

Article 15

Right to food security

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States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- (b) establish adequate systems of supply and storage to ensure food security.

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1 Introduction

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) is the first international treaty to explicitly protect the right to food security. Before its advent, the legal protection of the right to food security could be deduced directly or indirectly from existing African and global human rights instruments.¹ Article 15 of the Maputo Protocol crowns

1 International Convention on Economic, Social and Cultural Rights, art 11 (right to food); Convention on the Elimination of All the Forms of Discrimination against Women (CEDAW) art 14 (right of rural women); UN Convention on the Rights of the Child (CRC) arts 24 & 27; African Charter on the Rights and Welfare of the Child (African Children’s Charter) art 14 (health and health services) and, indirectly, from the African Charter on Human and Peoples’ Rights (African Charter) arts 4, 16 & 22.

political and economic strides made by African states within and outside the African Union to ensure that the best attainable standard of living for women is protected by binding legal standards.² These standards are supplemented with a robust institutional framework comprising the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). These two human rights organs are mandated to deal with communications or complaints related to food security;³ the former can specifically review the implementation of article 15 by member states.⁴ This judicialisation of the right to food security, understood as the ability for individuals to bring food security-related claims before judicial and quasi-judicial mechanisms, ensures that the right of women to food security is not merely on paper.

Given the significance of women's right to food security in Africa, the normative and institutional frameworks safeguarding the right are vital. Women shoulder significant responsibility for ensuring personal and household food security in Africa. This responsibility is often explicitly reflected in the multiplicity of roles African women juggle in food systems, from agricultural production to consumption.⁵ African women make up 50 to 60 per cent of the agricultural labour force and are further involved in long hours of unpaid household work, including food gathering and preparation.⁶ Whether directly or indirectly involved in food system processes, African women are critical to individual, national and continent-wide food security levels.

Despite their quintessential role in food systems and food security, African women are highly represented in food insecurity and malnutrition statistics. As of 2018, 25.2 per cent of women in Africa were food insecure against 23.7 per cent of men.⁷ In addition, more women in Africa suffer from one or more forms of malnutrition, with underweight affecting an estimated 27-51 per cent of African women of reproductive age, while obesity is a challenge for 17 per cent.⁸ Intersectionality must be recognised in the way women face food security problems.⁹ Rural women, refugee women, internally displaced women, older women, women with disabilities or indigenous women are among the most vulnerable to food insecurity and malnutrition. The food security needs of these categories of women must therefore be considered and prioritised by states because of the disproportionate impact of food insecurity on their lives and dignity. For these reasons, including article 15 in the Maputo Protocol is a welcome development.

This chapter aims to unpack the normative content of article 15 by analysing its meaning, nature and scope. The chapter is divided into 7 sections, including this introduction. The next section details the drafting history of article 15. Section 3 examines the relationship between article 15 and other international human rights treaty provisions. Section 4 deals with critical concepts arising from article 15, followed by a discussion of the nature and scope of states parties' obligations in section 5. Section

2 R Murray *Human rights in Africa: from the OAU to the African Union* (2004) 253-255.

3 Maputo Protocol art 27.

4 Maputo Protocol art 28.

5 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 (2001-2019) para 551; African Commission Resolution on the Right to Food and Nutrition in Africa ACHPR/Res.431 (LXV) 2019 recognises the role women play in improving livelihoods especially in rural areas but acknowledges that their face the risk of being poor and malnourished.

6 Food and Agriculture Organization *The role of Women in Agriculture* (ESA Working Paper No. 11) Agricultural Development Economics Division <https://www.fao.org/3/am307e/am307e00.pdf> (2011) 3-17.

7 Food and Agriculture Organization & African Union 'Leaving no one behind: Empowering Africa's rural women for zero hunger and shared prosperity' (2018) 4 <https://www.fao.org/family-farming/detail/en/c/1153850/> (accessed 24 May 2023).

8 P Conceicao, R Fuentes-Nieva, L Horn-Phathanothai & A Ngororano 'Food security and human development in Africa: strategic considerations and directions for further research' (2011) 23 *African Development Review* 238.

9 J Bond *Global intersectionality and contemporary human rights* (2021) 2.

6 reviews measures of implementation by states parties, while section 7 concludes with broader reflections on article 15 and offers recommendations.

2 Drafting history

The Maputo Protocol's drafting history shows little debate on the normative content of the right to food security. During the inception meeting by the International Commission of Jurists and the African Commission in April 1997, aspects of the right to food security were protected under article 16 of the proposed Nouakchott Draft, guaranteeing the right of 'all women [to] have an equal right to men to have a healthy and adequate nutrition'.¹⁰ It was not identified as the 'right to food security' although the content of the provision resembles what is the right to food security in the Maputo Protocol today. In the 1999 Kigali Draft, article 16 went through a few linguistic clarifications and additions.¹¹ First, the indication 'right to food security' was added to the title of what then became article 17. Second, by contrast to the Nouakchott Draft, the Kigali Draft removed the reference to 'equal right to men,' simply guaranteeing women's right to 'access to nutritious and adequate food'.¹² Third, a few concepts were replaced with others,¹³ most notably, 'nutritional security' under article 17(1)(b), which was replaced with 'food security', the latter being broader in scope and content than mere 'nutrition'.¹⁴ The change from 'nutritional security' to 'food security' leaves one with the impression that the idea of framing the current article 15 as the right to food security only emerged during the Kigali meeting. While the normative content of the provision did not change significantly, framing this provision as one related to the right to food security has the potential of extending the protection to aspects of food security, for example, food prices and food safety, not explicitly mentioned under that provision but widely recognised in international law and by specialised 'food security' institutions.¹⁵

In the Final Draft¹⁶ and the Revised Final Draft,¹⁷ the right to food security became article 15 and 14, respectively. The notable modification was that instead of guaranteeing a qualified subjective right of women to food security as article 17 of the Kigali Draft did when it stated that 'women *shall have the right* to access to nutritious and adequate food',¹⁸ these provisions weakened the language in which the right to food security was couched by stating that '*states parties shall ensure that women have the right to nutritious and adequate food*'.¹⁹ This wording reflects the general understanding under international law that the realisation of socio-economic rights should be progressive and must consider resources

10 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft) 7.

11 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 (Kigali Draft).

12 Kigali Draft (n 11) art 17(1).

13 Eg, 'potable water' with 'clean drinking water'; 'domestic sources of energy' with 'sources of domestic fuel' as well as 'appropriate supply and storage systems so as to ensure their nutritional security' with 'adequate systems of supply and storage to ensure food security'.

14 DM Chirwa *Child poverty and children's rights of access to food and basic nutrition in South Africa: a contextual, jurisprudential and policy analysis* (2009) 10.

15 See broadly O de Schutter 'Building resilience: A human rights framework for world food and nutrition security', Report of the Special Rapporteur on the Right to Food, 8 September 2008, para 11.

16 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted 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* 53-65.

17 Revised Final Draft CAB/LEG/66.6/Rev.1, 22 November 2001 (Revised Final Draft).

18 Our emphasis. The South African Constitution sec 27(1)(b) provides: 'Everyone has the right to have access to sufficient food and water'.

