

Living in security, peace and dignity
The right to have access to housing
of women who are victims of gender-based violence

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CONTENTS

ACKNOWLEDGEMENTS	v
EXECUTIVE SUMMARY	vii

1	INTRODUCTION	1
1.1	Origin of this research paper	2
1.2	Problem statement	3
1.3	Housing needs of women experiencing domestic violence	4
	1.3.1 Housing needs as a continuum	4
	1.3.2 Domestic violence as 'forced eviction'	6
1.4	Outline of the paper	7
2	CONSTITUTIONAL OBLIGATIONS TO PROMOTE ACCESS TO HOUSING	8
2.1	Interpretation of the right to have access to adequate housing	9
	2.1.1 The <i>Grootboom</i> judgment	9
	2.1.1.1 Analysis of three key elements	10
	2.1.1.2 Evaluation of the state's housing programme	11
	2.1.2 Subsequent judgments	12
2.2	Interpretation of the right to freedom from all forms of violence	16
2.3	Discussion	17
3	LEGISLATIVE AND POLICY FRAMEWORK	18
3.1	Housing Act 107 of 1997	18
3.2	Other legislation	20
	3.2.1 Extension of Security of Tenure Act 62 of 1997	20
	3.2.2 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998	21
	3.2.3 Housing Consumers Protection Measures Act 95 of 1998	21
	3.2.4 Rental Housing Act 50 of 1999	21
	3.2.5 Home Loan and Mortgage Disclosure Act 63 of 2000	21
3.3	Provincial housing legislation	22
3.4	Policy documents	22



3.5	Housing delivery programmes	23
3.5.1	Emergency housing	23
3.5.2	Shelters	24
3.5.2.1	Institutional housing subsidy programme	24
3.5.2.2	Transitional housing programme (KwaZulu-Natal, Gauteng and Western Cape)	26
3.5.3	Communal housing (Gauteng)	27
3.5.4	Social housing	28
3.5.5	Rental and individual home ownership programmes	28
3.6	Discussion	30
4	INTERNATIONAL LAW	31
4.1	International Covenant on Economic, Social and Cultural Rights	32
4.2	Convention on the Elimination of All Forms of Discrimination against Women	35
4.3	Resolutions	40
4.3.1	UN Commission on Human Rights	40
4.3.2	UN Human Rights Council	42
4.3.3	UN General Assembly	42
4.4	Reports by special rapporteurs	43
4.4.1	Special Rapporteur on Adequate Housing	43
4.4.2	Special Rapporteur on Violence against Women	45
4.5	Regional Instruments	47
4.5.1	African Women's Protocol	47
4.5.2	SADC Protocol on Gender and Development	49
4.6	Discussion	50
5	EVALUATION AND CONCLUSION	52
<hr/>		
ANNEXURE A		
	The Housing Ladder	73



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EXECUTIVE SUMMARY

South Africa currently faces a confluence of three factors – high levels of domestic violence, a dire lack of access to adequate housing and the largest HIV epidemic in the world – that demands an urgent consideration of the right of access to adequate housing of women experiencing domestic violence. The need for this paper was identified during the course of a project executed by the Socio-Economic Rights Project at the Community Law Centre in partnership with the Centre's Gender Project and the Saartjie Baartman Centre for Women and Children during 2006 and 2007. The project was aimed at investigating and strengthening the role of informal community structures in determining access to adequate housing for women who are vulnerable to gender-based violence and HIV/AIDS in three communities in Cape Town.

That research included an analysis of the constitutional and legislative framework supporting women's housing rights in South Africa and revealed a gap in current knowledge regarding the nature and extent of the government's duty to promote the realisation of the right of women who are victims of gender-based violence (particularly domestic violence) to have access to adequate housing. This paper is aimed at addressing that gap.

In order to gain a better understanding of the background to this problem, the paper briefly examines the housing needs of women experiencing domestic violence. While women who are abused should ideally be able to stay in their own homes (with their children), with



the *perpetrators* moving out, in practice it is usually the women who have to leave and find alternative accommodation.

A useful model for understanding how people's housing needs change over time is known as the 'Housing Ladder'. This 'ladder' represents a continuum, ranging from emergency shelter at one end to full independent home ownership at the other.

A second conceptual theme explored in the paper is an understanding of a domestic violence victim's ultimate departure from home as a result of the violence and having to seek alternative accommodation as a form of forced eviction. 'Forced eviction' has been defined as the permanent or temporary removal against their will of individuals, families or communities from the home or land that they occupy, without the provision of, or access to, legal and other forms of protection.

The reasons for, or causes of, forced eviction include development and infrastructure projects (such as dam building) and urban redevelopment projects. However, the causes can also be gender-specific: for example, domestic violence that drives women out of the home or discriminatory inheritance laws or customs that result in the eviction of women from their homes and lands. Victims of domestic violence who have no option but to leave their homes in order to escape the violence have much in common with victims of more 'conventional' forced evictions.

The South African Constitution guarantees the right to have access to adequate housing (section 26(1)). Section 26(3), which deals with evictions, provides that 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. Legislation may not permit arbitrary evictions. Legislation, policies and programmes on housing have also been adopted. The Constitution furthermore provides for the right to be free from all forms of violence from either public or private sources (another respect in which the South African Bill of Rights is unique) as well as the right to gender equality. The state has a general obligation, set out in section 7(2) of the Constitution, to 'respect, protect, promote and fulfil' the rights in the Bill of Rights. Section 26(2) imposes a specific duty on the state to take reasonable measures, within its available resources, to achieve the progressive realisation of the right to have access to adequate housing. In the context of access to adequate housing, it is also important to have regard to section 25(5), which requires the state to take reasonable legislative



and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

As explained in this paper, the state's duties also include promoting the meeting of special housing needs, including, but not limited to, the needs of the disabled and the housing needs of marginalised women and other groups disadvantaged by unfair discrimination.

The constitutional duty of the state to 'progressively realise' the right to have access to housing was first considered and interpreted by the Constitutional Court in *Government of Republic of South Africa and Others v Grootboom and Others*. The Constitutional Court set out a number of requirements with which the state's measures had to comply in order to be 'reasonable'. Importantly, the Court also emphasised the interrelated nature of rights, by stating that reasonableness should further be understood in the context of the Bill of Rights as a whole. To date, the *Grootboom* judgment remains the standard-setting pronouncement on the interpretation of the right to have access to adequate housing. Certain principles further refining the standard of reasonableness have emerged from subsequent judgments arising from the state's intransigence in implementing the order of the Constitutional Court.

Furthermore, since the introduction of the interim Constitution in 1994, South African law has seen a series of judgments relating to various aspects of the state's duty to respond to violence against women. The courts have found obligations resting on the state to enact legislation to prevent and reduce domestic violence, and, in different contexts, have held the state liable for the failure of state agents to prevent acts of violence against women committed by private actors. These findings have been based on section 12(1)(c) read with section 7(2) of the Constitution, with the Constitutional Court also emphasising that domestic violence simultaneously constitutes a violation of the right to equality and non-discrimination. A consideration of the constitutional provisions relating to the right of women who are victims of domestic violence to have access to adequate housing should entail not only an analysis of the right in section 26 read with section 12(1)(c); these rights should be understood against the background of substantive equality.

An examination of international and regional (including sub-regional) human rights law and standards shows the emergence of clear standards in respect of the interrelationship between women's



right of access to adequate housing and domestic violence. These standards include the recognition of a state's duty to provide women experiencing domestic violence with access to safe housing. These developments have the potential to give significant guidance to South African courts tasked with the interpretation of this right in respect of women experiencing domestic violence.

It is questionable whether existing housing programmes in South Africa, as they apply to women experiencing domestic violence, comply with constitutional standards (as amplified by the norms that have developed in international law). An overview of the existing programmes, measured against the *Grootboom* requirements and the norms of international law, as described in this paper, emphasises the fragmented nature of programme development in the area of housing for women experiencing domestic violence. It leads to the conclusion that the current government approach to this group falls short of these standards in several respects.



1 INTRODUCTION

One of the most persistent challenges facing a democratic South Africa is the high incidence of violence experienced by women, including domestic violence. Statistics on the number of domestic violence incidents reported to the South African Police Service only recently started becoming available, which makes the identification of trends somewhat difficult.¹ However, community-based prevalence studies have shown that domestic violence, in one form or another, affects as many as half the women in South Africa.² All too frequently, this violence has fatal consequences.³

It has been noted that a lack of access to safe housing alternatives is often a major factor in keeping women trapped in violent relationships.⁴ This is said to be true for women all over the world, regardless of whether they live in developing or developed⁵ countries. In our experience, it certainly holds true in the South African context.⁶ The Special Rapporteur on Violence against Women observed in 2000 that in the United States, 50%–60% of homeless women had fled domestic violence.⁷ Although women living on the streets are exposed to high risks of violence, that may be their only alternative to violence from a partner they are forced to be with in order to have a roof over their heads.⁸

Evidence continues to emerge of links between domestic violence and women's increased vulnerability to HIV/AIDS.⁹ This implies that where women are forced to remain in violent or coercive relationships due to a lack of access to adequate housing, this increases their sus-



ceptibility to HIV infection; conversely, ensuring women's access to adequate housing and property rights has been identified as a valuable strategy in reducing their risk of sustaining HIV.¹⁰

According to the 2008 UNAIDS Global Report, the estimated 5.7 million South Africans living with HIV in 2007 make this the largest HIV epidemic in the world.¹¹ Although HIV data from antenatal clinics in South Africa suggest that the country's epidemic might be stabilising, there is no evidence yet of major changes in HIV-related behaviour.¹²

A further reality to be considered is that although significant progress has been made in terms of housing delivery in South Africa, the current housing backlog is estimated to stand at 2.154 million.¹³ The confluence of these three aspects in the South African environment – namely, high levels of domestic violence, the lack of access to housing and the proportions of the local HIV epidemic – argues for an urgent consideration of the right of access to adequate housing of women who are victims of gender-based violence, with specific reference to domestic violence.

1.1 Origin of this research paper

In 2007 the Socio-Economic Rights Project at the Community Law Centre, in partnership with the Centre's Gender Project and the Saartjie Baartman Centre for Women and Children, completed a one-year project aimed at investigating and strengthening the role of informal community structures in determining access to adequate housing for women who are vulnerable to gender-based violence and HIV/AIDS in three communities in Cape Town.¹⁴

The project consisted of a number of activities, including an education workshop, field research and strategy workshops. A comprehensive report setting out the project results and recommendations was published.¹⁵ In the course of the project, researchers also communicated with the housing departments of the Cape Town City Council and the Western Cape provincial government regarding the formulation of 'special needs'¹⁶ housing policies in the Western Cape.

In the early stages of the project in 2006, the researchers established that neither the city nor the provincial housing department had policies in place to accommodate women experiencing domestic violence or other vulnerable groups, such as persons with disabilities.



However, the researchers were pleased to learn later (in October 2006) that both departments had commenced a process of drafting special needs housing policies. At the beginning of 2009, a provincial policy to 'Support Group Accommodation for People with Special Needs' was adopted in the Western Cape.

A concern voiced by civil society organisations at consultative workshops preceding the adoption of the Western Cape provincial policy was whether the vehicles for housing provision proposed in draft policies would be appropriate for the clients concerned.¹⁷ For example, service providers emphasised that women who were victims of domestic violence generally would not be able to afford housing under the 'social housing' model,¹⁸ and that rental housing in various forms would be better suited to their specific needs. For this reason, they argued that this form of housing provision should receive serious consideration in a special needs housing programme. Whether this recommendation has been included in the 2009 provincial policy is considered below.

1.2 Problem statement

Part of the research was an analysis of the constitutional and legislative framework supporting women's rights to access housing in South Africa. This examination included the leading judgment of the Constitutional Court in *Government of Republic of South Africa and Others v Grootboom and Others*.¹⁹ Although the Court in the *Grootboom* case did not specifically deal with the position of women experiencing domestic violence, commentators have argued that the principles set out in the judgment in respect of vulnerable and disadvantaged groups can also be made applicable to this group of women.²⁰ They make the hypothetical argument that one should apply the court's approach of considering housing rights in their historical and social context when examining women's claims to have access to housing, especially in the context of 'emergency housing' for women who are forced to leave their homes as a result of domestic violence.²¹ However, these authors stop short of considering what a reasonable programme of providing access to housing would mean in practice.

Hence there is a gap in current knowledge regarding the nature and extent of the South African government's duty to promote the realisation of the right of women who are victims of gender-based vio-



lence (particularly domestic violence) to have access to adequate housing. This paper aims to address that gap.

1.3 Housing needs of women experiencing domestic violence

Women are in the shelter with their children for three months, then they don't know where to go and find themselves in abusive situations again. A friend of mine has said that she would rather kill herself than go back [to the abuser].²

1.3.1 Housing needs as a continuum

In order to gain a better understanding of the broader background to this problem, it is useful to briefly examine the housing needs of women experiencing domestic violence. As Emdon points out, women who are abused should ideally be able to stay in their own homes (with their children) and it should be the *perpetrator* who moves out.²³ In reality, however, this rarely happens and it is usually the woman who literally has to flee under conditions of extreme stress and find alternative accommodation.²⁴

Depending on the woman's financial resources and whether family or friends are able to accommodate her and her children, she may find herself at a shelter for abused women when she leaves the violent situation.

Most shelters in South Africa are run by non-governmental organisations (NGOs), with their operational costs subsidised by the provincial departments of social development,²⁵ are in urban areas and operate at maximum capacity, often with a waiting list.²⁶

The length of the woman's stay in such a shelter is usually limited to, for instance, a maximum of three or six months. During this period, she will receive emergency or short-term counselling and at some shelters she will also be able to access legal advice on and assistance in, for example, obtaining a protection order in terms of the Domestic Violence Act²⁷ or instituting a divorce against the perpetrator.²⁸ These 'first-stage' shelters will usually also accommodate the woman's children, although certain shelters do not allow boys over the age of 12.²⁹

Because the majority of shelters offer short-term stays only, the big question facing residents is where they will go when their time in the shelter comes to an end. For many women, the realities of unemploy-



ment and financial dependence on their partner leave them with no option but to return to the abusive relationship.³⁰

A number of shelters, such as the Saartjie Baartman shelter in Heideveld, Cape Town, also offer second-stage accommodation, where women can stay for up to two years, generally after having completed their stay in the first-stage shelter. In some instances, women are expected to pay low or nominal rent.³¹ The purpose of these second-stage shelters is to allow women and their children a period of stability: women can receive ongoing counselling and attend skills training programmes, while their children can go to local schools.³² The emphasis in this phase is on encouraging women to become more independent. The aim is that at the end of their stay, women should have found employment and be able to move into more permanent accommodation.³³ Unfortunately, the number of second-stage shelter facilities in South Africa is very limited, which presents abused women who have to leave first-stage shelters with harsh choices. Ideally, what should be available for these women on leaving a second-stage shelter is a 'third-stage' shelter: that is, secure, permanent housing that still provides some form of support. However, almost no third-stage shelters are available for abused women in South Africa.³⁴

At this point, it is useful to briefly look at a model for housing options that illustrates how people's housing needs change. Over time, a person who once found herself in need of emergency or shelter housing can progress to a more independent and sustainable position regarding housing.³⁵ This model, termed the 'Housing Ladder',³⁶ can be illustrated on a continuum ranging from emergency shelter at one end to full independent home ownership on the other end (see Annexure A).

