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Women, International Human Rights Law, and the Right to Adequate Housing in Africa

John Mukum Mbaku

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WOMEN, INTERNATIONAL HUMAN RIGHTS LAW, AND THE RIGHT TO ADEQUATE HOUSING IN AFRICA

*John Mukum Mbaku**

ABSTRACT

In many African countries, the rights of women and girls to adequate housing are under threat and remain vulnerable to violation by state- and non-state actors. This is so even though these rights are guaranteed by international human rights instruments and national constitutions. Of particular note is the existence of customary laws that discriminate against women and frustrate their ability to realize the right to adequate housing. To enhance the ability of women to realize their right to adequate housing, each African State must domesticate the various international and regional human rights instruments that guarantee this right in order to create rights that are justiciable in domestic courts. In the meantime, however, progressive judiciaries are using their power to interpret the constitution to eliminate or modify customary and other laws that are not in conformity with the provisions of international human rights instruments and the country's Bill of Rights. For example, in several African countries, courts have been adjudicating cases involving the right to adequate housing (e.g., discrimination against women by customary laws and forced evictions of women and other vulnerable individuals by state- and non-state actors). These courts have issued directives that can help the political branches develop and implement policies to ameliorate the deplorable living conditions that many women and their children face on a daily basis. Unfortunately, in many countries, the political branches have not been amenable to implementing court orders. However, recent socio-economic rights jurisprudence by the South African Constitutional Court offers a possible solution to this quagmire. That solution is found in the engagement approach, which emphasizes robust dialogue between the political branches, the affected individuals and groups,

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and civil society and its organizations. While such a holistic approach can proffer solutions that reflect the values and norms that are enforced by the socio-economic rights guaranteed by the constitution, it can also encourage democratic engagement and make the courts an important force in the protection of human rights, particularly those of women and girls. Of greater importance is that this approach places women at the center of public efforts to confront the problems that afflict them.

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INTRODUCTION

The Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations General Assembly (UNGA) on December 10, 1948, created the foundation for the modern effort to recognize and protect human rights. Since that time, the international community has adopted several other conventions, treaties, and declarations, aimed at elaborating on and guaranteeing human rights for all members of the global community, “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹

Today, some of the most important human rights instruments are part of what is referred to as the *International Bill of Human Rights* and these include: (1) UDHR; (2) International Covenant on Economic, Social and Cultural Rights (ICESCR); (3) International Covenant on Civil and Political Rights (ICCPR); (4) Optional Protocol to the International Covenant on Civil and Political Rights; and (5) Second Optional Protocol to the International Covenant on Civil and Political rights.² International and regional organizations, as well as national governments, have also adopted “procedures for protecting against and providing remedies for human rights abuses.”³

The international community, however, does not have a “world government” that can ensure that the rights guaranteed by the various international human rights instruments are enforced in all United Nations member states. Although international human rights law is part of international law, international legal experts have argued that “[t]he most effective mechanism for enforcing international law [including international human rights law] is for each ratifying government to incorporate its treaties and customary obligations into national laws.”⁴

Some African states have already internationalized their national constitutions through processes that create, out of the international human rights instruments, rights that are justiciable in domestic courts. Kenya, for example,

¹ International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, S. Exec. Doc. E, 95–2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

² *Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights (June 1996)*, OFF. U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS., <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet2Rev.1en.pdf>.

³ DAVID WEISSBRODT & CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 3 (2007). The African Union, for example, has adopted the African Charter on Human and Peoples’ Rights, the African Charter on the Rights and Welfare of the Child, and Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. *Id.*

⁴ WEISSBRODT & DE LA VEGA, *supra* note 3, at 4.

adopted a new constitution in 2010, which has the following provisions: “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”⁵ and “[t]he general rules of international law shall form part of the law of Kenya.”⁶

In 2012, the U.N. High Commissioner for Human Rights released a report titled *Women and the Right to Adequate Housing* and declared that “[t]he right to adequate housing is clearly recognized in international human rights law, including the International Covenant on Economic, Social and Cultural Rights.”⁷ The former U.N. Special Rapporteur on the right to adequate housing, Mr. Miloon Kothari, has declared that “[t]he human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity.”⁸

Advocates for the poor have argued that “housing is a human right, not a commodity to maximize profit.”⁹ Additionally, noted the U.N., the right to adequate housing must include, at the minimum, certain entitlements including (1) security of tenure; (2) housing, land and property restitution; (3) equal and non-discriminatory access to adequate housing; and (4) participation in housing-related decision-making at the national and community levels.¹⁰

Unfortunately, the “right to adequate housing continues to be unmet in all regions of the world, particularly for vulnerable groups of women but also for certain groups of men, such as men from minority communities.”¹¹ Violence against women generally and domestic violence, in particular, have been linked to “the lack of enjoyment of the right to adequate housing.”¹² In her 2000 report, *The Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Ms. Radhika Coomaraswamy noted that “[h]ousing policy is

⁵ CONSTITUTION art. 2(6) (2010) (Kenya).

⁶ *Id.* art. 2(5).

⁷ OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., *WOMEN AND THE RIGHT TO ADEQUATE HOUSING*, 1 (2012) [hereinafter *WOMEN AND THE RIGHT TO ADEQUATE HOUSING*].

⁸ *Id.* at 5 (quoting Miloon Kothari, former Special Rapporteur on the right to adequate housing).

⁹ CASEY J. DAWKINS, *JUST HOUSING: THE MORAL FOUNDATIONS OF AMERICAN HOUSING POLICY* 159 (2021); see also *The Human Right to Adequate Housing*, OHCHR [hereinafter *The Human Right to Adequate Housing*]

<https://www.ohchr.org/EN/Issues/Housing/Pages/AboutHRandHousing.aspx#:~:text=Housing%20is%20a%20right%2C%20not,home%20or%20lands%20taken%20away> (noting that housing is not just a commodity but a human right).

¹⁰ *The Human Right to Adequate Housing*, *supra* note 9.

¹¹ *WOMEN AND THE RIGHT TO ADEQUATE HOUSING*, *supra* note 7, at 5.

¹² *Id.* at 6.

directly related to issues of violence against women,” and “[i]nadequate housing provides living conditions that are conducive to violence.”¹³

Throughout Africa, the rights of women and girls to adequate housing are extremely vulnerable to violation by state- and non-state actors. First, many African countries have ethnocultural groups whose customary laws and traditional practices interfere with the rights of women and girls to adequate housing. In many of these communities, women and girls are prohibited from owning or inheriting land and other forms of real property. For example, the customary laws of many ethnic groups in Nigeria, Kenya, Uganda, and Zimbabwe generally prohibit women from inheriting the real property of their deceased husbands or, in the case of girls, that of their deceased fathers, a practice that greatly interferes with the ability of these individuals to exercise their right to adequate housing.¹⁴

Second, in recent years, due to decreasing opportunities for self-actualization in the rural areas of many African countries, as well as the dispossession of widows of their lands by opportunistic male relatives of the widows’ deceased husbands, many women and their children have migrated to the urban areas where they are forced to live in slums, with usually no access to adequate housing.¹⁵ As slum dwellers, these women usually do not have secure tenure rights and hence, are subject to violent eviction by corrupt civil servants and politicians and opportunistic land developers.¹⁶ In countries such as Ghana,

¹³ Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, ¶ 68–69, U.N. Doc. E/CN.4/2000/68/Add. 5 (Feb. 24, 2000).

¹⁴ *Zimbabwe: Widows Deprived of Property Rights*, HUM. RTS. WATCH (Jan. 24, 2017), <https://www.hrw.org/news/2017/01/24/zimbabwe-widows-deprived-property-rights#> (detailing the extent to which widows are deprived of their right to inherit the landed property of their deceased husbands); see also Kelechukwu Iruoma, *Pushing for Stronger Laws to Protect Widows’ Rights in Nigeria*, NEW HUMANITARIAN (Apr. 25, 2018), <https://deeply.thenewhumanitarian.org/womensadvancement/articles/2018/04/25/pushing-for-stronger-laws-to-protect-widows-rights-in-nigeria> (noting that Nigerian widows often “suffer a double loss: after their husbands die, the assets they should inherit are taken by their in-laws”). Human Rights Watch has argued that although reforms of statutory law over the last several years in Nigeria, Ghana, Kenya, Uganda, and Zimbabwe have granted “women equal rights to inheritance,” judges in these countries “continue to apply customary law,” effectively subjecting women to the abolished discriminatory practices. HUMAN RIGHTS WATCH, *WORLD REPORT 2002: EVENTS OF 2001, NOVEMBER 2000–NOVEMBER 2001*, 538 (2002).

¹⁵ Julia Bello-Bravo, *Rural-Urban Migration: A path of Empowering Women Through Entrepreneurial Activities in West Africa*, 5 J. GLOBAL ENTREPRENEURSHIP RES. 9, 13 (2015) (noting that “[a] marital breakdown in rural areas [of Africa] sometimes influences the decision of women to migrate to urban areas” and that “[t]he lack of support and social exclusion of women in the case of divorce impacts the decision of women to migrate out of the comfortable zone of the cultural group”).

¹⁶ *Recognizing Slum Dwellers’ Land Rights*, U.N. HABITAT (Oct. 13, 2022), <https://unhabitat.org/news/13-oct-2022/recognizing-slum-dwellers-land-rights> (noting that “[w]omen are usually neglected in land ownership in many African countries, and the situation is no different in most informal settlements of Uganda”).

Kenya, and Nigeria, so-called slum clearance projects, which usually involve the forced eviction of dwellers and are designed to make land available for development, are quite common.¹⁷ These violent evictions often render poor households, many of which are headed by women, homeless and destitute.¹⁸

All international and regional human rights instruments that guarantee the right to adequate housing impose an obligation on States Parties to take necessary steps to help their citizens realize this right.¹⁹ First, to put itself in a position to facilitate and enhance the ability of citizens to realize the right to adequate housing, each African state must sign and ratify each relevant international and regional human rights instrument. Second, the state must domesticate the instrument and create rights that are justiciable in domestic courts. This process will allow aggrieved citizens to bring action in domestic courts to force the state to either prevent the violation of their right to adequate housing or enhance their ability to realize this right.²⁰ Third, the state must ensure that it has a judiciary that has the necessary independence to be able to function effectively, not just to prosecute and bring to justice those individuals who violate human rights, including the right to adequate housing, but can also use its power to interpret the law to eliminate or modify

¹⁷ *Slum Dwellers Across Africa Urge Governments to Respect Housing Rights*, AMNESTY INT'L (Mar. 20, 2012), <https://www.amnesty.org/en/latest/news/2012/03/slum-dwellers-across-africa-urge-governments-improve-housing-conditions/> (detailing actions taken by thousands of slum dwellers and their supporters in several African countries to call on governments to stop forced evictions and provide essential services to these individuals). See also Nita Bhalla, *Forced Evictions Leave 5,000 Kenyan Slum Dwellers at Risk of Coronavirus*, REUTERS (May 6, 2020), <https://www.reuters.com/article/us-health-coronavirus-kenya-homelessness/forced-evictions-leave-5000-kenyan-slum-dwellers-at-risk-of-coronavirus-idUSKBN2211VC> (noting the impact of forced evictions on slum dwellers in Kenya).

¹⁸ Ayobami Adedinni, *'We Woke to Bulldozers': Nigeria Slum Clearance Leaves Thousands Homeless*, GUARDIAN (Mar. 1, 2022), <https://www.theguardian.com/global-development/2022/mar/01/we-woke-to-bulldozers-nigeria-slum-clearance-leaves-thousands-homeless> (noting the extent to which slum-clearance activities in Nigeria are rendering thousands of people homeless); *Forced Evictions Leave Nigerian Slum Dwellers Homeless*, NEW HUMANITARIAN (Jan. 13, 2016), <https://www.thenewhumanitarian.org/news/2015/10/21/forced-evictions-leave-nigerian-slum-dwellers-homeless> (showing how forced evictions render inhabitants of slums in Nigeria homeless); see also GLOBAL VIEWPOINTS: HUMAN RIGHTS 26 (Margaret Haerens ed., 2011) (noting “[m]ass forced evictions of people from their homes in Africa, for example in Angola, Ghana, Kenya and Nigeria, often driving people deeper into poverty”).

¹⁹ ICCPR, *supra* note 1, art. 1; U.S. Department of Health & Human Services, *International Agreements*, PUB. HEALTH EMERGENCY, [https://www.phe.gov/s3/law/Pages/International.aspx#:~:text=An%20agreement%20between%20two%20countries,agreement%20between%20states%20\(countries\)](https://www.phe.gov/s3/law/Pages/International.aspx#:~:text=An%20agreement%20between%20two%20countries,agreement%20between%20states%20(countries)) (stating that “countries bound by an international agreement are generally referred to as “States Parties”).

²⁰ John Mukum Mbaku, *Protecting Human Rights in African Countries: International Law, Domestic Constitutional Interpretation, the Responsibility to Protect, and Presidential Immunities*, 16 S.C. J. INT'L L. & BUS. 1, 8 (2019) [hereinafter *Protecting Human Rights in Africa*] (noting how Kenya has made the “rules of international law” justiciable in its domestic courts).

customary and other laws that are not in conformity with the provisions of international human rights instruments and the country's Bill of Rights.²¹ Finally, each country must ensure that its political branches, especially those at the local and municipal levels, have the capacity to implement court orders. While the courts can play a supervisory or oversight role in reviewing and approving the agreed-upon policy, civil society, and its organizations can also put pressure on the state to fully and timely implement all court orders. It is especially important that state action does not violate the fundamental human rights of the aggrieved parties.

African courts have very important roles to play in the recognition and protection of human rights. As states take "legislative or other measures"²² to meet the obligations imposed on them by regional and international human rights instruments, including those that guarantee the right to adequate housing, courts can ensure that (i) the exercise of government power does not violate the rights of citizens; and (ii) governments provide citizens with the wherewithal (e.g., a well-defined and protected property rights regime) to realize their right to adequate housing.²³ Additionally, courts can adjudicate cases involving the violation of the right to adequate housing and provide relief to victims. Through the adjudication of cases, courts can make sure that customary laws and traditional practices do not violate human rights generally and the right to adequate housing in particular. For example, in *Ephrahim v. Pastory*, the High Court of Tanzania at Mwanza declared "section 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963," unconstitutional because it violated the country's Bill of Rights.²⁴ By also playing a supervisory role, courts can ensure that their orders are fully and timely carried out by the political branches. Finally, civil society can, through its organizations (e.g., independent press), put pressure on the state so that it performs its constitutionally assigned functions, which includes implementing the court's orders.

In *Ephrahim*, Judge Mwalusanya, writing for the High Court, used his power to interpret the constitution to resolve a conflict between customary law and

²¹ John Mukum Mbaku, *International Human Rights Law and the Tyranny of Harmful Customary and Traditional Practices on Women in Africa*, 52 CAL. W. INT'L L. J. 1, 22 (2021) [hereinafter *The Tyranny of Harmful Customary and Traditional Practices*] (noting that once an African country has domesticated international human rights instruments and created rights that are justiciable in domestic courts, it must then ensure that it has a judiciary that is independent enough and has the capacity to enforce these laws and bring to justice those who violate them).

²² ICCPR, *supra* note 1, art. 2(2).

²³ See, e.g., JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA 217–19 (2004) (explaining the concept of a property rights regime).

²⁴ See *Ephrahim v. Pastory & Another* (2001) AHRLR 236 (TzHC 1990) (Tanz.), ¶ 42.

Tanzania's Bill of Rights.²⁵ Thus, through the adjudication of cases, courts can make certain that customary and traditional practices (e.g., the denial of inheritance rights to women and girls) do not violate human rights generally and the right to adequate housing in particular.²⁶ Most countries in Africa are governed through a combination of statutory and customary laws, as well as those inherited from colonialism. Some countries with large Muslim populations have laws based on Islamic religious practices.²⁷ Throughout many of these countries, "the widespread application of customary laws effectively prevents many girls and women from owning, retaining, or inheriting property."²⁸

Many African countries have not yet domesticated the major regional and international human rights instruments to create rights that are justiciable in domestic courts. However, progressive judges in these countries are stepping in and using their power to interpret the constitution to bring national laws, including customary laws, into conformity with the provisions of international and regional human rights instruments. For example, in two landmark cases—*Ukeje v. Ukeje*²⁹ and *Anekwe v. Nweke*³⁰—whose judgments were delivered on the same day, Nigeria's Supreme Court "condemned the refusal of customary law to recognize female inheritance with regard to property."³¹ Specifically, in *Ukeje v. Ukeje*, the Court held that the customary law which prohibits a female child from inheriting her deceased father's estate is a breach of § 42(1) and (2) of the Constitution of Nigeria.³² In *Anekwe v. Nweke*, the Supreme Court condemned the Awka people's customs and traditional practices, noting that a custom or practice "which militates against women particularly, widows, who are denied their inheritance, deserves to be condemned as being repugnant to

²⁵ *Id.*

²⁶ See, e.g., *Mmusi & Others v. Ramantele & Another*, MAHLB-000836 (H. Ct. Botswana at Gaborone) (2012) (Bots.), ¶ 222 (ruling that the Ngwaketse customary law, to the extent that it denies girls and women the right to inherit family land, is unconstitutional).

²⁷ For example, although the constitution is the basic or supreme law in Nigeria, some of the country's states have legal systems in which personal laws—that is laws that regulate family relations—are based on Sharia. See Katrin Gansler, *Nigeria Looks Back on 20 Years of Sharia Law in the North*, DW NEWS (Oct. 10, 2019), <https://www.dw.com/en/nigeria-looks-back-on-20-years-of-sharia-law-in-the-north/a-51010292> (noting that personal laws in some Nigerian states are based on Sharia).

²⁸ WOMEN IN DEVELOPMENT [WID], NADIA STEINZOR, WOMEN'S PROPERTY AND INHERITANCE RIGHTS: IMPROVING LIVES IN CHANGING TIMES 5 (Mar. 2003).

²⁹ *Ukeje v. Ukeje*, [2014] 11 NWLR 384 (Nigeria).

³⁰ *Anekwe v. Nweke* [2014] 9 NWLR 393 (Nigeria).

