

The right to adequate housing under African regional human rights law: exploring the extent of protection accorded to refugees

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ABSTRACT: A considerable portion of disadvantaged people in Africa live in inadequate housing and are particularly prone to homelessness, forced evictions and other housing challenges. These people include refugees in vulnerable situations, who face multiple challenges linked to their refugee status and other factors such as gender, disability, status as a child and poverty. African regional human rights law provides a robust protection for the right to adequate housing. However, for those who live in homelessness and precarious housing conditions, the regional legal protection is only useful if it is given effect at the domestic level. The clarification of the nature of the right to adequate housing and the corresponding obligations of states through the work of the three African regional human rights bodies, scholars and other actors is a worthwhile endeavour that can potentially contribute to the realisation of this right. So far, important contributions have been made in this regard, but further clarification of applicable norms is necessary. Situated in two areas of the African human rights system, namely the regional human rights law and refugee law regimes, this article builds on the rather limited literature in these areas and sheds new light on relevant provisions of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on Human and Peoples' Rights and its Protocols on the Rights of Women in Africa and the Rights of Persons with Disabilities in Africa, and the African Charter on the Rights and Welfare of the Child. It articulates the group-specific dimensions of the right to adequate housing and argues that the corresponding obligations imposed on states, including the immediate obligation to fulfil (or 'provide') adequate housing, must not be overlooked in the interpretation of this right.

TITRE ET RÉSUMÉ EN FRANÇAIS

Le droit à un logement adéquat en droit africain des droits de l'homme: analyse de l'étendue de la protection accordée aux réfugiés

RÉSUMÉ: En Afrique, un nombre significatif de personnes économiquement et socialement marginalisées vivent dans des conditions de logement inadéquates, les exposant à des risques accrus de sans-abrisme, d'expulsions forcées et d'autres formes de précarité résidentielle. Parmi elles figurent les réfugiés, une catégorie particulièrement vulnérable, confrontés à des défis complexes découlant de leur statut juridique, auxquels s'ajoutent des facteurs aggravants tels que le genre, le handicap, l'âge ou la pauvreté. Le cadre juridique régional africain en matière de droits de l'homme reconnaît et protège le droit à un logement adéquat. Toutefois, pour les populations vivant dans des conditions de logement précaires ou privées de logement,

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cette protection juridique n'est efficace que si elle est dûment mise en œuvre et appliquée au niveau national. Une clarification des contours de ce droit ainsi que des obligations des États en la matière, menée à travers les travaux des organes africains de protection des droits de l'homme, des chercheurs et d'autres parties prenantes, constitue une démarche essentielle pour en garantir la réalisation effective. Bien que des avancées significatives aient été réalisées dans ce domaine, des incertitudes subsistent quant à la portée normative et opérationnelle des obligations imposées aux États. S'inscrivant dans le cadre du système africain des droits de l'homme, cet article explore les interactions entre le droit régional des droits de l'homme et le droit des réfugiés. Il s'appuie sur des contributions doctrinales encore limitées pour examiner les dispositions clés de la Convention de l'OUA régissant les aspects propres aux réfugiés en Afrique, de la Charte africaine des droits de l'homme et des peuples, ainsi que de ses Protocoles relatifs aux droits des femmes et des personnes handicapées, et de la Charte africaine des droits et du bien-être de l'enfant. L'analyse met en lumière les dimensions spécifiques au groupe des réfugiés du droit à un logement adéquat, tout en insistant sur l'importance d'interpréter ce droit à la lumière des obligations immédiates et progressives des États. L'obligation de garantir un accès effectif à un logement adéquat, y compris par des mesures immédiates, ne saurait être sous-estimée dans la mise en œuvre et l'interprétation des droits garantis.

KEY WORDS: right to adequate housing; refugees; African regional human rights law; economic, social and cultural rights; the rights of refugees

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1 INTRODUCTION

The lack of adequate housing is a major challenge that affects a significant number of people in Africa. Although accurate and updated data on the situation of the right to adequate housing in Africa is not available, various sources show that this right has been realised only to a very limited extent. The number of homeless people is estimated to be in the tens of millions.¹ A 2019 report of the UN Habitat for Humanity International showed that 55.4 per cent of households in sub-Saharan

1 For the number of homeless persons in African countries, see World Population Review 'Homelessness by country 2024' <https://worldpopulationreview.com/country-rankings/homelessness-by-country> (accessed 17 December 2024).

Africa lived in unaffordable housing.² The majority of urban dwellers in Africa live in informal settlements in inadequate houses or shelters.³ It is estimated that, by 2050, the number of informal settlement dwellers in Africa will reach 1.2 billion.⁴ One of the main causes of the housing challenges in Africa is the lack of affordable housing in sufficient quantity.⁵

People in vulnerable situations are disproportionately and uniquely affected by the lack of adequate housing. A significant number of women, persons with disabilities, children, older persons, and refugees who live in homelessness or inadequate housing face peculiar housing challenges.⁶ Many refugees experience housing challenges that are linked to their refugee status, poverty, sex or gender, disability, and their status as children.⁷ Since most of them live in refugee camps⁸ that are located in remote areas,⁹ they do not have adequate access to infrastructure, services and amenities.¹⁰ Their encampment also confines them to live in overcrowded shelters that do not give them adequate protection from the elements. Encamped refugees may also

- 2 UN Habitat for Humanity International 'The global housing affordability challenge: a more comprehensive understanding of the housing sector' (2019) Urban Data Digest 5.
- 3 B Chitekwe-Biti and others 'Upgrading informal settlements in African cities' 24 March 2022 *African Cities Research Consortium* available <https://www.african-cities.org/upgrading-informal-settlements-in-african-cities/> (accessed 17 December 2024).
- 4 UN Habitat International 'Urban development in Africa, and the role of participatory city-wide slum upgrading for urban sustainability and the prevention of new slums' (year not provided) Policy recommendation paper 1.
- 5 M Maina and others 'Housing: domain report' African Cities Research Consortium working paper 18 (2024) 4.
- 6 See M Sobantu 'Revisiting gender and housing: housing as seen through the eyes of women in social rental housing in Gauteng, South Africa' (2019) 56 *Social Work/Maatskaplike* 65; S Tesemma & S Coetzee 'Manifestations of spatial exclusion and inclusion of people with disabilities in Africa' (2023) 38 *Disability and Society* 1938-1939; UNICEF & Ministry of Labour and Social Affairs 'Situation and access to services of people with disabilities and homeless people in two sub-cities of Addis Ababa' (2019) 23-25, 38-40.
- 7 See Y El-Lahib 'Social work at the intersection of disability and displacement: Rethinking our role' (2020) 31 *Journal of Progressive Services* 2; J van der Goltz and others 'The labour market impact of forced displacement: Jobs in host communities in Columbia, Ethiopia, Jordan, and Uganda' Executive summary booklet (2023) World Bank Group vii.
- 8 UNHCR's report shows that 78.5 per cent of refugees in Africa live in refugee camps. See UNHCR 'Global Report: 2018' 65.
- 9 ND Coniglio and others 'The geography of displacement, refugees' camps and social conflicts' (2022) World Bank Group: Policy research Working Paper 3.
- 10 The UNHCR's Handbook for Emergencies confirms that although 'the availability of an adequate amount of water' is crucial in camps, it is also 'the most problematic'. See UNHCR *Handbook for emergencies* (2007) 210. In Kenya, Kakuma refugee camp is the largest urban settlement in North-West Turkana County, but only five per cent of its residents have access electricity. See UNHCR 'Kakuma camp and Kalobeyei settlement: Briefing kit, May 2019'. See also EO Abuya 'Past reflections, future insights: African asylum law and policy in historical perspective' (2007) 19 *International Journal of Refugee Law* 54.

lack legal security of tenure to their shelters in refugee camps.¹¹ A 2019 study showed that 65 per cent of refugee shelters in refugee settlements in Uganda were damaged,¹² and 'female-headed households' were particularly affected because most of them lived in shelters that had 'structural damage'.¹³ Ironically, they were not allowed to construct their shelters using durable and culturally appropriate materials.¹⁴

Refugees living in urban areas also experience housing challenges. They are seldom included in national housing schemes, and, therefore, do not benefit from enabling mechanisms that facilitate their access to housing.¹⁵ Many of them face discrimination in accessing housing in the market, expressed either in the denial to let housing to them, or in landlords requiring them to pay exorbitant rent.¹⁶ In one instance, refugee women and their children were rendered homeless because they were unable to pay rent.¹⁷ To make matters worse, state authorities evicted them from their makeshift shelters and demolished their shelters.¹⁸

Although refugees often face housing challenges that are distinct in their nature and extent, it is clear that many citizens of asylum states also face housing challenges. For example, in Uganda, one of the most generous refugee hosting countries in Africa, the government reported that more than 1 in 10 people were homeless,¹⁹ and over three-fourths of the population lived in 'sub-standard housing conditions'.²⁰ Therefore, an intuitive reaction to any discourse about refugees' right to adequate housing in a country like Uganda may be 'these states should not be required to ensure the right to housing of refugees because they do not have sufficient resources and most of their own citizens have significant housing problems'. However, it must be noted that the housing challenges faced by citizens do not absolve these states from their obligations towards refugees. One may also argue that housing problems in any given country reflect the level of attention paid to the right to adequate housing and the measures taken by the state to ensure this right. In light of this, one may raise a counter question: in a country that has adequate legal and policy frameworks, mobilised and allocated sufficient resources for adequate housing, adopted all appropriate

11 For example, in refugee settlements in Uganda, almost all refugees lack documents attesting ownership or 'legal occupancy'. See REACH Initiative and Norwegian Refugee Council 'Refugee access to livelihoods and housing, land and property in Uganda' (2019) 24.

12 REACH Initiative and Norwegian Refugee Council (n 11) 2.

13 REACH Initiative and Norwegian Refugee Council (n 11) 18.

14 REACH Initiative and Norwegian Refugee Council (n 11) 18.

15 See eg C Kavuro 'Housing and integrating refugees: South Africa's exclusionary approach' (2019) 40 *Obiter* 81-82.

16 See eg Women's Refugee Commission 'The living ain't easy: urban refugees in Kampala' (2011) 12.

17 Women's Refugee Commission (n 16) 13.

18 E Lyytinen 'Congolese refugees' "right to the city" and urban (in)security in Kampala, Uganda' (2015) 9 *Journal of Eastern African Studies* 602.

