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IMPLEMENTING THE RIGHT TO ADEQUATE HOUSING UNDER THE NATIONAL HOUSING STRATEGY ACT:

THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

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THE NATIONAL RIGHT TO HOUSING NETWORK

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Executive Summary

This paper explores the *National Housing Strategy Act*'s (NHSA's) unique reliance on international human rights as potentially transformative of housing policy and human rights in Canada. It considers how international human rights should inform the implementation of the NHSA, the mandates of the Federal Housing Advocate and the Review Panel and support a new human rights practice in housing.

The NHSA recognizes the right to housing as a fundamental human right "affirmed in international law" and commits the Government of Canada to "further the progressive realization of the right to housing as recognized in the *International Covenant on Economic, Social and Cultural Rights*" (ICESCR). International human rights law thus provides the normative content for the commitments and purposes of the NHSA and the institutional mechanisms it puts in place. Commentary and jurisprudence on the right to housing under international law will be a central reference for the Federal Housing Advocate's and the Review Panel's findings and recommendations. The commitment to the progressive realization of the right to housing under international law also defines the purposes of the rights-based National Housing Strategy and the role of the National Housing Council in advising the Minister.

The novel procedures under the NHSA to ensure accountability to the right to housing under international law have been modelled on similar procedures and mechanisms through which the right to housing in Canada has been monitored and adjudicated internationally, by the UN Committee on Economic, Social and Cultural Rights (CESCR) and the UN Special Rapporteur on the right to housing. Since the 1990s, those with lived experience of violations of the right to housing in Canada and their advocates have turned to international human rights norms and procedures for an "adjudicative space" in they are recognized as legitimate human rights claimants, given voice to bring to light systemic violations of the right to housing, and able to hold Canadian governments accountable to defined human rights obligations. The NHSA brings this adjudicative space home. It implements longstanding recommendations from UN human rights bodies urging Canada to recognize the right to housing in legislation and to establish a national housing strategy that includes independent monitoring, participation of affected groups, goals, timelines and hearings into complaints.

As the first legislation in Canada to explicitly recognize a socio-economic right affirmed in the ICESCR, the NHSA rejects the dominant legal paradigm of human rights that has prevailed in Canada, in which those who are homeless or precariously housed have

been denied equal recognition as rights-holders. It draws on developments in human rights at the international level and in most domestic jurisdictions over the last quarter century that have rejected any rigid distinction between the rights that were divided into two separate covenants during the cold war, affirming the indivisibility of all human rights and restoring the unified architecture of the *Universal Declaration of Human Rights* (UDHR). With the adoption of an individual petitions procedure for ESC rights under the Optional Protocol to the ICESCR (OP-ICESCR) in 2008 to match a similar procedure that had been in place since 1966 for civil and political rights, the UN General Assembly formally recognized that ESC rights, like their civil and political counterparts, require access to justice, meaningful accountability and effective remedies.

Prior to the adoption of the NHSA, the Government of Canada resisted these historic developments in international law, arguing in domestic courts and at the UN that ESC rights are matters of policy to be left up to governments, not suitable for adjudication by courts or quasi-judicial bodies. Even where the right to life is at stake, the Government of Canada has argued that courts should not require governments to protect the lives of those who are homeless, if doing so could be construed as enforcing a right to housing. The NHSA rejects these outdated notions that have denied "human rights citizenship" to many of the most marginalized groups in Canada, affirming instead that housing is "essential to the inherent dignity and well-being of the person" and that claimants of the right to housing must be afforded access to hearings and effective remedies.

The legislative history of the NHSA makes clear that it is intended to represent a radical departure from earlier opposition to the recognition of the right to housing and other socio-economic rights. The original version of the legislation as tabled was largely based on the 2017 public policy document that created the 2017 National Housing Strategy. It did not recognize the right to housing as a fundamental human right and did not provide for hearings or effective accountability to international human rights. After strong concerns were voiced by civil society organizations, human rights experts and the UN Special Rapporteur on the right to housing, the government introduced extensive amendments to the NHSA to recognize the right to housing as a fundamental human right, provide for hearings before a Review Panel and to clarify the purposes and roles of the National Housing Council and the Federal Housing Advocate in relation to the right to housing. On introducing the amendments, the Minister speaking for the government stated that they were added in order to establish "robust accountability mechanisms" so as to ensure the fulfillment of "one of Canada's key international commitments."

The right to housing under international law is not directly enforceable in

Canadian courts and the NHSA does not change that. It supplements judicially enforceable components of the right to housing contained in a range of statutes and law, including security of tenure legislation and the Canadian Charter. The NHSA focuses, however, on a critical dimension of the right to housing which often transcends individual rights claims and which courts have been ineffective in addressing systemic issues related to progressive realization. To ensure effective remedies in this area of law, the NHSA relies on a more dialogic and less adversarial approach, relinquishing the finality of a court order in favour of an ongoing participatory process, facilitated by the Federal Housing Advocate, through which systemic barriers to the realization of the right to housing are examined and human rights obligations clarified. Findings and recommended measures are not binding like court orders, but they require a response and thus initiate a dialogic process. This novel approach will not work, however, if the commitments to international human rights in the NHSA as considered somehow optional or of less importance because they are not enforceable in court. As recently affirmed by the Supreme Court of Canada, international human rights "were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities." Governments are legally required to comply with international human rights commitments "in good faith" and the effectiveness of the NHSA will rely on governments honouring that obligation.

The legal standard for assessing compliance with the central commitment in the NHSA, to progressively realize the right to housing as recognized in the ICESCR, was agreed in the negotiation of the OP-ICESCR, to be a standard of "reasonableness" as applied by the South African Constitutional Court in the famous *Grootboom* case on the right to housing. This should not be confused with a procedural standard of reasonableness review of government decisions under administrative law. In the context of the right to housing, an assessment of reasonableness begins by considering the circumstances in which rights-holders find themselves living in order to assess whether appropriate positive measures have been adopted to address these. Consistent with the accepted definition of the right to housing as "a place in which to live in peace security and dignity" and the recognition that everyone is equal in dignity in rights, reasonableness analysis focuses on dignity and requires that priority be accorded to those who have been marginalized or excluded. Reasonable housing policy must respond to particular circumstances based on care and concern but at the same time address broader structural issues and consider the effects of systemic discrimination, including racism and colonization. The emerging jurisprudence under the OP-ICESCR has addressed not only individual violations but also systemic issues, and provides important guidance on how to apply the reasonableness standard.

