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**The right to  
adequate housing in  
the African regional  
human rights  
system:  
Convergence or  
divergence between  
the African  
Commission and  
South African  
approaches**

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**1 INTRODUCTION**

The right to adequate housing holds a central place within the international human rights system. It is an important basic human right, “of central importance for the enjoyment of all economic, social and cultural rights”.<sup>1</sup> Also, the right is linked to other rights,

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<sup>1</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment 4, The right to adequate housing E/1992/23 (1991) paras 1 & 4.

such as, to non-discrimination, dignity, privacy, freedom of association, freedom of expression, social security, education, health, work, vote, and the right to an adequate standard of living, which are essential if the right to adequate housing is to be realised and maintained by all groups in society.<sup>2</sup> The right to adequate housing therefore clearly expresses the principle of interdependency of rights, which “suggests that there is a mutually reinforcing dynamic between different categories of rights in the sense that the effective implementation of one category of rights can contribute to the effective implementation of other categories of rights and vice versa”.<sup>3</sup> Though Quane’s exposition limits the dynamic to different categories of rights (that is, civil and political rights, on the one hand, and socio-economic rights, on the other), the concept should also be understood as suggesting a mutually reinforcing dynamic between various rights including those within one category (that is, there can be a mutually reinforcing dynamic between various civil and political rights or between various socio-economic rights).<sup>4</sup> Scott defines interdependence in the sense of organic interdependence (“one right forms a part of another right and may therefore be incorporated into that latter right”) and related interdependence (“the rights in question are mutually reinforcing or mutually dependent, but distinct”). It should be emphasised that the interdependence of human rights can be in relation to the actual content of rights and not just with respect to “mutual reinforcement and equal importance” of rights.<sup>5</sup>

The right to adequate housing was first recognised, as a component of the right to an adequate standard of living, in the Universal Declaration of Human Rights of 1948 (UDHR).<sup>6</sup> It has subsequently been codified in various human rights instruments at the United Nations (UN) and regional levels.<sup>7</sup> Its recognition in African regional human rights instruments is considered below.

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<sup>2</sup> General Comment 4 (1991) at para 9; Office of the United Nations High Commissioner for Human Rights and UN-Habitat Fact Sheet 21/Rev.1 (2009) 9; World Health Organization Health Principles of Housing (1989) 1.

<sup>3</sup> Quane H “A further dimension to the interdependence and indivisibility of human rights?: Recent developments concerning the rights of indigenous peoples” (2012) 25 *Harvard Human Rights Journal* 49 at 49.

<sup>4</sup> Scott C “The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights” (1989) 27 *Osgoode Hall Law Journal* 769 at 779-786.

<sup>5</sup> Quane (2012) at 51.

<sup>6</sup> UDHR, s 25(1).

<sup>7</sup> At the United Nations level, see, for example, the International Covenant on Economic, Social and Cultural Rights 1966 (art 11), the International Covenant on Civil and Political Rights 1966 (art 17(1)), the Convention on the Elimination of All Forms of Racial Discrimination 1965 (art 5(e)(iii)), the Convention on the Elimination of All Forms of Discrimination against Women 1979 (art 14(2)(h)), the Convention on the Rights of the Child 1989 (art 27(3)), the Convention Relating to the Status of Refugees 1952 (art 21), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (art 43(1)(d)), and the Convention on the Rights of Persons with Disabilities 2008 (arts 2, 5(3), 9(1)(a), 22(1), 28(1) & 28(2)(d)). With regard to other regions, in the European human rights system, the European Social Charter of 1961 was revised in 1996 to include the right to housing (art 31; see also arts 16 & 19(4) on housing for families & migrant workers, respectively); in the Inter-American human rights system, though the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (Protocol of San Salvador) is silent on this right, it however provides for the right of everyone to live in a healthy environment and to have access to basic public services (art 11(1)), which is relevant in the

This article considers the right to adequate housing in the African regional human rights system, with specific emphasis on its enforcement by the African Commission on Human and Peoples' Rights (African Commission). The discussion is restricted to its recognition, meaning and content; state obligations; and the interactions of the right to adequate housing with other rights in terms of the principle of interdependency of rights. The African Commission is, currently, the only quasi-judicial body at the African regional level that has engaged with the enforcement of this right. The discussion of the recognition of the right in the African system and the jurisprudence on it is done against the backdrop of South Africa's approach to the protection and enforcement of this right, with the aim of identifying instances of convergence or divergence between the African Commission and South Africa's approaches. South Africa is well-known for its comprehensive and progressive jurisprudence on socio-economic rights, and housing rights in particular. It is known for its progressive housing laws, jurisprudence, policies and programmes. It would be interesting to see if, despite this progressive jurisprudence, there are still some lessons that could be learned from the African Commission's limited jurisprudence; or is it the other way round – that is, the African Commission drawing lessons from South Africa to enhance its limited jurisprudence on housing. It must be emphasised that this article does not aim to discuss the South African housing jurisprudence comprehensively. References are made to some aspects of the jurisprudence where relevant in order to highlight congruencies and divergences.

