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EXPANDING SOCIO-ECONOMIC RIGHTS AND ACCESS TO HOUSING

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Please direct all queries regarding this report to:

Mega-Tech/South Africa
Bank Forum Building
Lobby 1, Second Floor
337 Veale Street
New Muckleneuk
0181 Pretoria RSA
Tel. 012 452 0060
Fax 012 452 0070
Email megatech@intekom.co.za

Or

Mega-Tech, Inc.
180 South Washington Street, Suite 200
Falls Church, VA 22046
Tel. (703) 534-1629
Fax (703) 534-7208
Email info@mgtech-world.com

Abstract

This report discusses the implications for the Department of Housing of a rights-based approach to housing policy. First of all, the international right to adequate housing, as expressed in a number of international treaties, declarations and recommendations, and the South African right of access to adequate housing, as expressed in Section 26 of the Constitution are discussed. The processes whereby these rights are realized through legal/ administrative implementation and social/political contestation are then discussed. The views of civil society organisations and municipalities on housing rights, as determined by interviews and a survey undertaken for this study, are incorporated into this discussion. The key components of a rights-based approach to housing are then determined, grouped under the headings of the duty of the State to respect, protect, promote and fulfill rights. This is followed by an assessment of the extent to which current legislation, policies and programmes (and proposed policy shifts) meet the requirements of a rights based approach. Finally, recommendations for research, policy development and programmes of action are made for the Department of Housing's Policy and Research Agenda.

Executive Summary

The need to adopt a rights-based approach to housing is becoming increasingly important, for a number of reasons. Firstly, in an age of increasing globalization, the commitment of States to international and regional human rights policy instruments is becoming essential, and the international right to adequate housing is regarded as a basic human right. Secondly, ever since the Grootboom Case it has become necessary that the State pays attention to its constitutional obligations, as the courts have become more assertive around rights issues. Thirdly, citizens and civil society are increasingly mobilizing around their rights (and using constitutional litigation as a strategy). Fourthly, and most importantly, the realization of human rights can be regarded as the very essence of human development.

At an international level, the right to adequate housing is contained in a number of international human rights policy instruments, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child. Declarations such as the Habitat Agenda also contain commitments related to housing rights, and recommendations of United Nations bodies, such as the United Nations Committee on Economic, Social and Cultural Rights' General Comment No. 4 on the right to adequate housing, provide interpretations of what the obligations of States are in terms of rights. The South African government has a range of housing-related obligations in terms of these international human rights instruments, including legal duties in terms of ratified treaties and political commitments to declarations.

At a national level, Section 26 of the Constitution contains the "right of access to adequate housing" and Section 28(1) contains the right of children to shelter. The Grootboom Judgement (2000) and other court rulings have, with the assistance of international recommendations, interpreted what this right means for the State. The key principles are that the State must establish comprehensive and coherent programmes capable of facilitating the realization of the right, and the measures (legislation, policies, programmes) adopted by the State must be "reasonable" within their context and within the availability of resources. In addition, the needs of the most vulnerable require special attention, e.g. the State must "devise, fund, implement and supervise measures to provide relief to those in desperate need. In contrast to international interpretations of the obligations of the State, the South African courts have rejected the concept of an individual right to a minimum core entitlement, and have instead emphasised the collective right to a reasonable policy.

It is important to note that housing rights are not just a legal issue. The way that rights are defined and realized is largely a political process that depends upon the mobilization of citizens and civil society organisations, and the engagement of civil society with the State around basic needs.

The key components of a rights based approach to housing can be considered as being grouped into three clusters: respecting and protecting the right to adequate housing, promoting the right to adequate housing and fulfilling the right to adequate housing.

The obligations of the State in terms of respecting and protecting the right to adequate housing, include recognising the right to adequate housing, through the ratification of international treaties and through including housing rights in the Constitution, and preventing violations of the right to adequate housing. Preventing violations of the right to adequate housing has three major elements: preventing discrimination, preventing arbitrary evictions, and ensuring an independent judiciary and access to courts.

The broad duty to promote the right to adequate housing requires the State to educate the public about their rights and to strive to create a culture in which the right of access to adequate housing can become a reality. The key to this lies in the concept of "citizenship". Over and above civic education about rights and responsibilities, citizenship also implies democratic participation (the participation of citizens and civil society in decision making at all levels), access to relevant

information and assistance to enable citizens and civil society to be able to access their rights, and promoting awareness of the duties of broader society in terms of housing rights.

The obligations of the State in fulfilling the right to adequate housing include: focusing on integrated development using rights as an organizing principle (housing rights are particularly important as an organising principle of State policies and programmes because they intersect with a particularly wide range of other rights) and formulating, with broad-based participation, a coherent policy aimed at the progressive realization of the right to adequate housing. These policies and programmes need to be reasonably implemented. The monitoring and evaluation of adequate progress in realizing the right to adequate housing is essential. In terms of actual content, an enabling approach, in which the role of non-State roleplayers is maximized needs to be taken. Core housing programmes need to include housing subsidies, facilitating access to credit, rapid land release, informal settlement upgrading and support for self-help housing. Special measures for vulnerable groups are required, including measures for people in crisis and desperate situations (e.g. communities displaced by evictions or floods), disabled people, people living with HIV/AIDS, women, children, refugees and “street people”.

On the whole, South Africa has made great progress in the realization of the right to adequate housing since 1994. The biggest shortcomings are that there has been inadequate quantitative progress in the realization of the right, there has been a lack of integrated development (which has in many cases resulted in unsustainable settlements) and there has been a lack of programmes to address specific housing needs (e.g. informal settlements) and specific vulnerable groups (e.g. refugees).

There have been a number of major housing policy shifts proposed recently. The proposed policy emphases on co-ordination and policy alignment, improving the quality of the end product and urban environment, on increasing the delivery rate and on People’s Housing Process all fit in extremely well with a rights-based approach. It is noticeable, however, that using housing rights as an organizing principle for housing policies and programmes is not explicitly mentioned, and the participation of citizens and civil society in housing-related decision making at all levels is not emphasized. In addition, the emphasis on social housing (as currently defined in South Africa) and savings as a mechanism for allocating subsidies, which are strongly emphasized by recent proposals, are not high priorities in terms of housing rights.

The main implications of a rights-based approach for the Department of Housing’s Policy and Research Agenda are, firstly, that there needs to be more research on the legal obligations of the State in terms of international human rights policy instruments. New developments, such as new court rulings, also need to be continually followed up, and more research on the obligations of other roleplayers would also be useful. Secondly, appropriate policies need to be developed in relation to integration between different departments and different spheres of government, a framework for engagement with and participation by citizens and civil society, new national housing programmes to address current gaps (e.g. informal settlement upgrading, single people, refugees, improvement of existing housing) and ensuring adequate protection against arbitrary eviction for tenants. Thirdly, there are some programmes of action that could be implemented in the short term, including greater co-ordination/ policy alignment between the Department of Housing and other relevant departments, and the capacity building of officials and other stakeholders to create greater awareness of housing rights. It is also essential that the Department of Housing take actions to ensure that there is adequate access to relevant information in order to assist citizens and civil society organizations in accessing their housing rights, and in order to ensure that the South African Human Rights Commission and civil society are able to meaningfully monitor progress of the realization of the right to adequate housing.

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1. Introduction

This report is the fourth deliverable for the project to prepare a source paper for the Department of Housing's Policy and Research Agenda (Element Five: Expanding Socio-Economic Rights and Access to Housing).

The report explores a rights-based approach to housing, going beyond narrow legal interpretations to look at the emerging international consensus about what the practical implications are for the duties of States in terms of the international right to adequate housing. The practical legal implications of the Grootboom Case and other relevant court rulings, the views of local government and the rights agenda of South African civil society, are also incorporated.

Why is a rights-based approach to housing important? Firstly, in an age of increasing globalization, commitment of States to international and regional human rights policy instruments is becoming increasingly important, and the international right to adequate housing is regarded as a basic human right. Secondly, ever since the Grootboom Case it has become essential that the State pays attention to its constitutional obligations, as the courts have become more assertive around rights issues. Thirdly, citizens and civil society are increasingly mobilizing around their rights (and using constitutional litigation as a strategy). Fourthly, and most importantly, "any society committed to improving the lives of its people must also be committed to full and equal rights for all" (slogan on the cover of the UNDP Human Development Report 2000).

The ultimate objective of the report is to make proposals for the Department of Housing as to how it can revise its policy, programmes and practice so as to meet its constitutional duties and responsibilities with regards to the right of access to adequate housing. The detailed objectives of the report are:

- To determine what the Department's duties and responsibilities with regard to fulfilling the right of access to adequate housing are, given international obligations and guidelines (e.g. Habitat Agenda), the Bill of Rights in the Constitution, policies and legislation, Constitutional Court rulings and resource constraints.
- To describe the processes whereby citizens and civil society influence the substance and content of the housing policy, programmes and legislation.
- To determine what the key components of a rights based approach to housing policy should be, especially with regard to the role of the Department of Housing.
- To assess the extent to which the current legislative/ institutional framework, policy and practice meet housing rights, and to highlight areas of underperformance; proposed policy changes would also be assessed.
- To make recommendations as to how the Department of Housing could adopt a rights-based approach to housing that meets its constitutional duties and responsibilities, including its role of awareness raising of housing rights amongst citizens and civil society.

First of all, the international right to adequate housing and the South African right of access to adequate housing are examined, and the processes whereby these rights are realized through legal/administrative implementation and social/political contestation are discussed. Secondly, the key components of a rights-based approach to housing are determined, grouped under the headings of the duty of the State to respect, protect, promote and fulfill rights. Thirdly, there is an assessment of the extent to which current legislation, policies and programmes (and proposed policy shifts) meet the requirements of a rights based approach. Finally, recommendations are made for the Department of Housing's Policy and Research Agenda.

2. Background: Housing Rights and Processes for their Realization

It is important to recognise that rights are not theoretical concepts on paper, and the interpretation and application of rights are not academic exercises. Rights take many forms, e.g. international human rights, constitutional rights, statutory rights, informal rights, and they impact on many different spheres of life. The way that rights are defined and implemented depends, on one hand, on legal and administrative implementation by the State, and, on the other hand, on social and political contestation between the State and civil society (see Table 1).

Table 1: Rights arenas

Level	Form of rights and domain	Level of operation, institutional framework and authority structure	Legal and administrative implementation	Social and political contestation
International human rights law	Human rights with universal application	International/global level, implemented and monitored through United Nations	 <p>The operation of the legal system, the allocation of resources and the administration of services.</p>	 <p>Economic and social groups seeking to make claims on their rights</p>
Regional law	Human rights which apply to specific regions (e.g. Africa)	International/regional, increasing with power of enforcement		
Constitutional law	National constitutional rights	National level, enforced through constitutional courts and other legal mechanisms		
Statutory law	Statutory rights deriving from criminal, commercial and other law	National or provincial; formal legal system		
Customary, religious and living law	Customary, religious and informal rights and norms, mainly around kinship, the domestic sphere and resource rights	Local level. Customary law is enforced through customary authorities (e.g. chiefs); religious law and living law are not formally incorporated into the national legal system		

Source: Conway et al., 2002.

A new international development paradigm with a strong focus on human rights, strongly associated with the work of the Nobel prize winning economist Amartya Sen, is emerging (see Table 2). The most complete articulation of this approach is found in the United Nations Development Programme (UNDP) Human Development Report 2000, which identified human freedom¹ as the common purpose of both human rights and human development, and strongly focused on the overlap and complementarity between human development and human rights approaches. The Human Development Report 2000 is an extremely important document in terms

¹ Human freedoms include: freedom from discrimination and inequality, freedom from want, freedom to develop and realize one's human potential, freedom from fear, freedom from injustice, freedom for decent work, and freedom of participation, speech and association (UNDP, 2000).

of unpacking what a rights-based approach to development is. An increasing number of development institutions are also adopting a rights perspective for their development policies, for example, the UK Department for International Development (DFID): “DFID maintains that the human rights approach to development provides the rationale for empowering people to take their own decisions. The objective of its Human Rights Strategy is to enable people to be active citizens with rights, expectations and responsibilities” (Moser et al, 2001: 2).

Table 2: Changing development paradigms

Concept	Past approaches	New approaches
Individual interests/ well-being	Income, consumption, individual happiness and fulfillment	Human capabilities and opportunities, with an explicit role for human rights and freedoms
Poverty	Deprivation in income/ consumption/ expenditure	Deprivation in human capabilities such as knowledge, longevity and living standards
Ultimate objective of development	Economic efficiency, maximization of GDP per capita	Human development and “development as freedom”, i.e. the expansion of capabilities and the realization of human rights and freedoms

Source: ODI, 2001.

A rights based approach needs to take a broader approach than a narrow focus on legal obligations² in terms of the Constitution and international treaties. Although legal obligations of the State are a vital part of a rights based approach, a coherent and comprehensive approach needs to be based on more than just legal obligations – international interpretations of what obligations the right to adequate housing and other socio-economic rights impose, the role of rights in human development and poverty alleviation, the political nature of the realization of rights and the role of citizens and civil society in the struggle for the realisation of rights all need to be incorporated into a framework for a rights based approach.

It needs to be borne in mind that, as with any approach, a rights-based approach has both strengths and weaknesses. Its strengths include:

- The realization of human rights is the essence of what human development is about.
- There is a well-developed body of international human rights law that most governments and civil society organisations have at least some commitment to.
- There are well-established international mechanisms for the promotion and monitoring of rights.
- A rights-based approach can facilitate the participation of all roleplayers, including citizens and civil society.
- Rights are enforced by an independent judiciary that is, to some extent, outside the sphere of political interests.

The weaknesses of a rights-based approach include:

- Human rights are indivisible, i.e. they are all equally important; adopting a rights-based approach for all socio-economic rights may be practically unfeasible in some contexts.
- Human rights are sometimes in conflict with each other, e.g. the right to gender equality versus the right to culture, and the right to property versus the right of unlawful occupiers of property not to be arbitrarily evicted.
- Human rights treaties are formulated through political processes, and therefore sometimes lack coherence.

² In this context, a legal obligation is an obligation that a State must abide by in order to comply with a legally recognized and articulated standard or norm. International law creates legal obligations on behalf of States which ratify treaties.

- The legal obligations in terms of human rights are seldom clearly defined.
- Judges, who play an important role in a rights-based approach, are not elected, accountable public representatives.

Given increasing globalization, and the important role of human rights law at the global level, however, adopting a rights-based approach is virtually unavoidable. In order to determine the key components of a rights-based approach to housing, one needs to, firstly, look at the rights themselves and where they come from and what they mean, and, secondly, examine the processes whereby these rights are realized. These issues are examined under two broad headings: housing rights, which looks at the international right to adequate housing, and processes for the realization of housing rights, which look at State and civil society processes for engagement with housing rights.

2.1 Housing rights

Housing rights are looked at in two sections:

- The international right to adequate housing, as expressed in international policy instruments.
- The South African right of access to adequate housing, as expressed in court rulings and interpretations of court rulings and the recommendations of the South African Human Rights Commission.

2.1.1 International right to adequate housing

It is important to look at housing rights in international human rights law for a variety of reasons. Apart from the fact that South Africa has legal obligations in terms of some of the human rights treaties and declarations, Section 39 of the Constitution obliges the Court to consider international law as a tool for interpretation of the Bill of Rights. Section 232 of the Constitution states that customary international law is part of South African law unless it is inconsistent with the Constitution or an Act of Parliament (although most aspects of housing rights are regarded as not having yet attained the status of customary international law). The Grootboom Judgement (para 26) cites Chaskalson: ". . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, ... and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]."

Frequent reference is made to international human rights texts by the South African government and judiciary. The National Action Plan for the Protection and Promotion of Human Rights lists South Africa's international obligations with regard to "housing and shelter" as being guided by Article 25 of the Universal Declaration of Human Rights, Article 11 of the International Covenant on Economic, Social and Cultural Rights, and "the objectives, principles and recommendations contained in the [UN-Habitat's] Global Urban Observatory Programme and Habitat Agenda". Constitutional Court rulings on housing rights (and the South African Human Rights Commission's Reports on Economic and Social Rights) have contained frequent references to the General Comments of the UN Committee on Economic, Social and Cultural Rights – the Grootboom Judgement referred to the General Comments as being "helpful" in understanding the Constitution.

In addition, the international definition of the right to adequate housing is generally more comprehensive and detailed than the way it is being defined in South African courts. Interpretations of the obligations imposed by the international right to adequate housing therefore have an important role to play in determining the key components of a rights-based approach to

housing, and could be an important tool in arguing that a particular strategy meets the requirements of the right to adequate housing.

There are a number of covenants, conventions and declarations, which together form the body of international law recognising housing rights. In legal terms, the most powerful documents are *conventions*, *covenants* or *charters*. They are legally binding treaties for the countries that have ratified or acceded to them, and States Parties³ have clearly identifiable legal obligations to fulfill the particular housing rights provisions contained in the treaty. Countries that have only signed a covenant, convention or charter are generally not legally bound to enforce the rights contained in the treaty, but they are committed to not to actively violate any of the rights in the treaty. United Nations *declarations* (e.g. Habitat Agenda) are accorded less legal weight than conventions, covenants and charters, but they are important political documents that represent the commitment of States towards a particular goal. The *recommendations* of UN treaty bodies are also important, as they are generally regarded as being authoritative interpretations of the treaties. Declarations and recommendations are generally documents of intent, but usually do not create legally binding obligations on the countries that have signed them, although declarations may gain the force of binding law if the declaration in question achieves the status of customary law. *Resolutions* are adopted by bodies comprised of governments, with the exception of the Sub-Commission on Protection and Promotion of Human Rights and some others, which are often comprised of “individual experts”, rather than government representatives. Resolutions generally are not considered to be legally binding (apart from resolutions of the UN Security Council), but the adoption of a resolution constitutes a significant political pledge of the international community towards a particular aim.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, was the first major international agreement on human rights, and was the inspiration for all subsequent human rights treaties. It is now regarded by many lawyers as having achieved the status of international customary law. The Declaration specifically recognised housing rights in Article 25: “Everyone 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, widowhood, old age or other lack of livelihood in circumstances beyond his control”.

Under Article 55 of the United Nations Charter, all UN members make a commitment to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction”. By ratifying human rights treaties, States make additional legal commitments.

International Covenant on Economic, Social and Cultural Rights

The most significant articulation of the international right to adequate housing is found in the International Covenant on Economic, Social and Cultural Rights (1966): “This is the most legally significant universal codification provision recognizing this right and has been subject to the greatest analysis, application and interpretation of all international legal sources of housing rights” (COHRE, 2000).

The Covenant is monitored by the Committee on Economic, Social and Cultural Rights (CESCR). Over 140 countries have ratified it; South Africa signed it in 1994, but has not yet ratified it (although the National Action Plan lists the Covenant as being in the process of being ratified, and explicitly says that South Africa’s international obligations with regard to “housing and shelter” are guided by Article 11 of the Covenant). Article 11(1) of the Covenant states: “The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement

³ States Parties: States which have consented to be bound by a Covenant, Convention or Charter.

of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.” Although South Africa has not yet ratified the Covenant, the fact that it has signed it indicates intent to ratify, and in terms of international law the State should not act contrary to it. The reason why South Africa has not yet ratified the Covenant is unclear.