The right to participate in decision-making through "meaningful engagement" is also recognized as a central component of reasonableness. The concept was developed by the Constitutional Court of South Africa in cases involving residents of informal occupations, whose right to housing required the provision of alternative housing prior to any eviction. Rather than imposing a court-ordered remedy, the Court chose to clarify the government's obligations and in that context required the government to negotiate a solution with the residents in accordance with their human rights. The Federal Housing Advocate may play a similar role in some cases by clarifying applicable human rights norms for affected communities and facilitating meaningful engagement with governments to ensure their human rights.

Progressive realization as defined in article 2(1) of the ICESCR requires the realization of Covenant rights "by all appropriate means" and "to the maximum of available resources." Budgetary considerations have in the past been a basis for governments denying access to justice for ESC rights, asserting that they are best placed to decide what is reasonable. The NHSA, however proposes a more dialogic engagement with the issue of resource constraints. As with requirements to reasonably accommodate disability or other groups under human rights legislation, international human rights places the onus on the government to justify any systemic violation of the right to housing on the basis of resource constraints. Under the NHSA, however, a more constructive approach would be appropriate. The government should provide relevant information regarding budgetary constraints to assist the Federal Housing Advocate or Review Panel to determine what is reasonable in the circumstances. There is now a growing body of research comparing the realization of the right to housing and other rights in particular States , relative to available resources and human rights-based budget analysis may be helpful in assessing budgetary constraints. Issues of taxation and tax avoidance are important elements to consider. Any "retrogressive measures" or austerity measures affecting the right to housing, or severe levels of deprivation, such as homelessness, can only be justified under international human rights law in the most exceptional circumstances.

The NHSA's reliance on international human rights law also has important implications for the consideration of jurisdictional issues under the NHSA, which, understandably, restricts findings and recommended measures submitted to the Minister to measures within federal jurisdiction. Federal jurisdiction with respect to international human rights, however, includes responsibilities for leadership and co-ordination of other orders of government which are equally bound by international human rights law, and should be included in the scope of recommended measures submitted to the Minister. In addition, it would be impossible for the Federal Housing Advocate to review and address

systemic issues affecting the realization of the right to housing in Canada without considering the responsibilities and roles of all orders of government, as well as the actions of businesses and other private actors. While the NHSA does not require any response from provincial, territorial or municipal authorities or from private actors, it will be important for the Federal Housing Advocate to communicate recommendations to provincial, territorial or municipal authorities or private actors in relation to a systemic issue, so as to further the progressive realization of the right to housing. The relation between international human rights law and business, as recognized by the Supreme Court of Canada in the *Nevsun* case, is also an evolving area of law. It will be important for the Federal Housing Advocate to consider how the obligation to adopt "all appropriate means" to realize the right to housing may require enhanced measures to regulate financial actors.

1

Introduction

The *National Housing Strategy Act* (NHSA) is unique in Canada for its reliance on international human rights. It is the first Canadian legislation to rely explicitly on international human rights to describe the human right it recognizes and the government's commitments to realizing it. It is the first federal legislation to explicitly recognize a socio-economic right as guaranteed in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) as a "fundamental human right". It is the first legislation to specifically address systemic issues related to the realization of a fundamental human right rather than violations of individual rights guaranteed in domestic law. It is the first legislation to reference the obligation of "progressive realization" under international human rights law, and to require a rights-based strategy with goals, independent monitoring and participatory processes to implement that obligation. And it is the first legislation to provide for independent review, hearings, findings and remedial measures in response to submissions on systemic issues affecting a right under the ICESCR.

The NHSA also has unique international origins. As will be described below, it emerged from Canada's distinctive engagement over many years with international human rights mechanisms in which the growing problem of homelessness and inadequate legislative protection of the right to housing in Canada was identified as a central concern. It implements specific

recommendations from international human rights bodies and its accountability mechanisms draw inspiration from international procedures. As such, it has been applauded as an important initiative by the UN Office of the High Commissioner on Human Rights that may serve as a model for other countries, part of an evolving international project of developing more effective rights-based approaches to meet the challenges of growing socio-economic and housing inequality facing all countries.[1]

Ratified international human rights treaties are not considered judicially enforceable in Canada and the NHSA's unique reliance on international human rights law does not guarantee the right to housing as a right that can be claimed in court. Some may conclude from this that the NHSA has not in fact departed from Canada's past failures to implement the right to housing as a fundamental human right and to provide rights claimants with access to justice or effective remedies. They may read the NHSA as reaffirming that the right to housing is simply a policy aspiration of governments, a human right in name only, which cannot be claimed by rights-holders or adjudicated based on accepted legal norms.

This paper seeks to establish that this is an entirely incorrect understanding of the NHSA's unique reliance on international human rights law. It argues that interpreting the NHSA through the lens of the narrow legal paradigm of human rights that has denied access to justice for claimants of the right to housing would essentially turn the legislation on its head, making the historic recognition of the right to housing as a fundamental human right in legislation into a continuation of its denial.

The paper argues that the NHSA must be understood and implemented based on a new, inclusive paradigm of human rights that has now been accepted internationally. This modern paradigm recognizes the interdependence and indivisibility of the right to housing with civil and political rights, puts economic, social and cultural (ESC) rights on an equal footing with civil and political rights and demands that claimants of the right to housing be equally entitled to access to justice and effective remedies. In significantly amending the NHSA to recognize the right to housing as a fundamental right, providing for submissions, reviews and hearings into systemic issues, parliament rejected the idea that the only rights that count in Canada are individual rights subject to judicial enforcement. It committed to implementing key components of the right to housing under international human rights through novel mechanisms, designed to be more accessible and more effective in

[1] Office of the High Commissioner on Human Rights, "Canada: New rights-focused housing policy shows the way for other countries, says UN expert." (Geneva: 24 June 2019) https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24728&LangID=E.

addressing systemic issues than courts in Canada have proven to be.