## 2 RECOGNITION, MEANING AND CONTENT

### 2.1 A right to adequate housing for all

The main human rights treaties at the African regional level either explicitly recognise the right to adequate housing or are silent on it. The African Charter on Human and Peoples' Rights of 1981 (African Charter)<sup>8</sup> provides for both civil and political rights and economic, social and cultural rights. This is in fact one of its unique features – that is, the recognition of both categories of rights on the same footing and the provision of the same enforcement mechanism for both.<sup>9</sup> This approach is based on the recognition of the interdependency of rights, which is explicitly stated in the Preamble to the Charter – “that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”.

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enjoyment of the right to adequate housing.

<sup>8</sup> OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>9</sup> Chirwa DM “African regional human rights system: The promise of recent jurisprudence on social rights” in Langford M (ed) *Social rights jurisprudence: Emerging trends in international and comparative Law* (2008) 323 at 323; Viljoen F *International human rights law in Africa* (2007) at 236-237; Nwobike JC “The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria” (2005) 1 *African Journal of Legal Studies* 129 at 140.

Notwithstanding the recognition of the interdependency of rights, the African Charter is silent on the right to adequate housing. To fill this gap, the African Commission has creatively, in relation to the principle of interdependency of rights, interpreted other rights in the Charter to include a right to adequate housing. In *Social and Economic Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC case)*, the African Commission stated that:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.<sup>10</sup>

The right to housing or shelter thus forms a part of the rights to property, health, and protection of the family, read together, because property, health and family life are all adversely affected when housing is destroyed. It should be noted that the right to adequate housing, in the context of the African Charter, includes a right to protection against forced evictions. In the *SERAC* case, the African Commission held that “the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions”.<sup>11</sup> The right to protection from forced evictions is thus a derivative of the right to housing, which is itself a derivative of other rights.

The right to adequate housing, as stated by the African Commission, refers to “the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity”, which “includes access to natural and common resources, safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services”.<sup>12</sup> The African Commission is, therefore, of the view that “[t]he right to shelter goes further than a roof over one’s head. It extends to embody the individual’s right to be let alone and to live in peace – whether under a roof or not”.<sup>13</sup> The African Commission thus drew from the UN Committee on Economic, Social and Cultural Rights (CESCR), which defines the right to adequate housing as “the right to live somewhere in security, peace and dignity”, which goes beyond a right to have “a roof over one’s head”.<sup>14</sup> A house should, therefore, “not be exclusively perceived as what it is,

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<sup>10</sup> Communication 155/96, 15th Annual Activity Report of the ACHPR (2002); 10 IHRR 282 (2003) at para 60. The case concerned alleged violations, by the Nigerian government, of various rights in the African Charter, through condoning and facilitating the operations of oil corporations in Ogoniland, giving rise to protests against the activities, with resulting deaths and burning and destruction of homes, crops and farms.

<sup>11</sup> *SERAC* case para 63.

<sup>12</sup> Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (African Commission Principles and Guidelines), adopted in 2010 and formally launched in 2011; at para 78. Available at <http://www.escr-net.org/docs/i/1599552> (accessed 22 December 2013).

<sup>13</sup> *SERAC* case para 61.

<sup>14</sup> General Comment 4 (1991) para 7.

but rather what it does for the person or family who inhabits it”.<sup>15</sup> Furthermore, in line with the approach of the CESC, the elements that must be taken into account in determining the adequacy of shelter or housing under the African Charter include availability, adequacy, affordability, acceptability (culturally appropriate) and security of tenure.<sup>16</sup>

The phrasing of the right by the African Commission can be distinguished from the way it is phrased in the South African context. The African Commission refers to a “right to housing or shelter” in the *SERAC* case, but has subsequently used the terminology “right to adequate housing” in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights.<sup>17</sup> The South African Constitution of 1996, on the other hand, refers to a “right to have access to adequate housing”.<sup>18</sup> With regard to the phrasing used, in *Government of the Republic of South Africa and others v Grootboom and Others* (*Grootboom* case), the Constitutional Court held that a “right to have access to housing”, as distinct from a “right to adequate housing” recognises that housing entails more than just “bricks and mortar”, and requires access to land, appropriate services, such as, the provision of water and the removal of sewage, and the financing of all these, including the building of the house itself.<sup>19</sup> This interpretation is in line with the view of the CESC and that of the African Commission, thus reflecting congruence in the understanding of the meaning of the right and the fact that it must be interpreted broadly. Therefore, irrespective of how the right is phrased, it implies something more than a roof over one’s head.

## 2.2 Children’s right to adequate housing

In addition to the African Charter, the African Charter on the Rights and Welfare of the Child of 1990 (African Children’s Charter)<sup>20</sup> guarantees children’s right to housing. Article 20(2)(a) on “parental responsibilities” requires that States parties take “appropriate measures”, “in accordance with their means and national conditions”, towards assisting “parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to ... housing”. The provision clearly places the primary responsibility for the provision of housing on parents, with the State’s role being to ensure the conditions necessary for parents to meet this responsibility.

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<sup>15</sup> Leckie, S *From housing needs to housing rights: An analysis of the right to adequate housing under international human rights law* (1992) at 4.

<sup>16</sup> African Commission Principles and Guidelines paras 3 & 79. For example, acceptability in relation to housing “includes the requirement that provision of housing, particularly regarding construction and the building materials used, should be culturally appropriate for example for minorities and indigenous peoples” (para 3(d)).

<sup>17</sup> Para 78.