This progression can be explained as follows: the first stage is seen as basic *emergency housing*,³⁷ which the person in need of accommodation enters for a very short period. Thereafter the person moves into a *shelter*, where a greater level of support is offered, such as the first-stage shelters described above. From this shelter accommodation, the person should become able to move into a *transitional housing institution*, such as the second-stage housing referred to above, for a longer period. A very low rental is payable and the emphasis is on support services to help the person become financially independent and find employment.

Communal housing is the next step. The rent is higher and there is less support, but still some training. The lifestyle is supportive as



there are communal facilities and shared living arrangements. There is no time limit stipulated for how long a person may stay. Thereafter, as the person is more independent, they may move onto a *social housing project* where there is an individual flat with its own facilities such as kitchen and bathroom and where the rent is higher. A properly managed social housing project should offer some support to its residents in the form of crèche facilities, playground areas and other community activities. However, there is less emphasis on support. The last housing option on the ladder is full home ownership in a separate family house.

Emdon notes that while, in an ideal world, the Housing Ladder approach is a useful model, women may move back and forth between different 'housing rungs', depending on their particular life circumstances: there is no straightforward imperative towards stepping up in a linear way.³⁸ This model is nevertheless a useful concrete reminder of the fact that the housing needs of women experiencing domestic violence are not uniform: women's needs for accommodation and support may vary according to the stage at which assistance is sought. In this context, 'women experiencing domestic violence' as a group should not be seen as homogeneous either: within this group, there are significant distinguishing factors that may further impact on women's access to housing, such as class, disability and sexual orientation.

The different options of transitional, communal and social housing for women experiencing domestic violence and how they fit into the various housing programmes and policies developed by the South African government are explored in more detail in section 3 of this paper.

1.3.2 Domestic violence as 'forced eviction'

A second conceptual theme is the understanding of domestic violence as a form of forced eviction, where the victim ultimately leaves the home as a result of the violence and seeks alternative accommodation. 'Forced eviction' has been defined as the permanent or temporary removal against their will of individuals, families or communities from the home or land that they occupy, without the provision of, or access to, legal and other forms of protection.³⁹

The reasons for, or causes of, forced eviction include development and infrastructure projects (eg dam building) and urban redevelop-



ment, gentrification and city beautification projects.⁴⁰ In addition, forced eviction has been recognised as both a strategy and a weapon of war.⁴¹ However, the causes of forced eviction can also be gender-specific: for example, domestic violence that drives women out of the home, discriminatory inheritance laws or customs that result in the eviction of women from their homes and lands and discriminatory laws and other policies and customs that prevent women from being granted title to a home or land upon dissolution of marriage.⁴²

Paglione points out that victims of domestic violence who have no option but to leave their homes in order to escape the violence have much in common with victims of more 'conventional' forced evictions.⁴³ It could be argued that these abused women leave their homes 'voluntarily', which implies that their eviction from their home was not 'forced'.⁴⁴ However, in reality, for abused women the alternative of remaining in the abusive relationship is not an option, bearing in mind that a choice implies the existence of feasible alternatives.⁴⁵

The decision of a battered woman to leave her abusive husband is therefore not a truly voluntary one; if the alternative includes the daily threat to one's own life and the permanent cohabitation with a violent partner, whose violence intensifies beatings after beatings, such decision loses its discretionary aspect and clearly turns into a compulsory survival act.⁴⁶

Viewing domestic violence, resulting in the victim leaving the home, as a form of forced eviction, is discussed further in section 4.1 below.

1.4 Outline of the paper

Section 1 introduces the paper by sketching the broad background to domestic violence and housing in South Africa generally. It also sets out the origin of this research paper and the problem statement and explains the housing needs of women experiencing domestic violence. The section further outlines those needs and briefly describes domestic violence which results in the victim leaving her home and having to find alternative accommodation as a form of forced eviction.

Section 2 examines constitutional obligations to promote access to housing, with reference to the *Grootboom* and subsequent judgments. It also examines the line of judgments dealing with state duties to address acts of violence against women.



Section 3 sets out the legislative and policy framework supporting access to housing in South Africa and examines whether this framework currently makes adequate provision for women who are victims of domestic violence.

Section 4 looks at the standards and norms that have emerged in international human rights law, with specific reference to the rights to adequate housing, gender equality and freedom from violence.

Section 5 returns to the research question and evaluates, against the findings of the preceding sections, the nature and extent of state duties to realise the right of women who are victims of gender-based violence to have access to housing. It also proposes certain recommendations based on the conclusions reached.

2 CONSTITUTIONAL OBLIGATIONS TO PROMOTE ACCESS TO HOUSING

The South African Constitution,⁴⁷ in its Bill of Rights, guarantees the right to have access to adequate housing (section 26(1)).⁴⁸ South Africa is the only country in southern Africa with that right entrenched in its Constitution.⁴⁹ In addition, section 26(3), which deals with evictions, provides that 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. Legislation may not permit arbitrary evictions. The Constitution furthermore provides for the right to be free from all forms of violence from either public or private sources⁵⁰ (another respect in which the South African Bill of Rights is unique) as well as the right to gender equality.⁵¹

The state has a general obligation, set out in section 7(2) of the Constitution, to 'respect, protect, promote and fulfil' the rights in the Bill of Rights. Section 26(2) imposes a specific duty on the state to take reasonable measures, within its available resources, to achieve the progressive realisation of the right to have access to adequate housing. In this context, it is also important to have regard to section 25(5), which requires the state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.⁵²

In this section, the interpretation of the right to have access to adequate housing is considered with specific reference to the *Grootboom*



judgment. The judgment has generated an extensive body of comment and a number of subsequent judgments relating to the right of access to adequate housing have followed this key decision. This section is not a detailed discussion of the *Grootboom* case, but, in line with the problem statement set out in section 1 above, it rather attempts to trace the basic principles set out in the judgment and to lay the foundation for a subsequent analysis of how these principles might apply to women experiencing domestic violence. Following this analysis, the section traces the development of the notion of state responsibility to respond to acts of (private) violence against women in South African case law.

2.1 Interpretation of the right to have access to adequate housing

2.1.1 The *Grootboom* judgment

The constitutional duties of the state to ‘progressively realise’ the right to have access to housing were first considered and interpreted by the Constitutional Court in *Government of Republic of South Africa and Others v Grootboom and Others*.⁵³ This matter arose from the eviction of a group of people who had illegally occupied vacant private land earmarked for formal low-cost housing.⁵⁴ Their occupation of this land, which they optimistically named ‘Nuwerus’,⁵⁵ was the result of the intolerable conditions under which they had been living in an informal squatter settlement called Wallacedene, near Cape Town, while waiting their turn to be allocated low-cost housing. The eviction left the respondents⁵⁶ homeless, squatting on a municipal sports field under structures made from plastic sheeting at the start of the rainy Cape winter. They accordingly approached the Cape High Court for an order requiring the government (in the form of the local municipality) to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court granted the respondents the requested relief and the government appealed against this order.

Although the High Court had based its order on section 28 of the Constitution,⁵⁷ the Constitutional Court dealt with both sections 26 and 28 in its judgment. The Court’s analysis of section 26 is exam-



ined here in some detail, since it is of importance for the subsequent discussion. The Court noted that the extent of the state's obligation to provide access to adequate housing, which is not an absolute or unqualified one, was defined by three key elements: 'to take reasonable legislative and other measures', 'to achieve the progressive realisation' of the right and 'within available resources'.

2.1.1.1 *Analysis of three key elements*

The Court explained that the state was required to take 'reasonable legislative *and* other measures',⁵⁸ and that legislative measures by themselves were not likely to constitute compliance with the Constitution. The legislative measures would invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive.⁵⁹ This meant that 'the legislative and other measures' had to establish a coherent housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means.⁶⁰ The programme had to be capable of facilitating the realisation of the right. It had to be a coordinated, comprehensive programme determined by all three spheres of government in consultation with each other.⁶¹ The precise content of the measures to be adopted was primarily a matter for the legislature and executive. However, they had to ensure that these measures were *reasonable*. A court considering reasonableness in this context would not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.

The element of reasonableness extended to both the formulation of housing programmes and policies and their implementation.⁶² An otherwise reasonable programme that was not *implemented* reasonably would not constitute compliance with the state's obligations. Importantly, the Court pointed out that in determining whether a set of measures was reasonable, it would be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme.⁶³ The programme had to be balanced and flexible and make appropriate provision for attention to housing crises and to short-, medium- and long-term needs. A programme that excluded a significant segment of society could not be said to be reasonable.

The Court again emphasised the interrelated nature of rights by



stating that reasonableness had to be further understood in the context of the Bill of Rights as a whole:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. ... Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.⁶⁴

Regarding the second aspect of the state's obligation to provide access to adequate housing, the Court stressed that the use of the term 'progressive realisation' showed that it was contemplated that the right to adequate housing could not be realised immediately.⁶⁵ But the goal of accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing had to be made more accessible not only to a larger number of people but to a wider range of people as time progressed.

The third aspect of the state's obligation, 'within available resources', entailed that both the content of the obligation (in relation to the rate at which it is achieved) and the reasonableness of the measures employed to achieve the result were governed by the availability of resources.⁶⁶

2.1.1.2 Evaluation of the state's housing programme

The Court then proceeded to examine the state's housing programme in order to determine whether it complied with the obligation imposed upon it in terms of section 26 of the Constitution. It observed that the national framework legislation⁶⁷ did not contemplate the provision of housing that fell short of the definition of 'housing development' in the Housing Act of 1997. This meant that there was no express provision to facilitate access to temporary relief for people who had no access to land or no roof over their heads, or who were living in intolerable conditions and in crisis because of natural disasters such as floods and fires, or because their homes were under threat of demolition.⁶⁸



The Court found that the national government bore the overall responsibility for ensuring that the state complied with the obligations imposed on it by section 26,⁶⁹ and concluded that the nationwide housing programme fell short of obligations imposed upon the national government to the extent that it failed to recognise that the state must provide for relief for those in desperate need.⁷⁰ It was essential that a reasonable part of the national housing budget be devoted to this; however, the precise allocation was for the national government to decide in the first instance.

The Cape Metro had realised that the desperate housing situation required government action to accommodate families in crisis and had accordingly formulated an ‘Accelerated Managed Land Settlement Programme’.⁷¹ The Court therefore found in respect of the Cape Metro that the municipality had recognised the housing needs of people in the position of the respondents and had put in place this Accelerated Programme in an effort to fulfil those needs. The programme, on the face of it, met the state’s obligations. However, its formulation was a starting point only and it also had to be implemented in a reasonable manner.⁷² Effective implementation required at least adequate budgetary support by the national government. This, in turn, required recognition of the obligation to meet immediate needs in the nationwide housing programme.⁷³

In conclusion, the Court issued a declaratory order requiring the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This included the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.⁷⁴

To date, the *Grootboom* judgment remains the standard-setting pronouncement on the interpretation of the right to have access to adequate housing.⁷⁵ However, the enforcement of the Court’s order in practice has proven problematic⁷⁶ and a series of similar court matters has resulted from the state’s failure to properly implement the judgment in similar contexts. Some of the resulting decisions are discussed below.

2.1.2 Subsequent judgments

Following the *Grootboom* judgment, the national Department of Housing introduced an emergency housing programme in 2004.⁷⁷ One of



the difficulties experienced in respect of this programme has been the failure of provinces and municipalities to put it into practice.⁷⁸ Such a failure on the part of the Cape Town municipality led to the judgment in *City of Cape Town v Rudolph*,⁷⁹ when the City attempted to evict a group of illegal squatters from a City-owned public park situated in Valhalla Park. The group of occupiers, which included former so-called 'backyard dwellers', had moved into the park and erected shacks there because they were dissatisfied with their living conditions and the fact that they had been on the waiting list for formal housing for a long time without results.⁸⁰

It became clear during a counter-application brought by the illegal occupiers, firstly, that they were 'persons with no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations' as contemplated in the *Grootboom* judgment.⁸¹ Secondly, it was apparent that in spite of the clear order by the *Grootboom* court that the Accelerated Managed Land Settlement Programme formulated by the Cape Metropolitan Council had to be implemented as a matter of urgency, the City of Cape Town, more than a year later, neither had implemented such a programme nor had any intention of doing so.⁸² The Court thus found that the City was in breach of the Constitution and the order made by the Constitutional Court in *Grootboom*.⁸³

Interestingly, one of the aspects on which the *Rudolph* court faulted the City's response was in respect of the housing waiting list. The City in this instance insisted that it had no obligations to any category of people beyond the obligation to place them on the waiting list for housing in the medium to long term⁸⁴ and would accordingly continue to deal with housing applicants purely on the basis of when their name was placed on the waiting list.⁸⁵ This consideration formed part of the Court's finding of unconstitutionality. Although it was not stated explicitly in the judgment itself, the Court included the following as part of its formulation of the failure on the part of the City of Cape Town to comply with its constitutional and statutory obligations in setting out the order:

*[I]n the allocation of housing [the City] fails to have any or adequate regard to relevant factors other than the length of time an applicant for housing has been on the waiting list and in particular does not have regard to the degree and extent of the need of the applicants ...*⁸⁶



This approach may form the basis of an argument for the prioritisation of certain vulnerable groups on the waiting lists (housing database), based on ‘the degree and extent of the need of the applicants’. In appropriate circumstances, such prioritisation may not only be desirable, but may be *expected* in order for the state to adequately comply with its constitutional obligations.

A second instance where a local municipality failed to put into place the required emergency housing programme came before the courts in *Occupiers of 51 Olivia Road, Berea Township and Others v City of Johannesburg*.⁸⁷ This matter arose from an application brought by the City of Johannesburg for the eviction of a group of more than 400 persons occupying two buildings in the inner city of Johannesburg, on the basis that the buildings were unsafe and unhealthy.⁸⁸ The Johannesburg High Court found that the City’s housing programme fell short in certain respects and, accordingly, the City was ordered to produce a programme for those in desperate need. The eviction of the occupiers was interdicted, subject to certain conditions.⁸⁹ On appeal, the Supreme Court of Appeal authorised the eviction of the occupiers, but directed the City to provide those occupiers who were ‘desperately in need of housing assistance with relocation to a temporary settlement area’.⁹⁰

After hearing an application for leave to appeal, the Constitutional Court issued an interim order aimed at establishing a process of ‘meaningful engagement’ between the parties.⁹¹ Much of the judgment revolved around this notion of ‘meaningful engagement’ and the City’s duty to engage in such a process before embarking on a process of eviction that could leave people homeless.⁹² Because of the way the process of court-mandated engagement between the parties subsequently unfolded towards resolution of their dispute, it ultimately became unnecessary for the Court to evaluate the City’s housing plans for people occupying unsafe or unhealthy buildings in the inner city or to consider the reach and applicability of section 26(1), (2) and (3) in this context.⁹³ These were broad questions initially raised before the Constitutional Court in the application for leave to appeal.⁹⁴

The judgment is nonetheless important for present purposes in the sense that it provides guidance in evaluating the criterion of ‘reasonableness’ of state action in respect of the obligations of local government to formulate housing programmes to accommodate persons who are ‘living in desperate conditions’.



