

## Article 23

### Special protection of women with disabilities

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- The States Parties undertake to:
- (a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;
  - (b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

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## 1 Introduction

Disability is a global challenge, giving rise to a global commitment to ensuring realisation of the rights of persons with disabilities (PWDs) and equalisation of opportunities for them.<sup>1</sup> The number of PWDs are increasing dramatically due to various factors, including health conditions and demographic trends. They are considered ‘the world’s largest minority’, with an estimated 1.3 billion people (16 per cent of the world’s population) living with disabilities worldwide.<sup>2</sup> Disability is more prevalent among women than men, with women representing more than half of all PWDs.<sup>3</sup> In Africa, about 80 million people live with some kind of disability.<sup>4</sup> However, there is a general lack of up to date data on PWDs in the continent, and especially on women and girls with disabilities (WGWs). This contributes to their

1 See generally, AH Eide & B Ingstad *Disability and poverty: a global challenge* (2011).

2 World Health Organization ‘Disability: key facts’ (7 March 2023), <https://www.who.int/news-room/fact-sheets/detail/disability-and-health> (accessed 1 April 2023). See also I Bantekas & L Oette *International human rights law and practice* (2020) 589; United Nations Department of Economic and Social Affairs (UNDESA) ‘Factsheet on persons with disabilities’, <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> (accessed 23 June 2023).

3 Global Call to Action against Poverty (GCAP) ‘Leave no women behind – Africa report: situation of women and girls with disabilities’ (2021), <https://gcap.global/wp-content/uploads/2021/03/Africa-Regional-Study-on-LNWB-final.pdf> (accessed 23 June 2023) 6 & 10.

4 T Falola & N Hamel *Disability in Africa: inclusion, care and the ethics of humanity* (2021) 406. UN Women East and Southern Africa ‘Mapping of discrimination against women and girls with disabilities in East & Southern Africa’ (2020) 5, <https://africa.unwomen.org/en/digital-library/publications/2020/04/mapping-of-discrimination-on-disabilities-in-esar> (accessed 2 September 2022) places the figure at 84 million.

nvisibility (worldwide, WGWDs make up more than half of all PWDs and nearly 20 per cent of all women, with the prevalence rate being 19.2 per cent for women compared to 12 per cent for men).<sup>5</sup> Historically, aspects relating to WGWDs have been neglected in international and national laws and policies on disability.<sup>6</sup> Over the years, a commitment to ensuring all PWDs have equal access to social and economic opportunities<sup>7</sup> has intensified. International frameworks on disabilities or provisions on disabilities, including aspects relating to WGWDs, have been adopted, requiring a shift from just viewing disability as an individual impairment to focusing on measures aimed at creating enabling environments that accommodate all persons in their diversity and promote inclusiveness. Among them is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Its article 23, requiring special protection of women with disabilities (WWDs), is a notable novelty in the Protocol, supplementing the general provision on PWDs in the African Charter on Human and Peoples' Rights (African Charter).<sup>8</sup> The protection of WWDs has subsequently been reinforced through the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities).<sup>9</sup> Just over a year after the Maputo Protocol entered into force, the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) was adopted, with a provision on WGWDs.<sup>10</sup>

Article 23 of the Maputo Protocol recognises the intersection between disability and gender and the importance of considering the needs of WWDs. This is important because disabilities negate the enjoyment of rights by a significant number of women in Africa.<sup>11</sup> Generally, PWDs in Africa are the poorest of the poor and face structural barriers in education, employment and the environment, systematic discrimination, rights violations and prejudice in various spheres.<sup>12</sup> The consequence is their exclusion from family, community and political life.<sup>13</sup> WGWDs are disproportionately affected.<sup>14</sup> They face multiple and intersecting forms of discrimination.<sup>15</sup> In Africa, they are chronically and multidimensionally poor, and face persistent discrimination, stigma, marginalisation and routine rights violation. They are also vulnerable to human trafficking and exploitation and have difficulties accessing education (due to exclusion, inaccessible buildings or learning materials not adapted to their needs). Difficulties in accessing education, in turn, have negative consequences for their employment prospects.

5 GCAP (n 3) 6, 8, 10 & 25; as stated by UN Women East and Southern Africa (n 4) vii & 3, this translates to one in five women having a disability. A 2011 report showed that moderate and severe disability was highest in Africa (both for men and women) compared to other regions, but prevalence of women with disabilities within Africa was higher than men: 60 and above age group at 54.3 per cent for women compared to 52.1 per cent for men; 15-59 years age group at 21.6 per cent for women compared to 16.4 per cent for men; and 0-14 age group at 6.5 per cent for women compared to 6.4 per cent for men (see WHO and the World Bank *World Report on Disability* (2011) 30; UN Women East and Southern Africa (n 4) 13 & 65).

6 General Comment 3 on women and girls with disabilities, CRPD Committee (25 November 2016), UN Doc CRPD/C/GC/3 (2016) para 3.

7 Eide & Ingstad (n 1) 2.

8 Article 18(4).

9 Adopted 29 January 2018, not yet in force (with five ratifications – Angola, Burundi, Kenya, Mali and Rwanda, and 10 other signatories as at March 2023) art 27 & generally.

10 Article 6.

11 See generally, Z Nampewo 'Gender, disability and human rights in Africa' in O Yacob-Haliso & T Falola (eds) *The Palgrave handbook of African women's studies* (2021) 2307-2321.

12 T Shakespeare, A Mugeere, E Nyariki & J Simbaya 'Success in Africa: people with disabilities share their stories' (2019) 8 *African Journal of Disability* 1; Protocol on the Rights of Persons with Disabilities, Preamble; African Union (AU) 'Social policy framework for Africa' First Session of the AU Conference of Ministers in Charge of Social Development (27-31 October 2008), CAMSD/EXP/4(I) (2008) para 72. The Social Policy Framework for Africa was adopted in January 2009 by the AU Executive Council (Decision on the First Session of the African Union Conference of Ministers in charge of Social Development, Doc.EX.CL/477(XIV), Decision Ex.CL/Dec.473(XIV) (14th ordinary session 2009) para 2).

13 AU Social policy framework (n 12) para 72.

14 Shakespeare et al (n 12) 1.

15 General Comment 3 (n 6) paras 2 & 3; GCAP (n 3) 6.

They also have difficulties accessing health and other social services, including social protection (due to stigma, infrastructural limitations or defects, problems of coverage and adequacy, and other challenges). Finally, WGWDs have limited access to food and housing and face barriers to participation in decision-making, among other challenges.<sup>16</sup> Age, gender and type of disability exacerbates WWDs' marginalisation, stigma and invisibility, leading to violence and multiple discriminations.<sup>17</sup> Domestic laws are ineffective due to the depth of negative attitudes and stigma towards them.<sup>18</sup> WWDs in Africa have varying needs due to the diverse nature of classes of disability. Understanding their needs is relevant to appreciate the rationale for special protection for them and for fulfilling their needs.