<sup>18</sup> Emphasis added.

<sup>19</sup> 2000 (11) BCLR 1169 (CC) para 35.

<sup>20</sup> OAU Doc. CAB/LEG/24.9/49 (1990).

The South African Constitution, on the other hand, uses the term “shelter” when providing for this right in relation to children. Section 28(1)(c) of the Constitution states that “[e]very child has the right ... to basic nutrition, *shelter*, basic healthcare services and social services”.<sup>21</sup> The use of “shelter”, as explained by the Constitutional Court, does not mean that it bears a different meaning from the word “housing”. The Court held further that “[h]ousing and shelter are related concepts and one of the aims of housing is to provide physical shelter. But shelter is not a commodity separate from housing”. Also that “shelter” is not limited to basic shelter alone as it “embraces shelter in all its manifestations”.<sup>22</sup>

The South African Constitution’s congruence with the African Children’s Charter is evident from the interpretation of this right by the South African Constitutional Court. The Court was of the view that parents or family bear the primary responsibility to provide shelter for children that they care for, and only alternatively does this obligation shift to the state.<sup>23</sup> This does not mean that the State incurs no obligation towards children who are cared for by parents or families. Similar to the position under the African Children’s Charter, the state bears an obligation to “provide the legal and administrative infrastructure necessary to ensure that children” enjoy their right to shelter, which can be achieved through enacting laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children.<sup>24</sup> In addition, the state has to “provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27”.<sup>25</sup> The state therefore has primary obligation towards children in relation to the direct provision of shelter to them when they are removed from their families.<sup>26</sup>

### 2.3 Women’s right to adequate housing

The recognition that the African Charter does not provide adequate protection to women<sup>27</sup> gave birth to the Protocol to the African Charter on Human and Peoples’

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<sup>21</sup> Emphasis added. It should be noted that the phrasing of the right, unlike s 26 of the Constitution, is not qualified by the term “access” or reference to available resources. However, the South African Constitutional Court has held that the obligation to provide children and their parents with rudimentary housing does not exist independently of the general obligation to take reasonable legislative and other measures under s 26(2) as well as s 25(5) & s 27 of the Constitution (*Grootboom* case para 74).

<sup>22</sup> *Grootboom* case para 73.

<sup>23</sup> *Grootboom* case para 77.

<sup>24</sup> *Grootboom* case para 78.

<sup>25</sup> *Grootboom* case para 78.

<sup>26</sup> It should, however, be noted that the South African Constitutional Court’s socio-economic rights jurisprudence shows that the protection of children’s socio-economic rights is not only triggered when children are physically separated from their parents, as some children are born to indigent parents, who are not able to make provision for them (see *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) paras 78 & 78).

<sup>27</sup> Nsibirwa MS “A brief analysis of the draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women” (2001) 1(1) *African Human Rights Law Journal* 40 at 41.

Rights on the Rights of Women in Africa of 2003 (African Women's Protocol).<sup>28</sup> Article 16 of the Protocol guarantees women's right to adequate housing. It guarantees "equal access to housing and to acceptable living conditions in a healthy environment" for women, and requires that for this right to be effectively realised, States parties have to "grant to women, whatever their marital status, access to adequate housing". The right is thus guaranteed to all women irrespective of their marital status. This can be contrasted with the criteria for access to state subsidised housing in the South African context, which requires that a woman should be married or single with financial dependants.<sup>29</sup> The provision in the African Women's Protocol is yet to be interpreted by the African Commission.

### 3 STATE OBLIGATIONS

#### 3.1 Progressive realisation and resources

While there seems to be divergence, in terms of explicit reference to the principles of progressive realisation and resource availability, in relation to housing rights under the African Charter and in the South African context, the practical implementation of the right reflects congruence. The African Charter is silent on progressive realisation or available resources; that is, it does not explicitly refer to these in relation to the rights protected. Section 26 of the South African Constitution, however, refers to these principles in the recognition of the right. Notwithstanding this difference, congruence is evident in both contexts, as the African Commission has recognised the principle of progressive realisation, stating:

While the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with articles 61 and 62 of the African Charter. States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights.<sup>30</sup>

The African Commission also notes that "[s]ome obligations in relation to progressive realisation are immediate", such as, the "obligation to take concrete and targeted steps to realise economic, social and cultural rights".<sup>31</sup> Also, in order to progressively realise the right to adequate housing under the African Charter, "States need sufficient resources", including "a budgeting process that ensures that economic, social and cultural rights are prioritised in the distribution of resources".<sup>32</sup>

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<sup>28</sup> CAB/LEG/66.6 (2000).

<sup>29</sup> Tissington K *A resource guide to housing in South Africa 1994-2010: Legislation, policies, programmes and practice* (2011) at 23.

<sup>30</sup> African Commission Principles and Guidelines para 13. Art 61 of the African Charter requires the African Commission to consider international law in the interpretation and application of the Charter. Art 62 places an obligation on States to report every two years on measures taken towards implementing the rights and freedoms in the Charter. Art 60 is also of relevance, as it requires the Commission to draw inspiration from international human rights law as well as human rights instruments adopted by African countries.

<sup>31</sup> African Commission Principles and Guidelines para 14.

<sup>32</sup> African Commission Principles and Guidelines at para 15.

