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AND EVICTIONS



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I. INTRODUCTION

United Nations General Assembly resolutions leading to system-wide human rights institutional reform have brought about major opportunities for the implementation of human rights in all UN Member States. One of the most important of these developments is the new institution of the Universal Periodic Review (UPR), slated to become operative in 2008. General Assembly Resolution 60/251 mandates that constructive engagement with States will be the dominant mode of the UPR. The UPR will engage in “interactive dialogue” with the “full involvement of the country concerned”. The guiding principles behind the UPR are universality, impartiality, objectivity and non-selectivity. The UPR thus constitutes among the most important developments in the Charter-based system of human rights review in the history of the United Nations.

On 18 June 2007, the 5th Human Rights Council adopted unanimously a text on institution building, among other things setting out the modalities of the Universal Periodic Review. As set out in the 18 June resolution, the Office of the High Commissioner for Human Rights (OHCHR) is to prepare for Council two 10-page texts on each country coming under UPR assessment. The first of these documents is to summarize material included in the reports of treaty bodies and special procedures regarding the country concerned. The second document summarises “additional credible and reliable information” coming to the attention of the OHCHR.

South Africa is a country of extreme inequalities, with the gap between the rich and the poor widening. From the lush suburbs of northern Johannesburg to the slum conditions of the inner city, these inequalities in South Africa are starkly visible and, while class-determined, exist predominantly along racial lines. According to the United Nations Development Programme (UNDP), 45 percent of the population are living below the UNDP-defined poverty line, and over 90 percent of the 21.9 million poor are black. Although much of that is attributable to the legacy of the previous oppressive and racist apartheid regime, there is increasing evidence of disturbing policies and practices being implemented at local, provincial and national levels, which severely curtail the socio-economic rights of a vast majority of the population. The challenges and opportunities of this post-apartheid ‘transition economy’ are manifest in a range of human rights concerns, particularly the right to adequate housing, protection from forced eviction and the right to adequate water and sanitation.

South Africa is often viewed as a bastion of economic development and social reform in Africa, and it is indeed the hub of much of the economic activity taking place on the continent. However, many of the progressive policies adopted by the new government in 1994 have not yet led to positive change. There is a need for both political will and institutional capacity to deliver equality, particularly in social and economic fields. The gap between government rhetoric, legislation and policy formulation on the one hand, and the reality of policy implementation (or lack thereof) on the other, is evident.

Of great significance in the current context is South Africa’s failure to date to ratify the International Covenant on Social, Economic and Cultural Rights (ICESCR). This long-term lacuna is inconsistent with its purported commitment to upholding international law and human rights.

The Centre on Housing Rights and Evictions (COHRE) herewith offers the present submission on human rights issues in South Africa, with the aims of (i) assisting the work of the OHCHR in

providing the Human Rights Council with high quality reporting in these areas; as well as (ii) facilitating civil society input into this revolutionary new international procedure. It is our hope that, during this crucial first phase of the Universal Periodic Review, in which its credibility as a mode of redressing human rights harms is inevitably under intense scrutiny, the material provided herein can provide a sound basis for engagement with the authorities of South Africa, as well as other relevant officials and agencies.

Following a brief summary of the information herein, this submission provides:

- Details of South Africa's non-ratification of key international human rights law instruments;
- A summary of relevant information derived from the reports of treaty bodies and special procedures, highlighting key priorities; and
- Documentation by COHRE and/or credible and reliable partners.

II. EXECUTIVE SUMMARY

1 Non-ratification of international human rights law

It is of serious concern that South Africa has not yet ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), despite having signed the ICESCR in 1994. Insofar as the Covenant comprises among the core elements of the International Bill of Human Rights, and insofar as lack of treaty ratification can have major distortative impacts on the human rights legal order in effect in South Africa, this is a major oversight which should be remedied without any form of delay.

In addition, South Africa has neither signed nor ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), and has not yet ratified the Convention on the Rights of Persons with Disabilities (CPD).

2 Rights to housing, water and sanitation

The right to adequate housing is enshrined in a number of international treaties to which South Africa is a party, as well as in the Constitution of South Africa. Nevertheless, United Nations Treaty Bodies and Special Rapporteurs have in recent years identified the following patterns and practices in South Africa, giving rise to significant concerns about South Africa's human rights record:

- widespread *inadequate housing* conditions, particularly among the black majority;
- *forced evictions*, as well as an evidently inadequate policy framework for upholding decisions by the Constitutional Court and others;
- *racial discrimination in access to housing*;
- *land expropriation* implemented with inadequate procedural guarantees for individuals and communities, as well as little effective, adequate compensation provided in cases of actual expropriation;
- a *lack of access to safe water and sanitation*, especially for children;
- a *lack of consultation and participation in decision-making* of relevance to affected individuals and/or communities; and
- a *lack of disaggregated data* collection on the housing rights situation of women and indigenous persons.

2.1 Forced evictions

South African domestic law, particularly following extensive progressive jurisprudence developed by the Constitutional Court, includes extensive protections against forced eviction. The *Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 1998 (PIE Act)* and Section 26 of the Constitution can be summarised as requiring that everyone is entitled to reasonable measure of secure tenure; that evictions which lead to homelessness will almost never be permitted; and finally that the state should participate in eviction proceedings in order to prevent evictions which lead to homelessness and to be accountable to property owners whose rights to property are unjustifiably infringed by the state's failure to ensure adequate tenure security to all.

These protections notwithstanding, according to the COHRE database of forced evictions, over 840,000 people were forcibly evicted in South Africa between 1995 and 2006, with over 5000 people being evicted in 2006.

COHRE is following a number of cases of further threats of eviction, including cases involving tens of thousands of persons. For example, the City of Johannesburg has forcibly evicted thousands of poor people in the inner city in the context of the Johannesburg Inner City Regeneration Strategy (ICRS), which is aimed at creating an 'African World Class City'. The Johannesburg City Council has obtained urgent eviction orders under the pretence of being concerned for the health and safety of residents. However, evictions have been carried out in the middle of the night and without notice. People are not consulted or offered any viable alternatives. In the name of safety and health in the buildings, residents have been made homeless and left on the streets to fend for themselves. The strategy affects some 70,000 residents of 'bad buildings'.¹

Housing programmes that have provided housing for low-income residents have been criticised for insufficient consultation with affected people, substandard construction, and delayed housing delivery.² South Africa's *Breaking New Ground* housing policy acknowledges that "programmes aimed at delivering housing and creating sustainable human settlements will only succeed where they are directly informed by the people who they affect, and where they are responsive and targeted to the specific needs of a given community."³ Unfortunately, the Government has repeatedly failed in this regard.

In some cases, authorities have used violence to end peaceful demonstrations against threatened forced evictions. For example, on 28 September 2007, shack dwellers in eThekweni Municipality of Durban marched on the mayor's office to present a memorandum of their concerns regarding housing and forced evictions in the area. Police met peaceful protestors with rubber bullets and stun grenades.

Several efforts at amendments to South African domestic law are of concern:

- The so-called "PIE Act", currently pending before South African Parliament, would erode existing protections against forced eviction. As the Centre for Applied Legal Studies (CALS) has observed: "The PIE Bill as it stands allows municipalities to escape responsibility for dealing with the very real housing crises which can be caused by evictions. Even where the municipality itself is seeking an eviction as landlord in terms of a validly cancelled lease, the PIE Bill does not envisage that it will be required to assist the occupiers it seeks to evict in finding any alternative at all. In circumstances where lease-holding occupiers of state-owned housing are often likely to be very poor and vulnerable people, this is perverse."⁴
- One very problematic piece of legislation that has recently been actually enacted into law in the KwaZulu-Natal province is the *KZN Elimination and Prevention of Re-emergence of Slums Act, 2006 (Slums Act)*. As Marie Huchzermeyer warned before the *Slums Act* was passed, "with the emphasis on control, the Province's proposed Slum

¹ City of Johannesburg, http://www.joburg.org.za/2004/aug/aug13_inner.stm; see also COHRE, *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (8 Mar. 2005).

² Mzolisi Witbooi, 'N2 Gateway: No rent, no roof', *IOL* (20 July 2007) available at http://www.iol.co.za/index.php?set_id=1&click_id=124&art_id=vn20070720115641141C393541.

³ United Nations, 'United Nations Expert on Adequate Housing Concludes Visit to South Africa', Press Release, (7 May 2007), p. 3.

⁴ CALS, 'Comment on General Notice 1851 of 2006', p. 9.

Elimination Bill places onus on land owners to prevent informal occupation and in cases of existing informal occupation, to institute eviction procedures. Herein lies a worrying commonality with apartheid's 1951 Prevention Squatting Act, which, also gave a role to landowners in the 'elimination' of informal settlements."⁵ The *Slums Act* was passed despite much protest and many reservations on the part of COHRE and other stakeholder groups in Kwazulu Natal. It represents a significant regression in national efforts to improve slum dwellers' lives, and it should be urgently reconsidered.

2.2 Lack of affordable housing

Another impediment facing South Africa in terms of its commitment to providing adequate housing is the critical shortage of rental public housing stock for low-income groups. A 2007 report by COHRE and CALS on housing rights in Pietermaritzburg highlighted the Municipality's regressive and anti-poor housing policies and the general lack of affordable housing for over 50 percent of the population of Pietermaritzburg - leading to burgeoning informal settlements.⁶ Persistent inequalities in South Africa between the rich and poor shape trends in the housing market in cities, and this has been sharpened in a city like Pietermaritzburg as a result of its relatively recent reinstatement as the administrative and legislative capital of the province of KwaZulu-Natal in 2004. The relocation of a number of government departments to the city saw an influx of government officials and their families, and others seeking new employment opportunities. The increased effective demand for accommodation has resulted in an unprecedented surge in property prices.⁷

2.3 Racial discrimination

Although South Africa has taken concerted and successful steps towards eliminating racial discrimination in *de jure* terms, there still exists *de facto* racism and racial discrimination, particularly related to the access to adequate housing, water and sanitation. Policies and politics of racial segregation prior to 1994 have left a legacy of inadequate and peripheral accommodation for the urban poor, including a substantial under-provision of decent housing opportunities for black people; and the segregation of black people in overcrowded townships and informal settlements on the periphery of the City far away from employment opportunities and facilities.

Due to the under-provision of adequate housing and the lack of employment opportunities in peripheral areas, there has been a substantial increase in the number of informal settlements in and around urban areas in South Africa. For instance, in 1990 there were 20 informal settlements in the province of Gauteng. As of 2005 there were at least 300 in this one province, at least 190 of which were located in the Johannesburg metropolitan area.⁸ Municipal governments have largely responded to the growth of informal settlements by relocating residents to areas farther outside of cities or - in some cases - by implementing forced evictions without the provision of alternative accommodation. A 2005 COHRE fact-finding mission report on housing rights violations in Johannesburg, found that new housing developments have largely taken place on the

⁵ Marie Huchzermeyer, "KZN Slum Elimination Bill: A Step Back" (13 March 2007) available at <http://abahlali.org/node/903>

⁶ CALS and COHRE, *Pushed to the periphery: Low-income residents in Pietermaritzburg, South Africa* (May 2007).

⁷ Ibid.

⁸ COHRE, *Any Room for the Poor: Forced Evictions in Johannesburg, South Africa*, (Mar. 2005), p. 19. available at <http://www.cohre.org/southafrica>.

outer edges of existing townships, far away from jobs, facilities and services. This has marginalized new settlements and contributed to the further fragmentation of the urban fabric of Johannesburg.⁹

2.4 Restitution

One of the most pressing issues facing South Africa post-1994 was that of land reform, restitution and redistribution. Some 3 to 5 million people were forcibly relocated between 1950 and 1980 -- leaving 80 percent of the population with only 13 percent of the land.¹⁰ The African National Congress promised to redistribute 30 percent of arable land within the first five years of government - later revising this target to the year 2015.¹¹ Despite having addressed approximately half of all claims lodged with the Commission on Restitution of Land Rights by 2003, less than two percent of land has been redistributed.¹² The failure to redistribute land is largely due to an urban bias in restitution delivery, leaving many rural restitution claims outstanding; and a preference for monetary compensation, particularly where claimants have built lives in new places and do not want to relocate.¹³ As of 2006, according to the SAHRC, the majority of the land still resides in the hands of a white, male, landowning class with class, race, and gender relations being further entrenched.¹⁴ Furthermore, the South African Government has failed to provide adequate services to successful claimants in rural areas, making it difficult, if not impossible, for people to re-accommodate themselves and survive financially once they have successfully resolved a land claim.¹⁵

The Special Rapporteur on Adequate Housing has urged that “the 2005 Land Summit’s recommendations should be adopted and implemented without delay” in order to improve land redistribution.¹⁶ The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People has recommended “the acceleration of the land restitution process.”¹⁷

2.5 The right to water and sanitation

South Africa’s water delivery and sanitation system has been criticised for having a number of weaknesses, including community non-engagement, lack of consumer education resulting in widespread refusal to pay for water and sanitation services, vandalism and water piracy. Additionally, water supply projects have been far too expensive for rural communities where people cannot afford to pay for water. Estimated failure of water supply projects ranges from

⁹ COHRE, *Any Room for the Poor: Forced Evictions in Johannesburg, South Africa*, (Mar. 2005), p. 19. available at <http://www.cohre.org/southafrica>.

¹⁰ Jean du Plessis, *Land Restitution in South Africa: Overview and Lessons Learned*, Working Paper No. 6, BADIL Resource Center for Palestinian Residency & Refugee Rights, (Dec. 2004), p. 4.

¹¹ Ibid.

¹² Ibid, p. 9.

¹³ Ibid, p. 9.

¹⁴ SAHRC, *Shadow Report*, p. 38.

¹⁵ Jean du Plessis, *Land Restitution in South Africa: Overview and Lessons Learned*, p. 9-10.

¹⁶ United Nations, ‘United Nations Expert on Adequate Housing Concludes Visit to South Africa’, Press Release, (7 May 2007), p. 3 (statement issued by the Special Rapporteur on Adequate Housing; the official report of the Special Rapporteur from his mission to South Africa is not publicly available at this time),

¹⁷ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), p. 3.

between 50 percent and 90 percent, with residents in some multi-million rand schemes reduced to fetching water from rivers just months after the launch of water reticulation networks.