This chapter provides a guide to understanding article 23 of the Maputo Protocol. Section 2 of the chapter briefly explains the drafting history related to article 23. Section 3 explains the concepts of WWDs and 'special protection' that are incorporated in article 23. It also considers the nature and scope of state obligations and other relevant treaty provisions that reinforce and elaborate on what is required of states in relation to protection of WWDs. Section 4 considers implementation measures that states have undertaken. Section 5, the conclusion, highlights the role of other actors in implementation of article 23.

## 2 Drafting history

Article 23 goes beyond earlier drafts of the Maputo Protocol in terms of its content, though not detailed enough. The Kigali Draft<sup>19</sup> and Final Draft<sup>20</sup> included a vague provision on WWDs, placing them into one provision with elderly women and with a single statement on them having 'the right to specific measures of protection commensurate with their physical and moral needs'.<sup>21</sup> This vagueness has been seen as deliberate 'so that states have leeway to act according to the prevailing conditions in their separate territories'.<sup>22</sup> Further discussions resulted in subsequent drafts addressing WWDs in a separate provision, distinct from that on elderly women.<sup>23</sup> As regards the needs of WDDs, initially, only two categories of needs were considered – 'physical and moral need' – but was subsequently expanded to 'physical, economic and social needs'. Also, 'disability' (in the singular, instead of 'disabilities') was initially used, which the Organisation of African Unity Office of the Legal Counsel flagged for

16 GCAP (n 3) 6-7 & 14-24 (capturing the lived experiences of WGWDs, using Kenya, Mali and Ghana as case studies). Abuse and discrimination was established in *Z v Tanzania*, Communication 24/2014, CRPD Committee (19 September 2019), UN Doc CRPD/C/22/D/24/2014 (2019) (concerning a Tanzania woman with albinism).

17 GCAP (n 3) 15.

18 As above.

19 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda.

20 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, CAB/LEG/66.6 (final version of 13 September 2000) (2000 Draft), reproduced in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 53-63.

21 Kigali Draft (n 19) art 6; 2000 Draft (n 20) art 22. Non-governmental organisations (including African and women organisations) and various other interested parties participated in discussions leading to these and subsequent drafts (Nsibirwa (n 21)) 41; F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50(1) *Journal of African Law* 72-74.

22 Nsibirwa (n 20) 49-50.

23 Draft Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, adopted by the Meeting of Governments Experts in Addis Ababa on 16 November 2001, CAB/LEG/66.6/Rev.1 (2001) 18 (art 21) (2001 Rev.1 Draft); Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, MIN/WOM.RTS/DRAFT.PROT(II) Rev.5 (2003) arts 22 & 23; Maputo Protocol, art 22.

review.<sup>24</sup> The explicit reference to violence in article 23 was informed by the particular vulnerability of WWDs to violence, the fact that acts of violence impede achievement of equality, development and peace, and states' obligation 'to take special measures to eliminate violence against women especially those in vulnerable situations established by the Beijing Platform for Action.'<sup>25</sup>

### 3 Concepts and definitions

#### 3.1 Women with disabilities

Disability is an evolving concept, and there are various types of disabilities.<sup>26</sup> The concept 'WWDs' should not be viewed as a unitary status but an intersectional one. Disability intersects with gender, age, race and other constructs of otherness, resulting in negative outcomes for WWDs.<sup>27</sup> Also, WWDs are not a homogeneous group.<sup>28</sup> Based on the definition of women in the Maputo Protocol as 'persons of female gender, including girls',<sup>29</sup> the term WWDs includes girls with disabilities (GWDs). Also, drawing from the definition of PWDs in the Protocol on the Rights of Persons with Disabilities,<sup>30</sup> WWDs refers to women and girls

who have physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments', which in interaction with environmental, attitudinal and other barriers hinder their full and effective participation in society on an equal basis with others.<sup>31</sup>

Hence, the term includes different types of impairments and allows for accommodation of more expansive interpretations. An African context to PWDs is evident in the explicit recognition of those with a developmental disability and environmental and attitudinal barriers, compared to the CRPD definition of PWDs.<sup>32</sup>

Furthermore, a shift from viewing WWDs as mere objects of charity or passive members of society or as just a medical problem requiring medical or rehabilitation intervention to fix it is evident in the above definition, read together with article 23 and other relevant provisions of the Maputo Protocol. The definition recognises barriers in society as disabling and WWDs as full and effective participants in society. In addition, WWDs are placed within a human rights framework - they are viewed as holders of rights and able to claim the rights on an equal basis with others, with states parties required to protect WWDs and remove barriers that inhibit realisation of their rights and their inclusion as full and effective participants in society. The above is reflective of aspects of both the social and human rights approaches to disability.<sup>33</sup>

24 Comments by the Office of the Legal Counsel on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted by the Meeting of Governments Experts on 16 November 2001).

25 2001 Rev.1 Draft (n 23) 19.

26 L Chenwi 'Housing for persons with disabilities in South Africa' (2021) 21(3) *International Journal of Housing Policy* 324.

27 See, eg, J Moodley & L Graham 'The importance of intersectionality in disability and gender studies' (2015) 29(2) *Agenda* 24-33, establishing in the South African context, how disability intersects with gender (in addition to age and race) to result in negative outcomes in employment, education and income for PWDs particularly black WWDs.

28 General Comment 3 (n 6) para 5.

29 Maputo Protocol, art 1(k).

30 Protocol on the Rights of Persons with Disabilities, art 27 & generally.

31 Protocol on the Rights of Persons with Disabilities, art 1.

32 L Chenwi 'Protection of the economic, social and cultural rights of older persons and persons with disabilities in the African regional system' in DM Chirwa & L Chenwi *The protection of economic, social and cultural rights in Africa: international, regional and national perspectives* (2016) 182.

33 For further reading on the different approaches to disability, see UNDESA, Division for Social Policy and Development 'Toolkit on disability for Africa' (18 November 2016) <https://www.un.org/development/desa/dspd/2016/11/toolkit-on-disability-for-africa-2/> (accessed 1 April 2023), see module on 'Introducing the United Nations Convention on the Rights of Persons with Disabilities' 5-8.