19 Our emphasis.

available to the state.²⁰ In a 2003 meeting convened to discuss the Revised Final Draft, the Law Project of Equality Now and ten other women's rights organisations proposed that the auxiliary 'have' in the first sentence be replaced by 'enjoy' and that 'domestic' be removed.²¹ They also proposed that article 15(b) include a second limb which would read '... food security and *ensure that all family members, including girls, shall have access to nutrition and food*'.²² These proposed changes were not incorporated in the Addis Ababa Draft.²³

There is no evidence that the inclusion of women's right to food security was resisted at the various drafting and discussion meetings or by member states. Although the provision on women's right to food security was not the only uncontested provision during the drafting process,²⁴ the lack of opposition to this right offers several insights into the legal protection of the right to food security in Africa. First, the acceptance of article 15 may stem from the assumption that its content was not 'new' to African states, given that they had already committed to similar obligations provided for under relevant international human rights treaties.²⁵ Second, states that included the right to food security in their national constitutions may have viewed article 15 as nothing more than a restatement of their domestic commitment to an international treaty.²⁶ Last, article 15 could be interpreted as an effort by African countries to fill the normative lacuna left by the African Charter.²⁷ In any case, the relevance of article 15 in Africa is not in doubt, given the unequal effect of food insecurity on men and women, the latter bearing a heavy burden in feeding the family.

3 Linkages with other treaty provisions

This section explores the relationship between article 15 of the Maputo Protocol with other relevant international treaties. Article 15 can be said to have two types of relationships with other relevant provisions which enhance the quality of women's right to food security in Africa: an intra-textual, systemic and horizontal relationship with other provisions of the Maputo Protocol, the African Charter and its normative protocols, and other African human rights instruments. This is followed by a vertical relationship between article 15 and relevant global human rights treaties provisions. All these norms may constitute a system of legal norms that aim to improve women's food security in Africa and must be looked at as interlinked.²⁸

20 African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Socio-Economic Rights Principles) para 16; ICESCR art 2; UDHR art 22. L Hennebel & H Tigroudja *Traité de droit international des droits de l'homme* (2018) 1203-1204.

21 Revised Final Draft (n 17) 16 & 8.

22 Our emphasis. Revised Final Draft (n 17) 16.

23 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

24 Articles 16 & 17 were also adopted without amendment.

25 ICESCR art 11; CEDAW art 14; CRC arts 24 & 27; African Children's Charter art 14. The Universal Declaration of Human Rights, art 25 encapsulates the right to food security aspects.

26 South African Constitution secs 27(1), 28(1)(c) & 35(2)(e); Constitution of the Republic of Malawi, 1994 sec 30(2); Constitution of the Republic of Uganda, 1995 xxii. The Constitution of the Democratic Republic of the Congo (DRC), 2005 art 47(1) contains a right to food security.

27 L Chenwi 'The African system' in J Dugard, B Porter & D Ikawa (eds) *Research handbook on economic, social and cultural rights as human rights* (2020) 31; F Viljoen *International human rights law in Africa* (2012) 215. See also Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Food Security to the UN General Assembly (28 August 2003) para 17.

28 See also B Nkrumah 'Opening Pandora's box: a legal analysis of the right to food in South Africa' (2019) 52 *De Jure Law Journal* 47, 55.

Human rights are interdependent, interrelated and indivisible.²⁹ This entails that article 15 must be read in conjunction with other rights in the Maputo Protocol, whether civil and political, socio-economic, or collective rights. Article 15 is linked to foundational women's rights provisions such as the elimination of discrimination against women (article 2), the right to dignity (article 3), the rights to life, integrity and security of person (article 4) and the elimination of harmful practices (article 5). Article 2 advances the right to food security by requiring states to ensure equal access of women and men to the means of production and to take positive or remedial action to redress historical imbalances rooted in harmful cultural or religious practices that have feminised most food-related household activities.³⁰

Dignity is central to every human right,³¹ so the realisation of women's right to food security is integral to upholding their dignity.³² While the distribution of food parcels to women in need can be lauded, a dignified approach should empower them to produce their own food.³³ The African Commission took this approach in *Endorois*.³⁴ Indigenous women for whom land is more than a commodity should be enabled to produce and consume food from their ancestral lands. In *ACHPR v Kenya*³⁵ the African Court ruled that the Ogiek, who are a Kenyan indigenous community, should enjoy 'the right to use (*usus*) and the right to the produce of [their ancestral lands] (*fructus*)'.³⁶ This presupposes their right to access and possession of the land. Violating these rights means the Ogiek 'have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands'.³⁷ Article 7 is critical to women's rights to food security, particularly regarding land ownership after separation, divorce and annulment of marriage.³⁸ Effective protection of the right to food security under article 15 goes hand in hand with assuring women can own land and property and that widows can inherit the land of their deceased spouse irrespective of the matrimonial regime.³⁹ Similarly, their right of access to justice to vindicate their right to food security must be ensured, as should their participation in decision-making regarding food programmes and relevant development projects. Access to drinking water, food sources, and arable lands can be hampered when peace is absent.⁴⁰ Therefore realisation of the right to peace is also central to food security.⁴¹

29 Vienna Declaration and Programme of Action (Vienna Declaration). The Preamble to the African Charter makes it clear that 'civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.

30 As explained in the introduction.

31 L Ackermann *Human dignity: lodestar for equality in South Africa* (2012).

32 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 65.

33 B Saul, D Kinley & J Mowbray *The International Covenant on Economic, Social and Cultural Rights: commentary, cases, and materials* (2014) 870.

34 *Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009) para 283.

35 *African Commission on Human and Peoples' Rights v Kenya (ACHPR v Kenya)* (merits) (2017) 2 AfCLR para 201.

36 *ACHPR v Kenya* (n 35) para 201.

37 As above.

38 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The right to property during separation, divorce or annulment of marriage (art 7(d), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia (19 February-4 March 2020) para 47. See CN Musembi 'Article 7' in this volume.

39 African Commission Resolution on Women's right to land and productive resources – ACHPR/Res.262 (LIV) 2013 (African Commission Resolution 262).

40 A Ujunwa, C Okoyeuzu & EU Kalu 'Armed conflict and food security in West Africa: socioeconomic perspective' (2018) 46 *International Journal of Social Economics* 182.

41 See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) 251. See A Budoo-Scholtz 'Article 10' in this volume.

Articles 15 and 19 (on the right to sustainable development) can be said to be twin provisions in many respects. Food security programmes and plans of action are generally an integral part of national development policies and programmes. For women to effectively enjoy their right to food security, ‘access to and control over productive resources’, ‘access to credit, training, skills development and extension services at rural and urban levels’ must be guaranteed.⁴² Significantly, globalisation and neoliberal economic policies have reduced women’s control over productive resources, which are being grabbed by multinational corporations, with weakened state capacity for effective intervention. The impact of neoliberal policies and African countries’ liberal policies *vis-à-vis* foreign direct investment⁴³ must be minimised and appropriately checked to ensure full realisation of article 15.

Article 15 of the Maputo Protocol can also be linked to the African Charter and its other three normative protocols on the rights of older persons,⁴⁴ the rights of persons with disabilities⁴⁵ and on social protection and social security,⁴⁶ as well as with the African Children’s Charter. While all the rights under the African Charter are significant, those that deserve particular mention include:

- article 3 (equality and equal protection by and before the law both in its formal and substantive dimensions);
- access to public property and services (article 3(3));
- article 14 on the right to property;
- article 18(3) and (4) on the elimination of discrimination against women, including older and disabled women; and
- women’s rights to development, national and international peace and self-determination.