19 Committee on Economic, Social and Cultural Rights 'Initial reports submitted by states parties due in 1990: Uganda' (2013) paras 120 & 136.

20 As above, paras 120 & 136.

measures and prioritised the most disadvantaged sections of its population, will a significant proportion of its population experience serious housing problems? Resource-related scepticism may also be countered. African states are endowed with enormous amounts of natural and human resources²¹ that are more than enough to ensure that their populations live a dignified life. As Olowu points out, the problem is not the lack of resources: 'the bigger crisis of [African states'] incapacity lies in corruption and malevolent governance exemplified by skewed policy prioritisation'.²²

These issues show that realising the right to adequate housing of refugees is often indistinguishable from realising the same right for other sub-groups of a country's population.²³ After all, in a state that has not ensured that sufficient affordable housing is available for its own people, how can refugees find affordable housing? While responses tailored to the unique housing challenges of refugees are crucial, in many cases, it would be appropriate to ensure that they are integrated into responses that address the housing challenges of all segments of the population of an asylum state. Such an approach must comply with the normative frameworks in place at the African regional level. In order to ensure this, articulating the applicable normative framework is in order. It is precisely for this reason that this article seeks to shed new light on the regional normative framework on the right to adequate housing applicable to everyone.

However, there are differences in the nature and scope of the protection given to the right to adequate housing under the treaties discussed in this article. In order to clarify and bring out a consistent interpretation of the relevant provisions of the treaties, this article employs the rules of treaty interpretation set out under the Vienna Convention on the Law of Treaties (VCLT). For the purpose of clarifying the meaning of the relevant provisions of treaties, this article relies on the 'general rule of treaty interpretation' laid out in article 31 of the VCLT. According to article 31 of the VCLT, the meaning ascribed to treaty provisions must accord with the 'ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose'.²⁴ The context of a treaty includes the 'text, including its preamble and annexes', subsequent legal instruments, including agreements between all the state parties, or by 'one or more state parties', that relate to the treaty in question.²⁵ Article 31(3) of the VCLT requires that subsequent agreement or practice of the state parties and any other pertinent 'rules of international law applicable in the relations between the parties'

21 F Viljoen *International human rights law in Africa* (2012) 544.

22 D Olowu *An integrative rights-based approach to human development in Africa* (2009) 206.

23 In the context of the rights of refugee children, Kaime has also emphasised the importance of addressing the challenges faced by children who are citizens of asylum states. See T Kaime 'The protection of refugee children under the African human rights system: finding durable solutions in international law' in J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (2008) 193-194.

24 VCLT, art 31(1); M Waibel 'Demystifying the art of interpretation' (2011) 22 *The European Journal of International Law* 574.

25 VCLT, arts 31(2)(a) & (b).

must be considered along with the context of a treaty. It is only in cases where using the general rule leads to an 'ambiguous' or 'manifestly absurd or unreasonable' meaning that the supplementary rule of interpretation (interpretation based on the drafting history and conclusions of the drafters of a treaty) becomes utilisable.²⁶ In other words, if one uses the general rule of interpretation and ascribes a sufficiently clear and reasonable meaning to a treaty provision, it is neither permissible, nor necessary to use the supplementary rule of interpretation.²⁷

In order to interpret the relevant provisions of each treaty in relation to other treaties considered in this article, and to demonstrate their applicability to refugees, this work relies on article 30 of the VCLT. This work seeks to identify, analyse, and explore the applicability to refugees of treaties that offer relatively more favourable standards of protection to the right to adequate housing. Except for the OAU Refugee Convention, all of the treaties considered in this article contain express provisions that either allow or require the application of more favourable standards enshrined in other treaties.²⁸ Because the more favourable clauses of these treaties are self-explanatory, this article does not foresee any interpretative issues.²⁹ This view is supported by article 30(2) of the VCLT, which provides that, if a treaty specifies that 'it is not to be considered as incompatible with an earlier or later treaty, the provisions of the other treaty prevail'.³⁰

Regarding the OAU Refugee Convention, two alternatives may be pursued in order to apply the more favourable standards enshrined in other treaties. First, because the OAU Refugee Convention provides that it is the 'effective regional complement' to the UN Refugee Convention, the 'more favourable treaty clause' contained under article 5 of the UN Refugee Convention serves as a gateway for applying the higher normative standards enshrined under other treaties. Second, one may invoke the relevant rule of the VCLT that applies in situations where a treaty does not contain a 'more favourable treaty clause'. Article 30(3) of the VCLT provides that 'the earlier treaty applies only

26 VCLT, arts 32(a) & (b).

27 U Linderfalk *On the interpretation of treaties: the modern international law as expressed in the 1969 Vienna Convention on the Law of Treaties* (2007) 323.

28 See eg UN Refugee Convention, art 5; African Women's Protocol, art 31; African Protocol on PWDs, art 36(1).

29 Regarding the UN Refugee Convention and other treaties, a similar approach has been adopted by notable writers in the field. See eg MG Wachenfeld & H Christensen 'Note: an introduction to refugees and human rights' (1990) 59 *Nordic Journal of International Law* 183; T Clark & F Crépeau 'Mainstreaming refugee rights: the 1951 Refugee Convention and international human rights law' (1999) 17 *Netherlands Quarterly of Human Rights* 389-392, 401; A Edwards 'Human rights, refugees and the right to "enjoy" asylum' (2005) 17 *International Journal of Refugee Law* 306; V Chetail 'Are refugee rights human rights? An unorthodox questioning of the relations between refugee law and human rights law' in R Rubio-Marín (ed) *Human rights and immigration: collected courses of the Academy of European Law* (2014) 22.

30 VCLT, art 30(2).

to the extent that its provisions are compatible with those of the later treaty'.³¹

This article is divided into eight sections. The introduction is the first section. Section 2 explores the protection of the 'right' to housing under the UN Refugee Convention.³² Section 3 analyses how and to what extent the OAU Refugee Convention protects this right. Section 4 discusses how the indirect protection accorded to the right to housing under the African Charter on Human and Peoples' Rights (African Charter) complements the protection accorded to this right under the global and African regional refugee-specific treaties. Section 5 analyses the novel legal protection accorded to (refugee) women's right to adequate housing under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). Section 6 analyses the protection accorded to the right to adequate housing of persons with disabilities under the Protocol to the African Charter on the Rights of Persons with Disabilities in Africa (African Protocol on PWDs). In this section, the article spotlights the unique nature of the right to adequate housing of persons with disabilities and the corresponding obligations of states under the African Protocol on PWDs and its applicability for refugees with disabilities in Africa. Section 7 analyses the indirect protection accorded to refugee children's right to adequate housing under the African Charter on the Rights and Welfare of the Child (African Children's Charter). Section 8 concludes the article.

2 THE PROTECTION OF REFUGEES' 'RIGHT' TO HOUSING UNDER THE UN REFUGEE CONVENTION

The UN Refugee Convention³³ does not expressly provide for refugees' right to housing using a rights language. Under article 21, it merely lays down obligations on its state parties with respect to refugee housing. As discussed below, the obligations it imposes are contingent on three factors: the level of the relationship that a refugee has with the state, the

31 In this case, the interpretative issue must relate to 'the same subject matter' governed by the treaties in question. The OAU Refugee Convention does not contain a provision that expressly deals with refugees' right to housing. However, as the analysis in section 3 shows, the 'right' to housing is implied in article 2(1) of this Convention. It is worth noting that the rule provided under art 30(3) also applies in cases where not all the parties to the earlier treaty are parties to the latter treaty. If all the parties to the earlier treaty are not parties to the latter treaty, the latter treaty applies to the states that are parties to it. See VCLT, art 30(4)(a)-(b).

32 This is necessitated by the fact that the OAU Refugee Convention does not contain a provision that expressly deals with refugees' right to housing, and instead, encourages its state parties to accede to the UN Refugee Convention and its Protocol of 1967, and apply the provisions of these treaties. See the preamble to the OAU Refugee Convention, para 11.

33 The temporal and geographic scope of application of this Convention has been by article 1(1) & (2) of the Protocol Relating to the Status of Refugees in 1967.

state's role with regard to housing, and the level of treatment it is required to grant refugees.

Under article 21 of the UN Refugee Convention, state parties' obligation towards refugees does not apply to all refugees. Instead, it is limited to refugees 'lawfully staying'. Lawful stay is determined based on the length of the refugees' stay in the country of asylum. If a refugee stays in an asylum state for more than a temporary period, they meet the criteria of lawful stay.³⁴ This clearly excludes refugees who have stayed in an asylum state for a short period of time. Because the personal scope of article 21 is restricted to this group of refugees, refugees who do not satisfy the requirement of lawful stay do not qualify as holders of the 'right' under article 21.³⁵ For this reason, Leckie and Simperingham suggest that these refugees 'will be limited, as regards housing, to protection under general human rights law'.³⁶

In addition, under the UN Refugee Convention, state parties' obligation regarding refugees' 'right' to housing is conditional upon whether housing is 'regulated by laws or regulations or is subject to the control of public authorities'. This implies that a state party does not have housing-related obligations towards refugees if (and to the extent that) housing is a matter left outside its control, for example, if housing is entirely left to the private sector.

Unlike the typical formulation of housing related state obligations in human rights treaties, housing related state obligations under the UN Refugee Convention are formulated in relative terms. There are two types of relative obligations under article 21 in this regard, which may be understood as obligations pertaining to the minimum and higher standards of treatment. The minimum obligation of states is to grant protection to refugees to the extent that they protect the right to housing of 'aliens generally in the same circumstances'.³⁷ The higher standard enjoins states to grant refugees 'treatment as favourable as possible'. Although both types of obligations have similarity in that they

34 'Where the term "habitual residence" is used in other articles of the 1951 Convention [other than art 1A(2)], it signifies more than a stay of short duration, but was apparently not intended necessarily to imply permanent residence or domicile'. See G Goodwin-Gill & J McAdam *The refugee in international law* (2007) 526.

35 See S Leckie & E Simperingham 'Lodgment/housing' in E Zimmermann (ed) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary* (2011) 1009. However, refugees may be accorded a national treatment by virtue of art 23. But this depends on whether housing forms part of public relief in the relevant laws and policies of a state party. See E Lester 'Article 23 (Public relief/Assistance publique)' in E Zimmermann (ed) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary* (2011) 1055.