The Constitutional Court noted that the City of Johannesburg had constitutional obligations to the occupants of Johannesburg. It had to provide services to communities in a sustainable manner, promote social and economic development and encourage the involvement of communities and community organisations in matters of local government. It also had the obligation to fulfil the objectives mentioned in the preamble to the Constitution to '[i]mprove the quality of life of all citizens and free the potential of each person'. Most importantly, it had to respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2)). The most important of these rights, for present purposes, were the right to human dignity and the right to life.⁹⁵ In the light of these constitutional provisions, a municipality that ejected people from their homes without first meaningfully engaging with them was acting in a manner broadly at odds with the spirit and purpose of the constitutional obligations set out above.⁹⁶

However, the duty of the City to engage people who might be rendered homeless after an eviction was also squarely grounded in section 26(2) of the Constitution.⁹⁷ In this regard, the Court referred to the *Grootboom* judgment, where it was stated that '[e]very step at every level of government must be consistent with the constitutional obligation to take *reasonable measures* to provide adequate housing.'⁹⁸ Reasonable conduct by a municipality pursuant to section 26(2) accordingly included the reasonableness of every step taken in the provision of adequate housing.⁹⁹ Every homeless person was in need of housing and this meant that every step taken in relation to a homeless person also had to be reasonable if it was to comply with section 26(2).

Significantly, the Court pointed out that the response of the municipality in engaging with *potentially* homeless people had to be similarly reasonable:

It may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless. It must not be forgotten that the City cannot be expected to make provision for housing beyond the extent to which available resources allow. As long as the response of the municipality in the engagement process is reasonable, that response complies with section 26(2).¹⁰⁰



The judgments in the *Rudolph* and *Olivia Road* cases thus provide additional refinement of the notion of ‘reasonableness’ at different levels of government and emphasise that this requirement must apply in terms of both the formulation and the implementation of housing programmes.

2.2 Interpretation of the right to freedom from all forms of violence

Since the introduction of the interim Constitution, South African law has seen a series of judgments relating to various aspects of the state’s duty to respond to violence against women.¹⁰¹ The first judgment in this regard was *S v Baloyi*,¹⁰² which examined the constitutionality of the Prevention of Family Violence Act.¹⁰³ The Constitutional Court observed that the state had an obligation, arising both from the Constitution (section 12(1)(c), read with section 7(2)) and from international human rights law,¹⁰⁴ to enact appropriate legislation to prevent and reduce domestic violence.¹⁰⁵

The *Baloyi* judgment was followed by *Carmichele v Minister of Safety and Security*,¹⁰⁶ where the Court dealt with the potential liability of state agencies arising from their failure to prevent an act of violence by a private actor. In this instance, the Court found that the constitutional guarantee of the rights to life, dignity and freedom of the person imposed a duty on the state (and all its organs) to refrain from infringing these rights.¹⁰⁷ In certain circumstances, this guarantee also involves a positive duty to provide appropriate protection to everyone through the laws and structures designed to afford such protection.

*Thus one finds positive obligations on members of the police force both in the [interim Constitution] and the Police Act. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence.*¹⁰⁸

The Court concluded that in this instance, both the police and the prosecutors had a duty to act to protect the complainant in this matter and had failed to do so.

The Supreme Court of Appeal confirmed the approach followed in the *Carmichele* case in *Van Eeden v Minister of Safety and Security*,¹⁰⁹



and the protective aspects of the duty resting on the police received further reinforcement in the case of *K v Minister of Safety and Security*.¹¹⁰ In *Omar v Government of SA*,¹¹¹ the Constitutional Court reiterated the principle laid down in *Baloyi*: that there is a constitutional obligation on the state to deal effectively with domestic violence by means of legislation *inter alia*.¹¹² In this regard, the Court remarked as follows: 'Domestic violence brutally offends the values and rights enshrined in the Constitution.'¹¹³

In the series of judgments described above, the courts consistently pointed out that the obligations resting on the state arose not only from the Constitution, but also from the provisions of international law.¹¹⁴

One of the important themes emerging from this line of judgments is the recognition, expressed by the Constitutional Court in its *Carmichele* judgment, that the Constitution is not merely a formal document regulating public power, but also embodies an objective, normative value system. In determining whether the state officials had a legal duty to protect Alix Carmichele, the relevant factors had to be weighed in the context of the value system of a constitutional state founded on dignity, equality and freedom, where the government had positive duties to promote and uphold these values.¹¹⁵

I have argued elsewhere that this line of jurisprudence has not reached its final point of development,¹¹⁶ and it will be important to note how our courts respond to a challenge based on both section 12(1)(c) and section 26(1) of the Constitution.

2.3 Discussion

*All aspects of women's housing rights touch upon the themes of a woman's rights to nondiscrimination and equality.*¹¹⁷

When examining the judgments dealing with the South African state's obligations to address violence against women, one notes that these matters have so far dealt with aspects of criminal justice (such as the role of the police and prosecuting authority), extending to the role of the legislature in enacting appropriate legislation to address domestic violence. Socio-economic aspects, such as access to housing by women who experience domestic violence, have not yet come before the courts.

A consideration of the constitutional provisions relating to the right of women who are victims of domestic violence to have access



to adequate housing should entail not only an analysis of the right in section 26 read with section 12(1)(c); these rights should furthermore be understood against the background of substantive equality. Liebenberg and Goldblatt make a cogent case for an interpretative approach to socio-economic rights that integrates the value of equality.¹¹⁸ They explain that such an equality perspective alerts us to the fact that socio-economic programmes may be implemented in such a way that they exclude or are practically inaccessible to disadvantaged groups. Significantly, the examples they list include a housing programme that failed to make provision for the housing needs of women seeking refuge from abusive partners.¹¹⁹

In this sense, it is important to note that the Constitutional Court has recognised that domestic violence in particular is a violation not only of the right to freedom from violence, but also of the right to equality and non-discrimination.¹²⁰ At the same time, international human rights law has firmly located violence against women within an equality paradigm.¹²¹

An understanding of the interrelationship between women's right of access to adequate housing and the right to freedom from violence therefore has to be approached against the backdrop of a constitutional state founded on dignity, equality and freedom, where the government has positive duties to promote and uphold these values.

3 LEGISLATIVE AND POLICY FRAMEWORK

It has been observed that housing law consists of a 'complex network' of law, policy, social welfare, politics, international law, macro-economic planning, cooperative government and finance.¹²² This section builds an understanding of that network by looking at the legislative and policy framework applicable to housing in South Africa. The model of the housing needs of women experiencing domestic violence is then used to examine the housing programmes that have been developed within this framework.

3.1 Housing Act 107 of 1997

Building on the Constitution, the legislative framework for housing is first and foremost underpinned by the Housing Act.¹²³ Part 1 of the Act



sets out the general principles applicable to housing development in South Africa. These principles include the obligations resting on each of the three spheres of government. A number of these obligations are of direct or indirect relevance to women experiencing domestic violence. For example, national, provincial and local government must give priority to the needs of the poor in housing development,¹²⁴ must ensure that housing development is economically, fiscally, socially and financially affordable and sustainable¹²⁵ and, in the administration of any matter relating to housing development, must respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter 2 of the Constitution.¹²⁶

The duties of the three tiers of government further include the promotion of measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process;¹²⁷ promoting the meeting of special housing needs including, but not limited to, the needs of the disabled;¹²⁸ and promoting the housing needs of marginalised women and other groups disadvantaged by unfair discrimination.¹²⁹

The Act further sets out the functions of the different spheres of government in respect of policy-making and implementation. The function of the *national government* is to establish and facilitate a sustainable national housing development process.¹³⁰ To this end, the Minister must determine national policy and set national housing delivery goals. The Act also calls for the publication of a *National Housing Code*, which should contain national housing policy.¹³¹

The function of a *provincial government* is, through the member of the province's executive council (MEC) responsible for housing, to do everything in its power to promote and facilitate the provision of adequate housing in the province within the framework of national housing policy.¹³² In order to do this, a provincial government must *inter alia* determine provincial policy in respect of housing development, promote the adoption of provincial legislation to ensure effective housing delivery and take all reasonable and necessary steps to support and strengthen the capacity of municipalities to effectively exercise their powers and perform their duties in respect of housing development.¹³³ A provincial government must furthermore prepare and maintain a multiyear plan in respect of the execution in the province of every national housing programme and every provincial housing programme.¹³⁴



On the level of *local government*, every municipality must, as part of its process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure *inter alia* that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis, that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed and that services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient.¹³⁵ Municipalities must also identify and designate land for housing development,¹³⁶ provide bulk engineering services and revenue-generating services in so far as such services are not provided by specialist utility suppliers¹³⁷ and plan and manage land use and development.¹³⁸

McLean points out that the Housing Act does not contain a detailed account of actual housing policy: for example, the Act does not specify that housing delivery should be carried out through project-linked subsidies, or that individual ownership should be given preference over communal ownership or rental options.¹³⁹ Instead, as noted above, national housing policy is set out in the *National Housing Code*, which is binding on the provincial and local spheres of government.¹⁴⁰ The policy content of the Code is determined by the Minister; he or she is not obliged to engage in any consultative process in determining national housing policy.¹⁴¹ In addition, new national housing policy applies even if that policy has not yet been included in revisions of the Code.¹⁴²

3.2 Other legislation

3.2.1 Extension of Security of Tenure Act 62 of 1997

This Act protects occupiers against unfair evictions by a landowner and *inter alia* regulates the conditions and circumstances under which the right of people to reside on land may be terminated.¹⁴³ It applies to rural and peri-urban land, but not land in townships (ie towns and cities). Pillay *et al* point out that one weakness of the Act is its failure to make reference to the continued right of occupation of the spouse or dependants of the occupier.¹⁴⁴ As men usually acquire the right of occupation through labour on farms, while women acquire their right



of occupation through their relationship with the male labourer, this omission is detrimental to the interests of women.

3.2.2 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

This Act provides protection against unlawful evictions and sets out the procedures for the eviction of unlawful occupiers.¹⁴⁵ It requires specific consideration of the rights and needs of the elderly, disabled, children and households headed by women.¹⁴⁶

3.2.3 Housing Consumers Protection Measures Act 95 of 1998

This Act provides for the establishment of a statutory body for home-builders. This body, the National Home Builders Registration Council, registers builders engaged in certain categories of house construction and regulates the home building industry by formulating and enforcing a code of conduct.

3.2.4 Rental Housing Act 50 of 1999

This Act 'defines the government's responsibility in respect of rental-housing property'.¹⁴⁷ It creates mechanisms to promote the provision of rental housing and the proper functioning of the rental housing market. The Act reflects a recognition that home ownership is not appropriate for all persons in South Africa, given the high levels of poverty in the country.¹⁴⁸ It sets out the rights and responsibilities of landlords and tenants and makes provision for rental housing tribunals. Pillay *et al* point out that the Act has positive implications for women given that, due to their low economic status, the home ownership model is often not an option.¹⁴⁹ In terms of the Housing Ladder model discussed above, rental options become important as women move towards communal and social housing.

3.2.5 Home Loan and Mortgage Disclosure Act 63 of 2000

This Act, which came into operation in 2003, provides for the monitoring of financial institutions serving the housing credit needs of com-



munities.¹⁵⁰ It requires financial institutions to disclose information to enable it to identify possible discriminatory lending patterns. It also established an Office of Disclosure. The Act is important to women, since it addresses one of the key constraints that women face in accessing housing, namely access to credit.¹⁵¹

3.3 Provincial housing legislation

In addition to the national legislation outlined above, individual provinces have also enacted legislation dealing with access to housing.

3.4 Policy documents

The *National Housing Code*, which was adopted in March 2000, sets out a number of principles that guide the overall approach to housing in South Africa. Chapter 2 of Part 1 explains the eight broad principles applicable to housing sector activity. Under the third principle, 'Fairness and equity', the Code notes that, given the history of regulatory and statutory discrimination in South Africa, it is essential that new policies and legislative actions by the state be particularly sensitive to the removal of entrenched discriminatory mechanisms and conventions to ensure equality in respect of 'gender, race, religion and creed'. Housing policy must promote fairness and equity among all South Africans and achieve equal and equitable access to housing opportunities and services. The government has particularly identified the need to support the role of women in the housing delivery process.

Within the framework of fairness and equity, the government must acknowledge the diversity of our society and respond accordingly. State housing policies and subsidy programmes should therefore accommodate the needs of the youth, of the disabled, of single-parent families, of rural households without formal tenure rights, of hostel inhabitants and of other persons with special needs. The *National Housing Code* furthermore explains that South Africa's housing policy is based on seven key strategies, which include mobilising housing credit and private savings on a sustainable basis, providing subsidy assistance to disadvantaged households to assist them to gain access to housing and facilitating the speedy release and servicing of land.

Although the above principles, which underpin the housing policy



framework, do not expressly refer to the position of women experiencing domestic violence, they are broad enough to incorporate this particular group, for example where they refer to the need to achieve fairness and equity and to provide subsidy assistance to help disadvantaged households gain access to housing.

In 2004, a supplementary policy document entitled *Breaking New Ground* was adopted. This document arose from the need to 'redirect and enhance existing mechanisms to move towards more responsive and effective delivery'.¹⁵² While it retained the fundamentals of the national housing policy, its formulation was aimed at addressing certain problems identified during the previous ten years. Some of the developments outlined in *Breaking New Ground*, which emphasises a shift from housing to 'sustainable human settlements',¹⁵³ may be important to women experiencing domestic violence: for example, the expansion of funding mechanisms for communal housing.¹⁵⁴

3.5 Housing delivery programmes

Now that the legislative and policy framework has been considered, the next question is whether the principles contained in it have made their way into practice in the form of the housing delivery programmes operating at different levels of government. Some programmes that may be of particular significance to women experiencing domestic violence are discussed here.¹⁵⁵ As noted, the steps of the Housing Ladder can usefully guide this discussion, from emergency housing to individual home ownership.

3.5.1 Emergency housing

Chapter 12 of the *National Housing Code* deals with 'Housing assistance in emergency circumstances'. According to the introduction to the chapter, these rules are for assistance to people who:

*for reasons beyond their control, find themselves in an emergency housing situation such as the fact that their existing shelter has been destroyed or damaged, their prevailing situation poses an immediate threat to their life, health and safety, or they have been evicted, or face the threat of imminent eviction.*¹⁵⁶

The assistance consists of funds in the form of grants to municipalities



to give effect to accelerated land development, the provision of basic municipal engineering services and shelter and falls short of formal housing as provided for in other programmes of the housing subsidy scheme contained in the *National Housing Code*. It is rendered only in emergency situations of exceptional housing need.¹⁵⁷ The chapter notes that the programme was formulated after the *Grootboom* judgment.¹⁵⁸

Considering the position of women who are victims of domestic violence, it is quite apparent that this programme is unlikely to be of much benefit to them, given, firstly, the relatively narrow definition of an 'emergency housing situation'; and secondly, the nature of this assistance as contemplated.¹⁵⁹ For example, the emergency housing programme notes that assistance will be limited to absolute essentials: it will not seek to provide 'housing or engineering services commensurate with those that might have been previously enjoyed'.¹⁶⁰

Emdon also observes that while it is commendable that the government has this programme in place, it is not necessarily suitable for abused women.¹⁶¹ The reason for this is that the programme sees the solution in temporary housing such as shacks or tents, which have to be made available on land that the municipality identifies for this purpose. In most cases, this is likely to be far from the city or otherwise poorly located. Significantly, this emergency programme is not intended for funding NGOs to set up emergency shelters.

3.5.2 Shelters

At the time of writing, the national Department of Housing does not have a policy explicitly dedicated to funding the capital costs of building, purchasing or refurbishing properties for women's shelters. Certain shelters for abused women are reportedly being funded through the institutional and transitional housing subsidies.¹⁶² However, these subsidy programmes fund capital costs for acquiring and refurbishing or developing property only;¹⁶³ they do not cover operational costs¹⁶⁴ or ongoing property maintenance costs.