General Comments are official interpretations or elaborations on a specific right enumerated in an international instrument. General Comments Numbers 3, 4 and 7 are significant General Comments on the right to adequate housing in the Covenant by the UN Committee on Economic, Social and Cultural Rights.

General Comment No. 3 (1990) developed the concept of a minimum core obligation to describe the minimum expected of a State in order to comply with its obligation under the Covenant – i.e. each right has a minimum essential level that must be satisfied by the States Parties. In South Africa, the Grootboom Judgement rejected this approach, for a variety of reasons (e.g. lack of information and the diversity of housing needs).

General Comment No. 4 (1991) articulates the meaning of the right to adequate housing as enshrined in the Covenant. It identifies seven key aspects of adequate housing:

- Legal security of tenure
- Availability of services, materials, facilities and infrastructure
- Affordability
- Habitability: adequate space, and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors.
- Accessibility: Adequate housing must be accessible to those entitled to it.
- Location: access to employment options, health-care services, schools, child-care centres and other social facilities
- Cultural adequacy

General Comment No. 7 (1997) clarifies the obligations of governments with regard to forced evictions.⁴

Other human rights treaties

Apart from the International Covenant on Economic, Social and Cultural Rights, the international human rights treaties of the United Nations that establish committees of experts ("treaty bodies") to monitor their implementation include the following:

- The International Convention Relating to the Status of Refugees (1951) and its 1967 Protocol, which is monitored by UN High Commissioner for Refugees (UNHCR). South Africa acceded to this treaty in 1996. Article 21 states: “As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord refugees⁵ lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”
- The International Convention on the Elimination of All Forms of Racial Discrimination (1965), which is monitored by the Committee on the Elimination of Racial Discrimination

⁴ Forced evictions are defined 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” (General Comment No. 7, Article 3).

⁵ A refugee is “a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country” (COHRE, 2003).

(CERD) – South Africa ratified it in 1999. Article 5(e) (iii) states: “...States Parties undertake to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:... (e) in particular... (iii) the right to housing.”

- The Convention on the Elimination of All Forms of Discrimination Against Women (1979), which is monitored by the Committee on the Elimination of Discrimination Against Women (CEDAW) – South Africa ratified it in 1996: 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.”
- The Convention on the Rights of the Child (1989), which is monitored by the Committee on the Rights of the Child (CRC) – South Africa ratified it in 1995. Article 27(3) states: “States Parties in accordance with national conditions and within their means shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

Another human rights treaty which includes a housing clause, but which South Africa has not yet signed and which has not yet entered force (as only a few States have ratified it) is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). State compliance with this Convention will be monitored by the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families. Article 43(1)(d) states: “Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to... (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents.”

Habitat Agenda and Agenda 21

The Habitat Agenda (1996) and Agenda 21 (1992) are two significant United Nations declarations, which, although they have less legal weight than treaties, still impose certain obligations on the State in terms of the right to adequate housing.

The Habitat Agenda was adopted by the second United Nations Conference on Human Settlements (Habitat II) at Istanbul in 1996. Adopted by 171 countries, including South Africa, it contains over 100 commitments and 600 recommendations on human settlements issues. Article 39 states: “We reaffirm our commitment to the full and progressive realization of the right to adequate housing, as provided for in international instruments. In this context, we recognise an obligation by Governments to enable people to obtain shelter and to protect and improve dwellings and neighbourhoods. We commit ourselves to the goal of improving living and working conditions on an equitable and sustainable basis, so that everyone will have adequate shelter that is healthy, safe, secure, accessible and affordable and that includes basic services, facilities and amenities, and will enjoy freedom from discrimination in housing and legal security of tenure.” The Habitat II Agenda is not as binding as a treaty - it might acquire the status customary international law, but housing rights are not regarded as having attained this status as yet (with the possible exception of forced evictions). It is, however, politically very important, and provides a very comprehensive set of recommendations as to suitable policies to contribute to the realization of the right to adequate housing. In the National Action Plan for the Protection and Promotion of Human Rights, the government explicitly lists the Habitat Agenda as one of the guides to South Africa’s international obligations with regard to “housing and shelter”. In addition, the Department of Housing is required to report to the UN on the implementation of the Habitat Agenda and the realization of the right to adequate housing.

Chapter IV of the Habitat Agenda details recommendations for key components of housing delivery strategies for the realization of the right to adequate housing :

- Enabling markets to work
- Facilitating community-based provision of housing
- Ensuring access to land
- Mobilizing sources of finance
- Ensuring access to basic infrastructure and services
- Improving construction, planning, design, maintenance and rehabilitation

There have been a number of resolutions reaffirming the Habitat Agenda. For example, the UN Commission on Human Settlements resolution entitled “Implementation of the outcome of the second United Nations Conference on Human Settlements (Habitat II),” adopted in 1996, “Reaffirms the commitment to the full and progressive realization of the right to adequate housing, as provided for in international instruments, and in that context recognises an obligation by Governments to enable people to obtain shelter and protect and improve dwellings and neighbourhoods” (Article 5). The international commitment to implement the Habitat Agenda was confirmed by the Millennium Declaration on Cities in 2001. Two campaigns were launched by UN-Habitat in 2000/2001 in support of the implementation of the Habitat Agenda, around what were seen as two key prerequisites for addressing housing problems:

- The Global Campaign for Secure Tenure
- The Global Campaign for Good Governance

Agenda 21

Agenda 21, adopted by the UN World Conference on Environment and Development (UNCED), held in Rio de Janeiro in 1992, is another important UN declaration that includes housing-related issues. For example, Article 7.9(c) states: “All countries should, as appropriate, support the shelter efforts of the urban and rural poor, the unemployed and the no-income group by adopting and/or adapting existing codes and regulations, to facilitate their access to land, finance and low-cost building materials and by actively promoting the regularization and upgrading of informal settlements and urban slums as an expedient measure and pragmatic solution to the urban shelter deficit”. The Department of Environmental Affairs and Tourism is responsible for reporting to the UN on the implementation of Agenda 21.

Other United Nations recommendations

There are also a number of other recommendations as to what the right to adequate housing means in terms of the obligations of the State. General Comment No. 4, as mentioned above, is the most comprehensive, but there are also other international human rights instruments which propose a number of State obligations in terms of the right to adequate housing, for example⁶:

- UN Commission on Human Settlements resolution 14/6, “The Human Right to Adequate Housing” (1993) “encourages all States to take steps according to their available resources, with a view to achieving progressively the full realization of the right to adequate housing, by appropriate means, including particularly the adoption of legislative measures (Article 5).
- United Nations Commission on Human Rights Resolution 1995/12 on the Right to Adequate Housing (1995): “The Realization Of Economic, Social And Cultural Rights: The

⁶ A particularly interesting document is the Draft International Convention on Housing Rights (1994), prepared by the UN Special Rapporteur on Housing Rights: although it never went beyond draft stage, it persuasively fleshes out many aspects of housing rights. Some of it, however, most notably Article 5 (the right of homeless people to immediate access to adequate housing) is at odds with the Constitutional Court’s rejection of minimum core obligations.

- Right to Adequate Housing” , final report submitted by the Special Rapporteur⁷ to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities⁸
- The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1997/19 entitled “Women and the right to adequate housing and to land and property”.

New recommendations on housing rights are planned for the future. In July 2003 there was a meeting in Bangkok attended by housing rights experts from around the world (including various United Nations agencies) and model housing rights legislation was drawn up. The report of the recommendations formulated by the participants is intended to be released in March 2004 under the title of the *Bangkok Guidelines on Model Housing Rights Legislation*.

The African Charter on Human and Peoples’ Rights

There are an increasing number of regional human rights instruments, including in Africa. South Africa has ratified the African Charter on Human and Peoples’ Rights (adopted 1981 by the Organisation of African Unity⁹). “The socio-economic rights contained in the Charter are phrased in a rather broad way, and it is unclear from the text alone what their extent might be” (Amadi, 2002); although it does not specifically mention housing, it is regarded as containing an implied right to housing (Professor Sandra Liebenberg, Community Law Centre). The structures for safeguarding the rights in the African Charter include the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights¹⁰. In 2000, South Africa ratified the African Charter on the Rights and Welfare of the Child (1990), which contains explicit housing rights in Article 20(2).

2.1.2 The South African right of access to adequate housing

The Constitution

The Bill of Rights in the South African Constitution (1996) draws on international socio-economic rights, and Section 26 includes the international right to adequate housing (even though it is phrased as “the right of access to adequate housing”)¹¹. Section 26 states that:

- Everyone has the right to have access to adequate housing.
- The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The other mention of housing (although phrased as shelter rather than adequate housing) is in Section 28(1), where it is stated that: “Every child has the right... (c) to basic nutrition, *shelter*, basic health care services and social services.” “Shelter” is understood as being something less

⁷ Special Rapporteurs are people appointed by United Nations bodies with a mandate to examine and report on specific countries or themes. For example, Special Rapporteurs are appointed as envoys by both the UN Commission on Human Rights and the UN Sub-Commission on the Promotion and Protection of Human Rights to monitor human rights violations in specific countries or to monitor specific areas of human rights, such as housing.

⁸ Now known as the UN Sub-Commission on Promotion and Protection of Human Rights.

⁹ The Organization of Africa Unity (OAU) has been succeeded by the African Union.

¹⁰ The Protocol on the African Court on Human and Peoples’ Rights will enter into force once it has been ratified by 15 countries.

¹¹ In practice “the right of access to adequate housing” and “the right to adequate housing” mean the same thing, as both are interpreted as including the concept of progressive realisation, although it could potentially be argued that the former excludes the concept of minimum core obligations/ entitlements. The two terms are used interchangeably in the report, with the latter only being used where S. 26 of the Constitution is specifically being referred to.

than “adequate housing”, and this right is not qualified by reference to “available resources”. As a result, it has been argued that Section 28(1) gives children a minimum core entitlement to “shelter” – the Constitutional Court has rejected this argument, ruling that a direct entitlement only exists for children who have been orphaned, abandoned or removed from parental care, and not for children living with their parents (who would fall within the ambit of Section 26(2))¹².

Section 7(2) of the Constitution requires the State “to respect, protect, promote and fulfill the rights in the Bill of Rights” and the courts are “constitutionally bound to ensure that they are protected and fulfilled” (Grootboom Judgement). The justiciability¹³ of these rights was confirmed in the certification of the Constitution.¹⁴

Significant court rulings

There have been a number of cases testing the justiciability of the socio-economic rights in the Constitution. The case of *Soobramoney v. Minister of Health, KwaZulu-Natal* (1998) was the first socio-economic rights case in South Africa (see Box 1), and created the impression that “the courts will not lightly interfere with the State’s failure to protect, promote and fulfill socio-economic rights when the state pleads that the required resources are not available” (Majola, 1999). This impression was soon to change.

Box 1: Soobramoney v Minister of Health, KwaZulu-Natal (Constitutional Court, 1998)

Soobramoney, an unemployed man with chronic renal failure associated with diabetes, required ongoing dialysis treatment, otherwise he would die. He was refused this treatment by the State, because he did not meet their criteria for dialysis treatment – i.e. he was not eligible for a kidney transplant because he had heart disease. He applied to the court for a court order directing the hospital to provide him with ongoing dialysis treatment, and restraining the Provincial Minister of Health from refusing him admission to the renal unit of the hospital. The High Court dismissed the application, after which he appealed to the Constitutional Court, arguing that patients who suffered from terminal illnesses and required treatment to prolong their lives were entitled to be provided with such treatment by the State in terms of Section 27(3), which guarantees the right to of everyone not to be denied emergency treatment, and Section 11, which guarantees the right to life. The Court found that, given the constraints of available resources (there were more people suffering from renal failure than there were dialysis machines to treat them), the guidelines drawn up by the hospital authorities for determining patients who qualified for dialysis treatment were reasonable, and the guidelines had been rationally and fairly applied in the case of Soobramoney. The Court therefore refused to order the provision of the treatment. Soobramoney subsequently died due to the lack of dialysis treatment.

The case of *The Government of the Republic of South Africa and Others v. Irene Grootboom and Others* (2000) was the first case to demonstrate the justiciability of socio-economic rights in South Africa (see Box 2). The General Order granted by the court was that: “Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realize the right of access to adequate housing. The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme¹⁵, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”. The Grootboom Judgement has enormous implications for socio-economic rights in general and housing in particular. One of the weaknesses of the Grootboom Judgement, however, is the lack of clarity over the last sentence

¹² See Section 3.3.4 for further discussion of children and housing rights.

¹³ Justiciability is the ability to utilize judicial remedies as a means of enforcing legal rights, obligations, standards, and norms.

¹⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South African Constitution* 1996 (4) SA 744 (CC) (*In re Certification*), 1996 (10) BCLR 1253 (CC) at paras 76–8 (first certification judgement).

¹⁵ The Accelerated Managed Land Settlement Programme was an emergency housing programme formulated and funded by the Cape Metropolitan Council.

used in the General Order - the consensus seems to be that “people... living in intolerable conditions or crisis situations” is the key term (and that “no roof over their heads” is an example of people in intolerable conditions), and subsequent court rulings have agreed with this interpretation. The definition of “intolerable living conditions” is still being defined in the courts. It could be argued that almost all households who do not have adequate housing are living in intolerable living conditions, but the parameters have as yet not been fully tested. There are likely to be further cases which will define what the various categories of intolerable living conditions are or are not.

Box 2: Government of the Republic of South Africa and Others vs. Irene Grootboom and Others (Constitutional Court, 2001)

In September 1998, 900 people (including 510 children) from the overcrowded informal settlement of Wallacedene moved out and occupied a nearby vacant piece of privately-owned land. The landowner obtained an eviction order, and in May 1999, the respondents were evicted and their homes bulldozed and possessions destroyed. The residents returned to Wallacedene, where they were forced to live on the sportsfield. The community took Oostenberg Municipality, the Cape Metropolitan Council, the Premier of the Province of the Western Cape, the National Housing Board and the Government of the Republic of South Africa to court to attempt to ensure that the municipality would meet its constitutional obligations and provide temporary accommodation. The Cape High Court ruled in favour of the Grootboom community and ordered the municipality to provide temporary accommodation to households on the basis of Section 28(1), the right of children to shelter, until such time as the families are able to provide shelter for the children themselves. The National Government and the other respondents appealed to the Constitutional Court (largely on the basis that if they were “compelled to provide shelter on a temporary basis as ordered by the Cape High Court, ... the entire housing budget would be swallowed not only by the provision of temporary shelter as determined by the Court but also by the maintenance of these shelters and the services required to be provided”. The Court rejected the Cape High Court’s view that Section 28(1) conferred a minimum core entitlement, and focused on Section 26(2), using a test of “reasonableness”. The Court decided that, although the housing programme satisfied most of the requirements of the reasonableness test, it was nevertheless unreasonable in that “no provision was made for relief to the categories of people in desperate need”. The state was therefore found to be in violation of section 26(2) of the Constitution. Accordingly, a declaratory order was made requiring the government to act to meet the obligations imposed on it by section 26(2), which included the obligation to devise, fund, implement and supervise measures aimed at providing relief to those in desperate need. Because the Case was argued on the grounds of Section 26 and 28 of the Constitution, the relief was ordered on these grounds only; a voluntary commitment by Oostenberg Municipality and Western Cape Provincial Government to provide basic services and temporary accommodation was also made part of the court order (and in practice, it took almost a year before the Grootboom community actually received their basic services).

The principles for State policies and programmes arising from the Grootboom Judgement are (Liebenberg, 2002):

- The State must establish comprehensive and coherent programmes capable of facilitating the realization of the right.
- The measures (legislation, policies, programmes) adopted by the State must be “reasonable” within their social, economic and historical context and within the availability of resources.
- The needs of the most vulnerable require special attention, e.g. the State must “devise, fund, implement and supervise measures to provide relief to those in desperate need”, e.g. an accelerated land release programme for people in dire circumstances.
- The State must examine legal, administrative, operational and financial barriers to accessing socio-economic rights and, where possible, take steps to lower them over time so as to ensure the progressive realization of the right, e.g. so that a larger number and wider range of people can get access to adequate housing over time.
- Responsibilities and tasks must be clearly allocated to different spheres of government and the appropriate financial and human resources must be available.
- Policies and programmes must be reasonably implemented, e.g. must be adequately resourced and not hindered by bureaucratic inefficiency or onerous regulations.

Other notable housing-related cases have included the Kyalami Ridge Case (see Box 3), the Modderklip Case(s), the Rudolph case, the Baartman Case and the Sheffield Road Case, which reinforce the decisions in the Grootboom Judgement¹⁶. For example, in the Rudolph Case, some of the findings of the Cape High Court were that (Mohamed, 2003):

- The housing policy must make short term provision for people in a crisis or desperate situation.
- The housing policy must give adequate priority and resources to the needs of people who have no access to a place where they can lawfully live.
- The allocation of housing must have adequate regard to relevant factors such as the degree and extent of the need of the applicants, as well as the length of time an applicant for housing has been on the waiting list.

Box 3: Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Constitutional Court, 2001)

After floods displaced people in Alexandra, the government decided to establish a transit camp on state-owned land at Leeuwkop prison as a temporary measure. This was opposed by the surrounding residents of Kyalami Ridge, who asked the High Court to stop the Minister of Public Works and the contractor from establishing and constructing the camp, as the proposed transit camp was in contravention of legislation and regulations, and the surrounding residents had not been consulted. The High Court found in favour of the Association and granted the interim interdict. The government appealed to the Constitutional Court. The Constitutional Court decided that, in terms of the Grootboom interpretation of section 26(2) of the Constitution, the State's obligations included providing temporary relief for people who were living in intolerable conditions and for people who were in crisis due to such natural disasters as floods and fires, or because their homes were under threat of demolition. It was therefore held that the decision by government to establish a temporary camp was lawful, as it was intended to give effect to its constitutional obligations.

Although not housing related, in the TAC Case (see Box 4), the Constitutional Court for the first time intervened in making a policy choice (which had major budgetary implications). Although some have seen this as being a fundamental change that shows the Courts may be more willing to get involved in policy choices, it has been argued that in this particular case there was only one reasonable choice (i.e. anti-retrovirals); in the context of housing, however, there would generally be a range of reasonable policy options available to fulfill any particular objective, so the Court would probably be wary of intervening in policy choices.

Box 4: Minister of Health and Others v Treatment Action Campaign and Others (Constitutional Court, 2002)

The Treatment Action Campaign (TAC), Dr Haroon Saloojee and the Children's Rights Centre (CRC) challenged the government's policy on the prevention of mother-to-child transmission of HIV (the government's programme allowed the use of Nevirapine at a limited number of pilot sites, but for about 90% of all births, public sector doctors were prevented from prescribing the drug for their patients). The government was ordered to, "without delay", remove the restrictions on the use of Nevirapine and to facilitate the use of it where this is medically indicated, and to take reasonable measures to extend testing and counselling facilities throughout the public health sector to facilitate and expedite the use of Nevirapine for the purposes of reducing the risk of mother-to-child transmission of HIV.