36 Leckie & Simperingham (n 35) 1009. It is important to note that the protection of the right to adequate housing under international human rights law is also beneficial for 'refugees lawfully staying' in the territory of an asylum state.

37 States are permitted to give preferential treatment to citizens of states with which they have bilateral or other treaties to this effect. This article, thus, permits states to exclude refugees and other aliens from the standard of protection accorded to foreigners who enjoy preferential treatment. See JC Hathaway *The rights of refugees under international law* (2005) 197-198.

are formulated in relative terms, there are also clear differences between these levels of obligations. Whether a state has complied with the minimum obligation can be ascertained by looking at the treatment it gives to the comparator group, namely, 'aliens generally in the same circumstances'. In contrast, establishing whether a state has complied with its obligation concerning the higher standard of treatment may not be easy. The higher standard obliges states to give protection to refugees' 'right' to housing to the extent they can, as favourable as possible. Clearly, this obligation is contingent on different factors, including the capacity of the asylum state and the particular circumstances of the refugees.

The relative standard adopted regarding the minimum standard is problematic. This is not only because the comparator group is 'aliens generally in the same circumstances'. The relative standard is problematic even if the comparator group were nationals. For example, in the latter case, this provision would have little or no significance to refugees in a state party that does not protect the right to housing of its citizens. The use of a comparator group under article 21 of the UN Convention also implies that state parties to the Convention do not have an obligation to treat refugees on par with their citizens. The non-discrimination provision of the Convention is clear in this regard because it does not prohibit asylum states from making a distinction between refugees and citizens.³⁸ The Convention only prohibits discrimination among refugees. The prohibited grounds of discrimination are also limited: states are required to refrain from discriminating between refugees based on race, religion or country of origin.³⁹

Refugees' 'right' to housing is also implicitly protected under article 23 of the UN Refugee Convention, which deals with public relief. Public relief concerns state interventions to provide services or benefits for those who are in need.⁴⁰ Under article 23, the Convention requires state parties to provide public relief for refugees on equal terms with their 'nationals'. However, Hathaway points out two major limitations of article 23 of the UN Refugee Convention. First, this provision applies for refugees lawfully staying, which means that refugees who do not meet this criterion are outside the scope of this provision.⁴¹ Second, if public relief programmes are not in place in a state party, the Convention does not require it to provide public relief for refugees.⁴² If an asylum state provides public relief to its citizens, but the extent of public relief provided by the state is insufficient to meet the housing needs of refugees, the Convention does not require it to provide an adequate level of relief for refugees.⁴³ Similarly, if housing is not part of the existing public relief programmes of an asylum state, the

38 See UN Refugee Convention, art 3.

39 UN Refugee Convention, art 3; Clark & Crépeau (n 29) 393.

40 Hathaway (n 37) 824.

41 Hathaway (n 37) 808.

42 Hathaway (n 37) 808.

43 Hathaway (n 37) 809.

Convention does not enjoin the state to include housing as part of its public relief programmes. Therefore, though article 23 is significant in addressing the housing needs of refugees, its significance is also limited.

The UN Refugee Convention was not intended to set a static standard of protection for the rights of refugees. Instead, it was intended to enshrine minimum standards.⁴⁴ State parties to the Convention can 'grant' refugees 'more liberal rights'.⁴⁵ Under its article 5, the UN Refugee Convention provides that '[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'. A state party to the Convention may give a better protection for the rights of refugees by enacting legislation or by ratifying treaties that accord better protection for refugees' rights as compared to the UN Refugee Convention.⁴⁶ If new legislation or a treaty subsequently ratified more favourably protects refugees' right to housing as compared to the protection of this right under the UN Refugee Convention, the minimum standard of protection enshrined under the UN Refugee Convention should not bar refugees from benefiting from such protection.⁴⁷

Subsequent to the coming into force of the UN Refugee Convention in 1954, several human rights treaties that protect the right to adequate housing have been adopted at the global and regional level. This contribution mainly deals with African regional refugee-specific and 'general' human rights treaties that, in many ways, complement the protection of refugees' 'right' to housing enshrined under the UN Refugee Convention. Although this article makes a specific reference to refugees, the analyses and arguments of this article pertaining to the 'general' human rights treaties are also relevant for people other than refugees.

3 REFUGEES' RIGHT TO ADEQUATE HOUSING UNDER THE OAU REFUGEE CONVENTION

The OAU Refugee Convention contains provisions that are distinct from the provisions of the UN Refugee Convention. This includes the expanded definition of the term refugee,⁴⁸ (which, in relation to refugees' right to adequate housing, means that persons falling under

44 N Robinson *Convention Relating to the Status of Refugees: its history, significance and contents* (1952) 9-10; Hathaway (n 37) 109.

45 Robinson (n 44) 9-10.

46 A Grahl-Madsen *Commentary on the Refugee Convention* (1997) article 5; Hathaway (n 37) 109.

47 If this relates to a treaty ratified by the state party subsequent to its ratification of the UN Refugee Convention, art 30(3) & (4) of the Vienna Convention on the Law of Treaties apply. See also Robinson (n 44) 17.

48 Art 1(2).

the broader definition are holders of the right to housing); the recognition, in the broader sense, of the obligation not to return refugees to their country of origin against their will;⁴⁹ and the obligation it imposes on states of origin to 'make adequate arrangements' for the repatriation of refugees and 'facilitate their re-settlement'.⁵⁰

Unlike the UN Refugee Convention, the OAU Refugee Convention does not contain a broad range of substantive provisions. The limited number of substantive provisions under the OAU Refugee Convention are, just like in the UN Refugee Convention, framed as state obligations. However, as Viljoen notes, 'entitlements (or "indirect rights") are implied by the imposition of obligations on states'.⁵¹ The substantive provisions under the OAU Refugee Convention, from which 'indirect rights' can be inferred, are the ones that deal with refugee status and the protection against refoulement,⁵² non-discrimination,⁵³ the issuing of travel documents,⁵⁴ and the obligation to 'secure the settlement' of refugees.⁵⁵

The absence of explicitly stated substantive rights in the OAU Refugee Convention was because this Convention was designed to be an 'effective regional complement in Africa' to the UN Refugee Convention.⁵⁶ The aim was to ensure that the substantive provisions under the UN Refugee Convention would be applicable in African states that become parties to both the UN Refugee Convention and the OAU Refugee Convention.⁵⁷ This is why the Assembly of Heads of State and Government requested state parties of the OAU Refugee Convention to accede to the UN Refugee Convention and its Protocol of 1967, and to 'apply their provisions to refugees in Africa'.⁵⁸ Consequently, the 'right' to housing enshrined under article 21 of the UN Refugee Convention is applicable in asylum countries that are parties to both the UN and OAU Refugee Conventions.⁵⁹

In addition to the applicability of article 21 of the UN Refugee Convention, the right to adequate housing is more robustly, but

49 Art 2(3).

50 Art 5(2) of OAU Refugee Convention. See also Viljoen (n 21) 244.

51 Viljoen (n 21) 242.

52 OAU Refugee Convention, arts 1 & 2(3).

53 OAU Refugee Convention, art 4.

54 OAU Refugee Convention, art 6(1) & (3).

55 OAU Refugee Convention, art 2(1).

56 OAU Refugee Convention, art 8.

57 G Okoth-Obbo 'Thirty years on: a legal review of the 1969 Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *Refugee Survey Quarterly* 98; BTM Nyanduga 'Refugee protection under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2004) 47 *German Yearbook of International Law* 93.

58 See the preamble of the OAU Refugee Convention, where the Assembly of Heads of State and Government requested Member States of the OAU to apply the provisions of the 1951 Refugee Convention.

59 See also VCLT, art 30(2); M Sharpe 'The 1969 African Refugee Convention: innovations, misconceptions, and omissions' (2012) 58 *McGill Law Journal/Revue de droit de McGill* 140-141.

impliedly, protected under the OAU Refugee Convention. The obligation to 'secure the settlement of refugees', set out under article 2(1) of the OAU Refugee Convention imposes positive obligations on state parties. The term 'to secure the settlement of refugees' implies that state parties have an obligation to ensure that refugees have access to adequate housing, without which their settlement cannot be secured. It is crucial to note that this phrase imposes immediate and positive obligations (including the obligation to fulfil (provide)) on state parties to the Convention. This interpretation is consistent with state practice in several African countries.

The obligation to secure the settlement of refugees concerns the duty of states to find long term solutions for refugees.⁶⁰ Karadawi distinguishes between different phases of assistance that were provided to refugees in Sudan. The first phase is the 'relief phase' during which refugees are provided with emergency assistance upon their arrival.⁶¹ The second phase is the 'settlement phase', which is defined by some level of permanence.⁶² During this stage, refugees are given land, while 'infrastructure and services are financed by UNHCR'.⁶³ The allocation of plots of land for refugees, the primary aim of which was to enable refugees' self-reliance,⁶⁴ also facilitates their access to housing (for example, through self-help housing) and therefore, can be regarded as part of the state's performance of its Convention obligation to secure the settlement of refugees. While this is a widespread practice in many African countries that place refugees in refugee camps and refugee settlements, it is crucial that African states also pay attention to securing the settlement of refugees living in urban settings by facilitating and fulfilling their right to adequate housing.

It is also useful to note that the personal scope of article 2(1) is broader than the personal scope of article 21 of the UN Refugee Convention. In other words, the obligation to secure the settlement of refugees is not restricted to a portion of refugees, unlike article 21 of the UN Refugee Convention, which merely applies to a sub-group of refugees who have stayed in the country of asylum beyond a prescribed period of time.

The limitation of article 2(1) is that the right is circumscribed by the proviso 'consistent with their respective legislation'. Accordingly, the measures that states are required to take, including measures to ensure refugees' right to housing, are subject to their domestic legislation. This has the potential of jeopardising the protection of refugees' right to housing implied in this provision⁶⁵ because article 2(1) does not include a clause that stipulates limitations on domestic legislation, for example,

60 This does not necessarily imply durable solutions.

61 A Karadawi 'Constraints on assistance to refugees: some observations from the Sudan' (1983) 11 *World Development* 541.

