

Article 16

Right to adequate housing

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Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

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1 Introduction

Access to housing is an integral part of an adequate standard of living.¹ As set out by the African Commission on Human and Peoples' Rights (African Commission), the right to housing entails access to a 'safe and secure home and community in which to live in peace and dignity'.² In reality, however, many women, men, non-binary persons, and children live in squalor.³ While inadequate housing affects many people living in poverty there is a clear gender dimension.⁴ This requires states to take specific measures to address the right to adequate housing for women. As noted by Chenwi and McLean:

A gendered, or feminist, perspective on women and housing focuses on the lived reality of poor women and women-headed households, and the survival strategies employed by these women. It also provides a critique of the ways in which existing laws, policies and social practices perpetuate their situation.⁵

Article 16 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) provides one avenue to address the gendered dimension of inadequate housing. Article 16 provides for the right to access to housing of women, that women have the right to acceptable living conditions in a healthy environment and that in all aspects of the

1 Universal Declaration of Human Rights art 25(1).
2 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 (2011) para 78.
3 United Nations Statistics Division 'Make cities and human settlements inclusive, safe, resilient and sustainable', <https://unstats.un.org/sdgs/report/2021/goal-11/> (accessed 2 April 2023).
4 See eg United Nations *Women and the right to adequate housing* (2012).
5 L Chenwi and K McLean "A woman's home is her castle?" – Poor women and housing inadequacy in South Africa' (2009) 25 *South African Journal on Human Rights* 517.

right to access to housing, women should be treated equally to men, including that there should be no discrimination based on marital status.

This chapter is organised into six sections. Following this introduction, the second section discusses the drafting history of Article 16 and some possible impetus for the inclusion of Article 16 in the Maputo Protocol. This is followed in section 3 by a discussion of the key concepts addressed by the article. Section 4 analyses the nature and scope of state obligation under article 16 while the fifth section examines state practice in relation to implementation, drawing primarily on state reporting to the African Commission. The concluding section makes suggestions to the African Commission on how to further strengthen its engagement on the right to adequate housing of women.

2 Drafting history

The right to housing was incorporated in the early stages of the drafting of the Maputo Protocol. The 1997 Experts' Meeting included the right to housing provision in what eventually became Article 16 of the Maputo Protocol.⁶ Article 17 of the draft adopted at the 1997 meeting provided:

All women have an equal right to men to have adequate housing in acceptable housing conditions in a healthy environment. To that effect, State Parties undertake to enable women, whatever their matrimonial status, to have access to adequate housing.

Article 18 of the draft adopted at the November 1999 meeting adopted the formulation that was retained in the final protocol adopted in July 2003 as Article 16.⁷ The linguistic changes included that there was no longer any explicit comparison with men and that the first sentence of the article provides for a right to 'access to housing' rather than a right to housing.

As illustrated in the next section, equal access to housing had not been singled out previously as of major concern in human rights treaties. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) refers to access to housing for rural women but does not provide any detail. The impetus to include the housing provision in the draft Protocol may have been the 1995 Beijing conference on women's rights.⁸ Further incentive may have come from the Habitat II Agenda adopted in Istanbul in 1996.⁹ Women's rights NGOs pushed for the inclusion of the gender dimension of housing on the agenda. In 1996, Schlyter noted:

One of the controversial issues at the UN conferences in Cairo and Beijing was if a woman should have power to be in control over her own body, her sexuality and her fertility. Women's control over land and houses was another controversial issue on which discussions will continue at the Habitat II conference in Istanbul.¹⁰

6 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 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) art 18.

8 United Nations, Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, A/CONF.177/20/Rev.1, para 58(m): Governments should 'Enable women to obtain affordable housing and access to land by, among other things, removing all obstacles to access, with special emphasis on meeting the needs of women, especially those living in poverty and female heads of household'.

9 Report of the United Nations Conference on Human Settlements (Habitat II), Istanbul, 3-14 June 1996, A/CONF.165/14.

10 A Schlyter (ed) *A place to live: gender research on housing in Africa* (1996) 6.

The Habitat II Agenda highlighted the link between access to housing and the empowerment of women:¹¹

Women have an important role to play in the attainment of sustainable human settlements. Nevertheless, as a result of a number of factors, including the persistent and increasing burden of poverty on women and discrimination against women, women face particular constraints in obtaining adequate shelter and in fully participating in decision-making related to sustainable human settlements. The empowerment of women and their full and equal participation in political, social and economic life, the improvement of health and the eradication of poverty are essential to achieving sustainable human settlements.