### 3.2 Special protection

The obligation to protect rights requires states to take positive measures<sup>34</sup> (legislative and others, including the provision of effective remedies) to ensure third parties (state and private actors) do not violate rights.<sup>35</sup> In the context of special measures, ‘protection’ means ‘protection from violations of human rights emanating from any source, including discriminatory activities of private persons, to ensure the equal enjoyment of human rights and fundamental freedoms’.<sup>36</sup> Protection also ‘indicates that special measures may have preventive (of human rights violations) as well as corrective functions’.<sup>37</sup> ‘Special’ in this legal context does not mean ‘favoured’ but ‘unique’. The concept of special protection (or special measures) is thus used in international human rights law when requiring additional protection for vulnerable or disadvantaged individuals and groups.<sup>38</sup> Special measures include measures that are referred to in some countries as affirmative action or measures, or positive action.<sup>39</sup> Affirmative action should be consistent with the goal of remedying situations of disadvantage or exclusion of a group. WWDs require special protection as they face multiple and intersectional discrimination.<sup>40</sup>

Special protection measures serve the important function of correcting inequality and discrimination in the enjoyment of rights.<sup>41</sup> Hence, though they may be seen to have the effect of favouring the specific group or persons, such preferential treatment is legitimate and justifiable if aimed at ‘securing the adequate advancement of members of vulnerable and disadvantaged groups’ to enable rights enjoyment, reducing or suppressing ‘conditions that perpetuate discrimination’, and at achieving substantive equality.<sup>42</sup> In requiring special protection for WWDs, article 23 thus obligates states to meet the dimensions of substantive equality (redress disadvantage, address prejudice, stereotyping, stigma and violence, enhance voice and participation, and accommodate difference and achieve structural change).<sup>43</sup>

Special protection measures are temporary in nature, thus ‘should be discontinued after their intended objectives have been achieved’.<sup>44</sup> However, article 23 of the Maputo Protocol is crafted in a way that allows for temporary, short-term and long-term measures; that is, it does not explicitly limit

34 All human rights impose a combination of positive (take appropriate measures to ensure a right) and negative (refrain from interfering with a right) duties (Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples’ Rights, African Commission (24 October 2011) para 4; Bantekas & Oette (n 2) 79.

35 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, Communication 155/96, (2001) AHRLR 60 (ACHPR 2001) para 46; African Commission ‘ESCR principles and guidelines’ (n 34) para 7.

36 General Recommendation 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, CERD Committee (24 September 2009) UN Doc CERD/C/GC/32 (2009) para 23.

37 As above.

38 Though the Protocol on the Rights of Persons with Disabilities does not use ‘special protection’ terminology in the provision on the women and girls with disabilities (art 27 – reference is made to ‘specific measures’), the Protocol considers ‘the right to *special measures of protection* in keeping with their physical or moral needs’ as informed by the African Charter (Preamble; emphasis added).

39 General Recommendation 32 (n 36) para 12.

40 The African Commission seems to conflate multiple and intersectional discrimination (African Commission ‘ESCR principles and guidelines’ (n 34) para 1(l)). However, CRPD Committee, in the context of WGWDs, provides distinct definitions for the concepts – multiple discrimination as ‘a situation in which a person experiences discrimination on two or more grounds, leading to discrimination that is compounded or aggravated’ and intersectional discrimination as ‘a situation where several grounds interact with each other at the same time in such a way as to be inseparable’ (General Comment 3 (n 6) para 4(c)).

41 Chenwi (n 32) 189.

42 African Commission ‘ESCR principles and guidelines’ (n 34) paras 34-35.

43 S Fredman ‘Substantive equality revisited’ (2016) 14(3) *J•CON* 712, 713 & 727 where the four dimensions are explained.

44 African Commission ‘ESCR principles and guidelines’ (n 34) paras 35.

the measures states are expected to take to temporary specific measures. Considering the temporal nature of special measures and the multifaceted nature of disability, an integrated approach that focuses attention on the needs and rights of PWDs as those of ordinary people caught at a physical and social disadvantage is also important.

### 3.3 Nature and scope of state obligations

Article 23 of the Maputo Protocol, in requiring special protection for WWDs, outlines distinct state obligations to

- (a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;
- (b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

The obligation to protect WWDs in article 23 is broadly phrased, encompassing the protection of their rights in general. That is, not limited to the identified rights in the provision. For example, though article 23 is silent on their right to healthcare or reproductive services, states have a duty to protect these rights as seen below. Article 23 is yet to be elaborated on in case law, and there is scarcity of regional jurisprudence on the rights of WWDs and correlating state obligations. The African Commission on Human and Peoples' Rights (African Commission) has clarified the obligations of states in relation to some economic, social and cultural rights (ESCR) of PWDs, thus relevant to WWDs. It has also elaborated on state obligations in the context of mental health patients in *Purohit and Moore v Gambia (Purohit)*,<sup>45</sup> confirming the multiple and intersecting violations that PWDs experience. The impugned legislation was found to be inconsistent with the rights to be free from discrimination, be heard, challenge one's detention, be detained in humane conditions, review a determination of insanity and the right to health. The pronouncements were not in relation to article 23 of the Maputo Protocol but rather the African Charter. However, as they related to PWDs and considering the Protocol is supplementary to the Charter, the pronouncements are relevant to understanding states' obligations concerning WWDs under article 23.

Specific measures adopted must be 'deliberate, concrete and targeted' towards meeting the needs of WWDs. This is in line with the African Commission's interpretation of the obligation to take steps, which is of an immediate nature.<sup>46</sup> In *Purohit*, the African Commission, with reference to the right to health, accentuated states' obligation to take 'concrete and targeted steps, while taking full advantage of [their] available resources' to ensure full realisation of rights without discrimination.<sup>47</sup> Though many African states are affected by poverty and lack of resources, this alone, as held by the African Commission, does not absolve them of this obligation.<sup>48</sup> The African Commission did not articulate what would constitute sufficient steps in fulfilling this obligation but held that because the right to health is fundamental to the survival of persons with mental disabilities and their integration into society, their right to proper health care should never be denied.<sup>49</sup> This could be interpreted to mean that the African Commission would hold a state to a higher standard of accountability even where resources are demonstrably lacking, if an aspect of a right alleged to have been violated affected the survival of the claimant. Hence, as required by article 23 of the Maputo Protocol, specific measures

45 *Purohit and Moore v Gambia*, Communication 241/2001 (2003) AHRLR 96 (ACHPR 2003), concerning a challenge to the legislative regime for mental health patients in the Gambia.

46 African Commission 'ESCR principles and guidelines' (n 34) para 18.

47 *Purohit* (n 45) para 84.

48 *Purohit* (n 45) para 84.

49 African Commission 'ESCR principles and guidelines' (n 34) para 85.

should be proportionate to the rights and needs of WWDs and ensure non-discrimination in the enjoyment of their rights.

On the right to health of PWDs, the African Commission has also expressed in its ESCR principles and guidelines that states have to

- ensure accessible health facilities for WWDs;
- provide specific and needed health services for persons with intellectual, psychosocial and physical disabilities (including access to dignified and humane care and treatment);
- ensure prisoners with intellectual and psychosocial disabilities obtain the necessary medical treatment and care;
- ensure integration of mental health care into community health care systems;
- support PWDs to live independently in the community (rather than in institutions);
- ensure the rights of persons with intellectual, psychosocial, and physical disabilities that are institutionalised; and
- ensure WWDs have access to ‘information centres on HIV/AIDS, tuberculosis and other related infectious diseases’.<sup>50</sup>

Also, the African Commission has held that discrimination based on disability prevents women from realising their right to self-protection and protection from HIV infection and emphasised the right of women with physical and mental disabilities to be informed of their health status.<sup>51</sup>

Specific measures aimed at facilitating access to employment, professional and vocational training for WWDs should, *inter alia*, promote employment opportunities and career advancement for WWDs (including assistance in finding, maintaining and returning to employment), and ensure their effective access to general technical and vocational guidance programmes.<sup>52</sup>