62 As above, 541.

63 As above.

64 As above.

65 See also J Oloka-Onyango 'Plugging the holes: refugees, OAU policy and the practices of member states' (1986) USC Issue Brief, Washington DC 7-8.

where domestic legislation is too restrictive. However, the jurisprudence of the African Commission and the African Court on Human and Peoples' Rights (African Court) affirms that the term 'law' in such clauses does not give states an open remit to arbitrarily restrict human rights.

The protection of refugees' right to housing under the OAU Refugee Convention also has its limitations. Although article 2(1) can be interpreted broadly in a manner that addresses the housing challenges of diverse sub-groups of refugees, such as refugees with disabilities, refugee women, refugee children, and older refugees, its potential is yet to be unlocked through interpretation and application. A related setback to addressing refugees' housing challenges through the OAU Refugee Convention is that its non-discrimination provision has a very limited scope because it does not prohibit discrimination based on refugee status, sex, gender, disability and many other markers of identity or status.

To sum up, the OAU Refugee Convention indirectly protects refugees' right to housing in two ways. The first is by referring to article 21 of the UN Refugee Convention which deals with housing. The second indirect protection is through its article 2(1). As much as its value may be circumscribed by a clawback clause, the nature of states' obligations under article 2(1) reaffirms, and gives refugees a robust legal basis to claim their right to housing. Moreover, the expanded definition of the term 'refugees' under the OAU Refugee Convention provides a legal basis for the protection of the right to housing of a broader category of refugees included under article 1(2) of the OAU Refugee Convention, as compared to the narrow definition of the UN Refugee Convention. Furthermore, unlike the limited personal scope of application of article 21 of the UN Refugee Convention (which restricts the applicability of the right to housing to a sub-group of refugees), article 2(1) of the OAU Refugee Convention has a broader personal scope. However, its prohibition of discrimination is limited because it does not prohibit discrimination based on refugee status, sex or gender, and disability, among other grounds.

In what follows, this article explores how the African Charter, the African Women's Protocol, the African Protocol on PWDs, and the African Children's Charter strengthen the indirect protection of refugees' 'right' to housing under the OAU Refugee Convention, and respond to the specific housing challenges that different groups of refugees experience.

4 THE PROTECTION OF REFUGEES' RIGHT TO ADEQUATE HOUSING UNDER THE AFRICAN CHARTER

The right to adequate housing is not explicitly recognised in the African Charter. However, the African Commission on Human and Peoples' Rights (African Commission) has, in its jurisprudence, applied the

principle of interdependence of rights⁶⁶ and ‘read into’ other rights contained in the Charter in order to recognise and give meaning to the right to housing. In *Social and Economic Rights Action Centre and Another v Nigeria* (SERAC case), the Commission stated that the right to housing is impliedly protected in the rights to property, health and to the protection of family life, all of which are explicitly recognised in the African Charter.⁶⁷ It held that the destruction of the houses and villages of the Ogoni people by the Nigerian state violated its minimum obligations.⁶⁸ The Commission found that the minimum obligations with respect to the right to housing are the obligation to refrain from interfering in the enjoyment of the right to housing and the obligation to protect the enjoyment of this right.⁶⁹ It concluded that the state’s acts amounted to a ‘massive violation of the right to shelter’.⁷⁰ Similarly, the Commission has recognised the right to housing in other communications brought before it by invoking the interdependence of rights recognised in the Charter.⁷¹

The Commission elaborated on the content of the right to adequate housing. In its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights’ (Principles and Guidelines), it incorporated the ‘elements’ of adequate housing,⁷² which are useful for assessing the adequacy of housing.⁷³ The Commission made an important contribution to the clarification of the contents of the right to adequate housing. For example, its Principles and Guidelines spell out the elements of the right to adequate housing in a rights language and clearly state the corresponding obligations of states. This contrasts with the formulation of the ‘elements of adequate housing’ in General Comment 4 of the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR), which, for the most part, does not couch the ‘elements of adequate housing’ as entitlements and freedoms, and fails to specify the obligations of states in relation to each element.⁷⁴ In addition, in its Principles and Guidelines, the Commission has made it clear that state parties to the African Charter have an obligation to

66 For a discussion on the Commission’s use of the interdependency of rights in order to give recognition to the right to housing, see L Chenwi ‘The right to adequate housing in the African regional human rights system: convergence between the African Commission and South African approaches’ (2013) 17 *Law Democracy & Development* 355-357.

67 *SERAC and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 60.

68 *SERAC* para 61.

69 As above.

70 As above.

71 *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 159, 164, 205; and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 218.

72 Principles and Guidelines, paras 79(g)-(l).

73 The elements of adequacy were adopted by the Committee on ESCR in its General Comment 4, paras 8(a)-(g).

74 See eg Principles and Guidelines, para 79(j).

‘ensure, at the very least, basic shelter for everybody’.⁷⁵ The Principles and Guidelines denote that states have an immediate obligation that includes the obligation to fulfil (provide).

Perhaps most people who lack adequate housing would be able to realise their right to housing if states merely respect, protect, promote, and facilitate favourable conditions that enable them to meet their housing needs. For those who cannot do so for various reasons, states have the obligation to fulfil (provide), at minimum, basic shelter. This is because the obligation of states to ‘ensure, at the very least, basic shelter for everybody’ is an immediate obligation of result. In other words, for those who cannot or will not meet their shelter needs even if states respect and protect the right to adequate housing and facilitate favourable conditions, an immediate obligation of result triggers states’ obligation to fulfil (provide) basic shelter (at a minimum).

It is clear that the African Commission has adopted a minimalist approach in its Principles and Guidelines.⁷⁶ However, this should not come as surprise given the absence of an express provision on the right to adequate housing under the Charter, which would have provided a solid legal basis and guidance for the Commission. As discussed in sections 5 and 6 below, the African Women’s Protocol and the African Protocol on PWDs contain express provisions on the right to adequate housing and impose immediate obligations of result on their state parties.

The rights enshrined under the African Charter apply to every individual. The Charter requires that the rights contained in it must be applied ‘without distinction of any kind’.⁷⁷ The list of the prohibited grounds of distinction under the African Charter are not exhaustive, which means that it is possible to recognise the prohibition of distinction based on unenumerated arbitrary grounds, such as refugee status and intersectional discrimination that involves refugee status. It is particularly worth noting that one of the prohibited grounds listed in the Charter is ‘fortune’. As discussed in sections 6 and 7 of this article, the explicit legal recognition of fortune as a prohibited ground of distinction is significant with regard to the right to adequate housing.

The implied right to adequate housing is also applicable to refugees in their countries of refuge. The jurisprudence of the African Commission and its soft laws provide support to this interpretation. For example, in a matter that concerns human rights violations including the mass expulsion and forced eviction of Sierra Leonean refugees from their houses in Guinea,⁷⁸ the Commission based its findings both on the African Charter and the OAU Refugee Convention. It held that Guinea violated articles 2, 4, 5, 12(5) and 14 of the African Charter and

75 Principles and Guidelines, para 79(c).

76 See also *SERAC* para 61.

77 African Charter, art 2.

78 *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) para 3.

article 4 of the OAU Refugee Convention.⁷⁹ In addition, the Principles and Guidelines recommend that states ‘take measures to ensure that [...] refugees are guaranteed equal access to [...] adequate housing and shelter’.⁸⁰ The most explicit recognition of refugees as holders of the right to adequate housing is found in the African Guiding Principles on the Rights of All Migrants, Refugees, and Asylum Seekers (Guiding Principles on Migrants’ Rights), adopted by the African Commission on 21 October 2023.⁸¹

In sum, although the African Charter does not expressly enshrine the right to adequate housing, its provisions have been relied on to infer this right. As demonstrated in the jurisprudence and soft law of the Commission, this right applies to refugees. It is possible for the regional judicial and quasi-judicial human rights bodies to interpret this ‘derived’ right in a manner that addresses the peculiar housing challenges of various sub-groups of refugees.⁸² In order to do so, these bodies may invoke other provisions of the African Charter and the relevant provisions of the group-specific regional human rights treaties. The next three sections analyse how and to what extent the African Women’s Protocol, the African Protocol on PWDs, and the African Children’s Charter protect this right, with a particular reference to refugees.

5 THE PROTECTION OF WOMEN’S RIGHT TO ADEQUATE HOUSING UNDER THE AFRICAN WOMEN’S PROTOCOL AND ITS APPLICABILITY FOR REFUGEE WOMEN

The African Women’s Protocol aims to ensure the elimination of discrimination against women⁸³ and the ‘promotion, realisation, and protection’ of their rights.⁸⁴ This Protocol enhances the protection of women’s rights under the African Charter. For example, it includes rights that are not explicitly recognised in the African Charter. Banda has aptly stated that the ‘introduction of the right to adequate housing’ was ‘an important innovation of the African Protocol’.⁸⁵ Viljoen has also commented that, ‘by including the right to food security and the right to adequate housing’, the Protocol has ‘gone beyond the scope’ of

79 Although the Commission cited the non-discrimination provision, it did not reason that it interpreted ‘other status’ to include refugee status. It merely invoked article 2 of the Charter along with other provisions without any explanation.

80 Guiding Principles, para 79(p).

81 See Guiding Principles, Principle 28(1).

82 This is possible because the Commission is required to ‘draw inspiration’ from African regional and UN human rights instruments that do so. See art 60(1) of the African Charter.

83 African Women’s Protocol, preamble, para 13.

84 African Women’s Protocol, preamble, para 14.

85 F Banda ‘Blazing a trail: the African Protocol on Women’s Rights comes to force’ (2006) 50 *Journal of African Law* 23.

the rights enshrined under the African Charter.⁸⁶ Their observations elucidate that the Protocol has added more subsistence related rights to the catalogue of the rights enshrined in the African Charter.

In its article 16, the African Women's Protocol specifically deals with the right to adequate housing. Unlike article 14(2)(h) of the International Convention against the Elimination of All forms of Discrimination against Women (CEDAW), which applies only to women living in rural areas, article 16 of the African Women's Protocol applies to all women. It states that

[w]omen 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.