To sum up, while CEDAW made provision for the right to access to housing for rural women, there was an increasing realisation in the 1990s that the issue of access to housing for women was important to address more generally. The Beijing conference on women's rights and the Habitat II conference on human settlements put this on the agenda of the international community and provided the impetus for the inclusion of the issue in the Maputo Protocol.

3 Concepts and definitions

The right to housing is included as part of the right to an adequate standard of living in the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Universal Declaration in article 25 sets out that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family', including housing. The ICESCR in almost identical wording provides in article 11(1):

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The gendered language of the provisions on an adequate standard of living is clear to everyone and may represent the prevalent view at the time of men as breadwinners and heads of households. However, arguably 'his' and 'himself' should be read as gender neutral. This reading finds support in the use of the word 'everyone', as elsewhere in the ICESCR and the Universal Declaration, which could hardly refer only to men. The Committee on Economic, Social and Cultural Rights noted in General Comment 4 on the right to housing:¹²

The right to adequate housing applies to everyone. While reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups.

That it was necessary to refer to 'female-headed households', a term still commonly used, is one illustration of the fact that patriarchy was still the norm in 1991 when the General Comment was adopted, and still reflects the assumption as to gender roles today, more than 30 years after the adoption of the General Comment. In patriarchal societies, where men are often viewed as the 'head

11 Habitat II (n 9) para 15.

12 Committee on Economic, Social and Cultural Rights, General Comment 4: The Right to Adequate Housing (art 11(1) of the Covenant) (1991) para 6.

of the household' women are, in many different ways, discriminated against in relation to housing.¹³ In General Recommendation 29, the CEDAW Committee criticised 'laws stating that the man is the head of the household, thus giving him the role of sole economic agent as well.'¹⁴

The right to housing is also reflected in a number of other UN human rights treaties, including CEDAW which refers to access to housing as part of 'adequate living conditions' of rural women in article 14(2)(h).

At the African regional level, the African Charter on the Rights and Welfare of the Child¹⁵ (African Children's Charter) provides for the duty of the state to assist parents and other caretakers in need with 'material assistance and support programmes ... with regard to nutrition, health, education, clothing and housing'.¹⁶

The right to housing is not explicitly provided for in the African Charter on Human and Peoples' Rights (African Charter).¹⁷ However, the African Commission in *SERAC*,¹⁸ held that the right was implied in the right to property, health and protection of the family as set out in the African Charter.¹⁹

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.

The African Commission's Guidelines on Economic, Social and Cultural Rights (ESCR Guidelines) set out that the right to housing entails 'the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity'.²⁰ This entitlement 'includes access to natural and common resources, safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services'.²¹ Further, as noted by the African Commission in the *SERAC* case the right to shelter 'extends to embody the individual's right to be left alone and to live in peace – whether under a roof or not'.²²

Chenwi notes how the African Commission draws on General Comment 4 of the UN Committee on Economic, Social and Cultural Rights (ESCR Committee).²³ The ESCR Committee's factors for determining 'adequacy' of housing are therefore also relevant in the African regional context. These

13 See eg M Sobantu 'Revisiting gender and housing: Housing as seen through the eyes of women in social rental housing in Gauteng, South Africa' (2020) 56 *Social Work* 63.

14 General Recommendation 29 on art 16 of the Convention on the Elimination of All Forms of Discrimination against Women (economic consequences of marriage, family relations and their dissolution) (2013), UN Doc CEDAW/C/GC/29 para 36.

15 African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) (African Children's Charter).

16 African Children's Charter art 20(2)(a).

17 African Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986) art 20(2)(a).

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

19 *SERAC* (n 18) para 60.

20 African Commission (n 2) para 78.

21 As above.

22 *SERAC* (n 18) para 61.