The NHSA must therefore be understood as a rejection of the exclusionary paradigm of human rights that has denied human rights citizenship in Canada to those who are homeless or socially excluded by inadequate housing. It relies instead on critical developments in international human rights law, beginning with the *Vienna Declaration and Program of Action* in 1993 affirming that: "The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[2]

The implementation of this commitment to an inclusive human rights movement that places ESC rights on an equal footing and recognizes claimants of these rights as equal in dignity and rights has been arguably the most transformative development in the UN human rights system in the last quarter century. It culminated in the adoption, on December 10, 2008, the 60th anniversary of the UDHR, of a complaints procedure for ESC rights equivalent to what had been in place for civil and political rights since 1976. On that historic occasion the President of the General Assembly introduced the resolution to adopt the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*[3] (OP-ICESCR) by noting that history had divided the originally unified body of human rights in the *Universal Declaration of Human Rights* (UDHR), "resulting in greater focus on civil and political rights to the detriment of economic, social and cultural rights":

> *By adopting this draft optional protocol, the General Assembly will break down the walls of division that history built and will unite once again what the Universal Declaration of Human Rights proclaimed as a sole body of human rights 60 years ago. It will finally provide at the international level the same degree of protection to economic, social and cultural rights that has existed for civil and political rights since 1976. And it will do justice to the goals of the founders of this Organization, which were to ensure for all freedom from fear and freedom from want.*[4]

Remarkably, Canada was one of the few States that voiced reservations about this historic advance of "human rights made whole", as it was described by the UN High Commissioner on Human Rights, the retired Canadian Supreme Court Justice Louise Arbour, who had spearheaded its adoption.[5] The delegate for Canada explained that Canada "has consistently raised concerns regarding a proposed communications procedure under the Covenant on Economic, Social

[2] *Vienna Declaration and Programme of Action*, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5.

[3] UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (10 December 2008) A/RES/63/117.

[4] UN General Assembly, Official Records, Sixty-third session 66th plenary meeting (10 December 2008), 4.30 p.m. New York.

[5] Louise Arbour, *Human Rights Made Whole.* Project Syndicate (June 26, 2008).

and Cultural rights. The Optional Protocol did not take into account the deference accorded to States when assessing policy choices and how to allocate resources. Moreover, some rights contained in the Covenant were defined in a broad manner and could not be subjected easily to quasi-legal assessments."[6] Canada has still not agreed to ratify the OP-ICESCR but the adoption of procedures under the NHSA for "quasi-legal assessments" of the implementation of a legislative commitment to the progressive realization of the right to housing represents a long overdue decision to join the international consensus, at least with respect to the right to housing.

International human rights law requires that all dimensions of the right to housing be subject to effective remedies but States have some flexibility about how to achieve this. Some aspects of the right to housing, such as non-discrimination and security of tenure, rely on administrative tribunals and courts. Others may be subject to administrative hearings or procedures as long as these are timely, accessible and ensure effective remedies. Courts in Canada have not proven to be adept or willing to adjudicate dimensions of the right to housing that engage systemic issues or relate to governments' obligations to transform housing programs and systems over time, to eliminate homelessness and realize the right to housing. These latter dimensions that relate to the obligation of progressive realization described in article 2(1) of the *International Covenant on Economic, Social and Cultural Rights*[7] as requiring States to apply "all appropriate means" and the "maximum of available resources" "with a view to achieving progressively the full realization of the rights in the Covenant" are now, under the NHSA, subject to a new and different form of access to justice. Hearings, reviews, findings, and recommended measures will be provided outside of the court system.

The NHSA's novel approach to adjudication and remedies can be understood as a form of what has been labelled "democratic experimentalism," in which the traditional approach to adjudicative finality and immediately enforceable rights is replaced by more participatory, dialogic and transformational processes for the adjudication and implementation of ESC rights so as to effect systemic change.[8] The fact that the NHSA does not provide for court enforced remedies to individual claims does not mean it does not

[6] UNGA, Third Committee, Official Records. Summary record of the 40th meeting, New York (18 November 2008) 10 a.m. A/C.3/63/SR.40 https://undocs.org/A/C.3/63/SR.40

[7] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966)

[8] Sandra Liebenberg. "Participatory justice in social rights adjudication." *Human Rights Law Review* 18.4 (2018) 623-649; Sandra Liebenberg & Katharine Young, "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?" in Helena Alviar Garcia et al. eds, *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2015) Chapter 13; Roberto Gargarella, "Why Do We Care about Dialogue?: 'Notwithstanding Clause', 'Meaningful Engagement' and Public Hearings: A Sympathetic but Critical Analysis," in Katherine Young (ed.), *The Future of Economic and Social Rights* (Cambridge: Cambridge University Press) 212-232.

respect the right of access to justice and effective remedies guaranteed under international human rights law. On the contrary, it is designed to enhance access to justice for dimensions of the right to housing that have previously been denied effective remedies through more formal judicial processes.

There are, however, undeniable challenges to making the NHSA "experiment" in social rights implementation work in the Canadian context. Most fundamentally, the challenge will be to ensure that a legislative commitment to the right to housing as affirmed in international human rights law is not viewed as a weaker form of commitment that governments may ignore because rights-holders cannot go to court to enforce it. The NHSA challenges governments and other actors to treat a legislative commitment to a right under international human rights law as a commitment of the highest order, recognizing international human rights as the bedrock of Canada's constitutional democracy and the rule of law. As the Supreme Court of Canada has recently explained, international human rights, "the phoenix that rose from the ashes of World War II … were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities."[9]

The NHSA establishes mechanisms through which the human rights moral imperative and necessity to eliminate homelessness and realize the right to housing based on international human rights law are to be given effect through enhanced participation by affected groups, constructive dialogue with governments and other actors, and engagement with systemic issues through collaborative, multi-dimensional strategies. The findings and recommended measures that emerge from these processes for implementing human rights obligations should not be considered less authoritative or legitimate because they do not rely on courts. On the contrary, the outcome of these processes should have enhanced authority and relevance precisely because they address governments' concerns about judicial intrusions into democratic processes and provide a means through which the legislative commitment to the realization of the right to housing can be treated in the manner required by international human rights norms.

Courts in Canada have denied access to hearings into the fundamental human rights of persons experiencing homelessness on the basis that "there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless."[10] Whether or not that is true of domestic law, it is certainly not true of modern international human rights law that provides the basis for accountability and access to justice

[9] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, para 1.

[10] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, para 33.

under the NHSA. Implementing the legislative commitment to the progressive realization of the right to housing based on a "discoverable and manageable standard" under the NHSA will rely on the interpretation and application of international human rights norms. As with other fundamental human rights, these norms rarely provide fixed, universal "standards" but they provide a consistent and coherent set of principles, values and requirements to be applied in response to the lived experience and circumstances of rights claimants and the appropriate means available in particular contexts to address identified systemic issues.