To facilitate effective participation in decision-making, states have to provide necessary financial and political support.<sup>53</sup> WWDs’ right to participate in decision making can only be limited ‘on objective and reasonable criteria established by law’.<sup>54</sup> In *Purohit*, the African Commission found no objective bases within the legal system of the state to exclude persons with mental disabilities from political participation.<sup>55</sup> It also clarified that legal incapacity may not necessarily mean mental incapacity, and the former can only be invoked with reference to a law that conforms to internationally acceptable norms and standards.<sup>56</sup> Domestic case law has also addressed the question of the participation of WWDs, specifically their representation in elective bodies. For example, the Kenyan case of *Njoroge v Independent Electoral Boundaries Commission*<sup>57</sup> confirms that PWDs cannot be excluded from elections based on their disability. Reference was made in the case to article 23 of the Maputo Protocol, among other provisions in the Protocol and other treaties, which the court noted with appreciation, adding that the instruments should be read ‘in line with the Constitution of Kenya and in light of the claim of the petitioners’.<sup>58</sup> State duty to ensure the right of WWDs to participate in decision-making in article 23 was also mentioned in *National Gender and Equality Commission v Independent Electoral and Boundaries*

50 African Commission ‘ESCR principles and guidelines’ (n 34) paras 3 & 67.

51 General Comment 1 on art 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, African Commission (6 November 2012) paras 4 & 15.

52 African Commission ‘ESCR principles and guidelines’ (n 34) para 59.

53 As above para 29.

54 *Purohit* (n 45) paras 75-76.

55 *Purohit* (n 45) para 76.

56 *Purohit* (n 45) para 75.

57 *Njoroge v Independent Electoral Boundaries Commission (IEBC)* [2013] eKLR.

58 *Njoroge* (n 57) 7 & 17.

*Commission*<sup>59</sup> and *Director of Public Prosecutions, Western Cape v Prins*<sup>60</sup> to support the contentions in the cases, but the provision was not elaborated on by either court.

States' obligation to ensure WWDs are not discriminated against based on disability includes an obligation to take reasonable accommodation measures. This is drawn from the definition of 'discrimination based on disability' as 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others, of all human and peoples' rights in the political, economic, social, cultural, civil or any other field' and includes 'denial of reasonable accommodation'.<sup>61</sup> Reasonable accommodation refers to 'necessary and appropriate modifications and adjustments where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human and Peoples' Rights'.<sup>62</sup> Hence, states have to 'recognise and take steps to combat intersectional discrimination' based on sex/gender and disability.<sup>63</sup> As held in *Purohit*, condemning a person described as a lunatic to automatic and indefinite institutionalisation is contrary to the rights to equality and non-discrimination.<sup>64</sup> In the case, the African Commission linked the right to non-discrimination to human dignity, holding that dignity 'is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination'.<sup>65</sup> It found the use of terms like 'lunatic' and 'idiots' in the challenged legislation to describe persons with mental disabilities to be dehumanising and a denial of their human dignity.<sup>66</sup> It also held that at the heart of the right to dignity is the right to enjoy a decent life.<sup>67</sup> Hence, state measures should aim at ensuring WWDs have a decent life. In the context of children (thus girls) with disabilities, the African Court on Human and Peoples' Rights (African Court) in *PALU Vagrancy Opinion* (endorsing the UN Committee on the Rights of the Child's position) held that 'particular attention must be paid to *de facto* discrimination and disparities, which may be the result of a lack of a consistent policy'.<sup>68</sup>

The African Commission has further elaborated on state obligations in relation to the rights to education, housing, property and social security of PWDs, thus applicable to WWDs. On education, states are required to work towards inclusive education through maximisation of 'academic and social development'. They have to ensure the provision of 'inclusive, quality and free primary education and access to inclusive quality secondary and tertiary education' without distinction to children with disabilities (CWDs) (thus includes GWDs) and 'effective individualised support measures' in academic and social development environments, with the goal of full inclusion.<sup>69</sup> On housing, and in the context of evicted persons who are wounded and sick, states are required to pay 'special attention' to the health needs of WGWDs and ensure they receive necessary medical attention and care 'to the fullest extent practicable and with the least possible delay' and have access to social and psychological services.<sup>70</sup> On property, the African Commission has emphasised states' duty to ensure WWDs do

59 *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & Another* [2013] eKLR paras 29-30.

60 *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (10) BCLR 1049 (SCA) para 1.

61 Protocol on the Rights of Persons with Disabilities, art 1.

62 Protocol on the Rights of Persons with Disabilities, art 1.

63 African Commission 'ESCR principles and guidelines' (n 34) para 38.

64 *Purohit* (n 45) paras 44 & 54.

65 *Purohit* (n 45) para 57.

66 *Purohit* (n 45) para 59.

67 *Purohit* (n 45) paras 49, 57 & 61.

68 *Pan African Lawyers Union (PALU)*, Request 001/2018, Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa (ACTHPR 4 December 2020) (*PALU Vagrancy Opinion*) para 125.

69 African Commission 'ESCR principles and guidelines' (n 34) para 71.

70 African Commission 'ESCR principles and guidelines' (n 34) para 79.



not face discrimination, enjoy their right to equal sharing of joint property deriving from marriage, and are provided with effective access to justice during divorce proceedings.<sup>71</sup> States have to include quantitative and qualitative data disaggregated by disability, among other factors, when reporting on measures to ensure women's right to property.<sup>72</sup> On social security, states' social protection systems should cover disability as one of the principal branches of social security, providing adequate income support to PWDs.<sup>73</sup> To ensure timely social security benefits and physical accessibility to social security services, '[p]articular attention' must be paid to PWDs.<sup>74</sup>

Furthermore, states have a positive obligation to amend or repeal domestic laws that are contrary to the protections required under article 23. This was confirmed in *PALU Vagrancy Opinion*.<sup>75</sup> Though article 23 was not implicated in the case, in finding vagrancy laws to be incompatible with the right to protection of the family under article 18 of the African Charter (which article 23 supplements), the African Court held that 'arrests and detentions under vagrancy laws may result in the forcible removal of the suspected "vagrants" from their families' and, as a result, 'other family members that rely on those arrested under vagrancy laws, most notably ... the disabled may suffer from the deprivation of financial and emotional support', with the arrest accentuating their vulnerability.<sup>76</sup> It then affirmed states' positive obligation to 'repeal or amend' vagrancy and related laws, 'within reasonable time' but 'in the shortest time possible' to ensure compliance with the Maputo Protocol and other regional human rights standards.<sup>77</sup> This obligation is further in sync with the state obligation under article 8(6) of the Protocol to take all appropriate measures to 'reform of existing discriminatory laws and practices to promote and protect the rights of women'.