³¹ *Summary and Comment on Mrs. Lois Chituru Ukeje and Enyinaya Lazarus Ukeje v. Mrs Gladys Ada Ukeje*, Supreme Court of Nigeria, SC. 224/2004, ESCR-NET, <https://www.escr-net.org/caselaw/2018/mrs-lois-chituru-ukeje-and-enyinaya-lazarus-ukeje-v-mrs-gladys-ada-ukeje-supreme-court>.

³² Section 42(1) is part of Chapter IV, which elaborates "fundamental rights" and guarantees freedom from discrimination. See CONSTITUTION OF NIGERIA (1999), § 42.

natural justice, equity and good conscience.”³³ The Court noted further that “a custom of this nature in the 21st-century societal setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society.”³⁴ Finally, noted Nigeria’s Supreme Court, “[a]ny culture that disinherits a daughter from her father’s estate or wife from her husband’s property by reason of God instituted gender differential should be punitively and decisively dealt with” and that “[f]or a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband’s brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning.”³⁵

While customary law remains an important source of the law in Nigeria, “the holdings in these two cases illustrate that the validity of customary rules within the legal system depends on whether those rules are consistent with the Constitution and are not repugnant to natural justice, equity and good conscience.”³⁶

In addition, “[i]n a country like Nigeria where there is a large discrepancy in gender equality that is largely grounded in traditional cultures and practices, the holdings in [*Ukeje v. Ukeje & Anekwe v. Nweke*] are a significant step in the protection of women’s property rights and gender equality.”³⁷ However, the continued and pervasive denial of “a woman’s right to inherit land and other property” remains a very serious threat to the realization of women’s human rights.³⁸ In many traditional societies in Africa, “land use, housing, and the transfer of land and housing between generations is regulated by customary law, which largely excludes women and girls from property ownership and inheritance.”³⁹ Since a significant portion of African women, including especially those who live in urban slums and the rural areas, do not have secure land and property rights, “widows and orphans are often left homeless and destitute after the death of their husband or father.”⁴⁰

³³ Anekwe, 9 NWLR, *supra* note 30, at 400.

³⁴ *Id.* at 421.

³⁵ *Id.*

³⁶ *Summary and Comment on Ujeke v. Ujeke*, *supra* note 31.

³⁷ *Id.*

³⁸ Abby Morrow Richardson, *Women’s Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform*, 11 HUM. RTS. BRIEF 19, 19 (2004).

³⁹ *Id.*

⁴⁰ *Id.*

Many countries in Africa have not yet domesticated the core international human rights instruments to create rights that are directly justiciable in their domestic or municipal courts. As a consequence, citizens of these countries cannot directly invoke these rights or exercise them in domestic courts, which severely limits the effectiveness of international human rights instruments in protecting the rights of Africans, especially those of women and girls.

In addition to the fact that the rights guaranteed by international human rights instruments cannot be directly exercised in the domestic courts of many African countries, citizens of these countries are also burdened by customary laws and traditional practices that discriminate against certain individuals and groups, particularly women and girls. Research shows that “[c]ustomary and traditional practices, which usually reflect community values, include female genital mutilation . . . , child marriage, son preference, early pregnancy, nutritional taboos, denial of inheritance, and the prohibition of women to own real property.”⁴¹

These customary and traditional practices are extremely detrimental to the welfare of women and girls and violate their fundamental rights and freedoms. Unfortunately, throughout Africa, these practices persist and, in some communities, have become widely accepted “under the guise of morality.”⁴² Hence, “[e]radicating them will require deliberate and strategic efforts by the international community, regional organizations, and national governments, with significant input from civil societies and their organizations within each African country.”⁴³

The first and most effective way to ensure that the rights guaranteed to Africans by international human rights instruments are fully recognized and protected is for each African country to domesticate these instruments and create rights that are justiciable in their domestic courts. Second, each country should internationalize its constitution so that its provisions reflect those of the international human rights instruments. Third, the country should bring all customary and other laws in conformity with the constitution and hence, provisions of international human rights instruments. Fourth, the country should ensure that its judiciary has the necessary independence and capacity to enforce

⁴¹ Mbaku, *The Tyranny of Harmful Customary and Traditional Practices*, *supra* note 18, at 3–4.

⁴² *Id.* at 4.

⁴³ *Id.*

the laws.⁴⁴ Fifth, the courts should play a supervisory role to ensure that the political branches are enforcing their orders and doing so in ways that reflect the public norms that support the constitutional rights in question. Finally, civil society and its organizations can pressure the state to carry out its duties and do so in ways that do not violate the rights guaranteed by international human rights instruments and national constitutions.

Until these institutional changes are accomplished, each African country's judiciary, especially if it is part of a regime of separation of powers, which guarantees judicial independence, can temporarily cure this problem by using "its interpretive powers to interpret national laws [including the constitution] in light of international human rights norms."⁴⁵ In fact, independent and progressive judiciaries "are already taking advantage of their ability and right to interpret the constitution and determine the constitutionality of all the country's laws, including customary laws, to strike down laws that they determine do not conform with the national constitution or international human rights norms."⁴⁶

This Article will illustrate this approach to the protection of the rights of African women and girls, particularly the right to adequate housing, by examining case law from some African courts.⁴⁷ Before it does that, the Article will provide an overview of the right to adequate housing in international law.

I. INTERNATIONAL LAW AND THE RIGHT TO ADEQUATE HOUSING

A. Introduction

The UDHR, one of the earliest human rights instruments adopted by the U.N., recognizes the right to housing. According to Article 25,

[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, *housing* and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability,

⁴⁴ *Id.* at 22 ("The next step in the effort to eliminate these harmful practices and protect the rights of girls and women, is for these countries to provide a judiciary that is independent enough and has the capacity to enforce these laws and bring to justice those who violate them.")

⁴⁵ Mbaku, *Protecting Human Rights in Africa*, *supra* note 17, at 35.

⁴⁶ *Id.*

⁴⁷ *E.g.*, *The Government of the Republic of South Africa & Others v. Irene Grootboom & Others* 2000 (11) BCLR 1169 (CC) (S. Afr.) (case decided by the Constitutional Court of South Africa).

widowhood, old age or other lack of livelihood in circumstances beyond his control.⁴⁸

Since the 1970s, advocates for the poor in many countries around the world have been calling on national governments and the international community to recognize housing as a human right. For example, research conducted in India in the late-1980s and early-1990s determined that for Indians, “a house is a place to belong, a secure place to live—it is much more than just four walls and a roof.”⁴⁹ The U.N. notes that “[h]ousing is the basis of stability and security for an individual or family.”⁵⁰ The U.N. states further that “[t]he centre of our social, emotional and sometimes economic lives, a home should be a sanctuary—a place to live in peace, society and dignity.”⁵¹

Under international law, argued the U.N., “to be *adequately* housed means having secure tenure—not having to worry about being evicted or having your home or lands taken away.”⁵² Housing cannot be considered to be adequate if its “occupants do not have safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal.”⁵³ In addition, the U.N. noted conditions that must be met before any particular form of shelter can be considered to constitute “adequate housing” and these include: (1) *affordability* (housing cannot be said to be adequate “if its cost threatens or compromises the occupants’ enjoyment of other human rights”);⁵⁴ (2) *habitability* (housing must guarantee “physical safety or provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards”);⁵⁵ (3) *accessibility* (adequate housing must make allowance for the needs of “disadvantaged and marginalized groups”);⁵⁶ (4) *location* (housing cannot be considered adequate if it is located where residents are not able to access “employment opportunities, healthcare services, schools, childcare centers and other social facilities” or it is located in highly “polluted

⁴⁸ G.A. Res. 217 A (III), Universal Declaration of Human Rights, art. 25(1) (Dec. 10, 1948) (emphasis added).

⁴⁹ WOMEN AND THE RIGHT TO ADEQUATE HOUSING, *supra* note 7, at 5.

⁵⁰ *The Human Right to Adequate Housing*, *supra* note 9.

⁵¹ *Id.*

⁵² *Id.* See also U.N. Comm. on Econ., Soc. & Cultural Rts. (CESCR), *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 8, U.N. Doc. E/1992/23 (Dec. 13, 1991).

⁵³ *The Human Right to Adequate Housing*, *supra* note 9; see also CESCR General Comment No. 4, ¶ 8(b).

⁵⁴ *The Human Right to Adequate Housing*, *supra* note 9; see also CESCR General Comment No. 4, ¶ 8(c).

⁵⁵ *The Human Right to Adequate Housing*, *supra* note 9; see also CESCR General Comment No. 4, ¶ 8(d).

⁵⁶ *The Human Right to Adequate Housing*, *supra* note 9; see also CESCR General Comment No. 4, ¶ 8(e).

or dangerous areas”);⁵⁷ and (5) *cultural adequacy* (adequate housing must “respect and take into account the expression of cultural identity”).⁵⁸

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also recognizes a right to housing. Article 11(1) recognizes the right of “everyone,” and that includes women and girls, to “an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”⁵⁹ This right is important and significant for a variety of reasons. First, this right is guaranteed to “everyone” without qualification or distinction.⁶⁰ Second, this provision of the ICESCR “is not static in nature, but also ensures the right to the ‘continuous improvement of living conditions.’”⁶¹ Third, the treaty imposes an obligation on States Parties “to take ‘appropriate steps’ to ensure the realization of the right to adequate housing.”⁶² Hence, as part of their obligation under the ICESCR, States Parties, including those in Africa, must not allow customary and traditional practices or any other laws to interfere with a widow’s or girl’s right to adequate housing.⁶³

Most international human rights instruments also contain provisions that effectively prohibit discrimination based on sex and require that all the rights guaranteed by these treaties “should be enjoyed without distinction based on sex among other grounds.”⁶⁴ For example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) specifically imposes an obligation on States Parties to take appropriate measures to eliminate discrimination against women generally and particularly in access to adequate housing.⁶⁵

⁵⁷ *The Human Right to Adequate Housing*, *supra* note 9; *see also* CESCR General Comment No. 4, ¶ 8(f).

⁵⁸ *The Human Right to Adequate Housing*, *supra* note 9; *see also* CESCR General Comment No. 4, ¶ 8(g).

⁵⁹ Int’l Covenant on Econ., Social and Cultural Rights art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3.

⁶⁰ U.N. High Commissioner for Human Rights, *Women and the Right to Adequate Housing*, at 12, HR/Pub/11/02 (July 2012). *See also* Int’l Covenant on Econ., Social and Cultural Rights, *supra* note 56, art. 11(1).

⁶¹ *Id.* at 12. *See also* Int’l Covenant on Econ., Social and Cultural Rights, *supra* note 56, art. 11(1).

⁶² U.N. High Commissioner for Human Rights, *supra* note 60, at 12. *See also* Int’l Covenant on Econ., Social and Cultural Rights, *supra* note 59, art. 11(1).

⁶³ For example, after Owerri (Nigeria) resident Rosena Akuwuodor’s husband died, her brother-in-law, Maxwell Akuwuodor, evicted the widow and her children from her matrimonial home, claiming that tradition entitled him to his late brother’s real property. *See* Chidiebube Okeoma, *Widow, Children Rendered Homeless as Brother-In-Law Takes Over House*, PUNCH (NIGERIA) (Sept. 2, 2021), <https://punchng.com/widow-children-rendered-homeless-as-brother-in-law-takes-over-house/>.

⁶⁴ U.N. High Commissioner for Human Rights, *supra* note 60, at 12.

⁶⁵ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Sept. 3, 1981, 1249 U.N.T.S. 1 art. 14(2)(h) [hereinafter CEDAW].

Article 14(2)(h) states:

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right...

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.⁶⁶

CEDAW imposes an obligation on States Parties to ensure that women are not discriminated against when it comes to access to adequate housing, as well as the various services that significantly enhance the quality of life for residents in a house. These include “adequate living conditions, . . . sanitation, electricity and water supply.”⁶⁷ CEDAW also requires States Parties to eliminate all forms of discrimination against women in “all matters relating to marriage and family relations.”⁶⁸ Specifically, Article 16(1)(h) states as follows:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women...

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.⁶⁹

The Convention on the Rights of the Child also provides protections for children under the general rubric of adequate housing.⁷⁰ For example, Article 16(1) states: “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.”⁷¹ In addition, Article 27(1, 3) also provides various protections for the child:

States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.... States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ CEDAW, *supra* note 65, art. 16(1).

⁶⁹ *Id.* art. 16(1)(h).

⁷⁰ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, arts. 16, 27 [hereinafter CRC].

⁷¹ CRC, *supra* note 70, art. 16(1).

parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.⁷²

The CRC is specifically directed at protecting the rights of children, including those to adequate housing. In many African countries, the customs and traditions of various ethnocultural groups discriminate against widows, especially in issues of inheritance.⁷³ That discrimination usually has a significantly negative impact on the health and welfare of the children involved, including their ability to access adequate housing. Widows who are forced out into the streets by their deceased husbands' relatives are usually unable to support themselves and their children, eventually becoming destitute and homeless.⁷⁴ As made clear by Nigeria's Supreme Court in *Anekwe v. Nweke* with respect to customs and traditions of the Awka people of Nigeria that discriminate against girls in matters of inheritance, "[a]ny culture that disinherits a daughter from her father's estate . . . should be punitively and decisively dealt with."⁷⁵

The ICCPR also provides protections for women, including regarding their access to adequate housing: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, *home* or correspondence, nor to unlawful attacks on his honour and reputation."⁷⁶

Women and girls with disabilities are especially vulnerable to multiple sources of discrimination and ill-treatment. Hence, it is important that national laws and international human rights treaties provide protections for this category of persons. The Convention on the Rights of Persons with Disabilities (CRPD) was designed "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."⁷⁷

⁷² *Id.* art. 27(1, 3).

⁷³ See, e.g., Valerie Bennett et al., *Inheritance Law in Uganda: The Plight of Widows and Children*, 7 GEO. J. GEND. & L. 451, 453 (2006) (noting that in Uganda it is "not uncommon for relatives to take over a widow's home and grab all of the property and surrounding land for themselves," and that "[t]he widow's children suffer gravely as a result of these practices."). See also Rachel C. Loftsring, Comment, *Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda*, 29 U. PA. J. INT'L L. 243, 243 (2007) (noting the impact of Uganda's "devastating unequal inheritance laws and customs" on widows and their children).

⁷⁴ Loftsring, *supra* note 73, at 243–245 (noting how the ill-treatment of widows affects their children).

⁷⁵ *Anekwe v. Nweke* [2014] 9 NWLR 393, 421 (Nigeria).

⁷⁶ ICCPR, *supra* 1, art. 17(1).

⁷⁷ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, art 1[hereinafter CRPD].

According to Article 6(1) of the CRPD, “States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.”⁷⁸ These “human rights and fundamental freedoms” include effective access to adequate housing—the latter includes, not just an abode, but also the services that help sustain a reasonable quality of life for the abode’s residents.⁷⁹

The CRPD also imposes an obligation on States Parties to “take appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.”⁸⁰ The treaty also instructs States Parties to take appropriate measures to ensure that persons with disabilities have access, on an equal basis, to services that can significantly enhance their ability to live independently and “participate fully in all aspects of life.”⁸¹

Article 28 of the CRPD deals with housing in general and public housing in particular. It instructs States Parties to “recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.”⁸² Additionally, States Parties are instructed to recognize the rights “of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures... (d) [t]o ensure access by persons with disabilities to public housing programmes.”⁸³

The Office of the U.N. High Commissioner for Human Rights notes that “[t]he norms and principles of gender equality and non-discrimination *are enshrined in all fundamental human rights treaties*.”⁸⁴ In addition, notes the

⁷⁸ *Id.* art. 6(1).

⁷⁹ *The Right to Adequate Housing: Fact Sheet No. 21 (Rev. 1)*, U.N. HABITAT & U.N. HIGH COMM’R HUM. RTS., [hereinafter *The Right to Adequate Housing*], <https://unhabitat.org/the-right-to-adequate-housing-fact-sheet-no-21rev-1>.

⁸⁰ CRPD, *supra* note 77, art. 6(2).

⁸¹ *Id.* art. 9(1).

⁸² *Id.* art. 28(1).

⁸³ *Id.* art. 28(2)(d).

⁸⁴ U.N. High Commissioner for Human Rights, *supra* note 60, at 15 (emphasis added).

High Commissioner for Human Rights, “[t]he rights to equality and to be free from discrimination are not subject to progressive realization . . . but entail obligations of immediate application.”⁸⁵ This is the view of the Committee on Economic, Social and Cultural Rights (ESCR Committee) as made clear in its General Comment No. 16.⁸⁶ The ESCR Committee states as follows: “States [P]arties must fulfill their immediate and primary obligation to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights.”⁸⁷

International law recognizes access to adequate housing as a human right. In the section that follows, this Article will examine the human right to adequate housing.

II. THE HUMAN RIGHT TO ADEQUATE HOUSING

A. Introduction

U.N. Habitat has noted that “[i]nternational human rights law recognizes everyone’s right to an adequate standard of living, including adequate housing.”⁸⁸ However, “[m]illions around the world live in life- or health-threatening conditions, in overcrowded slums and informal settlements, or in other conditions which do not uphold their human rights and their dignity.”⁸⁹

Given the fact that most U.N. member states have ratified at least one international human rights treaty that includes provisions on the right to adequate housing and have “committed themselves to protecting the right to adequate housing through international declarations, plans of action or conference outcome documents,” the right to adequate housing “is relevant to all States.”⁹⁰ In addition to the fact that several African constitutions have protections for the right to adequate housing “or outline the State’s general responsibility to ensure adequate housing and living conditions for all,” national courts have also adjudicated cases involving various aspects of the right to adequate housing—for example, discrimination in the housing market,

⁸⁵ *Id.*

⁸⁶ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16, Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, ¶ 40, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005).

⁸⁷ *Id.*

⁸⁸ The Right to Adequate Housing, *supra* note 79 at 1.

⁸⁹ *Id.*

⁹⁰ *Id.*

inadequacy of housing services (e.g., water and sanitation), and the protection of tenants against forceful eviction.⁹¹

Most importantly, international and regional human rights groups and institutions have drawn attention to the right to adequate housing as a human right. Notable among this is the U.N. Commission on Human Rights, which has since been replaced by the Human Rights Council, created the mandate of the “Special Rapporteur on adequate housing as a component of the right to an adequate standard of living” in 2000.⁹² Finally, some African constitutions have elevated the right to housing to a fundamental right and made it part of their bill of rights.⁹³

Below, this Article will provide an overview of key aspects of the right to adequate housing, as well as examine how international human rights law defines this important human right.