This provision has started to attract scholarly attention.⁸⁷ Building on existing literature, this article analyses this provision and its significance for addressing the housing challenges of women (including refugee women). Before proceeding to the analysis of this provision, it is appropriate to note that the Principles and Guidelines of the African Commission have dealt with the right to housing, mentioned women and refugees as part of vulnerable groups, and specified state obligations regarding their right to housing.⁸⁸ However, the Principles and Guidelines only relate to the African Charter, which does not contain an express provision on this right. The robust protection accorded to women's right to adequate housing is not the legal basis for the Principles and Guidelines. Although the Principles and Guidelines have substantially clarified the contents of the right to adequate housing, some aspects of the Principles and Guidelines, such as the 'minimum core obligations' regarding the right to housing are at variance with the level of obligation imposed by the Women's Protocol.⁸⁹ Therefore, further clarification of women's right to adequate housing in line with article 16 of the African Women's Protocol and the object and purpose of this Protocol is essential. Women's right to adequate housing under the African Women's Protocol and the corresponding obligations of state parties to this Protocol are analysed below.

One of the most important and innovative features of article 16 of the Protocol concerns its formulation of the nature of women's right to adequate housing and the corresponding obligations of states. This article identifies four distinct features of women's right to adequate housing under the Protocol.

86 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 20.

87 See M Killander 'Right to adequate housing' in A Rudman and others (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 351; Viljoen (n 86) 20; Banda (n 85) 23.

88 Principles and Guidelines, para 79(n)-(r).

89 See Principles and Guidelines, para 79.

First, article 16 protects women's 'equal access' to adequate housing as an immediately claimable right and requires states to ensure this right immediately.

Second, by including the qualifier 'in a healthy environment', women's right to adequate housing under the African Women's Protocol strengthens the habitability element of adequate housing found in General Comment 4 of the Committee on ESCR.⁹⁰ By doing so, it crystalises the soft law obligation of states (regarding the habitability of housing) into a binding obligation. This responds to several housing challenges experienced by women in general, and refugee women in particular. It recognises their right to live in housing that protects them from, and is free from, threats to their health. This should also be understood as protection from physical threats, including domestic violence,⁹¹ harassment in housing, and discriminatory rental levels that jeopardise the affordability of housing and ultimately compromise women's health, for example, by undermining their ability to cater for their needs.

Third, by proclaiming that 'women shall have the right to *equal access* to housing',⁹² it transforms the accessibility dimension of the right to adequate housing, adopted in General Comment 4 of the Committee on ESCR⁹³ into a claimable right and a binding obligation on state parties. In addition to this relative standard (equal access), the Protocol also lays down an immediate and absolute standard by requiring state parties to 'grant to women [...] access to adequate housing'.

The 'equal access' clause under the first sentence of article 16 has profound significance and further comment is in order. Two issues stand out in this regard: (i) This right is framed as an immediately claimable right which means that state obligations are also immediate.⁹⁴ (ii) The term 'equal access' is not qualified by the comparator group found in CEDAW, namely, men. This addresses women's unequal access to housing more comprehensively. This is because inequality in access is not only related to gender-based factors, but also to other factors that play a role in women's access to housing.

Fourth, in the second sentence of article 16, which deals with what state parties must do in order to realise women's right to adequate housing, the Protocol imposes a combination of an obligation of

90 See Committee on Economic, Social and Cultural Rights 'General Comment 4' para 8(d).

91 In relation to this, the African Commission Guidelines prescribe that 'alternative housing should be provided to women victims of domestic violence. See African Commission Principles and Guidelines para 67(xxxv)(g). See also Chenwi (n 66) 352. It is important to note that refugee women and refugee girls living in refugee camps are highly vulnerable to sexual and gender-based violence.

92 Emphasis added.

93 Committee on ESCR, General Comment 4, para 8(e).

94 See also SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: theories, laws, practices and prospects* (2013) 258. It is important to note that non-discrimination is one of the immediate obligations.

conduct and an obligation of result on state parties. This underscores the important role of state parties in the realisation of women's right to housing, mainly by taking positive measures that guarantee this right. This includes facilitating women's access to housing and fulfilling this right.

The word 'access' in this phrase has been interpreted as implying that what is required of states is 'to create and maintain conducive environment within which individuals are able to acquire [housing] for themselves and not to provide them directly, except in certain exceptional cases'.⁹⁵ However, I argue that the obligation to 'grant access' is broader than merely facilitating conditions for women to realise their right to housing.

Given the multiple challenges that must be overcome in order to finally create a conducive condition for many women in Africa to realise their right to housing, and the fact that states in which most women lack access to housing might find it easy to claim that they are taking measures towards creating such conditions, a narrow interpretation of this word is not beneficial to women who are deprived of access to housing.

The steps to be taken to ensure women's access to adequate housing depend on the circumstances prevailing in a state party and on the challenges faced by each woman deprived of access to housing. In many contexts, what is required might be facilitating conditions for them to secure their own housing,⁹⁶ for example, by ensuring their access to land, and providing housing finance. Given the multiple barriers many women in Africa experience in accessing housing, removing all barriers and creating suitable conditions that enable all of them to 'acquire' housing might take a long time.

The obligation of states to 'grant to women [...] access to adequate housing' is not qualified by the progressive realisation terminology. The ordinary meaning of the terms 'grant' and 'access' both imply an obligation to fulfil (provide) and an obligation to fulfil (facilitate).⁹⁷ The Merriam-Webster's Dictionary defines the term 'grant' as follows (these are the relevant ones to this analysis): 'to consent to carry out for a person: allow fulfilment of', 'to permit as a right, privilege or favour', and 'to bestow or transfer formally'. The Cambridge Dictionary defines this term as follows: 'to give or allow someone something, usually in an official way'.⁹⁸ From these definitions, one may conclude that this term not only implies permission, but also 'bestowing, giving, and officially

95 Yeshanew (n 94) 290, citing C Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' in G Bekker (ed) *A compilation of essential documents on economic, social and cultural rights* (1999) 1 *Economic and Social Rights Series* 7.

96 Yeshanew (n 94) 290.

97 I rely on the ordinary meaning of these terms because the ordinary meaning of the terms of a treaty, read in their context, is the main means or rule of interpretation of treaties. See VCLT, art 31.

98 Cambridge dictionary, available <https://dictionary.cambridge.org/dictionary/english/grant> (accessed 9 January 2024).

transferring something to someone'.⁹⁹ Consequently, one may conclude that states' obligation to grant access to adequate housing includes a positive obligation to fulfil (provide) as one of its main components to realise this right. While the obligation to fulfil (provide) is not always relevant to realise this right, it is indispensable in many contexts, and it is enshrined in the Protocol to serve a purpose.

The African Women's Protocol was adopted to rectify a critical challenge that women in Africa face. As stated in the preamble to the Protocol, the central concern that necessitated the adoption of the Protocol was the fact that 'despite the ratification of the African Charter [...] and other human rights instruments' by African states, 'women in Africa still continue to be victims of discrimination'.¹⁰⁰ In other words, the Protocol was a 'response to the lack of implementation' of the rights of women enshrined under African and global human rights law.¹⁰¹ Its aim is to 'ensure that the rights of women are promoted, realised and protected'.¹⁰² It is in light of this aim that the right to adequate housing of women enshrined in the Protocol must be interpreted.

More support can be provided to the interpretation advanced in this article. 1) The formulation of accessibility of the right to health by the UN Committee on ESCR: Drawing on and adapting the four dimensions of the term 'accessibility' in its General Comment 15,¹⁰³ it would be helpful to construe 'access to adequate housing' in a multi-dimensional way that encompasses economic, informational, physical, and non-discrimination aspects. 2) The decision of the South African Constitutional Court in *Grootboom*, in which the Court interpreted the 'right to have access to adequate housing' enshrined under article 27(1) of the South African Constitution. It stated that '[f]or a person to have access to adequate housing, all of these conditions must be met: there must be land, there must be services, there must be a dwelling'.¹⁰⁴ It further emphasised that state policy must respond to the different needs of people. It stated that 'for those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses'.¹⁰⁵ Whereas, for 'those who cannot afford to provide themselves with housing', the Court stated that the state must 'pay special attention' and suggested that it must respond to their particular situation by providing 'adequate social assistance'.¹⁰⁶ It is worth noting that this decision, as well as the articulation of the different dimensions of 'accessibility' by the UN Committee on ESCR

99 This is a synthesised meaning of one aspect of the term.

100 Preamble to the African Women's Protocol, para 12; Banda (n 85); Viljoen (n 86) 16-17.

101 Viljoen (n 86) 17.

102 Preamble to the African Women's Protocol, para 14.

103 Committee on ESCR 'General Comment 15: the right to the highest attainable standard of health' para 12(b).

104 *Grootboom and others v Government of the Republic of South Africa and Others* (CCT38/00) [2000] ZACC 14 (21 September 2000) para 35.

105 *Grootboom*, para 36.

106 *Grootboom*, para 36.

relate to provisions of the South African Constitution and the ICESCR respectively, under which state obligations are qualified.¹⁰⁷ For this reason, although they provide insight into what 'access to adequate housing' entails, their interpretations of state obligations do not entirely correspond to how state obligations under article 16 of the African Women's Protocol should be interpreted. This is because the African Women's Protocol does not subject the realisation of women's right to adequate housing to the availability of resources.¹⁰⁸

In light of this, state parties' obligation to fulfil (provide) women's right to adequate housing should not be treated as an exception without even assessing the barriers to their right to housing and identifying the most suitable way of ensuring their access to adequate housing.

Research shows that domestic laws and customary practices in various African countries subject women's right to housing to their marital status.¹⁰⁹ In response, by enshrining women's equal access to housing regardless of their marital status, the Protocol addresses another dimension of access, and is useful to challenge laws and practices that anchor women's right to housing on their marital status. State parties' obligations in this regard are also immediate and are not subject to progressive realisation.

The African Women's Protocol contains provisions that specifically refer to refugee women. This includes article 4(2)(k), which concerns refugee women's equal access to refugee status determination and obliges states to give refugee women the 'full protection and benefits guaranteed under international refugee law, including their own identity and documents'. Under the rubric of 'the right to peace', the Protocol enjoins states to secure the participation of asylum seeker and refugee women at all levels of decision making regarding the protection of refugees.¹¹⁰ Evidently, the fact that the Protocol contains specific provisions dealing with refugee women does not mean that other rights contained in the Protocol do not apply to refugees. The specific provisions deal with matters that are specific to refugee women. In light of this, women's right to adequate housing, enshrined under the African Women's Protocol equally applies to refugee women.