### 3.4 Linkages to other treaty provisions

#### 3.4.1 Other Maputo Protocol provisions

Article 23 should be read together with the general obligation clause, article 26(1) of the Maputo Protocol, which is of overarching applicability<sup>78</sup> and provides clarity on the implementation measures required. Article 26(1) obliges states to adopt 'legislative and other measures' aimed at 'full realisation of the rights' in the Protocol. Hence, under article 23, states must adopt legislative and other measures. Article 26(2) also imposes a general obligation on states parties to 'provide budgetary and other resources for the full and effective implementation of the rights' of WWDs. As evidenced from the African Commission's *Purohit* decision and recommendation on Zimbabwe,<sup>79</sup> even where resources are inadequate, effective use of resources is required. In addition, the obligation of states to ensure WWDs are protected from discrimination based on age is reinforced in article 2 of the Maputo Protocol. Also, since WWDs are poor and marginalised, article 24 is relevant, as it requires special protection of poor women, including those from marginalised groups, and the provision of an environment to them that is suitable to their needs and condition. Likewise, provisions requiring states to respect the dignity

71 General Comment 6 on art 7(d) of the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa: The right to property during Separation, divorce or Annulment of marriage, African Commission (4 March 2020) paras 54 & 56.

72 General Comment 6 (n 71) 63.

73 General Comment 6 (n 71) para 82.

74 General Comment 6 (n 71) para 82.

75 *PALU Vagrancy Opinion* (n 68).

76 *PALU Vagrancy Opinion* (n 68) para 104.

77 *PALU Vagrancy Opinion* (n 68) para 155.

78 This is in line with the African Court's interpretation of a similar obligation clause, art 1 of the African Charter (see *Thomas v Tanzania*, Application 005/2013, Judgment on Merits (20 November 2015) para 136.

79 See secs 3.3 above & 4 below.

(article 3) and the integrity and security of women (article 4), eliminate harmful practices (article 5), and ensure rights to property (article 7) and health (article 14) are relevant.

### 3.4.2 Other treaty provisions

At the African regional level, in addition to guaranteeing rights for ‘all’ and requiring states parties to recognise and give effect to them, the right of PWDs to ‘special measures of protection in keeping with their physical and moral needs’ is provided for in article 18(4) of the African Charter. In *Purohit*, the African Commission reiterated this, holding that ‘as a result of their condition and by virtue of their disabilities, mental health patients should be accorded special treatment which would enable them not only attain but also sustain their optimum level of independence and performance’.<sup>80</sup> Also of relevance to WWDs is article 18(3)’s obligation on states to eliminate discrimination against women and protect their rights. Furthermore, article 23 obligations have been reinforced in article 27 of the Protocol on the Rights of Persons with Disabilities. The provision requires states to, *inter alia*:

- eliminate barriers that thwart the participation of WWDs in society and barriers in the labour market;
- protect WGWDs from discrimination based on disability;
- protect WWDs from – and provide them with psychosocial and rehabilitation and support against – sexual and gender-based violence;
- develop programmes aimed at overcoming their social and economic isolation;
- ensure their access to income-generating opportunities;
- adopt and implement specific measures to ensure their full participation in sports, culture and technology; and
- integrate disability-inclusive gender perspectives in legislation, plans, policies, programmes, budgets and other activities.

As the main regional treaty on the rights of PWDs, other provisions in the Protocol on the Rights of Persons with Disabilities are applicable to WWDs. Also of importance is its safeguard clause (article 36), requiring that interpretations of the Protocol not derogate from principles and values in other relevant instruments and that, in the event of a conflict, preference be given to interpretations that favour rights of PWDs and protect their legitimate interest. Other regional treaties with provisions relevant to WGWDs (which the Protocol on the Rights of Persons with Disabilities cites in its Preamble) are the African Youth Charter,<sup>81</sup> African Charter on Democracy, Elections and Governance,<sup>82</sup> and African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.<sup>83</sup> Regarding WWDs that are elderly, article 23 should be read alongside relevant provisions of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons,<sup>84</sup> especially its article 13, in terms of which states have a duty to protect the rights of elderly WWDs through legislative and other measures and ensure they have access to assistive devices and specialised care commensurate with their needs.

At the UN level, CRPD, which has been widely ratified by African states<sup>85</sup> and is recognised in the Preamble to the Protocol on the Rights of Persons with Disabilities, guarantees the rights for persons with disabilities with correlating state obligations. It recognises that WGWDs ‘are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment,

80 *Purohit* (n 45) para 81.

81 Adopted 2 July 2006, entered into force 8 August 2009.

82 Adopted 30 January 2007, entered into force 15 February 2012.

83 Adopted 23 October 2009, entered into force 6 December 2012.

84 Adopted 31 January 2016, not yet in force (with nine ratifications – Angola, Benin, Burundi, Ethiopia, Kenya, Lesotho, Malawi, Rwanda and Togo, and 14 other signatories as at March 2023).

85 Ratified by 51 African states and signed by one other as at March 2023.

maltreatment or exploitation' and 'are subject to multiple discrimination'.<sup>86</sup> States, therefore, have an obligation to take appropriate measures to ensure their full and equal enjoyment of rights and their empowerment, development and advancement.<sup>87</sup> The CRPD Committee has elaborated on states' obligations in relation to women and GWDs under article 6 of the CRPD and with reference to general principles in article 3 of the Convention.<sup>88</sup> The principles include respect for inherent dignity, equality, non-discrimination and full and effective participation, which are also echoed in article 23 of the Maputo Protocol. Overall, the committee emphasised states' obligations to take all appropriate measures (legislative, administrative, educational, cultural, political, linguistic and other measures) to ensure full and equal enjoyment of rights by WDDs and achieve and promote their advancement and empowerment. Measures could be temporary or long term. The committee further underscored states' obligations to respect, protect and fulfil the rights of WWDs and in relation to specific rights (including those explicitly captured in article 23 of the Maputo Protocol).

## 4 Implementation

As seen below, states have adopted constitutional, legislative and other measures aimed at protecting the rights of persons (including women) with disabilities. Many state reports to the African Commission are on measures taken with reference to article 18(4) of the African Charter. However, some have reported specifically on article 23, such as the latest reports of Lesotho, Kenya, Seychelles, South Africa, Burkina Faso, Zimbabwe, Angola, Malawi, Eswatini and Namibia, referred to below as illustrative examples.

The African Commission has applauded Rwanda for the progress made in supporting the rights of PWDs and in ensuring they not only benefit from but can contribute to national development.<sup>89</sup> Particularly, programmes have been put in place to facilitate access to education by WGWDs, strategies and guidelines have been developed for mainstreaming disability in the health system at the community level, and gender promotion and promotion of WWDs is highlighted in policy on modalities of recruitment, appointment and nomination of public servants.<sup>90</sup> In addition, the government has a principle of '[n]o one left behind' aimed at facilitating access to employment and other social programs for PWDs, has established a National Council for Persons with Disabilities to deal with issues affecting PWDs, and ensures representation of PWDs in parliament (one representative of PWDs in the Parliament's Chamber of Deputies).<sup>91</sup> Though Rwanda has adopted constitutional, legislative and other measures aimed at protecting PWDs and facilitating disability mainstreaming, including the adoption of the Law to Protect the Rights of Persons with Disabilities, financial, capacity, structural and ideological challenges to implementing the Maputo Protocol remain; hence, the state's recognition of the need for relentless efforts to ensure sustainability and improvement of achievements.<sup>92</sup>

The African Commission has expressed concern over the lack of specific disability law at the domestic level that is in line with relevant regional standards. In Lesotho, for example, where this

86 CRPD, Preamble & art 6.

87 As above art 6.

88 General Comment 3 (n 6).

89 African Commission Concluding Observations and Recommendations on the Combined 11th to 13th Periodic Report of Rwanda, adopted at its 64th ordinary session 24 April to 14 May 2019, para 78.