23 L Chenwi 'The right to adequate housing in the African regional human rights system: convergence or divergence between the African Commission and South African approaches' (2013) 17 *Law, Democracy & Development* 21.

factors include legal security of tenure; availability of services, materials, facilities and infrastructure, affordability; habitability; accessibility; location; and cultural adequacy.²⁴ It is noticeable that the Committee does not explicitly address issues of discrimination against women and gender-based vulnerability apart from highlighting the applicability of Article 11 to women as quoted above and calling for a broad and inclusive interpretation of ‘family’.²⁵ In contrast, a number of UN reports and resolutions over the last two decades have dealt with women’s access to housing.²⁶

The right to housing is interlinked with many other rights such as non-discrimination, an adequate standard of living, dignity, security, protection against domestic violence, access to land and rights at the dissolution of marriage through divorce or the death of a spouse. These related rights are reflected in the Maputo Protocol: article 2 (elimination of discrimination against women), article 4 (the rights to life, integrity and security of the person), article 5 (elimination of harmful practices), article 6 (marriage), article 7 (divorce), article 8 (equal protection of the law), article 18 (healthy environment), article 21 (inheritance) and article 24 (women in poverty). The related important issue of access to land is dealt with in the Protocol’s provisions on food security (article 15) and sustainable development (article 19). Despite the many provisions that are interlinked with the right to housing, some aspects are not explicitly addressed in the Protocol. For example, the Protocol makes no mention of the need to ensure that women and their dependents are not rendered homeless on account of domestic violence. Another issue that is not explicitly addressed in the Protocol but clearly linked to ‘acceptable living conditions’ is access to water and sanitation.

4 Nature and scope of state obligations

4.1 Equal access to housing

The African Commission has gone further than the ESCR Committee in considering the gendered dimension of access to housing. The African Commission in its ESCR Guidelines calls on states to ‘[i]mplement measures to ensure that titles to housing and land are conferred on women, and that they are able to access housing and land independently’.²⁷ States should further ‘ensure fair and equitable inheritance of land and rights in housing regardless of sex’.²⁸ Women should ‘enjoy equal rights to compensation for violation of their housing rights as men. Single women and widows should be entitled to their own adequate level of compensation’.²⁹ In its Resolution on Women’s Right to Land and Productive Resources, the Commission encouraged states to take special measures to ensure equal treatment in social housing projects.³⁰

24 CESCR General Comment 4 (n 12) para 8.

25 CESCR General Comment 4 (n 12) para 6.

26 See, eg, ‘Women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing’, Report of the Secretary-General submitted in accordance with Commission resolution 2001/34, E/CN.4/2002/53; UN Commission on Human Rights resolution 2002/49, Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing; Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, Women and their right to adequate housing, A/76/408 (2011); Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Balakrishnan Rajagopal, Discrimination in the context of housing, A/76/408 (2021); United Nations (n 4).

27 African Commission (n 2) para 79(q).

28 African Commission (n 2) para 79(p).

29 African Commission (n 2) para 79(r).

30 African Commission on Human and Peoples’ Rights, Resolution on Women’s Right to Land and Productive Resources – ACHPR/Res.262(LIV)2013, para 4.

4.2 Acceptable living conditions in a healthy environment

The right to acceptable living conditions in a healthy environment is a right that applies equally to men and women. The gendered dimension that the Maputo Protocol seeks to address is that in most countries, women are overrepresented among those living in unacceptable and unhealthy conditions.³¹ States must therefore approach the progressive realisation of the right to acceptable living conditions with a gendered lens. The African Commission defines the minimum core in relation to acceptable living conditions as ‘basic shelter for everybody’.³² Of course, this does not just mean a roof over one’s head. The Commission’s guidelines on economic, social and cultural rights for example highlight the importance of providing access to water and sanitation ‘taking into account the needs of women and children’.³³

Acceptable living conditions arguably include that household chores are equitably divided among the members of the household. Thus, the Commission has called on states to ‘[e]nsure that women and girls are not denied enjoyment of their rights because of a disproportional share of child care and other domestic responsibilities within the family’.³⁴

The Commission in its ESCR Guidelines called on states to

[e]nsure the equal rights of women and men to protection from forced evictions and the equal enjoyment of the human right to adequate housing and security of tenure. Implement measures to ensure that titles to housing and land are conferred on women, and that they are able to access housing and land independently.³⁵

The Commission further in its resolution on adequate housing further noted that: ‘women, children and other vulnerable groups suffer disproportionately from forced evictions and their effects’.³⁶ Given its practical relevance, it is surprising that the Maputo Protocol does not explicitly deal with the issue of forced eviction.

4.3 Marital status

The last sentence of Article 16 reads as follows: ‘[t]o ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.’ This aims to deal with discrimination in access to housing on the grounds of being unmarried, married, divorced or widowed. The most common such discrimination would be against married women. An example would be not paying housing allowances to female employees who are married, on the assumption that they are housed by their husbands.