The South African Constitutional Court rulings on socio-economic rights, such as the Grootboom and TAC Cases, have differed from international human rights law in the focus on collective rights to a "reasonable policy", rather than individual rights to a minimum core entitlement. This is

¹⁶ Modderklip Boerdery v. Modder East Squatters and Another (High Court, 2001) & Modderklip Boerdery v. President of the Republic of South Africa and Others (High Court, 2003); The City of Cape Town v. Neville Rudolph and Forty Nine Others (High Court – Cape of Good Hope Provincial Division, 2003); Cecil Baartman and Eleven Others v. Port Elizabeth Municipality (Supreme Court of Appeal, 2003); The City of Cape Town v. The Various Occupiers of the Road Reserve of Appellant Parallel to Sheffield Road in Philippi (High Court – Cape of Good Hope Provincial Division, 2003).

possibly because of sensitivity of the Court to the budgetary constraints of the States (as was first demonstrated in the Soobramoney case). “Reasonableness” is fairly subjective concept, however, and the debate on minimum core obligations/ entitlements is not yet over – minimum core obligations are still strongly advocated as a way of supplementing the Court’s approach based on reasonableness (e.g. Bilchitz, 2002). One respondent pointed out that although the minimum core obligation approach whereby every individual is entitled to a bare minimum has been rejected by the Constitutional Court, the emphasis on the most vulnerable in the Grootboom Judgement does have some resonance with a minimum core approach. The approach of the Constitutional Court has also been criticised for focusing primarily on the procedural defects - coherence, comprehensiveness and coordination - of government policy, rather than upon the substantive interests at stake in cases concerning socio-economic rights” (Bilchitz, 2003).

2.2 Processes for the realization of housing rights

The processes for the realization of housing rights are discussed in two sections:

- The formal institutional framework for monitoring/enforcing rights
- Civil society engagement with housing rights

2.2.1 Institutional framework for housing rights

The institutional framework for housing rights is discussed in six sections:

- International/regional bodies
- The judicial system
- South African Human Rights Commission
- National Government
- Office of the Public Protector
- Local authorities.

International/ regional bodies

At international and regional level there are a variety of United Nations and African Union bodies involved in the enforcement and monitoring of human rights, such as the United Nations Commission on Human Rights (UNCHR) and the African Commission on Human and People’s Rights (ACHPR). There are certain reporting requirements, most notably, South Africa is required to report to the UN on the implementation of the Habitat Agenda and the realization of the right to adequate housing.

The judicial system

The Constitution of the Republic of South Africa (1996) is the supreme law of the country and binds all legislative, executive and judicial organs of the State at all levels of government. In terms of Section 165 of the Constitution, the judicial authority of South Africa is vested in the courts, which are independent and subject only to the Constitution and the law. No person or organ of State may interfere with the functioning of the courts, and an order or decision of a court binds all organs of State and persons to whom it applies.

S. 9. of the Constitution states that “Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms.” The judicial system is responsible for protecting the rights in the Constitution (S. 38 of the Constitution says: “Anyone... has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief...”). The Constitutional Court, Supreme Court of Appeal and High Court are responsible for constitutional matters, e.g. ensuring that legislation, policies and programmes comply with rights are constitutional matters. “A constitutional matter includes any issue involving the interpretation,

protection or enforcement of the Constitution (S. 167(7)). "Courts of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation..." (S. 170).

High Courts are responsible for making decisions on most constitutional matters (apart from those matters reserved specifically for the Constitutional court in S. 167(4), e.g. deciding on the constitutionality of amendments to the Constitution, and the Supreme Court of Appeal decides appeals against High Court decisions. The Constitutional Court is the highest court in all constitutional matters. With the leave of the Constitutional Court, matters can be brought directly to the Constitutional Court, or can be appealed directly from the High Court. Of great importance in the enforcement of rights is the provision that the Constitutional Court "makes the final decision whether an Act of Parliament, a Provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force" (S. 167(5)).

The Constitutional Court has increasingly shown a willingness to intervene in policy issues where there is a perceived violation of rights, most notably in the TAC Case. The example of the Grootboom Case, however, where the interim order to provide emergency services to the Grootboom community took almost a year to implement and where the general order to formulate a national programme for emergency housing took about three years to implement, demonstrate the Constitutional Court's weakness with regard to the enforcement of decisions. Although there was lack of clarity over whether or not the South African Human Rights Commission had a mandate to monitor the enforcement of Constitutional Court decisions, in the case of the Grootboom Case it did so voluntarily.

Access to the courts requires lawyers. For people unable to afford lawyers, there is a legal aid system (in the form of Justice Centres) run by the Legal Aid Board. The Legal Aid Board is an independent statutory body established in terms of the Legal Aid Act of 1969. Its objectives are to provide legal services to indigent people and to provide legal representation to those constitutionally entitled to it. Criminal defence work makes up the bulk of legal services provided by the Board. Other priorities which the Board has identified, are vulnerable groups, especially women and children, and the landless and rural poor. In civil matters, a legal applicant is obliged to qualify in terms of a means test, and civil claims which do not have a reasonable prospect of success are also excluded from the civil legal aid scheme. The Board used to provide legal aid and representation mostly through legal practitioners in private practice, but due to excessive costs and abuse by some lawyers, the Board is moving towards a scheme in which most legal aid and legal representation will be provided by salaried legal practitioners employed by the Board. There are currently 50 Justice Centres throughout South Africa; by 2004, the Legal Aid Board plans to have a national network of 60 Justice Centres (GCIS, 2003).

South African Human Rights Commission

The South African Human Rights Commission (SAHRC) is, in terms of Section 184(1) of the Constitution, is responsible for:

- Promoting respect for human rights and a culture of human rights
- Promoting the protection, development and attainment of human rights
- Monitoring and assessing the observance of human rights in South Africa

Section 184(2) of the Constitution gives the Commission the power "to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate." In particular, Commission "must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment" (Section 184(3)).

Some civil society stakeholders interviewed regarded the SAHRC as being too technocratic and not participatory enough. The SAHRC recognizes this, however: "The Commission has been

criticised for its failure to follow-up on reports and for producing long and inaccessible reports. The Commission is in the process of revisiting these aspects of the reporting process, and also of seeking more active civil society participation in the process” (McClain, 2002). For the present, though, the SAHRC’s Reports on Economic and Social Rights have an over-reliance on information provided by the National and Provincial Departments of Housing, with little participation by, or consultation with other stakeholders. This is a serious shortcoming as much of the information provided by the State is inadequate: “The reports provided by the government departments still indicate a lack of understanding of the significance of this exercise... In general, government departments still provide information that is incomplete, contradictory, repetitious and not relevant...” (SAHRC, 2003a: 50). It is also not clear how the recommendations are intended to be followed up by the Commission. Nonetheless, the recommendations in the Reports on Economic and Social Rights represent the recommendations of the body with the constitutional responsibility for monitoring socio-economic rights in South Africa, and are therefore extremely important.

The South African Human Rights Commission initiated the process that culminated in the adoption of the National Action Plan for the Promotion and Protection of Human Rights (NAP). This was drawn up in terms of the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in Vienna, Austria in 1993, and was officially deposited with the United Nations in 1998. “The NAP is a valuable tool in the hands of both government and civil society to monitor compliance with human rights” (Pityana, 2000). In terms of the NAP, the National Consultative Forum on Human Rights (NCFHR) was launched in 2000, and is intended to “ensure coordination of human rights provisions across government departments” (Pityana, 2000). The South African Human Rights Commission has also established the National Centre for Human Rights Education and Training.

National Government

The Department of Housing is mainly responsible for the obligations of the State in terms of the right of access to adequate housing. This responsibility used to be shared with the Department of Land Affairs, which was responsible for all land and tenure legislation, but the Department of Housing has now taken over responsibility for the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (1998), which protects unlawful occupiers of land in urban areas against arbitrary eviction.

The Department of Justice and Constitutional Development is the government department responsible for the National Action Plan on the Promotion and Protection of Human Rights and the National Consultative Forum on Human Rights (NCFHR).

Office of the Public Protector

The Office of the Public Protector, in terms of Section 182 of the Constitution, is required to investigate, report on and take appropriate remedial action regarding “any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice”.

Local authorities

Local authorities are at the coal face of housing rights issues – they are the sphere of government directly involved in issues relating to the violation of housing rights (e.g. evictions), and are usually the point of engagement with the State by citizens and civil society.

This section is based on the responses to a survey of local authorities’ views on housing rights issues. The responses generally show that local authorities are not well-versed in the implications of a rights-based approach and that significant education of their responsibilities in this regard may be necessary.

Most of the local authority respondents displayed a good understanding of a definition of adequate housing, mentioning features that referred to the adequacy of the dwelling as well as the need for basic services, infrastructure, facilities, and the need for housing development to be well located, but only one respondent specifically referred to a right to housing in the context of the obligations stated in the Bill of Rights and the Constitution. That same respondent was also the only one to mention the need for protection of housing rights, such as through protections from evictions. A lack of reference to policy around protections from evictions may indicate a lack of understanding of the legal obligations in this regard, at least amongst the housing department officials or municipal managers that were targeted for the survey. When asked how the local authorities contribute to the fulfilment of the right to adequate housing, responses focused on the number of houses delivered and on the local authority efforts to provide basic services and to upgrade informal settlements.

Confusion created by differing messages and conflicting policy from provincial versus national level government was cited by local authority respondents as impeding housing delivery. Additionally, there was confusion about the varying priorities at national level and how important housing was. Given the growing backlog noted by most respondents, the budgetary allocations were not sufficient to address this. One respondent wondered: "The question is: is the provision of housing the core function of local authorities? If yes, the national policy is not very clear. If housing is the high priority at national level, then all local authorities should align their responsibilities and resources to meet this obligation."

While acknowledging their role in identifying suitable land for development, local authority respondents did frequently indicate that land availability was a major constraint. This, of course, was related to a number of other problems, as one respondent noted: "The major constraints are funds, resources, well-located developable land, cost increases, delays in project approvals, the inability of households to afford the R2479 contribution. The raw land cost component as stipulated by the subsidy (i.e. R1000 per site maximum) is unrealistic and not market related. This hinders the municipality from providing housing in well-located areas where households can have access to a range of opportunities." Another problem in designating land for housing development is the lack of adequate funding for bulk infrastructure, and a respondent suggests such funding should be available from national government.

Although some respondents expressed the need to prevent further land invasions, most respondents displayed a particular concern with meeting the needs of existing informal settlements, and several indicated they were involved in *in situ* upgrading projects or planning. Two municipalities specifically mentioned the development of an informal settlement upgrading strategy was in progress. Constraints in carrying out such strategies that were mentioned included: the inability to address the servicing needs of informal settlements on private land; the lack of personnel qualified to manage informal settlement upgrading; and the lack of a national subsidy for servicing and *in situ* upgrading of informal settlements.

There were many suggestions from local authorities for how to improve the policy, legislative and regulatory environment in order to improve their ability to expand the right to housing. One respondent from one of the larger cities advocated for more flexibility for local authorities as well as more funds: "The local authority should be the driver of housing projects but should not exclude NGOs, CBOs or private developers as developers as is the current policy. Current policy, legislation and regulations are not sufficiently flexible. Local authorities should be accredited to approve all housing projects in their area, including their own. Funds should be allocated annually from the national or provincial government to local authorities based on a multi-year housing programme and the operational costs of undertaking the housing function should also be covered by a grant. Municipalities should be allowed to develop a range of different housing solutions including current housing, site and service, emergency housing, backyard shack improvements, transitional shelter, and housing for special needs groups." Several respondents specifically mentioned the need for programmes to assist in the development of inexpensive rental housing as

well. And several respondents felt that the means of financing projects was unnecessarily bureaucratic and caused cash-flow problems at local level; there should be money available up-front for projects.

There was a great deal of concern in the responses with sustainability, particularly with regard to payment for rates and services, and several responses mentioned the municipalities' obligations around housing extended to promoting economic development. One respondent referred to the need to develop and manage housing programmes with long-term considerations in mind: "The various forms of housing subsidies that are available currently do make an important contribution towards the right to housing. However, their long-term sustainability is, in my view, questionable, as mechanisms to ensure that beneficiaries continue to meet their long term obligations are non-existent. In my view these programmes are short-sighted and fail to realise that a house is a product with a life-cycle which extends beyond the project life cycle."

2.2.2 The engagement of citizens and civil society with housing rights

The "realization of socio-economic rights is a profoundly political process" that is partially contingent on "civil society mobilisation and pressure to ensure the steadfastness of state commitment and effectiveness of state capability" (Pieterse and Van Donk, 2002: 6). Civil society organizations have an important role to play in advocating a rights-based approach and in monitoring rights, as the Treatment Action Campaign (TAC) has successfully done regarding HIV/AIDS issues. The example of TAC shows how the struggle for the fulfillment of rights can be largely a political battle for hearts and minds – one respondent said that "the case had been won before they even set foot in the court". The way that citizens and civil society organizations perceive and access rights are therefore important in determining the content of rights - "It is important to have politically independent CBOs and NGOs that can act as a check against the actions of government and monitor the role of government, for example, with respect to the right to adequate housing" (BESG, 1999: 40)

Civil society organizations involved in housing-related issues include:

- NGOs engaged in research and information dissemination on rights issues, e.g. Community Law Centre (CLC) at the University of the Western Cape, National Association of Democratic Lawyers (NADEL) Human Rights Research and Advocacy Project (HRRAP), Centre for Socio-Legal Studies (CSLS) at the University of Natal-Durban.
- NGOs engaged in helping people access housing rights – either through resisting rights violations, e.g. the Legal Resources Centre (LRC) and Housing Consumer Protection Trust (HCPT), or through proactively fulfilling housing rights, e.g. affiliates of the Urban Sector Network (USN) and People's Dialogue/ uTshani Fund.
- CBOs involved in engaging with rights issues either through resistance to State policies (Landless People's Movement in Gauteng, Anti-Eviction Campaign in the Western Cape) or through proactive actions and engagement with the State (e.g. Homeless People's Federation)
- Advocacy and lobbying campaigns often take a rights-based approach, e.g. the BESG/USN Right to Adequate Housing Campaign of 1999/2000. The People's Budget Campaign is also partially based on rights issues.

The ways in which rights are engaged with, and accessed, can be grouped into four main categories:

- Legal advice/ litigation: assisting communities and individuals facing eviction.
- Advocacy and lobbying: campaigns around housing rights, lobbying for policy changes.
- Research/ information dissemination: interpretations of court rulings, manuals on how citizens can access rights, reviews of international literature on rights issues, etc.
- Proactive involvement in housing delivery: assisting communities with accessing adequate housing through provision of technical support, training, credit, etc.

Many of the above strategies involve civil society either opposing the State through litigation or protest action, or at the opposite end of the continuum, acting almost as a service delivery agent for the State and assisting the State in the implementation of its housing programmes. In between these two ends of the continuum, there are also a limited number of official avenues for citizens and civil society to input into decision-making on housing issues. They include:

- Representation of civil society on official structures, e.g. National Task Teams, Western Cape Provincial Housing Development Board (the boards in other provinces have all been disbanded), the Western Cape MEC's Housing Partnership Committee, etc.
- Engagement in formal housing policy processes: written submissions on draft policies/legislation, attending formal stakeholder workshops/ Imbizos (e.g. National Housing Summit, NGO/CBO workshops on Western Cape Provincial Housing Plan and City of Cape Town Housing Plan) and oral submissions to Portfolio Committees.
- General local authority participation processes: attending council meetings, and participation in IDP processes and Ward Committees.

Although there are some official avenues for the active engagement of citizens and civil society with the State, which can facilitate the accessing of rights, in practice this participation is infrequent and uneven, for example, many provinces did not have any participation processes for their Provincial Housing Development Plans, many policy changes are unilaterally introduced at short notice, people from civil society appointed to official structures are often there in their personal capacity rather than as accountable representatives, deadlines for comment on draft policies are often unrealistically short and participation meetings are often arranged at inconvenient times and are not well advertised.

Although there has been local level mobilization about actual or planned evictions of particular informal settlements and about evictions of people for non-payment of rates and service charges in particular municipalities¹⁷, it is noteworthy that there has been no mass national mobilization around housing rights comparable to, say, the Treatment Action Campaign (TAC) in the HIV/AIDS sector. This is possibly because the concepts of adequacy of housing and progressive realization are not as clear cut as, for example, whether or not anti-retrovirals should be provided to pregnant women¹⁸. The only notable example of a SA campaign specifically on housing rights was the BESSG/USN Right to Adequate Housing Campaign of 1999/2000, funded by the European Union Foundation for Human Rights. This involved a publication (*Towards the Right to Adequate Housing*) for housing practitioners, a pamphlet for citizens, and a series of workshops and seminars across the country and it received fairly extensive media coverage. This campaign was largely based on international definitions of adequate housing and what this right entailed.

Despite the lack of high profile housing rights campaigns, the civil society stakeholders interviewed for this report generally have both a very clear understanding of what a right to housing in a broad sense is meant to consist of in South Africa, and a very strong belief in the central, activist role the State must play in expanding access to those rights. At the same time, there was also considerable frustration evident over the slow pace of delivery, the failure of the housing that has

¹⁷ For example, a 2002 press release of the Landless People's Movement in Gauteng, which was engaged in protest action against the planned relocation of a number of informal settlements in Gauteng, said "the City of Joburg and other structures of the government are waging war against the poor and landless. The police and the infamous "Red Ants" (Wozani Security) are deployed as the footsoldiers of the government in a war which aims to force hundreds of thousands of poor people out of their homes to distant open velds where many will die from exposure to the winter environment. These actions are undertaken completely outside of the law, in the absence of any proper consultation or procedures, and with total disregard of the basic human rights of the poor residents of informal Joburg" (LPM, 2002).

¹⁸ A study of the perceptions of housing subsidy beneficiaries commissioned by the Department of Housing found that, although "beneficiaries' experiences and perceptions of their new houses are almost universally negative", the mere fact that there has been some delivery and some improvement in their lives has meant that "they generally believe the government has done well and has fulfilled its promise to deliver housing" (Zack and Charlton, 2003: 50).

been developed to meet the criteria of adequate housing, the ways in which the State is actually violating housing rights through evictions, and the failure to demonstrate a commitment to real participation by communities and organizations of civil society in policy and implementation processes, particularly at the local level where most of the engagement is (at least initially) attempted. While stakeholders took various approaches in trying to assist communities to access housing rights, there was a recognition that the strategies of confrontation and direct action are becoming increasingly likely as the only means people find it possible to make their demands heard.

A rights-based approach to housing has influenced the thinking and practice of all of those interviewed. While they all squarely put the responsibility on the State to ensure that this right is to be extended to the greatest numbers of people (particularly poor people) possible, those interviewed understood that the right is qualified to some degree. However, civil society stakeholders are unlikely to agree with government about the extent to which the right is qualified. Those interviewed continually called for the State to vigorously engage civil society around such definitions and distinctions, which has so far been non-existent or at best inadequate. All interviewed viewed poor people not as passive recipients, but as active participants in meeting their housing needs, the potential of which should be more effectively unlocked, but also that the state had a very strong obligation to provide sufficient resources to ensure that the poor would be able to secure adequate housing and would be protected against losing it due to unemployment or other vulnerability. One respondent articulated the importance and meaning of a rights-based approach as follows: “A rights-based approach is central to the issues we’re dealing with, at the heart of the whole question around housing. The main point is that it’s not just something on a piece of paper, not just done out of goodwill, but something fundamental that no one can do without-- it is fundamental to survival, to grow and develop.... It is one of the key demands that we fought for under apartheid ... housing is one of the concrete ways people understood what democracy would mean for them, what rights mean to them. ...The right to housing has to do with people’s dignity—where is the dignity in a little brick shack? Right to housing must be meaningful, people must be uplifted, their dignity restored, poverty alleviated, they must have the opportunity to grow. A fundamental thing to any family is shelter, a home, and this is also central to democracy, the exercise of our democratic rights.”