B. Key Aspects of the Right to Adequate Housing

In its General Comments No. 4 (1991) and No. 7 (1997), the ESCR Committee states that “the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity.”⁹⁴ On the other hand, noted the ESCR Committee, the right to adequate housing “should be seen as the right to live somewhere in security, peace and dignity” and this is important for “at least two reasons.”⁹⁵

First, the right to adequate housing is “integrally linked to other human rights and to the fundamental principle upon which the [ICESCR] is premised.”⁹⁶ The ESCR Committee argues further that “‘the inherent dignity of the human person’ from which the rights in the [ICESCR] are said to derive requires that the term ‘housing’ be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources.”⁹⁷

⁹¹ *Id.*

⁹² *Id.*

⁹³ For example, in the Constitution of South Africa, 1996, the right to adequate housing is a fundamental right under Chapter 2, which is the Bill of Rights. *See* S. AFR. CONST., 1996, § 26(1).

⁹⁴ U.N. Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, ¶ 7, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter *CESCR General Comment No. 4*].

⁹⁵ *Id.*

⁹⁶ *Id.* (alteration in original).

⁹⁷ *Id.*

Second, the ESCR Committee notes, “the reference to [A]rticle 11(1) [of the ICESCR] must be read as referring not just to housing but to adequate housing.”⁹⁸ The latter must include “adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities—all at a reasonable cost.”⁹⁹

The ESCR Committee also noted that “[w]hile adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors...” it is important to “identify certain aspects of the right that must be taken into account for this purpose in any particular context” and these include the following:¹⁰⁰ (1) legal security of tenure; (2) availability of essential facilities for health, security, comfort, and nutrition; (3) affordability; (4) habitability (i.e., adequate housing must be “habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors”); (5) accessibility; (6) location (i.e., adequate housing must “be in a location which allows access to employment options, healthcare services, schools, childcare centers and other social facilities”); and (6) cultural adequacy (i.e., the “way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing”).¹⁰¹

The ESCR Committee’s General Comment No. 7 covers forced evictions, which the Committee argues, “are prima facie incompatible with the requirements of the [ICESCR].”¹⁰² In this General Comment, the ESCR Committee noted that the Commission on Human Rights has declared that “forced evictions are a gross violation of human rights.”¹⁰³ The ESCR Committee argued, however, that the international human rights community must determine the circumstances “under which forced evictions are permissible,” as well as “the types of protection required to ensure respect for the relevant provisions of the [ICESCR].”¹⁰⁴

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *CESCR General Comment No. 4, supra note 94, ¶ 8.*

¹⁰¹ *Id.* ¶ 8(a–g).

¹⁰² U.N. Committee on Economic, Social and Cultural Rights, *The Right to Adequate Housing (Art. 11.1): Forced Evictions: 20/05/97, CESCR General Comment 7, E/1998/22 (May 20, 1997)* [hereinafter *The Right to Adequate Housing (Art. 11.1)*] (alteration in original).

¹⁰³ *The Right to Adequate Housing (Art. 11.1), supra note 99, ¶ 2.*

¹⁰⁴ *Id.* (alteration in original).

After considering various expressions, such as “illegal evictions” and “unfair evictions,” the ESCR Committee settled on “forced evictions” and defined it as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”¹⁰⁵ However, the ESCR Committee noted, “[t]he prohibition on forced evictions does not . . . apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.”¹⁰⁶

Forced evictions are a widespread practice throughout many countries today, including those in Africa. As a consequence of the “interrelationship and interdependency which exist among all human rights,” argued the ESCR Committee, “forced evictions frequently violate other human rights.”¹⁰⁷ Forced evictions may, for example, result in “violations of . . . the right to life, the right to security of person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.”¹⁰⁸

In many countries, forced evictions often involve significant levels of violence. Examples include those that result from “international armed conflicts, internal strife and communal or ethnic violence.”¹⁰⁹ In many African countries, so-called slum clearance projects, designed to secure land for government-funded development programs, often involve the violent and sometimes deadly evacuation of poor and defenseless people, including women and children.¹¹⁰ In Nigeria, for example, widows are also susceptible to forced and violent eviction from their matrimonial homes by relatives of their deceased husbands.¹¹¹

In Africa, certain groups and individuals are especially susceptible to forced evictions. These include “[w]omen, children, youth, older persons, indigenous

¹⁰⁵ *Id.* ¶ 3.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 4.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ¶ 6.

¹¹⁰ Emmanuel Akinwotu, *Class Divide: Mass Demolitions Drive Poor From Valuable Land in Lagos*, THE GUARDIAN (UK) (Mar. 12, 2021), <https://www.theguardian.com/world/2021/mar/12/class-divide-mass-demolitions-drive-poor-from-valuable-land-in-lagos#:~:text=Since%20December%202019%2C%20Nigerian%20authorities,of%20mostly%20poor%20people%20homeless> (noting the demolition of the homes of poor people at Tarkwa Bay Beach in Lagos State by the government to make space for development).

¹¹¹ Such evictions have been recorded in Kenya, Malawi, Mozambique, South Africa, Zambia, and Zimbabwe. See Juliana Nnoko-Mewanu & Najma Abdi, *Securing Women’s Property Rights in Kenya*, HUM. RTS. WATCH, <https://www.hrw.org/news/2020/03/07/securing-womens-property-rights-kenya>.

people, ethnic and other minorities, and other vulnerable individuals and groups.”¹¹² All these groups of persons usually suffer disproportionately from violent evictions, even in countries where such practices are prohibited by law.¹¹³

Finally, the right to adequate housing must provide robust protection against forced evictions—“[p]rotection against forced evictions is a key element of the right to adequate housing and is closely linked to security of tenure.”¹¹⁴ Regardless of why there are carried out, forced evictions “may be considered a gross violation of human rights and a prima facie violation of the right to adequate housing.”¹¹⁵ In addition, “[l]arge-scale evictions can in general be justified only in the most exceptional circumstances and only if they take place in accordance with the relevant principles of international law.”¹¹⁶

Nevertheless, even if evictions are legal and justifiable, certain safeguards are still required. For example, while an eviction may be justified in the case where a tenant has repeatedly failed to pay rent owed the landlord or, by his actions, damages the property without reasonable cause, “the State must ensure that [evictions] are carried out in a lawful, reasonable and proportional manner, and in accordance with international law.”¹¹⁷ The people who are evicted must have available to them “[e]ffective legal recourses and remedies,” and these include “adequate compensation for any real or personal property affected by the eviction.”¹¹⁸ Whatever the reason or justification for evictions, U.N. Habitat notes, “[e]victions should not result in individuals becoming homeless or vulnerable to further human rights violations.”¹¹⁹ Most importantly, government policy regarding evictions must make allowance for the full and effective participation of evictees and their representatives.

C. *What is Not Included in the Right to Adequate Housing*

U.N. Habitat has noted that the right to adequate housing is often shrouded in certain misconceptions. The first is that the right to adequate housing includes

¹¹² See *The Right to Adequate Housing (Art. 11.1)*, *supra* note 102, ¶ 10.

¹¹³ See, e.g., Nnoko-Mewanu & Abdi, *supra* note 111, at 1–2 (noting the pervasiveness of forced evictions of widows in Kenya even though their rights are protected by the Marriage Act and the Matrimonial Property Act).

¹¹⁴ *The Right to Adequate Housing*, *supra* note 79, at 4.

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (alteration in original).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

a requirement that the State must build housing for the entire population and that homeless individuals can demand that the government provide them with housing. Granted, governments in many countries are involved in providing housing to some parts of their populations—primarily low-income households and other special populations (e.g., people in the armed forces, single women with dependent children). However, “the right to adequate housing clearly does not oblige the Government to construct a nation’s entire housing stock.”¹²⁰

The right to housing, on the other hand, as elaborated in and guaranteed by international human rights instruments, “covers measures that are needed to prevent homelessness, prohibit forced evictions, address discrimination, focus on the most vulnerable and marginalized groups, ensure security of tenure for all, and guarantee that everyone’s housing is adequate.”¹²¹ In some situations, for example, where a private owner of housing units is discriminating against certain categories of tenants (e.g., ethnic minorities, single women with dependent children, and the handicapped or disabled), the government need only enforce the law in order to guarantee the right to adequate housing. However, in others (e.g., where there is a natural or man-made disaster, such as an earthquake or heavy flooding that wipes out most of the community’s housing units), the government may have to directly intervene and provide targeted assistance, such as cash transfers to affected individuals.¹²²

For example, when Hurricane Katrina hit the Louisiana coast and inflicted significant damage, especially in the city of New Orleans and its outskirts in late August 2005, the U.S. Federal Emergency Management Agency (FEMA) provided emergency disaster relief, which included Stafford Act Section 403 (“general federal assistance to meet immediate threats to life and property”) and Traditional Stafford Act Sheltering/Housing.¹²³

Another misconception is that the right to adequate housing is realizable only in the long term and that it does not impose any immediate obligations on the State. U.N. Habitat, however, argues that “States must make every possible effort, within their available resources, to realize the right to adequate housing and to take steps in that direction without delay.”¹²⁴ Even where States are

¹²⁰ *Id.* at 6.

¹²¹ *Id.*

¹²² See FRANCIS X. MCCARTHY, CONGRESSIONAL RESEARCH SERVICE, FEMA DISASTER HOUSING AND HURRICANE KATRINA: OVERVIEW, ANALYSIS, AND CONGRESSIONAL ISSUES 21 (2008).

¹²³ These included “mass shelters (such as those run by the Red Cross and designated by local governments), cruise ships . . . , emergency group sites (using manufactured housing), rental assistance, and other supporting services paid for by state governments and reimbursed by FEMA.” *Id.* at 2.

¹²⁴ The Right to Adequate Housing, *supra* note 79, at 7.

constrained by resources, there are certain obligations that require immediate action by the State and these include the need to (1) eliminate discriminatory housing practices; (2) enact legislation to address forced evictions, including those occasioned by customary and traditional practices; and (3) guarantee some reasonable degree of tenure security for all citizens.¹²⁵

U.N. Habitat also notes that the right to adequate housing “does NOT prohibit development projects which could displace people.”¹²⁶ Throughout Africa, there is need by States to undertake development projects, which include, but are not limited to, the building of roads, hospitals, sewage disposal plants, water treatment facilities, schools, and other infrastructure to meet the needs of growing cities. According to U.N. Habitat, the right to adequate housing does not prohibit such development. However, it “imposes conditions and procedural limits” on such development projects.¹²⁷ Any such development projects must be carried out in full and effective consultation of those affected, only after their needs are duly considered, and there is a good faith effort to “develop solutions which minimize the scale of the eviction and the disruption caused.”¹²⁸

The right to adequate housing has often been made synonymous with the right to property, or property rights, or that it threatens the right to property. However, U.N. Habitat states that “[t]he right to adequate housing is NOT the same as the right to property.”¹²⁹ In addition, U.N. Habitat notes, the right to adequate housing is “broader than the right to own property as it addresses rights not related to ownership and is intended to ensure that everyone has a safe and secure place to live in peace and dignity, including non-owners of property.”¹³⁰ Importantly, U.N. Habitat argues, “[s]ecurity of tenure,” which is “the cornerstone of the right to adequate housing, can take a variety of forms, including rental accommodation, cooperative housing, lease, owner-occupation, emergency housing or informal settlements.”¹³¹

Since the right to adequate housing provides broader protections than those offered by property rights alone, “a sole focus on property rights might in fact lead to violations of the right to adequate housing, for instance, by forcibly evicting slum-dwellers residing on private property.”¹³² Nevertheless, it is

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 7–8.

¹³¹ *Id.* at 8.

¹³² *Id.*

important to note that the protection of “the right to property might be crucial to ensure that certain groups are able to enjoy their right to adequate housing.”¹³³ U.N. Habitat notes that “[t]he recognition of spouses’ equal rights to household property, . . . , is often an important factor in ensuring that women have equal and non-discriminatory access to adequate housing.”¹³⁴

Although U.N. Habitat does not make references to customary and traditional African practices that harm women and girls, the recognition of African women’s equal rights to household property, including land and the matrimonial home, can minimize their eviction by male members of the family after the death of their husbands. Of course, the existence of such legal protections is a necessary but not sufficient condition for these women to exercise their right to adequate housing.¹³⁵ Sufficiency requires that there be a police force that is not pervaded by corruption; instead, it is fully constrained by the law and has the capacity and willingness to enforce the law, as well as a judiciary that has both the independence and capacity to enforce the law.¹³⁶

While access to land can help an individual realize the right to adequate housing, especially in the rural areas, the right to adequate housing, however, is not synonymous with the right to land. Forced evictions, of course, “can be the consequence of being denied access to land and common property resources” and hence, in certain circumstances, notes U.N. Habitat, “the enjoyment of the right to adequate housing might require . . . securing access to and control over land.”¹³⁷ International human rights law, however, “does not, currently, recognize a self-standing right to land.”¹³⁸

Finally, the “right to adequate housing includes ensuring access to adequate services.”¹³⁹ For an individual to fully realize the right to adequate housing, that individual must also have “sustainable and non-discriminatory access to

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See, e.g., Dando Mweetwa, *Property Grabbing Forces Zambian Widows into Poverty*, GLOB. PRESS J. (Sept. 10, 2012), <https://globalpressjournal.com/africa/zambia/property-grabbing-forces-zambian-widows-into-poverty/> (noting the customary practice known as “property grabbing” in Zambia in which widows are forcefully evicted from their matrimonial homes by the deceased husband’s male relatives).

¹³⁶ See John Mukum Mbaku, *International Law, African Customary Law, and the Protection of the Rights of Children*, 28 MICH. ST. INT’L L. REV. 535, 596 (2020) (noting that the mere existence of laws against harmful customary and traditional practices, such as female genital mutilation, is not enough to ensure eradication and that sufficiency requires that the country have institutions that can actually enforce the law).

¹³⁷ The Right to Adequate Housing, *supra* note 79, at 8.

¹³⁸ *Id.* See also Miloon Kothari (Special Rapporteur on Adequate Housing), *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, ¶ 26, U.N. Doc. A/HRC/14/18 (Mar. 15, 2006) (stressing that “land is a critical element of the human right to housing”).

¹³⁹ The Right to Adequate Housing, *supra* note 79, at 8.

facilities essential for health, security, comfort and nutrition.”¹⁴⁰ The individual must, for example, have access to “safe drinking water, energy for cooking, heating, lighting, sanitation and washing facilities, means of storing food, refuse disposal, site drainage and emergency services.”¹⁴¹

Within each African country, some groups face significantly more obstacles, than the rest of the population, in exercising and realizing their right to adequate housing. These individuals and groups are often unable to realize their right to adequate housing as “a result of who they are, discrimination or stigma, or a combination of these factors.”¹⁴² U.N. Habitat has noted that in order for countries to effectively protect the right to adequate housing and help their citizens realize this right, they must give special consideration to the specific situations and individual circumstances of specific groups within their jurisdictions, particularly those on the economic and political margins. States must make sure that they use their housing laws and policies to make certain that these vulnerable groups are not discriminated against. Some of these vulnerable and historically marginalized groups include women, children, slum-dwellers, homeless persons, persons with disabilities, internally displaced persons (IDPs) and migrants (refugees), and indigenous peoples.¹⁴³

In the section that follows, this Article will examine women’s struggles to have access to adequate housing in Africa.

III. WOMEN AND THE RIGHT TO ADEQUATE HOUSING IN AFRICA

U.N. Habitat has argued that despite the fact that “data are lacking and figures are hard to estimate,” it is “widely thought that women represent an important proportion of those who are inadequately housed.”¹⁴⁴ In the market for housing, women face a lot of discrimination, either simply because they are women and/or because of other relevant factors such as (i) poverty; (ii) age; (iii) class; (iv) sexual orientation; or (v) ethnicity.¹⁴⁵ In many parts of Africa, especially in the rural areas, “women’s enjoyment of the right to adequate housing often depends on their access to and control over land and property.”¹⁴⁶

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 16.

¹⁴³ *Id.* at 16–24.

¹⁴⁴ *Id.* at 16–17.

¹⁴⁵ *Id.* at 17.

¹⁴⁶ The Right to Adequate Housing, *supra* note 79, at 17. Many subcultures in Africa have customs and traditions that prohibit women to own real property, including land. In fact, many women who reside in the rural areas of the African countries only have access to land through their husbands or fathers and cannot

For example, according to the land tenure system of the Igbo of southeastern Nigeria, an individual can acquire land through “inheritance, purchase, lease, pledge, exchange and gift.”¹⁴⁷ However, “[t]raditionally, women in Igboland were denied the right to own land.”¹⁴⁸ Professor Gloria Chuku, an expert on women in Igbo culture, argues that during the colonial period in Nigeria, Igbo women who acquired wealth through “trade and commerce started investing in landed property, . . . , however, the only way women could have access to land for cultivation was in their capacity as sisters, daughters or wives of a particular man.”¹⁴⁹

Research shows that in the housing market, women can be discriminated against based on statutory laws that have specifically legalized discrimination against women; gender-neutral laws and policies that do not take into account women’s unique circumstances (e.g., their vulnerability to sexual and gender-based violence); the existence of customary laws and practices that discriminate against women (e.g., the denial of the right of women and girls to inherit land, which also affects their ability to have access to credit since land is the most important form of collateral for loans); bias and/or corruption in the judiciary, as well as in the public sector in general; institutional constraints to remedies (e.g., forces of law and order, such as the police, that do not consider gender-based violence as a worthy issue to be investigated and prosecuted); customary practices that consider violence against women (e.g., spousal abuse) as a normal part of a group’s culture and traditions; and the failure of many women (e.g., for reasons of illiteracy) to be aware of their rights.¹⁵⁰

For example, studies of Côte d’Ivoire have revealed that “[w]omen and girls are often unaware of their rights and the meaning of the law” and that “[t]hey do not have access to the official judicial system and have no means of protection if they choose to seek help from public authorities.”¹⁵¹ In addition, frequent “out-

independently purchase and/or own land. See, e.g., Eric Yeboah, *Women’s Land Rights and Africa’s Development Conundrum—Which Way Forward?* INT’L INST. ENV’T & DEV. (Dec. 12, 2014), <https://www.iied.org/womens-land-rights-africas-development-conundrum-which-way-forward> (noting that patriarchal legal and cultural traditions in many African countries prevent women from owning land).