Ultimately, the argument advanced in this paper for an interpretation that "does justice" to the text of the NHSA and the implementation of a new form of human rights practice, based on a more inclusive human rights paradigm is also a plea that something new and important be given a chance to succeed. The NHSA relies on the recognition of the dignity and worth of the human person and the principle that all members of the human family are equal in dignity and rights under international human rights law. It affirms that those who are denied a home in so affluent a country as Canada must henceforth be considered rights-holders, entitled to equal dignity and rights and to both demand and become agents of systemic change for the realization of their right to housing. Although the right to housing under international human rights law and under the NHSA is not directly enforceable by courts, there is a legal standard under both domestic and international law for the implementation of rights in ratified human rights treaties. The *Vienna Convention on the Law of Treaties*[11] requires that States perform their treaty obligations in "good faith"— *pacta sunt servanda* – and this principle is recognized as a peremptory norm of customary international human rights law, and hence part of Canadian law. This paper is a plea for the good faith implementation of the international human rights commitments in the NHSA.

[11] *Vienna Convention on the Law of Treaties* (23 May 1969) United Nations Treaty Series, vol. 1155.

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Legislative History

I. International Origins of the NHSA

The legislative evolution and history of statutes is relevant in considering how they should be interpreted and applied.[12] In the case of human rights legislation, however, the wording of the text usually has a long history outside of the corridors of parliament or the legislature where the text is finalized. Human right texts are invariably the outcome of social movements, advocacy within civil society and the engagement of representative organizations and individuals with the legislative process. It is important that the interpretation of human rights texts be respectful of those historical origins and the expectations of rights-holders, as well as of the intent of parliament as reflected in debates and amendments to the legislation.[13]

The text of human rights legislation also imports meanings and norms from international human rights documents and institutions. International human rights are generally given domestic effect in Canada not by direct incorporation into legislation but by the commitment of all governments to take

[12] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 paras 43-46.

[13] For this kind of analysis of the right to equality in the Charter, see Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38(1) National Journal of Constitutional Law 35–88 and Bruce Porter, "Expectations of Equality" (2006) 33 *Sup Ct L Rev* 23.

necessary legislative and other measures to ensure that international human rights are protected and ensured in the domestic legal order. A derivative of this legislative commitment to domestic implementation is the presumption of conformity with international law that is to be applied by courts when they interpret domestic law.[14] "It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law … and that courts will strive to avoid constructions of domestic law pursuant to which the State would be in violation of its international obligations."[15]

In the case of the NHSA, these three principles of interpretation of human rights legislation— respect for the expectations of rights-holders, consideration of the intent of parliament and the presumption of conformity with relevant international human rights commitments— all converge. Civil society, stakeholder and experts' engagement with government officials, ministers and with the Finance Committee, were influential and led to transformative amendments to the legislation as originally tabled, but the changes sought and secured were those that were considered necessary for compliance with international human rights law. Moreover, the understanding of what was necessary to achieve compliance with international human rights was informed by years of dialogue between the government of Canada, the Committee on Economic Social and Cultural Rights (CESCR) and three UN Special Rapporteurs on the right to housing. Both the CESCR and the Special Rapporteurs repeatedly urged Canada to recognize the right to housing as s fundamental right in legislation, to implement a rights-based national housing strategy and to ensure meaningful accountability and access to hearings and effective remedies for systemic violations. Amendments to the legislation that were adopted by parliament were clearly intended to implement these recommendations. The NHSA is therefore unique for its origins in direct dialogue and engagement with international human rights mechanisms as well as in its direct reliance on the right to housing under the ICESCR.

An additional factor that informed the unique international human rights architecture of the NHSA was the previous experience of stakeholders and advocates for the right to housing in Canada with international human rights mechanisms. Advocacy for the right to housing in Canada has almost always been oriented around the recognition of the right to housing in international

[14] Gib Van Ert, "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law* (New York: Oxford University Press, 2019) p. 501;

Gib Van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in *Centre for International Governance Innovation, Canada in International Law at 150 and Beyond*, Paper No. 2. (Waterloo, Ontario: Centre for International Governance Innovation, 2018).

[15] *R. v. Hape*, 2007 SCC 26 at para 53.

human rights law and submissions on systemic issues related to the right to housing that can now be considered under the NHSA have been advanced for many years through UN procedures. Advocates and rights-holders have made submissions on systemic issues in housing in periodic reviews of Canada before the Committee on Economic, Social and Cultural Rights (CESCR), the UN Human Rights Committee, and other human rights treaty monitoring bodies. They have engaged with the mandate of the UN Special Rapporteur on the right to housing[16] and utilized a communications procedure through the Office of the High Commissioner on Human Rights to address systemic issues. They have participated in Canada's Universal Periodic Reviews.[17] Mutually reinforcing recommendations that emerged from these procedures directly informed the content of the NHSA but the experiences of participating also had a significant effect on the kind of participatory mechanism that civil society advocated in the NHSA. It was natural that in developing models for meaningful accountability, rights claiming and adjudication of an international human right outside of courts, both civil society and legislators would draw on approaches and experiences of international mechanisms serving the same purpose. These provided guidance on how the role of the Federal Housing Advocate, the Review Panel and National Housing Council should be defined in legislation and effectively implemented in practice.

a) Claiming Adjudicative Space at Periodic Reviews by the CESCR

In 1993 Canadian NGOs were instrumental in initiating new procedures at the periodic review of Canada by the UN Committee on Economic, Social and Cultural Rights (CESCR) to provide an oral hearing of NGOs from Canada regarding systemic violations of ESC rights. This new procedure, described as an "unofficial petition procedure" was celebrated internationally but also within Canada, particularly by low-income advocates dealing with homelessness and poverty.[18] It was experienced as a transformative moment in advocacy around homelessness and poverty, a claiming of "adjudicative space" for the right to housing and the right to an adequate standard of living that was unavailable under domestic law—

[16] The official name of the mandate is "Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context" as established by the UN Commission on Human Rights resolution 2000/9. The mandate dates back to a time when the recognition the recognition of the right to housing as an independent right was still contested by some States such as the U.S. but may now be referred to as the Special Rapporteur on the right to housing.

[17] Government of Canada, *The Universal Periodic Review process* available at https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/upr-epu/process-processus.aspx?lang=eng.