Those interviewed had an awareness of the multi-faceted nature of the definition, viewing housing in the context of its total environment. Many of the tenets of the Habitat Agenda definition of adequate housing appear in the responses - shelter is seen in the context of access to land, security of tenure, appropriate location, access to services, availability of community facilities, etc; and respondents also commented on the quality of the structure in terms of providing adequate protection, space, ventilation, etc. Many respondents emphasised affordability as being a central concern in the definition, that people have a responsibility to pay for housing and services, but only “within their means”, and that these rights shouldn’t be threatened because of a lack of ability to pay (particularly applicable to the issue of payment for services). For some respondents, this means that housing and service solutions can be tailored to the income levels of the target groups, so that households with marginal, irregular incomes are not automatically put into houses with high service and/or maintenance costs when they can’t expect to maintain these costs and can even lose their housing by defaulting on them. Instead, the obligation may be to make sure that people with marginal incomes at least have security of tenure and basic services, and assistance to develop their homes over time. But again, for people who are already in formal housing who may become unemployed, assistance to keep people in their homes is seen as a priority, and eviction is seen as an unacceptable solution.

Of paramount concern for all respondents was the issue of the location of land and housing options - the need for appropriately located land for the poor had to be an integral part of the definition of adequate housing. There were very strong objections to the reality that the poor are still located on the periphery of the city, despite the end of apartheid, developing a legacy of “the post-apartheid ghetto,” in the words of one respondent. Respondents expressed the view that it is a myth that there is no available, properly located land, and that integrated locations are too

expensive to develop housing for the poor—more often, respondents cited the lack of political will to designate such land as being the major stumbling block—the development of specific plans to exclude the poor from better located areas, the insistence on building codes that are not appropriate to providing settlement for the poor and the lack of innovation regarding the provision of affordable social and rental housing.

Linked to the issue of location, though, is the very strong sentiment expressed by many respondents that people should not be removed/evicted from the places where they have been living and have already developed livelihood strategies. In fact, removal of people from well-located areas, such as Alexandra Township in Johannesburg through the Alexandra Renewal Project, is seen as symptomatic of the disregard for the needs of the poor: “There is a *reason* people have been living in an area for a long time. Rather than relocate them, formalise their rights to the area they are in now, (then develop the area). They are living there, they have their own society, ask them what they would prioritise” noted one respondent. Similarly, another respondent commented, “If we want to improve people’s lives, the *last* thing we need to do is to forcibly evict them from the communities they’ve established”.

Though aware of international agreements that South Africa is a signatory to, and supportive of the goals of these documents, respondents seemed sceptical that these actually have much influence on expanding access to a right to housing for South Africa in practical terms: “I would hope international agreements have an influence on policy. International agreements are nice to have, but who really monitors implementation? If that information doesn’t filter down, what good is it?” commented one respondent. On the other hand, there seems to be at least qualified agreement that the influence of court cases that challenge the actions of the state on the basis of Constitutional rights has some potential for success: “Court rulings are important—they are the only way you can enforce the right to housing”. The legal route is not seen as unproblematic, however: “At the legal level, it is a key strategy that we are employing because there is some space for manoeuvring, but this space is becoming smaller. Through amendments to the protection from illegal evictions, they want to take these minimal protections away. We don’t have enough legal organisations taking up these cases, and this has left people demoralised with the legal system. If you can’t pay them, lawyers won’t take up a case” protested one respondent. “The law is not accessible, it doesn’t work in favour of the poor—and it is very, very hard to get legal representation for the poor” noted another.

Respondents typically cited the housing subsidy programme as the major vehicle for extending housing rights, and were quite clear that it does represent an achievement. Respondents found it difficult, however, to make this statement without also listing the number of flaws in the implementation of the subsidy programme, especially its failure to facilitate integrated development in well-located areas as part of the housing delivery programme, and its failure to even keep pace with the growing backlog. It is important to note that respondents tended not to take issue with the *policy* governing the subsidy programme itself, which was generally viewed positively, as much as with the problems in its implementation. There was concern expressed, however, regarding the contribution now required of beneficiaries¹⁹, putting subsidy housing out of reach of many households, and the inflexible procedures and standards, particularly the lack of bridging finance. The policy requiring Integrated Development Planning was seen as a gain, with the criticisms again in terms of poor implementation. Other gains noted were housing consumer protection measures and the recent commitment to a housing consumer education framework, and the establishment of legal aid/ legal support centres which could potentially contribute to housing rights.

In terms of strategies of engagement with the right to housing, civil society respondents saw themselves in three key roles:

- Promoting awareness of rights, and capacity-building of local communities to engage with securing their right to housing

¹⁹ The R2479 monetary contribution required to access a housing subsidy (other than for People’s Housing Process projects and “indigent” or disabled beneficiaries).

- Promoting innovation in the implementation of housing, settlement and service programmes
- Engaging in policy, legal challenges or political engagement with the State around the meaning and practice of expanding the right to housing.

The awareness, education and capacity-building role was seen as a critical first step by many respondents. There was a sense that many poor people were unaware of their rights, but in particular were unaware of how they could attempt to secure these rights, and that they generally lacked the information and support needed to do so. In addition, some noted the fear of repercussions from government. “I don’t think there have been sufficient (court) challenges (yet)—this form of challenging the state is fairly new: it needs to develop over time. The stigma of being ‘unpatriotic’ if you do these things are severe deterrents to challenging government when they are not performing. We need to overcome these issues before we have a society that will exercise its rights before even thinking about it. There is a whole lot of education necessary before people will know that there is recourse,” observed one respondent. Another cited the lack of support for individuals and communities facing housing problems, “People still don’t know where to go to get their problems addressed—there were supposed to be housing advice offices developed, but this never happened. 65% of the people coming here are coming to ask for information; they are looking for a one-stop shop. There isn’t that avenue for them.” Capacity-building in communities to engage with government on issues of concern to them is also a long-term process, and is limited as well by a lack of capacity (or unwillingness) by government to respond to or engage with communities constructively.

A number of respondents were directly engaged in efforts to implement housing and settlement programmes. These organisations often use government programmes as the basis for their projects, but add the element of innovation in order to demonstrate or extend certain key components that add value to the process – “being on the cutting edge of demonstrating alternatives”. These may be environmental innovations, design innovations, financing innovations, etc., but central to these approaches is the direct participation by those affected or benefiting from the programme in developing solutions that suit that community so that it is also a capacity-building and empowering process. One respondent noted that there was a need to involve key government personnel in such projects so that the learning process could be extended to more projects or result in policy changes. There could even be an “Innovation Fund” to assist pilot projects.

Many civil society respondents were very active in engaging in policy processes, political engagement (including direct action) and, occasionally, legal battles with the State, depending upon the situations that emerged locally and the “space” available to engage in a particular strategy. Attempts to engage with the State around accessing housing rights by communities, and the NGOs that support them, seem to largely begin at local level, in meetings with councillors or municipal officials - even though some respondents complain it is often very difficult to get such meetings. When these avenues produce no result or communities are met with indifference, attempts to engage higher levels of government are often made. The main form of direct action by which people tried to access housing rights was through land invasions, which many respondents noted was virtually inevitable given the long waits people are having to endure before they can possibly access land and housing. Protest actions seem to emerge slowly in cases where people are trying to proactively influence their right to access housing, despite the appalling, unserved conditions that many--particularly informal settlement dwellers--are living in. However, spontaneous and sometimes dangerous conflict erupts when communities feel they are directly under threat, especially through eviction actions on the part of the State. This can be channelled into organized action as the community makes linkages with organized people’s movements, CBOs, NGOs, legal assistance, etc., that offer some strategic support, and sometimes the chance of success.

There was no civil society respondent who was satisfied with the extent to which government institutions promoted consultation with communities, CBOs, NGOs and service providers, and they criticised the way opportunities for consultation, when they existed, were rendered meaningless by

being manipulated or limited by government (and political parties). There was therefore little confidence that those participating had any real influence over the decisions taken by government. It is this lack of meaningful consultation with civil society, coupled with the slow pace of delivery, that seems to emerge as the key problem, and which is likely to result in more direct confrontation with the State over housing rights if government refuses to substantially address this concern.

The language respondents use to articulate the preferred role of the state in addressing housing rights echoes back to the original principles of the RDP: "We see a central role for the State: there must be a people-driven, mass-based land and housing delivery programme, that responds to people's needs." In the absence of this, the language echoes back to the era of apartheid resistance: "Direct action is definitely one solution. If there is widespread ungovernability, the State will have to respond."

With regards to local government, while respondents acknowledged the key role the local authority must play in facilitating development for the poor, this was (perhaps inevitably) where civil society respondents noted they had the most problems. A litany of difficulties was mentioned: poor planning, or planning which prioritised the interests of upper income residents and was excessively geared to attracting investment; excessively bureaucratic procedures and/or inflexible or hostile attitudes; an unwillingness to cooperate with other development players (such as NGOs); a lack of capacity, and even outright corruption.

One respondent commented on how the priorities of municipalities exclude the poor: "In the case of Johannesburg, the State's "vision of the city" is to be a leading African city on the continent, part of the African Renaissance, but the regeneration of the city is about what we do to attract investment. The Blue IQ strategy, the Nelson Mandela Bridge, these are the priorities, but the outcome would have been very different if the city was planned according to the needs of those who live and work there. Meanwhile, the strategy is forcing poor people to the very, very edge of the city."

One respondent noted a lack of clarity on the institutional arrangements regarding different levels of government: "It's unclear to me where the responsibilities for land designation and development actually lie. Does the Metro or Provincial government have the authority? Ideally, there should be designated lead agencies with the powers to get things done. But there is so much squabbling over political influence, that is easier said than done. It would make most sense to have the local government in that role, if they were progressive - but I wouldn't trust local government."

Another respondent noted that the priorities of the council seem to specifically work against the right to housing, "The worst thing has been that while we attempt to engage with local representatives and officials in meetings to help intervene to prevent evictions, the Council rather puts its energy into enforcing evictions." The respondent described a case where a court ruling had found that the council failed in their constitutional duty in trying to evict a community without alternatives being provided. "Council was given four months to come up with a plan to provide housing to the community. But there is no will to come up with a plan. Instead of assisting the community, the Council wants to use resources to appeal the judgements-- it is a very sad situation. It is the same in Grootboom, the Council attempts to nullify the victory by doing the absolute minimum. The letter of the law rather than the spirit of the Constitution."

Another respondent echoed these frustrations. "We live in an area where large tracts of land are held by the municipality - making it impossible to get because of the way poor people are marginalized or excluded. They never treat developers the way they treat poor people." According to the respondent, the local authority had decided that it is the delivery agent for subsidy housing in the area, to the exclusion of any co-operation with other players. The projects the NGO initiate receive low priority. "The local government see other players (NGOs) as competition. They have systems of patronage, your stuff gets stuck in the pipeline. The notion of administrative justice will become important in the ensuing years. That will make for a better public service."

Another respondent had a similar concern regarding the provincial policy on PHP and cooperative housing, which in this area had insisted on the municipality as the support organisation; “But we were saying the community must set up its own support organisation. There is a trend that local government must provide housing, this is emphasized to the exclusion of approaches that encourage people’s initiatives. Government must support community initiatives instead of insisting the municipality must do it. We haven’t had significant success in turning it around, but have had success in slowing it down - some are realizing that maybe this isn’t the way to go.”

The respondent pointed to excessively bureaucratic procedures and a lack of co-operation by local authorities to make land available for development for the poor. According to this respondent, the local authority displays “development control mentality,” demanding that even before land can be considered for development, expensive feasibility studies (traffic control study, environmental impact study, etc.) must be conducted - these are pre-development costs that the organization can’t afford to sink into a project for the poor that might not even happen. Another respondent had similar concerns with the local authority: “To apply for land, it takes forever - you can’t get things done. You can’t even think about getting to (the) subsidy application (stage) if you don’t have a place to build. There is a battle to get a commitment around anything!”

While the local city/town level is clearly a site of contestation around housing rights, there are still some issues of common concern that emerge from both the civil society and the local government respondents. These seem to include the need for better means for accessing well-located land, the need for simplified and flexible procedures to accommodate different types of development and local needs and to ensure smooth implementation, a concern with ensuring that *in situ* upgrading becomes a reality, and the need for more resources generally to be devoted to housing and human settlement. Another point, however, is that there is a need for national priorities in other national departments, particularly the Department of Provincial and Local Government (DPLG), to be aligned with a rights-based approach and that there is a necessity for national departments to play a major role in encouraging and enforcing this approach through provincial and local levels of government. This must also include invigorating a much more open and inclusive public participation process that focuses on increasing meaningful participation by the poor in all planning processes. National policy needs to be coupled with intensive capacity-building that can encourage a truly more progressive realization of the right to adequate housing.

3. Analysis: Key Components of a Rights Based Approach to Housing

Through analysis of various interpretations of what the right to adequate housing means and the duties, both legal and moral, that this can be regarded as imposing on the State, it is clear that certain common threads run through all of these interpretations.

Not all of the international policy instruments and recommendations quoted below are legally binding upon South Africa, but they all have at least some commitment from the government or judiciary. The obligations of the State range from definite, although not always clearcut, legal obligations in terms of the Constitution and international/regional human rights treaties which South Africa has ratified, to political commitments to declarations like the Habitat Agenda and frequent references by the Constitutional Court and the SAHRC to General Comment No. 4 (see Table 3). Taken together they form a very comprehensive and persuasive argument for what the key components of a rights-based approach to housing should be.

Table 3: The obligations of the State in terms of housing rights

Legal obligations¹	Political commitments²	Other important texts³
<ul style="list-style-type: none"> ▪ Section 26 and 28(1) of the constitution as interpreted by the Grootboom Judgement and other Constitutional Court rulings ▪ Universal declaration of Human Rights (1948) ▪ International Convention Relating to the Status of Refugees (1951) ▪ The International Convention on the Elimination of All Forms of Racial Discrimination (1965) ▪ The Convention on the Elimination of All Forms of Discrimination Against Women (1979) ▪ The Convention on the Rights of the Child (1989) ▪ African Charter on Human and Peoples' Rights (1981) ▪ The African Charter on the Rights and Welfare of the Child (1990) 	<ul style="list-style-type: none"> ▪ International Convention on Economic, Social and Cultural Rights (1966) ▪ Agenda 21 (1992) ▪ Habitat Agenda (1996) 	<ul style="list-style-type: none"> ▪ General Comments of the United Nations Committee on Economic, Social and Cultural Rights, especially general Comments Nos. 4 and 7

1. Constitutional rights, and international/regional human rights treaties that include housing-related obligations and which have been ratified by South Africa.

2. Treaties, declarations and recommendations which South Africa has committed itself to through signing or through commitment in the National Action Plan.

3. Recommendations of UN treaty bodies extensively referred to in Constitutional Court rulings and the Economic and Social Rights Reports of the South African Human Rights Commission.

The obligations of the State with regard to the right of access to adequate housing can be considered under the broad obligations of the State for any right: to respect, to protect, to promote and to fulfill the right (see Table 4). These obligations are discussed in greater detail below.

Table 4: Suggested key components of a rights based approach to housing

Obligation	Elements
Respecting and protecting the right to adequate housing	Recognising the right
	Preventing violations of the right
Promoting the right to adequate housing	Democratic participation
	Access to information
	Promoting duties of broader society
Fulfilling the right to adequate housing	Rights as an organizing principle/ integration
	Coherent policy aimed at progressive realization
	Core programmes: finance, land release, informal settlement upgrading and self-help
	Special measures for vulnerable groups
	Reasonable implementation
	Monitoring progress

3.1 Respecting and protecting the right to adequate housing

“An obligation to respect requires that the State abstain from those practices which deprive, deny or obstruct people’s access to adequate housing or unfairly discriminate against an individual or group of individuals in extending access of the right to adequate housing. An obligation to protect requires the State to protect people’s rights of access to adequate housing from being infringed, violated, threatened or compromised by a third party” (SAHRC, 2003).

The two key elements of this are:

- Recognising the right
- Preventing the right from being violated.

3.1.1 Recognising the right

The first steps in respecting and protecting the right to adequate housing involve recognising the right. This would include ratifying relevant international and regional human rights treaties, including the right to adequate housing in the Constitution, and ensuring that there is an independent judiciary to protect these rights. This does not need elaboration, as South Africa’s Constitution is greatly admired internationally and the Grootboom Case is internationally acknowledged as a landmark case in the justiciability of the right to adequate housing.

3.1.2 Preventing violations of the right

Preventing violations of the right to adequate housing would seem to have three major elements:

- Preventing discrimination
- Preventing arbitrary evictions
- Ensuring an independent judiciary and access to courts.

Preventing discrimination

Preventing discrimination is a key component of any right. The Habitat Agenda, for example, contains a commitment to “Eradicating and ensuring legal protection from discrimination in access to shelter and basic services, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; similar protection should be ensured against discrimination on the grounds of disability or age” (Habitat Agenda, Article 40(j)). In terms of the International Convention on the Elimination of All Forms of Racial Discrimination, the State is obligated “to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national

or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:... in particular... the right to housing.”

Preventing arbitrary evictions

Section 26(3) of the Constitution states that: “No one may be evicted from their home, or have their home demolished, without an order of court made after considering the relevant circumstances”. Similarly, the Habitat Agenda includes the commitment to “Protect all people from and provide legal protection and redress for forced evictions that are contrary to the law... when evictions are unavoidable, ensure that, as appropriate, alternative suitable solutions are provided” (Habitat Agenda 40n, repeated verbatim as 98b). It is important to note that the rights of tenants must also be protected – the Habitat Agenda includes a commitment to “promote the... legal rights and obligations of both tenants and owners” (68(g)).

General Comment No. 7 fleshes out the detailed obligations of the State:

- “The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions”; “legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which... are designed to control strictly the circumstances under which evictions may be carried out” (Article 8 and 9)
- “Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected” (Article 11).
- “States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders. States parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected” (Article 13).
- “The procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts” (Article 15).
- “Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available” (Article 16).

South African Court rulings have (largely unconsciously) followed international jurisprudence (e.g. General Comment No. 7), for example, the need to provide alternative accommodation and the principle of evictions being a last resort. There have been a number of notable cases that have helped define the procedures for evictions, for example, the Baartman, Modderklip, Rudolph and Sheffield Road Cases. The Modderklip Case would seem to indicate the obligations of the State for lawfully evicted people include giving effect to their right of access to land and housing, and

providing alternative accommodation for “those unlawful occupiers who do not qualify for housing subsidies” (Christmas, 2003).

Although the general principles are to ensure that evictees have access to alternative accommodation and are not made worse off by the eviction, it is important to note that “land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable” (Grootboom Judgement, para 92). Evictions of homeless people may be necessary in the following four types of situation (Sheffield Road Judgement, para 20):

- A land invasion for the purposes of coercing a state structure into providing housing
- A situation where an inevitable choice must be made between two groups of people
- Where the occupation of the land causes a real threat to safety
- Where the landowner urgently requires the land, particularly for social developmental purposes.

