African regional human rights system. This process should be strengthened, for example, by de-linking disability rights from the Working Group, and by the articulation in the form of a General Comment, a set of 'principles' or a thematic resolution – by the African Commission of the particularities of the rights of PWDs in Africa.

Although the articulation of more regionalised and localised understandings of these rights in the form of a distinct treaty may raise greater awareness and assist states in the process of crafting appropriate domestic laws and policies, autochthonous standard-setting should not be fetishized. Just as the adoption of the African Women's Protocol did not see immediate benefits accruing to women, neither the CRPD nor an African-specific treaty would in itself guarantee an improvement in the plight of PWDs. Whatever form the evolution of international human rights takes in respect of the rights of PWDs, a balance between the arguments for further norm-elaboration and the imperatives of firmer norm-implementation should be carefully considered.

Formulating a new treaty is a complex and time-consuming exercise that will further delay the effective implementation of states' obligations. However, if the option of an African-specific treaty gains wide support, it should take the form of a protocol to the African Charter, with the African Commission as a monitoring mechanism, and not as a separate treaty with a self-standing treaty monitoring body. Given that the UN treaty is already in place and the treaty body established under it is already operational, a parallel African treaty body may only lead to duplication and divergence. The interaction between such a body and existing African treaty bodies must also be thoroughly interrogated before it is established. In the past, human rights institutions have been created without giving much thought as to their possible interaction in practice.¹⁰² The end-result may be an institutional framework lacking in coherence and harmony. As State Parties to the Charter, all AU member states have accepted the automatic competence of the African Commission to consider individual communications – including any complaint in respect of the rights of PWDs. The creation of a new treaty with a new treaty body would require ratification, thus creating uncertainty about the extent to which African states would in fact be bound by these new standards and procedures. From a pragmatic point of view, too, establishing a new treaty body is undesirable considering the huge cost involved. The proliferation of human rights bodies and mechanisms operating under the auspices of the AU has placed a heavy financial burden on the institution. As a result, most of these bodies are acutely under-resourced. The AU's limited capacity to finance the functioning of human rights bodies was laid bare by its decision to merge the African Court of Justice and the African Court on Human and Peoples' Rights into a single court.¹⁰³

102 See K Kithure 'The African Human Rights System: Unnecessary Overlaps or Useful Synergies?' (2006) 12 *East African J of Peace and Human Rights* 319.

103 See African Court Protocol.