¹⁴⁷ Regina Acholonu & Clara Ochiabutor, *Igbo Land Tenure System and Gender Inequality—The Mass Media Responsibilities*, 3 INT’L J. MGT. STUD. & SOC. SC. RES. 97, 98 (2021).

¹⁴⁸ Gloria Chuku, *Women in the Economy of Igboland, 1900 to 1970: A Survey*, 23 AFR. ECON. HIST. 37, 39 (1995).

¹⁴⁹ *Id.*

¹⁵⁰ The Right to Adequate Housing, *supra* note 79, at 17 (discussing the example of girl-children who are forced into early marriage and hence, are deprived of the opportunity to attend school and develop the skills that they need to be able to gain awareness of their rights).

¹⁵¹ 28 TOO MANY, THE LAW AND FGM: AN OVERVIEW OF 28 AFRICAN COUNTRIES 62 (Danica et al. eds., 2018).

of-court arrangements between village leaders and local police commissioners” often deprive women and girls of proper due process under the law.¹⁵²

A study conducted by Miloon Kothari, the U.N. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and presented to the U.N. General Assembly in February 2005, includes a section on *the right to property, inheritance and access to land*.¹⁵³ The study determined that in addition to various cultural factors (e.g., title to land must be recorded only in a man’s name; daughters, wives, and widows cannot own or inherit land; in some cultures, women may own land through their husbands, however, if the husband dies or the woman commits adultery, the woman’s ownership rights are extinguished),¹⁵⁴ “women face numerous barriers to realizing their rights to property, inheritance and access to land.”¹⁵⁵

For example, noted Mr. Kothari, “in Kenya increasing poverty, largely associated with rural landlessness, is also leading to increasing disinheritance of widows.”¹⁵⁶ Systematic exclusion of women and girls from access to and ownership of land in the rural areas forces them to migrate to the urban areas where “they often join the ranks of the increasing number of women-headed households in slum areas.”¹⁵⁷ These landless migrants become part of a collection of extremely poor households that eke out a living on the urban periphery and are subjected on a daily basis to violence from criminal gangs and corrupt public officials.¹⁵⁸

A study by Marjolein Benschop, a legal officer in U.N. Habitat’s land and tenure section, determined that “[i]n Kenya, for example, where women head 70% of all squatter households, over 25% of women slum dwellers migrated from their rural homes because of land dispossession.”¹⁵⁹ She also determined

¹⁵² *Id.*

¹⁵³ Miloon Kothari (Special Rapporteur on Adequate Housing), *Women and Adequate Housing: Study by the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, U.N. Doc. E/CN.4/2005/43 (Feb. 25, 2005).

¹⁵⁴ Kothari, *supra* note 153, ¶ 55.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Slum Dweller Representatives Denounce Forced Evictions*, NEW HUMANITARIAN (Mar. 22, 2012), <https://www.thenewhumanitarian.org/news/2012/03/22/slum-dweller-representatives-denounce-forced-evictions> (noting the pervasiveness of corruption in forced evictions from slums in Kenya). *See also* Marjolein Benschop, *Women in Human Settlements Development—Challenges and Opportunities—Women’s Rights to Land and Property*, GLOBAL PROTECTION CLUSTER 1 (Apr. 22, 2014), https://www.globalprotectioncluster.org/old/_assets/files/tools_and_guidance/housing_land_property/By%20Themes/Womens%20HLP%20Rights/Women%27s_Right_to_Land_and_Property_%202004_EN.pdf.

¹⁵⁹ Benschop, *supra* note 158, 1.

that forced evictions and exclusion involving widows—the latter were evicted from their matrimonial homes by their in-laws upon the death of their husbands—are quite common.¹⁶⁰ Throughout many African countries, noted Ms. Benschop, “married women also face eviction from the marital home, when their husband takes a second wife (or third) wife and cannot afford to support both his wives.”¹⁶¹ Such women, once involuntarily ousted from their matrimonial home and rendered landless, are not likely to return home. It is only in rare cases that such a person can safely return to settle on her husband’s land or her father’s land.¹⁶²

In countries such as Nigeria and Uganda, women are considered inheritable property and hence, cannot own property, including land.¹⁶³ In her study of Uganda, Ms. Benschop made the following determination: “asked about co-ownership of land between him and his wife, a Ugandan farmer compared his wife with a tractor, that he had paid for. How could she (co-)own property if she herself was (seen as) his property?”¹⁶⁴ She also determined that women in Africa face violence from two main sources—in addition to the fact that women face forced evictions by their in-laws, as well as abuse within the marital home, they are also “affected disproportionately by forced evictions, resettlement schemes, slum clearance and development projects carried out by or through state actors.”¹⁶⁵

In addition, noted Ms. Benschop, “[a]rmed conflicts and resulting displacement, destruction of homes, family structure and communities often leave women more vulnerable” and that “[t]he lack of documentation combined with legal or customary discrimination often block women from accessing their land rights.”¹⁶⁶ Finally, she noted, “the deprivation of widows after the 1994 genocide [in Rwanda] led to fierce lobbying for the reform of Rwanda’s civil code, which now allows widows to inherit property.”¹⁶⁷

Today, many African women are trapped in horrendous and terrible living conditions. According to the U.N. Special Rapporteur on Adequate Housing: “In

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Caroline Okumdi Muoghalu & Chiedu Akporaro Abrifor, *Traditional Society in South-Eastern Nigeria: Implications for Women’s Health*, 43 BANGLADESH DEV. STUD. 127, 127 (2020) (noting that among some ethnic groups in Nigeria, including the Igbo, women are considered inheritable property).

¹⁶⁴ Benschop, *supra* note 158, 1.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

almost all countries, whether ‘developed’ or ‘developing’, legal security of tenure for women is almost entirely dependent on the man they are associated with. Women headed households and women in general are far less secure than men. Very few women own land. A separated or divorced woman with no land and a family to care for often ends up in an urban slum, where her security of tenure is at best questionable.”¹⁶⁸

Rwanda is not alone in enacting statutes that grant women equality with men before the law in decisions regarding land ownership. However, even when “[s]tate law makes provisions for equal property rights, practical implementation often favors men.”¹⁶⁹ For example, in the 1990s, Uganda amended its constitution and its land legislation to significantly improve the protection of women’s rights to land ownership and, in addition, “to provide greater legal protection against property rights abuses.”¹⁷⁰

However, despite these constitutional changes, Ugandan women still face an uphill battle as they seek to realize their right to adequate housing. For example, according to Article 26(1) of Uganda’s Succession Act, after a man dies, ownership of the matrimonial home, household chattel, and the surrounding land, “passes to intestate’s ‘legal heir,’ which is the nearest male lineal descendant to the deceased, usually the eldest son.”¹⁷¹ Specifically, the Succession Act grants a widow only a limited right to occupy the matrimonial home.¹⁷²

According to research conducted for the International Women’s Human Rights Clinic at Georgetown University Law Center, “[t]he limited right to occupancy provided to widows by the Succession Act does little to provide any substantive, enforceable legal rights,” especially given the fact that the “[t]he legal heir can, for instance, remove the widow at any time by showing that ‘suitable alternative accommodation is available,’ or by simply declaring that she is not adequately maintaining the premises.”¹⁷³

¹⁶⁸ *Id.*

¹⁶⁹ U.N. Comm’n. on Hum. Rts., *Women and Adequate Housing: Study by the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, Miloon Kothari, U.N. Doc. E/CN.4/2005/43 (Feb. 25, 2005), at ¶60.

¹⁷⁰ Kothari, *supra* note 153.

¹⁷¹ Valerie Bennett, Ginger Faulk, Anna Kovina & Tatjana Eres, *Inheritance Law in Uganda: The Plight of Widows and Children*, 7 GEO. J. GENDER & L. 451, 463 (2006). The Succession Act defines “legal heir” as “the living relative nearest in degree to an intestate . . . where there is equality [of relation], a male shall be preferred to a female.” SUCCESSION ACT (CHAPTER 162) (UGANDA) (FEB. 15, 1906) (AS AMENDED TO 2000), art. 2(n)(ii).

¹⁷² SUCCESSION ACT, *supra* note 168, § 2 art. 1(1).

¹⁷³ Bennett et al., *supra* note 171, at 463–464.

In addition, notes Bennett et al., “the right of occupancy grants the widow only limited control of the property” and that “[u]nlike a right to own land in ‘freehold,’ the widow’s occupancy may be subject to the land rights of the clan, who may appropriate the land as ‘customary tenured’ land.”¹⁷⁴ In these circumstances, the widow is not able to develop the land, for example, “through the construction of additional structures,”¹⁷⁵ nor can she “mortgage the property, lease it, or control the proceeds from the sale of cash crops.”¹⁷⁶ Finally, “[m]ale clan members or in-laws, therefore, control the major economic decisions of a widow and her household.”¹⁷⁷

Uganda, of course, is not alone in its discriminatory practices against women and girls. Throughout the continent, women produce over “80 percent of food, provide 70 percent of agricultural labor, but own only 7 percent of land.”¹⁷⁸ Even in Kenya, which has progressive gender laws,¹⁷⁹ the implementation of these laws has not been very successful. While Kenya’s land laws appear gender-neutral, they, however, “are unequal in effect.”¹⁸⁰ In addition, while Kenya law recognizes “men’s traditional allocations, it fails to recognize women’s traditional user rights to the land.”¹⁸¹

The Special Rapporteur’s report on homelessness notes that “the right to land is inextricably linked to the right to adequate housing” and that for women, “the realization of the right to adequate housing is generally contingent on their right to access, own, and manage land.”¹⁸² According to Article 16(1)(h) of CEDAW, “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (h) The same rights for both spouses in respect of the ownership, acquisition, management,

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Kothari, *supra* note 153, ¶ 60.

¹⁷⁹ Karen Koech, *How Have 10 years of the Progressive Constitution Impacted the Lives of Women in Kenya?*, YOUTH CAFÉ (Sept. 17, 2020), <https://www.theyouthcafe.com/perspectives/how-have-the-10-years-of-the-progressive-constitution-impacted-the-lives-of-women-in-kenya> (noting that Kenya’s 2010 Constitution acted as a “catalyst for the inclusion of women in public spaces, dismantling of patriarchal structures and gender mainstreaming processes in Kenya”).

¹⁸⁰ Kothari, *supra* note 153, ¶ 60.

¹⁸¹ *Id.*

¹⁸² *Id.* ¶ 61.

administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”¹⁸³

Commenting on Article 16(1)(h), the CEDAW Committee has noted that “human activity in public and private life has been viewed differently and regulated accordingly” and that “[i]n all societies women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior.”¹⁸⁴ The CEDAW Committee notes that since these activities are “invaluable for the survival of society, there can be no jurisdiction for applying different and discriminatory laws or customs to them.”¹⁸⁵

With respect to Article 16(1)(h) of CEDAW, the CEDAW Committee notes that “[t]he rights provided in this article overlap with and complement those in article 15(2) in which an obligation is placed on States to give women equal rights to enter into and conclude contracts and to administer property.”¹⁸⁶ Article 15(1) of the CEDAW, notes the CEDAW Committee, “guarantees women equality with men before the law” and that “[t]he right to own, manage, enjoy and dispose of property is central to a woman’s right to enjoy financial independence, and in many African countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.”¹⁸⁷

In many African countries, “a significant proportion of the women are single or divorced and many have the sole responsibility to support a family.”¹⁸⁸ Thus, “[a]ny discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honorably discharge this responsibility is clearly unrealistic.”¹⁸⁹ As a consequence, argues the CEDAW Committee, “any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman’s practical ability to divorce her

¹⁸³ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), G.A. Res. 34/180 (Sept. 03, 1981), art. 16(1)(h).

¹⁸⁴ Comm. on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, U.N. Doc. A/49/38, at ¶ 11 (1994).

¹⁸⁵ *Id.* ¶ 12.

¹⁸⁶ *Id.* ¶ 25.

¹⁸⁷ *Id.* ¶ 26.

¹⁸⁸ *Id.* ¶ 28.

¹⁸⁹ *Id.*

husband, to support herself or her family and to live in dignity as an independent person.”¹⁹⁰

The African woman’s right to adequate housing must be guaranteed regardless of their marital status—whether they are married, divorced, widowed, or never-married. Where customs and traditions discriminate against women, those should either be abolished or reformed so that they conform with the country’s bill of rights and the provisions of international human rights instruments.¹⁹¹

Violence, including housing-related violence, against women and girls in Africa has a significant impact on their ability to realize their right to adequate housing. U.N. Habitat, for example, has noted that domestic violence is a major obstacle to the ability of women to realize their right to adequate housing. In the section that follows, this Article will examine the relationship between various forms of violence against women and the right to adequate housing in Africa.

IV. VIOLENCE AGAINST AFRICAN WOMEN AND THE RIGHT TO ADEQUATE HOUSING

A. *Introduction*

U.N. Women, the U.N. entity that is dedicated to the empowerment of women, defines violence against women and girls as “any act of gender-based violence that results in, or is likely to result in physical, sexual or mental harm or suffering to women and girls, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”¹⁹² U.N. Women notes further that “[v]iolence against women and girls encompasses, but is not limited to, physical, sexual and psychological violence occurring in the family or within the general community, and perpetuated or condoned by the State.”¹⁹³

Finally, notes U.N. Women, “[v]iolence against women and girls is one of the world’s most prevalent human rights violations, taking place every day,

¹⁹⁰ *Id.*

¹⁹¹ John Mukum Mbaku, *International Human Rights Law and the Tyranny of Harmful Customary and Traditional Practices*, 52 CAL. W. INT’L L. J. 1, 31 (2021) (noting that as part of the effort to protect the rights of women in Africa, “each country [must] understand that its laws, whether based on statute, custom, or the constitution, must conform with and reflect provisions of international human rights instruments”).

¹⁹² *Frequently Asked Questions: Types of Violence Against Women and Girls*, U.N. WOMEN, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence>.

¹⁹³ *Id.*

many times over, in every corner of the globe” and “has serious short- and long-term physical, economic and psychological consequences on women and girls, preventing their full and equal participation in society.”¹⁹⁴ Most importantly, studies conducted in Africa show that gender-based violence destroys the woman’s self-esteem, seriously weakens her will to live, and deprives her of the ability to defend her rights, including the right to adequate housing. In fact, violence within the home (e.g., spousal abuse) can render a woman’s living situation so toxic as to make it impossible for her to realize the right to adequate housing, even if she has a roof over her head.¹⁹⁵

In addition, when girl-children are forced to marry, they are deprived of the opportunity to attend school and develop the skills that can help them evolve into economically productive, as well as, politically aware, adults. Women who are more educated and economically more self-sufficient stand a much better chance of defending their rights against infringement by opportunistic in-laws and corrupt public officials. Such educated and financially viable women are more likely to be aware of their rights under the law and they are also more likely to be able to seek legal assistance to defend those rights.¹⁹⁶ Research also shows that educated women “are more likely to seek proper medical care both for themselves—especially maternal care—and their children.”¹⁹⁷

Forced evictions of women is one of the most important housing-related form of violence against women in Africa. It leads directly to the failure of women to realize their right to adequate housing. Human rights activists have argued that forced evictions, as well as the denial of the right of adequate housing, are not just a human rights violations, but one of such enormous proportions that it should be considered or equated to a “humanitarian emergency.”¹⁹⁸ Throughout many African cities, “hundreds of thousands of people have no other choice but to live in ramshackle housing, cramped conditions or inadequate structures. In the worst cases, people have nowhere to

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., Kaori Izumi, *Gender-Based Violence and Property Grabbing in Africa: A Denial of Women’s Liberty and Security*, 15 GENDER & DEV. 11 (2007) (examining how violence against women strips them of their self-esteem and their ability to defend their rights).

¹⁹⁶ See M. Fapohunda Tinuke, *Empowering Women Through Higher Education in Nigeria*, 9 EUR. J. HUM. & SOC. SCIENCES 389 (2011) (showing that education is an important tool for women empowerment and the lack of education significantly constrains the ability of women to participate in the political system and the formal labor force).

¹⁹⁷ See Abigail Dunn, *Five Important Facts to Know About Girls’ Education in Nigeria*, BORGAN PROJECT (May. 24, 2018), <https://borgenproject.org/tag/womens-empowerment-in-nigeria/>.

¹⁹⁸ Kate Allen, *Forced Evictions are a Violation of Human Rights*, THE GUARDIAN (Apr. 15, 2011), <https://www.theguardian.com/global-development/poverty-matters/2011/apr/15/forced-evictions-violation-human-rights> (examining the impact of forced evictions on women, especially in Africa).

live at all.”¹⁹⁹ The two most important sources of this intolerable situation in which many African women find themselves are (1) slums; and (2) forced evictions.²⁰⁰ The two sources work together to violate the rights of women and children—women and children who live in urban slums are exposed to significant levels of violence from criminal gangs, intolerable living conditions, and the absence of basic services, such as clean water, schools, and hospitals.²⁰¹

While women who are forced to live in slums are already exposed to significant levels of violence (e.g., from criminal gangs), forcefully evicting them from these dwellings constitutes a form of violence against them. These violent evictions are usually undertaken by state- and non-state actors who seek to make the land available for so-called urban renewal and/or development projects.²⁰²

B. Urban Slums as a Form of Violence Against Women

Forcing women and their children to live in the shanty towns and slums that dot the margins of many large cities throughout the continent is a form of violence against them. For example, in these slums, residents usually do not have access to the most basic services, such as sanitation, clean water, waste collection, storm drainage, street lighting, paved sidewalks, roads for emergency access, and healthcare. In addition, their children are unable to access primary education and the women and their children are regularly exposed to significant levels of abuse and violence at the hands of both state- and non-state actors, as well as criminal gangs. Under these circumstances, slum dwellers find it very difficult to realize their right to adequate housing as defined by international law.²⁰³

Housing in urban slums is usually built on land that the occupants do not have legal claim to. In addition, there is usually no formal urban planning nor do the builders of this informal habitats adhere to any formal zoning regulations. According to the World Economic Forum, about 25% of “the world’s urban

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See Yohannes Dibaba Wado et al., *Exposure to Violence, Adverse Life Events and the Mental Health of Adolescent Girls in Nairobi Slums*, 22 *BMC WOMEN’S HEALTH* 156, 156 (2022) (examining the mental effects of girls who are exposed to violence in Kenyan slums).