90 As above. It should however be noted that CRPD Committee has raised concern over accessibility of health care facilities and public health education in remote areas and exclusion of refugees with disabilities from health care coverage in Rwanda. Concluding Observations on the initial report of Rwanda, CRPD Committee (3 May 2019), UN Doc CRPD/C/RWA/CO/1 (2019) para 45.

91 African Commission Concluding Observations on Rwanda: 11th to 13th Periodic Report (n 89) paras 15 & 25.

92 Republic of Rwanda the 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the implementation status of the African Charter on Human and Peoples' Rights and the initial report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights and the rights of women in Africa (2017) paras 123-126 & 130.

gap existed, the African Commission called on the state to ensure its draft Disability Bill complies with standards in the Protocol on the Rights of Persons with Disabilities.<sup>93</sup> Lesotho reported on constitutional, legislative (acknowledging the absence of a disability-specific law) and administrative (including plans to counter poverty faced by WWDs through, *inter alia*, social grants) measures to give effect to article 23.<sup>94</sup> It also noted challenges that WWDs face such as discrimination based on disability and gender, forced sterilisation, inadequate infrastructure that reasonably accommodates them, stagnant or ineffective law enforcement of cases of PWDs, and inability of WWDs that have graduated from vocational programme to start their own businesses due to non-provision of start-up kits.<sup>95</sup> The challenges point to failure of the state to implement article 23 effectively. The African Commission called on the state to raise awareness on issues of disability and on how to mainstream the rights of PWDs.<sup>96</sup> Another implementation concern related to the insufficiency of special schools for CWDs.<sup>97</sup> This affects GWDs' education right, which should be protected in terms of, among others, article 23. The African Commission called on Lesotho to provide more special schools for CWDs.<sup>98</sup> Lesotho was commended for its provision of health services to PWDs without waiting for payment, provision of sign language in courts, and ongoing efforts to make legislation accessible to PWDs.<sup>99</sup>

Though Malawi has domestic disability law (Disability Act) and policies (like the National Action Plan on Persons with Albinism and the National Disability Mainstreaming Strategy and Implementation Plan 2018-2023) to address issues affecting PWDs, the African Commission was concerned that the law was still under review, requesting the state to enact it into the law.<sup>100</sup> Furthermore, a major challenge to the implementation of Maputo Protocol provisions in Malawi, identified by the state, is the implementation of domestic laws and policies.<sup>101</sup> Also, the lack of disability-friendly justice services, including sufficient officers trained on the needs of WGWDs, has resulted in them experiencing exclusion and denial of access to justice.<sup>102</sup>

Implementation gaps also exist in Kenya despite some commendable measures adopted. Kenya has policies, programmes, plans and institutional measures aimed at ensuring the inclusion of persons with disabilities in society and learning institutions, including in regular schools.<sup>103</sup> Specifically, the National Policy for Persons with Disabilities, the Disability Policy and Guidelines for the Public Service, the National Plan of Action on the Rights of Persons with Disabilities 2015-2022, the Sector Policy for Learners and Trainees with Disability, and Education Assessment and Resource Centres for assessment of children with special needs and promotion of their inclusion in regular schools.

93 African Commission Concluding Observations and Recommendations on the Kingdom of Lesotho's Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa adopted at its 68th ordinary session 14 April to 4 May 2021, paras 52 & 73.

94 The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2018) paras 527-530.

95 Lesotho (2018) (n 94) paras 531-533.

96 Lesotho (2021) (n 94) para 73.

97 Lesotho (2021) (n 94) para 53.

98 Lesotho (2021) (n 94) para 74.

99 Lesotho (2021) (n 94) para 26.

100 African Commission Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of Malawi 2015-2019, adopted at its 70th ordinary session 2022, paras 42 & 55.

101 Republic of Malawi 2nd to 3rd Periodic Report on the Implementation of the Provisions of the African Charter and the Protocol to the African Charter on the Rights of Women in Africa, 2015-2019 (2020) para 142.

102 Malawi (2020) (n 101) para 250.

103 Republic of Kenya Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) para 309.

However, Kenya faces implementation challenges related to access to housing, basic services, buildings and transport, and the existence of multiple forms of discrimination against WGWDs.<sup>104</sup> Relevant to addressing these challenges is the state's National Gender and Equality Commission, mandated 'to monitor and promote mainstream issues of disabilities ... in governance structures in order to achieve substantive equality and inclusion at all levels'.<sup>105</sup> In reporting on other rights in the African Charter and Maputo Protocol, Kenya referred to policy and other measures taken to protect the rights of PWDs and facilitate their participation in political and cultural life.<sup>106</sup>

The impact of measures in some contexts is unclear due to underreporting on article 23. Seychelles, for example, scantily reported on legislative and other measures adopted to ensure equality in benefits and rights between women and men with disabilities and equal access to free health care, social protection and schooling.<sup>107</sup> They include the Disabled Person's Act (to serve in the best interest of PWDs), Exceptional School of Seychelles (to cater for the educational needs of PWDs) and Vocational Training Center (to prepare PWDs to enter the working world). In reporting on other rights, the state referred to general legislation (Employment Act) that addresses the consequences of discrimination based on gender or disability in the workplace.<sup>108</sup> It has also provided income support for travel for PWDs.<sup>109</sup> The African Commission has yet to issue its observations on the report at the time of writing. However, the information is not detailed enough to provide a full picture on the implementation of article 23.

In addition to underreporting, non-disaggregation of information makes it difficult to monitor and understand the extent of WWDs that have benefitted from measures directed at PWDs. Burkina Faso, for example, reported with limited information on article 23, indicating adoption of legislative and institutional measures, and the disability card system that provides benefits in the areas of housing and living conditions, education, health, social welfare, employment, vocational training, social integration, communication, transportation, sports and leisure, and culture and arts.<sup>110</sup> The information is, however, not disaggregated; hence, the extent of representation of WWDs among the beneficiaries is unclear. Notwithstanding, the African Commission commended Burkina Faso for having the measures in place.<sup>111</sup> Rwanda also provided limited statistics when reporting on article 23, specifically statistics of GWDs *vis-à-vis* males at different levels of education, reflecting progress in promoting education for GWDs.<sup>112</sup> The African Commission also expressed concern over the lack of adequate disaggregated data on gender, age, type of disability and other elements that are important in formulating policies for PWDs in relation to South Africa.<sup>113</sup> It thus recommended that South Africa provides such data in its subsequent report.<sup>114</sup>

104 Kenya (2020) (n 103) para 309.

105 Kenya (2020) (n 103) para 307.

106 Kenya (2020) (n 103) paras 78, 122, 127 & 131-135. See also Concluding Observations and Recommendations on the Combined 8th to 11th Periodic Report of Kenya, African Commission (19th extraordinary session, 2016) para 20, commending Kenya on some measures adopted.