### 3.2 The obligation to respect, protect, promote and fulfil

Generally, the obligations of states in relation to the right to adequate housing is also seen within the framework of the four levels of obligations – respect, protect, promote and fulfil.<sup>33</sup> These four levels of obligations, which entail a combination of positive and negative duties, were recognised by the African Commission in the *SERAC* case.<sup>34</sup> In relation to the obligation to respect and protect housing rights, the African Commission held as follows:

The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.<sup>35</sup>

The four levels of obligations are also recognised in the African Commission Principles and Guidelines as applying to all economic, social and cultural rights.<sup>36</sup>

Section 7(2) of the South African Constitution recognises these four levels of obligations in relation to the rights in the Bill of Rights, which include the right to have access to adequate housing and children's right to shelter. The provision on the right to adequate housing in the Constitution also reflects these levels of obligations. The duty to respect is reflected in sections 26(1) and (3), which create negative duties. The negative obligation in sections 26(3) requires not just the state but other entities as well to desist from carrying out arbitrary evictions. The obligation to protect, promote and fulfil is reflected in section 26(2) which creates positive duties. These levels of obligations are further recognised in other housing legislation. For example, section 2(1)(h)(i) of the Housing Act<sup>37</sup> requires all levels of government to respect, protect, promote and fulfil the rights in the Constitution, in the administration of any matter relating to housing development.

Congruence is thus evident in terms of the four levels of obligations relating to housing rights. The point that a state does not bear the sole responsibility in relation to the provision of housing is another area of congruence. The African Charter's recognition of individual duties in Articles 27 to 29, for example, is illustrative of this. In the *Grootboom* case, the South African Constitutional Court stated that individuals and other agents within the society are also responsible for the provision of housing and must be enabled by legislative and other measures to provide housing.<sup>38</sup>

<sup>33</sup> Leckie S "The right to housing" in Eide A, Krause C & Rosas A (eds) *Economic, social and cultural rights* (1995) 107 at 112-115.

<sup>34</sup> *SERAC* case para 44.

<sup>35</sup> *SERAC* case para 61.

<sup>36</sup> African Commission Principles and Guidelines paras 4-12.

<sup>37</sup> Act 107 of 1997.

<sup>38</sup> *Grootboom* case para 36.

### 3.3 Obligations relating to national plans, policies and systems

The African Commission Principles and Guidelines lay down a series of obligations in relation to national plans, policies and systems in the realisation of the right to adequate housing.<sup>39</sup> Some of the obligations, which reflect congruence in terms of the obligations under the African regional system and in the South African context are stated below.

The African Commission points out the obligation of states to undertake “comprehensive reviews of relevant national legislations and policies with a view to ensuring their conformity with international human rights provisions”, which “should also ensure that existing legislation, regulation and policy address the privatization of public services, inheritance and cultural practices, so as not to lead to, or facilitate forced evictions”.<sup>40</sup> The South African Constitutional Court, though not in the context of housing rights (but relevant to their realisation) has recognised the importance of regular review of legislation and policies – not just in terms of compliance with international standards but review that would ensure consistency of policies with progressive realisation of rights. In *Mazibuko and Others v City of Johannesburg and Others* (*Mazibuko* case), the Constitutional Court held that “policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved”.<sup>41</sup> Also, by virtue of section 39 of the Constitution and its international obligations, South Africa needs to review its policies to ensure compliance with international standards.

States also have an obligation to give priority to “the provision of shelter for all persons in desperate need of emergency housing” in their national plans and policies.<sup>42</sup> The provision of emergency housing to those in desperate need has been accentuated on numerous occasions by the South African Constitutional Court. In the *Grootboom* case, for instance, the Court was of the view that the state’s housing rights obligations include an obligation to “devise, fund, implement and supervise measures to provide relief to those in desperate need”.<sup>43</sup> Also, in *Minister of Public Works v Kyalami Ridge Environmental Association* (*Kyalami Ridge* case), the Constitutional Court emphasised the State’s obligation to facilitate access to temporary housing relief for people who are living in intolerable conditions and for people who are in crisis due to natural disasters.

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National plans and policies have to protect tenure security, including that of tenants, and ensure affordability (economic accessibility), habitability, cultural acceptability and appropriateness, and access to social amenities and services.<sup>45</sup> The

<sup>39</sup> African Commission Principles and Guidelines paras 79 (iv-xiii).

<sup>40</sup> African Commission Principles and Guidelines para 79(iv).

<sup>41</sup> 2010 (3) BCLR 239 (CC) at paras 40, 67, 162 & 163. The case also concerned the constitutionality of pre-paid water metres.

<sup>42</sup> African Commission Principles and Guidelines para 79(vi).

<sup>43</sup> *Grootboom* case at para 96.

<sup>44</sup> 2001 (3) SA 1151 (CC) at paras 38-40. This case was a challenge to the government’s decision to house people who had been displaced by severe floods.

<sup>45</sup> African Commission Principles and Guidelines para 79(vii and ix-xii).