²⁰² Rosamond Hutt, *These are the World’s Five Biggest Slums*, *Global Agenda: Cities and Urbanization*, *WORLD ECON. F.* (Oct. 19, 2016), <https://www.weforum.org/agenda/2016/10/these-are-the-worlds-five-biggest-slums/> (noting that the government is attempting to build a road through Nairobi’s Kibera slum, against the residents’ wishes).

²⁰³ *Slums and Slum Upgrading*, *CITIES ALLIANCE*, <https://www.citiesalliance.org/themes/slums-and-slum-upgrading> (last visited on Mar. 13, 2022).

population lives in slums” and “[t]he number of slum dwellers in developing countries increased from 689 million in 1990 to 880 million in 2014.”²⁰⁴ The fact that most inhabitants of these urban slums lack legal rights to the land on which they live “only makes the daily struggle worse, threatening people’s homes and efforts to invest in essential services.”²⁰⁵

A study of Khayelitsha, a slum settlement on the margins of Cape Town (South Africa), with a population of 400,000, determined that many inhabitants are forced to “share inadequate temporary toilets like porta potties or chemical toilets and have to walk a long way without light. Others have no access at all and have to use fields or bushes. Children cannot go alone but finding a parent or neighbor is not always possible for them.”²⁰⁶ Under these conditions, residents, especially women and children, are vulnerable to marauding criminal gangs.

Kenya’s Kibera, which is located at a distance of 5 kilometers from Nairobi’s city center, is considered Africa’s biggest slum and is home to “more than 50,000 children, most of whom go to the informal schools set up by residents and churches.”²⁰⁷ For example, a study of violence against women “found that 39% of women in the general population had *ever* experienced gender-based violence from a partner.”²⁰⁸ However, “[t]he Kibera survey revealed that 84.5% of respondents had experienced gender-based violence in their lifetime.”²⁰⁹ The study also determined that “[w]omen in the general population indicated a lower prevalence of gender-based violence in each of the 11 categories stipulated in the survey compared with women in Kibera.”²¹⁰ In general, the study concluded, “[f]or each category of abuse, women in Kibera reported a prevalence rate *at least twice* as high as that reported among women in the general population.”²¹¹ Under these conditions, it is virtually impossible for a woman living in Kibera to realize her right to adequate housing.

Slums, regardless of where they are located, are notorious for having extremely poor or no effective access to basic health care, as well as, poor sanitation and hygiene. In these environments, the privacy that women and girls

²⁰⁴ Hutt, *supra* note 202.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Elizabeth Stewart, *Gender-Based Violence in a Kenyan Slum: Creating Local, Woman-Centered Interventions*, 38 J. SOC. RES. 427, 433 (2012).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

need in order to safely access water and toilets for personal hygiene usually does not exist. For example, a study conducted in the Democratic Republic of Congo (DRC) found a link between access to sanitation and sexual violence against girls and women. The study determined that “due to [a] lack of access to private latrines, women faced no choice but to walk outside of their village, often at night, to defecate—increasing their exposure to sexual violence.”²¹²

A study of Oginigba, a slum in Obio-Akpor Local Government Area (LGA) in Rivers State, as well as Urua Ekpa, a slum in Uyo LGA in Akwa Ibom State, both in Nigeria, found that women and girls faced similar problems as those in the DRC.²¹³ Specifically, the study of slums in Nigeria determined that “[w]omen . . . face the greatest problem in relation to privacy and safety. The prospect of waiting in queues for use of a shared and often poorly maintained latrine for a woman would translate to a waste of valuable business time and justifies widespread open defecation behaviors.”²¹⁴ Unfortunately, noted the study, “open defecation is more likely to expose women to abuses, sexual harassments and insect bites especially at night hours.”²¹⁵

Sabo is a high density migrant slum settlement in Ibadan’s city center.²¹⁶ This slum, like others in Nigeria, has extremely “poor environmental sanitation, especially poor housing and waste disposal.”²¹⁷ A study of women in this slum settlement found that a significant percentage of them experienced physical, psychological and sexual violence and that for a variety of reasons, including extreme poverty, and cultural and religious imperatives, these women were unable to move away from the slum settlement and escape perpetual abuse and violence.²¹⁸

²¹² Archana Patkar & Louisa Gosling, *Equity and Inclusion in Sanitation and Hygiene in Africa*, in *SANITATION AND HYGIENE IN AFRICA: WHERE DO WE STAND? ANALYSIS FROM THE AFRICASAN CONFERENCE, KIGALI, RWANDA 35, 38* (Piers Cross & Yolande Coombes eds., 2014) (ebook).

²¹³ Emmanuel M. Akpabio et al., *Slums, Women and Sanitary Living in South-South Nigeria*, 36 *J. HOUSING & BUILT ENV'T* 1229, 1229 (2021).

²¹⁴ *Id.* at 1243.

²¹⁵ *Id.*

²¹⁶ Ibadan is the capital city of Oyo State and Nigeria’s third largest city after Lagos and Kano. *See, e.g.*, *NIGERIAN CITIES* (Toyin Falola & Steven J. Salm eds., 2004) (examining the historical evolution of cities in Nigeria).

²¹⁷ Olufunmilayo I. Fawole, O. Asekun-Olarinmoye & Kayode O. Osungbade, *Are Very Poor Women More Vulnerable to Violence Against Women? Comparison of Experiences of Female Beggars with Homemakers in an Urban Slum Settlement in Ibadan, Nigeria*, 24 *J. HEALTH CARE POOR & UNDERSERVED* 1460, 1462 (2013).

²¹⁸ *Id.*

Professors Oduro, Swartz, and Arnot have studied gender-based violence in slums in Ghana, Kenya, and South Africa.²¹⁹ They determined that “[i]n all three contexts, young women confront different types of violence—for example, domestic, sexual and street gang violence.”²²⁰ In addition, they determined that “[e]xperiences of uncontrolled physical and sexual abuse as children or as school pupils can drive young women and men to leave home and school to live on the street, making them vulnerable to further violence.”²²¹ The young women studied lived in “degraded and impoverished urban” settlements in Ghana, Kenya, and South Africa and were exposed to significant levels of various types of violence, including sexual assault and physical beatings from parents, boyfriends, and random strangers.²²²

Women who live in Africa’s slums face various forms of violence—from their domestic partners and relatives, or random strangers (e.g., members of criminal gangs)—virtually on a daily basis. In addition, they are exposed to violence through their struggles to “negotiate access to water, sanitation and hygiene.”²²³ Forced evictions of these women, even from what are already highly compromised habitats, are a form of violence against them. In the next section, this Article will briefly look at forced evictions as a form of violence against women.

C. Forced Evictions as a Form of Violence Against Women in Africa

The forced evictions of women from their homes in many African countries are a form of violence against women and they come from several sources, the two most important of which are evictions by (i) state- and non-state actors to make way for public and private development projects; and (ii) opportunistic in-laws who are seeking to deprive widows of real and other property left by their deceased husbands.

Since 2013, Lagos State (Nigeria) has engaged in several forced and often deadly evictions of people, including women and children, from informal

²¹⁹ Georgina Yaa Oduro, Sharlene Swartz & Madeleine Arnot, *Gender-based Violence: Young Women’s Experiences in the Slums and Streets of Three Sub-Saharan Africa*, 10 THEORY & RES. EDUC. 275, 276 (2012).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 276–283.

²²³ Akpabio et al., *supra* note 213, at 1229. For example, women and girls who must travel long distances, often at night, to perform essential hygiene activities, because of lack of access to water and toilets in their homes become susceptible to molestation by criminal gangs and other opportunistic males. *See, e.g.*, Patkar & Gosling, *supra* note 209, at 38–39 (examining the exposure of Congolese women slum dwellers, who must travel at night to defecate, to violence).

settlements on the margins of the city of Lagos. A study by Amnesty International (“AI”) has determined that since 2013, Lagos State government has “forcibly evicted at least 50,000 people,” including over “30,000 people [who were] forcibly evicted from Ilubirin and Otodo-Gbame waterfront communities.”²²⁴ According to the government, the evictions of people from these slum settlements were designed to “address security concerns.”²²⁵

The Lagos State government, however, failed to acknowledge the fact that these informal settlements were located on land that had increasingly become targeted for “high-value property development projects by state- and non-state actors.”²²⁶ Osai Ojigho, the Amnesty International Country Director for Nigeria, noted that “[w]hile the state may need to address security and environmental concerns, destroying people’s homes and forcibly evicting thousands who live along the Lagos waterfronts is a completely disproportionate response and is not the answer.”²²⁷

The forced evictions from the Ilubirin and Otodo-Gbame slum settlements, which took place between March 19, 2016, and April 22, 2017, “were carried out by the authorities in disregard of their obligations under international and domestic laws, and, in some cases, in direct violation of court orders.”²²⁸ In its investigations, AI determined that “[t]he forced evictions and related attacks resulted in at least 11 deaths, some or all of which may amount to unlawful killings.”²²⁹ In addition, AI documents “17 reports of people who disappeared during the forced evictions, massive destruction of property, homelessness, loss of livelihoods, separation of families, and children deprived of access to education.”²³⁰

In interviews with evictees, AI learned that the “police, armed men and Lagos State Taskforce officers” usually started arriving around one a.m. and about five a.m., they started “shooting and demolishing structures.”²³¹ There was no prior consultation and no warning. Video footage of the April 9, 2017 forced eviction of Otodo-Gbame informal settlement, according to AI, “showed

²²⁴ Amnesty Int’l, *The Human Cost of Forced Evictions of the Urban Poor in Lagos, Nigeria*, AI Index AFR 44/7389/2017 (Nov. 14, 2017).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Nigeria: Deadly Mass Forced Evictions Make Life Misery for Waterfront Communities*, AMNESTY INT’L (Nov. 14, 2017), <https://www.amnesty.org/en/latest/news/2017/11/nigeria-deadly-mass-forced-evictions-make-life-misery-for-waterfront-communities/>.

²²⁸ Amnesty Int’l, *supra* note 224, at 7.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 27.

women, men, children and babies stranded on the lagoon and watching as their homes burnt.”²³² During the March 26, 2016 evictions in Otodo-Gbame, most of the residents were beaten by the police, with some of them being inflicted with significant head injuries. AI determined that “[s]ix of those assaulted were women aged 50 years and above,” including one woman who sustained a head injury.²³³

Of course, Nigeria is not the only African country in which women who live in informal settlements are subjected to forced evictions from their homes. In fact, such evictions are quite common throughout the continent. For example, the Norwegian Refugee Council (NRC) has determined that “[o]ver 70,000 people, many of whom are internally displaced, were forcibly evicted from their homes in urban areas across East Africa even during the most prevalent months of the Covid-19 pandemic.”²³⁴ In 2018, U.N. human rights experts jointly condemned “the massive eviction [by Kenyan government authorities] of residents of the Kibera informal settlement in southwest Nairobi” and urged “the Kenyan authorities to halt all mass evictions until adequate legal and procedural safeguards are in place.”²³⁵

These forced evictions, which continue to take place in Ethiopia, Kenya, and Somalia, represent an existential threat to the welfare of vulnerable women, who have been forced by circumstances beyond their control, to live in slums that are not suitable for human habitation. These forced evictions violate a lot of rights guaranteed by international human rights instruments and the constitutions of many African countries. For example, in addition to directly violating the right to adequate housing, forced evictions also violate the rights to “education, work, protection of the family unit, and freedom from cruel, inhuman or degrading treatment or punishment, life, and property.”²³⁶ These are rights that are guaranteed by “the ICESCR, ICCPR, CRC, CEDAW, and the African Charter.”²³⁷

²³² *Id.*

²³³ *Id.*

²³⁴ *Vulnerable People Across East Africa Forcibly Evicted During Pandemic*, NORWEGIAN REFUGEE COUNCIL (July 1, 2020), <https://www.nrc.no/news/2020/july/vulnerable-people-across-east-africa-forcibly-evicted-during-pandemic/>.

²³⁵ Press Release, Office of the U.N. High Commissioner for Human Rights, Kenya: Stop Forced Evictions from Nairobi’s Kibera Settlement, Say U.N. Rights Experts (July 26, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23410&LangID=E>.

²³⁶ Amnesty Int’l, *supra* note 221, at 88.

²³⁷ *Id.*

The customary, traditional, and religious practices of various ethnocultural groups in Africa are also a source of violence against women. This traditionally-induced violence also contributes to the failure of many African women to realize their right to adequate housing. For example, when Taraba State (Nigeria) lawmaker, Abdulmumini Dame, died in 2017, his relatives forcefully evicted his widow, Rukkayya, from the home that she had lived in with her late husband in Jalingo, the State capital.²³⁸

At the time Anayo Mbah's husband, Jonas, died from COVID-19 complications, she was in a hospital in Umuida (Enugu State), giving birth to their sixth child.²³⁹ Jonas died before he could meet his new daughter, Chinaza, and because no one came to pay her bill, Anayo and her baby were forced to leave the hospital and return home. However, just "weeks into the mourning period that traditionally lasts six months, her late husband's relatives stopped providing food" and told her that, the earlier she left the house, the better for her and her children.²⁴⁰ Shortly after that, "[s]he left on foot for her mother's home with only a plastic bag of belongings for Chinaza and her other children."²⁴¹ Anayo, who now supports her children by working four jobs, is afraid that taking her in-laws to court to recover the properties she and her husband had accumulated during their marriage would only worsen the situation.

In Goma, DRC, after Venessa Emedy Kamana lost her husband, Dr. Godefroid Kamana, to COVID-19, her husband's relatives forced her and her young son out of the home she had shared with her husband.²⁴² She said that her husband's relatives had stripped her "of everything, all my possessions," including a bank account set up for the young boy by her husband.²⁴³

When Mutare (Zimbabwe) resident, Sheila Chimoyo's husband died in 2011, her in-laws immediately began to seek ways to evict her from the house that she lived with her two children in Harare, the capital of Zimbabwe.²⁴⁴ They resorted to an old tactic that is widely used by many communities throughout the continent to dispossess women of property either jointly acquired with their

²³⁸ Tayo Olu, *In-laws 'Throw Out' Childless Widow of Late Taraba Lawmaker*, WHISTLER CONSCIENCE & SOC'Y (Nov. 29, 2017), <https://thewhistler.ng/laws-throw-childless-widow-late-taraba-lawmaker/>.

²³⁹ *For Widows in Africa, COVID-19 Stole Husbands, Homes, Future*, PBS (May 10, 2022), <https://www.pbs.org/newshour/world/for-widows-in-africa-covid-19-stole-husbands-homes-future>.

²⁴⁰ PBS, *supra* note 239.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Andrew Mambondiyani, *Zimbabwe's Widows Left in the Cold as In-laws Seize Property*, REUTERS (Dec. 12, 2017), <https://www.reuters.com/article/us-zimbabwe-landrights-widows/zimbabwes-widows-left-in-the-cold-as-in-laws-seize-property-idUSKBN1E61Y5>.

husbands during their marriage or left to them by their deceased husbands. Ms. Chimoyo's in-laws accused her of using witchcraft to kill her husband and subsequently seized her house.²⁴⁵

Research shows that Ms. Chimoyo's case is not an outlier. A report by Human Rights Watch indicates that "[m]any widows in Zimbabwe lose property to in-laws, even on the day their husbands die" and that these women, who are usually forcefully evicted under customs and traditions that condone these practices, "face insurmountable obstacles defending their property or taking legal steps to reclaim it."²⁴⁶

Violence against women, whether it comes through forcing them to live in urban slums, or forced evictions, prevents them from fully realizing their right to adequate housing. The U.N. has noted that "adequate housing" must, at the minimum, include the availability of services.²⁴⁷ In addition to the fact that housing must be habitable—that is, it must guarantee "physical safety or provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards," its "occupants [must have] safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal."²⁴⁸

Africa's various slums usually fail to meet the minimum requirements for adequate housing and, hence, do not provide their inhabitants, including women, the opportunity to realize the right to adequate housing. Forced evictions, whether at the hands of state- and non-state actors, or at those of the opportunistic in-laws of the continent's many widows, constitute a violation of the rights of these women to adequate housing. As has been noted by AI, forced evictions are a violation of the right to adequate housing and other rights guaranteed by many international and regional human rights instruments, including the Banjul Charter.²⁴⁹

Courts are very important in helping women realize their right to adequate housing, especially in countries which have not yet domesticated the major human rights instruments and created rights that are justiciable in domestic courts. They can use their power to interpret the law to bring laws, such as customary laws, which violate the human rights of women, in line with the

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *The Human Right to Adequate Housing*, *supra* note 9.

²⁴⁸ *Id.*

²⁴⁹ Amnesty Int'l, *supra* note 224, at 88.

provisions of international human rights instruments. Of course, even in countries that have already domesticated international human rights instruments and created rights that are justiciable in domestic courts, the latter are still important in ensuring that these rights, when invoked locally, are enforced. In addition, courts can also serve a supervisory role to make sure that the political branches implement all court orders and do so in a way that reflects values and norms that are enforced by the socio-economic rights guaranteed by the constitution and international human rights instruments. In the section that follows, this Article will examine case law from different jurisdictions that deal with the right to adequate housing.

V. COMPARATIVE CASE LAW AND THE RIGHT TO ADEQUATE HOUSING IN AFRICA

A. *Introduction*

Most of the victims of the violations of the right to adequate housing are often individuals and groups who are marginalized politically and economically and these include historically vulnerable persons, such as girls and women.²⁵⁰ In order for there to be effective judicial remedies for interference with or the denial of the right to adequate housing, a country must provide itself with an independent judiciary and one that has the capacity and the wherewithal to function effectively as a check on the exercise of government power, as well as fairly adjudicate cases that come before it. As noted by U.N. Habitat, “[j]udges and lawyers must be able to conduct their work impartially, on the basis of facts and in accordance with the law, without any improper influence, threats or interference,” whether from state or non-state actors.²⁵¹ Members of the bar or law societies, judges, and other legal professionals, including law professors, must have the necessary skills and competencies to perform their roles effectively so as to enhance the country’s ability to maintain adherence to the rule of law.