5 State practice/implementation

The right to housing is linked to property ownership which throughout Africa is dominated by men.³⁷ There are few examples of formal gender discrimination in statutory law concerning access to housing

31 UN-Habitat ‘11.1 Adequate housing’, <https://unhabitat.org/11-1-adequate-housing> (accessed 5 April 2023).

32 African Commission (n 2) para 79(c).

33 African Commission (n 2) para 92(s) & (t).

34 African Commission (n 2) para 95(z) (right to family).

35 African Commission (n 2) para 79(q).

36 African Commission on Human and Peoples’ Rights, Resolution on the Right to Adequate Housing and Protection from Forced Evictions – ACHPR/Res.231(LII)2012.

37 I Gaddis, R Lahoti & W Li ‘Gender gaps in property ownership in sub-Saharan Africa’ (30 August 2018) <https://papers.ssrn.com/abstract=3246145> (accessed 31 July 2022). See also I Gaddis, R Lahoti & H Swaminathan ‘Women’s legal rights and gender gaps in property ownership in developing countries’, 21 January 2021 <https://blogs.worldbank.org/>

in Africa. Some example of legal discrimination is provided in the CEDAW Committee's Concluding Observations on Cameroon where it called on the repeal of provisions of the Civil Code which recognises the husband as the head of the household, the choice of residence by the husband and the administration of family property and of the wife's property by the husband.³⁸

Customary law or patriarchal misuse of customary law by male relatives remain a challenge in many African states. The words of one of the participants in a Ugandan study would resonate with many women across the continent: 'Even sons, *your own blood* can send you, the mother away. They know women do not inherit real estate. You end up with only cups and baskets.'³⁹

The approach to reporting on the right to housing in state reports submitted by states which have ratified the Maputo Protocol varies. Benin,⁴⁰ The Gambia,⁴¹ Kenya,⁴² Mali,⁴³ Mauritius,⁴⁴ Mozambique,⁴⁵ Nigeria⁴⁶ and Senegal⁴⁷ only provide a general discussion of the right to housing as it relates to various articles of the African Charter. Burkina Faso,⁴⁸ Cameroon,⁴⁹ Lesotho,⁵⁰ Mauritania,⁵¹

developmenttalk/womens-legal-rights-and-gender-gaps-property-ownership-developing-countries (accessed 23 June 2023).

- 38 Concluding observations on the Combined 4th and 5th Periodic Reports of Cameroon, Committee on Elimination of Discrimination against Women (9 March 2014), UN Doc CEDAW/C/CMR/CO/4-5 (2014) para 38(a).
- 39 J Ahikire "'Cutting the coat according to the cloth": decentralisation and women's agency on land rights in Uganda', Final report under the project entitled: Decentralization, Land Rights and the Construction of Women's Citizenship: A Comparative Study of Uganda, Kenya and Tanzania, 29 December 2010.
- 40 Benin Combined Periodic Report from the 6th to the 10th Periodic Reports on the implementation of the provisions of the African Charter on Human and Peoples' Rights, 2009-2018.
- 41 Gambia 2nd Periodic Report on 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 1994-2018. However, the Report notes that the Women's Act provides that women should have equal access to housing, 159.
- 42 Kenya's 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 2015-2021.
- 43 Mali 2nd to 7th Combined Periodic Report to the African Commission on Human and Peoples' Rights relating to the implementation of the African Charter on Human and Peoples' Rights, 2001-2011.
- 44 Mauritius 9th to 10th Combined Periodic Report on the implementation of the African Charter on Human and Peoples' Rights 2016- 2019.
- 45 Report from the government of the Republic of Mozambique submitted in terms of art 62 of the African Charter on Human and Peoples' Rights (Combined Report 1999-2010).
- 46 Nigeria's 6th Periodic Country Report – 2015-2016 on the implementation of the African Charter on Human and Peoples' Rights in Nigeria, 66-67.
- 47 Periodic Report on the implementation of the African Charter on Human and Peoples' Rights presented by the Republic of Senegal, April 2013, 59-60.
- 48 Periodic Report of Burkina Faso within the framework of the implementation of art 62 of the African Charter on Human and Peoples' Rights, 53-56.
- 49 Single Report comprising the 4th, 5th and 6th Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention [2020], 33-35, 67-70.
- 50 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, April 2018.
- 51 10th, 11th, 12th, 13th and 14th Periodic Reports of the Islamic Republic of Mauritania on the implementation of the provisions of the African Charter on Human and Peoples' Rights, July 2016.