[18] Matthew Craven, "Towards an Unofficial Petition Procedure: A Review of the Role of the UN Committee on Economic, Social and Cultural Rights", in Drzewicki, Krzystof, Catarina Krause, and Allan Rosas, eds., *Social rights as human rights: a European challenge* (Åbo:Institute for Human Rights:Åbo Akademi University, 1994),

providing for a right to be "heard" as rights-holders in a forum in which it was possible to hold governments accountable to rights that were not recognized at home.[19]

Periodic reviews of Canada subsequently developed a reputation within the UN treaty monitoring system for extensive written submissions and over-crowded rooms at the UN in Geneva, with unique participation not only by human rights advocates representing a wide range of NGOs, but also by rights-holders and lived experience experts.[20] While Canadian governments invariably responded to concerns and recommendations from the CESCR by citing data showing a high average level of economic development, rights claimants were validated by the way in which Canada was assessed, in international fora, based on its available resources and its capacity to prevent homelessness and poverty. Participants often shared an experience of some degree of shame for their country when they witnessed the shock among international experts, particularly those from less affluent countries, at the extent of homelessness in so affluent a country, with a reputation for commitment to human rights. The challenge, however, was to bring this human rights 'mirror' that was found to be so compelling in Geneva back to Canada.[21]

The experiences of claiming the right to housing in international fora had a significant influence on the unique architecture and final text of the NHSA. Participants experienced the importance of access to rights-based hearings and the transformative power that international human rights accountability brings to issues like homelessness viewed through an international human rights lens that was largely absent within Canada. Housing and homelessness issues loomed large in all periodic reviews of Canada, and the concluding observations on Canada served to clarify the nature of obligations with respect to the right to housing in the Canadian context, including the need for a rights-based National Housing Strategy and what this should entail.

In its first substantive review of Canada in1993 the CESCR expressed considerable concern about the emergence of homelessness, noting the particular effects on families, widespread discrimination in housing, including on grounds related to poverty, and the relatively low percentage of federal budgetary allocations on social housing in comparison to other countries.[22] The

[19] Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality and Citizenship" in Margot Young et al, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 77.

[20] Emily Paradis, "Do Us Proud: Poor Women Claiming Adjudicative Space at CESR," *Journal of Law and Social Policy* Volume 24 *A Road to Home: The Right to Housing in Canada and Around the World* (2015).

[21] Bruce Porter, "Socio-economic Rights Advocacy: Notes from Canada" (1999) 2(1) ESR Review 1.

[22] UN Committee on Economic, Social and Cultural Rights, *Concluding observations: Canada* (10 June 1993) E/C.12/1993/5, (CESCR Concluding Observations Canada, 1993) available at: https://www.refworld.org/docid/3ae6ae638.html para 20.

Committee emphasized the importance of access to justice for the right to housing, expressing concern that the Canadian government had described rights under the ICESCR as mere "policy objectives" of governments rather than as “fundamental human rights”.[23] This was the beginning of a developing tension between Canada and the CESCR regarding whether the progressive realization of the right to housing and other ESC rights could be considered and implemented by Canada merely as a policy goal, to be left up to governments, or whether, as the CESCR increasingly insisted, the right to housing must be recognized as a fundamental human right subject to effective domestic remedies.

By the time Canada was next reviewed by the CESCR, in 1998, housing and homelessness had emerged as a dominant concern. The Committee expressed alarm that Canada had allowed the problem of homelessness and inadequate housing to grow to such proportions and issued a wide-ranging list of recommendations, centred on the need for a national strategy:

> *The Committee recommends that the federal, provincial and territorial governments address homelessness and inadequate housing as a national emergency by reinstating or increasing, as the case may be, social housing programmes for those in need, improving and properly enforcing anti-discrimination legislation in the field of housing, increasing shelter allowances and social assistance rates to realistic levels, providing adequate support services for persons with disabilities, improving protection of security of tenure for tenants and improving protection of affordable rental housing stock from conversion to other uses. The Committee urges the State party to implement a national strategy for the reduction of homelessness and poverty.*[24]

The CESCR continued to emphasize the need for access to justice, reiterating the recommendation that courts and governments adopt interpretations of rights under the *Canadian Charter of Rights and Freedoms* (the Canadian Charter) consistent with the ICESCR and suggesting that human rights legislation be amended to include the right to housing and other social and economic rights. The Human Rights Committee issued concluding observations on Canada a few months later, in which it, too, expressed concern about widespread homelessness, stating that Canada has an obligation to address systemic homelessness in order to protect the right to life under the *International Covenant on Civil and Political Rights* (ICCPR)[25] Craig Scott

[23] *Ibid*, para 21.

[24] UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* (10 December 1998) E/C.12/1/Add.31, available at: https://www.refworld.org/docid/3f6cb5d37.html para 28.

[25] UN Human Rights Committee, *Concluding Observations: Canada* (7 April 1999) CCPR/C/79/Add.105 para 12; UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966).

wrote that "it is not an overstatement to describe the two sets of Concluding Observations as pathbreaking in their focused treatment of the overlapping and shared obligations which emanate from the two Covenants as a partly fused legal order. .... Significantly, both committees' Concluding Observations also address a number of inadequacies in the opportunities for legal protection in Canada's legal system of Covenant rights in such a way that we cannot, if we act at all in good faith, relegate the committees' concerns to some rarefied international space."[26]

In the 2006 review of Canada, the CESCR noted with significant frustration Canada's failure to implement its recommendations from 1998, noting the higher numbers of homeless people and a wide range of violations of the right to housing affecting women, Indigenous Peoples, children, persons with disabilities and other vulnerable groups. The CESCR reiterated its previous recommendations but added to these a more specific recommendation for a National Housing Strategy that became the central plank of advocacy by civil society groups for a rights-based national housing strategy: "The Committee urges the State party to implement a national strategy for the reduction of homelessness that includes measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms, in keeping with Covenant standards."[27]

Continued failure by Canada to implement a national housing strategy and further increases in widespread homelessness prompted the CESCR in its 2016 periodic review to again urge Canada to develop and effectively implement a human rights based national strategy on housing and to examine the root causes of the continued increase in homelessness. [28] The Committee emphasized the need to address systemic inequality, exclusion and violence linked to inadequate housing and homelessness, including measures to address violence against women in a "holistic" manner by ensuring access to long term affordable housing and the integration of a "disability lens" into all housing plans and policies. The 2016 concluding observations recommended a range of measures to be included in aligned national and provincial/territorial housing strategies, including adjusted social assistance rates to reflect the real cost of housing, increased social housing, regulations to protect existing affordable housing stock, and reformed evictions laws to conform with international human rights standards.