A combined reading of article 15 with article 14 of the African Children’s Charter enhances girls’ right to food security as the former complements aspects of food security not covered by the latter, just as the latter does for areas not dealt with under article 15, for example, the prevention of malnutrition within the framework of ‘primary health care through the application of appropriate technology’.⁴⁷

Three UN Conventions – two specific and the other general – have a direct relationship with article 15 of the Maputo Protocol. Article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) protects rural women’s rights in a manner that contains aspects of the right to food security. The notion of ‘rural’ represents a geographical area and a place where individuals are mainly excluded from ‘services and opportunities’.⁴⁸ Generally, women living in rural areas face unfavourable legal frameworks that exclude them from land ownership and the decision-making process. They are also victims of neoliberal economic policies. Article 14 of CEDAW, on which article 19 of the Maputo Protocol seems to have been modelled, lists critical considerations that further women’s rights to food security. Today, 45 African states have ratified/acceded to

42 See A Jegede & N Mulaudzi ‘Article 19’ in this volume.

43 T Mfete ‘Neo-liberalism and inequality in post-apartheid South Africa’ (2020) 14 *Pretoria Student Law Review* 412.

44 Adopted 31 January 2016.

45 Adopted 31 January 2016. See art 20 on the right to adequate standard of living.

46 Adopted 6 February 2022. See arts 19 (food and nutrition) and 22 (environment and climate change).

47 Article 14(1)(d) & (e).

48 F Banda ‘Article 14’ in MA Freeman, B Rudolf & C Chinkin (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* (2012) 359.

CEDAW,⁴⁹ 37 of which have also ratified the Maputo Protocol.⁵⁰ The protection afforded by these two treaties thus enhances the protection of women's right to food security. Furthermore, article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also captures a spate of elements relevant to the protection of the right to food security, as do articles 24 and 27 of the UN Convention on the Rights of the Child (CRC) for they seek to ensure that children's highest attainable standard of health and an adequate standard of living are met.⁵¹ Together, these human rights treaties complement already existing national standards on the right to food security.

The foregoing discussion in this section highlights that the approach to the interpretation of article 15 at the regional and domestic levels must consider the complex relationship the provision has with other relevant treaties and laws. Clearly, literalism as an approach to interpretation will fail to acknowledge these relationships and may lead to simplistic outcomes. A contextual, purposive and systemic interpretation will go a long way toward giving effect to what article 15 seeks to achieve. The African Commission should also be aware of the linkages between article 15 and other human rights treaties when reviewing measures of implementation adopted by states as described in their initial and/or periodic reports. It should also understand critical concepts arising from article 15 for meaningful examination of states' compliance with the right to food security.

4 Concepts and definitions

This section defines the following concepts: food security, nutritious food, adequate food, clean drinking water and domestic fuel sources.

4.1 Food security

The thinking around food security has undergone tremendous evolution since the 1940s when the concept first gained attention.⁵² This long history notwithstanding, food security is currently understood to exist 'when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.'⁵³ The foregoing definition encapsulates the accumulative understanding of the multidimensional nature of the concept over the years and adequately portrays food security as resting on six pillars or dimensions. These are availability, accessibility, utilisation, stability, agency and sustainability,⁵⁴ each discussed briefly below.

49 Office of the High Commissioner for Human Rights 'Ratification Status for CEDAW – Convention on the Elimination of All Forms of Discrimination against Women' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en (accessed 23 June 2023); Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Democratic Republic of Congo, Egypt, Eritrea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, South Sudan, Togo, Tunisia, Uganda, Tanzania, Zambia and Zimbabwe.

50 Of the above list, the following states have not ratified the African Women's Rights Protocol: Burundi, Botswana, CAR, Chad, Egypt, Eritrea, Morocco and South Sudan.

51 The Committee has developed these standards in two notable general comments; General Comment 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, adopted by the Committee at its 62nd session (14 January-1 February 2013) and General Comment 19 on Public Budgeting for the Realisation of Children's Rights adopted on 20 July 2016.

52 S Hendriks 'The food security continuum: a novel tool for understanding food insecurity as a range of experiences' (2015) 7 *Food Security* 609.

53 Food and Agriculture Organization 'Report of the World Food Summit' 13-17 November (1996) <https://www.fao.org/3/w3548e/w3548e00.htm> (accessed 23 June 2023). See also Socio-Economic Rights Principles (n 20) point k.

54 High Level Panel of Experts on Food Security and Nutrition (HLPE) 'Food security and nutrition: building a global narrative towards 2030. A report by the High-Level Panel of Experts on food security and nutrition of the Committee on World Food Security' (2020) 35; UN Committee on Economic, Social and Cultural Rights (Socio-Economic Rights

Availability as a dimension of food security entails an adequate supply of food that meets dietary needs⁵⁵ and is directly linked with systems, strategies, and structures that facilitate the efficient functioning of agricultural production, trade, transportation and storage mechanisms.⁵⁶ Adequate availability of food at the macro level is not sufficient for food security, especially when differentials in access to food exist at the household and individual levels. This explains the inclusion of accessibility as a dimension of food security. Accessibility refers to physical, social and economic access to adequate quantity and quality food.⁵⁷ While access to food is necessary, it is not sufficient to assure food security, particularly when the human body does not properly utilise accessible food. Therefore, utilisation in food security speaks to the consumption of safe foods rich in macro and micro-nutrients and the metabolism of those nutrients by the body for optimum physical and cognitive health.⁵⁸ Utilisation is complemented by access to safe drinking water, sanitation facilities, hygiene and health care.⁵⁹ Availability, accessibility and utilisation cannot thrive in isolation. They depend on the stability of the biophysical, political, economic and social environment within which people operate.⁶⁰ In addition to the four dimensions above, agency and sustainability have recently been explicitly considered dimensions of food security.⁶¹ Agency is concerned with people's autonomy in making individual or group decisions regarding the production and consumption of foods that meet their dietary needs without violating cultural and religious prohibitions.⁶² Sustainability speaks to using food systems without harming ecosystems and the political economy in the long run.⁶³ Ultimately, food security is a complex phenomenon, with all six of its dimensions intricately interlinked. In fact, food security is only realised when all six dimensions are attained simultaneously.

4.2 Nutritious food

The Global Alliance for Improved Nutrition (GAIN) has defined nutritious food as

a food that, in the context where it is consumed and for the individual who consumes it, provides beneficial nutrients (e.g., vitamins, major and trace minerals, unrefined complex carbohydrates, protein, unsaturated fats, essential amino acids, essential fatty acids, and dietary fibre) and minimises potentially harmful elements (e.g., trans fats, excess quantities of saturated fats, free sugars, and sodium).⁶⁴

This definition aligns with the Food and Agricultural Organisation of the United Nations (FAO) definition of the same and with the Voluntary Guidelines set out by the Committee on World Food Security on Food Systems and Nutrition.⁶⁵ To date, a single, universally accepted method for categorising

Committee) General Comment 12, The right to adequate food (art 11), 20th session, 12 May 1999, E/C.12/1999/5 para 11.