Namibia,⁵² Rwanda,⁵³ South Africa,⁵⁴ and Togo⁵⁵ include housing in general in the discussion on the implementation of the African Charter while setting out the implementation of the gendered dimension separately in the section on implementing the Maputo Protocol, even though a general discussion on housing is often included also in the Maputo Protocol section. The Democratic Republic of the Congo (DRC)⁵⁶ discusses housing only in the section on the implementation of the Maputo Protocol while the report of Seychelles only covers the implementation of the Maputo Protocol.⁵⁷ Angola⁵⁸ and Eswatini⁵⁹ only discuss housing under article 16 of the Maputo Protocol but do not refer to how the various housing initiatives set out in the report affect women at all. Malawi reported on the implementation of both the African Charter and the Protocol but provided very little information about housing.⁶⁰

Most state reports focus the discussion on access to adequate housing on the provision of subsidised housing.⁶¹ The reports rarely provide any information specifically about women's access to subsidised housing, though the report of The Gambia notes that '[d]espite the numerous initiatives to make adequate housing affordable, owning a home remains a problem in the country particularly for women who tend to take on low paid jobs which affect their ability to afford such housing schemes.'⁶² States which included separate sections on implementation of the Maputo Protocol generally highlighted how the various housing programmes reported on were implemented in a non-discriminatory manner.⁶³ Some highlight that customary law may stand in the way of women's access to adequate housing.⁶⁴ Important measures such as requiring registration of subsidised housing in the name of both spouses, as provided for in South Africa,⁶⁵ is not discussed in the state reports. There is not much discussion about forced evictions in the state reports.⁶⁶ The DRC report takes note of the disadvantage faced by women in accessing housing but does not provide any details or say what the state is doing to address

52 Republic of Namibia 7th Periodic Report (2015-2019) 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.

53 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).

54 Republic of South Africa, Combined 2nd 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, August 2015.

55 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.

56 Democratic Republic of the Congo, Report to the African Commission on Human and Peoples' Rights on the implementation of the African Charter on Human and Peoples' Rights from 2008 to 2015 (11th, 12th and 13th Periodic Reports) and of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women from 2005 to 2015 (initial Report and 1st, 2nd and 3rd Periodic Reports).

57 Republic of Seychelles, Country Report 2019 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa.

58 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, January 2017.

59 Republic 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.

60 Republic of Malawi, Periodic Report on the African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019.

61 See eg Benin (n 40) 43; Kenya (n 42) 52-54; Mali (n 43) 39; Mauritius (n 44) 46-51; Mozambique (n 45) 32-33; Nigeria (n 46) 66-67.

62 Gambia (n 41) 160.

63 See eg Cameroon (n 49) 146-147.

64 Burkina Faso (n 48) 39.

65 O Elliot 'A place to call my own: the significance of housing for women' (8 March 2019) <https://www.fsdafrica.org/news/a-place-to-call-my-own-the-significance-of-housing-for-women/> (accessed 23 June 2023).

66 However, see Burkina Faso (n 48) 53-54.

this situation.⁶⁷ The most detailed discussion about challenges encountered by women is found in the Lesotho state report. The report notes that one of the key challenges is the provision in Lesotho's Constitution permitting gender discrimination under customary law.⁶⁸

Section 18(4) of the Constitution of Lesotho allows for discrimination based on customary law. As a result many women have been expelled from their marital and /or maiden homes and left with no housing on the basis of customary law principles on marriage and inheritance. For instance, in the case of *Ramatlapeng v Jessie*, the Court of Appeal of Lesotho upheld a decision of the High Court that a woman who has returned to her maiden home to seek solace from her husband's ill-treatment without divorcing her husband, 'ngala' does not have a right to live in her maiden home indefinitely.