Policies on access to water and sanitation have done little to address the most desperate and needy segments of society. They have failed to meet the requirements of balance, flexibility and capacity to respond to emergencies. While significant investment is being made in the provision of a safe water supply, inadequate attention is being paid to sanitation and to health and hygiene promotion. It has been estimated that 37 percent of households do not have access to adequate sanitation facilities, the majority being in rural and urban informal settlement areas. There has been a lack of integration of the policies aimed at water access, sanitation and health.¹⁸

¹⁸ Céline Dubreuil, *The Right to Water: from concept to implementation* World Water Council (2006) p. 19.

III. NON-RATIFICATION OF INTERNATIONAL HUMAN RIGHTS LAW

Although South Africa signed the International Covenant on Economic, Social & Cultural Rights (ICESCR) in 1994, it has yet to ratify the ICESCR. The fact of non-ratification of one of the three key elements of the International Bill of Human Rights constitutes created a constant and standing distortion in South Africa's interaction with international human rights law, and as a result, the totality of its domestic legal order. COHRE and the Community Law Centre (CLC) wrote to President Thabo Mbeki on 28 June 2007, setting out detailed reasons for the urgent ratification of the Covenant by South Africa. In addition, the COHRE/CLC communication requested the following:

1. The reasons for the delay in South Africa's ratification of the ICESCR;
2. Information on the progress and steps currently being taken towards ratification of the ICESCR; and
3. The expected time-frame within which ratification will occur.

To date, we have not yet received a formal response to the July 2007 communication.

It is also of concern that South Africa has taken no action to sign or ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), which was adopted by the UN General Assembly in 1990. This convention is essential to securing equality of treatment for non-nationals in relation to, *inter alia*, "access to housing, including social housing schemes, and protection against exploitation in respect of rents."¹⁹ It also requires that "due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned."²⁰ COHRE would thus strongly urge South Africa to sign and ratify the CMW.

South Africa has further only signed, and has not yet ratified, the Convention on the Rights of Persons with Disabilities (CPD). The CPD requires "the identification and elimination of obstacles and barriers to accessibility" through "appropriate measures" to "enable persons with disabilities to live independently and participate fully in all aspects of life."²¹ It also requires States parties "to ensure to persons with disabilities access, on an equal basis with others," to, *inter alia*, housing, "both in urban and in rural areas."²² COHRE encourages the Government to take the appropriate steps to ratify this important convention.

¹⁹ CMW, Article 43(1)(d).

²⁰ CMW, Article 64(2).

²¹ CPD, Article 9(1)(a).

²² Ibid.

IV. SUMMARY OF RELEVANT INFORMATION DERIVED FROM THE REPORTS OF TREATY BODIES AND SPECIAL PROCEDURES, HIGHLIGHTING KEY PRIORITIES

1 Introduction

The Republic of South Africa has made great strides in the past 15 years in dismantling the Apartheid system and working to build a new society based on principles of equality and freedom. New legislation and programs seek to eradicate race and gender discrimination, protect housing and water rights, and promote participation in public decision-making. Still, many problems persist, and the Government is bound by international and domestic legal obligations to ensure that the rights to freedom from discrimination, adequate housing, access to water and sanitation, and land restitution, are adequately protected. Under international law, some of these rights, such as freedom from discrimination, are required to be realized immediately. Between 1998²³ and 2007, Treaty Bodies and Special Rapporteurs found the following human rights violations to be prevalent in South Africa:

- widespread ***inadequate housing*** conditions, particularly among the black majority;
- ***forced evictions*** carried out, as well as an evidently inadequate policy framework for upholding decisions by the Constitutional Court and others, and also the recommendations of a number of international institutions;
- ***racial discrimination in access to housing***;
- ***land expropriation*** implemented with inadequate procedural guarantees for individuals and communities, as well as little effective, adequate compensation provided in cases of actual expropriation;
- a ***lack of access to safe water and sanitation***, especially for children;
- a ***lack of consultation and participation in decision-making*** of relevance to affected individuals and/or communities; and
- a ***lack of disaggregated data*** collection on the housing rights situation of women and indigenous persons.

COHRE urges the Human Rights Council and the Office of the High Commissioner of Human Rights to take note of the observations and recommendations made, and incorporate them into their assessment of the Government's compliance with its obligations.

2 The right to adequate housing

The right to adequate housing appears in various international instruments and declarations, regional instruments and national laws, as well as in the Constitution of South Africa. Aspects of the right to adequate housing are set out under the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), as well as the International Convention in the Elimination of All Forms of Discrimination against Women (CEDAW), all of which are binding law in South Africa. As noted above, South Africa

²³ COHRE has chosen to focus on this period as the reports of the Committee on the Rights of the Child (1998) and the Committee on the Elimination of all Forms of Discrimination against Women (1998) are the most current available. The remainder and majority of the information contained herein dates from 2005 onward.

has not yet ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Convention on the Rights of the Child, article 27(3), provides that “States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this²⁴ right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.” Equal access to housing is required by the ICERD, Article 5(e)(iii), which provides that “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] The right to housing.” CEDAW, to which South Africa is party, similarly requires in Article 14, paragraph 2(h) that:

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women...[t]o enjoy adequate living conditions, particularly in relation to housing, sanitation, ... and water supply....

2.1 Lack of adequate housing conditions

During his visit in April 2007, the Special Rapporteur on Adequate Housing noted that “South Africa is one of the few countries that has made a legislative and constitutional commitment to the recognition and protection of socio-economic rights including the right to access to adequate housing as contained in sections 26 (1) and (2) of the South African Constitution.”²⁵ He also “noted the National Housing Subsidy Scheme (‘NHSS’) that has financed the construction of over 2.4 million households since 1994.”²⁶ Also, he “welcomed the National Department of Housing’s ambitious policy, ‘Breaking New Ground’, which seeks to promote sustainable human settlements and cites a commitment to socially inclusive and integrated housing projects and developments and the many policies developed at the provincial and municipal levels.”²⁷

It is, however, of serious concern that despite various international legal instruments ensuring the right to housing, there is a lack of reporting on the situation of this right in South Africa by treaty bodies and special procedures. While the Special Rapporteur on Adequate Housing visited South Africa in April 2007, much of the valuable data and testimony he gathered could not be included in the present submission as his official report is not yet publicly available. The only available official UN description of current conditions of inadequate housing -- made by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in 2005 -- is the following:

²⁴ The “right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.” (Article 27(1)).

²⁵ United Nations, ‘United Nations Expert on Adequate Housing Concludes Visit to South Africa’, Press Release, (7 May 2007), p. 2.

²⁶ Ibid.

²⁷ Ibid.

A large part of the fast-growing black majority lives in oppressive poverty and, in the outer districts of the cities, a spread of vast miserable settlements of tin and carton shacks, lacking sufficient sanitation, electricity and water, is the persistent reality....²⁸

Increased reporting on conditions of inadequate housing is essential to improvement of the situation of this right on the ground.

Also of concern is the fact that South Africa has not ratified the International Covenant on Economic, Social and Cultural Rights. This has been noted, and the ratification of the ICESCR has been recommended, by the Special Rapporteur on Adequate Housing²⁹ and the Committee on the Rights of the Child.³⁰ The Committee of the Rights of the Child was specifically “of the opinion that the ratification of this international human rights instrument would strengthen the efforts of the State party to meet its obligations in guaranteeing the rights of all children under its jurisdiction.”³¹ It is also of note that, despite South Africa’s failure to ratify the ICESCR, the Government has promoted the protection by all countries of economic, social and cultural rights by enshrining them in its Constitution, as well as by sponsoring a Human Rights Council resolution to rectify the status³² of the Committee on Economic, Social and Cultural Rights.

2.2 Forced evictions

The obligation of States to refrain from, and protect against, forced evictions from home(s) and land arises from the several international legal instruments that protect the human right to adequate housing, such as the Convention on the Rights of the Child, and CEDAW. In addition, Article 17 of the ICCPR states that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence,” and further that “[e]veryone has the right to the protection of the law against such interference or attacks.” Article 16, paragraph 1, of the Convention on the Rights of the Child contains a similar provision.

This universal right has also been recognized by the Sub-Commission on the Promotion and Protection of Human Rights in its adoption of the *Pinheiro Principles*. Principle 5 affirms “the right to be protected from displacement,” including that:

5.1 Everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence.

²⁸ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 9.

²⁹ *Ibid.* at pp. 4-5.

³⁰ Committee on the Rights of the Child, *Initial reports of States parties due in 1997: South Africa, Addendum*, U.N. Doc. CRC/C/51/Add.2 (1998), para. 11.

³¹ *Concluding Observations of the Committee on the Rights of the Child : South Africa* (Twenty-third session, 2000), U.N. Doc. CRC/C/15/Add.122, para. 11.

³² In March, 2007, the Human Rights Council decided “to initiate a process to rectify, in accordance with international law, in particular the law of international treaties, the legal status of the Committee on Economic, Social and Cultural Rights, with the aim of placing the Committee on a par with all other treaty monitoring bodies.” This process included seeking views of States and those of all other stakeholders” by “conven[ing] an interactive dialogue highlighting the importance of the principles of universality and indivisibility and the primacy of equal treatment of all human rights, with a view to deciding on the future direction of this process.” (U.N. Human Rights Council, 4th Sess., 21st mtg., ‘Rectification of the legal status of the Committee on Economic, Social and Cultural Rights’, *Human Rights Council Res. 4/L.17*, U.N. Doc. A/HRC/4/L.17 (2007), p. 2)

5.2 States should incorporate protections against displacement into domestic legislation, consistent with international human rights and humanitarian law and related standards, and should extend these protections to everyone within their legal jurisdiction or effective control.

5.3 States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war.

5.4 States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement.³³

In addition, the Government of South Africa has also initiated numerous national housing law policies designed to protect the right to secure tenure including *The Housing Act* (107 of 1997); *the National Housing Code; Extension of Security of Tenure Act* ('ESTA'); the *Land Reform (Labour Tenants) Act* ('LTA'), designed to extend and secure the rights of those who have insecure tenure; and the *Prevention of Illegal Eviction from Unlawful Occupation of Land Act* 1998 (PIE), which makes it a criminal offence to evict anyone without a court order.

2.2.1 Widespread forced evictions

The foregoing provisions of law notwithstanding, Special Rapporteur on Adequate Housing concluded, "despite the legislative framework that bolsters and complements the right of access to adequate housing, it appears that evictions are taking place regularly throughout South Africa."³⁴

For example, in his visit to South Africa in April 2007, the Special Rapporteur on the Right to Adequate Housing found that "evictions are being used with the aim of gentrifying urban areas and promoting urban regeneration and development."³⁵ The Special Rapporteur observed that "particularly, in inner city Johannesburg it seems that the drive to attract private investment has been at the expense of the urban poor who have been living in dilapidated buildings in the inner city close to services and livelihood opportunities for many years."³⁶ As part of its Inner City Regeneration Strategy, the City of Johannesburg has sought court orders to evict residents of derelict buildings on an urgent basis, due to 'health and safety concerns' without adequate consultation or the provision of alternative accommodation. In addition to urban populations, evictions are affecting "black farm dwellers" in rural areas (where there have been more than 2 million³⁷ displacements since 1994), and "backyard shack dwellers" who have insufficient tenure protection.³⁸

³³ Pinheiro Principles, U.N Doc. E/CN.4/Sub.2/2005/17 (2005), Principle 5.

³⁴ United Nations, 'United Nations Expert on Adequate Housing Concludes Visit to South Africa', Press Release, (7 May 2007), p. 2.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Social Surveys and Nkuzi Development Association, *Still Searching for Security – The Reality of Farm Dweller Evictions in South Africa* (2005).

³⁸ United Nations, *Press Release: United Nations Expert on Adequate Housing Concludes Visit to South Africa*, Geneva, 7 May 2007, p.2.

2.2.2 Lack of consultation and participation prior to forced evictions and development-based displacement

The right of all people to participation in public decision-making, especially when decisions directly affect them, has been elaborated as flowing from a number of human rights instruments, including the CESCR General Comment No. 4 and the CERD General Comment No. 23 on Indigenous Peoples.³⁹ CESCR General Comment No. 4 on the Right to Adequate Housing states that “the full enjoyment of other rights - [including] the right to participate in public decision-making - is indispensable if the right to adequate housing is to be realized and maintained by all groups in society.”⁴⁰ CERD General Comment No. 23 on Indigenous Peoples calls upon States parties to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.”⁴¹ The Committee especially called upon States parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources...”.⁴² Pinheiro Principle 14, “Adequate consultation and participation in decision-making,” provides the following:

14.1 States and other involved international and national actors should ensure that voluntary repatriation and housing, land and property restitution programmes are carried out with adequate consultation and participation with the affected persons, groups and communities.

14.2 States and other involved international and national actors should, in particular, ensure that women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled and children are adequately represented and included in restitution decision-making processes, and have the appropriate means and information to participate effectively. The needs of vulnerable individuals including the elderly, single female heads of households, separated and unaccompanied children, and the disabled should be given particular attention.⁴³

Specifically with regards to development-based evictions and displacement, the Special Rapporteur on Adequate Housing has emphasized the following practices:

38. States should explore fully all possible alternatives to evictions. All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider. In the event that agreement cannot be reached on a proposed alternative among concerned parties, an independent body having constitutional authority, such as a court of law, tribunal or ombudsperson should mediate, arbitrate or adjudicate as appropriate.

39. During planning processes, opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons, including women and vulnerable and

³⁹ CESCR, *General Comment 4, The Right To Adequate Housing* (Sixth Session, 1991), U.N. Doc. E/1992/23, annex III, (1991), para. 9; CERD, *General Comment No. 23, Indigenous Peoples* (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V, para. 4(d).

⁴⁰ CESCR, *General Comment 4, The Right To Adequate Housing* (Sixth Session, 1991), U.N. Doc. E/1992/23, annex III, (1991), para. 9.

⁴¹ CERD, *General Comment No. 23, Indigenous Peoples* (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V, para. 4(d).

⁴² *Ibid.* at para. 5.