South African Constitutional Court has recognised some of these elements in the context of other socio-economic rights.<sup>46</sup> Of particular relevance to the South African context due to its challenges in relation to access to adequate housing and relevant services for informal settlement dwellers is the principle that “[n]o one should be denied access to water and sanitation because of their housing or land status”, including those in informal settlements.<sup>47</sup>

The African Commission also recognises the need to “[e]ntrust an independent national body, such as a national human rights institution, to monitor State compliance ... including investigation of forced evictions and other violations and ensuring prosecution of perpetrators.”<sup>48</sup> Congruence is evident when one looks at the mandate of the South African Human Rights Commission (SAHRC). Section 184(1)(c) of the South African Constitution requires the SAHRC to “monitor and assess the observance of human rights”; and section 184(3) specifically requires it to monitor the realisation of the right to adequate housing (among other socio-economic rights), through requiring the relevant government departments to report to it on a yearly basis on measures taken towards realising the right. However, a number of challenges, including low response rates from government agents and delays in reporting, have impacted on the ability of the SAHRC to effectively monitor the realisation of socio-economic rights.<sup>49</sup>

### **3.4 Obligations relating to vulnerable groups, equality and non-discrimination**

As stated above, the African Children’s Charter and the African Women’s Protocol guarantee the right to adequate housing for specific vulnerable groups – children and women, respectively. Article 18(4) of the African Charter also recognises the need for “special measures of protection” for older persons and persons with disabilities, “in keeping with their physical or moral needs”.

In relation to the right to adequate housing in particular, states have to: (a) prioritise “housing and land allocation” for the vulnerable and marginalised; ensure that it is culturally appropriate for them; (b) ensure equality in “access to land, adequate housing or shelter and to acceptable living conditions in a healthy environment”, giving special attention to “ensuring fair and equitable inheritance of land and rights in housing regardless of sex”; and (c) ensure equality between men and women in protection against forced evictions, access to land, conferment of title, enjoyment of security of tenure, and in compensation in cases of violations.<sup>50</sup> The obligation to ensure equal access to housing and land for women “includes the obligation to take measures

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<sup>46</sup> See Chenwi L “Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations CESCR and the South African Constitutional Court” Research paper written for Studies in Poverty and Inequality Institute (2010) at 11-15.

<sup>47</sup> African Commission Principles and Guidelines para 92(xviii).

<sup>48</sup> African Commission Principles and Guidelines para 79(xiii).

<sup>49</sup> See generally, Klaaren J “A second look at the South African Human Rights Commission, access to information, and the promotion of socioeconomic rights” (2005) 27 *Human Rights Quarterly* 539.

<sup>50</sup> African Commission Principles and Guidelines paras 79(xiv-xviii). Even in the allocation of resources, the essential needs of vulnerable and marginalised groups must be prioritised (para 14).

to modify or prohibit harmful social, cultural or other practices that prevent women and other members of vulnerable and disadvantaged groups from enjoying their right to property, particularly in relation to housing and land”.<sup>51</sup>

The need to prohibit cultural practices that limit women’s access to housing has been accentuated by the South African Constitutional Court. In *Bhe and Others v Magistrate, Kyayelisha and Others*, (*Bhe* case), the Constitutional Court found the African customary law principle of male primogeniture, by which only a male could participate in intestate succession, to be unconstitutional, on the basis that it constituted impermissible discrimination against women and girls and violated women’s right to dignity.<sup>52</sup> In *Gumede v President of the Republic of South Africa and Others* (*Gumede* case), the Court found laws that recognised a husband as the family head, with ownership of and control over all family property in the family home, impacting negatively on women’s ability to access property during and upon dissolution of their customary marriages, to be discriminatory and at odds with the right to dignity.<sup>53</sup> Further, the High Court in *Nzimande v Nzimande and Another*, (*Nzimande* case), taking into consideration various constitutional provisions, including section 26(1), overturned a pre-constitutional certificate giving housing rights to the brother of a deceased, and granted them to the former customary wife of the deceased, on the basis that the succession rules have discriminatory effects.<sup>54</sup>

As stated in the African Commission’s Principles and Guidelines, states are required to provide “alternative and safe housing programmes for women fleeing situations of domestic violence”.<sup>55</sup> In the South African context, special needs housing is meant to address the housing needs of such women.<sup>56</sup> However, though some polices respond to some extent to this issue, the policy environment in the area of special needs housing in South Africa is still poorly developed.<sup>57</sup>

### 3.5 Obligations in the context of evictions

In addition to their general obligations in relation to housing rights, states have specific obligations in relation to housing in the context of evictions. In defining the elements of adequate housing, the CESCR has stated that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats”.<sup>58</sup> The CESCR then elaborated on the obligations of states to realise the right to adequate housing in the context of evictions in its General Comment 7.<sup>59</sup>

<sup>51</sup> African Commission Principles and Guidelines para 55(viii).

<sup>52</sup> 2005 (1) BCLR 1 (CC) paras 91-93 & 241.

<sup>53</sup> 2009 (3) BCLR 243 (CC) paras 34 & 35-36.

<sup>54</sup> 2005 (1) SA 83 (W).

<sup>55</sup> African Commission Principles and Guidelines para 67(xxxv)(g).

<sup>56</sup> For a definition of “special needs housing”, see Chenwi L “Taking those with special housing needs from the doldrums of neglect: A call for a comprehensive and coherent policy on special needs housing” (2007) 11(2) *Law, Democracy and Development* 1 at 3-4.

<sup>57</sup> Chenwi (2007) at 9-15.