[26] Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Groups: Finally Into the Spotlight?" (1999) 10:4 *Constitutional Forum*.

[27] *Ibid*, para 62.

[28] CESCR, Concluding Observations: Canada (23 March 2016) E/C.12/CAN/CO/6, paras 39, 42.

b) The Special Rapporteur on the right to adequate housing

Special procedures of the UN Human Rights Council provide an alternative avenue for civil society organizations and rights-holders to bring their circumstances to light, identify systemic issues and hold governments accountable to international human rights norms. Special Rapporteurs are independent experts appointed by the UN Human Rights Council for a three-year term, renewable once, receiving staff and other support from the Office of the High Commissioner for Human Rights. The parallels between the mandate of Special Rapporteurs and that of the Federal Housing Advocate under the NHSA, also appointed as an independent expert for a three-year term, renewable once, and receiving staff and other support through the Canadian Human Rights Commission, are striking.

One of the important functions of special procedures mandates is to carry out country visits or fact-finding missions at the invitation of States to "assess the general human rights situation in a given country, as well as the specific institutional, legal, judicial, administrative and de facto situation under their respective mandates."[29] Mission reports outlining findings and recommendations are submitted to States for response and presented annually to the UN Human Rights Council, where States are provided an opportunity to engage in inter-active dialogue with the Special Rapporteur. The procedure provides a useful model for the way in which the Federal Housing Advocate may engage directly with affected communities in order to identify systemic issues, or to investigate systemic issues raised in submissions under the NHSA procedures.

In 2007, the UN Special Rapporteur on the right to housing, Miloon Kothari, conducted a mission to Canada, meeting with stakeholders, affected communities and NGOs and government officials across the country. The mission substantiated many of the concerns that had been raised by the CESCR, and one of the central recommendations in his Mission Report on Canada was for "a comprehensive and co-ordinated national housing policy based on indivisibility of human rights and the protection of the most vulnerable."[30] The key ingredients were again listed: "measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms."[31]

The Special Rapporteur also expressed concern at the lack of legal redress for

[29] OHCHR, *Country and other visits of special procedures* https://www.ohchr.org/EN/HRBodies/SP/Pages/CountryandothervisitsSP.aspx

[30] United Nations Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada (9 to 22 October 2007)*, UN Human Rights Council OR, 10th Sess, UN Doc A/HRC/10/7/Add.3, (2009) at para 90 [*SR Mission to Canada.*

[31] *Ibid* para 90.

the right to housing resulting from insufficient coverage in domestic legislation.[32] He noted that "the exclusion of rights such as the right to adequate housing from the statutory mandate of national human rights institutions is of particular concern in view of the Paris Principles."[33] His summary recommendations led off with the statement that "the legal recognition of the right to adequate housing is an essential first step for any State to implement the human right to adequate housing of the people under its protection."[34]

The Special Rapporteur's 2007 Mission Report also focused on the right to housing of Indigenous Peoples, recommending "a comprehensive and coordinated housing strategy based on a human rights approach, in collaboration with Aboriginal governments and communities, to address effectively their responsibility to ensure adequate housing for on and off reserve Aboriginals" as sell as "to commit funding and resources to a targeted Aboriginal housing strategy that ensures Aboriginal housing and services under Aboriginal control."[35] As with the recommendations emerging from period reviews before the CESCR, a review of the many concerns and recommendations made by the Special Rapporteur on the right to housing following his ten day mission to Canada reveals that these are very consistent with the consensus of experts on where Canada went astray in relation to housing policy over the last two decades. Even relatively cursory and under-resourced international human rights accountability mechanisms for the review of Canada's compliance with the right to housing have produced reliable results, in large part by providing a forum in which the experience of systemic issues could be brought to light.

c) The Communications Submitted to the Special Rapporteur

Another procedure at the U.N. utilized by stakeholders and civil society organizations in Canada, very similar to the procedure for submissions to the Federal Housing Advocate under the NHSA, is the "communications procedure" under the Special Procedure mandates. This procedure allows for any individual, group, civil-society organization, inter-governmental entity or national human rights body to make a submission to one or more "mandate holders" (such as the Special Rapporteur on the right to housing) providing a factual description of alleged violations of human rights, based on credible and detailed information. An online form is available for making submissions.[36]

If one or more mandate holders decides to act on a submission, they will send to a State (or sometimes to a non-state

[32] *Ibid*.

[33] *Ibid* para 33.

[34] *Ibid* para 88.

[35] *Ibid* paras 105-106.

[36] Available at https://spsubmission.ohchr.org/

actor) a "letter of allegation" concerning past human rights violations, or an "urgent appeal" in the case of an ongoing issue. The letter or appeal describes the factual information that has been received and outlines the applicable international human rights norms which may apply, asking the State or the non-state actor to respond within a reasonable timeframe.

One communication in particular was influential in the development of the NHSA. In 2017 several organizations representing homeless communities in British Columbia made submissions to the Special Procedures branch regarding the circumstances of 140 informal settlement residents on provincial land in Victoria; the eviction and displacement of almost 800 households in Burnaby British Columbia and the discrimination and stigmatization experienced by homeless persons in Maple Ridge, British Columbia. Information about these particular circumstances and events was presented as evidence of systemic violations of the right to housing that were occurring across Canada.

An Allegation Letter was sent to Canada by four Special Rapporteurs — on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; on the right to adequate housing; on the rights of Indigenous Peoples; and on extreme poverty and human rights. The Letter stated that "increasing homelessness in Canada, even during times of economic prosperity, appears to be at least in part a result of a failure to recognize housing as a fundamental right and to respond to concerns and recommendations from human rights bodies, parliamentary committees and experts to implement a national housing strategy based on human rights."[37]

The Special Rapporteurs noted that the Federal Government had recently committed to implement a national housing strategy but noted that it was unclear "whether the national housing strategy will be based on the recognition of the right to adequate housing and the need for meaningful accountability, access to justice and effective remedies."[38] They asked for information from the government for clarification of whether the national housing strategy would "reference Canada's international human rights obligations and include goals and timelines for the elimination of homelessness, independent and transparent accountability mechanisms, and a complaints mechanism to provide access to justice for violations of the right to housing."[39]

d) Lessons Learned from Engagement with UN Human Rights Bodies

It is clear from the above that the content of the NHSA should be interpreted in light of, and welcomed as

[37] Office of the High Commissioner on Human Rights (OHCHR) AL CAN 1/2017

(16 May 2017) p. 2.