It may be concluded that the African Women's Protocol provides a robust protection to the right to adequate housing of women. The main feature of the right to adequate housing of women under the African Women's Protocol is its formulation of the obligation of states as an immediate obligation of conduct and result. The other important feature of the right to adequate housing under the Protocol is the transformation of some aspects of the components of the right to

107 See the Constitution of the Republic of South Africa, secs 26(1)-(2); ICESCR, art 12.

108 In addition, the interpretation of the Court must be viewed by taking into account other factors such as the overall difference in the level of socio-economic development between South Africa and the majority of the rest of African states.

109 See eg L Chenwi & 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* 531-532.

110 African Women's Protocol, art 10(2)(c) - (d).

adequate housing from soft law-based, non-binding obligations into binding obligations. This section has also shown that the rights contained in the Protocol, including the right to adequate housing apply to refugee women.

6 THE RIGHT TO ADEQUATE HOUSING UNDER THE AFRICAN PROTOCOL ON PWDs AND ITS APPLICABILITY FOR REFUGEES WITH DISABILITIES

The African Protocol on PWDs was adopted with the aim of providing a legal response to multiple factors that constitute, and contribute to, the violation of the rights of PWDs in Africa. In its preamble, this Protocol mentions some of the factors that necessitated its adoption, which include the ‘extreme levels of poverty’,¹¹¹ and the ‘systemic discrimination, social exclusion, prejudice within political, social and economic spheres’,¹¹² which PWDs experience, and the absence of an appropriate and binding legal and institutional framework at the regional level.

One of the serious challenges that PWDs face relates to housing.¹¹³ Difficulties in access, caused by financial and physical inaccessibility,¹¹⁴ discrimination,¹¹⁵ harassment, violence, and the lack of essential services and facilities could be cited as some examples of the housing challenges that PWDs face. As shown below, by providing tailored legal responses to these challenges, the African Protocol on PWDs addresses the shortcomings of the African Charter, and the OAU Refugee Convention and its global counterpart.

6.1 An overview of general and housing-specific obligations

In response to the above mentioned and other challenges, the African Protocol on PWDs enshrines the right to housing of PWDs and related PWDs-specific rights. The PWD-specific rights include, and are reflected in the Protocol’s provisions dealing with, the right to

111 African Protocol on PWDs, para 16, 20, of preamble.

112 African Protocol on PWDs, para 17 of preamble.

113 El-Lahib (n 7) 2.

114 United Nations Department of Economic and Social Affairs ‘Factsheet on persons with disabilities’ available <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> (accessed 30 September 2023).

115 United Nations General Assembly ‘Report of the Special Rapporteur on adequate housing as a component of an adequate standard of living, and non-discrimination in this context’ A/72/128 (2017) para 13.

equality¹¹⁶ and non-discrimination based on disability,¹¹⁷ reasonable accommodation,¹¹⁸ accessibility,¹¹⁹ and the 'right to live in the community'.¹²⁰

The Protocol provides that the rights it contains apply to every person with disabilities 'without distinction of any kind on any ground'.¹²¹ Just like the African Charter, it mentions prohibited grounds of distinction but does not exhaustively list them. One of the prohibited grounds of distinction is 'fortune'.¹²² Given the fact that access to adequate housing mainly depends on one's economic resources, those who lack the economic resources needed to secure adequate housing live either in substandard housing or homelessness. In recognition of the strong link between the availability or lack of economic resources and access or deprivation of adequate housing, the Committee on ESCR has stated that 'the right to housing should be ensured to all persons irrespective of income or access to economic resources'.¹²³ Because many PWDs lack adequate housing due to poverty, the fact that the African Protocol on PWDs states that the enjoyment of the rights it contains must not be contingent on the economic resources available for the PWDs is a significant legal protection.

Other general obligations applicable to the rights contained in the Protocol include obligations to 'ensure, respect, promote, protect and fulfil' the rights contained in the Protocol.¹²⁴ The obligation to respect entails abstaining from 'engaging in any act or practice' that violates the rights of PWDs.¹²⁵ The obligation to protect includes taking measures to protect PWDs from discrimination by non-state entities.¹²⁶ The obligation to fulfil includes allocating sufficient resources for the realisation of the rights of PWDs enshrined in the Protocol, and 'providing assistance and support' to PWDs.¹²⁷

The Protocol enjoins its state parties to take 'appropriate and effective measures' to ensure that PWDs live in the community,¹²⁸ and stipulates various measures required for the full realisation of this right. Among the measures is that community services and facilities have to be provided to PWDs on equal terms with the general population.¹²⁹ This requires modifying inaccessible infrastructure and

116 African Protocol on PWDs, art 6.

117 African Protocol on PWDs, arts 4 & 5.

118 African Protocol on PWDs, art 3(g).

119 African Protocol on PWDs, art 15.

120 African Protocol on PWDs, art 14.

121 African Protocol on PWDs, art 5(1).

122 African Protocol on PWDs, art 5(1).

123 Committee on ESCR, General Comment 4, para 7.

124 African Protocol on PWDs, art 4.

125 African Protocol on PWDs, art 4(g).

126 African Protocol on PWDs, art 4(f).

127 African Protocol on PWDs, art 4(h) & (i).

128 African Protocol on PWDs, art 14(2).

129 African Protocol on PWDs, art 14(2)(g).

ensuring that all new infrastructures are universally designed.¹³⁰ State parties shall take 'reasonable and progressive' steps to ensure that such infrastructures are made accessible to PWDs.¹³¹

These obligations overlap with the specific obligations laid down in the article dealing with the right to adequate housing. State parties' disability-specific obligations relating to housing include, *inter alia*, the obligation to ensure that PWDs have access to various services and 'accessible housing',¹³² and making available financial resources to 'cover disability-related expenses'.¹³³ State parties must ensure that PWDs get equal access to housing provided by the state.¹³⁴ They must also ensure that such housing is accessible to PWDs.¹³⁵ The obligation to ensure that PWDs shall be given equal access to housing provided by the state should not be interpreted in a formalistic and restrictive manner. In this regard, the Protocol does not expressly enjoin states to give PWDs priority of access to housing provided by the state.¹³⁶

6.2 The formulation of the right to adequate housing of PWDs

The African Protocol on PWDs enshrines the right to adequate housing of PWDs and related disability-specific rights. The PWD-specific rights include and are reflected in the Protocol's provisions dealing with the right to equality (article 6) and non-discrimination based on disability (articles 4 and 5), reasonable accommodation (article 3(g), accessibility (article 15), and the 'right to live in the community' (article 14).

In addition to the abovementioned disability-specific rights and the corresponding state obligations they entail, the African Protocol on PWDs enshrines their right to adequate housing. Just like article 11(1) of the ICESCR, article 20 of the Protocol provides for PWDs' right to adequate housing as a component of the right to an adequate standard of living.

The African Protocol on PWDs does not subject the realisation of PWDs' right to adequate housing to the availability of resources or frame adequate housing as a progressively realisable right. Similarly, the 'general obligations' provision of the African Protocol on PWDs does not state that the realisation of the rights enshrined in the Protocol

130 African Protocol on PWDs, art 15(2)(e).

131 African Protocol on PWDs, art 15(2).

132 African Protocol on PWDs, art 20(2)(a).

133 African Protocol on PWDs, art 20(2)(c).

134 African Protocol on PWDs, art 14(2)(g).

135 See African Protocol on PWDs, art 15(1) & (2)(b).

136 The Commission's Principles and Guidelines require states to prioritise disadvantaged groups in their housing programmes. At the global level, the Committee on ESCR has, in its General Comment 4, included PWDs as a group that 'should be ensured some degree of priority in the housing sphere'. See General Comment 4 para 8(e).

depends on the availability of resources for a state party.¹³⁷ This contrasts with similar provisions of the ICESCR and the UN Convention on the Rights of Persons with Disabilities (CRPD), which contain clauses such as ‘progressive realisation’ and ‘maximum available resources’.¹³⁸ Despite the fact that many provisions of the Protocol mirror the provisions of the CRPD, the omission of such a clause from the Protocol signals that the Protocol seeks to avoid giving states a leeway that they might misuse to cloak their failure to implement the rights enshrined under the Protocol. This interpretation of the omission of such a clause is also consistent with the general approach adopted in the African Charter and the African Women’s Protocol.

Under the African Protocol on PWDs, the scope of state obligations pertaining to the right to adequate housing is not limited by the ‘availability of resources’ clause.¹³⁹ The Protocol requires state parties to ‘take appropriate and effective measures to facilitate full enjoyment’ by PWDs of ‘this right’.¹⁴⁰ ‘Appropriate and effective measures’ include ‘policy, legislative, administrative, institutional and budgetary’ measures that will ‘ensure, respect, promote, protect and fulfil’ the rights laid out in the Protocol.¹⁴¹ State parties have a margin of appreciation to decide on the kinds of measures that they deem appropriate. The fact that the measures required of state parties must be ‘effective’ further qualifies whether the measures taken by a state party are appropriate to eventually realise the full enjoyment of the right to adequate housing by PWDs. In many cases, an appropriate and effective measure to ensure the realisation of PWDs’ right to adequate housing may require the deployment of all the abovementioned measures and a direct state intervention. If the realisation of PWDs’ right to adequate housing depends on the direct intervention of the state (for example, the provision or facilitation of housing), the state party has an obligation to do so.¹⁴²

Article 20 of the Protocol deals with the right to adequate housing of PWDs, nothing more, nothing less. It does not deal with the full realisation of this right (which refers to more than an adequate level of housing). The term ‘full realisation’ is used under article 2(1) of the ICESCR and article 4(2) of the CRPD. The full realisation of the right to housing can only be achieved progressively. The term ‘full enjoyment of this right’ is used under article 20(2) of the Protocol on PWDs and implies immediate obligations. This is because the (level of the) right it refers to is the right to adequate housing, which, in turn, is not formulated as a progressively realisable right. This is to flag the far reaching consequences that could result from confusing the terms ‘full enjoyment of this right’ and ‘full realisation’.