107 Seychelles: 3rd Periodic Report, 2006-2019, African Commission (69th ordinary session, 2021) 47-48.

108 Seychelles (n 107) 33.

109 Seychelles (n 107) 49.

110 Burkina Faso 3rd and 4th Periodic Report on the implementation of the African charter (2011-2013) (2015) paras 354-356.

111 African Commission Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso 2011-2013 adopted at its 21st extraordinary session, 2017, para 12.

112 Rwanda: 11th to 13th Periodic Report (n 92) part B para 125.

113 African Commission Concluding Observations and Recommendations on the 2nd Periodic Report of South Africa' adopted during its 20th extraordinary session, 2016, para 39.

114 South Africa (2016) (n 113) para 55.

Furthermore, the African Commission raised concern over provision of inadequate information on PWDs or on the actual implementation of measures that have been put in place in relation to Zimbabwe. The African Commission was concerned that the state did not provide information on measures taken to combat discrimination and stigmatisation for PWDs and how measures, policies and strategies put in place to protect their rights have been effectively implemented especially in the rural areas.<sup>115</sup> On article 23, Zimbabwe referred to provisions in its constitution requiring the state to ensure PWDs, including WWDs are protected from exploitation and abuse, realise their full potential, participate in social and other activities, and are provided state-funded education and training where required.<sup>116</sup> The state also referred to administrative, policy and institutional measures, including collaborative initiatives to ensure WGWDs have access to quality health and are given equal treatment and disability awareness training of health workers.<sup>117</sup> The state cited 'significant economic challenges' it is facing, which severely hamper effective provision for the rights and welfare of PWDs.<sup>118</sup> The African Commission, though noting that limited resources affect Zimbabwe's ability to ensure enjoyment of the rights in the Maputo Protocol, called on Zimbabwe to adopt legislative and other measures to combat discrimination and stigmatisation against PWDs, adopt and effectively implement appropriate policies and support programmes to protect their rights, and establish adequate budgetary and material resources to address inequality and other challenges faced by PWDs which restrict their full enjoyment of rights.<sup>119</sup> Hence, states have to ensure the effective use of resources, and limited resources would not absolve a state from its article 23 obligations.

Discrimination against WWDs and their subjection to cultural, social and economic disadvantages are a challenge in Namibia, impeding their access to education, training and employment.<sup>120</sup> Programmes or campaigns to raise awareness on disability and the rights of PWDs is thus a key feature in the state's implementation measures.<sup>121</sup> The state has also adopted disability-specific legislation (National Disability Council Act) and policy (National Disability Policy), among other measures.<sup>122</sup> Similarly, constitutional and comprehensive legislative measures exist in South Africa to address discrimination based on disability and advance social inclusion.<sup>123</sup> The African Commission has commended South Africa for the measures adopted, including its provision of disability grants and free health care services for PWDs and its adoption of a framework for mainstreaming disability issues into policies, plans, programmes and activities of local government.<sup>124</sup> However, full realisation of rights of PWDs is undermined by stereotypes and other perceptions; hence, the African Commission called on South Africa to develop a proactive sensitisation policy to reduce or eliminate the stereotypes/perceptions.<sup>125</sup>

Limited resources (human and financial) and facilities dedicated to PWDs have also been a concern in Eswatini, with the African Commission recommending that the state allocates adequate resources

115 African Commission Concluding Observations and Recommendations on the Combined 11th to 15th Periodic Report of Zimbabwe adopted during its 69th ordinary session, 2021, para 49.

116 Zimbabwe: Combined 11th to 15th Periodic Report, 2007-2019, African Commission, 65th ordinary session, 2019, part C paras 11.2 & 11.3.

117 Zimbabwe (n 116) part C paras 11.6-11.10.

118 Zimbabwe (n 116) part C para 11.11.

119 Concluding observations on Zimbabwe: 11th to 15th Periodic Report (n 115) paras 34 & 63.

120 Republic of Namibia 7th Periodic Report on the African Charter on Human and Peoples' Rights and the second report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) para 33.

121 Namibia (n 120).

122 Namibia (n 120) sec B para 84.

123 Republic of South Africa Combined Second Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2015) paras 526-532.

124 Concluding Observations on South Africa: 2nd Periodic Report (n 113) para 18.

125 Concluding Observations on South Africa: 2nd Periodic Report (n 113) para 55.

and facilities to PWDs.<sup>126</sup> The African Commission was also concerned about restricted access to healthcare for PWDs and limited communication capacity.<sup>127</sup> It thus called on the state to continue to support accessibility for PWDs through adequate resource provision, improve access to healthcare facilities for PWDs, and build the necessary capacity to facilitate effective communication with them.<sup>128</sup> Eswatini has adopted constitutional, legislative and other measures affording protection to WWDs but their effective implementation remains a challenge. The measures include disability-specific legislation to promote and protect rights of PWDs (Persons with Disability Act), policy providing strategies to promote and protect rights of PWDs (National Disability Policy), plan to ensure mainstreaming of disability in planning, implementation and monitoring of programmes (National Disability Action Plan, 2018-2022), and skills training for WWDs.<sup>129</sup> However, the Act is not fully operationalised due to the non-establishment of key institutions provided for under the Act.<sup>130</sup>

States have generally not adequately addressed discrimination against WWDs. In addition to the aforementioned examples where discrimination is persistent, it is also a concern in Angola despite having legislative and other measures in place. On article 23, Angola referred to the adoption of legislative frameworks that guarantee the rights of PWDs.<sup>131</sup> Their practical application/impact is however unclear. A social protection measure has also been put in place (Social Support Programme) under which 12 457 WWDs (out of 27,684 persons) have benefitted from compensation and technical aids.<sup>132</sup> A critical implementation challenge identified by the state is ‘multiple discrimination’ that women and CWDs face, with the state taking measures to guarantee equal enjoyment of rights.<sup>133</sup> Generally, the state acknowledged the existence of various challenges, particularly cultural ones, in fulfilling women’s rights, but which could be addressed through adoption of different programmes and plans.<sup>134</sup> Hence, the state is falling short in terms of meeting its article 23 obligations in some respects.

Generally, some implementation measures are in line with article 23, while others are inadequate. In some cases, the legislative measures are general (that is, they address disability generally as opposed to adopting a specific law on PWDs that comprehensively addresses their rights and needs). The African Commission has thus called on some states, as seen above, to enact specific laws on PWDs, and to ensure the enacted law accords with standards in relevant regional treaty law. Effective implementation of adopted measures remains a challenge, and lack of disaggregated data contributes to the invisibility of WWDs. Underreporting on implementation of article 23 is a challenge, limiting effective monitoring.