3.5.2.1 *Institutional housing subsidy programme*

This is a national housing programme that is available to women's shelter groups and organisations in all provinces. The subsidy (a spec-



ified amount per beneficiary household) is paid to 'approved' housing institutions to enable them to buy, build or refurbish residential property and manage it. This scheme is designed to fund institutions (which have to be registered as 'section 21' companies) to provide housing to subsidy beneficiaries through rental and other forms of tenure.¹⁶⁵

To be eligible for this subsidy, the proposed beneficiary must comply with a number of requirements:

- She must be married or have financial dependants.
- She must be lawfully resident in South Africa (ie be a citizen or in possession of a permanent residence permit).
- She must have the legal capacity to conclude a contract.¹⁶⁶
- The monthly household income must not exceed R3 500 and there is a strong preference for supporting projects where the monthly income of beneficiaries is less than R2 500.
- She must not yet have benefited from government funding.

The institutional subsidy is available to women's groups or organisations for shelters for women experiencing domestic violence in any province. An institution must comply with a number of requirements, which are assessed by the provincial housing department.

Certain requirements may, in practice, make this model less than ideal for women's shelters. For example, the institutional subsidy is designed to accommodate households rather than individuals.¹⁶⁷ This means that a woman who has children is regarded as eligible because her situation is considered to be a household, but a single or married woman without children seeking accommodation at the shelter would not be considered as a subsidy beneficiary. Furthermore, the requirements that the institutional subsidy beneficiary be lawfully resident in South Africa and be over the age of 18 may both be unrealistically exclusive in the context of domestic violence and the dire need for shelter accommodation in South Africa.¹⁶⁸ As such, these requirements may constitute unfair discrimination.¹⁶⁹

Emdon observes that despite these (and other) problems, the institutional housing subsidy provides an opportunity for shelter organisations outside KwaZulu-Natal and Gauteng to access Department of Housing funding to develop shelters.¹⁷⁰ She also suggests that with willingness from the government, these problems could be overcome if the national Department of Housing adjusted certain elements to



create a policy that was more appropriate and enabling for women's shelters.

3.5.2.2 *Transitional housing programme (KwaZulu-Natal, Gauteng and Western Cape)*

These programmes, which are currently being implemented in the provinces of KwaZulu-Natal and Gauteng (and have recently been launched in the Western Cape), are variations of the institutional housing subsidy. Some of the rules are 'relaxed' in the case of transitional housing, making this mechanism more suitable for women's shelters. For example, single people can be beneficiaries and institutions do not have to set up a special-purpose vehicle to access the subsidy.¹⁷¹ While this model is suitable for second-stage women's shelters in existing buildings, the transitional subsidy can also be accessed to develop new housing for a women's shelter.¹⁷² One of the advantages of this model is that, as in the case of the institutional subsidy discussed above, the name of the beneficiary who stays in a transitional housing project is not recorded in the national subsidy database. This means that she may benefit from an individual subsidy later.¹⁷³

In terms of this model, an institution such as an NGO accesses the institutional subsidy and uses it to acquire or renovate a building or facility in which people can be accommodated.¹⁷⁴ The accommodation provided is temporary – that is, from six to eighteen months, depending on the rules of the particular organisation. Typically, in transitional housing, the rents are low and people occupy shared rooms (rather than flats or apartments). There are communal ablutions, kitchens and recreational facilities and the facilitating organisation runs programmes such as counselling, skills development and life skills.¹⁷⁵

Commentators have pointed out that like institutional housing, transitional housing is not the perfect model for shelters for abused women. For one thing, the subsidy amount is rarely enough to cover the costs of purchasing a project and refurbishing it to an adequate level.¹⁷⁶ This means that either additional funding has to be found from other sources, or the facility may not be built to a sustainable standard (ie cheap finishes, etc).

Another problem is that the projects are generally initiated and driven by NGOs that do not necessarily have the capacity or management skills either to source the funding in the first place or to main-



tain sustainable institutions in the longer term.¹⁷⁷ More disconcertingly, perhaps, these projects are generally only funded if they involve refurbishment of inner-city buildings (with some exceptions).¹⁷⁸ For example, currently a transitional housing subsidy is not generally accessible for the purchase of a large house for a women's shelter outside an inner-city area. This restricts the applicability of the programme as it excludes many options that may be more suitable for women's shelters than upgraded inner-city buildings. Despite these shortcomings, the transitional housing model, as tested in both Gauteng and KwaZulu-Natal offers a very important potential mechanism for the funding of first- and second-stage women's shelters.¹⁷⁹

At the beginning of 2009, the provincial Department of Housing in the Western Cape adopted a policy document entitled 'Policy to Support Group Accommodation for People with Special Needs'. It explains that 'whilst HIV/AIDS and special needs groups are a high development priority for South Africa' and while it is understood that the national Department of Housing has agreed in principle to assist the Departments of Social Development and Health in respect of shelter requirements, there is not yet any national framework or policy on special needs housing, nor is special needs housing covered in the National Housing Code.¹⁸⁰ This programme accordingly provides for group residential facilities for persons with special needs more or less as the transitional subsidy schemes of KwaZulu-Natal and Gauteng do.¹⁸¹

3.5.3 Communal housing (Gauteng)

Communal housing is another variation of the institutional subsidy that is being applied in a number of projects in Gauteng.¹⁸² The emphasis here is on longer-term rental housing with some shared facilities. For example, there could be some communal facilities such as laundry and ablutions and some facilities in the rooms. This type of housing focuses less on self-development and empowerment programmes. The rents are higher than those for transitional housing and tenure is permanent. This form of accommodation is most suited to third-stage shelters for women experiencing domestic violence, as it includes some support and certain shared resources; at the same time, it offers a measure of privacy that encourages independent living.



3.5.4 Social housing

Social housing, a housing option that is still under development in South Africa, can be defined as affordable, high-quality, well-located subsidised housing that is managed on a sustainable basis by independent institutions (mostly NGOs).¹⁸³ These housing developments are generally medium- to high-density projects such as flats or two- and three-storey 'walk-ups'. They are usually located near the city centre or on good transport routes to the city and have facilities such as open space, crèches or playgrounds and parking areas. Shared laundries and, in some instances, recreational areas may be part of the design. Although efforts have been made to keep rents low, this form of housing is widely acknowledged to be too expensive for the very poor.¹⁸⁴

The projects are managed by property management companies (such as NGOs or private-sector companies) which collect rent and maintain the properties. Tenants enter into lease agreements and may stay as long as they wish, provided they pay rent and otherwise comply with the agreement (including adherence to the house rules).

Many NGOs and some private-sector housing developers have accessed the institutional subsidy to develop social housing.¹⁸⁵ These projects provide accommodation, usually in the form of flats, in areas that are close to transport and employment opportunities. Unfortunately, many of the more than 80 social housing institutions that have been set up over the past 15 years have failed to become financially sustainable, which has made the government rethink this form of subsidy and housing. Currently, the implementation of new legislation on social housing is awaited¹⁸⁶ and selected pilot projects are being implemented.

3.5.5 Rental and individual home ownership programmes

This section briefly explores the extent to which housing programmes promote access to rental and individual home ownership for women. As noted earlier, these programmes do not make specific provision for abused women and one therefore has to examine how the programmes apply to such women in practice.

In terms of individual home ownership, the main vehicle here is the housing subsidy scheme, which can take the form of an individual



subsidy (either credit-linked or non-credit-linked) or a project-linked subsidy. Low-income housing development in South Africa is financed primarily through this housing subsidy.¹⁸⁷ The subsidy amount is currently set at R43 506 and beneficiaries must comply with certain requirements. Depending on monthly income, beneficiaries are also expected to contribute an amount upfront.¹⁸⁸ For many women who are also the primary caregivers of children, this amount is simply beyond reach.

Provinces and municipalities are generally responsible for the allocation of specific houses to beneficiaries. Municipalities have different methods of allocating available housing in their areas, subject to beneficiaries fulfilling the above criteria. Many use their own waiting lists, while others, such as eThekweni municipality, have scrapped waiting lists on the grounds that they evolved under apartheid, when access to the list was not equitable.¹⁸⁹ McLean cautions that potential beneficiaries cannot access individual subsidies to build or buy houses or their own. They are therefore restricted, as a matter of practice, to housing available in a developer-built project.¹⁹⁰ This means that unless one's name is on the waiting list for a specific project, it is very difficult to get access to housing in the short term.¹⁹¹

The allocation of the housing subsidy has in practice resulted in certain difficulties for women. In many instances, women have been recorded in the national housing database as having benefited from the housing subsidy because they identified themselves as the spouse of a primary beneficiary.¹⁹² Technically speaking, this means that they will never be eligible for another subsidy. However, the house received through the subsidy is recorded in the name of the male partner in ownership terms. Should the relationship come to an end, the woman may be left without any legal claim to the house (depending on the nature of the union), while having no recourse to a further subsidy either.¹⁹³

Governmental rental units (houses and flats) are available to low-income beneficiaries complying with criteria similar to those set for housing subsidies.¹⁹⁴ Applications must be submitted to local municipalities. One of the major difficulties facing women experiencing domestic violence here is the shortage of rental stock and the concomitant long waiting lists in all the urban centres.

The question of housing allocation based on the ubiquitous waiting lists is an emotive one that has also acquired political undertones in South Africa. A question that has repeatedly been raised in the context



of special needs housing is whether vulnerable groups, such as women experiencing domestic violence, should be prioritised when allocating housing.¹⁹⁵ Charlton reported in 2004 that the national Department of Housing was debating the prioritisation of vulnerable groupings in the allocation of housing units.¹⁹⁶

For the national Department of Housing, certain questions arose with respect to such prioritisation: for example, should all abused women get access to housing, irrespective of other criteria? Were some more vulnerable than others? Preferential treatment of vulnerable groups could also raise the issue of discrimination against others. It was further regarded as important to understand the distinction between assisting those that were *excluded* from accessing housing in some way and whether some people should be *prioritised* – in other words ‘equality of access’ versus ‘active prioritisation’.¹⁹⁷ The fact that these questions were not resolved at the time provides some insight into why it is taking so long to develop special needs housing policies in South Africa.

3.6 Discussion

Having looked at the range of housing delivery programmes potentially available to women experiencing domestic violence, one can make the following observations. Firstly, Chapter 12 of the *National Housing Code*, which deals with ‘Housing assistance in emergency circumstances’, is unlikely to benefit victims of domestic violence much, owing to both the relatively narrow definition of an ‘emergency housing situation’ and the nature of the assistance contemplated. This emergency programme is not intended for funding NGOs to set up and operate emergency shelters, the type of intervention that is required by women who have left a violent home and need short-term emergency accommodation.

In terms of first-stage shelters, there are certain housing programmes operating at national level (ie the institutional housing subsidy programme) and, in KwaZulu-Natal, Gauteng and the Western Cape, at provincial level (ie the transitional housing programme) that may be utilised to develop women’s shelters. These programmes could extend to include second-stage shelters. They are not without problems, however and additional funding has to be found to cover the operating costs and ongoing capital maintenance costs of the facilities.



Two funding mechanisms that may be useful for projects for women experiencing domestic violence (although not as an emergency intervention) are communal housing and social housing. Pilot projects are under way. It should be noted, however, that social housing especially is not appropriate (or intended) for women with a monthly income below R3 500.

The housing outcomes at the top end of the Housing Ladder – that is, individual rental or home ownership – may also present difficulties for women, such as the waiting list for a particular housing development project or the shortage of rental housing. It appears that the approach taken to women experiencing domestic violence and applying for housing is generally the same as that noted in the *Rudolph* case, namely that in the allocation of housing, no factors other than the length of time an applicant has been on the waiting list are taken into consideration.

This overview emphasises the fragmented nature of programme development in the area of housing for women experiencing domestic violence and stresses the urgent need for a coherent and comprehensive national policy. While it is unrealistic to expect a separate national programme for each of the different groups with so-called ‘special’ housing needs, including women experiencing domestic violence, a national special needs policy should be flexible enough to incorporate the particular needs of distinct groups.

4 INTERNATIONAL LAW

Over the past decade, women’s housing rights have increasingly garnered the attention of the international community.¹⁹⁸ This section analyses the standards and norms that have emerged in international human rights law, with specific reference to the rights to adequate housing, gender equality and freedom from violence. It examines the two major international instruments that are relevant in this regard, namely the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)¹⁹⁹ and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).²⁰⁰ This is by no means an exhaustive account, since there are a number of other international documents dealing with various aspects of these rights, including the *Declaration on the Elimination of Violence against Women*



(1993)²⁰¹ and the *Beijing Platform for Action* (1995).²⁰² However, the discussion here has been limited in the interests of brevity.²⁰³

After examining these two documents, this section looks at resolutions adopted by various United Nations (UN) bodies and then considers the reports of the Special Rapporteur on Violence against Women and the Special Rapporteur on Adequate Housing. Finally, the provisions of regional instruments adopted in Africa are investigated.

As a starting point, it should be noted that international law is relevant in the South African context for several reasons. Firstly, where South Africa has ratified an international instrument (as is the case with CEDAW), the country is legally bound by the document in terms of international law. Secondly, section 39(1)(b) of the Constitution requires a court to consider international law when interpreting the Bill of Rights. This may include both binding (ie ratified by South Africa) and 'non-binding' sources of international law.²⁰⁴ Furthermore, section 233 of the Constitution states that every court, when interpreting legislation, must prefer any reasonable interpretation of such legislation that is consistent with international law.

4.1 International Covenant on Economic, Social and Cultural Rights

Article 11(1) of the ICESCR guarantees the right to housing as a component of the right to an adequate standard of living:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

The Committee on Economic, Social and Cultural Rights (CESCR) has provided guidance on the interpretation of this article in the form of several 'general comments'. The first of these is General Comment 4,²⁰⁵ which is regarded as the most authoritative interpretation of the right to adequate housing under international human rights law.²⁰⁶ The CESCR emphasised here that the right to housing should not be interpreted in a narrow or restrictive sense that equates it with,



for example, the shelter provided by merely having a roof over one's head.²⁰⁷

Rather, [the right to housing] should be seen as the right to live somewhere in security, peace and dignity. *This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. Thus, 'inherent dignity of the human person' from which the rights in the Covenant are said to derive requires that the term housing be interpreted so as to take account of a variety of other considerations. Secondly, the reference in article 11(1) must be read as referring not just to housing but to adequate housing.*²⁰⁸

The CESCR has also clearly expressed its views on forced evictions.²⁰⁹ In General Comment 7,²¹⁰ the state's obligations in respect of forced evictions are set out. In essence, the obligations of states parties to the ICESCR in relation to forced evictions are based on article 11(1), read in conjunction with other relevant provisions.²¹¹ The state itself must refrain from forced evictions and must also ensure that the law is enforced against its agents or third parties who carry out forced evictions. Moreover, states parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out without appropriate safeguards by private persons or bodies.²¹²

According to the CESCR, evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.²¹³ 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.

Importantly, the CESCR recognises the disproportionate impact of forced evictions on women in General Comment 7:

*Women ... are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.*²¹⁴



Farha observes that in order for women to benefit equally from human rights protection against forced evictions, this General Comment must be read as encompassing substantive equality.²¹⁵ Interestingly, she relates (writing in 2002), that in her discussions with individuals, the notion that domestic violence constitutes forced eviction was categorically rejected by both NGO workers and members of the CESCR.²¹⁶ She observes that a male-centric view of the right to be free from forced evictions meant that instances of forced evictions of particular relevance to women, such as domestic violence, discriminatory rental, ownership and inheritance laws and cutbacks to social assistance entitlements with a disproportionate impact on single mothers' ability to pay the rent, were not identified as falling within the ambit of forced eviction under international law.