Judges must be able to use their power to interpret the law, especially the constitution, to modify or annul customary law that does not conform to the country’s bill of rights or provisions of international human rights instruments. This balancing role is critical, especially in countries, such as those in Africa, in which customary and traditional practices (e.g., denial of a woman’s right to own land or to keep real property left behind by her deceased husband) continue

²⁵⁰ The Right to Adequate Housing, *supra* note 79, at 40.

²⁵¹ *Id.*

to impose significant harm on women and girls and effectively interfere with their ability to realize their right to adequate housing.

Once an African country has domesticated international human rights instruments (e.g., the ICESCR) and created rights that are justiciable in domestic courts, it must make certain that “its courts have the capacity to enforce the laws and that there is no political interference in the ability of the courts to do so.”²⁵² A country’s judiciary must be granted the necessary independence so that it can prosecute persons who violate human rights, including the right to adequate housing. In *De Lange v. Smuts*, the Constitutional Court of South Africa held that “judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.”²⁵³

Judicial independence is an extremely complex and multifaceted concept. At the minimum, courts must be “completely independent of any other entity”²⁵⁴ and that includes “other branches of government, social groups, and individuals.”²⁵⁴ In addition, “a court must not only be independent, the public must also see it as independent.”²⁵⁵ The judiciary’s role in protecting a country’s constitution is tied to “the principle of separation of powers,” which means that “the branches of government should be independent of one another” and that “[e]ach of the branches exercises separate and distinct functions that the other branches cannot interfere with.”²⁵⁶ This, however, does not mean that each of the three branches of government “is completely separate from the other.”²⁵⁷

However, the “[t]hree branches of government have a particular relationship with one another based on their functions.”²⁵⁸ In most countries with federal systems of government, “the relationship between the judiciary and the other branches [of government] is a depoliticized one,” which means that “the legislature and executive cannot put political pressure on the judiciary, and the judiciary should not speak publicly on issues that could come before the courts.”²⁵⁹ Judicial independence is an essential element of the rule of law and

²⁵² John Mukum Mbaku, *International Law, African Customary Law, and the Protection of the Rights of Children*, 28 MICH. ST. INT’L L. REV. 535, 616 (2020).

²⁵³ *De Lange v. Smuts* 1998 (3) SA 785 (CC) para. 59 (S. Afr.).

²⁵⁴ *Judicial Independence*, CTR. CONST. STUD. (July 4, 2019), <https://www.constitutionalstudies.ca/2019/07/judicial-independence/>.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

this means that “governments can only take actions that are permitted by law and the Constitution.”²⁶⁰ The judiciary is the branch of government that is granted the power by the constitution to examine government actions and laws and make sure that they are “consistent with the Constitution.”²⁶¹

In general, judicial independence has two dimensions—individual and institutional.²⁶² While individual independence means that “individual judges decide cases without interference,”²⁶³ institutional independence implies that “courts are independent from other branches of government.”²⁶⁴ Judicial independence consists of three core elements or characteristics and these are security of tenure, financial security, and administrative independence—unless all three of them are present, a judiciary cannot be said to be enjoying independence.²⁶⁵

If judges are granted security of tenure, that means that they cannot “be removed on a whim.”²⁶⁶ Judges are appointed either for life (as in the United States’ Article III judges who have lifetime appointments) or until retirement (as is the case with federal judges in Canada who are eligible to serve on the bench until age seventy-five), unless it is proven that they can no longer perform their duties, or for a fixed term, as is the case with judges of the Constitutional Court of South Africa, who hold office “for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.”²⁶⁷

With respect to financial security, the salaries of judges must be set by law, making certain that the executive cannot change them or interfere with the compensation granted to judicial officers.²⁶⁸ In *Valente v. The Queen*, the Supreme Court of Canada held that financial security implies “security of salary

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁵ *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 493 (Can.).

²⁶⁶ *Judicial Independence*, *supra* note 254.

²⁶⁷ See CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA Dec. 18, 1996, at ch. 8, § 176(1); see also *Reference re Remuneration of Judges of the Provincial Court of P.E.I.*; *Reference re Indep. & Impartiality of Judges of the Provincial Court of P.E.I.*, [1977] 3 S.C.R.SCR 3, 34 (Can.); U.S. CONST. art. III, Article III, § 1 states as follows: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

²⁶⁸ *Valente v. The Queen*, [1985] 2 S.C.R. 673, 705 (Can.).

or other remuneration, and, where appropriate, security of pension” and that “[t]he essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.”²⁶⁹

Finally, is administrative or institutional independence of the court with respect to “matters of administration bearing directly on the exercise of the judicial function.”²⁷⁰ According to the Supreme Court of Canada in *Valente v. The Queen*, “[j]udicial control over such matters as assignment of judges, sittings of the court and court lists has been considered the essential or minimum requirement for institutional independence.”²⁷¹ Where legislative assemblies are granted the power to change the salaries of court judges, as is the case with provincial court judges in Canada, they must not do so unilaterally. For, if they do so, they would be interfering with the financial security of provincial court judges. Instead, the provincial assembly must “set up an effective and independent commission to determine whether . . . the salaries of provincial court judges” should be frozen or changed.²⁷²

In the effort to ensure that they meet their obligations under international human rights law and ensure that the right to adequate housing is realized by all individuals and groups within their jurisdictions, States must make sure that they have judiciaries that are independent and have the capacity to enforce the law. Even where countries have not yet internationalized their national constitutions, domestic courts can still “cite to the provisions of international human rights instruments in adjudicating human rights cases,” such as those involving a violation of the right to adequate housing.²⁷³ In carrying out this function, “courts can declare unconstitutional legislative, customary, and traditional laws that violate the provisions of international human rights instruments.”²⁷⁴ For example, in making its decision in *Naidoo v. Minister of Police*,²⁷⁵ the South African Supreme Court of Appeal cited to the Protocol to the African Charter on Human and 'People's Rights on the Rights of Women in Africa (Maputo

²⁶⁹ *Id.* at 676.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Judicial Independence*, *supra* note 254.

²⁷³ John Mukum Mbaku, *International Human Rights Law and the Tyranny of Harmful Customary and Traditional Practices on Women in Africa*, 52 CAL. W. INT'L L.J. 1, 73 (2021) [hereinafter *Tyranny of Harmful Customary and Traditional Practices on Women in Africa*].

²⁷⁴ *Id.*

²⁷⁵ *Naidoo v. Minister of Police* 2015 (4) All SA 609 (SCA) (S. Afr.).

Protocol)²⁷⁶ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁷⁷

Writing for the Supreme Court of Appeal in *Naidoo*, Judge Petse noted that both South Africa's highest court—the Constitutional Court—and the Supreme Court of Appeal “have reaffirmed the principle that the State is obliged under international law to protect women against violent crime and gender discrimination inherent in violence against women.”²⁷⁸ *Naidoo* illustrates “how domestic courts can use international law to interpret national constitutional law and ensure that domestic standards for the protection of women's and girl's rights conform to those set by international human rights instruments.”²⁷⁹

In the section that follows, this Article will examine *The Government of the Republic of South Africa & Others v. Irene Grootboom & Others (Grootboom)*,²⁸⁰ a case of the Constitutional Court of South Africa, to see how the Court has dealt with various aspects of the right to adequate housing, which include discrimination in the housing market, inadequacy of housing services, and the protection of tenants against forceful eviction.

B. The Government of the Republic of South Africa & Others v. Irene Grootboom & Others (CC, S. Africa)

Although *Grootboom* was essentially a case about the forced eviction of 510 children and 390 adults by local authorities, many of whom were girls and women, from their informal homes on private land, it came to symbolize the extent to which the post-apartheid government in South Africa had failed to implement policies that were capable of curing one of the most destructive effects of apartheid's influx control policies—the forced displacement of hundreds of thousands of South Africans into intolerable informal settlements.²⁸¹ Mrs. Grootboom and several others, who included children, had

²⁷⁶ Protocol to the African Charter on Human and 'Peoples' Rights on the Rights of Women in Africa, July 11, 2003, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (last visited on Apr. 1, 2022).

²⁷⁷ G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

²⁷⁸ *Naidoo*, (4) All SA 609, *supra* note 275, para. 27.

²⁷⁹ *Tyranny of Harmful Customary and Traditional Practices on Women in Africa*, *supra* note 273, at 76.

²⁸⁰ *Government of the Republic of South Africa & Others v. Irene Grootboom & Others* 2000 (1) SA 46 (CC) (S. Afr).

²⁸¹ *See, e.g., THE APARTHEID CITY AND BEYOND: URBANIZATION AND SOCIAL CHANGE IN SOUTH AFRICA* (1992) (presenting a series of essays that examines influx control and urbanization in apartheid South Africa and how that policy became a threat to apartheid's survival).

been “rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing.”²⁸²

After they were evicted, the respondents (Mrs. Grootboom and Others) applied to the Cape of Good Hope High Court (“High Court”) for “an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.”²⁸³ The High Court ordered the appellants, “who represented all spheres of government responsible for housing, . . . to provide the respondents who were children and their parents with shelter.”²⁸⁴ The High Court noted that “tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum.”²⁸⁵ The appellants then challenged the “correctness of the order.”²⁸⁶

While a hearing was being held on the challenge, the appellants offered to immediately ameliorate the housing situation and the respondents accepted the offer. However, four months after that offer was made and accepted by the respondents, the latter made an urgent application to the Constitutional Court (“CC”) “in which they revealed that the appellants had failed to comply with the terms of their offer.”²⁸⁷

Writing for the CC, Justice Yacoob argued that South Africa’s present “acute housing shortage lies in apartheid” whose central feature was a “system of influx control that sought to limit African occupation of urban areas’.”²⁸⁸ In the Western Cape, where the respondents lived, noted Justice Yacoob, “[t]he legacy of influx control . . . is the acute housing shortage that exists there now” and that “[h]undreds of thousands of people in need of housing occupied rudimentary informal settlements providing for minimal shelter, but little else.”²⁸⁹

Although Justice Yacoob accepted the validity of the eviction, he noted, however, that Mrs. Grootboom and the other respondents had been “forcefully evicted at the municipality’s expense” and that “[t]his was done prematurely and inhumanely: reminiscent of apartheid-style evictions,” and that “[t]he respondents’ homes were bulldozed and burnt and their possessions

²⁸² *Grootboom & Others*, (1) SA 46, *supra* note 280, para. 4.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* para. 5.

²⁸⁸ *Id.* para. 6.

²⁸⁹ *Id.*

destroyed.”²⁹⁰ In addition, noted Justice Yacoob, “[m]any of the residents who were not there could not even salvage their personal belongings.”²⁹¹ The Court then held that South Africa’s housing authorities had violated the constitution by failing to develop and adopt a housing plan that would “meet [the] immediate needs”²⁹² of people in “desperate need in our society,”²⁹³ such as Mrs. Grootboom.²⁹⁴

Critics of the *Grootboom* ruling argue that despite its importance, it is deficient in that the Court had “refused to order an individualized remedy for the plaintiff, such as an order that the state provide her with housing.”²⁹⁵ The CC had argued that the constitution does not entitle the respondents (Mrs. Grootboom and the others) “to claim shelter or housing immediately upon demand.”²⁹⁶ Hence, noted Justice Yacoob, the High Court should not have obliged “the state to provide rudimentary shelter to children and their parents on demand if parents are unable to shelter their children.”²⁹⁷

In addition to the fact that the CC did not elaborate on the housing plan that it argued the appellants should have designed,²⁹⁸ it did not require the political branches to adopt such a plan. Instead, the CC stated that the State had an obligation to “devise and implement a coherent, co-ordinated programme”²⁹⁹ and that “a reasonable part of the national housing budget [should] be devoted to [providing relief to] those in desperate need [of immediate housing].”³⁰⁰ The CC, some critics note, was likely concerned that “it would lack the legitimacy and capacity to issue a stronger order.”³⁰¹

Professor Cass Sunstein, one of the legal scholars who had “lauded the [*Grootboom*] decision as a reconciliation of two imperatives previously thought mutually exclusive by most—the enforcement of the detailed social rights now found in most constitutions and the assurance that courts do not overstep their

²⁹⁰ *Id.* para. 10.

²⁹¹ *Id.*

²⁹² *Id.* para. 68.

²⁹³ *Id.* para. 56.

²⁹⁴ *Id.* para. 96.

²⁹⁵ David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L. J. 189, 197 (2012).

²⁹⁶ *Grootboom & Others*, (1) SA 46, *supra* note 280, para. 95.

²⁹⁷ *Id.*

²⁹⁸ The appellants in the case before the CC were the country’s political branches—South Africa’s federal government; the Premier of the Province of the Western Cape; the Cape Metropolitan Council; and Oostenberg Municipality. See *Grootboom & Others*, (1) SA 46, *supra* note 277, para. 1.

²⁹⁹ *Id.* para. 95.

³⁰⁰ *Id.* para. 66.

³⁰¹ Landau, *supra* note 295, at 197.

bounds of democratic legitimacy and capacity,”³⁰² noted that the CC had “steer[ed] a middle course between two straightforward positions: (1) that socioeconomic rights are nonjusticiable and (2) that socioeconomic rights create an absolute duty, on government’s part, to ensure protection for everyone who needs them.”³⁰³ Professor Sunstein noted further that “[a] socioeconomic guarantee can have an enduring function” and that “[i]t can do so in part by promoting a certain kind of deliberation, not by preempting it, as a result of directing political attention to interests that would otherwise be disregarded in ordinary political life.”³⁰⁴

Recent research, however, has criticized the interpretation given the decision in *Grootboom* by Sunstein and other legal scholars. As noted by Landau, “[a] large group of South African and American scholars has argued that weak-form enforcement, as exemplified by *Grootboom*, did not work—the legislature did not produce the plan that the Court requested, and the case did virtually nothing to actually advance the right to housing.”³⁰⁵ These scholars have argued that although “*Grootboom* had more or less the right idea,” it, however, “needed to be ratcheted up: the remedy needed to be made a little less ‘weak’ in order to be effective.”³⁰⁶

C. Government Efforts Post-*Grootboom*

There appears to be evidence that, as important and groundbreaking as *Grootboom* was, the remedy provided by the Court was relatively weak. *Grootboom* was decided in 2000 and nearly twenty years later, conditions for “those living in extreme poverty, homelessness or intolerable housing”—the subject matter of *Grootboom*—have not improved significantly.³⁰⁷ In fact, despite the passage of several pieces of legislation and the launching of the government’s ambitious 2004 *Breaking New Ground* for housing delivery, recent data shows that “there are about 3.3 million people living in informal settlements” and that includes people “living in temporary relocation areas.”³⁰⁸ Although temporary relocation areas were established by South Africa’s municipalities “as emergency housing for displaced people,” many of them have

³⁰² *Id.*

³⁰³ CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 233, 235 (2001).

³⁰⁴ *Id.*

³⁰⁵ Landau, *supra* note 295, at 197–198.

³⁰⁶ *Id.* at 198.

³⁰⁷ Soraya Beukes, *Promise of Right to Housing Remains Elusive in Democratic South Africa*, *THE CONVERSATION* (Nov. 26, 2018), <https://theconversation.com/promise-of-right-to-housing-remains-elusive-in-democratic-south-africa-105706>.

³⁰⁸ *Id.*

nevertheless, become permanent homes for these people, placing them “in a situation of limbo.”³⁰⁹

The response of local, provincial, and national governments to the Court’s *Grootboom* order to “deliver social housing, as required by the Constitution,” has been a major failure.³¹⁰ For example, seven years after *Grootboom*, a temporary relocation area was established in Delft, on the outskirts of Cape Town (generally referred to as Blikkiesdorp).³¹¹ Blikkiesdorp was designed to provide “temporary shelter for 650 displaced, indigent people.”³¹² More than a decade after this temporary and transitory shelter was set up, the city of Cape Town “still has no definite plans to provide adequate housing for those people,” and “[t]he number of residents has since swelled to 15,000 in about 3,000 dwellings.”³¹³ Apparently, these people seemed to have been reallocated and abandoned by the government.

Blikkiesdorp, of course, is not the only failed experiment in government programs to provide social housing to the extremely poor and highly deprived persons. In 2001, “118 households were evicted from the Marie Louise informal settlement” and subsequently “placed in temporary relocation areas” where they were supposed to live for only “18 months.”³¹⁴ However, since then, the “community is still without adequate homes” and this is so, despite the fact that the courts have ordered the city of Johannesburg “to provide [these people with] adequate basic housing.”³¹⁵ Similar to the situation in Blikkiesdorp, “there are still no precise time-frames for when [the evictees from the Marie Louise informal settlement] will receive adequate basic housing.”³¹⁶

Finally, in 2008, the Jadhu Place informal settlement, located in Durban, was razed down by a fire, leaving 1,500 of its inhabitants homeless.³¹⁷ More than a decade later, “these residents remain in temporary shelters” and do not know

³⁰⁹ *Id.* See also DEPT. HUM. SETTLEMENTS, REPUBLIC OF SOUTH AFRICA, BREAKING NEW GROUND (2004) (outlining a plan to provide social housing in South Africa).

³¹⁰ Beukes, *supra* note 307.

³¹¹ Although Blikkiesdorp was built by the City of Cape Town in 2007 in response to a court order, it is still considered an informal settlement, even by the government. Many residents call it a “dumping ground” for people not wanted by society. See, e.g., ‘Dumping ground’ for Unwanted People, MAIL & GUARDIAN (Oct. 9, 2009), <https://mg.co.za/article/2009-10-09-dumping-ground-for-unwanted-people/>.