Ensuring an independent judiciary and access to courts

The obligations of the State include:

- “Providing access to effective judicial and administrative channels for affected individuals and groups so that they can challenge or seek redress from decisions and actions that are socially and environmentally harmful or violate human rights, including legal mechanisms to ensure that all State bodies, both national and local, and other civil organizations remain accountable for their actions, in accordance with their social, environmental and human rights obligations” (Habitat Agenda, 182 (k)).
- “Facilitating access to... legal services by people living in poverty and other low-income groups through the provision of such facilities as legal aid and free legal advice centres” (Habitat Agenda, 182 (o)). Specific vulnerable groups may require additional support to access the judicial system; for example: “To reduce vulnerability, Governments at the appropriate levels, including local authorities, should... (g) Facilitate the availability of legal information... and assistance to vulnerable groups” (Habitat Agenda, 98). In addition, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1997/19 reminds States of “the critical importance of providing women with legal resources and human rights information and education to address the violence they experience in relation to housing”.

3.2 Promoting the right to adequate housing

“An obligation to promote requires the State to educate the public about their rights and to strive to create a culture in which the right of access to adequate housing can become a reality” (SAHRC, 2003). The key to this lies in the concept of “citizenship” (of seeing people as citizens with rights and responsibilities, as opposed to a welfare approach, in which people are seen as passive beneficiaries or a market-based approach, in which people are seen as customers). The key elements of “good citizens” are well summed up by the Department of Education’s view of the learners it wishes to develop, as expressed in the National Curriculum Statement (Scott, 2001):

- Make informed decisions and accept accountability as responsible citizens;
- Understand and show respect for the basic principles of human rights, recognizing the inter-dependence of members of society and the environment;
- Have an understanding of and be equipped to deal with the social, political and economic demands made of a South African as a member of a democratic society, in a local and global context.

There are many interpretations of what citizenship means. Some interpretations focus on the responsibilities of citizens to pay for government services, and an emphasis on cost recovery (and treating citizens as “customers”) is reflected in some aspects of local government policy and

practice. Although the responsibility to pay for services is important, it is essential that this responsibility is recognised as a responsibility for citizens to pay within their means, not necessarily on a cost recoverable (or market-related) basis: General Comment No. 4 clearly highlights that affordability is an integral component of the right to adequate housing.

Civic education on rights issues is an important part of promoting citizenship (although, civic education on housing rights is difficult because it is such a complex issue - one respondent pointed out how difficult it would be to empower people on what the Grootboom case means, given all the various interpretations of the Judgement), but citizenship goes far beyond civic education. Three important related concepts go hand in hand with the concept of citizenship:

- Democratic participation
- Access to information
- Promoting the duties of broader society.

3.2.1 Democratic participation

One of the key principles running through every right is that of “true participation – enabling people to be involved in decisions that effect their well-being” (UNDP, 2000: 95). Therefore, “States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights” (Declaration on the Right to Development, Article 82). “Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, [a national housing strategy] should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives” (General Comment No. 4, Article 12). It is important to note that participation goes beyond the right to know: “If the right to housing is recognized for the social process that it is then it is essential that, beyond the necessary statutory and voluntary right to know, conditions need to be created... so that people can play the central role in all local and area-level activities of planning, resources allocation and resource generation” (UNCHR, 1995).

The Habitat Agenda proposes that the mechanisms for facilitating participation should include “broad-based participatory and consultative mechanisms that involve representatives from public, private, non-governmental, cooperative and community sectors, including representatives of groups that are considered to be living in poverty, at all levels in the policy development process” (68a). Elsewhere it is added that these should be “regular and broad-based consultative mechanisms”, that they should be “agenda-setting participatory mechanisms enabling individuals, families, communities, indigenous people and civil society to play a proactive role in identifying local needs and priorities and formulating new policies, plans and projects”, and that they should include “consultative mechanisms in decision-making and management processes at the local level” and “policy dialogue among all levels of government and the private and community sectors and other representatives of civil society to improve planning and implementation” (182(f), (h), 180(i), (j)). Similarly, the South African Human Rights Commission has proposed that “there should be a national regulatory framework to encourage public consultations, debates at round tables at all levels of government with community based organisations and all the [other] stakeholders on the housing programmes and projects...” (SAHRC, 2003: 61). It is particularly important that vulnerable groups are included in participatory processes: “To reduce vulnerability, Governments at the appropriate levels, including local authorities, should... (f) Pursue policies that will provide... consultation with vulnerable groups” (Habitat Agenda, 98).

Effective participation is dependent upon the capacity of roleplayers to be able to make effective use of opportunities for participation. “The effective implementation of the Habitat Agenda requires strengthening ... community organizations and non-governmental organizations in the spheres of education, health, poverty eradication, human rights, social integration, infrastructure and improvement of the quality of life, and relief and rehabilitation, enabling them to participate constructively in policy-making and implementation” (Habitat Agenda, 237). Possible ways of strengthening civil society organizations include: “advocacy training and seminars, including those

that develop mediating and consensus-building skills that will facilitate effective networking and alliance formation” for women and vulnerable groups (Habitat Agenda, 182 (j)).

It must be noted that participation with regards to housing rights is not unproblematic, however - different citizens and different civil society organisation may have different agendas and they may be lobbying for the fulfillment of competing rights, for example, the State’s obligations to protect landowners’ right to property under Section 25 of the Constitution versus unlawful occupiers’ rights against arbitrary eviction under Section 26(3) (as in the Modderklip Case).

3.2.2 Access to information

A rights-based approach depends upon citizens and civil society having access to relevant information. Section 32 (1) of the Constitution says that “Everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights”.

International policy instruments recognise the crucial linkages between the right to information (“the right to know”) and the right to adequate housing. “Even though not always seen as being linked to the right to housing, ‘the right to know’ is in fact a critical aspect of finding and then relating to a place to live in security and dignity”; information that citizens and civil society organisations require can include information “on all resource and planning issues that can have an impact, positively or negatively, on their struggle for the right to housing”, “information on what housing schemes are available and where, what land is available, what are one’s rights in terms of water, sanitation and other services, what master plans and other development plans are in the offing”, etc. (UNCHR, 1995). It is particularly important that vulnerable and disadvantaged groups have access to information (Habitat Agenda 96g, 98).

The various ways that information could be provided include: telephonically, via helplines; face to face, through housing advice desks; radio; newspapers; pamphlets; information on websites; reports available for inspection at offices/ public libraries; through the inclusion of civil society representatives in decision making bodies; and through conferences, workshops and seminars.

3.2.3 Duties of broader society

Rights can only be fulfilled if social norms and social arrangements facilitate this, i.e. the attitudes and actions of citizens with regard to rights. “Social arrangements are created and supported ultimately, by people acting individually or through communities, associations, companies, institutions and governments” (UNDP, 2000: 103). It is important that there is awareness of rights, and acceptance of the obligations of everyone in society, both those who work for the State and those in the private sector, to contribute towards the realization of the right to adequate housing where possible. It has been argued that the principles of solidarity and fairness embodied in the Universal Declaration of Human Rights suggest that “people have some claims on others and on the design of social arrangements regardless of what laws happen to be enforced” (Sen, in ODI, 2001). A distinction can be made between “perfect duties” (duties for particular agents which specify both how the duty is to be performed and to whom it is owed) and “imperfect duties” (the more general duties of “those who can help”) – and even where there is no clear linkage between right and duty, the neglect of an imperfect duty can amount to serious “moral or political failure” (ibid)²⁰. All citizens could thus be regarded as having “imperfect duties” with regard to the right to adequate housing.

For example, in realizing the right to primary education in India, key actors were identified as government (providing schools that are accessible and adequate, ensuring quantity and quality of teaching staff), parents (must be willing to send children to school), community (must support

²⁰ Sen’s use of the terms “perfect duties” and “imperfect duties” in the context of human rights is based on Immanuel Kant’s distinction between perfect duties and imperfect duties in *The Groundwork of the Metaphysics of Morals* (1785).

schools, teachers and parents) and the media (must report on neglect of basic education). The African Charter on Human and People's Rights (1981) has a particularly strong emphasis on the duties of individuals, for example, Article 27 says: "Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community".

In the Grootboom Judgement, the Constitutional Court held, in the context of the right to housing, that there exists "at the very least, a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right to access to adequate housing". The Court also noted that the right of access to housing suggested that "it is not only the State that is responsible for the provision of houses". This supports the position that private actors have both negative and positive obligations relating to socio-economic rights. "Although still rudimentary, international law, certain municipal legal systems and the South African Constitution suggest that the obligations of non-state actors for socio-economic rights have both negative and positive aspects. In principle, there is no socio-economic right that can be said to bind the state only. All private actors are enjoined, at the very minimum, to respect socio-economic rights. The difficulty, however, lies in distinguishing the levels of positive obligations among private actors considering that these actors are of different character and nature" (Chirwa, 2002). Similarly, the BESG/USN Right to Adequate Housing campaign also emphasized the role of broader society – the "Right to Adequate Housing" pamphlet highlighted the roles that households, communities, builders, citizens, councillors, local government officials, Members of Parliament and National Government officials need to play (BESG, 1999a).

Possible ways of ensuring appropriate social norms to facilitate the realisation of the right to adequate housing include: "Undertaking civic and human rights education and training programmes, using all forms of the media and education and information campaigns, to promote a civic spirit and an awareness of civil rights and responsibilities and the means of exercising them, of the changing roles of women and men and of issues relating to sustainable human settlements development and the quality of life" (Habitat Agenda, 182 (e)). Ultimately, creating awareness of the obligations of broader society with regards to housing rights, could assist in helping to defuse not-in-my-backyard (NIMBY) resistance to low-income housing projects (improving the quality and sustainability of new housing projects so that they do not become "instant slums" will also help).

3.3 Fulfilling the right to adequate housing

"An obligation to fulfill requires the State to institute measures which ensure that persons who do not currently enjoy access to this right gain access to it. This also requires the State to take specific measures when an individual or group is unable, for reasons beyond their control, to realise the right to adequate housing themselves" (SAHRC, 2003b).

These positive obligations of the right to adequate housing are more difficult to define than the negative obligations (although the positive obligations of the state are partially defined by the negative obligations – for example, the State cannot evict unlawful occupiers of land unless there is a coherent policy in place).

The key areas of fulfilling the right to adequate housing can be regarded as:

- Rights as an organizing principle/ integration
- Coherent policy aimed at progressive realization
- Core programmes: finance, land release, informal settlement upgrading and self-help
- Special measures for vulnerable groups
- land release and informal settlement upgrading
- Reasonable implementation
- Monitoring progress.

3.3.1 *Rights as an organizing principle/ integration*

The fundamental principle of a rights-based approach is that government must view rights as an “organizing principle of State policy”, so with regard to the right to adequate housing, for example, steps must be taken to “reconcile different policies (energy, environment, industrial, agriculture and so forth) and halt processes that impinge upon the realization of the right to housing” (UNCHR, 1995). This concept has particularly important implications for macro-economic policy – the State must ensure “consistency and co-ordination of macroeconomic and shelter policies and strategies as a social priority within the framework of national development programmes and urban policies” (Habitat Agenda, 40a); “constantly monitor the impact of macroeconomic policies on shelter delivery systems, considering their specific linkages and taking into account their possible effects on vulnerable and disadvantaged groups” (Habitat Agenda, 67b).

Human rights are indivisible, i.e. they intersect and interlink with each other.²¹ The right to housing is interlinked with a particularly wide range of other rights (e.g. right to property, right to family life, right to privacy, the right to water, the right to basic services, right to choose one’s residence, the right to a safe environment, the right to a healthy environment, etc.). “The human right to adequate housing... is of central importance for the enjoyment of all economic, social and cultural rights (General Comment No. 4, Article 1). “The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole” (Grootboom Judgement, para 24); “Adequate housing is essential to freedom, dignity, equality and security for everyone... the enjoyment of other human rights such as those to privacy, to respect for the home, to freedom of movement, to be free from discrimination, to environmental health, to security of person, to freedom of association, to equality before the law and other rights are indivisible from and indispensable to the realization of the right to adequate housing” (preamble, Draft International Convention on Housing Rights).

The fulfillment of other rights is also important for being able to realize the right to adequate housing. General Comment No. 4 states that “the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making - is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing” (Article 9).

An integrated approach towards fulfilling socio-economic rights is therefore required, and housing needs to play a key organizing role in this approach due to its particularly wide range of linkages with other rights. A key sub-principle of this is policy alignment - Section 67 of the Habitat Agenda elaborates on the ways in which housing policy should be integrated with “macro-economic, social, demographic, environmental and cultural policies”. Formulating coherent strategies in an integrated, consultative way with other stakeholders is especially important (67a).

An important factor in motivating for integrated development is the broad definition of adequate housing: “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. Rather it should be seen as the right to live somewhere in security, peace and dignity” (General Comment No. 4, Article 7). Adequate shelter therefore means more than a roof over one’s head – “It also means adequate privacy; adequate space;

²¹ “Human rights are indivisible in two senses. First there is no hierarchy among different kinds of rights. Civil, political, economic, social and cultural rights are all equally necessary for a life of dignity. Second, some rights cannot be suppressed in order to promote others. Civil and political rights may not be violated to promote economic, social and cultural rights. Nor can economic, social and cultural rights be suppressed to promote civil and political rights” (UNDP, 2000: 16).

physical accessibility; adequate security; security of tenure; structural stability and durability; adequate lighting, heating and ventilation; adequate basic infrastructure, such as water-supply, sanitation and waste-management facilities; suitable environmental quality and health-related factors; and adequate and accessible location with regard to work and basic facilities: all of which should be available at an affordable cost. Adequacy should be determined together with the people concerned, bearing in mind the prospect for gradual development. Adequacy often varies from country to country, since it depends on specific cultural, social, environmental and economic factors" (Habitat Agenda, 60).

The definition of adequate housing in the Housing Act of 1997 is similar to that in the Habitat II Agenda²²: "the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to:

- permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements;
- and potable water, adequate sanitary facilities and domestic energy supply."

Finally, once rights have been adopted as the organizing principle of policies and programmes, there need to be "appropriate processes for coordination and decentralization that define clear local-level rights and responsibilities within the policy development process" (Habitat Agenda 68b). "Governments should strive to decentralize shelter policies and their administration to subnational and local levels within the national framework, whenever possible and as appropriate" and should "establish and adopt a regulatory framework, and provide institutional support for facilitating participation and partnership arrangements at all levels" (Habitat Agenda, 66, 68e).

3.3.2 Coherent policy aimed at progressive realization

The Grootboom Judgement general order said that "Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realize the right of access to adequate housing". Other important principles arising from the Grootboom Judgement are: the State must establish comprehensive and coherent programmes capable of facilitating the realization of the right; the measures (legislation, policies, programmes) adopted by the State must be "reasonable" within their social, economic and historical context and within the availability of resources; the State must examine legal, administrative, operational and financial barriers to accessing socio-economic rights and, where possible, take steps to lower them over time so as to ensure the progressive realization of the right, e.g. so that a larger number and wider range of people can get access to adequate housing over time (the Grootboom principles, as stated in Liebenberg, 2002).

Although the policy needs to be coherent, it also needs to be flexible. There will continue to be cases in which people are evicted and will need to be relocated, and is thus important for the State to have a reserve fund (and reserve land) to deal with emergency situations. Most litigation is triggered by evictions and the right to housing will probably continue to be progressively defined over time through eviction cases. A certain *ad hoc* dimension to housing policy is therefore unavoidable.

The concept of progressive realization has a number of implications. For example, General Comment No. 4 recommends the adoption of "a national housing strategy which... defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of the necessary measures" (Article 12). "In essence, the

²² The Grootboom Judgement defined housing narrowly as land, services ("such as the provision of water and the removal of sewage") and the dwelling, but this is possibly only because of the facts of the case.

obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources” (General Comment No. 4, Article 14).

The broad objectives of adequate progress with regards to the progressive realization of the right to adequate housing are, crudely, that increasing numbers of people should live in adequate housing conditions and that fewer people should live in inadequate housing conditions. It is therefore essential to define what adequate housing is. One internationally proposed practical definition of adequate housing suggests the following minimum standards (UN-Habitat, 2003: 17):

- Water supply: Household connection or access to public stand pipe or rain water collection with at least 20 litres per person available within an acceptable collection distance.
- Sanitation: Public sewer, septic tank, pour flush latrine, ventilated improved pit (VIP) latrine; either private or shared by a maximum of two households.
- Structural quality of housing: Permanent structures that comply with building codes, standards and by-laws.
- Occupancy: Maximum of 2 people per habitable room or minimum of 5 m² of floor area per person.
- Security of tenure: Formal title deed to land and/or residence, enforceable agreement or any document as proof of a tenure arrangement.

3.3.3 Core programmes: finance, land release, informal settlement upgrading and self-help

The need to have a coherent policy in place to ensure the realization of the right to adequate housing for as many people as possible as quickly as possible in the shortest time almost inherently implies the adoption of an enabling approach rather than direct State provision of housing: “While in some States public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing. The promotion by States parties of ‘enabling strategies’, combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged” (General Comment No. 4, Article 14). Similarly, the Habitat Agenda recommends that in order “to improve shelter delivery systems, Governments at the appropriate levels should... adopt an enabling approach to shelter development” (Habitat Agenda 70(a)). This is defined as a strategy of “enabling all key actors in the public, private and community sectors to play an effective role - at the national, state/provincial, metropolitan and local levels - in human settlements and shelter development” (Habitat Agenda, 44).

Coming out of the Urban 21 initiative²³, the key elements of the enabling approach were defined as (Hall and Pfeiffer, 2000: 230, 238):

- Developing functioning markets with flexible supply mechanisms that provide a wide range of housing options in different locations for different affordability levels (“creating strategies which enable markets to function adequately is often more important than fulfilling targets of subsidy programmes”).
- Using public assistance to lever additional resources from elsewhere
- Concentrating on areas and groups which are active and are prepared to mobilize their own resources and to co-operate and participate in the provision of housing and building of infrastructure (“enabling has to be seen as a special form of care which concentrates on the ability for self-help and not primarily on the need for subsidies”)
- Providing urban land with security of tenure at low cost
- Providing basic services
- Simplifying planning processes and having flexible building standards.

²³ The Urban 21 initiative on sustainable urban development grew out the overlap between the Habitat Agenda and Agenda 21. South Africa was one of the four countries selected to drive the Urban 21 process (along with Germany, Brazil and Singapore). The Urban 21 Conference resulted in consensus on approaches to deal with sustainable urban development, as reflected in the Berlin Declaration (2000).

Within the adoption of an enabling approach to housing, there are some clearly identifiable core programmes that can be seen as obligations of the State in terms of a rights-based approach to housing:

- Housing finance
- Land release
- Informal settlement upgrading
- Self-help housing.

It should be noted that access to basic services (as discussed in Section 3.3.2 of this report) is an essential element of both land release and informal settlement upgrading.

Housing finance

There are two aspects to housing finance: subsidies and credit. Access to both is seen as essential:

- Subsidies: General Comment No. 4 states that: “States parties should establish housing subsidies for those unable to obtain affordable housing...” (Article 8(c)).
- Credit: To improve the effectiveness of existing housing finance systems, Governments at the appropriate levels should... Adopt policies that increase the mobilization of housing finance and extend more credit to people living in poverty, while maintaining the solvency of credit systems”; “To create new housing finance mechanisms, as necessary, Governments at the appropriate levels should... Review and strengthen the legal and regulatory framework and institutional base for mobilizing non-traditional lenders” (Habitat Agenda, 81(a), 82(b)).