For this reason, Farha argues for General Comment 7 to be interpreted so that women's material conditions and experiences are included in the definition of forced eviction and reflected in the conditions imposed on state actors to guarantee the right to freedom from forced eviction.²¹⁷ This requires a recognition of women's structural disadvantage: that is, the fact that women are sometimes forcibly evicted from their homes for other reasons than men are, such as domestic violence.

Paglione notes that recognising domestic violence as forced eviction is more than an 'intellectual exercise'.²¹⁸ Instead, it offers women experiencing domestic violence certain advantages. This understanding acknowledges that they have a justiciable right not to be subjected to violence in their private sphere and provides the possibility of redress against the state. Once it is accepted that domestic violence is a form of forced eviction, state responsibility can be claimed in cases of forced eviction carried out by private individuals through domestic violence, since the state has failed to guarantee to those domestic violence victims (and their children) the right to adequate housing and its inherent protection from forced eviction.²¹⁹

More recently, the CESCR adopted General Comment 16,²²⁰ which deals with the equal right of men and women to the enjoyment of all economic, social and cultural rights, as set out in article 3 of the ICESCR. The General Comment recognises that the enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. In this regard, guarantees of non-discrimination and equality in international human rights treaties mandate both *de facto* and *de jure* equality.²²¹



The CESCR points out that article 3 is a cross-cutting provision, which applies to all the rights contained in articles 6 to 15 of the ICESCR.²²² Specific examples are provided of states parties' obligations and one of the most significant of these relates specifically to women's housing rights. The Committee observes that implementing article 3, in relation to article 10,²²³ requires states parties *inter alia* to provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress for physical, mental and emotional damage.²²⁴ The Centre on Housing Rights and Evictions refers to this recognition as 'a tremendous achievement for women's housing rights advocates and anti-domestic violence activists alike and a critical realisation for the international community'.²²⁵

The CESCR also addresses state obligations to deal with gender-based violence under the intersection between articles 3 and 10.²²⁶ It points out that gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. States parties must therefore take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.

Implementing article 3 in relation to article 11(1) requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men and to access the necessary resources to do so.²²⁷

Although South Africa has signed the ICESCR, it is yet to ratify it. As noted, both the ICESCR and the general comments adopted by the CESCR are still of importance in the context of the interpretation of the right of access to adequate housing and the courts – for example, in the *Grootboom* matter²²⁸ – have found guidance in these sources in their reading of section 26 of the Constitution.

4.2 Convention on the Elimination of All Forms of Discrimination against Women

CEDAW is regarded as the major international women's rights instrument. Although CEDAW does not contain any articles dealing exclusively with housing rights, a number of its provisions are of importance to women's access to housing. The right to be free from discrimination



is covered in several areas that are crucial to women's access to housing, land and property (eg inheritance, ownership, loans and credit and the disposition of property).²²⁹ If enforced, these rights would go some distance in improving women's security of tenure and would enable women to leave violent or abusive relationships. CEDAW does refer to housing in article 14, which deals with the situation of rural women. States parties must assure rural women of the right 'to enjoy adequate living conditions, particularly in relation to *housing*, sanitation, electricity and water supply, transport and communications'.²³⁰

Article 13 provides that state parties shall take all appropriate measures to eliminate discrimination against women in economic and social life to ensure, on a basis of equality of men and women, the same rights, in particular the right to bank loans, mortgages and other forms of financial credit. Article 15, which broadly deals with women's equality before the law, requires states parties to accord to women equal legal capacity to conclude contracts and to administer property. In article 16(1)(h), states parties are enjoined to take all appropriate measures to eliminate discrimination against women in matters relating to marriage and family relations, in particular ensuring, on a basis of equality of men and women, the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property (whether free of charge or for a valuable consideration).

It has been noted, as indicated by the CEDAW Committee's²³¹ concluding observations to country reports, that the Committee has exerted some amount of pressure on governments to address discrimination against women with respect to inheritance, ownership, loans and credit, disposition of property, etc.²³²

As far as violence against women is concerned, CEDAW itself does not explicitly refer to this issue. Accordingly, the CEDAW Committee has formulated detailed guidelines explaining how CEDAW applies to such violence.²³³ General Recommendation 19 states that gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms, is discrimination within the meaning of article 1 of CEDAW.²³⁴ It clarifies how gender-based violence 'fits' under specific articles and then sets out specific state duties to address gender-based violence. In this regard, states parties are required to take a range of measures to provide effective protection of women against gender-based violence, including effective legal



measures,²³⁵ preventive measures²³⁶ and protective measures such as refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.²³⁷

Importantly, the CEDAW Committee emphasises that discrimination under CEDAW is not restricted to action by or on behalf of governments.²³⁸ It confirms the principle that under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation.²³⁹

In 2005, the CEDAW Committee issued its views in the matter of *A.T. v Hungary* brought under the Optional Protocol to CEDAW.²⁴⁰ This matter illustrates the broad ambit of the obligations of state parties to respond to violence against women and demonstrates that these obligations may include ensuring access to safe housing for women experiencing domestic violence.

It is useful to look at the facts of this case in some detail. Ms A.T., the author (complainant), explained that she had been subjected to regular and serious domestic violence by her common-law husband, one L.F. He was also the father of her two children, one of whom was severely intellectually disabled. Although L.F. was allegedly in possession of a firearm and had threatened to kill A.T. and rape the children, she had not gone to a shelter, reportedly because no shelter was equipped to accommodate a severely disabled child with his mother and sister. The author also explained that Hungarian law at the time did not make provision for protection orders or restraining orders to assist women experiencing domestic violence.²⁴¹

In March 1999, L.F. moved out of the family apartment.²⁴² His subsequent visits were allegedly typically marked by loud shouting and battering, aggravated by drunkenness. In March 2000, hoping to protect herself and the children, A.T. changed the lock on the front door of the apartment. On 14 and 26 March 2000, L.F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused him entrance. On 27 July 2001, he broke into the apartment using violence.

L.F. was said to have battered the author severely on several occasions, beginning in March 1998.²⁴³ Since then, ten medical certificates had been issued in connection with separate incidents of severe physical violence, even after L.F. had left the family residence, which,



the author submitted, constituted a continuum of violence. The last incident took place when he broke into the apartment in July 2001 and subjected A.T. to a severe beating, which necessitated her hospitalisation.

The author initiated civil proceedings against L.F. regarding his access to the family's residence, a two-and-a-half-room apartment, 54 by 56 square metres, jointly owned by L.F. and A.T.²⁴⁴ Decisions by the court of first instance, the Pest Central District Court, were rendered on 9 March 2001 and 13 September 2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court issued a final decision authorising L.F. to return and use the apartment. The judges reportedly based their decision on the following grounds: a lack of substantiation of the claim that L.F. regularly battered the author and L.F.'s right to the property, including possession, which could not be restricted. A.T. claimed that since that date and on the basis of the earlier attacks and verbal threats by her former partner, her physical integrity, physical and mental health and life were at serious risk and that she lived in constant fear.²⁴⁵

The author reported that there were two ongoing criminal procedures against L.F. arising from incidents of his assaulting her. In both cases, the trials were yet to take place at the time of submitting her communication.²⁴⁶ She further pointed out that L.F. had not been detained at any time in connection with these procedures and that no actions were taken by the Hungarian authorities to protect her from him.

She accordingly alleged that she was a victim of violations by Hungary of articles 2(a), (b) and (e), 5(a) and 16 of CEDAW for its failure to provide effective protection from her former common-law husband.²⁴⁷ She claimed that the state party was passively neglecting its 'positive' obligations under CEDAW and supporting the continuation of a situation of domestic violence against her. She claimed *inter alia* that the irrationally lengthy criminal procedures against L.F., the lack of protection orders or restraining orders under current Hungarian law and the fact that L.F. had not spent any time in custody constituted violations of her rights under CEDAW as well as General Recommendation 19.²⁴⁸ In addition to seeking justice for herself and her children, including fair compensation for suffering and for the violation of the letter and spirit of CEDAW by the state party,²⁴⁹ the author also asked for the CEDAW Committee's intervention in an intolerable situation that affected many women from all segments of Hungarian society.²⁵⁰



In this instance, the CEDAW Committee had little difficulty in reaching the finding that the Hungarian state had failed to fulfil its duties and had thereby violated the rights of the author under article 2(a), (b) and (e) and article 5(a) in conjunction with article 16 of CEDAW. Importantly, the CEDAW Committee made the following statement:

*Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.*²⁵¹

The Committee's recommendations to Hungary regarding the author were to take immediate and effective measures to guarantee the physical and mental integrity of A.T. and her family. It also recommended that Hungary ensure that A.T. be given a safe home in which to live with her children and receive appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights. In general, it recommended that Hungary

- respect, protect, promote and fulfil women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence; and
- implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular its recommendation that a specific law be introduced prohibiting domestic violence against women that would provide for protection and exclusion orders as well as support services, including shelters.

South Africa ratified CEDAW on 15 December 1995 and the Optional Protocol in March 2005, both without reservation. It presented its initial country report to the CEDAW Committee in 1998,²⁵² and a combined second, third and fourth report was submitted early in 2009.²⁵³ South African courts have referred to CEDAW as well as to General Recommendation 19 in their judgments on state duties to address violence against women.²⁵⁴



4.3 Resolutions

A number of UN bodies, including the General Assembly, have adopted resolutions dealing with various aspects of the eradication of violence against women, women's equal access to housing and freedom from forced eviction. A comprehensive consideration of the developments reflected in these resolutions, which date from the early 1990s, goes beyond the scope of this report. However, a brief overview is provided to reflect some of the main themes emerging in the work of UN bodies. The way these resolutions incorporate and build on the language and spirit of influential earlier statements is clearly significant.²⁵⁵

In terms of international law, resolutions are not legally binding as such.²⁵⁶ However, it has been observed that resolutions at this level are useful as they provide recommendations as to what the international community, as well as national governments, can do to address, for example, violations of women's housing rights.²⁵⁷ However, the caveat is also added that it is unlikely that the UN and individual governments will undertake these recommendations without pressure.

4.3.1 UN Commission on Human Rights

The UN Commission on Human Rights adopted a range of resolutions addressing women's equal right of access to adequate housing, forced evictions and violence against women.²⁵⁸ An example of the latter is resolution 1993/77,²⁵⁹ in which the Commission confirmed that the practice of forced evictions constituted a gross violation of human rights, particularly the right to adequate housing.²⁶⁰ Governments were urged to take immediate measures, at all levels, to eliminate the practice of forced evictions,²⁶¹ and to provide immediate restitution, compensation or appropriate and sufficient alternative accommodation or land to persons and communities that had been forcibly evicted.²⁶²

In the Commission's resolution 2000/13 on women's equal right to adequate housing, *inter alia*,²⁶³ it emphasised that the impact of gender-based discrimination and violence against women on women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing was acute, particularly during complex emergency situations, reconstruction and rehabilitation.²⁶⁴ It also noted that elimination of discrimination against



women required consideration of women's specific socio-economic context.²⁶⁵ Governments were encouraged to take a range of measures to increase land and housing availability to women living in poverty, particularly female heads of households.²⁶⁶

In 2003, the Commission observed that women were continuing to suffer from discriminatory treatment in all areas decisive to the attainment of adequate housing.²⁶⁷ It urged states to address the issue of forced relocation and forced evictions from home and land and to eliminate its disproportionate impact on women.²⁶⁸ The Commission also included recommendations for national and local housing financing institutions and other credit facilities to take certain steps to remove discriminatory policies and practices, giving special consideration to single women and households headed by women and to evaluate and measure progress to this end.²⁶⁹

In 2005, the Commission adopted a further resolution addressing women's right of access to adequate housing.²⁷⁰ The Commission explained that a lack of adequate housing could make women more vulnerable to various forms of violence, including domestic violence and in particular that the lack of housing alternatives might limit many women's ability to leave violent situations.²⁷¹ It also noted that the UN Secretary-General had linked the growing prevalence of HIV/AIDS in women with laws inhibiting the full enjoyment of women's rights to land ownership and inheritance and that he had called for positive change and attention to women's empowerment and the protection of women's housing and land rights to make women less vulnerable to HIV/AIDS. The Commission accordingly urged governments to take appropriate measures to address the increasing rate of homelessness or inadequate housing for women, including its underlying factors, such as gender inequality, HIV/AIDS, poverty and violence.²⁷²

The Commission also adopted a series of resolutions addressing the elimination of violence against women. In its resolution 2000/45,²⁷³ the Commission emphasised the duty of governments to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts were perpetrated by the state or by private persons.²⁷⁴ It specifically called upon states to apply international human rights norms and to ratify and implement fully international human rights instruments that related to violence against women.²⁷⁵ In 2002,



the Commission further pointed out that violence against women in the family occurred within the context of *de jure* and *de facto* discrimination against women and the lower status accorded to women in society, exacerbated by the obstacles women often faced in seeking remedies from the state.²⁷⁶

4.3.2 UN Human Rights Council

The UN Human Rights Council, which replaced the Commission on Human Rights in 2006, adopted a resolution in 2007 on adequate housing as a component of the right to an adequate standard of living.²⁷⁷ In this resolution, the Council expressed its concern that any deterioration in the general housing situation disproportionately affected the poor, including women and children. It urged states to protect all persons from forced evictions that were not in accordance with the law and international human rights treaties and to provide legal protection and redress for such forced evictions.²⁷⁸ The Council further encouraged states to enable all persons to obtain shelter and access to affordable housing and access to land, *inter alia*, by taking appropriate measures aimed at removing discriminatory obstacles to access, with special emphasis on meeting the needs of women, especially those who were facing or who had faced violence and those living in poverty and female heads of household.²⁷⁹

4.3.3 UN General Assembly

The UN General Assembly has also in recent years adopted a series of resolutions relating to violence against women.²⁸⁰ The latest of these stresses yet again that states have an obligation to exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of violence against women and girls and to provide protection to victims.²⁸¹ States are urged to use best practices to end impunity and a culture of tolerance towards violence against women in a number of areas, including empowering women, in particular women living in poverty, through *inter alia* taking appropriate measures to address the increasing rate of homelessness or inadequate housing for women in order to reduce their vulnerability to violence.²⁸²

In spite of these encouraging pronouncements by some of the highest UN bodies, it is important to bear in mind that resolutions are not



per se legally binding. Though they may lack the legal force of treaties, however, these resolutions are considered important normative standards of international human rights law and their strength and usefulness lie in the fact that they possess political legitimacy.²⁸³

4.4 Reports by special rapporteurs

4.4.1 Special Rapporteur on Adequate Housing

The former UN Special Rapporteur on Adequate Housing²⁸⁴ devoted three reports to the question of women and housing.²⁸⁵ The 2005 report on women and adequate housing acknowledged the links between violence against women and the right to adequate housing²⁸⁶ and observed that women living in situations of domestic violence inherently lived in inadequate housing, due to the violence they faced within the home.²⁸⁷ He proposed that legislation against domestic violence must recognise the link with the right to adequate housing and contain legal protection for women to realise this right, while ensuring the provision of alternative adequate housing for victims of domestic violence and abuse.²⁸⁸

In his 2006 report, the Special Rapporteur pointed out that there were different groups of women who were particularly vulnerable to discrimination and, due to a combination of factors, faced additional obstacles in accessing adequate housing. Special attention was required for some groups or categories of women who could be more vulnerable than others. Such groups often included victims of domestic violence, women with disabilities and women who had become widows as a result of HIV/AIDS.²⁸⁹ He made the following comment:

*Highlighting the violations of the right to adequate housing experienced by different groups of women in vulnerable situations brings to the forefront the impact of multiple discrimination women face in relation to adequate housing, due to their gender, race, caste, ethnicity, age and other factors, but in many cases, also due to their relative impoverishment and lack of access to social and economic resources.*²⁹⁰

Regarding the links between violence against women and women's right to adequate housing, the Special Rapporteur expressed the view in his 2006 report that persistent poverty, where women and others



were forced to live in inadequate and insecure housing and living conditions, was itself a form of violence.²⁹¹ He further took note of the impact of HIV/AIDS, observing that gender inequality, particularly in terms of women's inadequate housing, was an underlying factor of women's vulnerability to HIV/AIDS.²⁹²

In the context of evictions, the Special Rapporteur observed that women were at particular risk of being subjected to forced evictions associated with different forms of gender discrimination.²⁹³ Examples included women who were living with HIV/AIDS, who were vulnerable to eviction or who were living with their husband's family and vulnerable to being evicted as widows or due to domestic violence or divorce.²⁹⁴ Significantly, the Special Rapporteur also adopted the approach that eviction by a husband or his family as a result of (or during) domestic violence constituted 'forced eviction'.²⁹⁵

The overarching finding of the Special Rapporteur's 2006 report was 'the prevailing culture of silence regarding the violations across the world of women's right to adequate housing and land'.²⁹⁶ At the national level, there continued to be a need for states to strengthen national legal and policy frameworks for protecting women's rights to adequate housing, land and inheritance and to provide avenues for redress where violations occurred. The report therefore urged states to, *inter alia*,

- ensure that gender-sensitive policies were developed, taking into account the situations of specific groups of women who were particularly vulnerable to homelessness and housing rights violations due to multiple forms of discrimination (noting that specific measures were necessary to eliminate multiple discrimination in housing experienced by groups of women in vulnerable situations, including ensuring access to affordable utilities such as water, electricity and heating, as well as access to education, employment and health facilities);²⁹⁷
- ensure that women could access temporary appropriate shelters and retain access to adequate housing on a longer-term basis so that they did not have to live in situations of violence in order to access adequate housing;²⁹⁸
- act with due diligence to prevent, investigate and punish acts of violence against women, given the interlinkages between violence against women and women's adequate housing;²⁹⁹ and
- include anti-violence provisions in housing legislation and policies



and ensure that domestic violence laws included provisions to protect women's right to adequate housing.³⁰⁰

In addition, the CEDAW Committee was encouraged to adopt a general recommendation on women's right to adequate housing and land.³⁰¹

During April 2007, the Special Rapporteur on Adequate Housing undertook a mission to South Africa at the invitation of the government. His ensuing report contained a number of incisive observations, which are dealt with below.³⁰²

4.4.2 Special Rapporteur on Violence against Women

The connection between housing and violence against women was drawn early on in the work of the first Special Rapporteur on Violence against Women.³⁰³ For example, in her second report, dealing with violence against women in the family, the Special Rapporteur pointed out that victims of domestic violence, fearing for their lives, were often compelled to flee their homes. However, due to a lack of support services, many if not most of these women had no place to go.³⁰⁴

This theme was developed in more depth in the Special Rapporteur's 2000 report on the impact of economic and social policy on violence against women.³⁰⁵ In this report, the Special Rapporteur pointed out how violations of women's housing rights could be both the cause and a consequence of violence against women. She firstly noted that inadequate housing produced living conditions that were conducive to violence.³⁰⁶ Overcrowded housing conditions, where stress levels were high and tolerance was low (combined with unemployment or poverty and the resulting financial anxieties) exacerbated the risk of domestic violence.³⁰⁷

At the same time, women who were economically dependent on their partner or their family often faced the dilemma of either being abused or being homeless.³⁰⁸ A lack of shelter facilities forced up to 30% of women who had fled domestic violence to return to their homes and thus to violence. Especially when they lived in remote areas, it might be very difficult for women to seek help at shelters.

More recently, the Special Rapporteur produced a report on the development and application of the 'due diligence' standard, as it is known, as a tool for the elimination of violence against women.³⁰⁹ The Special Rapporteur recounted that the notion of 'due diligence', which



had a long history in international law, had been incorporated in the watershed decision of the Inter-American Court of Human Rights in *Velasquez Rodriguez v Honduras*.³¹⁰ This judgment's formulation of state liability for the acts of private actors has subsequently found its way into a number of international instruments, including General Recommendation 19 adopted by the CEDAW Committee.³¹¹

The recommendation emphasises that states may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.³¹² This principle is also set out in the *Declaration on the Elimination of Violence against Women* (1993),³¹³ the *Beijing Platform for Action* (1995)³¹⁴ and the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (1994).³¹⁵

Significantly, after considering the practices of human rights bodies, the Special Rapporteur concluded on the basis of practice and *opinio juris* that a rule of customary international law had developed that obliged states to prevent and respond to acts of violence against women with due diligence.³¹⁶ She then noted that what was less clear was the *content* of generalised obligations of due diligence – those that went beyond specific (identifiable) individuals or groups of women at known risk of violence and the manner in which compliance with these obligations might be assessed and monitored.³¹⁷

The Special Rapporteur accordingly set out a number of principles constituting due diligence in respect of the prevention, protection and punishment of acts of violence against women.³¹⁸ In the context of *protection*, she pointed out that states undertook many measures in terms of their due diligence obligation to protect, which consisted mainly of providing services to women, such as legal assistance, shelters and financial aid to victims of violence.³¹⁹ She commented as follows:

*The major gaps in the enforcement of protective obligations include a lack of adequate enforcement by police and the judiciary of civil remedies and criminal sanctions for violence against women and an absence or inadequate provision of services such as shelters, which mean that women often have no choice but to continue living with their abusers.*³²⁰

She also noted that the focus of protection had too often been on the provision of short-term emergency assistance rather than on provid-



ing women who had been the victims of violence with the means to avoid re-victimisation.

In terms of recommendations, the Special Rapporteur pointed out that the due diligence obligation of *protection* required states to ensure that women and girls who were victims or at risk of violence had access to justice as well as to health care and support services that responded to their immediate needs, protected against further harm and addressed the ongoing consequences of violence for individual women.³²¹ Measures aimed at *inter alia* providing immediate material assistance (shelter, clothing, child maintenance, employment and education) to women who were survivors of violence had to be established.³²²

The Special Rapporteur concluded that the potential of the due diligence standard lay in a renewed interpretation of the obligations to prevent, protect, prosecute and provide compensation and to map out the parameters of responsibility for state and non-state actors alike in responding to violence.³²³ What was required to meet the standard of due diligence would necessarily vary according to the domestic context, internal dynamics, nature of the actors concerned and international circumstances.

4.5 Regional Instruments

4.5.1 African Women's Protocol

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa³²⁴ guarantees every woman respect for her life and the integrity and security of her person.³²⁵ States parties are required to take a range of measures to address all forms of violence against women.³²⁶ Article 3, which guarantees the right to dignity, similarly requires states parties to adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and the protection of women from all forms of violence, particularly sexual and verbal violence.³²⁷

Article 16 provides that women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, states parties must grant women, whatever their marital status, access to adequate housing.

The former UN Special Rapporteur on Adequate Housing described article 16 as a model example for the 'regional recognition of women's



equal rights to access housing'.³²⁸ He also welcomed the recognition of the right to acceptable living conditions in a healthy environment.

In terms of article 6 of the African Women's Protocol, states parties must ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. In particular, they must enact appropriate national legislative measures to guarantee that during her marriage, a woman has the right to acquire her own property and to administer and manage it freely.³²⁹ This provision should be read with article 7, which deals with the obligations of states parties in relation to the enactment of appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. Regarding property, they must ensure that in case of separation, divorce or annulment of marriage, women and men have the right to an equitable sharing of the joint property deriving from the marriage.³³⁰

Although the African Women's Protocol does not contain any specific provisions on women's right to ownership or access to land as such, there are certain articles that do address this important issue. Article 15, which deals with the right to food security, requires states parties to ensure that women have the right to nutritious and adequate food. They accordingly have to provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food. As part of the right to fully enjoy their right to sustainable development, states parties must take measures to promote women's access to and control over productive resources such as land and guarantee their right to property.³³¹

The African Women's Protocol came into force on 25 November 2005. South Africa has ratified the Protocol and is therefore bound by it in terms of international law.

Given the fact that there is, at the time of writing, no existing jurisprudence dealing with the African Women's Protocol, it is instructive to examine the interpretation of other regional instruments. For example, the Inter-American Commission on Human Rights, in ruling on a challenge brought against the Civil Code of Guatemala for the violation of women's right to equality, also responded to the issue of domestic violence. The petitioners in *Morales De Sierra v Guatemala*³³² alleged that certain provisions of the Civil Code, which defined the role of each spouse within the institution of marriage, created discriminatory distinctions between men and women and accordingly



violated articles 1(1), 2, 17 and 24 of the American Convention on Human Rights.

The Inter-American Commission's finding was that the gender-based distinctions established in the challenged articles could not be justified and constituted a violation of the rights of Ms Morales De Sierra.³³³ As a married woman, she had been denied, on the basis of her sex, protections that married men and other Guatemalans enjoyed. The provisions she challenged restricted, *inter alia*, her legal capacity, her access to resources, her ability to enter into certain kinds of contracts (eg those relating to property held jointly with her husband) and to administer such property. These provisions had the further effect of reinforcing systemic disadvantages that impeded the ability of the victim to exercise a host of other rights and freedoms.³³⁴

Of particular importance in this context is the further link made by the Inter-American Commission between domestic violence as a consequence of gender discrimination:

*Conversely, gender-discrimination operates to impair or nullify the ability of women to freely and fully exercise their rights and gives rise to an array of consequences. The inter-American system has recognized, for example, that gender violence is 'a manifestation of the historically unequal power relations between women and men'. De jure or de facto economic subordination, in turn, forces many women to stay in violent relationships.*³³⁵

This ruling is significant not only for its recognition of women's right to equal protection and to be free from discrimination, but also for the fact that it emphasises the positive obligations resting on the state to ensure that rights are realised.³³⁶

4.5.2 SADC Protocol on Gender and Development

The newly adopted Southern African Development Community (SADC) Protocol on Gender and Development contains a fairly extensive section on gender-based violence, setting out *inter alia* obligations to enact legislative measures, provide support services and train service providers.³³⁷ However, shelters are not explicitly listed among these support services.

The Protocol does not address housing as such, although it does provide, in the article dealing with access to property and resources,



that states parties undertake, by 2015, to review all laws and policies that determine women's access to, control of and benefit from productive resources in order to ensure that women have access and rights to credit, capital, mortgages, security and training equal to those of men.³³⁸ Such equal access and equal rights may in certain instances contribute to improved access to housing for women who are victims of domestic violence. South Africa signed the Protocol upon its adoption in 2008, but has not yet ratified it.

4.6 Discussion

The cumulative effect of the international documents examined above is that clear standards are emerging in the international context in respect of the interrelationship between women's right of access to adequate housing and domestic violence. These standards include the recognition of state duties to provide women experiencing domestic violence with access to safe housing.

In terms of the explicit enunciation of the links between access to adequate housing and domestic violence (and concomitant state duties) in the form of a 'general comment', it can be said that the CESCR has to date made the most progress. On the other hand, the CEDAW Committee's approach in the matter of *A.T. v Hungary* demonstrates that its understanding of state obligations to address discrimination (in the form of violence against women) may include the provision of access to safe housing.

The resolutions adopted by various UN bodies in recent years are significant in that they constitute a recognition and in many instances a reinforcement, of state obligations to advance women's right of access to adequate housing. These documents also serve to emphasise issues of concern in the broader environment. Significantly, the corpus of resolutions dealing with women's equal rights of access to housing, land and property have been linked to the key issues of poverty, HIV/AIDS and violence against women. Conversely, the recent General Assembly resolutions also bring women's right of access to housing into the sphere of state obligations to address violence against women. Even though these resolutions are not binding as such, it is crucial for these associations to be made at both a conceptual and a policy-making level.

The reports compiled by the former Special Rapporteur on Adequate Housing contain a number of important observations, includ-



ing the recognition that women living with domestic violence inherently live in inadequate housing and that special attention is required for some groups or categories of women that may be more vulnerable than others (eg victims of domestic violence). Certain recommendations in the Special Rapporteur's 2006 report are of direct relevance in the South African context. For example, the state should ensure that women can access temporary shelters and retain access to adequate housing on a longer-term basis so that they do not have to live in situations of violence in order to access adequate housing.³³⁹

The work of the former Special Rapporteur on Adequate Housing is complemented by that of the Special Rapporteur on Violence against Women, who made the connection between women's lack of access to adequate housing and domestic violence at an early point in her tenure. In subsequent reports, she commented further on the nature and implications of this connection. The development of the 'due diligence' standard, which is used to measure the response of governments to violence against women, has been an important aspect of the work of the Special Rapporteur and there is scope for this standard to be refined further with specific reference to the protective aspect of state obligations in the context of access to housing for women experiencing domestic violence.

On a regional and subregional level, the African Women's Protocol and the SADC Protocol on Gender and Development set out further standards relating to women's rights and accompanying state duties in respect of access to housing and addressing violence against women. Although these documents have not been subjected to interpretation, there are precedents for a progressive construction from other regional bodies.

Commentators have pointed out that these developments have not necessarily reached far enough. For example, both Farha and Paglione argue for a gendered analysis of the seven constituent elements of 'adequate' housing.³⁴⁰ The authors both point out, for example, that the notion of *habitability* is linked to protection from the elements and physical danger from external sources, but does not contemplate danger or threats resulting from domestic violence.³⁴¹ Similarly, under the element of *accessibility*, women as a group are excluded from the list of 'disadvantaged groups' who must be ensured some degree of priority consideration in the housing sphere.³⁴² Notwithstanding this criticism, the developments at the international and regional levels



represent major advances in the promotion of women's right of access to adequate housing and have the potential to provide significant guidance to South African courts tasked with the interpretation of this right in respect of women experiencing domestic violence.

5 EVALUATION AND CONCLUSION

Thus, ours is an uphill struggle: to reconceive housing rights and other economic, social and cultural rights in a way that both recognizes and challenges dominant social orders and gender roles and guarantees substantive equality.³⁴³

This paper began by posing the central question of the nature and extent of the South African government's duty to promote the right of access to adequate housing of women experiencing domestic violence. In returning to this question, it is worthwhile firstly to revisit the *Grootboom* judgment. As discussed above, the Constitutional Court noted that the national government bore the overall responsibility for ensuring that the state complied with the obligations imposed on it by section 26. In this instance, the nationwide housing programme fell short of the obligations imposed upon the national government for its failure to recognise that the state must provide for relief for those in desperate need. The formulation of housing programmes on provincial and local government level could be a starting point only; these programmes also had to be *implemented* in a reasonable manner. Reasonable implementation required at least budgetary support by national government and this, in turn, required recognition of the obligation to meet immediate needs in the nationwide housing programme.

The National Housing Code does not make express provision for women experiencing domestic violence (and other persons who are vulnerable due to their special housing needs). These women may, depending on their housing needs at a particular time and their own financial resources, benefit from existing housing programmes. The availability of these programmes varies from province to province. The question is whether this approach meets the requirements of reasonableness as set out in the *Grootboom* judgment.