137 African Protocol on PWDs, art 4.

138 See ICESCR, art 2(1); CRPD, art 4(2).

139 See African Protocol on PWDs, art 20(1) - (2).

140 African Protocol on PWDs, art 20(2).

141 Adapted from African Protocol on PWDs, art 4(1).

142 See for example African Protocol on PWDs, arts 4(h) & 20(2)(a).

Regarding the right to adequate housing of PWDs, the Protocol imposes disability-specific obligations on its state parties. The most explicit of these obligations is found in article 20(2)(a), which requires states to ensure access by PWDs to 'appropriate and affordable services, devices and other assistance for disability-related needs, including accessible housing'. In order to 'ensure' 'accessible housing' for PWDs, state parties to the Protocol must take measures that secure accessible housing for PWDs, and fulfil the 'access dimension' of the right to adequate housing. Again, one may argue that accessible housing encompasses inclusion and non-discrimination, economic accessibility, physical accessibility, and the accessibility of information.¹⁴³ This level of state parties' obligation is not subject to progressive realisation.

The Protocol on PWDs explicitly provides for disability-related dimensions of the right to adequate housing and imposes binding obligations on states in this regard.¹⁴⁴ Moreover, the African Protocol on PWDs transforms some aspects of the 'elements' of the right to adequate housing recognised in General Comment 4 of the Committee on ESCR from 'soft' obligations to binding obligations. For example, under this Protocol, the right to 'safe drinking water', 'sanitation', and 'accessible housing' entail binding obligations.¹⁴⁵ Furthermore, by comparing the different components of the right to an adequate standard of living enshrined under article 20(1) of the with article 28 of the CRPD, Basson notes that 'the express inclusion of [safe drinking water and sanitation], which have historically proved to be socially and politically critical, reminds us that many persons with disabilities in Africa do not yet have access to these basic necessities'.¹⁴⁶

The overview of state obligations analysed above shows the extent to which the African Protocol on PWDs protects the right to adequate housing of PWDs in Africa. Therefore, it is important to explore whether the Protocol extends this protection to refugees with disabilities. The Protocol does not expressly state that its provisions apply to refugees with disabilities. However, the term 'persons with disabilities' is an umbrella term that encompasses refugees with disabilities and therefore, the protection accorded to the right to adequate housing under the Protocol applies to refugees with

143 With respect to 'facilities and services open or provided to the public', see these dimensions under the African Protocol on PWDs, art 15(1) & (2)(b). Regarding these dimensions in the context of the right to health under ICESCR, see Committee on ESCR 'General Comment 15: the right to the highest attainable standard of health' para 12(b).

144 See Committee on Economic, Social and Cultural Rights 'General Comment 5 on the rights of persons with disabilities'.

145 See art 11(1) of CESC; Committee on ESCR 'General Comment 4' paras 8(b) & (e), and art 20(1) of the African Protocol on PWDs. See also arts 28(2)(a) & (d) of the UN Convention on the Rights of Persons with Disabilities.

146 Y Basson 'The right to an adequate standard of living in the protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2019) 7 *African Disability Rights Yearbook* 262.

disabilities.¹⁴⁷ The non-discrimination provision of the Protocol also affirms that the rights contained in the Protocol apply to ‘every person with a disability’.

The Protocol requires state parties to take ‘specific measures to ensure the protection and safety of persons with disabilities in situations of [...] forced displacements’.¹⁴⁸ The obligation of states to take ‘specific measures’ that protect forcibly displaced PWDs implies that these measures are additional to the general measures that are applicable to all PWDs. This indirectly confirms that the personal scope of the Protocol includes refugees with disabilities. It also confirms that the Protocol not only extends the same level of protection to refugees with disabilities, but also requires states to take further measures that particularly ensure the protection of refugees with disabilities. The Protocol enshrines specific rights and corresponding obligations that deal with women and girls with disabilities (article 27), children with disabilities (article 28), youth with disabilities (article 29), and older persons with disabilities (article 30).

To sum up, the African Protocol on PWDs is a crucial treaty that addresses many housing related challenges that refugees with disabilities experience. It transforms the nature of obligations regarding some aspects of the elements of adequate housing, for example, accessibility and the availability of services (including water) from soft obligations to binding obligations. The Protocol recognises the right to adequate housing of persons with disabilities and imposes immediate obligations on states. It also contains a number of disability-related dimensions of the ‘elements’ of the right to adequate housing. In general, the Protocol addresses the shortcomings of the African Charter, the OAU Refugee Convention, and the UN Refugee Convention.

7 THE LEGAL PROTECTION OF REFUGEE CHILDREN’S RIGHT TO ADEQUATE HOUSING UNDER THE AFRICAN CHILDREN’S CHARTER

The African Charter on the Rights and Welfare of the Child (African Children’s Charter) is the only African human rights treaty that expressly proclaims that the rights it contains, including the right to housing, apply to refugee children. This sets it apart from other African human rights treaties and the UN Refugee Convention. It also enshrines child-specific principles and rights, such as the right to life

147 Except for the right to vote, the right to run for public office, and ‘the right to enter and stay in a country’, all human rights apply for refugees. See F Crépeau & I Atak ‘Global migration governance: avoiding commitments on human rights, yet tracing a course for cooperation’ (2016) 34 *Netherlands Quarterly of Human Rights* 117 (in relation to migrants in general). See for example African Charter, art 13. The African Protocol on PWDs is uncharacteristic in this regard. See art 21.

148 African Protocol on PWDs, art 12(a).

and development,¹⁴⁹ non-discrimination,¹⁵⁰ the best interests of the child, and the right to participation.¹⁵¹

Unlike the UN Convention on the Rights of the Child, the African Children's Charter does not contain an express provision on the right to adequate housing.¹⁵² However, as discussed below, this right is implied in the provisions dealing with the freedom against interference on the home and parental responsibilities. The protection against interference on the home is one of the guarantees for housing rights that the Charter provides for the (refugee) child. Under article 10, it stipulates a non-interference obligation stating that '[n]o child shall be subject to arbitrary or unlawful interference with his privacy, family, home ...'. As the prohibition relates to arbitrary or unlawful interference, this provision suggests that reasonable and lawful interference is permissible and recognises the rights of parents or legal guardians to 'exercise reasonable supervision over the conduct of their children'. Clearly, an interference amounting to harassment or forced eviction is outside the ambit of the rights of parents and guardians. To protect a child from arbitrary or unlawful interference, the provision guarantees the child's right to be legally protected against such an interference.¹⁵³ This provision has the potential of protecting a child's housing rights, for example, from various forms of interference including forced eviction.

The African Children's Charter explicitly provides for the obligation to fulfil (provide) both on parents and those responsible for the child, and on state parties. It recognises parents and other persons responsible for the child as primary duty bearers in the provision of housing for the child.¹⁵⁴ State parties must take 'all appropriate measures' to assist parents or those responsible for the child especially if they are in need. The African Children's Charter requires state parties to take 'all appropriate measures' to 'provide material assistance and support programmes' for such parents or people responsible for the child. The measures that state parties are required to take must be 'in accordance with their means and national conditions'. The phrase 'in accordance with their means and national conditions' is a key

149 African Children's Charter, art 5(1).

150 African Children's Charter, art 3.

151 African Children's Charter, art 4; See also C d'Orsi 'Legal protection of refugee children in Africa: positive aspects and shortcomings' (2019) 3 *African Human Rights Yearbook* 300-303; P Eriamiatoe 'Article 23: refugee children' in J Sloth-Nielsen, E Fokala & G Odongo (eds) *The African Charter on the Rights and Welfare of the Child: a commentary* (2024) 339.

152 Viljoen (n 21), regarding the right to adequate standard of living.

153 African Children's Charter, art 10.

154 Art 20(1) imposes on parents and those responsible for the child the duty 'to secure, within abilities and financial capacities, conditions of living necessary to the child's development'. States also have the obligation ensure, to the maximum extent possible, the survival, protection and development of the child'. See art 5(2). Evidently, housing is one of the conditions necessary for the development of a child. See also art 20(2)(a), and the Committee's recommendation to Liberia, in which the Committee states that inadequate and substandard provision of [...] housing [...] affect[s] the healthy development of children'. ACRWC Committee 'Concluding recommendation to Liberia' (2014) 8. See also Kaime (n 23) 184.

determinant of the scope of states' obligations under article 20(2)(a). As discussed below, it may be interpreted in two ways – restrictively or broadly:

- i) Whether a state party has an obligation to provide 'material assistance or support programmes' depends on its 'means and national conditions'. A state party can invoke the lack of resources to justify its failure to provide assistance and support for those in need. In other words, any measure required of states towards fulfilling this obligation is resource dependent and progressively realisable. States are required to 'take all appropriate measures', which means that the obligation to fulfil (provide) is not an immediate obligation.
- ii) The phrase 'in accordance with their means and national conditions' does not make state parties' obligations entirely conditional. The obligation of states to 'take all appropriate measures' to provide assistance or support for children in need is a given. The phrase in question only deals with the extent of the assistance required of states. It is not permissible for states to sidestep their obligation of providing 'material assistance or support programmes' by invoking the lack of resources. States have an immediate obligation to take measures. Regardless of the extent of resources available for a state, if the state takes all appropriate measures immediately, it can provide some form of assistance and support for children in need.

The second interpretation is more favourable for children in need because it does not open room for states to avoid fulfilling their article 20(2)(a) obligation on the pretext of the lack of resources. This interpretation also aligns with article 5 of the Charter, which deals with the 'survival and development' of children. Article 5 proclaims that 'every child has an inherent right to life', and requires state parties to 'ensure, to the maximum extent possible, the survival, protection and development of the child'.¹⁵⁵ Given the fact that the lack or deprivation of adequate housing is a threat to a child's life, the failure to 'take all appropriate measures' to provide assistance for a child with a housing need would constitute a violation of article 5 of the Children's Charter. A consideration of the object and purpose of the Charter also supports the second interpretation. As the object and purpose of the African Children's Charter includes the provision of a legal response to the specific 'needs of [the child's] physical and mental development', which are not met for a significant proportion of children in Africa,¹⁵⁶ an interpretation of article 20(2)(a) that better responds to the situation of deprived children is certainly preferable. Finally, the second interpretation is consistent with the right to housing provisions of the African protocols on women and persons with disabilities. As shown in the forgoing sections, the provisions of these protocols dealing with the right to adequate housing, which require states to fulfil (provide) this right, do not subject this obligation to the availability of resources.