[38] *Ibid*, p. 7.

[39] *Ibid*, p. 17.

a positive outcome of a longstanding dialogue with UN human rights bodies and with Special Procedures, in which the requirement of a rights-based national housing strategy, the legislative recognition of the right to housing as a fundamental human right, and provision for access to justice and effective remedies for the right to housing were identified central priorities.

It is also clear that the design of the mechanisms through which access to justice is to be implemented under the NHSA was informed by a human rights practice around the right to housing in Canada that largely relied on international quasi-adjudicative hearings and submissions procedures. The Federal Housing Advocate's mandate to monitor goals and timelines, to conduct reviews of systemic issues, to engage with rights-holders and governments and to issue reports with findings and recommended measures are more akin to the human rights monitoring, review, communication and petition procedures at the UN than to human rights mechanisms under any previous domestic human rights legislation in Canada. Similarly, hearings before the Review Panel, with direct participation by rights claimant and NGOs into systemic issues have more in common with the participatory and non-adversarial hearings that are conducted by human rights treaty monitoring bodies than with procedures in human rights tribunal or courts.

International procedures have provided a space in which rights-holders and human rights and housing organizations have been able bring to light the lived experience of violations of the right to housing and address long-neglected systemic issues linked to marginalization and exclusion from housing, drawing on an established framework of human rights norms and obligations. These procedures have provided opportunities for direct dialogue of civil society representatives with high level government officials that are rarely available at home. For example, the Canadian Ambassador regularly hosts a reception at the Permanent Mission in Geneva in conjunction with periodic reviews, at which NGOs and representatives from claimant communities are able to meet with the Canadian delegation. It is well recognized, however, that the interaction that is facilitated in Geneva, in the context of reviews that occur every five years or more, is far too limited.

Civil society organizations and treaty monitoring bodies have long advocated for a more effective process within Canada to ensure ongoing engagement with civil society regarding the implementation of international human rights obligations, including preparation for and follow-up to the periodic reviews in Geneva. In November, 2020 the Federal, Provincial and Territorial Ministers Responsible for Human Rights endorsed a *Protocol for Follow-up to Recommendations from International Human Rights Bodies* and an *Engagement Strategy on Canada's International Human Rights Reporting Process*, but without any meaningful

consultation with civil society about the contents.[40] The engagement strategy is based on principles of transparency and accountability; inclusion and accessibility; collaboration with civil society and Indigenous representatives; and sustainability of resources. Discussions are ongoing about how the protocol on engagement can be improved and implemented and it is hoped that procedures under the NHSA will be recognized as important components of engagement with and follow-up to international review and petition procedures by the newly formed

There is an appreciation of the role of civil society organizations and human rights experts at the UN that contrasts with the way in which NGOs and human rights experts are sometimes treated within Canadian processes, such as at parliamentary committees.[41] The UN procedures rely on the information that is solicited from rights-holders, human rights organizations and civil society representatives and they encourage respectful and constructive dialogue among rights-holders, advocates and government representatives. Rights-based procedures only work if rights claimants and their advocates are able to be heard respectfully and the systemic issues they face adequately understood through the lens of their experience rather than through a politicized process. It will be important that the ethic of constructive and respectful dialogue that is encouraged at the UN be imported into the similar dialogic procedures under the NHSA.

Similarly, it will be important for civil society and governments to extend the kind of courtesy and respect to the Federal Housing Advocate that is expected to be accorded to UN independent experts. Like a UN Special Rapporteur, the Federal Housing Advocate must be free to identify problems and shortcomings in government policy without this being viewed as a political critique. Just as any Mission Report submitted by a Special Rapporteur is expected to identify areas of non-compliance with human rights and make recommendations for improvement, so the findings and recommended measures submitted to government by the Federal Housing Advocate must be expected to raise concerns and propose changes. That is the value of accountability mechanisms. But it is important that the role of the Federal Housing Advocate not be personalized, as if the views expressed

[40] See, for example, the *Engagement Strategy on Canada's International Human Rights Reporting Process* (2020) endorsed by the Federal, Provincial and Territorial Ministers Responsible for Human Rights its meeting of 9-10 November, 2020 available at https://www.canada.ca/en/canadian-heritage/services/about-human-rights/engagement-strategy-human-rights-reporting.html.

[41] See, for example, the interaction between the Finance Committee member Pierre Poilievre and the UN Special Rapporteur on the right to housing regarding the NHSA, in which Mr Poilievre described UN special procedures as "wasting egregious sums on international lobbyists who travel around and lecture for a living" (mandate holders are actually unpaid by the UN) and the Special Rapporteur on the right to housing, as "this looney-tune here the other day from the UN." Minutes of Proceedings, Standing Committee on Finance (FINA) 42nd Parliament, 1st Session Meeting 213 (May 15, 2019) 16:50 p.m.; Minutes of Proceedings, Standing Committee on Finance (FINA) 42nd Parliament, 1st Session Meeting 212 (May 14, 2019) 13:50.

are personal opinions rather than assessments based on human rights norms. Such findings should be treated with respect, subject to the obligation to engage in good faith with human rights-based procedures and not viewed as statements of opinion to be immediately subjected to critique and defense.

Another critical lesson that has emerged from experiences with international human rights mechanisms is the importance of ensuring that civil society organizations have the capacity and resources to play the role that is required of them to make the processes effective. UN treaty bodies have made efforts to provide transparent processes for NGO involvement and they have encouraged collaboration among civil society organizations to ensure that all issues and relevant information is presented as efficiently as possible. Some of the most important benefits of the international review and accountability procedures, whether in the context of periodic reviews or engagement with Special Rapporteurs conducting missions or follow-up visits to Canada, have been the way in which they have brought civil society organizations from across Canada together to work collaboratively to identify priority systemic issues linked to international human rights obligations. However, the demands of this kind of co-ordinating work are extensive and there have never been sufficient resources available for this work. Inequities across Canada with respect to funding for human rights-based work play a part, so that, for example, issues from Ontario have tended to better represented at treaty body review in Geneva because the Ontario legal clinic system is better funded than others to work on systemic issues. The Federal Court Challenges Program has not provided funding for cases under UN petition procedures, though the Test Case Funding Program under the Ontario Legal Aid Plan has been able to do so in exceptional cases.