55 C Barret 'Measuring food insecurity' (2010) 375 *Science* 825.

56 Barret (n 55).

57 Food and Agriculture Organization 'Food security information for action: Practical guides. An introduction to the basic concepts of food security' (2008) 3 <https://www.fao.org/3/al936e/al936e00.pdf> (accessed 20 May 2023).

58 Barret (n 55).

59 Hendriks (n 52).

60 As above.

61 HLPE (n 54) 35; General Comment 12 (n 54).

62 As above.

63 As above.

64 Global Alliance for Improved Nutrition (GAIN) *GAIN's definition of nutritious and safe foods*. (GAIN Briefing Paper No 8) (2021) DOI: <https://doi.org/10.36072/bp.8>.

65 Committee on World Food Security (CFS) 'Voluntary guidelines on food systems and nutrition' adopted at the 47th Session of the Committee on World Food Security 8-11 February (2021) 6, para 19; Food and Agriculture Organization 'Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security' adopted by the 127th Session of the FAO Council November 2004 (2005) 38 para 10(3).

individual foods as nutritious does not exist, partly because the process of such categorisation has to consider a myriad of internal and external factors like individual nutritional requirements, which vary according to age, sex, physical activity, lifecycle, health, genetics, among others.⁶⁶ That classification would be possible in the face of a lot of context-specific data, which is often missing, especially in most parts of Africa.

4.3 Adequate food

In General Comment 12, the Socio-Economic Rights Committee unpacks the term ‘adequate food’ as a combination of three factors: availability, accessibility and adequacy.⁶⁷ Availability speaks to the ability of people to feed themselves either from their own production or from well-functioning food supply systems that can move food from production points to consumption points. Accessibility entails that food sources should be within easy reach of individuals both in physical proximity and economic terms. Adequacy is achieved when the food consumed is free from contaminants and meets all of an individual’s dietary needs according to sex, age, health status, physical activity and living conditions without violating cultural and religious prohibitions.⁶⁸

4.4 Access to clean drinking water

Clean drinking water is free from chemical, biological and radiation contaminants and of an acceptable odour, colour and taste, used for personal and domestic purposes. Access to clean drinking water is pivotal to food security because clean water facilitates the effective absorption and utilisation of nutrients by the body.⁶⁹ Unsafe and unclean drinking water can promote ill health caused by waterborne diseases and intestinal infections.⁷⁰ Poor health affects the body’s ability to absorb nutrients and increases the risk of malnutrition.

Africa is home to almost half of the people without access to safe water. The rural African population is disproportionately affected. For example, in 2012, 47 per cent of the African population without access to safe, clean drinking water lived in rural areas.⁷¹ Collectively, it is reported that women in Africa spend nearly 40 billion hours each year collecting water, face physical safety risks, lose time for education and income-generating activities, and risk health problems due to the physical toll of carrying heavy loads.⁷² Improvement in the food security outcomes of African women is closely tied to the ability of water supply facilities and services in their respective countries to provide water in adequate quantities and quality in addition to having water sources within physical and economic reach.

66 GAIN (n 64) 1.

67 General Comment 12 (n 54) 3-4, paras 9-13.

68 General Comment 12 (n 54).

69 N Vilakazi, K Nyirenda & E Vellemu ‘Unlocking water issues towards food security in Africa’ in B Mahmoud (ed) *Food security in Africa* (2021) 2.

70 High Level Panel of Experts on Food Security and Nutrition (HLPE) ‘Water for food security and nutrition. A report by the High-Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security’ (2015) 11 <https://www.fao.org/3/a-av045e.pdf> (accessed 20 May 2023).

71 HLPE (n 70) 11.

72 UN Women ‘Facts and figures’ <https://www.unwomen.org/en/news/in-focus/commission-on-the-status-of-women.-2012/facts-and-figures> (2012) (accessed 5 June 2022).

4.5 Sources of domestic fuel

Most foods need some form of cooking before they are consumable and digestible. This makes access to fuel sources integral to food security and to the realisation of the right to adequate food.⁷³ In Africa, more than 70 per cent of the population relies on wood fuel, mainly in the form of charcoal or firewood for cooking.⁷⁴ Charcoal is commonly used in urban centres, while firewood is the default fuel in rural areas.⁷⁵ Fuel wood collection and procurement and food preparation are gendered activities. The workload falls disproportionately on women and girls. Women and girls work longer days than men finding and providing fuelwood. In trying to provide energy for household use, women are exposed to physical threats (injuries or animal attacks) and suffer from ‘time poverty.’⁷⁶ Women spend time that could be used for income generation, food production and other activities on seeking out fuel wood. It thus behoves states, based on their obligations flowing from article 15, to alleviate the plight of women facing food insecurity.

5 Nature and scope of state obligations

The right to food security generates the obligation ‘to respect, protect, promote and fulfil’ generally recognised under international human rights law.⁷⁷ Food security imposes positive and negative duties on member states, and there is no hierarchy among these obligations; states must meet them on equal terms. One needs to look at whether measures adopted by states have met all the six elements of food security – availability, accessibility, utilisation, stability, agency, and sustainability⁷⁸ – in relation to women.

5.1 The obligation to respect women’s right to food security

The obligation to respect the right to food security imposes a duty on states not to interfere with how women exercise this right, for example, by letting women freely choose the methods and resources for food production as they deem suitable.⁷⁹ Non-interference includes refraining from practices, such as concessions on agricultural or customary land, to companies without providing alternative cultivable lands for food production.

The notion of state, irrespective of the form of government and the nature of its political system of governance, encompasses the triad of central government – the executive, the legislature and the judiciary – and sub-national levels of government as well as its organs. Drawing on the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, state organs would include private entities vested with public law mandates.⁸⁰ A violation of the right to food security by a private company empowered to build roads in rural areas through a public-private

73 P Sola, C Ochieng, J Yila & M Iiyama ‘Links between energy access and food security in sub-Saharan Africa: an exploratory review’ (2016) 8 *Food Security* 636.

74 Sola et al (n 73) 636.

75 R Mendum & M Njenga ‘Integrating wood fuels into agriculture and food security agendas and research in sub-Saharan Africa’ (2018) 3 *Facets* 1-11.

76 Africa Renewable Energy Access Program (AFREA) ‘Wood-based biomass energy development for sub-Saharan Africa: Issues and approaches’ (2011) 11 <https://openknowledge.worldbank.org/bitstreams/2102a5a7-54b5-57c5-a8a5-4164e8b16b30/download> (accessed 20 May 2023).