⁴³ Pinheiro Principles, U.N. Doc. E/CN.4/Sub.2/2005/17 (2005), Principle 14.

marginalized groups, and, when necessary, through the adoption of special measures or procedures.⁴⁴

South Africa's new housing policy, *Breaking New Ground*, acknowledges that "programmes aimed at delivering housing and creating sustainable human settlements will only succeed where they are directly informed by the people who they affect, and where they are responsive and targeted to the specific needs of a given community."⁴⁵

The current situation in South Africa, especially the lack of consultation with affected individuals prior to evictions and large development projects, appears to be contrary to these principles. During his visit to "large development projects (for instance in Limpopo province, the Anglo Platinum's PPL mining project), [the Special Rapporteur on Adequate Housing] had the opportunity to meet communities affected by mining operations."⁴⁶ In these meetings and others during his visit, the Special Rapporteur noted that "there appears to be insufficient meaningful consultation [with] communities."⁴⁷ He noted that "residents spoke with frustration about the lack of information on resettlement and relocation and of participation in resettlement planning and implementation."⁴⁸

2.3 Racial discrimination in access to housing, water and sanitation

Racial discrimination, especially as manifested in segregation, is unequivocally banned in international instruments to which the Republic of South Africa is party. Non-discrimination in housing is required by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 5(e)(iii), which provides that:

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] The right to housing.

Under ICERD, Article 3, "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." The International Covenant on Civil and Political Rights (ICCPR) Article 2(1) similarly provides that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [including the right to freedom from interference with one's home, art. 17], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The ban on racial discrimination is also widely understood as customary international law.

⁴⁴ 'Basic Principles And Guidelines On Development-Based Evictions And Displacement', *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, U.N. Doc. A/HRC/4/18, annex 1 (2007).

⁴⁵ United Nations, 'United Nations Expert on Adequate Housing Concludes Visit to South Africa', Press Release, (7 May 2007), p. 3.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

While the Special Rapporteur on Adequate Housing acknowledged that “genuine attempts by law and policy makers to address issues of racial segregation, inequality and systematic human rights violations” have been made,⁴⁹ the current Government of South Africa is facing a legacy of a system where the expropriation of natural and social resources was central.⁵⁰ Land was perhaps the most visible, if not the most central, subject of disenfranchisement for black, coloured and Indian South Africans. While South Africa has taken concerted and successful steps towards eliminating racial discrimination in *de jure* terms, there still exists *de facto* racism and racial discrimination, particularly related to the access to adequate housing, water and sanitation.

Indeed, the Government of South Africa agreed in its Third Periodic Report to the Committee on the Elimination of Racial Discrimination (CERD) in 2005, that “on a day to day basis, facially neutral provisions relating to access... housing... discriminate on the ground of race by feeding on and perpetuating the systemic patterns of racial inequality as result of privilege and exclusion under colonialism and apartheid.”⁵¹ Similarly, CERD “remains concerned by the *de facto* segregation that persists as a legacy of apartheid in spite of the measures the State party has adopted to put an end to this situation, especially regarding ownership of property, access to finance, and social services such as health, education and housing (art. 3).”⁵²

As a result of these systemic inequalities, the black majority suffers disproportionately from inadequate housing. As partially cited above, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People found that:

[A] large part of the fast-growing black majority lives in oppressive poverty and, in the outer districts of the cities, a spread of vast miserable settlements of tin and carton shacks, lacking sufficient sanitation, electricity and water, is the persistent reality... While poverty exists among all sectors of society, Blacks constitute the poorest segment of the population, making up over 90 per cent of the 22 million poor.⁵³

⁴⁹ United Nations, ‘United Nations Expert on Adequate Housing Concludes Visit to South Africa’, Press Release, (7 May 2007), p. 1.

⁵⁰ See, e.g., Committee against Torture, *Initial reports of States parties due in 2000: South Africa*, U.N. Doc. CAT/C/52/Add.3 (2005), para. 4: “The formalisation of apartheid into a State ideology resulted in an intensification of racial discrimination and racism became fully institutionalised. Black people were subjected to cruel, inhuman and degrading treatment. The key features of apartheid in South Africa included the dispossession and segregation of black people, achieved mainly through the *Group Areas Act of 1951*, which subjected black people to forced removals and conditions of squalor in the so-called black townships. This Act was implemented from 1954. It demarcated the entire country into zones for exclusive occupation by designated racial groups. It resulted in the uprooting of (almost exclusively) black citizens from their homes and the destruction of communities like Sophiatown, District Six and Cato Manor. Immense suffering and huge losses of property and income were endured (Truth and Reconciliation Commission of South Africa Report; Vol. 1; page 31).”

⁵¹ CERD, *Third periodic reports of States parties due in 2004, Addendum*, U.N. Doc. CERD/C/461/Add.3 (2005), para. 51; see also *ibid.* at para. 114: “The key challenge facing South Africa today with regard to compliance with article 3 is the persistence of systemic socio-economic and cultural patterns of racial inequality and accumulated disadvantages on the one hand and accumulated social power on the other. Not surprisingly, these patterns resemble the patterns of legalized injustices during apartheid and manifest themselves in the control of the South African economy, employment opportunities, ownership of property including land, access to finance, and social services such as health, education, housing, nutrition, clean water, energy and justice related services.”

⁵² *Concluding observations of the Committee on the Elimination of Racial Discrimination: South Africa* (Sixty-ninth session, 2006) U.N. Doc. CERD/C/ZAF/CO/3 (2006), para. 13.

⁵³ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa*, (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 9.

CERD was also “concerned about the extent of restitution, the sustainable development of resettled communities and the enjoyment of their rights under the Convention, in particular their rights to housing, health, access to water and education (art. 5 (e)).”⁵⁴ Accordingly, it “encourage[d] the State party to strengthen its policy of land restitution and post-settlement support in order to ensure to those resettled ethnic communities an improvement in the enjoyment of their economic, social and cultural rights under the Convention.”⁵⁵

CERD was further concerned “at the situation of indigenous peoples, inter alia the Khoi, San, Nama and Griqua communities, and, in particular, hunter-gatherer, pastoralist and nomadic groups, and notes the absence of information on the specific measures adopted by the State party to ensure the enjoyment of all rights by those indigenous communities (art. 5(e)).”⁵⁶

As racial inequality defines the landscape of human rights in South Africa, it is important for the Council to remain aware of the compounded harm that South Africans of colour suffer as it examines other rights that they are denied, such as the right to adequate housing, security of tenure, and access to water and sanitation.

2.4 Land expropriation, reparations and restitution

2.4.1 Introduction

The right to “housing, land and/or property restitution” is articulated by the *Pinheiro Principles*, which “reflect widely accepted principles of international human rights, refugee and humanitarian law and related standards.”⁵⁷ Principle 2 (“The right to housing and property restitution”) provides that:

2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.

2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.

⁵⁴ *Concluding observations of the Committee on the Elimination of Racial Discrimination: South Africa*, (Sixty-ninth session, 2006), U.N. Doc. CERD/C/ZAF/CO/3 (2006), para. 18.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at para. 19.

⁵⁷ U.N. Sub-Commission on the Promotion and Protection of Human Rights, 56th Sess., *Principles on Housing and Property Restitution for Refugees and Displaced Persons* (‘*Pinheiro Principles*’), U.N. Doc. E/CN.4/Sub.2/2005/17 (2005), para. 8 (stating that these standards are “enshrined in the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child; the 1951 Convention relating to the Status of Refugees; the Geneva Convention relative to the Protection of Civilian Persons in Time of War; and the Second Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts. The Principles also reflect other relevant international human rights and related standards, in particular, the Guiding Principles on Internal Displacement, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law and relevant UNHCR Executive Committee Conclusions.”).

A similar articulation of the right to restitution is found in CERD General Comments 22 and 23. CERD General Comment 22 provides that:

(c) All [refugees and persons displaced by military or ethnic conflict, on the basis of ethnic criteria] have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void;

(d) All such refugees and displaced persons have, after their return to their homes of origin, the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance.⁵⁸

CERD General Comment 23, paragraph 5 states:

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁵⁹

In addition to providing an opportunity to submit a restitution or compensation claim to “everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property,”⁶⁰ “States should ensure that all aspects of the restitution claims process, including appeals procedures, are just, timely, accessible, free of charge, and are age and gender sensitive....”⁶¹

As a result of the Natives Land Act of 1913 and similar policies, thousands of hectares of land were seized from native South African communities. While there have been efforts by the post-1994, democratically elected government to provide restitution for land seized from indigenous Africans during apartheid, including passing of a Constitutional provision,⁶² legislation for restitution,⁶³ and South African Constitutional Court rulings in favour of indigenous South Africans, there are still serious problems. First, the uncompensated and un-restored expropriation of land has caused on-going social and economic harm to those affected. Second, many argue that land claims are not being processed quickly enough, that there has been an over-emphasis on financial compensation instead of land restoration, and that the process of restoring lands to their previous owners is not timely. Finally, even for those who have been granted some type of restitution, support services that would secure the enjoyment of basic rights, including rights to housing, health, access to water and education, are neglected, thus severely compromising the ability of people to enjoy full restitution.

⁵⁸ CERD, *General Recommendation No. 22, Article 5 and Refugees and Displaced Persons* (Forty-ninth session, 1996), contained in U.N. Doc. A/51/18 (1996), para. 2(c)-(d).

⁵⁹ CERD, *General Recommendation No. 23, Indigenous Peoples* (Fifty-first session, 1997), contained in U.N. Doc. A/52/18, annex V (1996), para. 5.

⁶⁰ U.N. Sub-Commission on the Promotion and Protection of Human Rights, 56th Sess., *Principles on Housing and Property Restitution for Refugees and Displaced Persons* (‘Pinheiro Principles’), U.N. Doc. E/CN.4/Sub.2/2005/17, annex (2005), Principle 13.1.

⁶¹ *Ibid.* at Principle 13.2.

⁶² Section 25(7) of the Constitution provides for restitution of rights in land to persons or communities who were dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices.

⁶³ *See, e.g.*, Restitution of Land Rights Act 22 of 1994.

2.4.2 Land expropriated

As the Government of South Africa acknowledged in its 2005 report to CERD, “millions of African people were rendered landless and homeless by the Natives Land Act of 1913 and similar laws and policies, and many continue in this condition.”⁶⁴ Indeed, “the social consequences of such laws and policies, applied over decades, continue to define the South African economic, social and cultural landscape.”⁶⁵ The South African Government highlighted in its report to CERD how:

[G]ross racially defined economic and social inequalities remain part of South African life with the major part of the land of the country remaining in the hands of the White beneficiaries of the *Land Act of 1913*. All other economic and social indicators, including control of the economy and income distribution, access to jobs and other life opportunities are still racially defined.⁶⁶

For example, during the 1970s, “the Khomani San of the southern Kalahari (Northern Cape Province) were dispossessed of the then Kgalagadi Transfrontier Park, their traditional land, and were dispersed through South Africa, living in small groups or “clans” as a de facto underclass.”⁶⁷ Today, while their claims launched under the Land Restitution Programme are ongoing,⁶⁸ the Khomani San are “probably among the poorest and most marginalized indigenous communities in the country and their situation requires priority attention,” according to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People.⁶⁹

2.4.3 Extent and efficiency of restitution

Between 1994 and 2003, the Commission on Restitution of Land Rights, the Land Claims Court, and the Department of Land Affairs had addressed approximately half of all claims lodged. Despite this, less than two percent of land had been redistributed -- due to an urban bias and preference for monetary compensation in lieu of the transfer of land -- while most rural restitution claims remained outstanding as of that year.⁷⁰ Unfortunately, since 2003 not much has changed in terms of land reform in South Africa, and at present the programme is in a crisis of sorts. As Dirk Du Toit, deputy minister of agriculture and land affairs, stated recently, “if we don't get land reform right...we're sitting on a time bomb.”⁷¹ In one restitution case, “Griqua organisations complain that progress has been very slow and political decisions on their status are still to be determined. Today the Griqua claim the right to land restitution. So far they have obtained only two farms with slightly over 7,200 hectares through the Government's land

⁶⁴ CERD, *Third periodic reports of States parties due in 2004, Addendum*, U.N. Doc. CERD/C/461/Add.3 (2005), para. 48.

⁶⁵ *Ibid.* at para. 20.

⁶⁶ *Ibid.*

⁶⁷ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 38.

⁶⁸ *Ibid.* at para. 37.

⁶⁹ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), p. 1.

⁷⁰ *Ibid.*, p. 9.

⁷¹ See The Economist, ‘Why land reform is so tricky’ (3 May 2007) available at http://www.economist.com/displayStory.cfm?story_id=9124780

restitution programme.”⁷² The Special Rapporteur on Adequate Housing concluded after his visit to South Africa in April 2007 that while “commendable goals have...been set that will achieve redistribution of 30% of white-owned agricultural lands in South Africans by 2014, [...] the 2005 Land Summit’s recommendations should be adopted and implemented without delay [in order to achieve these goals].”⁷³ Similarly, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People recommended “the acceleration of the land restitution process.”⁷⁴

2.4.4 Lack of post-resettlement support for basic rights

In addition to delay in land claims processing, communities which have managed to obtain land through restitution are struggling to receive post-resettlement support, making it difficult, if not impossible, for people to accommodate themselves and survive financially once they have settled a land claim. As a result, many lack access to basic and social services, such as potable water, electricity, healthcare, and education.

2.4.4.1 No Support

While “noting the promulgation of the Restitution of Land Rights Amendment Act of 2004 and the post-settlement support programmes,” CERD was “concerned about the extent of restitution, the sustainable development of resettled communities and the enjoyment of their rights under the Convention, in particular their rights to housing, health, access to water and education (art. 5 (e)).”⁷⁵

The Khomani San community of the Andriesvale area lodged a land claim in 1999.⁷⁶ The group of about 300 people received six farms totalling approximately 40,000 hectares of land.⁷⁷ They also received rights to part of the Kgalagadi Transfrontier Park, in which, “the reclaimed land was to be used for game farming, eco-tourism and related activities”. A second phase of the settlement was concluded in 2002, covering a further 25,000 hectares.⁷⁸ Unfortunately, as the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People reported, “while the future activities of the community, based upon the reclaimed land, appear to have been well planned, after five years the South African Human Rights Commission has found that the living and social conditions of the Khomani San have not substantially improved, and a number of human rights issues have appeared.”⁷⁹ According to information received by the Special Rapporteur, “[t]he government departments responsible for the projects allegedly did not provide the promised assistance nor delivered (sic) the required social services to

⁷² *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 30.

⁷³ United Nations, ‘United Nations Expert on Adequate Housing Concludes Visit to South Africa’, Press Release, (7 May 2007), p. 3.

⁷⁴ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), p. 3.

⁷⁵ *Concluding observations of the Committee on the Elimination of Racial Discrimination: South Africa*, para. 18, U.N. Doc. CERD/C/ZAF/CO/3 (2006).