These requirements can be summarised as follows. They must be adopted through both legislative and policy means; they must be rea-



sonably implemented; they must be flexible and balanced; they must not exclude a significant segment of society; and there must be a clear and efficient assignment of functions to the three spheres of government.³⁴⁴

The Constitutional Court in *Grootboom* specifically emphasised the need to consider housing problems in their social, economic and historical context. In this regard, women's increased vulnerability to domestic violence and HIV/AIDS as a result of a lack of access to adequate housing must be considered. A flexible and balanced approach implies the recognition of the full spectrum of the housing needs of women experiencing domestic violence: that is, their needs in the short, medium and long term. (A clear appreciation of these needs should lead to the understanding that many women who are forced to leave a violent home in fear of their own lives and those of their children are persons in 'desperate need' of alternative accommodation as contemplated in the *Grootboom* judgment.) This requires the development of a policy approach that takes account of the degree and extent of the violation of rights arising in this situation. In practice, this may imply some form of prioritisation, for example, in relation to the consideration of applicants on waiting lists for rental housing.³⁴⁵

The interpretation of section 26(1) must be amplified here by its intersection with section 12(1)(c), which implies the determination of the nature of state obligations to respond to domestic violence against the background of a constitutional state based on the values of equality, freedom and dignity. It also requires an understanding of the principle of the state's duties to address violence against women with 'due diligence', as this principle has developed both in South African case law (albeit not with the express terminology of 'due diligence') and in international human rights law. Here the work of the Special Rapporteur on Violence against Women provides specific guidance.

In this context, the conceptualisation of domestic violence as forced eviction is also important, in that it reinforces the state's duty to respond to this violation of rights. Although section 7(2) of the Constitution already imposes positive duties on the state to 'respect, protect, promote and fulfil' the rights in the Bill of Rights, the right to be free from forced eviction (in the form of domestic violence) acquires additional force when interpreted in the light of international law, including General Comment 7 of the CESCR.

This interpretation also adds interesting dimensions: for exam-



ple, commentators have suggested that where the victim of domestic violence flees and has no intention of returning to the family home, compensation is called for in the form of permanent relocation to a safe place.³⁴⁶ Westendorp suggests that the perpetrator should be compelled to contribute to his victim's housing situation should she be unable to provide for adequate housing herself. Moreover, since the state is also responsible,³⁴⁷ financial contributions in the form of housing subsidies in cases where the perpetrator is unable to pay, or his contribution falls short, may be in order.³⁴⁸

The unavoidable cumulative effect of this overview must be that the current government approach to access to housing for women experiencing domestic violence falls short of the standards set by the Constitution and international and regional human rights law in several respects. The first shortcoming is the fact that there is no national special needs housing policy; flowing from this gap (or, perhaps, giving rise to this gap) is a clear recognition on the part of the government that the housing needs of women experiencing domestic violence may vary at different stages and may require different forms of housing support. A one-size-fits-all special needs housing policy (as recently adopted in the Western Cape) may therefore not be adequate.

During April 2007, the former Special Rapporteur on Adequate Housing undertook a mission to South Africa at the invitation of the government.³⁴⁹ His subsequent report contained a number of instructive comments. He firstly noted the positive measures undertaken by the South African government in the field of adequate housing,³⁵⁰ but also observed that, in spite of these measures, more remained to be done, as a significant number of South Africans still did not have access to adequate housing.

The Special Rapporteur acknowledged the efforts of the South African government at all levels to meet its goal of delivering 30% of housing to women-headed households.³⁵¹ However, the shortage of affordable housing, the lack of timely access to public housing and inadequate government provisions for long-term safe housing, particularly in rural areas, meant that many women were still forced either to remain in, or return to, situations of domestic violence and continued to live in inadequate housing where they risked the safety and health of their children and themselves. Such situations violated not only the right of access to adequate housing but the human right to be free from violence. In addition, the Special Rapporteur noted that there



was no specific housing programme to address vulnerable groups.³⁵² This was in spite of the fact that the Housing Act called for ‘the meeting of special housing needs including, but not limited to, the needs of the disabled’ and the promotion of ‘the housing needs of marginalized women and other groups disadvantaged by unfair discrimination’.

The Special Rapporteur’s report includes a number of recommendations of particular significance to women experiencing domestic violence. He stated that there was an urgent need to restructure the availability of rental housing for low-income groups, to guarantee security of tenure for tenants and to formulate a specific national policy for groups with specific housing requirements (special housing needs).³⁵³

The introduction of these measures will benefit not only women experiencing domestic violence, but also other persons with special housing needs and is therefore supported. However, it is important to bear in mind that whatever measures are adopted should not be a piecemeal, *ad hoc* response, but should form part of a comprehensive housing development programme for women experiencing domestic violence. It is hoped that this paper will contribute to the speedy formulation and implementation of such a programme, since, in the words of the Constitutional Court, few things can be more important to women than freedom from the threat of violence³⁵⁴ – or, to put it differently, to live in security, peace and dignity.



Notes

- 1 These statistics are contained in reports submitted to Parliament every six months by the National Commissioner of the South African Police Service in terms of the Domestic Violence Act 116 of 1998. The reports are included in the minutes of the National Assembly Portfolio Committee on Safety and Security, accessible through the website of the Parliamentary Monitoring Group [www.pmg.org.za].
- 2 Vetten (2007: 429).
- 3 According to a study published by the Medical Research Council in 2004, a woman is killed by her intimate partner in South Africa every six hours. This is the highest rate of intimate femicide (8.8 per 100 000 female population 14 years and more) reported in research internationally (Mathews *et al*, 2004: 4).
- 4 COHRE (2008: 34).
- 5 Describing countries as ‘developed’ or ‘developing’ can be problematic, but this paper uses the terms for ease of reference.
- 6 See eg Combrinck & Chenwi (2007: 1–2).
- 7 Special Rapporteur on Violence against Women (2000) at para 71. See also Bergquist (2008: 46).
- 8 *Ibid.*
- 9 See in this regard Combrinck & Wakefield (2007: 17–18).
- 10 COHRE (2008: 19); Swaminathan *et al* (2008: 77–78).
- 11 UNAIDS (2008: 40).
- 12 *Ibid.*
- 13 Presentation by the national Department of Housing to Parliament on 29 October 2008, available at <http://www.pmg.org.za/files/docs/081029doh.pdf>.
- 14 The project formed part of a small grants programme entitled *Reducing Women’s and Girls’ Vulnerability to HIV/AIDS by Ensuring their Property and Inheritance Rights* implemented by the International Center for Research on Women, in partnership with the Global Coalition on Women and AIDS and the UN Food and Agriculture Organization.
- 15 Combrinck & Chenwi (2007).
- 16 Chenwi (2007: 3) notes that the term ‘special needs housing’ is used to describe housing that is aimed at meeting the specific needs of groups who have varying degrees of vulnerability. In the South African context, such groups would include (amongst others) persons with disabilities, persons living with HIV/AIDS, women experiencing domestic violence, elderly persons and orphans and other vulnerable children – see Chenwi (2007: 4).
- 17 The author attended some of these workshops.



- 18 See 3.5.4 below.
- 19 2001 (1) SA 46 (CC).
- 20 Pillay *et al* (2002: 5–6).
- 21 See Pillay *et al* (2002: 7–10) for a useful exposition of this historical, social and economic background to women’s access to housing in South Africa.
- 22 Shelter resident cited in Combrinck & Chenwi (2007: 28).
- 23 Emdon (2007: 4). In terms of the Domestic Violence Act 116 of 1998, a court may include in a protection order a term prohibiting the respondent from entering a residence shared by the applicant and the respondent (sec 7(1)). This is not an eviction order as such and experience has shown that enforcement is often problematic. Complainants occasionally have to resort to an additional application in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 to effect eviction of the perpetrator (personal communication with Charmaine Morris, paralegal at Saartjie Baartman Legal Advice and Training Project, 26 March 2009).
- 24 *Ibid.*
- 25 Charlton (2004: 30).
- 26 Wicht (2006: 9).
- 27 Act 116 of 1998.
- 28 The Saartjie Baartman Legal Advice and Training Project is one such legal advice programme.
- 29 Emdon (2007: 11).
- 30 Charlton (2004: 31).
- 31 Emdon (2007).
- 32 *Ibid.* See also Charlton (2004: 31).
- 33 Emdon (2007).
- 34 *Ibid.*
- 35 *Ibid.* 7.
- 36 Operation Job Creation *The Housing Ladder: Facilities to Enable Progressive Housing Options* (2005) cited in Wicht (2006: 9).
- 37 *Emergency housing* is very short-term accommodation aimed at assisting people in crisis. People stay for a very short time, usually 72 hours or, in some cases, up to a week. The aim is to relocate people as soon as possible to something more permanent. Emergency housing is seen as assisting people who have been victims of floods or other disasters and is also aimed at helping people who have been evicted from their homes. Abused women who are escaping violent circumstances also fall into the category of those requiring emergency shelter. Many emergency shelters exist around South Africa for women who have been victims of domestic violence (Emdon, 2007).
- 38 Emdon (2007: 9).



- 39 CESCR *General Comment 7: The Right to Adequate Housing (Art. 11(1) of the Covenant): Forced Evictions* UN Doc. E/C.12/1997/4 (1997), para 3.
- 40 See General Comment 7, para 7. COHRE (2002: 7).
- 41 See General Comment 7, para 5. The use of forced evictions during the conflict in the former Yugoslavia can be listed as an example – see COHRE (2002).
- 42 COHRE (2002); COHRE (2008: 31).
- 43 Paglione (2006: 136). See also COHRE (2002: 7).
- 44 See in this regard also Farha (2002: 134).
- 45 Paglione (2006: 138).
- 46 *Ibid.*
- 47 Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter ‘the Constitution’).
- 48 Section 26 reads as follows:
- (1) *Everyone has the right to have access to adequate housing.*
 - (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
 - (3) *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.*
- 49 UN-Habitat (2007: 30).
- 50 S 12(1)(c).
- 51 S 9(3).
- 52 The Constitutional Court has confirmed that land rights are an integral part of housing rights – see *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 19.
- 53 2001 (1) SA 46 (CC).
- 54 See paras 3–11 of the judgment for an exposition of the facts.
- 55 Meaning ‘New Rest’.
- 56 The group of respondents consisted of 510 children and 390 adults. Mrs Irene Grootboom, the first respondent, brought the application before the High Court on behalf of all the respondents.
- 57 Sec 28(1)(c) of the Constitution provides that every child has the right to basic nutrition, shelter, basic health care services and social services. The High Court reasoned that although parents bore the primary obligation to provide shelter for their children, section 28(1)(c) imposed an obligation on the state to provide such shelter if parents could not. It added that an order that enforces a child’s right to shelter should take account of the need to be accompanied by his or her par-



- ent.
- 58 Para 42 (emphasis in original).
- 59 *Ibid.*
- 60 Para 41.
- 61 Para 40, as contemplated by Chapter 3 of the Constitution.
- 62 Para 42.
- 63 Para 43.
- 64 Para 44.
- 65 Para 45.
- 66 Para 46.
- 67 The relevant provision is the definition of ‘housing development’ as set out in sec 1 of the Housing Act 107 of 1997, which reads as follows:
- 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 –*
- (a) *permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and*
- (b) *potable water, adequate sanitary facilities and domestic energy supply ...*
- 68 Para 52.
- 69 Para 66.
- 70 Para 66.
- 71 See paras 57–62.
- 72 Para 67.
- 73 Para 68.
- 74 Para 96.
- 75 Regarding the ‘reasonableness’ standard to assess state compliance with positive duties arising from sections 26 and 27, see also *Minister of Health v Treatment Action Campaign (TAC) (No 2) 2002 (5) SA (CC) 721*. As a tragic postscript to the Constitutional Court case, Ms Irene Grootboom died in Wallacedene in August 2008 without having gained access to formal housing (Hweshe, 2008).
- 76 See in this regard Mbazira (2008: 20–25) for a useful discussion.
- 77 The contents of this programme, which is called ‘Housing assistance in emergency circumstances’ and is set out in Chapter 12 of the *National Housing Code*, are discussed in more detail in section 3.
- 78 McLean (2008: 55–21); see also Chenwi (2007: 11).



- 79 2003 (11) BCLR 1236 (C); 2004 (5) SA 39 (C). See also *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), which arose from a similar set of facts.
- 80 At 1239I–1240C. See also 1271B–1272I.
- 81 At 1271A–B.
- 82 At 1274C–1275C.
- 83 At 1275C–D.
- 84 At 1273B.
- 85 At 1275B; see also 1273B.
- 86 At 1281A.
- 87 2008 (5) BCLR 475 (CC).
- 88 The City of Johannesburg relied on section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 in seeking the eviction – see paras 1–2 of the Constitutional Court’s judgment for a summary of the events.
- 89 The judgment is reported as *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W).
- 90 *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417 (SCA); 2007 (6) BCLR 643 (SCA).
- 91 Para 5.
- 92 Paras 9–23.
- 93 Para 37.
- 94 Para 3.
- 95 Para 16.
- 96 *Ibid.*
- 97 Para 17.
- 98 *Ibid* 17. Emphasis added.
- 99 *Ibid.*
- 100 Para 18.
- 101 See in this regard generally Combrinck (2005: 171).
- 102 2000 (1) BCLR 86 (CC).
- 103 Act 133 of 1993.
- 104 The Court referred to the Declaration on the Elimination of All Forms of Violence against Women, the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and Peoples’ Rights – para 13.
- 105 Para 11–12.
- 106 2001 (4) SA 938 (CC).
- 107 Para 44.
- 108 Para 62.
- 109 2002 (4) ALL SA 346 (SCA).
- 110 2005 (9) BCLR 835 (CC).
- 111 2006 (2) SA 289 (CC).



- 112 Para 14–17.
 113 Para 17.
 114 See discussion in Section 4 below.
 115 *Carmichele v Minister of Safety and Security* (above) para 43.
 116 Combrinck (2005: 185), with reference to Carpenter (2003: 265–266).
 117 COHRE (2008: 12).
 118 Liebenberg & Goldblatt (2007: 351).
 119 *Ibid.*
 120 *S v Baloyi*, para 12.
 121 See discussion of the Convention on the Elimination of All Forms of
 Discrimination against Women in 4.2 below.
 122 McLean (2008: 55–1).
 123 Act 107 of 1997.
 124 S 2(1)(a).
 125 S 2(1)(c).
 126 S 2(1)(h)(i).
 127 S 2(1)(e)(vi).
 128 S 2(1)(e)(viii).
 129 S 2(1)(e)(x).
 130 S 3(1).
 131 S 4. See discussion below.
 132 S 7(1).
 133 S 7(2)(a)–(c).
 134 S 7(2)(g).
 135 S 9(1)(a)(i)–(iii).
 136 S 9(1)(c).
 137 S 9(1)(g).
 138 S 9(1)(h).
 139 McLean (2008: 55–4).
 140 S 4(6) of the Act. See McLean (2008: 55–5) for criticism of this frame-
 work.
 141 The Act does refer to inclusion of ‘administrative or procedural guide-
 lines’ in the code after consultation with the provincial housing MECs
 and the South African Local Government Association – see sec 4(2)(b).
 142 S 4(5).
 143 See Chenwi (2007: 28).
 144 Pillay *et al* (2002: 17).
 145 See Chenwi (2007: 36).
 146 S 4(6) and (7).
 147 *Ibid.*
 148 Pillay *et al* (2002: 17).
 149 Pillay *et al* (2002: 18).
 150 National Department of Housing (2007).