77 Socio-Economic Rights Principles (n 20) para 7.

78 General Comment 12 (n 54) paras 7-13.

79 Socio-Economic Rights Principles (n 20) para 5.

80 Adopted by the Commission at its 53rd session (2001) art 5. See J Crawford *The International Law Commission’s Articles on State Responsibility: introduction, text and commentaries* (2002) 100.

partnership cannot be considered as falling outside the ambit of the state's obligation to respect the right to food security.⁸¹

5.2 The obligation to protect women's right to food security

Apart from the obligation to respect, states have the obligation to protect the right to food security which entails adopting positive measures 'to ensure that non-state actors such as multinational corporations, local companies, private persons, and armed groups'⁸² do not violate women's right to food security. The African Commission draws two conclusions from this obligation.⁸³ First, states must regulate and monitor the activities of non-state actors, which may adversely affect the exercise of women's right to food security. The Commission has reiterated this obligation in several cases implicating the violation of human rights by multinational corporations alone or with the complicity of state agents.⁸⁴ In *SERAC*, Nigeria contravened its obligations under the Charter for failing to prevent private parties from destroying and contaminating 'food sources', which prevented people's ability to achieve their food needs.⁸⁵ States are accountable for actions conducted by private parties because only states may be held accountable for human rights violations under the human rights law regime.⁸⁶ Armed groups are enjoined to protect women's right to food security in so far as they exercise 'government-like functions' in areas they largely control.⁸⁷ Land grabbing can leave women deprived of their land.⁸⁸ The African Commission urged states to protect women from such deprivations and evictions, which adversely affect their livelihoods.⁸⁹ Second, states must ensure that legislation which imposes a duty on private parties to respect the right to food security is implemented and appropriate remedies provided to victims.⁹⁰ The remedies may range from administrative to judicial and quasi-judicial. Not only should women victims be able to approach courts and tribunals, but also emerging independent institutions such as human rights or gender equality commissions should be empowered to receive complaints and issue remedial orders that courts of law can enforce.⁹¹

5.3 The obligation to promote women's right to food security

States must adopt measures to enhance people's understanding of women's right to food security and of mechanisms that are in place to protect the right.⁹² The African Charter, the Maputo Protocol and some constitutions impose on states the duty to educate their citizens, including women, on the

81 Eg, South Africa's Promotion of Administrative Justice Act 3 of 2000 sec 1(b) defines an 'administrative action' to include actions or omissions by private entities exercising 'a public power or performing a public function in terms of an empowering provision'.

82 Socio-Economic Rights Principles (n 20) para 7.

83 As above.

84 *Institute for Human Rights and Development in Africa v Democratic Republic of Congo*, Communication 393/10, 9-18 June 2016 paras 101-102.

85 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 65-66.

86 EA Posner *The twilight of human rights law* (2014) 52.

87 J-M Henckaerts & C Wiesener 'Human rights obligations of non-state armed groups: an assessment based on recent practice' in E Heffes, MD Kotlik & MJ Ventura (eds) *International humanitarian law and non-state actors: debates, law and practice* (2019) 208-212.

88 J Chu 'Gender and "land grabbing" in sub-Saharan Africa: women's land rights and customary land tenure' (2011) 54 *Development* 35.

89 African Commission Resolution 262 on Women's right to land and productive resources ACHPR/Res.262 (LIV) 2013.

90 Socio-Economic Rights Principles (n 20) para 7.

91 The Commission for Human Rights and Administrative Justice of Ghana is empowered under sec 9 of its 1993 Act to 'bring an action before a Court in the Republic and may seek a remedy which is available from that Court'. The South African Human Rights Commission has brought before courts several petitions under sec 184(3) of the 1996 South African Constitution.

92 Socio-Economic Rights Principles (n 20) para 8.

rights, freedoms and duties that are enshrined in those texts.⁹³ Women have a fundamental right to be educated on food security. Awareness-raising has been considered an effective means through which states may see to it that their organs and private parties, especially in rural areas, understand the normative content of rights and mechanisms to protect them. Due to the technical nature of the right to food security, states should rely on technical cooperation with national and international specialised institutions⁹⁴ to produce sensitisation materials in plain English and other languages for everyone. Promoting the right to food security also entails the adoption of administrative and judicial decisions that advance the values and objectives of the right. The African Commission, when considering states' reports, should engage state representatives on the extent to which the obligation to promote the right to food security was realised. In its report, Malawi indicated that sensitisations on women's right to land in rural areas was conducted as part of its efforts to promote the right to food security.⁹⁵ Other states should emulate Malawi's example.

5.4 The obligation to fulfil women's right to food security

States must take steps to advance women's right to food security in the form of legislative, administrative, judicial and other measures which are 'comprehensive, co-ordinated, transparent, and contain clear goals, indicators and benchmarks for measuring progress'.⁹⁶ The number of women who have access to quality and adequate food of their choosing, as well as efforts to increase women's purchasing power must be demonstrated as part of states' efforts to fulfil the right to food security. These efforts should not remain merely theoretical; they must be enforced through clear programmes. These programmes must also aim to remove cultural, traditional and other barriers to realising women's rights to food security. Despite efforts by Cameroon to increase women's ownership of land – which was met with significant custom-related barriers, the number of women participants reached still remains low.⁹⁷ The African Commission may review whether states have established specific institutions whose role is safeguarding food-related women's rights.

A state's obligation to progressively realise socio-economic rights within its available resources was read into the African Charter and is applicable to the right to food security.⁹⁸ The existence of national plans and policies on food security shows that states are aware they should move expeditiously towards food security for women, which would be a proxy indicator for food security overall. Each of the six elements of food security must be examined against the backdrop of the number of women country-wide who are food secure. Intersectionality is key for such an analysis. Emphasis must be placed on the most vulnerable of all women, starting from rural women, women with disabilities, older women, internally displaced women, women deprived of liberty, and sexual minority women, including transgender women and girls.⁹⁹

93 Socio-Economic Rights Principles (n 21) para 8; Maputo Protocol, art 12; 1990 Constitution of Benin art 40; 2006 Constitution of DRC art 45.

94 General Comment 12 (n 54) para 36. See also 10th, 11th, 12th, 13th, and 14th Periodic reports of the Islamic Republic of Mauritania on the Implementation of the provisions of the African Charter (July 2016) 64-65.

95 Malawi: 2nd to 3rd Periodic Report on the African Charter and the Maputo Protocol (May 2015 to March 2019) para 242.

96 Socio-Economic Rights Principles (n 20) para 10.

97 Single Report Comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter and 1st Report relating to the Maputo Protocol and the Kampala Convention (2015-2019) paras 881-883. The state, both national and sub-national, should therefore enact internal policies and regulations, which advance a culture promoting women's right to food security.

98 Socio-Economic Rights Principles (n 20) para 13.

99 African Commission Resolution on the Right to Food and Food Insecurity in Africa ACHPR/Res.374(LX) 2017 (African Commission Resolution 374).

Women's right to food security may also contain a minimum core obligation where states may be expected to show that they have allocated their available resources to meet the core content of the six food security elements with regard to women.¹⁰⁰

It is relevant to emphasise the duty not to adopt 'retrogressive measures'¹⁰¹ that reduce the enjoyment of the right to food security. The validity of these measures under the African Charter is subjected to stringent conditions. If a state adopts a retrogressive measure, it must demonstrate that such a measure is reasonable and justified, that it is the least intrusive means toward the enjoyment of the right to food security, that meaningful and informed participation of affected women was sought, that the measure was not discriminatory in nature and application and that local remedies were provided to the affected group.¹⁰² The African Court has started to use this test to assess states' compliance with their socio-economic rights' obligations.¹⁰³ The African Court can therefore adopt this test in future to scrutinise measures employed by states towards the enjoyment of the right to food security.¹⁰⁴

Overall, the African Court and the African Commission should review states' compliance with their obligations under article 15 of the Maputo Protocol by using the 'respect, protect, promote and fulfil' framework. It provides a holistic picture during the examination of state reports on a state's progress toward realising all six limbs of the right to food security. The African Commission has not employed this approach in monitoring compliance with article 15 during the examination of states' reports.¹⁰⁵ In its publicly available Concluding Observations, the Commission does not allude to issues relevant to women's rights to food security either.¹⁰⁶

6 Measures of implementation

A review of the state practice reveals the adoption of a myriad of constitutional, legislative and policy measures to realise state obligations under article 15. In this section, we analyse what states have achieved in the area of women's rights to food security. The analysis is based on a review of 18 reports submitted to the African Commission at the time of writing pursuant to article 26 of the Protocol.