³¹² Beukes, *supra* note 307.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ James Milke, Jessica Gallo & Angela Wong, *Fire Safety Challenges in Informal Settlement*, A JAMES CLARK SCHOOL OF ENGINEERING (Aug. 30, 2021), <https://eng.umd.edu/news/story/fire-safety-challenges-in-informal-settlements>

when they will “receive adequate basic housing.”³¹⁸ In addition to the fact that these various situations “violate the Constitutional Court’s 2000 ruling [in *Grootboom*],” they also violate post-*Grootboom* legislation designed to fulfil the State’s obligations to provide basic housing to deprived individuals as elaborated in *Grootboom*.³¹⁹

The Constitution of South Africa assigns local governments an important role in the provision of basic services to citizens,³²⁰ and this has been interpreted to include “the administration of low-cost housing development.”³²¹ The Housing Act No. 107 (S. Africa) defines the government’s role in the provision of basic housing and calls on “[e]very municipality . . . as part of the municipality’s process of integrated development planning” to “*take all reasonable and necessary steps* within the framework of national and provincial housing legislation and policy to—(a) ensure that—(1) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis.”³²²

In addition, since *Grootboom*, the South African government has developed guidelines for housing assistance in emergency circumstances.³²³ However, settlements, such as Blikkiesdorp, which were supposed to serve only as temporary or short-term housing solutions, have instead become permanent homes for the poor. In these slums, these people endure extremely poor “basic services like water and sanitation.”³²⁴ Critics of the government have noted that “[t]his is contrary to the 2008 court judgment that provided guidance for dignified temporary housing.”³²⁵

In 2016, then mayor of Cape Town, Patricia de Lille, “demanded that her officials present her, in two weeks, with a plan which would set out time-frames for the rehousing of Blikkiesdorp.”³²⁶ However, two years later, the city of Cape Town confirmed that although at the time the city was engaged in three housing

³¹⁸ Beukes, *supra* note 307.

³¹⁹ *Id.* See also *Grootboom & Others*, (1) SA 46, *supra* note 280, at paras. 93–99.

³²⁰ S. AFR. CONST., 1996 (enumerating the objectives of local government).

³²¹ David Pottie, *Local Government and Housing in South Africa: Managing Demand and Enabling Markets*, 14 DEV. PRAC. 606, 611 (2004).

³²² HOUSING ACT 107 OF 1997 § 9(1)(a)(i) (S. AFR.),

³²³ DEPARTMENT OF HUMAN SETTLEMENTS, REPUBLIC OF SOUTH AFRICA, THE NATIONAL HOUSING CODE: INCREMENTAL INTERVENTIONS: PART 3 EMERGENCY HOUSING PROGRAM (2009).

³²⁴ Beukes, *supra* note 307.

³²⁵ *Id.* See also *Occupiers of 51 Olivia Rd. v. City of Johannesburg* 2008 (3) SA 208 (CC) at para. 14 (S. Afr.) (listing objectives of engagement in the context of a city wishing to evict people who might be rendered homeless).

³²⁶ Beukes, *supra* note 307.

developments for Blikkiesdorp, “poor contractor performance” had “caused indefinite delays.”³²⁷

D. South African Courts Post-Grootboom: Occupiers of 51 Olivia Rd. v. City of Johannesburg

By 2008, with its ruling in *Occupiers of 51 Olivia Rd. v. City of Johannesburg (Occupiers of 51 Olivia Road)*, the Constitutional Court had effectively abandoned the *Grootboom* approach and had now adopted a new approach called “engagement.”³²⁸ The main emphasis of this new approach is that the Court ordered the state to engage in robust negotiations with the plaintiffs in order to secure a satisfactory agreement on the issues raised. In this case, more than 400 occupiers of two unsafe and unhealthy buildings in a Johannesburg slum had brought an action to stop the government from forcefully evicting them.³²⁹

The “CC” noted that two days after the application for leave to appeal had been heard, “this Court issued an interim order aimed at ensuring that the City and the occupiers engaged with each other meaningfully on certain issues.”³³⁰ Specifically, the Court ordered, “[t]he City of Johannesburg and the applicants . . . to engage with each other meaningfully and as soon as possible . . . in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.”³³¹

The City and the occupiers reached an agreement in which the City agreed to render “both properties ‘safer and more habitable’”—that is, the City would refurbish instead of demolishing them.³³² With respect to evictions, the agreement “obliged all occupiers to move into alternative accommodation . . . and stipulated that this alternative accommodation is provided ‘pending the provision of suitable permanent housing solutions’ being developed by the City ‘in consultation’ with the occupiers concerned.”³³³

Professor Ray has argued that the Constitutional Court’s engagement approach, which it developed in *Occupiers of 51 Olivia Road* and has since

³²⁷ *Id.*

³²⁸ *Occupiers of 51 Olivia Road*, (3) SA 208, *supra* note 307, para. 5.

³²⁹ *Id.* paras. 1–5.

³³⁰ *Id.* para. 5.

³³¹ *Id.* para. 5(1).

³³² *Id.* para. 25.

³³³ *Id.* para. 26.

applied to other cases, is an alternative to *Grootboom*.³³⁴ Ray has noted further that “due to the court’s limited remedy, *Grootboom* has been described variously as ‘dialogic,’ ‘weak form,’ or ‘administrative law’ approach” and that “[t]hese labels all highlight the fact that the court’s use of a general declaration significantly limited the court’s role and largely left policy development to the political branches.”³³⁵

In *Occupiers of 51 Olivia Road*, both sides had called on the Court to adjudicate the much broader issue of “whether the City’s housing programme complied with the obligations imposed upon it by section 26(3) of the Constitution,” which was to develop a housing plan that sufficiently addressed the emergency needs of people in “desperate need in our society,”³³⁶ such as Mrs. Grootboom.³³⁷ The Constitutional Court’s final opinion and order in *Occupiers of 51 Olivia Road* were issued on February 19, 2008.³³⁸ In that decision, the Court declined to deal with the broader claim that the City of Johannesburg had not yet developed a comprehensive housing plan as required by *Grootboom*.³³⁹ However, the Court noted that the City had committed itself to working, in consultation with the plaintiffs, to develop a long-term housing plan.³⁴⁰ The Court argued further that “[t]here [was] every reason to believe that negotiations will continue in good faith” and that “[t]he City [had] shown a willingness to engage.”³⁴¹ Noting that the City’s position had evolved significantly, the Court argued that “[t]here [was] no reason to think that future engagement will not be meaningful and will not lead to a reasonable result.”³⁴² Nevertheless, noted the Court, intervention by the Court remained a viable option “if this course becomes necessary.”³⁴³

It was in *Occupiers of 51 Olivia Road* that the Constitutional Court formalized and made explicit the form of negotiation/mediation approach that came to be known as “engagement.” Yacoob J, writing for the Court, noted that in previous adjudications, the Court had invoked various versions of

³³⁴ Brian E. Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Establish Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797, 814 (2009).

³³⁵ *Id.* at 816.

³³⁶ *Grootboom & Others*, (1) SA 46, *supra* note 280, para. 56.

³³⁷ *Id.* para. 96.

³³⁸ *Occupiers of 51 Olivia Road*, (3) SA 208, *supra* note 307, at 1.

³³⁹ *Id.* para. 34.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

engagement.³⁴⁴ For example, in *Port Elizabeth Municipality v. Various Occupiers*,³⁴⁵ another case that involved forced evictions of sixty-eight people, including twenty-three children, the Court stated:

In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.³⁴⁶

The approach taken by the Court in *Occupiers of 51 Olivia Road* emphasized the participation of affected individuals and community in seeking effective solutions to the problems that afflicted them. Thus, in fulfilling its constitutional obligations towards the occupants of the Johannesburg slum, the City must “encourage the involvement of communities and community organizations in matters of local government.”³⁴⁷ The Court then held that governments also have “the obligation to fulfill the objectives mentioned in the preamble to the Constitution to ‘[i]mprove the quality of life of all citizens and free the potential of each person’” and that governments “respect, protect, promote and fulfil the rights in the Bill of Rights.”³⁴⁸ After reiterating that “[t]he most important of these rights for present purposes is the right to human dignity and the right to life,” the Court concluded that “[i]n the light of these constitutional provisions a municipality that ejects people from their homes *without first meaningfully engaging with them* acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.”³⁴⁹

The Court then proceeded to elaborate on what it meant by engagement. Drawing from and relying on *Grootboom*, the Court noted that “section 26(2) [of the Constitution] mandates that the response of any municipality to potentially homeless people with whom it engages must also be reasonable.”³⁵⁰

³⁴⁴ *Id.* para. 12.

³⁴⁵ *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.).

³⁴⁶ *Id.* para. 39 (emphasis added).

³⁴⁷ *Occupiers of 51 Olivia Road*, (3) SA 208, *supra* note 307, para. 16.

³⁴⁸ *Id.*

³⁴⁹ *Id.* (emphasis added).

³⁵⁰ *Id.* para. 18.

However, noted the Court, “[i]t may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless.”³⁵¹ Thus, as argued by Professor Ray, “[r]easonableness is context-specific and permits a range of substantive outcomes.”³⁵²

Second, the Court argued that “[i]t was common cause that the implementation of the [City of Johannesburg’s] Regeneration Strategy [was] an important reason that founded the decision to evict” and that “[i]t must then have been apparent that the eviction of a large number of people was inevitable.”³⁵³ The Court then noted that “[i]f structures had been put in place with competent sensitive council workers skilled in engagement, the process could have begun when the strategy was adopted.”³⁵⁴ Hence, noted the Court, the process of engaging all relevant stakeholders “must be incorporated at the outset of any long-term planning process and must involve a trained cadre of government employees.”³⁵⁵

Third, cautioned the Court, “[p]eople about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process.”³⁵⁶ These individuals and groups—that is, people in need of housing—“must not be regarded as a disempowered mass.”³⁵⁷ Instead, the State must encourage them “to be proactive and not purely defensive. Civil society organisations that support the peoples’ claims should preferably facilitate the engagement process in every possible way.”³⁵⁸

Finally, argued the Court, “secrecy is counter-productive to the process of engagement” because “[t]he constitutional value of openness is inimical to secrecy.”³⁵⁹ Yacoob J then reiterated that “it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* para. 19.

³⁵⁴ *Id.*

³⁵⁵ Ray, *supra* note 334, at 824.

³⁵⁶ *Occupiers of 51 Olivia Road, (3) SA 208, supra* note 307, para. 15.

³⁵⁷ *Id.* para. 20.

³⁵⁸ *Id.*

³⁵⁹ *Id.* para. 21.

meaningful engagement.”³⁶⁰ Thus, “[i]n any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within that process would ordinarily be essential.”³⁶¹ While “[t]he ejection of a resident by a municipality in circumstances where the resident would possibly become homeless should ordinarily take place only after meaningful engagement,” the determination of whether “there had been meaningful engagement between a city and the resident about to be rendered homeless is a circumstance to be considered by a court in terms of section 26(3)” of the Constitution.³⁶²

Professor Ray has argued that South Africa’s Constitutional Court has created a structure that, unlike others, such as “Sturm’s deliberative model,” operates “without a court liability determination”³⁶³ and does not set “specific guidelines in each case.”³⁶⁴ Instead, the Constitutional Court’s engagement model “sets more general guidelines for the engagement process, as it did in [*Occupiers of 51 Olivia Road*].”³⁶⁵ The Court’s engagement strategy, noted Professor Ray, would “presumably, be refined and expanded in cases that come before the court where engagement was tried and failed,” giving the Court “the power to structure the engagement process in ways that ensure attention to the values these rights protect.”³⁶⁶ Finally, noted Professor Ray, “[r]ather than setting direct policy through substantive interpretation of section 26, the courts instead establish the ground rules for a procedure by which the parties themselves, assisted by civil society, can develop the specific policies required to provide access to adequate housing.”³⁶⁷

VI. LESSONS FROM POST-GROOTBOOM JURISPRUDENCE

A. *The South African Constitutional Court’s Engagement Approach*

Critics have argued that although *Grootboom* “had more or less the right idea, . . . the remedy needed to be made a little less ‘weak’ in order to be effective.”³⁶⁸ However, *Grootboom* represents a very important foundation for

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* para. 22.

³⁶³ Ray, *supra* note 334, at 825.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ Landau, *supra* note 295, at 198.

South Africa's socio-economic rights jurisprudence, particularly on how socio-economic rights should be enforced. Most importantly, the *Grootboom* decision opened the door to a lot of discussions, not just in South Africa but also around the world, on how socio-economic rights should be enforced and also on whether they should be considered fundamental rights to be included in constitutional texts.³⁶⁹ Most importantly, *Grootboom* provided the foundation for the courts to delineate specific roles for courts and the political branches on how to deal with the fulfilment of rights guaranteed by the constitution, including socio-economic rights.³⁷⁰

Through several post-*Grootboom* cases, including *Occupiers of 51 Olivia Road*³⁷¹ and *Port Elizabeth Municipality*,³⁷² South Africa's Constitutional Court developed a new approach called "engagement," which was intended to allow courts to manage "the tension between the need to enforce [the rights guaranteed by the constitution] and the capacity and legitimacy problems that courts feel when they enforce them."³⁷³ While this jurisprudence was developed by South Africa's Constitutional Court and based on issues unique to South Africa, it has the potential to benefit other countries in Africa that are dealing with similar issues.

The South African Constitutional Court's engagement approach includes a "public reporting requirement," which can be beneficial to other African countries facing similar issues as those in *Grootboom*, *Occupiers of 51 Olivia Road*, *Port Elizabeth Municipality*, and other post-*Grootboom* cases. First, this approach emphasizes openness and transparency, which are an important element of the rule of law.³⁷⁴ Conducting public activities through an open, transparent, and participatory process reduces corruption and significantly improves the chances that outcomes that "reflect the values, interests, and aspirations of all . . . relevant stakeholder groups will result."³⁷⁵ It is likely to produce more effective outcomes by trying to ensure that deprived and marginalized groups, including especially women, realize the right to adequate housing, introducing openness and transparency into the process and providing

³⁶⁹ *Id.* at 196.

³⁷⁰ See, e.g., *Occupiers of 51 Olivia Road*, (3) SA 208, *supra* note 307 at para. 5 (elaborating the Constitutional Court's new strategy called "engagement").

³⁷¹ *Id.*

³⁷² *Port Elizabeth Municipality*, 2005 (1) SA 217, *supra* note 345.

³⁷³ Landau, *supra* note 292, at 198.

³⁷⁴ John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 1011 (2013) [hereinafter *Providing a Foundation for Wealth Creation and Development in Africa*] (noting that openness and transparency are an element of the rule of law).

³⁷⁵ *Id.* at 1012.

the wherewithal for these individuals and groups to participate. Perhaps, more importantly, openness and transparency help affected groups “understand and appreciate how that decision was made and why”³⁷⁶ and, in addition, minimize the distrust that marginalized groups often have in their governments.

Second, this approach also imposes an obligation on the state to maintain a complete record of the proceedings “that will be the basis for potential judicial review,” which implies that if the engagement fails, “courts will have the information necessary to develop the process in ways that protect public values.”³⁷⁷ In addition, a transparent decision record can help “an interested person to ‘verify claims made’ or otherwise reconstruct both the process and rationale for the decision.”³⁷⁸ Finally, such a decision record can provide necessary data for researchers and other groups (e.g., human rights advocates; legal researchers) seeking to determine the efficacy of the decisions made and their impact on the affected groups.

Third, as made clear by some scholars, since the parties to the engagement “know that they must develop a record that a court may ultimately review for compliance with procedural and substantive obligations, the public reporting requirement creates a strong incentive for engagements to incorporate these public values throughout the process.”³⁷⁹ In other words, “[t]he public reporting requirement gives the parties incentive to make reasoned arguments and claims of rights because they know those arguments may be assessed by the courts and certainly will be subject to analysis and critique by the public at the end of the process.”³⁸⁰

However, there is a danger that the engagement process could threaten the confidentiality that is an important feature of the alternative dispute resolution (ADR) process. With respect to ADR, an important benefit of “confidentiality in private disputes is the opportunity to avoid public disclosure of the terms of the settlement itself”³⁸¹; however, “the policies that result from successful engagement will be public in any event, thus eliminating this potential concern.”³⁸¹ Most importantly, judiciary oversight is very important to making certain that governments, including those of sub-national units, “engage

³⁷⁶ *Id.* at 1012–1013.

³⁷⁷ Ray, *supra* note 334, at 826.

³⁷⁸ *Providing a Foundation for Wealth Creation and Development in Africa*, *supra* note 371, at 1012. Such interested persons can include, not just individuals affected by the policy, but also policy makers, including especially those representing the affected persons and groups.

³⁷⁹ Ray, *supra* note 334, at 826.

³⁸⁰ *Id.*

³⁸¹ *Id.*

seriously and also to providing the opportunity for public critique of the results.”³⁸²

When engagements are successful, the parties are unlikely to return to court. However, when they are not successful, a return to the court will most likely ensue, allowing the courts “to provide guidance on how the engagement process should be structured and what substantive outcomes are constitutionally permissible.”³⁸³ The outcome of judicial involvement would be a decision record that can serve as “guidelines for future engagements, thus creating a multi-level remediation process . . . [which] is necessary for individual resolutions to become precedents in other cases.”³⁸⁴ Finally, engagement, as elaborated by the jurists of the South African Constitutional Court, does not operate independently. It “ties the process back to the courts and creates the opportunity to address the results of failed engagements and tweak the process to deal with problems they raise.”³⁸⁵

B. Women’s Right to Adequate Housing and the Engagement Approach

In situations involving the inability of people living in intolerable conditions, who include women, to realize the right to adequate housing, it has often been the case that governments, including those of sub-national units, make decisions unilaterally without consulting or providing the wherewithal for affected individuals and groups to participate.³⁸⁶ Without such consultation, the decision-makers often fail to avail themselves of the time-and-place information that is critically required to make decisions that reflect the issues (e.g., homelessness and extreme poverty) faced by the affected individuals and groups. That necessary time-and-place information can only come from the affected persons and groups. Hence, participation is critical.³⁸⁷

Amnesty International (AI) has noted that, since the Lagos State government did not consult or engage the thousands of people, including women, that it had

³⁸² *Id.*

³⁸³ *Id.* at 827.

³⁸⁴ *Id.* (alteration in original).

³⁸⁵ *Id.*

³⁸⁶ For example, when Lagos State government bulldozed the homes of many residents of the Badia East slum on February 23, 2013, and subsequently forcibly evicted them, it did so “without genuine consultation or adequate and reasonable notice and with no remedy for the loss suffered.” See Amnesty Int’l, *Nigeria: Forced Eviction Victims Inadequately Compensated*, HABITAT INT’L COAL. (Aug. 19, 2014), <http://www.hlrn.org/french/activitydetails.php?id=o3BmZA=#.YptuJuzMI11>.