One weakness of the Constitutional Court judgements has been that they have avoided core obligations and the granting of individual rights – they have rather granted collective rights to a reasonable policy. It is, however, important that the rights of individuals who are not part of groups be catered for as well. It could therefore be argued that the individual housing subsidy (for acquiring existing housing or for acquiring a serviced site and building a dwelling on it, as opposed to the project-linked subsidy) is an essential element of a reasonable housing policy, as it is the only mechanism that can cater for individual households, i.e. for the individual right as opposed to the collective right. In addition to individual households being able to access subsidies outside of projects, it can be argued that single people also need to have access to subsidies where necessary: “Individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors” (General Comment No. 4, Article 6).

The biggest demand for housing in South Africa is in metropolitan areas (National Spatial Development Perspective, 2003). Smaller urban centres and displaced urban settlements face similar problems to that of metropolitan areas, although on a smaller scale. Housing policy therefore has, of necessity, to focus on urban areas. In terms of South Africa’s legal obligation in terms of the Convention on the Elimination of All Forms of Discrimination Against Women, it is committed to, within the context of rural development, the right of women in rural areas to “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications”. Agenda 21 also specifically mentions the obligation of the State “to support the shelter efforts of the... rural poor”. A programme to deal with the housing needs of people in rural areas is therefore essential. It should be noted that “rural areas” consist of a number of different categories, however, and that different responses may be required for different categories, for example (WCPG, 2001):

- Communal areas (including former homelands, and mission station settlements in the Western Cape and Northern Cape)
- Farm workers (including both permanent and seasonal workers, and including both those who live “on farm” and “off farm”)
- Rural State workers (forestry workers, nature reserves).

Land release

Secure tenure is probably the most crucial aspect of the right to adequate housing, and this has been recognised in the Global Campaign on Secure Tenure, one of the two Global Campaigns intended to advance the implementation of the Habitat Agenda. Secure tenure is defined by UN-Habitat as “protection from involuntary removal from land or residence except through due legal process” (Herr and Karl, 2002). The security derives from the fact that “the right of access to and use of the land and property is underwritten by a known set of rules, and that this right is justiciable” (UN-Habitat, 2003b). “The granting of secure tenure is the single most important catalyst in the mobilising of individual investment in the locality. The insecurity of tenure is, likewise, often associated with the marginalisation of individuals and communities, to a concomitant lack of investment, and as a contributory factor to petty criminality and challenges to urban governance generally” (ibid). It is therefore essential that land release is a core programme in terms of the right to adequate housing: “increasing access to land by landless or impoverished segments of the society should constitute a central policy goal” (General Comment No. 4, Article 8(e)). “All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups” (General Comment No. 4, Article 8(a)). In addition, States should “work with non-governmental organizations and community-based organizations to assist members of vulnerable groups to obtain secure tenure” (Habitat Agenda, 98a).

Similarly, the general order of the Grootboom Judgement stated that “the programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme...” (a rapid land release programme for emergencies formulated by the Cape Metropolitan Council). One of the main implications of the Grootboom Case, therefore, is that there needs to be a land release programme, i.e. the provision of land, with secure tenure and basic services, for occupation by households without a lawful place to stay (e.g. Pillay, 2002).

Civil society stakeholders particularly emphasise the importance of access to land and secure tenure. One of the civil stakeholder interviewed for this study said: “We work with the poor, so obviously, a right to housing is fundamental. I see the question as being more of a phased process. For example, the right to land would come before the right to housing. This fits into what the Constitution says about the progressive realization of these rights—provide what you can first: land, then the right to water, sanitation, shelter, etc. Also, a right to housing needs to be understood together with the equity provisions of the Constitution: in the ‘width versus depth’ debate, for me the width argument wins”.

Informal settlement upgrading

An unavoidable implication of the progressive realization of the right to adequate housing, and the obligation of the State to provide security of tenure, “regularize self-built housing” and provide access to basic services, is that there needs to be an informal settlement upgrading programme. Informal settlements need to be recognised, and upgraded wherever possible. This has been recognised in the Millennium Development Declaration (2000), which established a series of development goals and targets, based on key policy documents of major UN Conferences held during the previous decade, such as the Habitat Agenda and Agenda 21. Target 11 is to “Achieve significant improvements in the lives of at least 100 million slum dwellers by 2020”.²⁴

²⁴ A slum is “a contiguous settlement where the inhabitants are characterized as having inadequate housing and basic services” and are defined by inadequate access to safe water, inadequate access to sanitation and other infrastructure, poor structural quality of housing, overcrowding, insecure residential status (UN-Habitat, 2003a). “Slums are neglected parts of cities where housing and living conditions are appallingly poor. Slums range from high density, squalid central city tenements to spontaneous squatter settlements without legal recognition or rights, sprawling at the edge of cities” (Cities Alliance, 2003). Slums include inner

The Urban 21 initiative also recognized that there is a need “to recognize informal housing, to give the people who live in it security of tenure, a sense of stakeholderhood and pride in their home and their neighbourhood, so that they can begin to work individually and collectively to improve both. They need this and want it and they are even willing to pay out of their meager earning and savings to get it. We know from hundreds of cases, all over the world, that people can upgrade their own shelter and massively improve their own quality of life, transforming slums into middle-class villa [i.e. freestanding house] suburbs” (Hall and Pfeiffer, 2000: 237-238).

It is important to upgrade informal settlements *in situ* wherever possible (i.e. with relocation of a minimum of residents or structures). “Experience accumulated over the last few decades suggests that *in situ* slum upgrading is more effective than resettlement of slum dwellers and should be the norm in most slum-upgrading projects and programmes. Eradication of slums and resettlement of slum dwellers create more problems than they solve... Relocation or involuntary settlement of slum dwellers should, as far as possible, be avoided, except in cases where slums are located on physically hazardous or polluted land, or where densities are so high that new infrastructure (especially water and sanitation) cannot be installed” (UN-Habitat, 2003: xviii).

Self-help housing

One of the key obligations that an enabling approach imposes on the State is the creation of sufficient space within processes and procedures for the poor to deliver their own housing through self-help processes. General Comment No. 4 states that “many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating ‘self-help’ by affected groups” (Article 9). Agenda 21 is also explicit in its promotion of support for self-help housing by “the urban and rural poor, the unemployed and the no-income group” and how self-help housing needs to be an essential part of land release and informal settlement upgrading programmes: “All countries should, as appropriate, support the shelter efforts of the urban and rural poor, the unemployed and the no-income group by adopting and/or adapting existing codes and regulations, to facilitate their access to land, finance and low-cost building materials and by actively promoting the regularization and upgrading of informal settlements and urban slums as an expedient measure and pragmatic solution to the urban shelter deficit” (Chapter 7.9(c)). The Habitat Agenda also includes the obligation of the State to “promote and support self-help housing programmes and initiatives” and recommends that “Governments at the appropriate levels should, where appropriate... promote self-built housing” (Habitat Agenda, 74(a), 98(c)).

3.3.4 Special measures for vulnerable groups

A rights-based approach inherently includes a strong welfare component, as rights impose special obligations on the State with regard to vulnerable groups. The Grootboom Case highlighted specific vulnerable groups (those living in “intolerable conditions or crisis situations”). Other vulnerable groups, for example, those listed by the Human Rights Commission include: persons living with HIV/AIDS, child-headed households, refugees and asylum seekers. In a broader sense of the term, vulnerable groups can also include the “poor” in general and the “homeless” (i.e. “those who have no access to a place where they can lawfully live”, as the Rudolph Judgement phrased it). Other frequently mentioned vulnerable groups in international instruments include women, children, the elderly and the disabled; international instruments relating to the rights of specific vulnerable groups include: the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees; the International Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members

city slums (e.g. inner city Johannesburg), slum estates (townships), and informal settlements. UN Habitat (2003) notes that the Millennium Declaration Goal refers specifically to *in situ* development.

of Their Families; and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

Article 8(e) of General Comment No. 4 says that “such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups”. In a South African context, however, it has been argued that the Grootboom Judgement does not necessarily imply that vulnerable groups be prioritized, merely that they be catered for (Roux, 2002).

Some vulnerable groups may require specific delivery programmes (e.g. an emergency housing programme), while other vulnerable groups may require policy sensitivity and possibly priority allocation, rather than specific delivery programmes (e.g. women). The following vulnerable groups are looked at below:

- People in crisis or desperate situations
- Disabled people
- People living with HIV/AIDS
- Women
- Children
- Refugees and asylum seekers
- Homeless people (street people)

People in crisis or desperate situations

Both the Grootboom and Rudolph Judgments emphasise that over and above the progressive realization of the right of access to adequate housing, there also needs to be short term provision for people in a crisis or desperate situations, including evictions, floods, etc. (Mohamed, 2003). The general order of the Grootboom Judgement said that “the programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”. The Habitat Agenda also refers to the obligation of States in “promoting shelter and supporting basic services and facilities for education and health for... displaced persons,... victims of natural and man-made disasters...” (Article 40(I)).

Disabled people

Disabled people have a right to housing suitable for their special needs. For example: “Such disadvantaged groups as ... the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent, medical problems, the mentally ill... should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups” (General Comment No. 4, Article 8(e)).

People living with HIV/AIDS

The UN Declaration of Commitment on HIV/AIDS commits the state to provide housing to people living with HIV/AIDS. Dealing with HIV/AIDS is mainly an issue of education and health care, and people living with HIV/AIDS are ideally best cared for through home-based care. In some cases this is not possible, however, and institutions for children and adults with HIV/AIDS are necessary; State housing programmes can play a role in funding the land, infrastructure and building costs of HIV/AIDS hospices, orphanages and small-scale cluster homes.

Women

The Habitat Agenda includes a commitment to “providing legal security of tenure and equal access to land to all people, including women and those living in poverty; and undertaking legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property, credit, natural resources and appropriate technologies” (Habitat Agenda, Article 40(b)). There is a further commitment in the Habitat Agenda to “integrating gender perspectives in human settlements related legislation, policies, programmes and projects through the application of gender-sensitive analysis” (Article 46(a)).

Children

Children’s rights to shelter are included in Section 28(1) of the Constitution. The Habitat Agenda emphasizes the rights of vulnerable children: “Special attention must be paid to the shelter needs of vulnerable children, such as street children, refugee children and children who are victims of sexual exploitation” (Habitat Agenda, 13).

Although it has been argued that Section 28(1) of the Constitution gives basic core entitlements to children (“the right to shelter”, perceived as being something less than adequate housing²⁵), the Constitutional Court has not agreed with this view. “Through legislation and the common law, the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families” (Grootboom, para 77).²⁶

Child-headed households are particularly vulnerable. The death of a parent should not result in their being disadvantaged, for example, being dispossessed of their accommodation by relatives. While children can own property if bequeathed it in a will, the Administration of Estates Act of 1965 limits their rights; in terms of the provisions of the Act, the Master of the High Court has to appoint a curator/tutor to administer the property on behalf of the minor until he/she reaches the age of majority. The way that the Department of Social Development is grappling with the issue of child headed households perhaps holds lessons for the Department of Housing. The Social Assistance Act of 1992 defines a “primary care giver”; although the Act does not specify a minimum age, in practice the Department of Social Development accepts applications for child support grants from primary care givers of 16 years and older, based on eligibility requirements in the regulations that the primary care giver must produce an identity document. Government intends to introduce an amended Social Assistance Bill that will specifically set the minimum age of primary care givers at 16 years, but rights activists have argued that some child heads of households may be younger than 16 but still mature enough to act as a primary care giver (Christmas, 2003; Professor Sandra Liebenberg, Community Law Centre).

²⁵ In the Cape High Court judgement on the Grootboom Case (Irene Grootboom and Others v. Oostenberg Municipality, Cape Metropolitan Council, The Premier of the Province of the Western Cape, National Housing Board and Government of the Republic of South Africa, High Court – Cape of Good Hope Provincial Division, 1999) which took the minimum core obligation approach subsequently rejected by the Constitutional Court’s Grootboom Judgement, shelter was defined as “tents, portable latrines and a regular supply of water”.

²⁶ This view is similar to that in the African Charter on the Rights and Welfare of the Child. Article 20(1) of the Charter states that: “Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty... to secure, within their abilities and financial capacities, conditions of living necessary to the child’s development”. Article 20(2) adds that “States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures... to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing”.

The State has two distinct constitutional duties with regards to child-headed households (Sloth-Nielsen, 2002):

- It has a duty to ensure that children in child-headed households are linked with some form of parental, familial or institutional care.
- It has a duty to provide the resources necessary for the survival and development of the children.

The latter duty in Section 28(1)(c) of the Constitution is not subject to the qualification of available resources. “This means that ultimately the State has a constitutional duty, as the surrogate 'parent' of such children, to ensure that their basic needs are met” (ibid).

The UN Committee on the Rights of the Child, in response to South Africa's first report in terms of the Convention of the Rights of the Child, recommended that South Africa should “pay particular attention to the full implementation of article 4 of the Convention by prioritising budgetary allocations and distributions to ensure the implementation of the economic, social and cultural rights of children to the maximum extent of its available resources and, where needed, within the framework of international co-operation” (Bekker, 2000).

Refugees and asylum seekers

South Africa is a State Party to the International Convention Relating to the Status of Refugees, which states that the State Parties “shall accord refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances”. Ideally, therefore, there should be a programme that, for example, provides affordable short term rental accommodation for refugees. The Habitat Agenda includes an obligation to provide “temporary shelter and basic services for refugees”, and “special attention must be paid to the shelter needs of ...refugee children” (Habitat Agenda 40(l), 13).

In the National Action Plan for the Protection and Promotion of Human Rights, the rights of refugees to shelter/housing are mentioned in two places: it is stated that “refugees enjoy the rights set out by Chapter Two of the 1996 Constitution, except for those rights where non-citizens have been expressly excluded. In particular, refugees have a right to... receive shelter...”; later on in the document it is stated that “All refugees enjoy human rights and fundamental freedoms. They are entitled to specific rights arising from their particular situation. These include... rights to education and housing...”

Homeless people/ street people

“Homeless people” are frequently mentioned in human rights documents and court rulings, but usually in the broader sense of the term, e.g. “those who have no access to a place where they can lawfully live” (Rudolph Judgement). Some references to the obligations of the State to homeless people in the narrower sense of the word (i.e. “street people”) include the National Action Plan for the Protection and Promotion of Human Rights, which lists “providing shelter for homeless people and street people in conjunction with the Department of Health and Welfare” as a priority, and the Habitat Agenda: “Special attention must be paid to the shelter needs of vulnerable children, such as street children...” (Habitat Agenda, 13).

3.3.5 Reasonable implementation

The way in which policies and programmes are implemented is crucial in determining the extent to which housing rights are realized. Section 33 of the Constitution states that: “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons”. Many of the *Batho Pele* principles (in the *Batho Pele* White Paper) relate to the way policies and programmes are implemented, e.g. courtesy, openness and transparency, and redress where necessary (an apology, explanation and a remedy).

One of the Grootboom principles (as stated in Liebenberg, 2002) is that policies and programmes must be reasonably implemented, e.g. must be adequately resourced and not hindered by bureaucratic inefficiency or onerous regulations. In the Grootboom Judgement it was also stated that “effective implementation requires at least adequate budgetary support by national government”.

Lack of capacity is often given as a reason for inadequate implementation. With regard to “lack of capacity”, the South African Human Rights Commission says that “it is the responsibility of both the national and provincial governments to strengthen the role and responsibilities of municipalities through exchange of expertise and experience, in line with the principles of co-operative governance to locally implement the adopted housing programme” (SAHRC, 2003a).

The Habitat Agenda recommends that local authorities, community organizations and non-governmental organizations must be strengthened to ensure delivery through: “Supporting capacity-building programmes for such organizations in critical areas such as participatory planning, programme design, implementation and evaluation, economic and financial analysis, credit management, research, information and advocacy; Providing resources through such measures as grant programmes, and technical and other administrative support for initiatives taken and managed at the community level” (237 (b), (c)).

3.3.6 Monitoring progress

The progressive realization of rights can only be enforced if progress with regards to respecting, protecting, promoting and fulfilling rights is monitored. The UN Commission on Human Settlements Resolution 14/6 entitled “The Human Right to Adequate Housing”, adopted in 1993, “urges all States... to establish in accordance with the human settlements parts of international human rights law, appropriate monitoring mechanisms to provide, for national and international consideration, accurate data and indicators on the extent of homelessness, inadequate housing conditions, persons without security of tenure and other issues arising from the right to adequate housing and providing insights into policy, structural and other impediments to the efficient operation of the shelter sector”.

The National Action Plan for the Protection and Promotion of Human Rights recommends that the following bodies should be involved in actively participating in the monitoring of rights: the South African Human Rights Commission, the Office of the Public Protector, the Judicial Inspectorate, the Courts, Parliament, NGOs, CBOs and the media.

The monitoring of rights needs to include the following elements:

- Monitoring international accountability
- Benchmarking: the setting of targets by the State and civil society
- Indicators to measure adequate progress (whether or not benchmarks have been set).

Monitoring international accountability

The three main areas to look at in monitoring international accountability in terms of international human rights law are (UNDP, 2000):

- Acceptance: fundamental acknowledgement of international accountability: ratification or accession to international human rights covenants and conventions, ratification of the individual complaints procedures for these covenants and conventions.
- Co-operation: participation in established international procedures, e.g. submission of reports to treaty bodies in good time, provision of requested information to special rapporteurs.
- Responsiveness: extent of adequate replies to requests, e.g. adequate response to recommendations and treaty bodies and recommendations by country rapporteurs.

Benchmarking

An important tool for agreeing on adequate rate of process is benchmarking. “Setting benchmarks enables civil society and government to reach agreement about what rate of progress would be adequate” (UNDP, 2000: 99). It is important that benchmarks are independently monitored, e.g. by the SAHRC and civil society, or else “benchmarks will have their biggest impact on recorded statistics not on reality” (ibid). In Bolivia, for example, the government consulted with civil society and opposition political parties to create a national action plan for 1997-2002, that included setting benchmarks for 17 indicators, e.g. increasing the number of births attended by trained personnel from 58% in 1997 to 68% in 2002 (ibid).

Indicators to measure progress

“Effective monitoring of the situation with respect to housing is another obligation of immediate effect... [There is] a need to provide detailed information about those groups within ... society that are vulnerable and disadvantaged with regard to housing” (General Comment No. 4, Article 13).

Indicators to measure progress in the fulfillment of the right to adequate housing need to (UNDP, 2000):

- Reveal who are the most deprived and how their lives are affected by policies
- Reflect disparities between groups (gender, race, region) to help identify current or historical discrimination and to show whether policies are reducing or exacerbating the gaps
- Respond to policy measures, i.e. must use variables that respond in the short term, and must use data that is available frequently (ideally at least every 5 years).

Three perspectives need to be used simultaneously (ibid):

- Average perspective – overall progress
- Deprivation perspective – progress by the most deprived groups
- Inequality perspective – progress in narrowing inequalities.

Table 5: Framework for assessing progress in human rights and human development

Period	Average perspective	Deprivation perspective	Inequality perspective
One period	What is the national average?	Who are the most deprived? By: - Income quintile - Gender - Region - Rural or urban - Race - Educational level	What is the disparity? Between: - Bottom and top income quintiles - Females and males - Worst-off and best-off regions - Rural and urban - Worst-off and best-off race groups - No education and higher education
Over time	How has the national average changed?	How have the most deprived groups progressed?	How have the disparities between groups changed – have they widened or narrowed?