Discussion linking the right to housing to women's rights in the state reports and Concluding Observations is limited. For example, the report of Burkina Faso notes, '[t]here is no discrimination in housing. Men and women enjoy the same right to housing. The housing policies and programmes considered earlier in this report aim at promoting this right'.⁶⁹ To this the Commission responds in its Concluding Observations, '[t]he Commission commends Burkina Faso for promoting a non-discrimination policy in the area of housing, ensuring that men and women have equal rights of access to housing'.⁷⁰ Nothing in Burkina Faso's report gives assurance that the absence of discrimination in law has resulted in the achievement of substantive equal access to housing, yet the Commission takes the state report at face value. Although in other Concluding Observations the Commission has criticised states for not doing enough to ensure access to housing for women, it could certainly take a more engaging approach.⁷¹ Despite Lesotho's admission that it faced numerous challenges about the implementation of article 16, not least, from the constitution itself, the Commission did not enquire into measures that Lesotho intended to take to overcome those challenges, apart from a general call for constitutional reform to remove article 18(4)(c).⁷²

It is relevant to compare the African Commission's Concluding Observations with those adopted by the CEDAW Committee.⁷³ The Committee has in a number of Concluding Observations highlighted the importance of access to housing for rural women. It has further highlighted the vulnerability of

67 DRC (n 56) para 285.

68 Lesotho (n 50) para 484.

69 Burkina Faso (n 48) para 348.

70 Concluding Observations and Recommendations on the Combined Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights (2011-2013) adopted at the 21st extraordinary session of the African Commission on Human and Peoples' Rights, 23 February to 4 March 2017.

71 Concluding Observations and Recommendations on the Combined Periodic Report of the Republic of The Gambia on the Implementation of the African Charter on Human and Peoples' Rights 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 (the Maputo Protocol) 2005-2014 adopted at the 31st extraordinary session of the African Commission on Human and Peoples' Rights, 19-25 February 2021, para 45(vii); Concluding Observations and Recommendations on the Combined Periodic Report of on the Implementation of the African Charter on Human and Peoples' Rights 2007-2019 and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) 2008-2019, African Commission on Human and Peoples' Rights, adopted at the 69th ordinary session 5 November-5 December 2021, para 48(x).

72 Concluding Observations and Recommendations on 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, African Commission on Human and Peoples' Rights, adopted at the 68th ordinary session, 14 April to 4 May 2021.

73 A survey by the author of Concluding Observations on state reports to the UN Committee on Economic, Social and Cultural Rights shows that the Committee has rarely, if ever, commented on the gendered dimension of the right of equal access to housing in art 11(1) of the ICESCR.

‘women and girls with disabilities, with albinism, living with HIV/AIDS and in prostitution, lesbian, bisexual and transgender women and intersex persons’ in relation to access to housing’.⁷⁴

Most state reports, whether to UN treaty monitoring bodies or the African Commission lack disaggregated data. Thus, the CEDAW Committee recommended to Mauritius the establishment of ‘monitoring mechanisms ... [including] comprehensive statistical data disaggregated by sex, age, disability, ethnicity, location and socioeconomic status in its next periodic report to illustrate the degree to which women benefit from existing anti-poverty initiatives, including on housing, in line with Sustainable Development Goal 5’.⁷⁵ In its Concluding Observations on South Africa, the CEDAW Committee expressed concern that the Basic Conditions of Employment Act 75 of 1997, Sectoral Determination on Domestic Workers did not cover the right to adequate housing for domestic workers.⁷⁶ This issue was not covered by the African Commission in its Concluding Observations on South Africa’s state report which included no criticism in relation to access to housing for women specifically.⁷⁷ This further reinforces the point of the need for the African Commission to have a deeper level of engagement with states.

The CEDAW Committee’s strongest criticism has been reserved for those African states that have not ratified the Maputo Protocol. Thus, in its Concluding Observations on Botswana, the Committee noted the ‘disproportionate levels of poverty among women and the limited access for women to land and housing’.⁷⁸ The Committee called on the Botswana government to ‘increase awareness among women of their rights concerning access to land and housing, including the right to have access to a land tribunal to challenge abuses in land allocation and to benefit from a housing scheme for low-income people’.⁷⁹ The Committee further recommended quotas for housing for women as ‘temporary special measures with time-bound targets’.⁸⁰ With regard to South Sudan the Committee expressed concern over how in the absence of codified family law, discriminatory customary law prevailed in many matters, among them access to housing.⁸¹

The ESCR Committee has highlighted forced eviction as a violation of the right to housing in a number of Concluding Observations against African states. This is in line with its General Comment 7. However, the Committee has not highlighted the specific plight of women in this context.