- 151 Pillay *et al* (2002).
152 National Department of Housing (2004a: 1).
153 National Department of Housing (2004a: 5–6).
154 National Department of Housing (2004a: 14).
155 A comprehensive audit of housing programmes in all provinces is beyond the scope of this paper, given the variations across provinces. See eg Chenwi (2006) for additional information.
156 National Department of Housing (2004b: 4).
157 *Ibid.*
158 National Department of Housing (2004b: 5).
159 National Department of Housing (2004b: 6–8).
160 National Department of Housing (2004b: 6).
161 Emdon (2007: 7).
162 See 3.5.2.1 and 3.5.2.2 below.
163 Emdon (2007: 13). Emdon’s analytical overview of the different housing programmes is generally useful and this section relies on it extensively.
164 ‘Operational costs’ typically include electricity, water, municipal rates, staff salaries and administrative costs. See also Emdon (2007: 9).
165 The rules regulating the institutional housing subsidy are set out in Chapter 6 of the *National Housing Code*. For a more comprehensive discussion, see Emdon (2007: 14–18) and Chenwi (2006: 6–7).
166 This means that she must have attained majority (either by reaching the age of majority, which is currently 18, or through marriage) and must be of sound mind. Prior to the commencement of sec 17 of the Children’s Act 38 of 2005, the age of majority was 21 and at the time of writing this age is still indicated as one of the subsidy requirements on the website of the national Department of Housing. The department confirmed telephonically, however, that the current ‘age requirement’ is 18 years and older.
167 See Emdon (2007: 17).
168 See also Emdon (2007).
169 See in this regard McLean’s (2008: 55–6 at fn 2) comments regarding the requirements for accessing the (individual) housing subsidy. She argues convincingly that the restrictive provision of housing benefits may be challenged on the basis of the judgment in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); the state would have to demonstrate that this restriction was reasonable or did not constitute unfair discrimination.
170 Emdon (2007: 18). Chenwi also notes that the institutional subsidy is the mechanism that comes closest to dealing with special needs housing (2007: 9).
171 Emdon (2007: 18).



- 172 Emdon (2007: 19).
 173 *Ibid.*
 174 Emdon (2007: 12).
 175 See Emdon (2007: 19–20) for examples.
 176 Emdon (2007: 22).
 177 *Ibid.*; see also Charlton (2004: 27).
 178 Emdon (2007: 22).
 179 Emdon (2007: 23).
 180 Provincial Government: Western Cape (2009) *Policy to Support Group Accommodation for People with Special Needs* Part 1 ‘Overview’ (unpublished – on file with author).
 181 There are certain differences in the Western Cape version, but these are beyond the scope of this paper.
 182 See generally Emdon (2007: 25).
 183 See generally Emdon (2007: 10–11); Chenwi (2006: 19–20).
 184 Charlton (2004: 12).
 185 Emdon (2007).
 186 At the time of writing, the commencement date of the Social Housing Act 16 of 2008 has yet to be proclaimed.
 187 McLean (2008: 55–6).
 188 Beneficiaries are required to contribute either R2 479 or the equivalent in labour or ‘sweat equity’ to the construction of their houses. Pensioners, the disabled or those with proven health problems are not required to do so. Because poor households found it difficult to make these payments, *Breaking New Ground* excluded those earning less than R1 500 per month. For further information on housing subsidies, see National Department of Housing website, www.housing.gov.za, accessed: 14 April 2009.
 189 Charlton (2004: 23–24). This municipality generally advertises sites in housing projects on the radio and in newspapers and allocates them on a first-come-first-served basis.
 190 McLean (2008: 55–19). She views this as an instance of unreasonable implementation.
 191 Charlton (2004: 23) similarly points out that sites in new projects are often reserved for people moving out of informal settlements or other precarious living arrangements and very few become available to the general public. Although Charlton’s comments are made in relation to eThekweni municipality, they apply more widely as well.
 192 Charlton (2004: 18).
 193 See Charlton (2004). The Department of Housing has reportedly now amended this policy, but since the amendment does not apply retrospectively, it does not assist women who already find themselves in this position – email communication with Jennifer Williams, Director



- of Women's Legal Centre, 23 April 2009.
- 194 See Chenwi (2006: 21–24).
- 195 See eg minutes of Western Cape Special Needs Housing Forum 1st Meeting (unpublished – on file with author).
- 196 Charlton (2004: 21–22).
- 197 Charlton (2004: 22).
- 198 COHRE (2008: 3).
- 199 Adopted 19 Dec 1966, GA Res 2200 (XXII), UN GAOR, 21st Session, Supp No 16, UN Doc A/6316 (1966) (entered into force 3 Jan 1976) [hereinafter referred to as 'ICESCR'].
- 200 Adopted 18 Dec 1979, GA Res 34/180, UN GAOR, 34th Session, UN DOC A/34/ 46 (1980) (entered into force 3 Sept 1981) [hereinafter referred to as 'CEDAW'].
- 201 Adopted 20 Dec 1993, GA Res 48/104 (1994).
- 202 UN GAOR UN Doc A/Conf.177/20 (1995).
- 203 The discussion in this paper does refer in passing to these documents – see 4.4.2 below.
- 204 *S v Makwanyane* 1995 (6) BCLR 665 (CC) at 686D–F.
- 205 CESCR *General Comment 4: The Right to Adequate Housing (Art 11(1) of the Covenant)* UN Doc. E/C.12/1991/4 (1991).
- 206 COHRE (2000) at 21.
- 207 General Comment 4, para 7.
- 208 *Ibid.* Emphasis added.
- 209 The issue was first touched on in General Comment 4, in which the CESCR observes that forced evictions are *prima facie* incompatible with the ICESCR and can only be justified in the most exceptional circumstances (and in accordance with the relevant principles of international law) – para 18.
- 210 General Comment 7.
- 211 General Comment 7, para 8.
- 212 Para 9.
- 213 Para 16.
- 214 Para 10.
- 215 Farha (2002: 131).
- 216 Farha (2002: 134).
- 217 Farha (2002: 135).
- 218 Paglione (2006: 139).
- 219 Paglione (2006: 140).
- 220 CESCR *General Comment 16: Article 3: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights* UN Doc. E/C.12/2005/3 (2005).
- 221 Para 14).
- 222 Para 22.



- 223 Article 10(1) of the ICESCR 10 requires states parties to recognise that the widest possible protection and assistance should be accorded to the family and that marriage must be entered into with the free consent of the intending spouses.
- 224 General Comment 16, para 27.
- 225 COHRE (2008: 7).
- 226 General Comment 16, para 27.
- 227 Para 28.
- 228 *Grootboom* , para 45.
- 229 COHRE (2000: 31).
- 230 Article 14.2.h. Emphasis added.
- 231 The Committee on the Elimination of Discrimination against Women [hereinafter referred to as ‘CEDAW Committee’].
- 232 COHRE (2000: 31). See in this regard the concluding observations to South Africa’s first country report – CEDAW UN Doc A/53/38/Rev.1 paras 100–137 (June 1998) paras 117–118.
- 233 *General Recommendation No 19: Violence against Women*, UN Doc. CEDAW/C/1992/L/1/Add.15 (1992).
- 234 Art 7.
- 235 Art 24(t)(i).
- 236 Art 24(t)(ii).
- 237 Art 24(t)(iii).
- 238 Art 9.
- 239 Art 9. The principle of ‘due diligence’ is discussed in more detail below – see 4.4.2.
- 240 Communication No 2/2003, *A. T. v Hungary* (Views adopted on 26 January 2005, thirty-second session).
- 241 Para 2.1.
- 242 Para 2.2.
- 243 Para 2.3.
- 244 Para 2.4. These events vividly illustrate the links between domestic violence and access to housing. The perpetrator not only succeeded in preventing the victim from finding safety within the apartment; by contesting her attempts to gain control of the apartment, he turned the apartment itself into an instrumentality of coercion. A.T. first attempted to exclude him from the apartment ‘mechanically’, by changing the locks. When he then brought trespass proceedings against her, she attempted to obtain legal tenure of the apartment by bringing an action against L.F. for separation of their common property – see para 5.2.
- 245 The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision, which was pending at the time of her submission of supplementary information to the CEDAW



- Committee on 2 January 2004.
- 246 Para 2.6. One of the criminal procedures began in 1999, the other in July 2001.
- 247 Para 3.1.
- 248 Para 3.2.
- 249 Para 3.3.
- 250 Para 3.4.
- 251 Para 9.3.
- 252 The report was considered by the CEDAW Committee during its 19th session in 1998 – *CEDAW Report of the Committee on the Elimination of Discrimination against Women (Eighteenth and nineteenth sessions)* UN Doc. A/53/38/Rev.1.
- 253 After the initial report, no further reports were submitted. The second periodic report was due on 14 January 2001 and the third on 14 January 2005 and the fourth was due on 14 January 2009.
- 254 See e.g. *S v Baloyi*, para 13; *Carmichele v Minister of Safety and Security*, para 67.
- 255 For example, several of the resolutions cited here include reference to resolution 42/1 of the Commission on the Status of Women, which deals with human rights and land rights discrimination – see COHRE (2000: 52–54).
- 256 See Dugard (2005: 34).
- 257 COHRE (2000: 54).
- 258 For this paper, the resolutions for the period 2000–2005 were examined. However, it should be noted that the Commission was already dealing with these issues before that.
- 259 ‘Forced evictions’ (adopted on 10 March 1993). See also resolution 2004/28: ‘Prohibition of forced evictions’ (adopted on 16 April 2004).
- 260 Para 1.
- 261 Para 2.
- 262 Para 4.
- 263 Resolution 2000/13: ‘Women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing’ (adopted on 17 April 2000). See also resolutions 2001/34 ; 2002/49.
- 264 Preamble.
- 265 Preamble.
- 266 Para 6.
- 267 Resolution 2003/22: preamble.
- 268 Para 7.
- 269 Para 8.
- 270 Resolution 2005/25: ‘Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate hous-



- ing' (adopted on 15 April 2005).
- 271 Preamble.
- 272 Para 10.
- 273 Resolution 2000/45: 'Elimination of violence against women' (adopted on 20 April 2000).
- 274 Para 2. See also subsequent resolutions: resolution 2001/49, 2002/52, 2003/45, 2004/46, 2005/41.
- 275 Para 15(a).
- 276 Resolution 2002/52: 'Elimination of violence against women' (adopted on 23 April 2002). para 7.
- 277 Resolution 6/27: 'Adequate housing as a component of the right to an adequate standard of living' (adopted on 14 December 2007).
- 278 Para 4(c).
- 279 Para 4(h).
- 280 UN General Assembly resolution 61/143: 'Intensification of efforts to eliminate all forms of violence against women' UN Doc A/Res/61/143 (adopted 19 December 2006); resolution 62/133 UN Doc A/Res/62/133 (adopted 18 December 2007); resolution 63/155 UN Doc A/Res/63/155 (dated 18 December 2008).
- 281 UN General Assembly resolution 63/155: para 10.
- 282 Para 16(j).
- 283 COHRE (2000: 41).
- 284 The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living was appointed in September 2000 in terms of resolution 2000/9 of the UN Commission on Human Rights UN Doc. E/CN.4/2001/51 (adopted on 25 Jan. 2001). Mr Miloon Kothari was the incumbent until 2008.
- 285 In its resolution 2002/49 on 'Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing', the Commission on Human Rights entrusted the Special Rapporteur on Adequate Housing with the additional mandate of preparing a report on women and adequate housing for consideration at its 59th session. The Special Rapporteur subsequently submitted three reports on this theme.
- 286 Special Rapporteur on Adequate Housing (2005) para 41.
- 287 Para 43.
- 288 Para 46. According to his subsequent 2006 report, the Special Rapporteur initiated work with the Special Rapporteur on Violence against Women to draft model provisions to protect women's rights in domestic violence legislation – Special Rapporteur on Adequate Housing (2006) para 22.
- 289 Special Rapporteur on Adequate Housing (2006) para 30.
- 290 Para 31.



- 291 Para 32.
292 Para 73.
293 Para 68.
294 *Ibid.*
295 *Ibid.*
296 Para 79.
297 Para 83(c).
298 Para 83(e).
299 Para 83(d).
300 Para 83(g).
301 Para 81.
302 See section 5 below.
303 The mandate of the Special Rapporteur on violence against women, its causes and consequences was established by the Commission on Human Rights in 1994 (Resolution 1994/45). The current Rapporteur is Yakin Ertürk; the previous incumbent was Radhika Coomaraswamy.
304 Special Rapporteur on Violence against Women (1996) para 59.
305 Special Rapporteur on Violence against Women (2000).
306 Para 69.
307 *Ibid.*
308 Para 70.
309 Special Rapporteur on Violence against Women (2006).
310 Para 19–20.
311 See 4.2 above.
312 *General Recommendation No 19: Violence against Women* UN GAOR 11th Session, UN Doc CEDAW/C/1992/L/1/Add.15 (1992) para 9.
313 Art 4(c).
314 Para 124(b).
315 OAS/Ser.L.V/II.92/doc31 rev.3 (1994) (adopted 9 June 1994) Art 7(b).
316 Special Rapporteur on Violence against Women (2006) paras 28–29.
317 Para 30.
318 For purposes of this discussion, the focus is on aspects enumerated by the Rapporteur that are relevant to access to housing. These resort under protection, rather than prevention or punishment.
319 Para 47.
320 Para 49. Emphasis added.
321 Para 82.
322 Para 83. She emphasises that shelters are better operated by NGOs that take a women’s rights approach, but their creation and maintenance and the protection of the safety of victims and personnel, are part of the state’s obligation.
323 Para 103.
324 Adopted by the 2nd Ordinary Session of the Assembly of the African



- Union (Maputo, 11 July 2003) [hereinafter referred to as the ‘African Women’s Protocol’].
- 325 Art 4(1).
- 326 Art 4(2).
- 327 Art 3(4). See also art 22 and 23, which require states parties to ensure the right of elderly women and women with disabilities to freedom from violence.
- 328 Special Rapporteur on Adequate Housing (2006) para 24.
- 329 Art 6(j) of the African Women’s Protocol.
- 330 Art 7(d).
- 331 Art 19(c).
- 332 Report No 4/01, Case 11.625, *Maria Eugenia Morales De Sierra v Guatemala*, Ruling on the Merits, (19 Jan. 2001).
- 333 Para 39.
- 334 Para 39.
- 335 Para 52. Footnotes omitted.
- 336 Para 51.
- 337 Arts 20–25 of the SADC Protocol on Gender and Development.
- 338 Art 18(b).
- 339 Special Rapporteur on Adequate Housing (2006) para 83(e).
- 340 These elements, set out by the CESCRC in General Comment 4 (CESC-R, 1991: para 8), are legal security of tenure, availability of services, affordability, habitability, accessibility, location and cultural adequacy – see Farha (2002: 127–131) and Paglione (2006: 124–132).
- 341 Farha (2002: 129); Paglione (2006: 130).
- 342 Farha (2002).
- 343 Farha (2002: 136).
- 344 See McLean (2008: 55–14).
- 345 See in this regard the discussion of the *Rudolph* case in 2.1.2 above.
- 346 Westendorp (2003: 14). Restitution and compensation are issues that have not yet been raised in the South African situation in the context of domestic violence and access to adequate housing.
- 347 See eg CESCRC (1997: para 13).
- 348 Westendorp (as above).
- 349 Special Rapporteur on Adequate Housing (2008).
- 350 *Ibid.* para 28.
- 351 Para 85.
- 352 Para 89.
- 353 Para 105.
- 354 See quotation from the *Carmichele* judgment as cited in 2.2 above. The original refers to ‘sexual violence’ only; this has been paraphrased slightly here.



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ANNEXURE A