<sup>58</sup> General Comment 4 para 8(a).

<sup>59</sup> General Comment 7, The right to adequate housing: Forced evictions, E/1998/22 (1997), annex IV.

The African Commission, drawing from the CESC, has also set down elaborate substantive and procedural obligations in relation to the right to protection against forced evictions as a component of the right to adequate housing.<sup>60</sup> The Commission sees an eviction as an exceptional measure that must be authorised by law.<sup>61</sup> Similarly, in the South African context, to ensure that an eviction is legal, a court order must first be obtained.<sup>62</sup>

Consultation with those likely to be affected by eviction is seen as a key requirement in the housing planning and development process.<sup>63</sup> This is also an important requirement in the South African context, resulting in the development of the concept of “meaningful engagement”.<sup>64</sup>

The African Commission lists other substantive and procedural safeguards in the following words:

The eviction process should include the following elements: (a) appropriate individual notice to all potentially affected persons; (b) effective dissemination by the authorities of relevant information in advance; (c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities. Prior to any decision to initiate an eviction, authorities must demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare.<sup>65</sup>

Similarly, in the South African context, the state and other agents seeking to evict people are required to adhere to a number of procedural and substantive requirements, contained in legislation adopted to give effect to section 26(3) of the Constitution. Two key pieces of legislation containing these requirements are the Extension of Security of Tenure Act 62 of 1997, which requires a landowner to get a court order before evicting unlawful occupiers, among other things; and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act), aimed at ensuring that evictions take place in a manner that is consistent with the values of the Constitution. For example, section 4(6) of the PIE Act requires that before granting an eviction order, the court must be of the opinion “that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women”.

The African Commission Principles and Guidelines further require states to prevent violence in the eviction process, ensure medical assistance to the sick and wounded, prevent disproportionate use of force, ensure that family members are not

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<sup>60</sup> African Commission Principles and Guidelines para 79(xix-xxxvi).

<sup>61</sup> African Commission Principles and Guidelines para 79(xix-xxi).

<sup>62</sup> See, for example, s 26(3) of the Constitution.

<sup>63</sup> African Commission Principles and Guidelines at para 79(xxii).

<sup>64</sup> See, for example, *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC); and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC).

<sup>65</sup> African Commission Principles and Guidelines para 79(xxiii).

separated, and ensure “sufficient alternative accommodation”, including access to “essential food, potable water and sanitation”, “basic shelter and housing”, “appropriate clothing”, “essential medical services”, “livelihood sources”, “fodder for livestock and access to common property resources previously depended upon”, and “education for children and childcare facilities”.<sup>66</sup>

### 3.6 Minimum core obligations

Minimum core obligations comprise one of the immediate obligations on states in the realisation of economic, social and cultural rights.<sup>67</sup> Such obligations must be understood within the broader framework of progressive realisation, as they do not imply that governments should fulfil the bare minimum and then do nothing. The African Commission Principles and Guidelines identify three minimum core obligations in relation to the right to adequate housing:

- i) Refrain from and protect against forced evictions from home(s) and land, including through legislation. All evictions must be carried out lawfully and in full accordance with relevant provisions of national and international human rights and humanitarian law. States should apply appropriate civil or criminal penalties against any public or private person or entity within its jurisdiction that carries out evictions in a manner inconsistent with applicable national and international law, including due process.
- ii) Guarantee to all persons a degree of security of tenure which confers legal protection upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land, against forced evictions, harassment and other threats.
- iii) Ensure at the very least basic shelter for everybody.<sup>68</sup>

It should be noted that the above mainly speak to minimum “obligations” as opposed to minimum core “content” of the right to adequate housing, with the exception of the third obligation. With regard to the third obligation, the African Commission Principles and Guidelines do not provide much as regards the content of “basic shelter”, defining it broadly as “the basic minimum housing required by the individual for protection from the elements”.<sup>69</sup> In the *SERAC* case, with regard to minimum core obligations in relation to housing, the African Commission held that “[a]t the very minimum, the right to shelter obliges [States] not to destroy the housing of citizens and not to obstruct efforts by individuals or communities to rebuild lost homes”.<sup>70</sup>

While the African Commission seems, at least, to be open to using the minimum core obligations terminology in relation to the right to adequate housing, divergence can be seen from the South African approach in this regard. Though the South African Constitutional Court, in elaborating on reasonableness, has set minimum standards to be met in the progressive realisation of socio-economic rights, it has not yet endorsed the minimum core obligations language in relation to housing rights. In the *Grootboom* case, the Court stated that “it is not possible to determine a minimum threshold for the

<sup>66</sup> African Commission Principles and Guidelines para 79(xxvi-xxxii).

<sup>67</sup> African Commission Principles and Guidelines para 16.

<sup>68</sup> African Commission Principles and Guidelines para 79 (i-iii).

<sup>69</sup> African Commission Principles and Guidelines para 1(o).

<sup>70</sup> *SERAC* case para 61.

progressive realisation of the right to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right”.<sup>71</sup> The Court, however, acknowledged that “there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable”.<sup>72</sup>

#### 4 INTERDEPENDENCY IN HOUSING RIGHTS JURISPRUDENCE

An examination of the housing jurisprudence of the African Commission and the South African Constitutional Court reflects congruence in relation to the interdependency of rights, illustrating a mutually reinforcing dynamic between housing and other rights or, in the context of the African Commission, between various socio-economic rights resulting in the promotion and protection of the right to adequate housing.