³⁸⁷ See *id.* (noting that “[i]n addition, the Lagos state government reneged on an agreement reached between a committee it had established and community representatives on compensation” and that “[t]he World bank knew this.”).

forcibly evicted from the Badia East slum in 2013, the compensation package which it designed for them was declared totally inadequate and “not consistent with international human rights law and standards.”³⁸⁸ AI stated that “[i]t is an outrage that a community, left destitute by the actions of the Lagos state government, has been denied an effective remedy by the same government and that the World Bank has been complicit in this matter.”³⁸⁹

In *Grootboom*, Justice Yacoob, writing for the Court, also noted the unilateral and non-participatory way in which the municipality undertook the evictions. He noted that “on 18 May 1999, at the beginning of the cold, windy and rainy Cape winter, the respondents were forcibly evicted at the municipality’s expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents’ homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings.”³⁹⁰ In *Occupiers of 51 Olivia Road*, the evictees or “occupiers attacked the constitutional validity of the decision by the City to evict them as being unfair because it had been taken without giving them a hearing.”³⁹¹

The Court noted that, although the issue of “meaningful engagement between the City and the occupiers was not directly raised by the parties before this Court,” it, however, was “foreshadowed by [the occupiers’] contention that the City was obliged to give the occupiers a hearing before taking the decision to evict on the basis that the decision was an administrative one.”³⁹² The Court’s decision in *Occupiers of 51 Olivia Road* is one of the post-*Grootboom* cases in which the Constitutional Court of South Africa developed its engagement remedy.³⁹³

A major problem in any effort to enhance the ability of women to realize the right to adequate housing is the lack of enforcement of judicial orders by each country’s political branches. This is true in situations where the court’s order is directed specifically at a governmental unit (e.g., the Cape Metropolitan Council in *Grootboom*) or where a legislative enactment is declared unconstitutional, and the legislature is then ordered to take action to amend the impugned provision so that it conforms to the constitution. The engagement approach seems to

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Grootboom*, *supra* note 280, para. 10.

³⁹¹ *Occupiers of 51 Olivia Road*, (3) SA 208, *supra* note 307, para. 7 (emphasis added).

³⁹² *Id.* para. 9.

³⁹³ *Id.* para. 5 (noting the order by the Court for the City to engage with occupiers to seek a solution that reflected and preserved the occupiers’ rights under the constitution).

suggest a cure because it provides (i) a mechanism for robust, open, and transparent dialogue between the state and all the relevant parties—this dialogue, in the case of women and their efforts to realize their right to adequate housing, must involve, not just the affected women (e.g., women who are at risk of forced eviction), but also various civil society groups and organizations, particularly those that advocate on behalf of vulnerable individuals and groups (e.g., women and girls); (ii) a strategy of court supervision that significantly increases the chances that court orders will be fully implemented by the political branches; (iii) for a public reporting requirement, which mandates that there will be a transparent decision record, which can significantly enhance the court’s ability to perform its oversight function and ensure that the political branches are implementing judicial orders; the public decision record also provides data for public analysis of government efforts to address issues (homelessness, forced evictions) that affect women and other vulnerable groups and minimizes corruption associated with the exercise of government power; and (iv) legal mechanisms for courts to provide governments with guidance on how to structure and manage the engagement process.

On June 21, 2017, the Lagos High Court ruled that “[a] series of brutal, government-ordered evictions that left more than 30,000 Nigerians homeless were . . . ‘unconstitutional’” and ordered the State government to halt all “future evictions in a move that could prevent an estimated 270,000 other residents of Lagos from losing their prime waterfront homes to development.”³⁹⁴ In the Court’s judgment, Justice Adeniyi Onigbanjo noted that the State had violated the rights of the evictees because it had not presented a resettlement plan and “ordered the government to cease evictions and pay compensation.”³⁹⁵ However, two years after the High Court made its order, the government had not yet implemented any of the High Court’s directives. As noted by one of the evictees, “[b]oth the compensation and resettlement orders have been ignored by the government. . . .”³⁹⁶ The Constitutional Court of South Africa’s engagement approach could have provided a more humane and human rights-friendly mechanism for dealing with the Lagos evictions and their impacts on the inhabitants of these waterfront settlements.

³⁹⁴ Paola Totaro, *Nigerian Court Rules Against Mass Eviction in Lagos: Activists*, REUTERS (June 21, 2017), <https://www.reuters.com/article/us-nigeria-landrights-lagos/nigerian-court-rules-against-mass-eviction-in-lagos-activists-idUSKBN19C2NE> (last visited on June 4, 2022).

³⁹⁵ Oladeinde Olawoyin, *Two Years After Court Ruling, No Justice for Otodogbame Residents Evicted by Lagos Govt*, PREMIUM TIMES (Sept. 20, 2019), <https://www.premiumtimesng.com/news/headlines/353264-two-years-after-court-ruling-no-justice-for-otodogbame-residents-evicted-by-lagos-govt.html> (last visited on June 4, 2022).

³⁹⁶ *Id.*

The Supreme Court of Nigeria decided *Ukeje v. Ukeje* and *Anekwe v. Nweke* in 2014.³⁹⁷ In addition to condemning the failure of Igbo customary law to recognize female inheritance rights with respect to land and real property, the Court also declared that the Igbo customary law, which prohibits the girl child from inheriting her deceased father's estate, breaches § 42(1) and (2) of the Constitution of Nigeria. Yet, since these cases were decided, Nigerian girls and women, including those from Igbo communities, still face discrimination in land matters. In other words, the political branches, at both the national, state, and municipal levels, have yet to take necessary measures to ensure that the rights guaranteed to women and girls by the constitution are recognized and fully protected.³⁹⁸

Yet, in 2021, Igbo girls and women still remained subject to the discriminatory customary laws that had been found unconstitutional by the Supreme Court.³⁹⁹ In an article published by *BBC News* in February 2021, Nduka Orjinmo noted that “[w]omen are still routinely being cut out of their parents’ inheritance in parts of south-eastern Nigeria, despite a Supreme Court ruling that it is discriminatory.”⁴⁰⁰ The article stated that Onyinye Igwe, the 29-year-old first child and daughter of a rich Igbo man who had died and left behind “houses, land and money in the bank,” was chased out of the family house by her brother, who then proceeded to take all of their deceased father’s properties.⁴⁰¹ Then, there was Evelyn Onyenokwalu, the first child in a family of four children. After her father died, her brother, “the last child in the family,” forced her sister out and took control of all of their father’s properties, “including the family house.”⁴⁰²

Judicial rulings and declarations alone are not likely to abolish these customary laws and traditional practices, which harm women and girls. As has been suggested by civil society organizations working in Southeastern Nigeria, eliminating discriminatory customary laws would involve the type of robust engagement that must bring together the courts (in a supervisory role), civil

³⁹⁷ *Ukeje v. Ukeje* [2014] 224 NSCC 2004 (Nigeria); *Anekwe v. Nweke* [2014] 129 NSCC 2013 (Nigeria).

³⁹⁸ See Nduka Orjinmo, *Nigeria Inheritance: ‘My Brothers Took Everything When My Father Died,’* BBC NEWS (Feb. 2, 2021), <https://www.bbc.com/news/world-africa-55675987> (noting that “[t]he cultural norms and cultural inhibitions that enable these harmful practices are still very much alive in the communities.”); *Ukeje v. Ukeje* [2014] 224 NSCC 2004 (Nigeria).

³⁹⁹ Orjinmo, *supra* note 398; see generally *Ukeje v. Ukeje* [2014] 224 NSCC 2004 (Nigeria) (noting the holding by the Supreme Court that the customary law which prohibits a female child to inherit her deceased father’s estate is a breach of § 42(1) and (2) of the Constitution of Nigeria).

⁴⁰⁰ Orjinmo, *supra* note 398.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

society organizations, custodians of the various customs and traditions (the region's highly influential traditional rulers), and groups representing women. This implicates, at least, some form of the engagement remedy introduced by the Constitutional Court of South Africa.⁴⁰³

Engagement, “a hybrid process that operates somewhere between pure ADR and pure adjudication—and, indeed oscillates between those extremes—. . . offers a novel and potentially important tool for enforcing socioeconomic rights.”⁴⁰⁴ Although critics of the South African Constitutional Court's engagement remedy have argued in favor of “full-fledged judicial interpretation and enforcement,” it is important to note that “the same features that make engagement something less than strong court enforcement also enhance its legitimacy.”⁴⁰⁵ Participation, which is part of the engagement regime, enhances the ability of vulnerable individuals and groups (e.g., women who are susceptible to forced eviction or discrimination in their efforts to access adequate housing) to understand and appreciate how policies affecting their lives are designed and implemented.⁴⁰⁶ It can also help increase trust in government and the public policy process, give opportunities for historically marginalized groups to provide necessary time-and-place information to policymakers, especially in the design and implementation of programs that directly affect them and their rights, and allow people living in intolerable conditions “to witness and understand how decisions affecting their lives are made” and why.⁴⁰⁷

Participation and engagement significantly improve the ability of historically marginalized and deprived individuals to understand and appreciate the rights guaranteed to them by their national constitutions and international human rights instruments.⁴⁰⁸ As noted by the UN, “participation contributes to policies which respect civil and political as well as economic, social and cultural rights” and “policies resulting from participatory processes are likely to be perceived as legitimate by the population.”⁴⁰⁹

⁴⁰³ See, e.g., *Occupiers of 51 Olivia Road*, (3) SA 208, *supra* note 307 (elaborating the engagement scheme for dealing with issues implicating human rights, including socio-economic rights).

⁴⁰⁴ Ray, *supra* note 334, at 842.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Providing a Foundation for Wealth Creation and Development in Africa*, *supra* note 374, at 1003, 1015.

⁴⁰⁷ *Id.* at 1013.

⁴⁰⁸ OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., GOOD GOVERNANCE PRACTICES FOR THE PROTECTION OF HUMAN RIGHTS, at 5, U.N. Doc. HR/PUB/07/4, U.N. Sales No. E.07.XIV.10 (2007) (noting the importance of participation for the protection of human rights).

⁴⁰⁹ *Id.* at 5.

Finally, this hybrid approach offers African countries an important instrument to force or coerce the political branches “to pay consistent attention to [constitutional provisions guaranteeing the right to adequate housing] (and . . . other socioeconomic rights . . .) whenever they develop social policy.”⁴¹⁰ Engagement assigns the courts a specific but limited role in policy-making; however, “substantive policy-making” is still the purview of the political branches.⁴¹¹

CONCLUSION

Throughout Africa, women’s and girls’ rights to adequate housing are under threat and vulnerable to violation by state and non-state actors. First, many ethnic groups have customs and traditions that discriminate against women and girls and interfere with their right to adequate housing. For example, the customary laws of various subcultures in Nigeria, Kenya, Uganda, and Zimbabwe generally prohibit women and girls from inheriting landed property and also from actually acquiring and using land unless they do so through their fathers, husbands, or other male relatives (e.g., a brother or uncle).⁴¹²

Second, because of increasing levels of poverty in the rural areas as well as the dispossession of widows of their lands by opportunistic in-laws, many African women have been forced to migrate to urban areas where they find themselves living in extremely unhealthy slums. These usually lack basic services (e.g., access to clean water and sanitation) and are plagued by high levels of violence, including sexual assault and rape. This situation effectively prevents women and girls from realizing their right to adequate housing. In addition to the fact that these women do not have secure tenure rights, they are also susceptible to eviction by state and non-state actors who want the land for so-called development projects. During the last several decades, governments in countries, such as Ghana, Kenya, Nigeria, and South Africa, have engaged in forced evictions of vulnerable individuals and groups (including women) from informal settlements in their jurisdictions. These violent evictions usually result in homelessness and destitution for the evictees effectively foreclosing any opportunities for these women to realize the right to adequate housing.

To help women realize their right to adequate housing, each African State must domesticate the various international and regional human rights

⁴¹⁰ Ray, *supra* note 334, at 843.

⁴¹¹ *Id.*

⁴¹² See HUMAN RIGHTS WATCH, *supra* note 14; Iruoma, *supra* note 14.

instruments that guarantee the right to adequate housing and create rights that are justiciable in domestic courts. In the meantime, progressive courts can use their power to interpret the constitution to eliminate or modify customary and other laws that are not in conformity with the provisions of international human rights instruments and each country's Bill of Rights. Unfortunately, the reluctance by political branches to enforce court orders has impeded courts' ability to protect the rights of women, including their right to adequate housing. This is what happened in South Africa after the *Grootboom* ruling.⁴¹³

In other countries, the victims of forced evictions have taken their cases to court in an effort to get the courts to direct the political branches to halt the evictions and provide them, even if only in the short term, with alternative housing and establish a plan for helping the evictees realize their right to adequate housing. However, when the evictees win their cases and the courts impose certain obligations on the political branches, the latter usually fail to meet those obligations. For example, after the Lagos State government evicted thousands of people, including women and children, from waterfront slums in order to make way for development, the Lagos High Court ruled that the government had acted unconstitutionally and ordered it to develop a plan for alternative housing for the evictees and compensate them for their losses and suffering. In addition to the fact that the Lagos State government continued with its demolition of the homes in the Otodo-Gbame settlement and the eviction of its residents, the compensation plan that the government eventually came up with was criticized by civil society, including Amnesty International, as totally inadequate and not in line with international human rights laws. This was due, inter alia, to the fact that the government had failed to engage with the evictees and their representatives before producing its remedial and compensation plan.⁴¹⁴

After its *Grootboom* decision, the South African Constitutional Court was criticized by those who believed that the remedy provided by the Court was relatively weak and that it needed to be "ratcheted up."⁴¹⁵ In fact, twenty years after *Grootboom*, many South Africans, including women and children, who were living in conditions of extreme poverty, homelessness, or intolerable housing, and some of whom had been the subject matter of *Grootboom*, had not

⁴¹³ Beukes, *supra* note 307 (noting the failure of municipal governments in South Africa to implement court orders).

⁴¹⁴ Amnesty Int'l, *At the Mercy of the Government: Violation of the Right to an Effective Remedy in Badia East, Lagos State, Nigeria*, at 13, AI Index AFR 44/017/2014 (Aug. 19, 2014), <https://www.amnesty.org/en/documents/AFR44/017/2014/en/>.

⁴¹⁵ Landau, *supra* note 295, at 198.

experienced any significant improvements in their welfare, including their living conditions.⁴¹⁶ Research shows that more than 3.3 million South Africans continue to live in informal and temporary settlements, effectively unable to realize their right to adequate housing.⁴¹⁷

Cognizant of the fact that the political branches had failed to fulfil the obligations imposed on them by *Grootboom*, the Constitutional Court used post-*Grootboom* cases, including the *Occupiers of 51 Olivia Road*, to elaborate a new approach to dealing with situations involving the violation of human rights in general and socio-economic rights in particular.⁴¹⁸ The Court ordered the City of Johannesburg to engage in robust negotiations with the evictees and their representatives and to do so “in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.”⁴¹⁹ What the Court established in the *Occupiers of 51 Olivia Road* and subsequent cases was “a procedure by which the parties themselves, assisted by civil society, can develop the specific policies required to provide access to adequate housing.”⁴²⁰

Of course, the Court reserved for itself a supervisory role which includes a review of the agreed-upon policy to resolve the problem of access to adequate housing. Such review by the courts would ensure that the final policy statement conforms with provisions of the constitution especially with regard to the protection of the rights guaranteed the evictees by the constitution. The requirement that the state “develop a complete record” of the proceedings was expected to enhance the ability of the courts to review the final policy statement as well as provide the data for civil society to critique the arrangements. Most importantly, the requirement for there to be a decision record “gives the parties incentive to make reasoned arguments and claims of rights because they know those arguments may be assessed by the courts and certainly will be subject to analysis and critique by the public at the end of the process.”⁴²¹ Finally, “[r]ather than a single, independent judge assessing the outcome for consistency with public values, engagement encourages a principled result protecting those values through the incorporation of multiple, experienced actors, as well as the

⁴¹⁶ Beukes, *supra* note 307.

⁴¹⁷ *Id.*

⁴¹⁸ *Occupiers of 51 Olivia Road*, (3) SA 208, *supra* note 307, para. 5.

⁴¹⁹ *Id.* para. 5(1).

⁴²⁰ Ray, *supra* note 334, at 825.

⁴²¹ *Id.* at 826.

integration of a range of perspectives and a critique of the process through public reporting.”⁴²²

Although the Constitutional Court’s engagement approach has been criticized by those who believe that the political branches could come to the table in bad faith or simply refuse to engage, it remains an important tool for the political branches and the affected residents to produce agreements that reflect the public norms that the constitutional rights in question enforce.⁴²³ In South Africa and other African countries, “engagement can establish a generalizable, but still flexible, set of process norms and substantive requirements for section 26 [of the South African Constitution or similar provisions in other African constitutions] that can be applied and modified in later cases.”⁴²⁴

Whether the situation involves (i) forced eviction of a girl from the family home by her brothers after the death of their father, (ii) the denial of the right of a widow to remain in the matrimonial home after her husband’s death, (iii) or the mass evictions of defenseless inhabitants of slum settlements, the hybrid mechanism called engagement offers an effective way to provide policy solutions that are based on reasoned arguments. These situations involve not just the political branches and the deprived individuals and groups but also members of civil society and their organizations. In addition to the fact that solutions arrived at through these participatory processes are most likely to reflect values and norms that are enforced by the socio-economic rights guaranteed by the constitution, the process itself is also likely to promote democratic engagement, enhance the court’s role in protecting human rights generally, the women’s right to adequate housing in particular as well as promote legitimacy in the public policy process.

International human rights instruments, such as the ICESCR, impose an obligation on each State Party to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁴²⁵ However, the realization of these rights must involve not just the political branches but also the courts and civil society. The engagement remedy

⁴²² *Id.* at 828.

⁴²³ *Id.* at 829, 831.

⁴²⁴ Ray, *supra* note 334, at 830.

⁴²⁵ Int’l Covenant on Econ., Social and Cultural Rights, *supra* note 59, pt. 2, art. 2(1).

will significantly enhance the realization of the holistic approach to the protection of human rights, including the right to adequate housing.