⁷⁶ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 39.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at para. 40.

the community. Abuses by the local police were also reported as well as the lack of access to justice services.”⁸⁰

2.4.4.2 Recommendations provided to the State party

The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People counselled the State party that:

[I]n the case of indigenous communities that were dispossessed of their lands by colonial and discriminatory legislation or practice before the Native Land Act of 1913, positive legal and judicial action should be initiated to enable these communities and individuals to file legitimate claims for restitution within a wider perspective of human rights and transitional justice. Likewise, the Government is urged to provide the necessary resources and technical cooperation to such indigenous communities, enabling them to proceed in this direction.⁸¹

As of April 2007, the Special Rapporteur on Adequate Housing was “disappointed by the lack of implementation of the recommendations of the Special Rapporteur on the rights of indigenous peoples following his visit to South Africa in 2005, in particular with regard to the issue of land restitution.”⁸²

In the context of achieving adequate land restitution, the Special Rapporteur on Adequate Housing emphasized “the indivisibility of human rights, in particular the right to enjoy an adequate standard of living, which implies adequate access to the means that enable its full enjoyment.”⁸³ CERD similarly encouraged the State party to “strengthen its policy of land restitution and post-settlement support in order to ensure to those resettled ethnic communities an improvement in the enjoyment of their economic, social and cultural rights under the Convention.”⁸⁴

With regards to women, CEDAW underlined that “vulnerable groups of women, especially rural women, require specific measures to empower them to overcome the constraints of poverty, low levels of education and literacy, high unemployment and high fertility rates”⁸⁵ and noted “the need for rural women’s participation in land reform programmes.”⁸⁶ CEDAW further “encourage[d] the Government to implement special programmes for vulnerable groups of women in rural areas,”⁸⁷ and encouraged “the national machinery for women...to work actively on matters of land reform policy and problems of rural women to ensure their active participation in those areas.”⁸⁸

⁸⁰ Ibid. at para. 41.

⁸¹ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 87.

⁸² United Nations, ‘United Nations Expert on Adequate Housing Concludes Visit to South Africa’, Press Release, (7 May 2007), pp. 3-4.

⁸³ Ibid. at p. 2.

⁸⁴ *Concluding observations of the Committee on the Elimination of Racial Discrimination: South Africa*, (Sixty-ninth session, 2006), U.N. Doc. CERD/C/ZAF/CO/3 (2006), para. 18.

⁸⁵ U.N. GAOR, 53rd Sess., Supp. No. 38, *Report of the Committee on the Elimination of Discrimination against Women*, (Eighteenth and nineteenth sessions, 1998), U.N. Doc. A/53/38/Rev.1 (1998), para. 135.

⁸⁶ Ibid.

⁸⁷ Ibid. at para. 136.

⁸⁸ Ibid.

3 Rights to water and sanitation

Implicit and explicit references to the right to water and sanitation are contained in the International Covenant on Economic Social and Cultural Rights (ICESCR), CEDAW, and the CRC.⁸⁹ CEDAW, Article 14, paragraph 2, stipulates that States parties shall ensure to women the right to “enjoy adequate living conditions, particularly in relation to [...] water supply.” Article 24, paragraph 2, of the CRC requires States parties to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking-water.” The right to water and sanitation is further elaborated and supported by the *Guidelines for the Realization of the Right to Drinking Water and Sanitation*, adopted by the Sub-Commission on the Promotion and Protection of Human Rights.⁹⁰ The Guidelines parse the right to water and sanitation as follows:

- 1.1 Everyone has the right to a sufficient quantity of clean water for personal and domestic uses.
- 1.2 Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.
- 1.3 Everyone has the right to a water and sanitation service that is:
 - (a) Physically accessible within, or in the immediate vicinity of the household, educational institution, workplace or health institution;
 - (b) Of sufficient and culturally acceptable quality;
 - (c) In a location where physical security can be guaranteed;
 - (d) Supplied at a price that everyone can afford without compromising their ability to acquire other basic goods and services.⁹¹

Inadequate access to clean water and sanitation were objects of concern in various UN reports. The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People reported that “inadequate access to clean water is a serious concern for a number of communities,” and that “in one San community outside Upington people have to walk eight kilometres to the river to collect water.”⁹² Indeed, the South African Government reported to the CRC that the average time spent fetching water and fuel wood outside urban areas is 4.5 hours a day.⁹³ The Committee on the Rights of the Child expressed concern about “...the poor situation of sanitation; and insufficient access to safe drinking water, especially in rural communities.”⁹⁴

Recommendations to the State party by various Special Rapporteurs and treaty bodies included the prioritisation of increased access to drinking water to indigenous communities in rural areas “where such service still does not exist or where these services are insufficient.”⁹⁵ The State party

⁸⁹ See CEDAW, Art. 14, para. 2 (h); see also CRC, Art. 24, para. 2 (c).

⁹⁰ United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Guidelines for the Realization of the Right to Drinking Water and Sanitation, Realization of the Right to Drinking Water and Sanitation, Report of the Special Rapporteur, El Hadji Guissé*, (Fifty-seventh session), UN Doc. E/CN.4/Sub.2/2005/25 (2005), adopted in *Resolution 2006/10, Promotion of the Realization of the Right to Drinking Water and Sanitation, Report of the Sub-Commission on the Promotion and Protection of Human Rights* (Fifty-eighth session), UN Doc. A/HRC/Sub.1/58/L.11 (2006), p. 41.

⁹¹ *Ibid.*

⁹² *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 58.

⁹³ CRC, *Initial reports of States parties due in 1997: South Africa, Addendum*, U.N. Doc. CRC/C/51/Add.2 (1998), para. 269.

⁹⁴ *Concluding Observations of the Committee on the Rights of the Child : South Africa* (Twenty-third session, 2000), U.N. Doc. CRC/C/15/Add.122, para. 29.

⁹⁵ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 96.

was also advised to “facilitate greater access” to, *inter alia*, safe drinking water and sanitation in the context of “reinforc[ing] its efforts to allocate appropriate resources and develop comprehensive policies and programmes to improve the health situation of children, particularly in rural areas.”⁹⁶

4 Rights of the child

The rights of children to a standard of living adequate for the child's physical, mental, spiritual, moral and social development is articulated in Article 27(1) of the CRC, to which South Africa is party. Article 27(3) requires States Parties, in accordance with national conditions and within their means, to take appropriate measures to assist parents and others responsible for the child to implement Article 27(1). In addition, the right of the child “to basic nutrition, shelter, basic health care services and social services” is provided in section 28 of the Constitution, as well as the right of every child to housing, food, water and social security, enshrined elsewhere in the Bill of Rights.⁹⁷ The right to privacy as articulated in Article 16 of the Convention on the Rights of the Child is also implicated.⁹⁸

The current situation features many clear violations of such rights. The South African Government reported to the CRC that discriminatory and deeply inequitable standards of living, inadequate shelter, unclean water and lack of sanitation are among the major causes of mortality among poor children.⁹⁹

In addition to lacking access to adequate housing and basic services, “a significant number of children live on the streets, including unaccompanied refugees and asylum seekers.”¹⁰⁰ These children are often targets of police abuse. Indeed, the South African Government reported to the CRC that “despite constitutional protection, homeless children remain vulnerable to abuse by law enforcement officials.”¹⁰¹ Homeless children also live “without security of shelter or the luxury of privacy.”¹⁰²

The Government has made efforts to change the situation, and developed a housing programme aimed at the provision of homes for families.¹⁰³ Further, “a number of Presidential Lead Projects of the RDP seek to provide basic services to children in the most disadvantaged areas, particularly informal settlements and rural areas. These include housing, water and sanitation, electrification, healthcare services, primary school nutrition, clinic building programmes and HIV/AIDS awareness and prevention.”¹⁰⁴ As for children who live or work on the streets, they

⁹⁶ *Concluding Observations of the Committee on the Rights of the Child: South Africa* (Twenty-third session, 2000), U.N. Doc. CRC/C/15/Add.122, para. 29 (emphasis added), para. 29.

⁹⁷ CRC, *Initial reports of States parties due in 1997: South Africa, Addendum*, para. 125, U.N. Doc. CRC/C/51/Add.2 (1998).

⁹⁸ Article 16 of the Convention reads: “1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation; 2. The child has the right to the protection of the law against such interference or attacks.”

⁹⁹ CRC, *Initial reports of States parties due in 1997: South Africa, Addendum*, paras. 213-214, U.N. Doc. CRC/C/51/Add.2 (1998).

¹⁰⁰ *Ibid.* at para. 103.

¹⁰¹ *Ibid.* at para. 185.

¹⁰² *Ibid.* at para. 186.

¹⁰³ CRC, *Initial reports of States parties due in 1997: South Africa, Addendum*, para. 190, U.N. Doc. CRC/C/51/Add.2 (1998).

¹⁰⁴ *Ibid.* at para. 127.

are “entitled to protection through a children's court inquiry,”¹⁰⁵ and “efforts have been made to provide the police with training on the Convention.”¹⁰⁶

Still, the Government recognized that “training for officials within the criminal justice system needs to be intensified, especially with regard to children's rights.”¹⁰⁷ With regard to provision of homes for families, it reported that there is “still an enormous backlog” and “greater efforts needs to be made to integrate homeless children into communities.”¹⁰⁸ Further, in the context of recommending that the State party “reinforce its efforts to allocate appropriate resources and develop comprehensive policies and programmes to improve the health situation of children, particularly in rural areas,” the CRC recommended that the State party “increase access to safe drinking water and sanitation.”¹⁰⁹ Additionally, the Committee “encourage[d] the State party to continue its technical cooperation with respect to the IMIC [Integrated Management of Childhood Illness] initiative and, where necessary, to pursue additional avenues for cooperation and assistance for child health improvement with, inter alia, WHO and UNICEF.”¹¹⁰

5 Lack of data collection

Many official UN reports admonished the State party for neglecting to collect disaggregated data on the population in order to monitor and evaluate progress in fighting poverty, and assuring land, housing and water rights.

The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People found that “the absence of comparative statistics is a very serious omission.”¹¹¹ Similarly, the CRC was “concerned that the current data collection mechanism is insufficient to afford the systematic and comprehensive collection of disaggregated quantitative and qualitative data for all areas covered by the Convention in relation to all groups of children in order to monitor and evaluate progress achieved and assess the impact of policies adopted with respect to children.” The Committee on the Rights of the Child was specifically concerned with the lack of data on

all children up to the age of 18 years, with specific emphasis on those who are particularly vulnerable, including girls; children with disabilities; child labourers; children living in remote rural areas, including Eastern Cape, Kwa Zulu-Natal and the Northern region, as well as other disadvantaged Black communities; children belonging to the Khoi-Khoi and San communities; children working and/or living on the streets; children living in institutions; children of economically disadvantaged families; and refugee children.¹¹²

To fill gaps in data, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People supported a proposal to conduct a household survey of “areas of dense indigenous population” to “create a baseline that would allow government departments

¹⁰⁵ Ibid. at para. 104.

¹⁰⁶ Ibid. at para. 185.

¹⁰⁷ Ibid. at para. 187.

¹⁰⁸ Ibid. at para. 190.

¹⁰⁹ *Concluding Observations of the Committee on the Rights of the Child : South Africa* (Twenty-third session, 2000), U.N. Doc. CRC/C/15/Add.122, para. 29.

¹¹⁰ Ibid.

¹¹¹ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 71.

¹¹² *Concluding Observations of the Committee on the Rights of the Child: South Africa* (Twenty-third session, 2000), U.N. Doc. CRC/C/15/Add.122, para. 14.

to make decisions about the relative needs of indigenous constituencies.”¹¹³ The Special Rapporteur further recommended that:

[O]fficial social and economic statistics should be disaggregated to specify indigenous communities, and special poverty reduction and social services delivery programmes (such as health care, housing, nutrition, education and others) should be designed also to target indigenous communities within South Africa’s efforts to meet its Millennium Development Goals.¹¹⁴

Indeed, poverty reduction strategies focused on the indigenous communities “will require an assessment of the specific needs and requirements of these communities and the use of disaggregated data (which do not exist at present when monitoring the results of such policies).”¹¹⁵ Further, “the relevant ministries should set up economic, social and human development indicators for indigenous peoples, in order to ensure in official statistics the inclusion of specific data on these peoples, as a basis for effective public policies and programme planning for social services and economic development purposes.”¹¹⁶

V. DOCUMENTATION BY THE CENTRE ON HOUSING RIGHTS AND EVICTIONS (COHRE) AND/OR CREDIBLE AND RELIABLE PARTNERS

1 Introduction

The concerns set out by United Nations monitoring instruments and other international agencies are mirrored by the findings of COHRE’s field research, as well as the research of partner organisations and other credible domestic institutions. South Africa has been one of COHRE’s focus countries since it began its human rights work in 1994. Since then, COHRE has undertaken several fact-finding missions to investigate housing rights violations and forced evictions in South Africa: in Pietermaritzburg, in Johannesburg and most recently, in Durban. It has established strong links with human rights organisations like the Centre for Applied Legal Studies (CALS) based at the University of the Witwatersrand, and grassroots movements like Abahlali baseMjondolo, based in Durban.

According to a recent survey by the South African Institute of Race Relations, the number of South Africans living on less than \$1 a day has more than doubled in a decade since shortly after the end of Apartheid. According to the survey, 4.2 million people were living on \$1 a day in 2005 which is up from 1.9 million in 1996, two years after the first democratic elections.¹¹⁷ While much of this can be attributed to the legacy of the previous oppressive and racist regime, there is increasing evidence of disturbing policies and practices being implemented at local, provincial and national level, which severely curtail the socio-economic rights of a vast majority of the population. The challenges and opportunities of this post-apartheid ‘transition economy’ are

¹¹³ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 71.

¹¹⁴ *Ibid.* at para. 89.

¹¹⁵ *Ibid.* at para. 90.

¹¹⁶ *Ibid.* at para. 91.

¹¹⁷ ‘Poor S Africans double in decade’, BBC (12 Nov. 2007) <http://news.bbc.co.uk/2/hi/africa/7091231.stm>

manifest in a range of human rights concerns, particularly the right to adequate housing; protection from forced eviction; racial discrimination in access to housing; land expropriation, reparations and restitution; and the right to adequate water and sanitation.

2 The right to adequate housing

The Government of South Africa has shown its recognition of the importance of the right to adequate housing, including protection from forced evictions, by enshrining this right in its Constitution.¹¹⁸ Section 26 of the Constitution reads in full 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.