100 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019) 33.

101 S Liebenberg 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) 37 *South African Journal on Human Rights* 188-191.

102 Socio-Economic Rights Principles (n 20) para 20.

103 Sébastien Germain Marie Aïkoue Ajavon *v Benin* (merits and reparations) (4 December 2020) 4 AfCLR 133 para 137; TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1262-1263.

104 On art 6-related adjudication, see BK Kombo 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook* 389-413.

105 Some aspects of food security are recommended under the right to property, see Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on the Implementation of the African Charter (1994-2018) and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2005-2014), African Commission on Human and Peoples' Rights, adopted at its 31th extraordinary session (19-25 February 2021) para 59 21-22.

106 Concluding Observations and Recommendations on the 2nd and 3rd Combined Report of Malawi (23 February-9 March 2022); Concluding Observations and Recommendations on the Combined 2nd Periodic Report under the African Charter and the Initial Report under the Maputo Protocol submitted by South Africa (9 to 18 June 2016); Concluding Observations and Recommendations on the Periodic and Combined Periodic Report of the Democratic Republic of Congo on the Implementation of the African Charter and Initial Report on the Implementation of the Maputo Protocol (21 October-10 November 2019).

6.1 Conflating food security with hunger and poverty

In reporting on the implementation of women's right to food security, some states, including the Democratic Republic of Congo (DRC)¹⁰⁷ and Lesotho,¹⁰⁸ reported on measures adopted to address issues like hunger. While hunger and food security are intricately interlinked, they are not interchangeable, and efforts made by states towards ending hunger cannot, on their own, be used to represent progress towards achieving food security.¹⁰⁹ The concept of hunger relates to the inadequate consumption of dietary energy resulting in an uncomfortable physical sensation and, at the macro level, is usually measured by a country's general food availability against the country's food needs.¹¹⁰ By contrast, food security is concerned with more than simply the sufficient intake of dietary energy. As defined earlier, food security is concerned with the availability, access and utilisation of safe and nutritious food while also considering stability, agency and sustainability issues surrounding the production, distribution and consumption of food.¹¹¹ Measures instituted by states to combat hunger are necessary but insufficient to address the multidimensionality of food security concerns.

Similarly, states like Angola¹¹² presented the measures put in place to reduce poverty. Indeed, poverty and food insecurity have a bidirectional relationship. Poverty is an underlying cause of food insecurity, and it undermines a person's ability to acquire nutritious food either through own production or purchase.¹¹³ At the same time, inadequate access to food and nutrition is an underlying cause of poverty. Nevertheless, poverty alleviation measures may not always translate into improved food security outcomes unless the interlinkages between poverty and food security are properly mapped out and leveraged in the implementation of poverty reduction measures.¹¹⁴ What states can do instead is to clearly demonstrate the pathways through which hunger and poverty alleviation measures will lead or have led to improvement in women's general food security outcomes. This element is missing in the state reports. Ideally, in the absence of a universal food security indicator, states can report on measures they have adopted towards improving the various dimensions of food security, namely, availability, access, utilisation, stability, agency and sustainability, using existing indicators to measure these dimensions. Taking this route will be more representative of the food security situation than simply reporting on hunger and poverty.

6.2 Adoption of measures not related to food security

In certain reports, countries adopt measures that do not directly provide comprehensive solutions to food security issues. Some of the reported measures revolve around the provision of agricultural support. In Africa, agriculture is an important driver of economic growth and a source of livelihood for much of the continent's population. Agriculture can be an important lever for improving household food security, nutrition outcomes and incomes and raising millions of people out of poverty.¹¹⁵ However, the reality of much of the African agriculture sector is that there is a disconnect between

107 Democratic Republic of Congo Combined 11th, 12th and 13th Periodic Reports 2008-2015 on the African Charter and Initial and 1st, 2nd and 3rd Periodic Reports on the Maputo Protocol (2017) paras 266, 269 & 270.

108 Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter and Initial Report under the Maputo Protocol 2001-2017 (April 2018).

109 FAO (n 57).

110 As above.

111 HLPE (n 70) 6-11.

112 Republic of Angola 6th Periodic Report on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Maputo Protocol 2011-2016 (January 2017).

113 FAO (n 57) 3.

114 As above.

115 JM Alston & PG Pardey 'Agriculture in the global economy' (2014) 28 *Journal of Economic Perspectives* 135.

agriculture and important elements of food security like nutrition and access.¹¹⁶ The design of existing agricultural interventions, programmes and policies emphasises improving agricultural productivity and food availability while hardly impacting on equally important components for food security like food distribution channels, marketing infrastructure or nutrition outcomes. Besides, agriculture sector policy strategies such as fertiliser subsidies, import subsidies and price regulation are often criticised for being driven more by political economy considerations than a concern for food security and adequate nutrition.¹¹⁷

Kenya,¹¹⁸ Lesotho,¹¹⁹ Malawi,¹²⁰ Mauritania,¹²¹ Rwanda,¹²² and Togo¹²³ report on policy interventions supporting the agricultural sector in the form of input subsidies, training programs and economic inclusion. While these measures may arguably be commendable for agricultural development, they may not directly translate into improved food security and nutrition outcomes. For example, while subsidies, which are issued mainly for staple food production, may improve the aggregate staple food availability in the country, food security and nutrition will not improve unless the subsidising of staple production is complemented by measures that ensure availability, access and utilisation of a wide range of diverse, safe and nutritious foods.¹²⁴ Investment in agriculture is only beneficial to food security outcomes if it leads to direct consumption of what is produced (nutritious food) or offers the means to people to access nutritious foods. The same reasoning applies to other agriculture support measures adopted by states, such as training and livestock breeding. These measures can only lead to improved food security outcomes if their direct links with food security are properly leveraged. South Africa¹²⁵ acknowledges that food security goes beyond the availability of food and highlights measures put in place to tackle other dimensions of food security, like nutrition. However, the nutrition information available in the report focused on children and the general population and did not specifically address women.¹²⁶

116 P Pingali 'Agricultural policy and nutrition outcomes-getting beyond the preoccupation with staple grains' (2015) 7 *Food Security* 583.

117 L Sneyd 'We eat what we have, not what we want: the policy effects of food riots and eating after 2008 crisis in Cameroon' in N Hossain & P Scott-Villiers (eds) *Food riots, food rights and the politics of provisions* (2017) 106 & 109; CN Musembi & P Scott-Villiers 'The constitution lies to us! Food protests in Kenya, 2007-2012' in N Hossain & P Scott-Villiers (eds) *Food riots, food rights and the politics of provisions* (2017) 146; L de Brito, E Chaimite & A Shankland 'Authoritarian responsiveness and the *greve* in Mozambique' in N Hossain & P Scott-Villiers (eds) *Food riots, food rights and the politics of provisions* (2017) 168.