Source: UNDP, 2000: 108

Another important aspect of the realization of rights that needs to be monitored via indicators is participation. Indicators can include (UNDP, 2000):

- To what extent are people aware of their housing rights (e.g. through public opinion polls)

- How much information on housing is made publicly available by the Department of Housing, Provincial Housing Departments and local authority housing departments (e.g. information on websites, publications, pamphlets, information sessions)
- Are there opportunities for people to be involved in discussions (e.g. meetings, media debates, public hearings, media debates).

The gender dimension of indicators measuring progress in housing is especially important. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1997/19, entitled “Women and the right to adequate housing and to land and property”, requests Governments “to support local, national and international initiatives, including the development of human rights indicators, aimed at assessing and improving the housing and living conditions of women throughout the world, in full consultation with and with the full participation of women themselves, their representatives and community-based non-governmental organizations and other relevant groups” (Article 14).

4. Key Findings: The Extent to Which Housing Policy, Programmes and Implementation Comply With the Right of Access to Adequate Housing

No government anywhere in the world has, as yet, been able to meet all its obligations in terms of the right to adequate housing: “The non-fulfillment of housing rights is a widespread and growing phenomenon and no single country can claim to have satisfied in full their existing legal obligations arising out of the right to adequate housing” (preamble, Draft International Convention on Housing Rights).

In South Africa, there has been rapid progress in the implementation of the right to adequate housing, and the terrain of debate has shifted from the duties of the state to recognise and protect the right to adequate housing towards the more proactive duties of promoting and fulfilling the right: “In some parts of the world, as in South Africa in the past, the right to adequate housing is mainly about resisting demolitions and forced removals, and persuading government to support people in providing housing for themselves. In South Africa, though, there is now protection against illegal evictions and the government is spending large amounts of money on assisting low-income people to obtain housing. The key issues about the right to adequate housing in South Africa relate to the adequacy of new housing...” (BESG, 1999b: 1).

There still seem to be some questions about political will, however. Many civil society stakeholders view the perceived shortcomings of the State with regard to the right to adequate housing more as a lack of political will on the part of government rather than a capacity problem or any other reason. This view is based on perceptions that plans formulated by government often fail to put the poor at the centre and instead cater to higher income constituents and potential investors, and on the attitudes of government representatives and officials to the poor and NGOs who work with the poor²⁷. This view, although a generalization, is symptomatic of the way that the noble intentions of government policies and programmes can sometimes be warped by the realities (or perceived realities) of resource constraints and political considerations.

The new policy directions of the Department of Housing have included emphasis on urban renewal, integrated land development, development in rural nodes, medium density housing, rental housing, social housing, emergency housing, informal settlement upgrading, the People’s Housing Process, promotion of marginalized women in construction and the needs of vulnerable categories of people, and savings-linked subsidies (as reflected in the Minister of Housing’s budget speech, 2003). The key issues identified by the Department of Housing for its Policy and Research Agenda include: maximising the value of housing as an asset to the resident household (as a usable support for a sustainable livelihood and as a bankable or saleable asset) and to local government (as a component of a well performing city or town with a strong rates base), and improving its value with the financial and other sectors (linked to stimulating the emergence of a secondary housing market); promoting development which is demand-defined (by households according to their needs, and through local government-based processes such as the Integrated Development Planning process) and is supply-negotiated with housing suppliers once the nature of the demand has been established through an empowering and participative process which results in well located, quality housing environments; building human settlements which go beyond the production of houses and ensure the integrated delivery of a wide range of social and economic amenities and infrastructure that ensure a supportive context for sustainable livelihoods and a strong civil society; and improved resource management in which viable partnerships are established between local government, communities (sometimes through mediating organisations such as CBOs or NGOs), and the private sector in which risks and resources are more evenly

²⁷ One of the civil society respondents interviewed for this study said: “Deep political questions are at the heart of the problem. Tinkering at the edges won’t really help.... It’s not enough to say that there is not enough consultation, or a lack of capacity to delivery. It’s fundamentally about in whose interests and on whose terms does development occur... I don’t think it’s about presenting rational arguments. We have presented alternatives to various government departments and haven’t had any success. The whole machinery of government does not have the interests of the poor at heart”.

spread and mechanisms are developed to mobilise and distribute resources efficiently and equitably. All of these priorities, except three, are important from a rights-based approach (“medium density housing” is not explicitly prioritised in housing rights, but can be regarded as essential for achieving real integration and real fulfillment of other rights). The three exceptions are:

- A savings-linked subsidy, i.e. where subsidies are allocated on the basis of people saving up a certain amount of money. This would seem to fit somewhat uneasily into a rights-based approach, but as long as there were programmes that met the needs of vulnerable groups on a basis of need rather than savings, it would not be incompatible with a rights-based approach.
- Social housing, as currently generally understood in the South African context, would generally not be considered a high priority in terms of a rights based approach, because it generally targets beneficiaries with relatively higher incomes (although many of the target groups are undeniable living in inadequate housing conditions and their needs do need to be addressed by appropriate housing programmes).
- “Supply-negotiated” delivery: a rights-based approach implies that there needs to be space for self-help delivery and for the initiation of projects by CBOs and NGOs (as is implied by the prioritization of the People’s Housing Process).

During consultative processes undertaken by the Department of Housing during 2003, the four major policy gaps identified included (SMM, 2003):

- Limited integrated development: alignment of multi-year plans, alignment of funding streams, quality of dwelling and housing environments.
- Underspensing of housing budgets: enabling environment, policy gaps, rate of delivery, capacity of municipalities.

Both of these sets of issues are also highlighted by a rights-based approach. The other two major policy gaps identified in the consultation process (housing not regarded as an asset, limited participation of the financial sector) are not high priority issues in terms of a rights based approach, but the need for beneficiary participation, the promotion of access to credit and the duties of other roleplayers in assisting in the realization of housing rights are integral parts of a rights based approach, so there is some overlap between these identified policy gaps and a rights-based approach.

The five cross-cutting “interventions” identified in the consultative processes are (SMM, 2003): awareness and communication, impact of HIV/AIDS, urbanisation of poverty, role of housing in urban/rural economy and capacity building/training. All of these are important from a rights perspective, especially awareness and communication and capacity building/ training.

As a response to the identification of major policy gaps, the Department of Housing facilitated the production of a “logical framework”, or “log-frame”, as a planning and management tool. The five key result areas identified included (UUDP, 2003):

- Housing demands are addressed by co-ordinated planning, funding and capacity building efforts at different spheres and sectors of government, under the leadership of the Department of Housing and in consultation with the Department of Provincial and Local Government.
- Government housing programmes respond to the needs of diverse groups of beneficiaries.
- Roleplayers, other than government, take on increased responsibility for meeting housing demands.

These three result areas coincide very closely with the main requirements of housing strategy in terms of a rights-based approach (integrated approach, coherent policy, programmes to meet special needs, promoting the duties of other roleplayers). The other two result areas (the viability of the social housing sector is enhanced and sustained, houses are regarded as assets in every conceivable way) are not priority issues in a rights-based approach, but there are some overlaps with the latter, as emphases on beneficiary participation and improving the quality of housing and

the urban environment can definitely be regarded as being essential components of a rights-based approach.

In summary, the key points arising out of an examination of the emerging new policy direction of the Department of Housing through a housing rights lens are:

- The emphases on co-ordination and policy alignment, improving the quality of the end product and urban environment, on increasing the delivery rate and on the People's Housing Process all fit in extremely well with a rights-based approach.
- Using housing rights as an organizing principle for housing policies and programmes is not explicitly mentioned.
- The participation of citizens and civil society in housing-related decision making at all levels is not emphasized.
- The emphasis on social housing (as currently defined in South Africa) and savings as a mechanism for allocating subsidies do not appear to fit comfortably within a rights-based approach; they are not incompatible with being part of a rights-based approach, but they are not high priorities in terms of housing rights.

The extent to which current and proposed housing policy and programmes meet the requirements of a rights-based approach are discussed below, using the same structure as for the previous chapter. On the whole, South Africa has made great progress in the realization of the right to adequate housing. The biggest shortcomings are that there has been inadequate quantitative progress in the realization of the right, there has been a lack of integrated development (which has in many cases resulted in unsustainable settlements) and there has been a lack of programmes to deal with specific housing needs and specific vulnerable groups (and most of the criticisms of housing policy by courts and the SAHRC have related to the lack of programmes to deal with specific vulnerable groups).

4.1 Respecting and protecting the right to adequate housing

4.1.1 Recognising the right

South Africa has ratified a number of relevant international and regional human rights treaties and has included the right to adequate housing in the Constitution. South Africa's Constitution is greatly admired internationally and the Grootboom Case is internationally acknowledged as a landmark case in the justiciability of the right to adequate housing. An inexplicable gap, however, is that South Africa has not yet ratified the International Covenant on Economic, Social and Cultural Rights, which is recognised as the most important international agreement in respect of housing rights.

4.1.2 Preventing violations of the right

The Promotion of Equality and Prevention of Unfair Discrimination Act (2000) gives legislative protection against discrimination. The Draft National Action Plan to Combat Racism in the Housing Sector notes that, over and above existing patterns of inequity, racism and other forms of discrimination (e.g. discrimination against foreigners and people living with HIV/AIDS) also sometimes occur in the ongoing allocation of housing resources, e.g. in the allocation of public or private rental housing, in the approval of housing loans by financial institutions, and in NIMBY resistance by surrounding residents to new low-income housing projects (USN, 2002).

There are three main pieces of legislation which protect the rights of unlawful occupiers and tenants as required by Section 26(3) of the Constitution:

- The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act of 1998, which prescribes the procedures to be followed in evicting unlawful occupiers of land in urban areas. The court needs to take the rights and needs of the elderly, children, disabled people and women-headed households into account. In addition, where the unlawful

occupiers have occupied the land for more than 6 months, alternative land needs to be made available for relocation. There has been confusion over the applicability of the Act - in the case of *Ndlovu v Ngcobo* (2003), the Court ruled that the Act also applied to tenants who have defaulted on rent, which was not how it had previously been generally interpreted. There is a draft Bill to amend the Act to exclude tenants. This is widely perceived as a retrogressive step, as it will take away rights of tenants. The Department of Justice and Constitutional Development, on their website states that “at the time of certifying the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act No. 19 of 1998, we stated that, in our view, the Act would apply to all occupiers of land whose occupation of the land in question was considered to be unlawful. In other words, the Act would apply both to so-called squatters and persons who had occupied land lawfully, but whose right to occupy that land had for various reasons lapsed”. To exclude “persons who had occupied the land lawfully” is thus clearly a retrogressive step.

- The Extension of Security of Tenure Act of 1997 applies in rural areas and agricultural areas within urban areas. In terms of this act, people who are occupying a piece of land with the consent of the owner or person in charge (including people who have “continuously and openly” occupied private land for 3 years) have certain tenure rights. There has also been confusion over the applicability of this act – an Eastern Cape High Court decision found that it should also apply in urban areas.
- Rental Housing Act of 1999. In terms of the Act, Rental Housing Tribunals are being set up in each province to deal with illegal or unfair practice relating to the landlord/tenant relationship. The Tribunals are courts, with powers similar to those of magistrate's courts. The impact of the act and the tribunals is unclear; anecdotal evidence would suggest, for example, that foreigners are frequently still exploited by landlords.

Although South Africa has legislative protection against arbitrary evictions, the complexity of the legislation still often results in evictions taking place without all the necessary steps having been correctly undertaken (some respondents were of the view that the majority of evictions fell into this category, and, indeed, a substantial proportion of eviction cases that reach the courts are successfully opposed on technicalities). The Global Survey on Forced Evictions lists five examples of forced evictions, involving an estimated 1344 households, in South Africa during the 1998-2000 period (COHRE, 2002). This is a relatively small number of forced evictions, however (less than 0.5% of all recorded forced evictions in Africa during the same period).

Access to courts and tribunals in order to be able to fight violations of rights generally depends upon access to legal advice. The legal aid system is regarded as far better than it was a decade ago, but is generally not perceived as doing an adequate job in terms of protecting rights. The Legal Aid Board established its Justice Centres largely as a cost-cutting exercise – it has more than halved its practitioner expenses by limiting its practice of hiring private lawyers and focusing on employing its own salaried legal practitioners. There have, however, been criticisms that most of the lawyers employed by the Board are inexperienced and that the quality of services offered to the poor are starting to decline (Mkhwanazi, 2003). The Legal Aid Board has only recently extended its services to include civil cases and legal advice, and its Justice Centres still focus on criminal cases. Although for civil cases they are meant to prioritise the poor and people facing eviction, civil cases are generally not perceived as being high priorities. As a result, the major socio-economic rights cases have all involved lawyers from grant-funded organizations like the Legal Resources Centre, Lawyers for Human Rights and the Women's Legal Centre.

4.2 Promoting the right to adequate housing

4.2.1 Democratic participation

The importance of participation has been recognized in housing policy documents. One of the basic points of departure for housing policy, as set out in Section 2.3 (Framework for a National Housing Policy: Basic Points of Departure) of the National Housing Code is: “Housing policy and

strategy must be structured so that South Africa's housing process... Maximizes the involvement of the community and leads to transfer of skills to and empowerment of the community to ensure higher levels of appropriateness and acceptability of such projects as well as the development of skills and capacities within these communities to pursue other development objectives". The practice has been uneven, however: 39% of beneficiaries in a national survey of housing projects claimed that they were not even consulted during the planning or implementation of the projects (PSC, 2003a).

4.2.2 Access to information

The Promotion of Access to Information Act of 2000 grants the right of access to information referred to in Section 32 of the Constitution. Although there is a substantial amount of information available, through pamphlets and on websites, there is a wide perception that the availability of information could be substantially better. Most provincial housing department annual reports lack important information such as performance against measurable objectives, information on existing housing stock and clear linkages between spending and specific projects (National Treasury, 2003a: 21). An investigation of the Department of Housing found gaps in availability of information, for example, a telephonic query as to how the subsidy scheme worked was not clearly dealt with, and for a walk in query, no housing subsidy information material was available (PSC, 2003a: 41).

4.2.3 Duties of broader society

A climate of awareness about rights issues has not yet been created²⁸, although there are some promising attempts. For example, human rights education has been strongly included in the Department of Education's Curriculum 2005. The National Curriculum Statement requires that all learning areas, especially the learning areas of Social Sciences and Life Orientation, include the principles and practice of human rights, and social and environmental justice. The lack of experience of teachers in human rights education, combined with pressures for delivery in other learning areas, may, however, negatively impact upon these intentions (Scott, 2001).

4.3 Fulfilling the right to adequate housing

4.3.1 Rights as an organizing principle/ integration

Rights have not been an explicit organizing principle driving State policies. At a national level, the two macro policy frameworks driving State programmes have been, firstly, the Reconstruction and Development Programme (RDP), which although not explicitly rights-based, was in part a response to social and political pressures around rights and basic needs. Secondly, the Growth, Employment and Redistribution (GEAR) policy of 1996, the government's macro-economic strategy, has also strongly impacted on government policies, with the National Treasury playing a key role in determining allocation of resources. One of the main emphases of GEAR is to limit government expenditure in order to avoid macro-economic imbalances such as high inflation, balance of payments difficulties and poor long-term economic growth and employment prospects. Although the Housing Subsidy Scheme was conceptualised within the framework of the RDP, the GEAR policy has played a role in determining budget allocations to fund the Housing Subsidy Scheme.

At the project level, apart from the Special Integrated Presidential Projects on Urban Renewal (SIPPs), new housing delivery has generally not occurred in an integrated way. Major national studies evaluating housing projects across the country have found many of the new settlements created by the Housing Subsidy Scheme be unsustainable in the long term: "...while many beneficiaries indicate that they will stay in their settlements, many are unclear about whether there

²⁸ For example, only 1 out of the 7 written responses from municipalities received for this study showed a good understanding of housing rights in South Africa.

is a future for their children in the area, citing a lack of recreation, and – above all – job prospects as major negative factors” (Zack and Charlton, 2003: 21). “Respondents often cite distances from shops, schools, clinics and recreational facilities as a problem. They commonly say distance to amenities has a major impact on their household finances: the cost of transport, particularly to places of work as well as schools, is cited as a heavy financial burden” (ibid: 28). “The only income generation activities in most housing projects are informal activities such as spaza shops, taverns and crèches” (PSC, 2003b: 100). “In general, apart from the Presidential Lead Projects such as Cato Manor and the Integrated Serviced Land Project, there has been inadequate funding for the capital and operational costs of facilities to accompany housing projects, such as halls, parks, sports fields. Many housing projects consequently lack essential facilities” (ibid: 108).

4.3.2 Coherent policy aimed at progressive realization

The number of households living in shacks in informal settlements and backyards increased from 1.45 million in 1996 to 1.84 million in 2001, an increase of 27%, which is far greater than the 10% increase in population over the same period (Statistics South Africa, 1998, 2003). This would not seem to indicate a progressive realization of the right to adequate housing in quantitative terms.

Qualitatively, there has been better progress. The minimum level of infrastructure for South African housing is generally higher than suggested international norms (e.g. as reflected in UN-Habitat, 2003a): The Department of Housing’s Norms and Standards for Permanent Residential Structures sets a minimum water supply of a metered standpipe per plot (compared to a proposed international minimum standard of communal standpipes “within reasonable distance”) and minimum sanitation system of one ventilated improved pit (VIP) latrine per household (compared to a proposed international minimum standard of two households sharing a VIP latrine), and the White Paper on Water proposes a minimum of 25 litres per person per capita of water per day, compared to the proposed international minimum standard of 20 litres per capita per person per day (and the free water supply of 6 kilolitres per month works out as internationally acceptable for a household of up to 10 people). Existing township areas generally have an even higher standard of infrastructure. In terms of overcrowding, however, South Africa is performing less well. The proposed international minimum standard is that there be a maximum of 2 people per habitable room or minimum of 5 m² of floor area per person. On average, this is met (the minimum house size is 30 m² – about 24 m² of habitable floor area²⁹ - with a minimum of two habitable rooms, for a typical household of 4 people³⁰ thus giving 6 m² of floor area per person and 2 people per room. Many households are considerably larger than 4 people, however - a survey of 12 project-linked housing subsidy projects across the country found that 39.8% of households consist of 5 or more people, therefore in a minimum 30m² two-room house there would be at least 2.5 people per habitable room and only up to 4.8m² of floor area per person (PSC, 2003b). The survey found that 12.3% of households consist of 7 or more people, therefore in a minimum 30m² two-room house there would be at least 3.5 people per habitable room and less than 3.5 m² of floor area per person (ibid). In the most severe case of overcrowding found in the survey, in a project in Kimberley there were two households with a total of nineteen people living in a 44m² four-room house (i.e. 4.8 people per habitable room and 2 m² of floor area per person).

4.3.3 Core programmes: finance, land release, informal settlement upgrading, and self-help

The two biggest gaps in policies and programmes are:

- The lack of a national land release/ managed land settlement programme, whereby serviced land in green field projects can be rapidly released for settlement.
- The lack of an informal settlement *in situ* upgrading programme suitable for the needs of the poor (incremental, with flexible tenure options).