Judicial authorities, too, have been taking a proactive approach to realization of economic, social and cultural rights by incorporating international norms into the domestic legal order. The most prominent example of this is *Government of the RSA v Grootboom* (2001) (ruling that there is an “obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing”). Another example is the recent judgement by the Supreme Court of Appeals, *City of Johannesburg v Rand Properties*, which further clarified this constitutional obligation in holding that “government, at every level in varying degrees, is constitutionally obliged to realize the right of every person to have access to adequate housing” and “the enormity of meeting that commitment cannot excuse inaction on the part of government.”¹¹⁹

Under the *National Housing Subsidy Scheme* (NHSS), South Africa has built more than 2.4 million houses since 1994. At the recent United Nations World Habitat Day, Housing Minister Lindiwe Sisulu delivered her keynote address, reiterating that ten million people have become beneficiaries of government-built houses since the country became a democracy. Under the National Department of Housing’s ambitious *Breaking New Ground* (BNG) policy, a commitment has been shown to promote sustainable human settlements and projects that are socially inclusive and integrated.¹²⁰ Flagship projects of this nature have already been implemented in the country, including Cosmo City in the north of Johannesburg and Olievenhoutbosch in Pretoria, amongst eight others.¹²¹

Despite these successes, more than four million South Africans, or 11 percent of the population, are still living in shacks in urban areas or informal settlements, with most of these informal dwellers being black, according to a 2006 study conducted by TNS Research Surveys.¹²² Many

¹¹⁸ There is an additional provision in section 28 that guarantees the right to shelter for children under the age of 18 years.

¹¹⁹ *City of Johannesburg v Rand Properties (Pty) Ltd 2007 SCA 25 (RSA)*.

¹²⁰ National Department of Housing, *Breaking New Ground: A Comprehensive Plan for Developing Sustainable Human Settlements* (Sept. 2004).

¹²¹ ‘Mokonyane calls for new housing plan’, *IOL* (3 Oct. 2007) at http://www.iol.co.za/index.php?set_id=1&click_id=124&art_id=nw20071003221325635C589259.

¹²² ‘Four million still living in shacks’, *IOL* (16 Sep. 2007) available at http://www.iol.co.za/index.php?set_id=1&click_id=124&art_id=vn20070916091330548C176051.

South Africans live in informal settlements, on farms or in slum-like conditions in cities. Those living in informal settlements generally have no secure tenure or legal right to occupy the land, although they have in almost all cases no alternative option than to be there. The Housing Minister has stated that, “we need to pay more attention to ensuring that our cities are a reflection of the world we long for, where poverty and marginalisation are urgently addressed.”¹²³

2.1 Forced evictions

South African domestic law, particularly following extensive progressive jurisprudence developed by the Constitutional Court, includes extensive protections against forced eviction. The *Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 1998 (PIE Act)* and Section 26 of the Constitution can be summarised as requiring that everyone is entitled to reasonable measure of secure tenure; that evictions which lead to homelessness will almost never be permitted; and finally that the state should participate in eviction proceedings in order to prevent evictions which lead to homelessness and to be accountable to property owners whose rights to property are unjustifiably infringed by the state’s failure to ensure adequate tenure security to all.

These protections notwithstanding, according to the COHRE database of forced evictions, over 840,000 people were forcibly evicted in South Africa between 1995 and 2006, with over 5000 people being evicted in 2006. Several examples follow below.

2.1.1 Forced evictions in Durban

The situation in the eThekweni Municipality of Durban regarding forced evictions is particularly acute. Mahendra Chetty, a lawyer at the Durban office of the Legal Resources Centre (LRC), recently told COHRE that:

I have never come across one incident where the City has acted in accordance with the law in terms of Section 21 of the Constitution and *PIE Act*. There is not one instance that we know of where the City has evicted with a court order. The City, as a matter of regular and consistent practice, acts in flagrant breach of the law.¹²⁴

Moreover shack dwellers in general, and the large membership based shack dwellers’ organisation Abahlali baseMjondolo in particular, have suffered severe and sustained illegal police repression. This has included the illegal banning of a number of Abahlali baseMjondolo protests by the local police¹²⁵, police assaults on the organisation’s leaders¹²⁶, and the police intimidation of journalists and academics trying to record police behaviour¹²⁷. Recently, Abahlali baseMjondolo marched to

¹²³ Michael Appel, ‘South Africa: Country Among Best in World in Housing Delivery’, *BuaNews*, (1 Oct. 2007) at <http://allafrica.com/stories/200710011491.html>.

¹²⁴ Mahendra Chetty, in-depth interview by COHRE, LRC Offices, (13 Sept. 2007)

¹²⁵ One such banning was overturned in court. See ‘FXI welcomes court ruling on Shack Dwellers’ Movement’s right to hold demonstration’, Freedom of Expression Institute (28 Feb. 2006) <http://www.fxio.org.za/content/view/full/68/51/>.

¹²⁶ One such assault is now the subject of a civil case supported by Amnesty International. It is described in Richard Pithouse, ‘Shack Dweller on the Move in Durban’ *Radical Philosophy*, Vol. 141, (Jan. 2007).

¹²⁷ The *Mercury* newspaper has filed an official complaint in this regard. Both Dr. Raj Patel (UCLA) and Dr. Nigel Gibson (Harvard) have had digital evidence of police behaviour unlawfully confiscated and/or erased by the police.

present a memorandum of their concerns regarding housing and forced evictions to the mayor. Unfortunately, police met peaceful protestors with rubber bullets, stun grenades, water canons and baton charges resulting in numerous injuries. Eleven church leaders issued a statement severely condemning the unprovoked police attack.¹²⁸ This is not the first time that peaceful and lawful marches by shack dwellers have been violently repressed.¹²⁹ Small shack dwellers' organisations based in individual settlements have also had marches summarily and unlawfully banned by the police and suffered assault and arrest.¹³⁰ The persistently antagonistic attitude and repressive actions by the police towards the lawful expression of grievances by shack dwellers in this Municipality are serious cause for concern.¹³¹

COHRE fully endorses the concerns expressed by Abahlali baseMjondolo in a range of statements and memoranda which include ongoing forced evictions from shacks and farms, including evictions without a court order and without the provision of alternative housing, in violation of the *PIE Act* and the South African Constitution; dangerously inadequate access to services such as water, sanitation, and electricity and the deficit in the affordable housing stock, leading to homelessness, disease, regular shack fires and growing overcrowding in remaining shacks. Shack dwellers have also voiced serious concerns about forced removal to relocation sites on the periphery of the city that reinscribe *de facto* race and class segregation and which are not viable for most shack dwellers in terms of livelihood and education opportunities.

COHRE has urged the eThekweni Municipality to become more attentive to shack dwellers' concerns and demands, and for the Municipality to encourage, instead of repress, a democratic process of consultation and cooperation to address land and housing issues in eThekweni. Furthermore, COHRE has requested the eThekweni Municipality to declare a moratorium on evictions in order to allow calm to return to the situation, and for the Municipality to meet with community representatives and organisations to discuss the issues at stake and proposals for practical alternatives to current Municipal policies. The Municipality has replied and has expressed its willingness to engage with Abahlali baseMjondolo. This has been welcomed by COHRE. However the Municipality has refused to declare a moratorium on evictions and continues to evict unlawfully.

2.1.2 Evictions in the context of inner city 'rejuvenation' and 'regeneration' in Johannesburg

The upcoming FIFA World Cup to be held in South Africa in 2010 entails the upgrading of stadiums and infrastructure, as well as the development of accommodation for the influx of visitors and teams in 2010. In the run-up to the World Cup, the frequency of evictions has and will likely continue to increase, particularly in the major host cities of Durban, Cape Town and

¹²⁸ 'Police Violence in Sydenham, 28 September 2007 A Testimony by Church Leaders' (3 Oct. 2007). <http://abahlali.org/node/2661>

¹²⁹ See for instance the statement by the Freedom of Expression Institute 'Residents of Foreman Road Settlement in Durban Shot By Police During Peaceful and Unarmed March', (15 Nov. 2005). <http://www.fx.org.za/content/view/81/>; See also Michael Wines, 'Shantytown Dwellers in South Africa Protest Sluggish Pace of Change', *New York Times* (25 Dec. 2005).

¹³⁰ For instance this has happened in the Siyathuthuka settlement in Sea Cow Lake. COHRE site visit and interview with Alex Mhlakwane, Siyathuthuka Settlement, (13 Oct. 2007); See also Nthokozo Mfusi 'Police fire rubber bullets', *The Mercury*, (5 Oct. 2007), <http://www.themercury.co.za/index.php?fArticleId=3895043>; Doreen Premdev, 'Residents caught up in protest chaos', *Sunday Tribune* (Herald Supplement) (7 Oct. 2007), <http://www.sundaytribune.co.za/index.php?fArticleId=4068172>.

¹³¹ See COHRE letter to Cllr Obed Mlaba and Michael Sutcliffe, 'RE: Urgent housing concerns and recent events in Durban', (3 Oct. 2007).

Johannesburg. COHRE has documented the effect of major international events like the Olympics and other ‘mega-events’ on forced evictions and housing violations, and is concerned about the impact the 2010 event will have on the poor and vulnerable in South African cities.¹³² In an attempt to create “World Class Cities” in South Africa and assert the country’s position as a global actor ripe for prime investment opportunities, there is the fear that gentrification through forced evictions will remove the inner city poor to outlying areas where resources and economic opportunities are scarce.

The City of Johannesburg has forcibly evicted thousands of poor people in the inner city in the context of the Johannesburg Inner City Regeneration Strategy (ICRS), which is aimed at creating an ‘African World Class City’. The strategy provides for the clearance of an estimated 235 ‘bad buildings’, which are regarded as being at the centre of developmental ‘sinkholes’. The strategy was initiated in pursuit of the overall goal of “raising and sustaining private investment leading to a steady rise in property values”.¹³³ The Johannesburg City Council has obtained urgent eviction orders under the pretence of being concerned for the health and safety of residents. However, evictions have been carried out in the middle of the night and without notice. Although conditions in many of the buildings are appalling, the procedures used by the municipality are grossly unjust, including the use of Apartheid-era laws and regulations. In addition, people are not consulted or offered any viable alternatives. In the name of safety and health in the buildings, residents have been made homeless and left on the streets to fend for themselves. The strategy affects some 70,000 residents of ‘bad buildings’.¹³⁴

Over 300 residents of six properties in inner city Johannesburg, who were threatened with eviction, brought a case against the City. On 3 March 2006, the High Court of South Africa ruled that the City of Johannesburg’s housing policy fails to comply with section 26 of the Constitution, which provides for the right to have access to adequate housing.¹³⁵ This was due to the City’s failure to provide suitable relief for, and to give adequate priority and resources to, the inner city poor living in a crisis situation or otherwise in desperate need of accommodation. The Judge dismissed the eviction applications brought by the City against the residents. He also interdicted the City from evicting or seeking to evict the residents until adequate alternative accommodation in the inner city area has been provided.

Following the judgement, the City appealed to the Supreme Court of Appeal (SCA), arguing that the Judge failed to accord the correct degree of deference to the manner in which the City can exercise its powers under the Building Standards Act. In addition, the residents, represented by the Wits Law Clinic and Webber Wentzel Bowens, cross-appealed the Judge’s decision not to rule on the constitutionality of Section 12 (4) (b) of the Buildings Standards Act (used by the City to justify the evictions). The residents also sought a structural interdict requiring the City to submit a reformulated housing policy and provide other ancillary relief. The Supreme Court of Appeal subsequently ordered the residents of San José and the Main Street properties to vacate the buildings concerned. It also ordered the City of Johannesburg to provide those residents who needed it with alternative shelter “where they may live secure against eviction”. While the SCA held that the residents did not have a constitutional right to alternative housing in the inner city,

¹³² See COHRE, *Fair Play for Housing Rights: Mega-Events, Olympic Games and Housing Rights Opportunities for the Olympic Movement and Others* (June 2007).

¹³³ Neil Fraser, City of Johannesburg quoted in ‘Sinkholes and Ripple Ponds’, City of Johannesburg website, (10 Mar. 2003), http://www.joburg.org.za/citichat/2003/mar10_citichat.stm.

¹³⁴ City of Johannesburg, http://www.joburg.org.za/2004/aug/aug13_inner.stm; COHRE, *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (8 Mar. 2005).

¹³⁵ Joint case numbers 04/10330; 04/10331; 04/10332; 04.10333; 04.24101; 04/13835. Full text available at: <http://www.law.wits.ac.za/cals/Inner%20City%20Judgement%20-%203%20March%202006.pdf82>

it said that the personal circumstances of the residents of the particular buildings concerned would have to be taken into account in consultation with the residents before any relocation took place. The City of Johannesburg was ordered to file an affidavit demonstrating compliance with the SCA's order within four months of the SCA judgement date. This judgment constitutes a partial victory for the inner city poor. South African law is now clear on the point that the inner city poor cannot be evicted without the provision of alternative accommodation.

However, the judgement effectively has denied the right of inner city residents to live near their places of work. Research conducted in Johannesburg by COHRE and the Centre for Applied Legal Studies (CALs) has demonstrated clearly that the affected residents are too poor to travel to and from far-flung settlements to their work places in the inner city. Relocating them to places far away from the city centre will have disastrous implications for the survival strategies of many families. The SCA also held that the *National Building Standards and Building Regulations Act, 1977 (NBRA)* was consistent with the Constitution, and that the decisions to seek the eviction of the occupiers concerned were procedurally fair. The *NBRA* allows a municipality to issue a notice ordering residents to vacate a property it considers unsafe without any consideration of the availability of alternative accommodation. The City of Johannesburg issued the notices in respect of the San Jose and Main Street buildings without first consulting with residents.

The SCA judgement appeared to condone the City of Johannesburg's decision to exclude the poor from its Inner City Regeneration Strategy and did not extend far enough in protecting the occupiers of so-called 'bad buildings' in the Johannesburg inner city from arbitrary exercises of state power. The judgment subsequently has been appealed in the Constitutional Court, where COHRE and the Community Law Centre (CLC) appeared as *amici curiae*, and the judgement is pending at the time of this writing. The COHRE/CLC *amici* brief argues that the Constitutional Court should respond to the City's claim of evictions for 'health and safety' concerns, "with a measure of scepticism where it is clear that the context of the claim is a policy with regard to the development of the inner city". The *amici* brief further states:

It is of course not for the court to say that the policy is either right or wrong. However, the policy context requires that a claim of pressing health or safety need ought to be regarded with an appropriate measure of scepticism. There are other reasons at play.