118 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 (April 2020) para 274.

119 Lesotho Combined Reports (n 108) para 470.

120 Malawi Combined Report (n 95) para 239.

121 Mauritania Combined Periodic Reports (n 94) para 2.

122 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 & 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 (Maputo Protocol) (2009-2016) para 97.

123 Togolese Republic 6th, 7th and 8th Periodic Reports of the State of Togo on the Implementation of the African Charter on Human and Peoples' Rights (August 2017) para 616.

124 H Walls et al 'The impact of agricultural input subsidies on food and nutrition security: A systematic review' (2018) 10 *Food Security* 1425 & 1428.

125 Republic of South Africa Combined 2nd Periodic Report under the African Charter and Initial Report under the Maputo Protocol (August 2015) para 450.

126 South Africa Combined Report (n 125) paras 452, 455 & 456.

Countries like Cameroon¹²⁷ and Togo¹²⁸ report that they adopted land registration and policy interventions to ensure access to land so as to improve food security. Clarity on whether the land is for agricultural purposes, the productivity of that land, whether it is going to be used for the production of food security-enhancing crops and whether there are any measures in place for women to have access to that land is lacking. It is one thing to put in place land access interventions. It is entirely another for women to benefit from institutionalising those interventions and improving their personal and household food security. Besides, Cameroon reports that rural women may still face cultural hindrances in their ownership of land, implying that land registration initiatives still leave many women behind. Meanwhile, Mauritania¹²⁹ specifically adopted measures that grant developed agricultural land to women's cooperatives. However, without data on the proportion of women in the country who belong to women's cooperatives, it is difficult to assess the impact of this measure on women's food security.

Measures that involve the financial and economic inclusion of women, as reported by Namibia¹³⁰ and Rwanda,¹³¹ need clarification on how and whether they promote women's right to food security. Namibia, reporting on women's access to financial services, states that the country does not restrict women from getting loans from banks. This statement assumes that a lack of restrictions at national policy level is a sufficient condition for women to access loans that could be pivotal in improving food security. The statement fails to acknowledge the underlying issues that impede women's access to loans and other financial services, which include women's lack of control over productive assets that could serve as collateral for obtaining loans. The lack of restrictions will not guarantee or foster women's access to financial services. Relatedly, The Gambia¹³² reports on loan availability for the general population of farmers. However, the food security benefits from access to loans will only accrue if that loan is used to ensure food security.

In addition to reporting on measures that have complex linkages with food security, many countries failed to interlink food security (particularly nutrition) with some of its important determining factors, such as health. Research has long established that health and nutrition reinforce one another.¹³³ The causal nexus between health and nutrition is such that poor nutrition leads to ill health, while ill health could lead to poor nutrition.¹³⁴ While the foregoing scenario depicts the vicious cycle of poor nutrition and ill health, the converse is also true. In this light, one would hope to see nutrition-health interlinkages mapped out in the reports. However, out of the 18 countries covered, only Angola, Rwanda and South Africa explicitly linked women's nutrition with the realisation of their health and reproductive rights.

6.3 The presentation of population-wide measures and statistics

Another inadequacy that was observed in the states' reports was the tendency to highlight general measures that apply to the food security situation of the country's entire population, not just women. As already established, African women face unique challenges in attaining food security. Therefore, measures that address these challenges must contain features that consider and recognise the uniqueness of the obstacles faced by women. For example, Togo¹³⁵ reports on the measures the country put in

127 Cameroon Single Report (n 97) paras 877-879.

128 Togo Combined Periodic Reports (n 123) para 616.

129 Mauritania Combined Periodic Reports (n 94) para 2.

130 Namibia 7th Periodic Report on the African Charter (2015-2019) and the Second Report under the Maputo Protocol (2020) para 27(10).

131 Rwanda Combined Periodic Reports (n 122) para 97.

132 Gambia Combined Report on the African Charter (1994 and 2018) and Initial Report under the Maputo Protocol (August 2018) 111.

133 Vilakazi (n 69).

134 As above.

135 Togo Combined Periodic Reports (n 123) paras 617-620.

place to improve access to land and access to drinking water. While such efforts are commendable, the report is not clear on how these measures have specifically protected and catered for women's right to food security. A similar generalisation issue can be observed in reports presented by Burkina Faso,¹³⁶ Eswatini,¹³⁷ Namibia,¹³⁸ Seychelles,¹³⁹ and South Africa.¹⁴⁰

The best practice in future reports and actions would be to disaggregate the general statistics by gender to facilitate a clear distinction of women's access to measures that governments have put into place. Aggregated data, as presented in the prior-mentioned reports, are not truly reflective of the situation of women. For example, as Togo reports on the works it has put in place to improve the national safe drinking water supply, the country reports a 48 per cent supply rate.¹⁴¹ However, that data is a national aggregate, and the proportion of women benefiting from that water supply rate increase is unclear. Regional differentiation of the data would reveal even deeper disadvantages for specific categories of women, such as rural women. The same case can be observed in the South African report. Therefore, the drafting of state reports should include specialised civil society organisations (CSOs) and research institutes so that they can provide accurate and well-documented data on women's food security situation in the country.¹⁴² The African Commission should equally encourage CSOs to submit shadow reports.

6.4 Focus on certain groups of women

The right to food security under the Maputo Protocol should be a reality for all African women. While we recognise the disproportionate impact of food insecurity on rural women as compared to urban women, the latter must not be side-lined in state measures.¹⁴³ Extensive focus on rural women can perpetuate the idea that food insecurity is mainly a rural problem and further contribute to the invisibility of the food insecurity that women in urban areas equally face. Women in urban areas are also often susceptible to food insecurity due to their over-dependence on the cash economy and volatile markets for their food needs. The situation is worse when these urban women face insecure and low-paying employment. Government efforts to address women's food security should comprehensively cover women irrespective of their location. In addition, some of the measures are focused on the reproductive nature of women, for instance, in the report by The Gambia.¹⁴⁴ These measures are directly linked to improving women's food security and nutrition before, during and after pregnancy. While the nutritional needs of women of reproductive age are critical and should therefore be prioritised,¹⁴⁵ reproduction should not be the main or only reason efforts are made to improve the food security situation of women. Women should have access to adequate nutrition at all life stages regardless of whether they choose to reproduce or not. Measures put in place should foster food security and nutrition outcomes for women as, first and foremost, human beings who need good nutrition for a healthy and active life, not merely as reproduction conduits.

136 Periodic Report of Burkina Faso on the Implementation of the African Charter and Initial Report on the Implementation of the Maputo Protocol (January 2015) paras 55-57.

137 Eswatini Combined Reports (n 5) paras 553-564.

138 Namibia Periodic Reports (n 130) paras 27(2)-27(4).

139 Seychelles Initial Report on the Maputo Protocol (2019) paras 15(1)-15(2).

140 South Africa Combined Report (n 125) para 460.

141 Togo Combined Periodic Reports (n 123) para 620.

142 On the DRC, see TM Makunya 'Beyond legal measures: a review of the Democratic Republic of Congo's initial report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2023) 67(2) *Journal of African Law* 230-231.