The *SERAC* case shows the interdependency of rights in the African Charter. In particular, the interaction between explicitly recognised socio-economic rights in the African Charter as a tool to recognise new socio-economic rights, one of which is the right to adequate housing. As stated above, based on the principle of interdependency, the right to housing or shelter, including a prohibition against forced evictions, was derived from the rights to property,<sup>73</sup> health,<sup>74</sup> and family life,<sup>75</sup> read together. Housing, property, health and family life are therefore mutually reinforcing, as property, health and family life are all adversely affected when housing is destroyed.

The *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan* (*Sudan case*),<sup>76</sup> also illustrates interdependency between housing and health as well as between the right not to be forcibly evicted and other rights. The prohibition of forced evictions and the right to freedom of movement and residence<sup>77</sup> were seen as interdependent since forced evictions restrict freedom of movement and residence. The African Commission did not find the restriction to be justifiable, because the state (the government of Sudan) had failed to prevent the evictions or take urgent steps to ensure that displaced persons return to their homes.<sup>78</sup> The Commission was also of the view that the right to liberty<sup>79</sup> complements freedom of movement, as the destruction of homes results in internally displaced persons not being able to move freely to their homes, and consequently, their liberty and freedom are proscribed.<sup>80</sup> The failure of the

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<sup>71</sup> *Grootboom* case para 32.

<sup>72</sup> *Grootboom* case para 33.

<sup>73</sup> African Charter, art 14.

<sup>74</sup> African Charter, art 16.

<sup>75</sup> African Charter, art 18.

<sup>76</sup> Communications 279/03 & 296/05 (2009) *AHRLR* 153 (ACHPR 2009). The case dealt with alleged “gross, massive and systematic” violations of human rights in the Darfur region of the Sudan, including forced evictions, destruction of public facilities and properties, looting and destruction of foodstuffs, crops and livestock, and poisoning of wells and denial of access to water.

<sup>77</sup> African Charter, art 12.

<sup>78</sup> *Sudan case* at paras 186, 189 & 190.

<sup>79</sup> African Charter, art 6.

<sup>80</sup> *Sudan case* at para 177.

government to take steps to protect the victims thus amounted to a violation of the right to liberty. Furthermore, forced eviction of people from their homes and the killing of some family members threatened the very foundation of the family, thus rendering the enjoyment of the right to family life difficult.<sup>81</sup> This was compounded by the fact that the government did nothing to prevent the violation. A violation of the right to property was also found on the basis that the government failed to refrain from eviction or demolition of the houses and property, and did not take steps to protect the victims.<sup>82</sup> Whether or not the victims had title to the land was immaterial. Similar to the *SERAC* decision, the African Commission found the right to adequate housing and the right to health to be interdependent, as the destruction of homes, amongst others, exposes victims to serious health risks.<sup>83</sup> The decision goes further to illustrate an interaction between peoples' right to economic, social and cultural development,<sup>84</sup> the right to education<sup>85</sup> and the right to be protected against forced evictions. The Commission held that forced eviction and displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities, and impeded their children's right to education.<sup>86</sup>

The decision of the African Commission in another case – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, (*Endorois case*)<sup>87</sup> – illustrates interdependency between the right to free disposition of natural resources<sup>88</sup> and the right to adequate housing. The Commission associated ownership of natural resources with the right to shelter.<sup>89</sup> Again, the interdependency of the right not to be forcibly evicted and the right to property is highlighted. The Commission held that “[f]orced evictions, by their very definition, cannot be deemed to satisfy Article 14 [right to property] of the Charter’s test of being done ‘in accordance with the law’”.<sup>90</sup> Lastly, the Commission, in illustrating the interdependence between peoples' right to development and the right to adequate housing, cited the report of a UN independent expert, which states that

[D]evelopment is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live ... the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available.<sup>91</sup>

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<sup>81</sup> *Sudan case* para 216.

<sup>82</sup> *Sudan case* paras 204-205.

<sup>83</sup> *Sudan case* para 212. Housing is recognised in the African Commission Principles and Guidelines (para 63) as a determinant of health.

<sup>84</sup> African Charter, art 22.

<sup>85</sup> African Charter, art 17.

<sup>86</sup> *Sudan case* para 224.

<sup>87</sup> Communication 276/2003 (2009) AHRLR 75 (ACHPR 2009). The case dealt with the rights of indigenous peoples to own land and to development.

<sup>88</sup> African Charter, art 21.

<sup>89</sup> *Endorois case* at para 212.

<sup>90</sup> *Endorois case* at para 218.

<sup>91</sup> *Endorois case* at para 278.