[...]The scepticism ought to be deepened if the practice of the applicant is to obtain orders in advance, often on an urgent basis, and then "stockpile" them for future use as and when considered appropriate. It should be further deepened if the evidence shows that the steps prior to litigation are taken at a leisurely pace, and application is then made to the court on an urgent basis. And the scepticism should be still further deepened when it is shown that the applicant's practice is to proceed with the litigation at an even more leisurely pace, if at all, if there is opposition to the application. All of this casts real doubt on whether there truly is a pressing need for a removal.¹³⁶

On 5 November 2007 the Constitutional Court handed down an order endorsing an agreement signed between the City of Johannesburg and the residents of the two buildings in question. This agreement pertains to relief sought for the applicants, particularly interim measures to improve the living conditions of the residents, as well as making provision for transitional and permanent accommodation in the near future. The agreement provides for the occupiers of both properties to be provided with affordable, safe accommodation in the inner city of Johannesburg where they may live "secure against eviction". Broader issues dealing with the class of approximately 67

¹³⁶ COHRE and CLC *amici curiae* brief, pp. 26-27 for *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* Case No: CCT 24/07 (CC)

000 inner city residents who face possible eviction due to the City's urban regeneration policy, the lack of a comprehensive housing plan for the inner city poor, the unconstitutionality of Section 12 (4)(b) of the *National Building Regulations and Building Standards Act* 103 of 1977 (*NBRA*) and other issues, are still to be decided by the Constitutional Court. While clearly a major victory, there is still much that needs to be achieved in order to secure adequate accommodation and eradicate forced evictions in the inner city of Johannesburg. Moreover, what this high profile case has brought to light is the existence of a much larger crisis regarding forced evictions which are undoubtedly occurring in smaller towns and cities and to a great extent in rural areas of South Africa.

2.1.3 Farm evictions

The publication of a recent report on farm evictions in South Africa has highlighted the massive scale of the problem in South Africa.¹³⁷ For the first time, farm evictions in South Africa have been quantified and the statistics that have emerged are very disturbing. As the report states, "one of the greatest concerns arising from the figures is the continuation, even increase, in the number of evictions taking place post-apartheid." Between 1984 and 1993, 1 832,341 people were displaced from farms with 737,114 of these being evicted. From 1994 to the end of 2004, 2,351,086 people were displaced from farms with 942,303 of these being evicted.¹³⁸ Those being evicted are black South Africans, with approximately 49 percent being children. Indeed, 77 percent of evictees are women and children and their extreme poverty, low level of education (over 70 percent qualify as functionally illiterate) and treatment as "secondary occupiers" through their link to the male occupier, renders them particularly vulnerable to eviction.¹³⁹ The insecurity of tenure, constant threat of eviction and extremely poor socio-economic status of women on farms in South Africa, and hence the equally dire consequences for their children, thus constitutes a major crisis in the country.

People are evicted from farms for a number of reasons, including farms closing down, farm workers being dismissed or passing away, changes in land use, conflicts over access to services, disputes over child labour and farmers simply not wanting people living on the farm anymore. A large number of people, mostly women and children, are evicted as a result of the main breadwinner passing away.¹⁴⁰ Perhaps the most shocking statistic that emerged from the report was that only 1 percent of the evictions involved any legal process. While new legislation such as *The Extension of Security of Tenure Act (ESTA)* and the *Land Reform (Labour Tenants) Act (LTA)* has been designed to extend and secure the rights of those who have insecure tenure, it is evident that this legislation is not working to protect vulnerable farm dwellers and that the court process is being utilised most often to evict people with no offer of alternative accommodation. As the report states, "Farm dwellers have limited knowledge of their rights and, even more importantly, do not have or know where they can get assistance. The growing perception that one cannot get justice for farm dwellers from the courts also discourages farm dwellers and those assisting them from using the court processes."¹⁴¹ The balance of power between white farm owners and black farm dwellers is still highly skewed and new spaces for dialogue and creative

¹³⁷ Marc Wegerif, Bev Russell and Irma Grundling, *Still Searching for Security – The Reality of Farm Dweller Evictions in South Africa*, Social Surveys and Nkuzi Development Association (Dec. 2005) available at <http://www.plaas.uwc.ac.za/>.

¹³⁸ 'Summary of Key Findings from the National Evictions Survey', Social Surveys and Nkuzi Development Association (Dec. 2005), p. 7, at http://www.plaas.uwc.ac.za/National_Evictions_Survey_summary.pdf

¹³⁹ *Ibid.*, pp. 10-12.

¹⁴⁰ *Ibid.*, p. 14.

¹⁴¹ *Ibid.*, p. 15.

problem-solving need to be created in dealing with this lingering issue. The report suggests a multi-pronged approach including tightening up legislation; implementing a well-resourced programme of information dissemination, support to farm dwellers and enforcement of the tenure laws; proactively creating new and sustainable settlements in farming areas; and finally, finding ways to separate tenure and employment rights.¹⁴²

2.1.4 Lack of consultation and participation prior to development-based displacement: the example of the N2 Gateway project

Housing programmes that have provided housing for low-income residents have been criticised for insufficient consultation with affected people, substandard construction, and delayed housing delivery.¹⁴³ South Africa's *Breaking New Ground* housing policy acknowledges that "programmes aimed at delivering housing and creating sustainable human settlements will only succeed where they are directly informed by the people who they affect, and where they are responsive and targeted to the specific needs of a given community."¹⁴⁴ Unfortunately, the Government has repeatedly failed in this regard.

In Cape Town, the National Government's pilot housing project, the N2 Gateway, has been plagued by difficulties and has come under heavy criticism. The National Department of Housing and its local housing subsidiary, Thubelisha Homes, launched the R2.3 billion project in 2004 to address the insufficient and inadequate housing for those living in informal settlements along the N2 freeway. The N2 Gateway project is an attempt to provide housing for over 15,000 households living in the N2 informal settlements and for about 6000 households living in backyard shacks in adjacent areas. To date, only 705 social housing units have been built as part of the first phase of the project, and there have been protests over the high rentals and structural defects in the units.¹⁴⁵

Currently, some 6000 residents of the Joe Slovo informal settlement, on which a segment of the housing project is being built, are facing relocation to Delft - an area on the outskirts of the city, far from residents' places of work, job opportunities and schools. The housing to be built on the Joe Slovo site, reportedly, will house only 1000 people and is unlikely to be affordable to the majority of Joe Slovo residents, as it is 'gap' housing, intended for those earning between 3,500 and 7,500 rand a month.¹⁴⁶ On 26 September 2007, CALS and COHRE wrote a joint letter of protest to the Minister of Housing condemning the Ministry's actions and urging it to reconsider the continued plans for the eviction of communities in Joe Slovo and urging it to "explore all feasible alternatives" to the planned evictions.¹⁴⁷

Many residents have been living at Joe Slovo for over ten years, establishing a settled community there, and object to the fact that the *Breaking New Ground* houses being built on their homes is unaffordable and hence inaccessible to them. Although the Government is offering alternative accommodation in Delft, and has promised to provide access to running water, electricity and

¹⁴² Ibid., p. 22.

¹⁴³ Mzolisi Witbooi, 'N2 Gateway: No rent, no roof', *IOL* (20 July 2007) available at http://www.iol.co.za/index.php?set_id=1&click_id=124&art_id=vn20070720115641141C393541.

¹⁴⁴ United Nations, 'United Nations Expert on Adequate Housing Concludes Visit to South Africa', Press Release, (7 May 2007), p. 3.

¹⁴⁵ 'N2 Gateway housing protest slams govt', *Mail and Guardian* (17 July 2007) available at http://www.mg.co.za/articlePage.aspx?articleid=314229&area=/breaking_news/breaking_news_national/

¹⁴⁶ Ibid.

¹⁴⁷ See Centre on Housing Rights and Evictions (COHRE) and Centre for Applied Legal Studies (CALS) letter to Housing Minister Lindiwe Sisulu "RE: Relocation of Joe Slovo informal settlement residents" (26 Sept. 2007)

toilets, as well as organising for buses to take children to school, residents have voiced concerns that these services might not be developed in time for their scheduled relocation or might not be provided in sufficient quantities to address the needs of all residents.

Residents have organised large-scale protests during 2007, arguing that the Government has not adequately consulted them on the relocation, but had merely met with them to inform them of their fate.¹⁴⁸ Residents are offering to work with Government to develop better housing and infrastructure at the Joe Slovo site, and are at present contesting the application for an eviction order by the Ministry of Housing, following an interim eviction order handed down by the Cape High Court.

Some South Africans have voiced concerns that the N2 Gateway is a mere “vanity project”, designed to make the Government look like it is addressing the housing shortage, while in fact adding to the problem.¹⁴⁹ While the Government’s advances in reducing the country’s immense housing backlog and providing low-cost housing are commendable, the eviction of residents from their homes to outlying areas to make way for those who can afford such housing is counterproductive.

2.1.5 Domestic legal developments of concern with respect to protections against forced evictions

The *Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 1998 (PIE Act)* gives effect to Section 26(3) of the Constitution, detailed above. However, ongoing attempts amend the Act – the so-called “*PIE Bill*”, currently pending before Parliament -- may render the *PIE Act* substantially ineffective.¹⁵⁰ The *PIE Bill*, as currently worded, concentrates on a highly formalistic distinction between two abstract legal statuses rather than focusing on socio-economic status. Section 3 of the *PIE Bill* proposes that the application of the *PIE Act* be significantly narrowed. If the Bill is passed, the *PIE Act* will no longer apply to tenants and persons who occupied land “in terms of any other agreement” so long as the tenancy or other agreement has been validly terminated, as well as persons who occupied land as its owner and have lost ownership of the land. Section 3 of the *PIE Bill* “will create undesirable and constitutionally unjustifiable inequalities between groups of occupiers who are equally in need of the *PIE Act*’s protection. It will increase the likelihood and frequency of evictions which lead to homelessness. It may enable organs of state to evict occupiers of state-owned land without considering their needs for alternative housing.”¹⁵¹

As the Centre for Applied Legal Studies (CAL S) has observed:

The *PIE Bill* as it stands allows municipalities to escape responsibility for dealing with the very real housing crises which can be caused by evictions. Even where the municipality itself is seeking an eviction as landlord in terms of a validly cancelled lease, the *PIE Bill* does not envisage that it will

¹⁴⁸ Martin Legassick, ‘N2 Gateway and the Joe Slovo informal settlement: the new Crossroads?’, *Cape Argus* (16 Sept. 2007).

¹⁴⁹ Dominique Herman, ‘N2 Gateway’s “wisdom” questioned’, *IOL* (9 Oct. 2007) available at http://www.iol.co.za/index.php?set_id=1&click_id=124&art_id=vn20071009033921989C325026

¹⁵⁰ See CAL S, ‘Comment on General Notice 1851 of 2006: Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2006’, (20 Feb. 2007) available at <http://abahlali.org/files/CALSPIESUBMISSION.pdf>

¹⁵¹ CAL S, ‘Comment on General Notice 1851 of 2006’, p. 4.

be required to assist the occupiers it seeks to evict in finding any alternative at all. In circumstances where lease-holding occupiers of state-owned housing are often likely to be very poor and vulnerable people, this is perverse.¹⁵²

One very problematic piece of legislation that has recently been actually enacted into law in the KwaZulu-Natal province is the *KZN Elimination and Prevention of Re-emergence of Slums Act, 2006 (Slums Act)*, which frustrates the Government's *Breaking New Ground* policy and effectively duplicates and contradicts key provisions in the *PIE Act*.¹⁵³ The main object of the *Slums Act* is to "eliminate slums and to prevent the re-emergence of slums,"¹⁵⁴ placing the onus on land owners to prevent informal occupation and in cases of existing informal occupation, to institute eviction procedures.¹⁵⁵ Thus, power is firmly placed with landowners and effectively taken away from those living in circumstances of insecure tenure, the exact situation which the *PIE Act* was created to reverse. COHRE believes that by passing the *Slums Act*, the Provincial Legislature of KwaZulu-Natal has instantly reduced the tenure security of millions of South Africans by making it mandatory for land owners and municipalities to instigate eviction procedures wherever people are unlawfully occupying land or buildings. This was one of the objectives of the Apartheid State's *Prevention of Illegal Squatting Act of 1951*.¹⁵⁶

The *Slums Act* represents a giant step backwards in national efforts to improve slum dwellers' lives, and it should be urgently reconsidered. The *Slums Act* is arguably unconstitutional by virtue of section 14(6) of the South African Constitution, which establishes criteria for determining how conflicts between national and provincial legislation in areas of concurrent competence shall be dealt with. Further, the *Slums Act* is likely to be in conflict with international and regional instruments binding on South Africa, including the African Charter on Human and Peoples' Rights. The African Commission on Human and Peoples' Rights, in 2002, found that the African Charter guaranteed the right to adequate housing, including the prohibition on forced eviction.¹⁵⁷ Similar obligations are guaranteed by the Constitution of South Africa and any forced evictions undertaken as a result of implementing this Act, may therefore be in violation of the Constitution of the Republic of South Africa, in particular Sections 26(1), 26(2), 26(3) and 28(1). COHRE expressed these concerns before the *Slums Bill* was passed; however they were not heeded and the new *Slums Act* has been gazetted.

2.2 Lack of affordable housing

Another impediment facing South Africa in terms of its commitment to providing adequate housing is the critical shortage of rental public housing stock for low-income groups. A 2007 report by COHRE and CALS on housing rights in Pietermaritzburg highlighted the Municipality's regressive and anti-poor housing policies and the general lack of affordable

¹⁵² Ibid., p. 9.

¹⁵³ See COHRE letter to the KZN Premier Sibusiso Ndebele, 'Urgent: KZN Elimination and Prevention of the Re-emergence of Slums Bill' (4 July 2007)

¹⁵⁴ See 'Kwazulu-Natal Elimination And Prevention Of Re-Emergence Of Slums Act, Act No. 6 Of 2007' (18 July 2007), p. 48.