When read in conjunction with the qualifier 'all appropriate measures', the clause 'in accordance with their means and national

155 African Children's Charter, arts 5(1)-(2).

156 See preamble to the African Children's Charter, paras 4, 6 & 8.

conditions' also serves as an important tool for assessing the appropriateness of measures taken by states towards 'provid[ing] material assistance and support programmes', including adequate housing. It can also be used to question states that have not fulfilled this obligation. A 2020 data released by the UNICEF shows that, in a number of African states South of the Sahara, only a small percentage of children benefitted from state provided social protection schemes.¹⁵⁷ In light of this, the obligation of states enshrined under article 20(2)(b) of the African Children's Charter can be understood as a key legal response to the prevailing situation and as guidance for states that are yet to fulfil their obligation towards children in need.

7.1 The prohibition of discrimination against refugee children

The rights and freedoms enshrined under the African Children's Charter are applicable to 'every child' regardless of the child's 'race, ethnic group, [...] fortune, birth or other status'.¹⁵⁸ It is noteworthy to point out three features of the non-discrimination provision of the African Children's Charter. First, the list of 'prohibited grounds' are not exhaustive, which means that it is possible to recognise and remedy discrimination based on other arbitrary factors. Second, the Charter 'prohibits' discrimination by association. The rights and freedoms enshrined under the Children's Charter must not be denied to a child based on the race and other status of 'his or her parents or legal guardians'. Third, in the same way as the African Charter and the African Protocol on PWDs, the African Children's Charter expressly recognises that the rights it contains apply to every child irrespective of 'fortune'.¹⁵⁹ By comparing the African Children's Charter and the CRC, Karabo and Nanima note that the inclusion of 'fortune' in the Children's Charter is unique as CRC does not have a similar ground listed in article 2 thereof.¹⁶⁰ Earlier sections of this article have pointed out the significance of the recognition 'fortune' as a prohibited ground of distinction in the enjoyment of the right to adequate housing, so it will not be repeated here.

157 The report does not contain data regarding 38 African countries (because data was not available). There is also a significant disparity in the percentage of children covered by social protection schemes provided by the 16 states for which data was available. See UNICEF 'One billion strong: Protecting children's rights in Africa today and tomorrow' (2020) 28. Available <https://data.unicef.org/resources/one-billion-strong-protecting-childrens-rights-in-africa-today-and-to-morrow/> (accessed 24 December 2024). See also L Mills 'Article 20: parental responsibilities' in J Sloth-Nielsen, E Fokala & G Odongo (eds) *The African Charter on the Rights and Welfare of the Child: a commentary* (2024) 289.

158 African Children's Charter, art 3.

159 See African Charter, art 2; ACHPR Protocol on PWDs, art 5.

160 RL Karabo & RD Nanima 'Article 3: non-discrimination' in J Sloth-Nielsen, E Fokala & G Odongo (eds) *The African Charter on the Rights and Welfare of the Child: a commentary* (2024) 44.

The African Children's Charter does not, either directly or indirectly, allow differential treatment between refugee children and children who are also citizens of the country of asylum. Instead, it states that the rights it contains apply to a refugee child.¹⁶¹ This guarantee against discrimination is distinctly framed when compared with references made to refugees in other African human rights treaties, and is the most straightforward legal protection accorded to refugees in this respect.

7.2 The applicability of more favourable standards under other legal regimes

Unlike the UN Convention on the Rights of the Child, the African Children's Charter does not contain an express provision dealing with the right to adequate housing.¹⁶² However, the Charter provides a partial remedy for this omission. One of the ways that the omission could be remedied (to some extent) is by reading into article 20(2)(a). However, article 20(2)(a) does not sufficiently protect the right to adequate housing of (refugee) children. This is because the entitlements, freedoms and state obligations pertaining to the right to adequate housing cannot be equated with a mere obligation to provide material assistance. For this reason, it is essential to resort to article 1(2) of the African Children's Charter, which deals with the applicability of more favourable standards contained under other treaties. Under article 1(2), the African Children's Charter acknowledges that the Charter's rights 'shall [not] affect any provisions [of other treaties] that are more conducive' for children. Whereas, under article 23(1), which deals with refugee children, the African Children's Charter requires states to make use of 'applicable international [...] law'. It provides that state parties shall 'take all appropriate measures' to ensure that a refugee child 'receives appropriate protection and humanitarian assistance in the enjoyment of the rights set out in [...] international human rights and humanitarian instruments' which they are party to.¹⁶³ It is useful to note that the scope of protection accorded to refugees' right to adequate housing under 'general' international human rights instruments is broader than that of the UN Refugee Convention. In light of this, the African Children's Charter's reference to international human rights law means that, the more favourable legal protection given to the right to adequate housing under human rights law is applicable for the protection of refugee children.¹⁶⁴ For example, as discussed in the previous sections, the Protocols to the African Charter on women and persons with disabilities enshrine key

161 African Children's Charter, art 23(1).

162 Art 27(3) of the CRC deals with the right to adequate housing as part of the right to an adequate standard of living. See Viljoen (n 21) 395.

163 African Children's Charter, art 23(1).

164 See art 1(2) of the African Children's Charter, which provides that more favourable provisions contained under other treaties are applicable for the protection of children. See also Kaime (n 23) 184; Viljoen (n 21) 395.

legal guarantees that protect the right to adequate housing of women and persons with disabilities respectively. They also contain principles and rights that are specific to women and persons with disabilities. The African Children's Charter obliges its state parties to apply these standards for refugee girls and refugee children who have disabilities.¹⁶⁵

In order to bridge the omission of the right to adequate standard of living in the African Children's Charter, Viljoen has suggested that the recognition of the right to housing by the African Commission and the express inclusion of this right under the African Women's Protocol 'could justify an updated interpretation of the Children's Charter as a "living instrument"'.¹⁶⁶ He further comments that the fact that 'all state parties to the Children's Charter are in any event also parties to the CRC', clearly suggesting the possibility of rectifying the omission of this right in the Children's Charter by resorting to the CRC.

7.3 Unaccompanied or separated refugee children

Unaccompanied or separated refugee children are more vulnerable than refugee children under the care of their parents or guardians.¹⁶⁷ The African Children's Charter recognises their vulnerability and provides that they 'shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment'.¹⁶⁸ This means that, for unaccompanied or separated refugee children, the obligation of state parties is to ensure that alternative care is provided for them on equal terms with other similarly situated children, for example, unaccompanied or separated children who are also citizens of the asylum state.¹⁶⁹ As housing is implied in alternative care, the protection of this right under the Charter responds to the peculiar housing challenges of such children.

The granting of nationality to unaccompanied or separated refugee children also gives them the legal basis (at the domestic level) to claim the same level of treatment accorded to unaccompanied or separated children who are citizens of a host state. This is especially important in cases where unaccompanied or separated refugee children are stateless. Recognising this, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee)

165 See also ACHPR Protocol on PWDS, art 27, which deals with 'women and girls with disabilities'.

166 Viljoen (n 21) 395.

167 Kaime (n 23) 188; SC Maioli and others 'International migration of unaccompanied minors: trends, health risks, and legal protection' (2021) 5 *Lancet Review* 882; Committee on the Rights of the Child 'General Comment 6(2005): treatment of unaccompanied and separated children outside their country of origin' paras 7-8.

168 Art 23(3); See also Eriamiatoe (n 151) 348.

169 African Children's Charter, art 25(2)(a); See also d'Orsi (n 151) 306.

has made recommendations to state parties to grant nationality to such children.¹⁷⁰ For example, in its concluding recommendation on the report of Ghana, it recommended that the state ‘provide centres to house [migrant] children until [they] are united with their families’.¹⁷¹

In sum, the African Children’s Charter responds to a wide range of specific housing challenges that many refugee children and sub-groups within them, such as unaccompanied or separated refugee children and refugee children living in poverty, experience. In addition to protecting their right to housing, the Charter recognises the applicability of their rights under human rights and humanitarian law. The African Children’s Charter provides two alternative types of standards of treatment: national treatment (relative standard) and qualitative standards. This gives refugee children alternatives, for example, if the relative standard (national treatment) falls short of sufficiently protecting refugee children’s right to housing, the standard of ‘adequate housing’ enshrined under other human rights treaties can be invoked. Also, if a state party accords better protection to children as compared to the standard of adequate housing under human rights treaties, claims based on the national treatment would be more beneficial for refugee children.

8 CONCLUSION

The lack of adequate housing is one of the most critical challenges that affect a significant number of people in Africa, particularly those in vulnerable situations. Refugees in vulnerable situations, who are also unevenly affected by the lack of adequate housing, experience this challenge in dismally unique ways. Adequate legal responses are part of the range of essential tools that guide African states to address this problem. Given the fact that these challenges have persisted despite the existence of robust legal frameworks in African regional human rights law, interpreting and clarifying the normative standards in a manner that is responsive to the prevailing situation is necessary and aligns with the object and purpose of relevant human rights treaties of this region. It is with the aim of doing so that this article has analysed applicable normative standards of African regional human rights law.

In addition to analysing the legal protection of the right to adequate housing under African human rights law, this article has explored the extent of protection given to refugees. It has found that, although the OAU Refugee Convention does not explicitly provide for the right to housing of refugees, and its non-discrimination provision fails to

170 ACRWC Committee ‘Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Federal Democratic Republic of Ethiopia’s report on the status of implementation on the African Charter on the Rights and Welfare of the Child’ (2014) para 33.

171 ACRWC Committee ‘Concluding recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Federal Democratic Republic of Ghana initial report on the status of implementation of the African Charter on the Rights and Welfare of the Child’ (2016) para 16.

protect refugees from discrimination based on their refugee status, gender, disability, and many other markers of identity, it imposes an obligation on its state parties to secure the settlement of refugees. It has asserted that this obligation is broad and includes obligations pertaining to refugees' right to adequate housing. The article has shown that the shortcoming of the OAU Refugee Convention with regard to non-discrimination has been addressed by the African Charter, its protocols on women and persons with disabilities, and the African Children's Charter. The African Women's Protocol and the Protocol on PWDs provide robust protection to the right to adequate housing, for example, by imposing immediate obligations on state parties to fulfil (provide) adequate housing. This article has demonstrated why the protection of these protocols applies to refugee women and refugees with disabilities, respectively. Although the right to adequate housing is not expressly enshrined under the African Children's Charter, this article has shown the indirect ways in which the Charter protects refugee children's right to adequate housing.