143 Cameroon Single Report (n 97) paras 881, 885 & 886.

144 Gambia Combined Report (n 132) 158-159.

145 FAO, ECA & AUC 'Africa-regional overview of food security and nutrition 2021: Statistics and trends' (2021) 32 <https://reliefweb.int/attachments/e9041375-bca4-3d44-b5bc-ef414f12f6ca/cb7496en.pdf> (accessed 20 May 2023).

6.5 The lack of judicial measures

Since modern African constitutions incorporate or give effect to international human rights treaties,¹⁴⁶ one can expect that state reports include information on how article 15 is being used to enhance the protection of women's right to food security, in particular before domestic courts. No state provided such information. To our knowledge, this provision has not been invoked before domestic courts either, although there is a potential that it could become the stepping stone for developing comprehensive jurisprudence on women's right to food security. In *Equal Education v Minister of Basic Education*, the High Court of South Africa (Gauteng Division) ruled that the respondents violated the right of learners to basic nutrition by failing to roll out the National School Nutrition Plan (NSNP).¹⁴⁷ Given the NSNP's pivotal role in providing daily meals to learners, 50 per cent of whom are from poor backgrounds, suspending the program plunged half of the learners nationally into food insecurity which had potentially adverse effects on their ability to study.¹⁴⁸ The Court was of the view that learners' right to basic nutrition was not subject to the progressive realisation clause.¹⁴⁹ The Court did not tether provisions of the Constitution of the Republic of South Africa, 1996 (South African Constitution) related to the right to food to article 15 of the Maputo Protocol or to article 14(2) (c) of the African Children's Charter – to which South Africa is a party. Arguably, this would have strengthened the protection of learners from poor backgrounds, particularly girls. However, the Court did cite provisions of other international human rights instruments, namely, articles 24, 27(2) and 27(3)¹⁵⁰ of the UN Convention on the Right of the Child, its General Comment 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health,¹⁵¹ and 19 on Public Budgeting for the Realisation of Children's Rights (article 4),¹⁵² as well as article 11 of the ICESCR. The latter prompted the Court to strictly scrutinise the state's retrogressive measures with respect to the right to food.¹⁵³ In *Wary Holdings v Stalwo*,¹⁵⁴ the Constitutional Court of South Africa ruled that 'equitable access to "agricultural land"' and the obligation to protect the environment were integral parts of the state obligation to protect the right to food, to make food available and accessible.¹⁵⁵ While not representing a continental jurisprudential trend on (women's) right to food (security),¹⁵⁶ both cases point to the existence in South Africa of ample opportunities for litigants and judges to use article 15 when women's right to food security is at stake. In this era of 'intra-African cross-fertilisation' of constitutional and human rights ideas,¹⁵⁷ these cases may inspire litigants and courts elsewhere in Africa to foster a judicial culture protective of women's right to food security.

Still, whether domestic courts can apply article 15 will largely depend on every state's approach to international human rights instruments and the ability of litigants to rely on international law-based arguments. Article 15 is more likely to be invoked in jurisdictions with constitutions that enjoin judges to 'consider' international law when interpreting human rights or to further an interpretation

146 M Killander 'The effects of international law norms on constitutional adjudication in Africa' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017).

147 *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 34.

148 *Equal Education* (n 147) paras 32-33.

149 *Equal Education* (n 147) para 54.

150 *Equal Education* (n 147) para 39.1.

151 CRC/C/GC/15 adopted on 17 April 2013.

152 CRC/C/GC 19 adopted on 20 July 2016.

153 *Equal Education* (n 147) para 46.

154 *Wary Holdings v Stalwo* 2009 (1) SA 337 (CC).

155 *Wary Holdings v Stalwo* (n 154) para 85.

156 B Nkrumah *Seeking the right to food: food activism in South Africa* (2021) 83-89.

157 C Fombad 'The diffusion of South African-style institutions? A study in comparative constitutionalism' in R Dixon & T Roux (eds) *Constitutional triumphs, constitutional disappointments: a critical assessment of the 1996 South African Constitution's local and international influence* (2018) 360.

that is consistent with international law.¹⁵⁸ Whether monist or dualist, the obligation to take necessary measures to implement international human rights law places a duty on judges and other state actors to construe the meaning of women's right to food security in a manner that is consistent with international law and democratic ideals, values and principles propelled by the Protocol and the African Charter as a whole.¹⁵⁹

7 Conclusion

Food security remains key to improving the lived realities of women and girls in Africa. Article 15 is a legal contribution to the existing social, economic and political initiatives the African Union, its partners, and African states have undertaken to reduce the effect of food insecurity. The nature of obligations that it imposes on states and non-state actors are wide and comprehensive to combat actions detrimental to food security as state and corporate development projects are increasingly likely to deprive women of their livelihoods, such as land¹⁶⁰ or render the land unproductive. A legal provision cannot be expected to cover all the aspects of social life. In this regard, the systemic linkages between article 15 and other relevant provisions strengthen the latter's capacity to transform regressive policies at the domestic and regional levels.

National and international cooperation is also necessary for this provision to realise its potential. Sadly though, the provision has not attracted much attention in the work of the African Commission and national judicial bodies. The African Commission has not placed significant emphasis on article 15 when reviewing states' reports, although some of its resolutions have underlined member states' obligations to improve women's rights to food security and reminded those that have not done so to ratify the Protocol. Furthermore, the example of courts in South Africa suggests that article 15 can be used as the launchpad for developing robust food security jurisprudence in order to alleviate the plight of women and girls. Overall, the impact of article 15 will depend on states' readiness to see to it that legislative and policy measures adopted in the area of food security are accompanied by actions aiming at raising the awareness of critical societal actors on women's rights to food security and women's rights literacy so that the multifaceted barriers to the enjoyment of the right are removed.

States should develop programs and policies that are specific to women's right to food security, which intentionally acknowledge and address underlying obstacles to women's food security. Existing programs and policies lack grounding in and are divorced from the specific realities of African women and therefore are inadequate and unlikely to improve food security outcomes for women. Better responses could be geared towards addressing the root causes of women's food insecurity. These root causes include insecure land tenure, inequitable access to productive resources, unfair labour burden, and inadequate education. States must also clarify and leverage the interconnectedness of food security with other sectors. Food security is inherently complex, and it is linked across multiple sectors of the economy, from agriculture to health, environment, trade, energy, law and finance. Intersecting policies must map out and leverage pathways that will support women's food security. Third, states' policies must go beyond the 'inclusion' of women. Current measures do not seem to take women as equal, fully embodied individuals that should fully participate in the development processes around them, including food security matters. The measures adopted by states highlight statements like 'inclusion of women' or 'include rural women', all of which could be indicative of women lacking a seat at the table, as though their participation was an afterthought. Policy action must move beyond hollow promises. Lastly, research institutions should collect and publish quality quantitative and qualitative economic

158 South African Constitution secs 38 & 233.

159 TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen et al (eds) *A life interrupted: essays in honour of the lives and legacies of Christof Heyns* (2022) 475.

160 European Parliament *Land grabbing and human rights: The involvement of European corporate and financial entities in land grabbing outside the European Union* (2016) 7.

data that are disaggregated by sex and other relevant markers, such as regional disparity. This data and research would help highlight the diverse experiences of women and how best to address issues that face them.