¹⁵⁵ Marie Huchzermeyer, "KZN Slum Elimination Bill: A Step Back" (13 March 2007) available at <http://abahlali.org/node/903>

¹⁵⁶ COHRE letter, 'Urgent: KZN Elimination and Prevention of the Re-emergence of Slums Bill'

¹⁵⁷ See *SERAC and CESR v. Nigeria*, ACHRP 2002.

housing for over 50 percent of the population of Pietermaritzburg - leading to burgeoning informal settlements.¹⁵⁸

The persistent inequality gap in South Africa between the rich and poor shapes trends in the housing market in cities, and this has been sharpened in a city like Pietermaritzburg as a result of its relatively recent reinstatement as the administrative and legislative capital of the province of KwaZulu-Natal in 2004. The relocation of a number of government departments to the city saw an influx of government officials and their families, and others seeking new employment opportunities. The increased effective demand for accommodation has resulted in an unprecedented surge in property prices.¹⁵⁹

Unable to afford market-rate rentals, low-income residents remain concentrated in the racialised townships, segregated more or less as they were under apartheid. Increasing numbers live in shack settlements carved into spaces that are at least closer to the survivalist opportunities of the city centre, even if their tenure is precarious and their living conditions grossly inadequate.

However, despite the increasing need for Government-subsidised rental accommodation in the city, the Municipality has undertaken a regressive policy of raising the rental rates by at least 15 percent per annum since 2000 for all State funded and Council-owned housing “until ‘break even’ market rentals are reached”, according to the Municipality’s documents.¹⁶⁰

The Msunduzi Municipal housing stock consists of 377 rental units. However, as of August 2005, 294 units out of the 377 were in arrears, and some 64 percent had been in arrears for more than six months due to the increase in rental rates beyond levels of affordability.¹⁶¹ Outstanding arrears totalled approximately R3.4 million in August 2006.¹⁶²

As growing numbers of tenants were unable to make their payments, the Municipality began to issue eviction notices, and to carry out evictions. Once a unit becomes vacant, the Municipality provides the unit to relatively wealthier applicants – people with salaries that meet new minimum income stipulations. Residents of Willow Gardens have concluded that the Municipality is implementing a clear and sustained strategy, calculated to force poorer tenants to vacate their homes. The Municipality’s policy of escalating rental rates at 15 percent per annum to achieve ‘break even’ market rentals will effectively end the Msunduzi Municipality’s provision of social housing in Pietermaritzburg.

The Municipality has placed residents in desperate circumstances by evicting them. If evictions continue, the Municipality will certainly force many residents into homelessness. They will be deprived of access to any housing at all, let alone adequate housing. The Municipality has failed to provide a sufficient reason for the compound rental increases of at least 15 percent per annum, and has thus failed to provide a sufficient reason for the evictions and threatened evictions. Rather than progressively realising the right to access adequate housing for the more than 57,790 households that cannot afford market rentals, it has instituted a regressive policy that will cause further homelessness.

¹⁵⁸ CALS and COHRE, *Pushed to the periphery: Low-income residents in Pietermaritzburg, South Africa* (May 2007).

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Mark Steele, ‘Msunduzi Municipality Housing Issues’, *The Witness*, (Aug. 2005).

¹⁶² Mbongeni Zondi, ‘Avoiding eviction and rent payments’, *Daily News* (25 Aug. 2006).

In terms of the National Housing Code, households who earn R3500 or less may qualify for housing subsidies. However, the Msunduzi Municipality now requires a minimum income of at least R3500 for a person or household to be placed on a waiting list for Municipal Housing. As such, the Municipality is ensuring that only residents who do not qualify for housing subsidies will be able to rent state-owned housing in Pietermaritzburg. To say the least, this is perverse. Municipal housing in Pietermaritzburg is no longer a form of social security. The rent increases are clearly an attempt to increase the Municipality's income by squeezing its most vulnerable residents.

COHRE and CALS contend that the approach the Municipality has taken with regard to its housing stock may be in violation of Section 26, or any sub-section therein, of the South African Constitution, as well as international legal obligations.

In response, COHRE and CALS have urged the Municipality to:

- Recommit itself to providing social housing including, at a minimum, preserving the existing Municipal housing stock for low-income residents who cannot afford market rentals.
- Negotiate an amicable resolution for all current residents of Municipal housing stock in such a way that will not lead to further evictions without the provision of adequate alternative housing.
- Carefully consider possibilities for in situ upgrading for shack settlements in consultation with affected residents. The Msunduzi Municipality should also consider undertaking informal settlement upgrading under the terms of the National Policy of Breaking New Ground.¹⁶³ This policy was developed in response to the realisation that housing delivery and relocation is disruptive to people's lives and does not curb the mushrooming of informal settlements. This plan also details the new funding mechanism for informal settlement upgrading.
- Involve low-income residents in the overall process of dealing with the housing demand in the city.

2.3 Racial discrimination in access to housing, water and sanitation

Since the end of apartheid in 1994, South Africa has made significant strides towards achieving an equitable and just society. Nevertheless, the affects of apartheid-era segregation have left their mark upon the past 13 years of democracy in which poverty, homelessness, forced evictions, and inadequate access to water and sanitation remain pervasive problems disproportionately suffered by the black majority.

2.3.1 On the basis of race or ethnicity

Although South Africa has taken concerted and successful steps towards eliminating racial discrimination in *de jure* terms, there still exists *de facto* racism and racial discrimination, particularly related to the access to adequate housing, water and sanitation. As the South African Human Rights Commission (SAHRC) commented in its 2006 report to the Committee on the Elimination of All Forms of Racial Discrimination (CERD):

[T]here still remain some formidable challenges and foremost amongst these are dealing with the legacy of racism and racial discrimination that still persists and evidenced by inequality, sharp

¹⁶³ National Department of Housing, *Breaking New Ground: A Comprehensive Plan for Developing Sustainable Human Settlements*, (Sept. 2004).

disparities in capital, skills and opportunities and intolerance. We have also come to learn that changing deep-seated attitudes and challenging harmful stereotypes and assumptions require more than legislative interventions – it requires concerted public education and advocacy, ongoing vigilance and constant dialogue.¹⁶⁴

Policies and politics of racial segregation prior to 1994 have shaped the racial geography of present day South Africa, leaving a legacy of inadequate and peripheral accommodation for the urban poor, in particular: a substantial under-provision of decent housing opportunities for black people; and the segregation of black people in overcrowded townships and informal settlements on the periphery of the City far away from employment opportunities and facilities.

Due to the under-provision of adequate housing and the lack of employment opportunities in peripheral areas, there has been a substantial increase in the number of informal settlements in and around urban areas in South Africa. For instance, in 1990 there were 20 informal settlements in the province of Gauteng. As of 2005 there were at least 300 in this one province, at least 190 of which were located in the Johannesburg metropolitan area.¹⁶⁵ Municipal governments have largely responded to the growth of informal settlements by relocating residents to areas farther outside of cities or - in some cases - by forced evictions without the provision of alternative accommodation.

A 2005 COHRE fact-finding mission report on housing rights violations in Johannesburg, found that new housing developments had largely taken place on the outer edges of existing townships, far away from jobs, facilities and services. This had marginalized new settlements and contributed to the further fragmentation of the urban fabric of Johannesburg.¹⁶⁶ There remains a gap between policy and practice concerning equality with regard to the enjoyment of rental accommodation and government services without racial discrimination.

Indeed, the South African Government submitted to CERD in 1995 that:

The key challenge facing South Africa today with regard to compliance with article 3 is the persistence of systemic socio-economic and cultural patterns of racial inequality and accumulated disadvantages on the one hand and accumulated social power on the other. Not surprisingly, these patterns resemble the patterns of legalised injustices during apartheid and manifest themselves in the control of the South African economy, employment opportunities, ownership of property including land, access to finance, and social services such as health, education, housing, nutrition, clean water, energy and justice related services.¹⁶⁷

The SAHRC highlighted the fact that these residential patterns were not addressed in the Government's report and recommended that during the forthcoming consideration of South Africa's periodic report, CERD should request South Africa to furnish its specific measures taken to tackle this lingering problem and bring *de facto* racial segregation and apartheid to an end.¹⁶⁸

¹⁶⁴ South African Human Rights Commission (SAHRC), *Shadow Report on South Africa's Compliance with the Provisions of the International Convention Against All Forms of Racial Discrimination* (June 2006), p. 6.

¹⁶⁵ COHRE, *Any Room for the Poor: Forced Evictions in Johannesburg, South Africa*, (Mar. 2005), p. 19. available at www.cohre.org/southafrica.

¹⁶⁶ COHRE, *Any Room for the Poor: Forced Evictions in Johannesburg, South Africa*, (Mar. 2005), p. 19. available at www.cohre.org/southafrica.

¹⁶⁷ SAHRC, *Shadow Report*, pp. 27-28.

¹⁶⁸ SAHRC, *Shadow Report*, pp. 27-28. ICERD General Recommendation XIX: Article 3 (para. 3) states that "The Committee observes that while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic

It is of serious further concern that South Africa has not yet fulfilled its obligations¹⁶⁹ to the majority of its citizens to redress the injustices of past violations of the rights established in CERD Article 5, especially with regard to providing to all persons, without discrimination, i) adequate housing, ii) basic services, and iii) protection from forced eviction and homelessness. As “the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of [racial] discrimination is not necessarily secured solely by the punishment of the perpetrator of the discrimination,” CERD has encouraged “courts and other competent authorities encourage to consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.”¹⁷⁰

2.3.2 On the basis of nationality

Another aspect of discrimination in South Africa that is often ignored is that based on national origin, whereby refugees, foreigners seeking asylum or migrant workers are discriminated against in the field of housing, and are excluded from housing policy. The SAHRC found that

despite the fact that South Africa acceded to the 1951 Convention Relating to the Status of Refugees, none of the State’s measures by the national government and the respective provincial departments make provision to provide transitional housing for refugees and asylum seekers... The Constitution requires that everyone be treated with care and concern irrespective of their country of origin or background, as long as they are within the Republic.¹⁷¹

As more foreign nationals, particularly from neighbouring African countries, enter South Africa in search of job opportunities and financial support for their families back home, there is the pressing need for the government to address their housing needs and ensure that xenophobic attitudes and practices are discouraged, both in law and in practice.

2.4 Land expropriation, reparations and restitution

One of the most pressing issues facing South Africa post-1994 was that of land reform, restitution and redistribution. Some 3 to 5 million people were forcibly relocated between 1950 and 1980 -- leaving 80 percent of the population with only 13 percent of the land.¹⁷² The African National Congress promised to redistribute 30 percent of arable land within the first five years of government, later revising this target to the year 2015.¹⁷³ Despite having addressed approximately half of all claims lodged with the Commission on Restitution of Land Rights by 2003, less than two percent of land has been redistributed.¹⁷⁴ The failure to redistribute land is largely due to:

origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds.”

¹⁶⁹ ICERD Article 6 requires that “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

¹⁷⁰ *General Recommendation XXVI: Article 6 of the Convention*, para. 2.

¹⁷¹ SAHRC, *4th Socio-Economic Rights Report* (2000/2002).

¹⁷² Jean du Plessis, *Land Restitution in South Africa: Overview and Lessons Learned*, Working Paper No. 6, BADIL Resource Center for Palestinian Residency & Refugee Rights, (Dec. 2004), p. 4.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, p. 9.

- an urban bias in restitution delivery, leaving many rural restitution claims outstanding; and
- a preference for monetary compensation, particularly where claimants have built lives in new places and do not want to relocate.¹⁷⁵

As of 2006, according to the SAHRC, the majority of the land still resides in the hands of an overwhelmingly white landowning class, which is strongly patriarchal.¹⁷⁶

Furthermore, the South African Government has failed to provide adequate services to successful claimants in rural areas, making it difficult, if not impossible, for people to re-accommodate themselves and survive financially once they have successfully resolved a land claim.¹⁷⁷

Recently, over 1000 farm workers and dwellers marched in Grahamstown in the Eastern Cape to express their dissatisfaction with the Government's land redistribution programme. In response, the land affairs department has admitted that the legislation governing land redistribution to farm workers and dwellers is not effective and should be amended because it serves to regulate rather than stop evictions from farms. An official from the department stated that “as a department we need to be looking at the legislative amendments of the Act but also we need to be pro-active in terms of acquiring land for the settlement of those farm workers and not wait until they are evicted.”¹⁷⁸

The delayed delivery in land restitution to date has meant that many frustrated people have reconceptualised their idea of landholding, either to a notion of trusteeship whereby land is owned by a higher authority on whom they can rely for protection, or even conceptualising their rightful place as being on the white-owned farms where they lived or once lived, but under the protection of a farmer. The problems encountered in the often unwieldy process of land reform and the failure of the Government's policy, with its focus on ‘property ownership,’ to deliver on its promises, has had the unexpected effect of turning people back to these past notions of land occupancy.¹⁷⁹ The Government must work together with social movements, communities and other relevant stakeholders in order to ensure that well-intentioned policies regarding land reform are implemented in a sustainable manner and that those who receive land do not do so in isolation from economic opportunities and other socio-economic rights, *inter alia* adequate housing and basic services such as water and sanitation.

3 Lack of access to water and sanitation

As early as 1999, weaknesses had been identified in South Africa's water delivery and sanitation system.¹⁸⁰ Some of these included community non-engagement, lack of consumer education resulting in widespread refusal to pay for water and sanitation services, vandalism and water piracy. Also, water supply projects were far too expensive for poor rural communities where

¹⁷⁵ Ibid, p. 9.

¹⁷⁶ SAHRC, *Shadow Report*, p. 38.

¹⁷⁷ Jean du Plessis, *Land Restitution in South Africa: Overview and Lessons Learned*, pp. 9-10.

¹⁷⁸ ‘Govt admits to problems with land redistribution’, SABC News (25 Aug. 2007) available at http://www.sabcnews.com:80/south_africa/land_affairs/0,2172,154697,00.html

¹⁷⁹ Deborah James, ‘“Failure” of land reform should be seen in context’, *Mail & Guardian* (11 Sept. 2007) available at http://www.mg.co.za/articlePage.aspx?articleid=318808&area=/insight/insight_comment_and_analysis/

¹⁸⁰ African Eye News Service: ‘Sustainability of South Africa's ‘water miracle’ questioned’ Peter Wellman (9 May 1999). See also African Eye News Service: ‘Study pin-points weaknesses in celebrated water delivery programme’ Peter Wellman (9 May 1999) accessed at <http://www.africanwater.org>.

many people cannot afford to pay for water in monetary terms. Estimated failure of water supply projects ranged from between 50% and 90%, with residents in some multi million rand schemes reduced to fetching water from rivers just months after the launch of water reticulation networks. These problems have not abated with time and they continue to plague the system in one form or another today. An International Environmental Law Research Centre Working Paper has identified several deficiencies in the protection of the right to water in South Africa.¹⁸¹ The first is the much touted Free Basic Water policy which aims to provide a free minimum quantity of potable water set at six kilolitres per household per month on the assumption that ‘...25 litres per person per day ...is a level sufficient to promote healthy living.’¹⁸² This amount is considered insufficient to meet basic human needs particularly for those in urban areas who rely on sewerage services for excreta disposal the urban poor and has thus been deemed not to fulfill the requirements in section 27 (1)(b) of the Constitution.¹⁸³ The World Health Organization has stated that a service level enabling collection of at least 50 litres of water per person per day is needed to ensure good hygiene, and that optimal access constitutes at least 100 litres per person per day.¹⁸⁴ Although the Strategic Framework for Water Services 2003 encourages an increase in the basic quantity of water provided free of charge to at least 50 litres per person per day to poor households, this reportedly has not happened to date.¹⁸⁵ Using a quantitative limit per household results in households of more than eight persons receiving less than 25 litres per person per day, including those households that sub-let to others.