There has been no litigation in relation to women’s access to housing before the African Commission or the African Court. The *Endorois*,⁸² and *Curtis Doebbler*⁸³ cases before the African Commission all deal

74 Concluding Observations on the 7th Periodic Report of Angola, Committee on the Elimination of Discrimination against Women (14 March 2019) UN Doc CEDAW/C/AGO/CO/7 (2019) para 43(a).

75 Concluding Observations on the 8th Periodic Report of Mauritius, Committee on the Elimination of Discrimination against Women (14 November 2018) UN Doc CEDAW/C/MUS/CO/8 (2018) para 30(c).

76 Concluding observations on the 5th Periodic Report of South Africa, Committee on the Elimination of Discrimination against Women (23 November 2021) UN Doc CEDAW/C/ZAF/CO/5 (2021) para 49.

77 Concluding Observations and Recommendations on the Combined 2nd Periodic Report under the African Charter on Human and Peoples’ Rights and the Initial Report under the Protocol to the African Charter on the Rights of Women in Africa of South Africa, African Commission on Human and Peoples’ Rights, adopted at the 20th extraordinary session, 9-18 June 2016.

78 Concluding Observations on the 4th Periodic Report of Botswana, Committee on the Elimination of Discrimination against Women (14 March 2019) UN Doc CEDAW/C/BWA/CO/4 (2019) para 39.

79 CEDAW Committee Concluding Observations Botswana (n 78) para 40.

80 CEDAW Committee Concluding Observations Botswana (n 78) para 22.

81 Concluding Observations on the initial Report of South Sudan, Committee on the Elimination of Discrimination against Women (23 November 2021) UN Doc CEDAW/C/SSD/CO/1 (2021) para 50.

82 *SERAC, Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009).

83 *Curtis Doebbler v Sudan (Doebbler)* Communication 236/2000 (2009) AHRLR 208 (ACHPR 2009).

with the right to housing, specifically forced evictions.⁸⁴ However, none of these cases dealt with the issue from a women's rights perspective.

At the national level, there have been no cases directly citing article 16 of the Maputo Protocol. In *Asola v Attorney General*,⁸⁵ before the Kenyan Court of Appeal, Ms Asola claimed that she and her daughter had been evicted from her matrimonial home by her in-laws following the death of her husband. She argued that the High Court had 'erred in law by failing to make a finding that the practice of widow eviction is discriminatory and violates the fundamental rights of the appellant and the other women as enshrined in the Constitution of Kenya 2010, *Maputo Protocol and CEDAW*'.⁸⁶ Ms Asola argued that certain provisions of the Law of Succession Act discriminated against women. The Court of Appeal held that the cited provisions of the Law of Succession Act did not apply to the case at hand and the court could thus not make a finding in relation to their constitutionality. The Court of Appeal further confirmed the order of the High Court that Ms Asola had no right to compensation from the state as it had done what it could to protect her rights and that if a claim for compensation should be submitted this should be submitted against her in-laws. The appellants did not cite which article of the Maputo Protocol they claimed had been violated. Article 21(1) sets out the right of a widow 'to continue to live in the matrimonial house'. However, article 16 on access to housing regardless of marital status is arguably also of relevance.

6 Conclusion

State reports to UN treaty monitoring bodies and the African Commission and Concluding Observations adopted imply that there is little formal discrimination in national legislation in African states in relation to women's right to housing. However, the African Commission and other actors should pay more attention to cultural norms and practices that may affect women's right to access to housing. This is even more important when such discrimination is constitutionally endorsed like in the case of Lesotho. Also, interventions that could promote equality in housing such as requiring joint registration of spouses in subsidised housing should be encouraged. Further issues that are not formally captured in the Protocol such as forced eviction and homelessness as a result of domestic violence tend to be neglected by states and the African Commission in the state reporting procedure.

It is noticeable that women's right to housing has been more thoroughly dealt with by the CEDAW Committee compared to the African Commission and the ESCR Committee. State reporting practice indicates that states which follow the guidelines of the African Commission to report separately on the Maputo Protocol engage more with the gendered dimension of housing than those states that do not include a specific section. However, often the engagement with the issue is superficial. The African Commission should be more thorough in its engagement with the issue in its review of state reports and in adopting its Concluding Observations.

84 Chenwi (n 23).

85 *Asola & another v Attorney General* (Civil Appeal 100 of 2017) [2021] KECA 201 (KLR) (19 November 2021) (Judgment).

86 *Asola* (n 85) para 3(v).