Finally, the case illustrates the interdependence between the right to culture<sup>92</sup> and the right not to be forcibly evicted, holding that the forced eviction has denied the Endorois people the very essence of their right to culture, “rendering the right, to all intents and purposes, illusory”, in violation of articles 17(2) and (3) of the African Charter.<sup>93</sup>

There is congruence with the South African approach in as far as other rights have been seen to interact with the right to have access to adequate housing and the prohibition of arbitrary evictions. The point of divergence comes in relation to the fact that the African Commission has seen the right to adequate housing as interacting with a broader category of economic, social and cultural rights, while the interaction in the South African context is limited largely to civil and political rights with housing rights. Constitutional provisions that have been seen to interact with housing rights include those relating to equality, dignity, life, access to information, the right to just administrative action, and access to courts. For example, the *Grootboom* case speaks to the interdependency and interrelatedness of the rights guaranteed in the Constitution and of housing and equality and dignity. As stated by the Constitutional Court:

All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.<sup>94</sup>

The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.<sup>95</sup>

In a later case – *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* (*Olivia Road* case)- the Court emphasised the special significance of the rights to human dignity and to life in the realisation of the right to adequate housing.<sup>96</sup>

## 5 REMEDIES

At the African regional level, the question of remedies can be viewed from two angles – the African Commission’s ability to grant remedies for violations and the obligation of states to ensure effective domestic remedies. As regards the former, the African Charter is silent on the African Commission’s role in granting remedies for violation of rights in the Charter. However, the African Commission has issued remedies where it has found a violation. The problem with the types of remedies issued thus far is that some of them

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<sup>92</sup> African Charter, art 17(2) & (3).

<sup>93</sup> *Endorois* case at para 251. See also paras 115-119 & 249-250.

<sup>94</sup> *Grootboom* case para 23.

<sup>95</sup> *Grootboom* case paras 23 & 24.

<sup>96</sup> *Olivia Road* case paras 10 & 16.

are open-ended – for example, requesting a state to bring its laws in line with the African Charter. What the state is supposed to do and the entitlements of the claimant(s) are not clear with open-ended remedies. In other instances, such as, in the *SERAC, Sudan* and *Endorois* cases, it has issued relatively clear and targeted remedies. For example, it requested the Sudanese government to prosecute those responsible for the destruction of properties and rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, and to resolve the issue of water rights;<sup>97</sup> and the Kenyan government to provide compensation for loss suffered and restitution of land.<sup>98</sup> Also, in the *Endorois* case, the African Commission indicates openness to dialogic remedies, specifically dialogue in the implementation of its recommendations, by requesting that the Kenyan government engage in dialogue with the claimants in order to ensure that its recommendations are implemented effectively.<sup>99</sup> The Commission, however, does not explain what the dialogue entails or its nature.

In this regard, South African courts have gone further by not only requiring dialogue in the enforcement of remedies but also specifying issues that the parties must engage with, as seen in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Joe Slovo case)*, and requiring engagement in the development of remedies as seen in the *Olivia Road* case. Though dialogic remedies are still developing in the South African context, the African Commission could learn from South Africa in terms of the understanding of what dialogue or engagement entails.

In addition to remedies issued at the regional level, states have an obligation “to ensure...access to enforceable administrative and/or judicial remedies for any violation of” economic, social and cultural rights.<sup>100</sup> This is crucial because it is only after a claimant has exhausted domestic remedies that it can approach regional bodies for relief. Generally, the kind of remedies issued should be concrete, targeted and clear so as to facilitate implementation and improve rights enjoyment on the ground. In relation to the right to adequate housing in the context of an eviction, the African Commission has emphasised the need to provide “adequate and effective legal or other appropriate remedies” to those affected, which should include “a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation, and protection from eviction during the period that their case is being examined before a national, regional or international legal body”<sup>101</sup>. Adequate compensation should be provided irrespective of whether the affected person holds title to the property or not.<sup>102</sup>

<sup>97</sup> *Sudan* case at para 229(c) & (e).

<sup>98</sup> *Endorois* case, Recommendation 1(a) & (c).

<sup>99</sup> *Endorois* case, Recommendation 1(f).

<sup>100</sup> African Commission Principles and Guidelines paras 2, 4 & 7. See also the Preamble.

<sup>101</sup> African Commission Principles and Guidelines para 79(xxxv).

<sup>102</sup> African Commission Principles and Guidelines para 79(xxxvi).

## 6 CONCLUSION

The African Commission's socio-economic rights jurisprudence, though still young, holds great promise. In the few cases in which the Commission has dealt with the right to adequate housing and the prohibition against forced evictions, the decisions reflect the interdependency of rights, which is one of the guiding principles of international human rights law. Though South Africa's housing jurisprudence is quite comprehensive, the aspect of interdependency of housing rights with other rights has been with regard to a limited set of rights. This is at least a lesson that South Africa could learn from the African regional system in terms of arguing cases and the interpretation of the right to adequate housing in a way that it also promotes interdependence between a broad set of socio-economic rights. This should, of course, be done only where relevant and if the rights add to the development of the content of the right to adequate housing in the particular context. Notwithstanding this, the discussion above shows more congruence than divergence in relation to the understanding, and the approach to the protection, of the right to adequate housing. There is evidently room for mutual lesson learning in instances of divergence. Also, lesson learning is not limited to the two bodies, but other African states could learn from both the African Commission and the South African Constitutional Court in respect of the enforcement of the right to adequate housing. Both bodies require that the right to adequate housing should be interpreted in context and not seen in isolation, as rights are interdependent. Also, it is not only the state that is responsible for providing housing, as individuals and other agents or structures within society must be permitted by legislative and other measures to provide housing. These two principles are of particular importance in the protection of the right and can serve as a starting point to other countries in their efforts to enforce the right to adequate housing.

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