Furthermore, households with outstanding water debt are not eligible for their allocation of free water until their debt is paid off, and families’ whose service has been disconnected for non-payment forfeit their right to free basic water.¹⁸⁶ The very unpalatable result is that a large number of the most disadvantaged citizens of the population are excluded from free basic water because of staggering water debts.

Another difficulty arising from the free basic water policy is the lack of funding for local governments who are actually responsible for the provision of water services. Cross subsidization has not been a viable source of funding especially in rural communities where the number of high volume users is not significant enough to cross subsidise the provision of free water. This has led local governments to resort to drastic cost recovery measures which end up depriving residents of any access to water.¹⁸⁷

Increasingly, access to water has been influenced by a policy of cost recovery. This suggests that the full cost of operation and maintenance of water utilities should be financed by consumers.¹⁸⁸ The idea is that water usage should be priced in order to reflect the true societal cost of consuming the resource and to finance the cost of managing and delivering it to end users. The flip side is that accessibility of water services is contingent on ability to pay.¹⁸⁹ According to the 2003 Strategic Framework ‘the prices of water and sanitation services reflect the fact that they are

¹⁸¹ Alix Goulland-Gualtieri, ‘South Africa’s Water Law and Policy Framework: Implications for the right to water’ International Environmental Law Research Centre Working Paper 2007- 03.

¹⁸² See *Department of Water and Forestry’s Free Basic Water Implementation Strategy 2002*.

¹⁸³ M. Kidd, ‘Not a drop to drink: Disconnection of water services for non-payment and the right of access to water’ 20 *South Africa Journal of Human Rights*, 119 (2004).

¹⁸⁴ World Health Organization, *The Right to Water* (2003).

¹⁸⁵ Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa, 10/07/98, p. 7.

¹⁸⁶ Heidi Vogt, ‘Environmental justice in South Africa : Water, Sanitation, Privatization and the Legacy of Apartheid, 246 *DOLLARS & SENSE* 8 (March 1, 2003).

¹⁸⁷ *Department of Water and Forestry’s Free Basic Water Implementation Strategy 2002*.

¹⁸⁸ South Africa, White Paper on a National Water Policy for South Africa (1997), para. 6.5.3.

¹⁸⁹ Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa, 10/07/98, p. 8.

both social and economic goods...’¹⁹⁰ The application of a policy of cost recovery has created serious challenges to the realisation of the right to access to water.¹⁹¹ It has led to dramatic increases in the price of water leading to substantial debts in low income households.¹⁹² Many households have very high municipal services arrears which can amount to R 80,000.¹⁹³ According to a resident of Orange Farm, ‘the problem is not that we do not want to pay for water, the problem is we cannot pay’.¹⁹⁴

A direct consequence of the application of cost recovery policies has been an increase in water disconnections as a response to a household or neighbourhood’s inability to pay for water services.¹⁹⁵ The question of disconnection of water services has been the object of several judicial decisions and is subject to continuing litigation.¹⁹⁶ The courts have used different approaches in dealing with this issue.¹⁹⁷

Another consequence of the application of a policy of cost recovery has been the installation of prepaid water meters – mainly in the poorest neighbourhoods – as a means to ensure payment for water use.¹⁹⁸ Pre-paid meters are a convenient tool for water providers because they allow for full cost recovery with little administrative paper work. However, it creates significant hurdles for the poor and impedes their access to safe and sufficient water.¹⁹⁹ One of the shortcomings of this system is that non-payment results in immediate disconnection; thereby bypassing safeguards provided in the Water Services Act, such as the requirements of reasonable notice of disconnections and the consideration of ability to pay. Also, the availability of water depends on the proper functioning of the devices which have been shown to be complex, unreliable and faulty.²⁰⁰

Finally, pre-paid meters are often installed without the provision of correct information to, and consultation with, local communities and even without their consent or knowledge.²⁰¹ This effectively prevents communication between the users and water providers and does not allow

¹⁹⁰ Strategic Framework for Water Services (2003), para. 2.

¹⁹¹ United Nations, Department of Economic and Social Affairs, *Intraagency Task Force on Gender and Water, A Gender Perspective on Water Resources and Sanitation, Background Paper no. 2*, DESA/DSD/2005/2, submitted at the Twelfth Session of the UN Commission on Sustainable Development, 14 to 30 April 2004 at 16 (Proposals on the application of a sustainable cost-recovery policy).

¹⁹² R. Francis, ‘Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics and Political Power’, 18 *Georgetown International Environmental Law Review*, 149 (2005), p. 172.

¹⁹³ Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa, 10/07/98, p. 9.

¹⁹⁴ Patrick Bond, ‘The battle over water in South Africa’ available at <http://www.africafiles.org>.

¹⁹⁵ Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa, 10/07/98, p. 11.

¹⁹⁶ COHRE has or will intervene as *amicus curiae* in at least two cases on the question of disconnections. The first is in the Witwatersrand High Court between Lindiwe Mazibuko & Ors v The City of Johannesburg & Ors Case no. 06/13865 and the other is in the Durban High Court between Bongani Protas Shezi (aka Mbatha) & Ors v The Ethekwini Municipality & Ors.

¹⁹⁷ In *Manquele v Durban Transitional Metropolitan Council* (2001), the Durban High Court made clear that beyond the free water quota water must be paid for, and that once a household is no longer able to pay for the excess it can be cut off completely for non-payment whilst in *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) it was found that the disconnection of water supply would constitute a prima facie breach of the state’s constitutional duty to respect the right of access to water..

¹⁹⁸ See R. Kasrils, Minister of Water Affairs and Forestry, ‘Pre-paid water meters serves peoples rights’, 13 April 2004.

¹⁹⁹ Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa, 10/07/98, p. 12.

²⁰⁰ Public Citizen, *Orange Farm South Africa: The Forced Implementation of Pre-paid Water Meters* (June 2004) pg 28-29.

²⁰¹ See 79 above, pp. 12-15.

for adequate public participation in water management.²⁰² The end result is that pre-paid water meters force people in the most deprived neighbourhoods to look for other, often contaminated sources of water when they cannot afford to pay.²⁰³

Of much significance is the fact that the policies on access to water and sanitation have done little to address the most desperate and needy segments of society. They have failed to meet the requirements of balance, flexibility and capacity to respond to emergencies. As part of a series on housing in South Africa the BBC News website spoke to residents of the overcrowded township of Alexandra in north-eastern Johannesburg who clearly amplify this inadequacy.²⁰⁴ While significant investment is being made in the provision of safe water supply, inadequate attention is being paid to sanitation as well as to health and hygiene promotion. It has been estimated that 37% of households do not have access to adequate sanitation facilities, the majority being in urban informal settlements and rural areas. Overall, there has been a lack of integration of the policies aimed at water access, sanitation and health.²⁰⁵

VI. CONCLUSION

Despite efforts by the Republic of South Africa to reverse the oppression of the Apartheid state and build a new society based on principles of equality and freedom, many problems persist. Multiple United Nations authorities note with concern and recommend ways of combating the following human rights violations in South Africa: conditions of ***inadequate housing*** and a ***lack of access to safe water and sanitation***, especially for children; ***forced evictions*** carried out; ***racial discrimination in access to housing***; ***land expropriation*** with ***little effective restitution***; a ***lack of consultation and participation***; and a ***lack of disaggregated data*** collection on women and indigenous people to monitor their human rights situation.

Currently, ***conditions of inadequate housing*** are ubiquitous, despite well-intentioned legislation to the contrary. A large part of the black majority lives in “oppressive poverty and, in the outer districts of the cities, a spread of vast miserable settlements of tin and carton shacks, lacking sufficient sanitation, electricity and water, is the persistent reality.”²⁰⁶

Forced evictions are “taking place regularly throughout South Africa,” and “are being used with the aim of gentrifying urban areas and promoting urban regeneration and development.”²⁰⁷ Municipalities often use the excuse of “urgent evictions,” where forced removal is justified on grounds of health threats to occupants.²⁰⁸ In addition to urban populations, evictions are

²⁰² See 78 above.

²⁰³ See 78 above.

²⁰⁴ See *BBC News*, “In Pictures: Johannesburg’s City Dwellers” available at http://news.bbc.co.uk/2/shared/spl/hi/picture_gallery/06/africa_johannesburg0s_city_dwellers/html/1.stm

²⁰⁵ Céline Dubreuil, “The Right to Water: from concept to implementation” *World Water Council* (2006) p. 19.

²⁰⁶ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 9.

²⁰⁷ United Nations, ‘United Nations Expert on Adequate Housing Concludes Visit to South Africa,’ Press release, (7 May 2007), p. 2.

²⁰⁸ *Ibid.*

affecting “black farm dwellers” in rural areas (where there have been more than 2 million²⁰⁹ displacements since 1994), and “backyard shack dwellers” who have insufficient tenure protection.²¹⁰

In the area of ***racial discrimination in access to housing***, the black majority still suffers disproportionately from inadequate housing and constitutes the poorest segment of the population, making up over 90 per cent of the 22 million poor.²¹¹ The enjoyment of rights to housing, access to water, health and education for poor ethnic minorities was also a concern.²¹²

The extent of ***land restitution*** was put into question in many UN reports. The uncompensated and un-restored expropriation of land has caused on-going social and economic harm to those affected.²¹³ The process of restoring lands to their previous owners is experiencing unwarranted delays.²¹⁴ Finally, even for those who have been granted some type of restitution, support services that would secure the enjoyment of basic rights, including rights to housing, health, access to water and education, are underprovided, challenging the ability of people to enjoy full restitution.²¹⁵

Inadequate access to safe drinking water and the “poor situation of sanitation”²¹⁶ were objects of concern in various UN reports and for a number of communities.²¹⁷ Some people have to walk eight kilometres to the river to collect water.²¹⁸ The South African government reported that the average time spent fetching water and fuel wood outside urban areas is 4.5 hours a day.²¹⁹

Children are especially affected by this problem. The South African Government reported that discriminatory and deeply inequitable standards of living, inadequate shelter, unclean water and

²⁰⁹ Social Surveys and Nkuzi Development Association, *Still Searching for Security – The Reality of Farm Dweller Evictions in South Africa* (2005).

²¹⁰ United Nations, ‘United Nations Expert on Adequate Housing Concludes Visit to South Africa,’ Press release, (7 May 2007), p. 2.

²¹¹ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa*, (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 9.

²¹² *Concluding observations of the Committee on the Elimination of Racial Discrimination: South Africa*, (Sixty-ninth session, 2006), U.N. Doc. CERD/C/ZAF/CO/3 (2006), paras. 15, 18.

²¹³ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), p. 1.

²¹⁴ *See, e.g., Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 30; *see also* United Nations, ‘United Nations Expert on Adequate Housing Concludes Visit to South Africa,’ Press release, (7 May 2007), p. 3; *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), p. 3.

²¹⁵ *Concluding observations of the Committee on the Elimination of Racial Discrimination: South Africa*, para. 18, U.N. Doc. CERD/C/ZAF/CO/3 (2006).

²¹⁶ *Concluding Observations of the Committee on the Rights of the Child : South Africa*, 23 Feb. 2000, U.N. Doc. CRC/C/15/Add.122, para. 29.

²¹⁷ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa*, 15 Dec. 2005, U.N. Doc. E/CN.4/2006/78/Add.2, para. 58.

²¹⁸ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa*, 15 Dec. 2005, U.N. Doc. E/CN.4/2006/78/Add.2, para. 58.

²¹⁹ CRC, *Initial reports of States parties due in 1997: South Africa, Addendum*, para. 269, U.N. Doc. CRC/C/51/Add.2 (1998).

lack of sanitation are among the major causes of mortality among poor children.²²⁰ In addition to lacking access to adequate housing and basic services, “a significant number of children live on the streets, including unaccompanied refugees and asylum seekers.”²²¹ These children are often targets of police abuse. Homeless children also live “without security of shelter or the luxury of privacy.”²²²

There is also a ***lack of prior consultation and participation*** for individuals affected by large development projects and forced evictions. The Special Rapporteur on Adequate Housing noted that “there appears to be insufficient meaningful consultation [with] communities”²²³ such as those affected by mining operations” like the Anglo Platinum's PPL mining project in Limpopo province.²²⁴ He noted that “residents spoke with frustration about the lack of information on resettlement and relocation and of participation in resettlement planning and implementation.”²²⁵

Finally, a ***lack of data collection*** that would help monitor and evaluate progress in fighting poverty, and assuring land, housing and water rights for children, indigenous people and women, was a “very serious omission.”²²⁶

These findings are mirrored by human rights issues documented by credible domestic and international civil society groups.

While strides have been made in South Africa with regard to eliminating racial discrimination, facilitating land redistribution and housing, water and sanitation delivery, the country still faces major human rights concerns, including in the area of economic and social rights. Adequate housing, protection from fear of forced eviction and access to a minimum standard of water and sanitation provision are enshrined in international and South African domestic law. COHRE urges the Human Rights Council and the Office of the High Commissioner of Human Rights to take note of the above observations and recommendations, and incorporate them into their assessment of the Government’s compliance with its obligations in the context of the Universal Periodic Review.

²²⁰ Ibid. at paras. 213-214.

²²¹ Ibid. at para. 103.

²²² Ibid. at para. 186.

²²³ United Nations, ‘United Nations Expert on Adequate Housing Concludes Visit to South Africa,’ Press release, (7 May 2007), p. 3.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission To South Africa* (Sixty-second session, 2005), U.N. Doc. E/CN.4/2006/78/Add.2 (2005), para. 71.