One of the aspects that states have underreported on is sexual abuse against WWDs with reference to article 23 (with some state reports addressing violence in general). It is, however, evident from CRPD Committee’s observations that some African states are falling short on implementation of their obligation to ensure WWDs are free from violence including sexual abuse. The CRPD Committee’s

126 Concluding Observations and Recommendations on the Kingdom of Eswatini’s Combined 1st to 9th Periodic Report on the implementation of the African Charter on Human and Peoples’ Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa, ACHPR 70th ordinary session: 23 February-9 March 2022, paras 42 & 74.

127 Concluding Observations and Recommendations Eswatini (n 126) para 42.

128 Concluding Observations and Recommendations Eswatini (n 126) paras 42 & 74.

129 Kingdom of Eswatini Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Periodic Report on the African Charter on Human and Peoples’ Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa (2021) paras 632-639.

130 Eswatini Periodic Report (2021) (n 129) para 641.

131 Republic of Angola 6th and 7th Report on the Implementation of the African Charter on Human and Peoples’ Rights and Initial Report on the Protocol on the Rights of Women in Africa 2011-2016 (2017) para 123.

132 Angola (n 131) part C para 121.

133 Angola (n 131) part C para 125.

134 Angola (n 131) part C paras 126-127.

observations are instructive as a similar obligation is contained in the CRPD, requiring state parties to ensure PWDs are free from violence and abuse. For example, regarding Rwanda, CRPD Committee raised concern over, *inter alia*, prevalence of violence, abuse and neglect against PWDs particularly women, lack of effective measures to monitor and prevent sexual, gender-based and other forms of violence in communities, refugee camps, institutions and homes where PWDs live, and absence of ‘dedicated mechanisms for identifying, investigating and prosecuting’ perpetrators.<sup>135</sup> On South Africa, CRPD Committee raised concern over, *inter alia*, lack of measures to prevent and tackle violence, ‘including rape and other forms of gender-based sexual violence’ and abuse against WGDs and to protect women and girls with intellectual and psychosocial disabilities from all forms of violence and abuse, and the absence of ‘dedicated mechanisms for identifying, investigating and prosecuting instances of exploitation, violence and abuse against’ PWDs.<sup>136</sup> Recently, CRPD Committee raised concern about the omission of provisions on the elimination of violence against WWDs, including conjugal violence, in Tunisia’s law on the elimination of violence against women (Law No. 2017-58 of 11 August 2017) and the fact that staff who respond to reports of violence against women are not trained to work with WWDs.<sup>137</sup> CRPD made recommendations towards addressing these implementation gaps.

## 5 Conclusion

UN and African regional frameworks have been developed aimed at creating enabling environments that accommodate all persons in their diversity and promote inclusiveness. At the national level, some states have adopted specific laws on PWDs recognising this shift, while others are yet to do so. The intersection between gender and disability has been recognised in both international and domestic frameworks. article 23 of the Maputo Protocol underscores the importance of ensuring a gender perspective in state interventions relating to PWDs. It departs from the approach in the African Charter in not conflating WWDs with elderly women and children under a provision on the family. Furthermore, regional and domestic jurisprudence has sought to protect the rights of PWDs, underscoring non-discrimination or exclusion on basis of disability, states’ obligation to protect PWDs and ensure their rights, the need for domestic laws to be consistent with their rights and needs, and the multiple and intersecting violations that PWDs experience. Gaps, however, remain in terms of its practical implementation, resulting in persistent discrimination, violence and abuse against WWDs and violation of their rights. Measures are thus required to ensure adequate protection of WWDs and improvement of their situation. In addition to the adoption of specific legislation on PWDs that incorporates a gender perspective (where such is lacking), states should ratify and domesticate the Protocol on the Rights of Persons with Disabilities. This is likely to trigger greater inclusion of the concerns of PWDs and WWDs in domestic laws and policies. Publication of disaggregated data by gender on PWDs, including as beneficiaries of state measures, is relevant to ensuring proper monitoring of the implementation of article 23. States should educate society as whole on the needs and rights of WWDs as part of efforts to, *inter alia*, eliminate the stigma associated with disability, address discrimination, abuse, violence and ensure they are treated with dignity. Also, there is a need for African states, as part of specific measures required under article 23, to develop ‘an intersectional lens in criminal justice systems to ensure greater criminal accountability for violence that WWDs face daily’.<sup>138</sup>

135 Concluding Observations on Rwanda: Initial report (CRPD) (n 90) paras 29-30.

136 CRPD Committee Concluding Observations on the Initial Report of South Africa (23 October 2018), UN Doc CRPD/C/ZAF/CO/1 (2018) paras 10, 11 & 30-31.

137 CRPD Committee Concluding Observations on the Combined 2nd and 3rd Reports of Tunisia (24 March 2023), UN Doc CRPD/C/TUN/CO/2-3 (2023) paras 27-28.

138 See generally, A Johnson & S Nabaneh ‘The invisible woman: limits to achieving criminal accountability for violence against women with disabilities in Africa’ in A Budoo-Scholtz & EC Lubaale (eds) *Violence against women and criminal justice in Africa: volume II, sexual violence and vulnerability* (2022) 259-301.



Though primary responsibility for implementation of article 23 rests with states, the African Commission, African Court, civil society organisations (CSOs), WWDs and other individuals have a role to play. The role of CSOs and individuals includes respecting the rights of WWDs and raising awareness of their needs, with the primary responsibility still resting with states. The African Commission, as seen from the preceding sections, is a relevant actor in monitoring and enforcement of article 23 through its reporting and complaints procedures. Another relevant mechanism within the African Commission is its Working Group on the Rights of Older Persons and Persons with Disabilities, established in 2009 and mandated to, *inter alia*, ensure proper mainstreaming of the rights of PWDs in state policies and development programmes and identify good practices to be replicated by states.<sup>139</sup> Also, the African Commission's Special Rapporteur on Women in Africa can monitor implementation and has called on states to ensure that gender mainstreaming efforts at national level 'are comprehensive and inclusive of all categories of women especially ... women with disabilities',<sup>140</sup> thus recognising an implementation gap in this respect. In addition, the African Court has a role in ensuring the implementation of article 23, especially in cases of violations if presented with an opportunity, as it has jurisdiction over matters of interpretation arising from the application or implementation of the provision.<sup>141</sup> Such an opportunity is necessary, as there is a need to further develop jurisprudence, specifically on article 23 of the Maputo Protocol, as evident from the case law considered in this chapter. The overall goal should be the realisation of the rights and needs of WWDs.

139 Resolution 143 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, African Commission (27 May 2009) ACHPR/Res.143(XXXV)09. The group comprises five members (two Commissioners of the African Commission and three experts in the field).

140 Special Rapporteur on Rights of Women in Africa 'Inter-session Activity Report (May-November 2021)', MT Manuela, African Commission (69th ordinary session 15 November-5 December 2021) para 25 (Recommendation 6).

141 Maputo Protocol, art 27. This interpretive mandate is reaffirmed in Protocol on the Rights of Persons with Disabilities, arts 34(4) & (5).