²⁹ Typically, about 20% of the built area of a “starter house” consists of walls and the bathroom/ toilet.

³⁰ Census 2001 found that the average household size for African households was 3.9 people (Statistics South Africa, 2003); a survey of 12 project-linked subsidy housing projects across the country found a median household size of 4 people (PSC, 2003b).

Another important issue is the extent to which the National Spatial Development Perspective will impact upon the State's obligations in terms of rural housing. The constitutionality of the National Spatial Development Perspective would depend upon how basic needs are defined. In principle there is no objection to it, as long as basic needs are met, but there are concerns about how it would be implemented. The NSDP could potentially be challenged on the basis of the right to development³¹, but this is not a right that has yet been fully engaged with in SA (even though it is included in the African Charter). It could also potentially be argued that lack of investment in economic growth and job creation in rural areas could make it difficult to provide truly adequate housing in these areas (but even with integrated development programmes, adequate housing could be difficult to achieve in rural areas).

Finance

South Africa is rare among developing countries in that it has a comprehensive housing subsidy scheme, and the number of housing subsidies issued since 1994 is internationally recognised as a virtually unique achievement. UN-Habitat (2003a) notes, however, that the percentage of South Africa's total government expenditure devoted to housing (currently 1.4%) is significantly less than the international average of about 2% for developing countries (see Table 5).

Table 6: Government expenditure on housing

Year	Housing expenditure (R millions)	National expenditure (R millions)	Housing expenditure as % of national expenditure	Number of subsidized houses delivered
1997/98	4 520	189 947	2.4%	295 811
1998/99	3 748	201 416	1.9%	248 391
1999/00	3 494	214 750	1.6%	161 572
2000/01	3 433	233 934	1.5%	190 643
2001/02	3 718	262 905	1.4%	143 281
2002/03	3 944	291 823	1.4%	203 588
2003/04 ¹	4 779	333 965	1.4%	-
2004/05 ²	5 040	363 345	1.4%	-
2005/06 ²	5 346	395 606	1.4%	-

1. National budget for 2003/2004

2. Medium-term Expenditure Framework (MTEF) estimates

Source: National Treasury, 2001, 2002, 2003b; Department of Housing, 2003

There have also been a wide range of interventions to facilitate greater access to housing credit, for example, the National Housing Finance Corporation (NHFC), National Urban Reconstruction and Housing Agency (NURCHA) and the Home Loan and Mortgage Disclosure Act of 2000. The access of low-income households to appropriate housing credit remains a major problem, however: there is still a "credit gap" between the micro-finance sector (loans of up to R10 000) and the mortgage finance sector (loans of usually more than R60 000) (Porteous and Naicker, 2003).

Land release

There is no national rapid land release/ managed land settlement programme, and access to land has been a major obstacle to housing delivery, especially in metropolitan areas. One of the major reasons for insufficient land acquisition is the high cost of well located urban land, and the inadequate provision within the housing subsidy amount for the cost of land. There is only provision of about R400 for the cost of raw land in the housing subsidy amount (although, in practice, up to R1000 of the subsidy amount can be used for the cost of raw land). In reality, the

³¹ The right to development is a relatively new concept in human rights (e.g. see Piron, 2002); it is included in the African Charter on Human and Peoples' Rights.

actual cost of the land per site for a housing project can be considerably more (more than 10 times as much in some cases). Well located land can be even more expensive.

Informal settlement upgrading

Although, the importance of informal settlement upgrading has started to be recognized in South Africa³², there is no national informal settlement upgrading programme. Project-linked housing subsidies can, and are, used for informal settlement upgrading, but are not ideal, as they require an immediate transformation to formal individual ownership. Tenure upgrading in informal settlements ideally requires an interim stage of a more flexible form of tenure that is more suited to the needs of the poor.

Self-help housing

The People's Housing Process is a programme that explicitly facilitates self-help processes. The People's Housing Process programme was viewed very positively by civil society respondents interviewed for this report, and was seen as having the correct principles and the most potential for addressing the needs of the poor while ensuring they have a active role in developing their housing solutions. Yet there was some concern that the pace of delivery was very slow with PHP thus far, and that there had to be a way to keep the community-centred process but still achieve mass delivery. There are also some concerns over the broad interpretations of PHP in some provinces (i.e. "managed PHP") and about increasing attempts to increase norms and standards. Increasing regularization of the People's Housing Process programme could ultimately make it an unaffordable option for the poor.

4.3.4 Special measures for vulnerable groups

People in crisis or desperate situations

Although respondents familiar with the contents of the new Emergency Housing Programme (Programme for Housing Assistance in Situations of Exceptional Emergency) felt that it will go a long way to meeting the obligation of the State in terms of the Grootboom Judgement, it is noticeable that the scope of the policy defines a target group somewhat narrower than that defined in some of the court rulings since the Grootboom case.

Disabled people

Parliament has enacted the Promotion of Equality and Prevention of Unfair Discrimination Act (2000) which enables people with disabilities to challenge unfair discrimination by both the public and private sectors. (Van Reenen, 2002). As part of the Housing Subsidy Scheme, there are extra subsidy amounts available for people with walking or hearing disabilities, to enable modifications to their subsidised houses. This does not seem to have been widely publicised, however: a survey of 20 housing projects found that none of the households in the sample who could theoretically have qualified for the extra amount, were aware of, or had accessed, this additional amount (PSC, 2003b).

People with HIV/AIDS

There is as yet no national programme for people with HIV/AIDS (but Gauteng and KwaZulu-Natal have used transitional housing subsidies³³ for providing institutional accommodation for people

³² For example, the Western Cape Provincial Housing Department/ City of Cape Town's *Informal Settlements Handbook*, and eThekweni Municipality's informal settlement upgrading strategy.

³³ Transitional housing subsidies involve use of part of the amount of the institutional subsidy for the provision of short-term rental accommodation (70% of the institutional subsidy can be paid out without having to identify individual beneficiaries, so the target group for transitional housing do not necessarily have to meet subsidy eligibility criteria).

with HIV/AIDS and AIDS orphans). The Department of Housing, in a submission to MINMEC entitled “The Impacts of HIV/AIDS on Housing and Human Settlements”, has recommended that there be an additional subsidy for the building of additional rooms and services to support the government’s home-based care strategy, and, for where home/community-based care is not a viable alternative, for the Department of Housing to assist the Department of Social Development with shelter requirements.

Women

A relatively large proportion of subsidy beneficiaries are women, ranging from 45% in the Western Cape and Northern Cape to 64% in Limpopo, for project-linked subsidies (Department of Housing, 2003). Although there is no discrimination against women in housing policy, some laws still discriminate against women, and this impacts on the right of women to inherit the ownership of housing. For example, women married under African customary law gender have no inheritance rights (Magardie, 2000). In terms of the Recognition of Customary Marriages Act of 1998, African customary marriages are now recognized in the eyes of the law, but women married in terms of Muslim rites are still excluded from inheritance by the non-recognition of Muslim marriages by South African law (De Villiers, 2003). The unconstitutionality of this discrimination against women still needs to be confirmed by the Constitutional Court. The Department of Housing, in its paper entitled “Submission to Strategic Management: Integrating Gender in Housing and Human Settlements” proposes that one way of dealing with discriminatory laws is to ensure that ownership is registered in the names of both partners.

Children

In the Department of Housing’s paper entitled “Submission to Strategic Management: Framework Document of Child-Headed Households”, it is proposed that prospective homeowners be educated about succession planning, that wills must form a part of subsidy applications, and that municipalities assist child-headed households with providing necessary documentation to the Master of the High Court for the necessary processes to be carried out. Given that there are hundreds of thousands of child-headed households in South Africa, it is doubtful whether the courts or municipalities currently possess the necessary capacity to undertake this. It is also proposed that a special housing programme be investigated for the subsidisation of capital costs to construct additional rooms to accommodate the need for additional space of foster care households.

Refugees and asylum seekers

There is no housing programme for refugees (there do not, however, appear to have been any court cases involving the right of refugees to housing). The Refugees Act has built-in protections in terms of which refugees are entitled to the same rights in the Bill of Rights as everyone else. There is, however, a general limitations clause, in terms of which these rights can be limited in certain cases. The Black Sash has estimated that there are about 30 000 refugees in South Africa.

Homeless people/ street people

There is no national housing programme for “street people”, but in Gauteng and KwaZulu-Natal, transitional housing subsidies have been used in a small number of projects to provide temporary accommodation for “street people” in rehabilitation programmes and for temporary visitors to cities who do not have a place to sleep³⁴. Shelters for “street people” face many problems, however.

³⁴ Cornelius House in Johannesburg is a run by a NGO called the Johannesburg Trust for the Homeless (JTH). 67 units (ranging from single person units to family units) provide accommodation for a total of 200 people. The accommodation is targeted at homeless people who are being rehabilitated into society (the JTH also runs various personal upliftment and job skills programmes). Rents range between R100 and R250 per month. “Strollers” is an institutional housing project in Durban that provides accommodation for people

One of the civil society organisations interviewed for this study is a NGO that runs a shelter for street children – although they have capacity to provide for 120 children, due to lack of funds (they receive funding from the Department of Social Services and private donors) and high operating costs (partially because the municipality refuses to give them a rebate on rates and service charges), they are currently only able to provide accommodation for 65 children. The NGO attempts to “rehabilitate” the children back into society, but they find a major problem is that many children are unable to return to their families because there is simply not enough space in the family dwelling (and in some cases, matric pupils have also had to return to the shelter because there was no lighting to enable them to study at night in the family dwelling). Another problem is that there is a severe lack of accommodation options cater for former street children, over the age of 18, who do not live with their families and are often still attending school.

4.3.5 Reasonable implementation

It is probably in implementation that there is the biggest gap between the ideal of a rights based approach and reality. The implementation of housing policy has been problematic, both in terms of lack of resources (both human and financial) and in efficiency. The National Department of Housing and some of the provincial housing departments (Western Cape, Northern Cape, North West) have reported that budget allocations are inadequate (SAHRC, 2003a). Lack of capacity at municipal level is also a major constraint. An audit of one of the more efficient provincial housing departments found “gross financial mismanagement, service delivery failure and lack of competent governance and accountability... We have a constitutional responsibility to provide housing and it is evident that the [Western Cape provincial] department of housing is not discharging its constitutional responsibility” (the director of the Western Cape provincial forensic audit unit, quoted in Dreyer, 2003). In terms of complaints procedures, a survey found that only 52% of citizens receiving a housing subsidy in local authority projects were aware that there is a complaints process, and of those who lodged complaints, 36% felt that their complaint was not dealt with appropriately (PSC, 2003a: 38).

4.3.6 Monitoring progress

The South African Human Rights Commission is not able to effectively monitor human rights on its own, and civil society has had little involvement in the monitoring of socio-economic rights - this has been recognized both by the Commission itself as well as other commentators (McClain, 2002; Newman, 2003). The Human Rights Commission’s monitoring essentially consists of an annual Report on Economic and Social Rights which relies heavily on information filled in by the National Housing Department and Provincial Housing Departments.

who occasionally visited the city centre and ended up sleeping on the pavements. Strollers has 300 beds, rented out from rents of R14-27 a night (Department of Housing 2002a, 2002b; Mark Byerley, eThekweni Municipality).

5. Recommendations

The implications of a rights-based approach for the Department of Housing's Policy and Research Agenda are discussed below. The recommendations are grouped into three sections:

- Priorities for research: issues which are not yet clear and need further investigation.
- Priorities for policy development: issues which need to be taken forward through the development of appropriate policies to provide a framework for future actions.
- Priorities for programmes of action: actions which could be implemented in the short to medium term.

5.1 Research

The four main priority areas for further research are:

- Further work, from a human rights law perspective, needs to be undertaken on determining the housing-related legal obligations of the State in terms of the African Charter on Human and People's Rights and the United Nations human rights treaties that South Africa has ratified (i.e. International Convention Relating to the Status of Refugees, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child).³⁵
- Proposed new recommendations on housing rights, such as the Bangkok Guidelines, need to be followed up.
- The implications of new housing-related court rulings need to be continually followed up to keep track of possible changes in the State's legal obligations. In September 2003 alone, there were two notable housing-related court rulings, in the Baartman Case and the Sheffield Road Case³⁶.
- More work needs to be done on determining the obligations of non-State roleplayers with regard to housing rights, as this is an area of research on which little has been done.

5.2 Policy development

The main priorities for policy development are:

- Integration
- Framework for engagement with and participation by citizens and civil society
- National housing programmes for new housing
- National housing programmes for existing housing
- Protection for tenants.

5.2.1 Integration

In order to achieve real integration, a fundamental restructuring of the way that budgets are prioritised and allocated is required, and there would need to be a restructuring of the way that policies and programmes are divided up between departments and between spheres of government. Essentially, a new macro-policy based on socio-economic rights is required as a framework for government policies and programmes and institutional arrangements.

³⁵ There should also be a renewed attempt to have the International Covenant on Economic, Social and Cultural Rights ratified by South Africa; this ratification would make the legal duties of the State with regards to the right to adequate housing clearer.

³⁶ Cecil Baartman and Eleven Others v. Port Elizabeth Municipality (Supreme Court of Appeal, Case No. 464/2002) – judgement delivered on 26 September 2003; The City of Cape Town v. The Various Occupiers of the Road Reserve of Appellant Parallel to Sheffield Road in Philippi (High Court – Cape of Good Hope Provincial Division, Case No. A5/2003) – judgement delivered on 30 September 2003.

5.2.2 Framework for engagement with and participation by citizens and civil society

Formal structures and processes to facilitate the involvement of civil society and other roleplayers in housing-related decision making at all levels (national, provincial, municipal) need to be developed. As proposed by the South African Human Rights Commission, there should be a regulatory framework to facilitate real participation by citizens and civil society in decision-making at all levels. Some lessons for such structures and processes could possibly be learned from the experiences of the National Consultative Forum on Human Rights (NCFHR).

5.2.3 National housing programmes for new housing

The key additional national housing programmes required to fulfil the obligations of the State with regards to housing rights are:

- A rapid land release/ managed land settlement programme
- An informal settlement upgrading programme
- Transitional subsidy programme to be used for the provision of accommodation for people living with HIV/AIDS, refugees/asylum seekers and the rehabilitation of homeless people/ street people
- A programme for single people (including the provision of affordable rental accommodation consisting of single rooms with access to shared facilities).

The individual subsidy programme (for households to access housing outside of projects) also needs to be revived, so that the housing needs of households that are not addressed by housing projects can also be met. It must be ensured that the People's Housing Process policy is flexible and appropriate to the needs of the poor, and must not become over-regulated, as that would restrict self-help housing delivery.

5.2.4 National housing programmes for existing housing

Appropriate programmes need to be developed for improving the adequacy of existing housing stock (the right to adequate housing is a progressive right that also applies to people who already have access to land, basic services and shelter, but whose housing conditions may still not be adequate). Programmes are required to address housing needs in the following areas:

- New housing projects
- Established townships
- "Inner city" slums
- Backyard shacks.

5.2.5 Protection for tenants

If the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act is amended to exclude tenants, alternative instruments for protecting tenants' rights need to be reviewed to see if they are adequate, and new instruments to ensure sufficient protection for tenants need to be developed if necessary.

5.3 Programmes of action

The main priorities for programmes of action which could be implemented in the short term include:

- Co-ordination/ policy alignment
- Capacity building of officials and other stakeholders
- Providing access to information
- Ensuring effective monitoring

5.3.1 Co-ordination/ policy alignment

Integration between housing and other sectors is essential (and is already starting to happen). The Department of Housing particularly needs to collaborate with the Department of Social Services on programmes for vulnerable groups, the Department of Land Affairs on rural housing programmes, and the Department of Justice and Constitutional Development on civic education and access to legal assistance for citizens and civil society for accessing rights. The National Development Agency should ensure that it allocates a proportion of its funds for funding civil society organisations involved with rights issues, and the the Justice Centres of the Legal Aid Board should prioritise cases in which poor and vulnerable people are attempting to access their human rights (and the necessary capacity for dealing with such cases needs to be developed).

5.3.2 Capacity building of officials and other stakeholders

In order to ensure a socio-political climate in which housing rights can be effectively realized, it is important to raise awareness amongst officials and other stakeholders in the housing sector (consultants, developers, politicians, communities, citizens) about the implications of the right to adequate housing in terms of duties of the State and broader society. The Department of Housing should collaborate with the South African Human Rights Commission and NGOs in developing appropriate capacity building programmes with regards to the right to adequate housing.

5.3.3 Providing access to information

Lack of information is the biggest obstacle to citizens and civil society being able to engage with their rights, especially at a local level. With regards to housing, municipalities should be required to annually release public reports on housing conditions in the municipality and progress made in attempting to deal with housing problems. Information on housing rights and programmes for accessing those rights must be distributed via:

- Pamphlets in the official languages of South Africa to be disseminated through municipal housing advice offices
- Information officers at municipal housing advice offices
- Radio stations
- Community newspapers.

5.3.4 Ensuring effective monitoring

The National Department of Housing and provincial housing departments must take steps to ensure that they are able to collect sufficient relevant information (as discussed in Section 3.3.6 of this report). This information must then be made readily available to the public (as provided for by the Promotion of Access to Information Act), to facilitate monitoring of the realization of the right to adequate housing by the South African Human Rights Commission and civil society bodies. The Commission “move towards a system of monitoring government policies and actions relating to socio-economic rights that mirrors those of the United Nations treaty bodies. This would mean that civil society, especially NGOs, would play a more important role in providing information and challenging the inputs made by government departments” (McClain, 2002).

6. List of Sources

Interviews

As part of this study, interviews on the ways in which citizens and civil society engage in accessing their housing rights, and on their perceptions of what a rights-based approach to housing should entail, were held with the following people:

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- Cameron Brisbane, Built Environment Support Group, 2/10/2003
- Faizel Brown, Anti-Eviction Campaign, 29/9/2003
- Geoff Budlender, Legal Resources Centre, 2/10/2003
- Ronald Eglin, Afesis-Corplan, 2/10/2003
- Clive Felix, Urban Services Group, 7/10/2003
- Samantha Hargreaves, National Land Committee, 1/10/2003
- Steve Kahanowitz, Legal Resources Centre, 2/10/2003
- Professor Sandra Liebenberg, Community Law Centre, 1/10/2003
- Patricia Matolengwe, Homeless People's Federation/ uTshani Fund, 6/10/2003
- Ivor Matshili, Twilight Children, 1/10/2003
- Maureen Mnisi, Landless People's Movement 17/10/2003
- Jan Pritchard, Twilight Children, 1/10/2003
- Rev. Les Sanabria, Gauteng Alliance for Street Children, 6/10/2003
- Linda van Meygaarden, Twilight Children, 1/10/2003
- Chris Watkinson, South African Human Rights Commission, 30/9/2003

Written questionnaires

An e-mail questionnaire accompanied by a covering letter from the Department of Housing was sent to a selection of 40 municipalities representing all provinces and most major cities. We received responses from the following 7 municipalities:

- Abaqulusi Municipality - Municipal Manager's office (name not provided)
- Blue Crane Route Municipality – Dirk Crous
- Buffalo City Municipality - D. B. Govender
- City of Cape Town - Basil Davidson

- eThekweni Municipality - Cogi Pather
- Ngwathe Municipality – Acting Chief of the Housing Department (no name provided)
- Richmond Municipality - Community Manager (name illegible)

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