Resources for affected communities to collaborate in similar fashion in order to engage effectively with the Federal Housing Advocate and the Review Panel under the NHSA will be essential. The 2017 National Housing Strategy included a commitment to “community tenant-based initiatives” but this fund is managed by social housing providers and is primarily focused on encouraging tenant participation in community social housing and in local decision-making. As was pointed out by civil society in response to the 2017 National Housing Strategy, the name of the fund itself would seem to exclude those who are homeless, which is an unacceptable exclusion for the implementation of community based engagement and participation under the NHSA. A new fund should be established with the explicit purpose of providing necessary support for civil society and community organizations to assist rights-holders, including those who are homeless or precariously housed, in identifying systemic issues, preparing submissions to the Federal Housing Advocate and participating in hearings before the Review Panel. If the NHSA is to bring accountability to international human

rights closer to home by advancing the idea of realizing the right to housing as a shared commitment and ongoing process involving civil society organizations, lived experience experts, human rights experts and diverse communities, it will be important to allocate resources to ensure that all of these voices can be heard. Current funding seems to be largely restricted to academic research, housing providers and tenant-based initiatives and has failed to recognized the critical role to be played under the NHSA by organizations with expertise in human rights in housing and civil society organizations representing and working with those who have lived experience of violations of the systemic issues that are to be addressed under the NHSA.

Another key element that has been important for civil society and rights-holders using international human rights mechanisms to claim and promote the right to housing in Canada has been the commentary issued by the CESCR and by the UN Special Rapporteur on specific issues or to clarify particular obligations. These mechanisms would not have been as effective if civil society organizations and rights-holders had not been able to refer to general comments issued by the CESCR which have clarified, for example, that the obligation of progressive realization means that States must adopt a National Housing Strategy with goals and timelines, that evictions should not be authorized if they will result in homelessness or that discrimination because of socio-economic status must be prohibited. Commentary and, more recently jurisprudence from the CESCR under the OP-ICESCR (discussed below), thematic reports on many components of the right to housing produced by the UN Special Rapporteur on the right to housing, Special Rapporteur's Mission Reports, previous concluding observations and other human rights documents emanating from the OHCHR have been critical to effective engagement, allowing participants to identify systemic issues and propose solutions in line with recognized human rights obligations.

It is worth considering how the these documents can be made available and accessible to participants and affected communities using the NHSA procedures and how these international practices may also be adapted to enable the Federal Housing Advocate, as an independent expert akin to a Special Rapporteur, to provide authoritative comments or statements to clarify what the right to housing or its progressive realization under the NHSA requires in particular contexts in Canada. It will also be important to ensure that the reports on systemic issues, with findings and recommended measures submitted to the Minister, are written in a manner that also provides an authoritative resource on obligations under international human rights law. Like the CESCR's comments or observations on States' obligations in concluding observations or Views in response to petitions under the OP-ICESCR, or the General Comments of treaty bodies or

the thematic reports or mission reports from Special Rapporteurs, authoritative guidance for States and civil society organization should emerge from the procedures and practices under the NHSA, and these should be disseminated in a variety of ways, so that civil society organizations, governments, community organizations and marginalized communities are able to make use of them.

II. Legislative Amendments

a) The 2017 Housing Strategy

It is important to clearly distinguish the 2017 National Housing Strategy released in November 2017 in the form of a "public policy document", entitled *Canada's National Housing Strategy: A place to call home*[42] from the *National Housing Strategy Act* adopted by parliament in June 2019, and which entered into force on July 9, 2019. There has been some confusion because the 2017 document included, in very preliminary form, the federal government's commitment to a rights-based approach to housing and described in summary fashion the proposed mandates of a National Housing Council and a Federal Housing Advocate. These were to be implemented in legislation, following consultations with civil society and housing providers on how a rights-based approach should be implemented. The understanding of what constitutes a rights-based approach and therefore the appropriate roles of the National Housing Council and Federal Housing Advocate was dramatically different in the 2019 legislation from what had been envisaged in the 2017 document and it is important that the NHSA and the mandates of the Federal Housing Advocate and the National Housing Council be interpreted correctly, based on the legislation. As noted in the paper prepared by Michèle Biss and Sahar Raza on behalf of the National Right to Housing Network (NHRN), the NHSA requires the Minister to develop and maintain a National Housing Strategy to further the Housing Policy that was adopted in the 2019 NHSA, and there are many elements of the 2017 Housing Strategy which require significant changes in order to meet that requirement.[43]

The 2017 public policy document promised that following a period of consultations, new legislation would be introduced that "promotes a human rights-based approach to housing." It noted that this will require the federal government to maintain a National Housing Strategy that prioritizes the housing needs of the most vulnerable.... and also require regular reporting to Parliament on progress toward the

[42] *Canada's National Housing Strategy: A place to call home* https://eppdscrmssa01.blob.core.windows.net/cmhcprodcontainer/sf/project/placetocallhome/pdfs/canada-national-housing-strategy.pdf

[43] National Right to Housing Network, *Implementing the Right to Housing in Canada: Expanding the National Housing Strategy*, Prepared for the Office of the Federal Housing Advocate by Michèle Biss and Sahar Raza, pp

Strategy's targets and outcomes."[44] Significantly, it referenced the right to housing and international human rights law, by describing the strategy as "additional steps to progressively implement the right of every Canadian to access adequate housing." It was unclear, however, whether the rights-based approach promised in the 2017 Strategy would conform with the requirements of international law, as had been clarified by the CESCR and the UN Special Rapporteur. The document stated only that the National Housing Strategy will be "grounded in principles: inclusion, accountability, participation and non-discrimination, and will contribute to United Nations Sustainable Development Goals and affirm the International Covenant on Economic, Social and Cultural Rights."[45] This could be interpreted as simply affirming principles of good housing policy and obligations of non-discrimination that were already legal requirements under human rights legislation and the Canadian Charter, rather than as a commitment to a truly transformative approach that would recognize the right to housing as a fundamental human right and ensure meaningful accountability for its progressive realization, as required by international human rights law.

As examined in the NRHN's paper, the 2017 National Housing Strategy set ten year targets of a 50% reduction in chronic homelessness, 530,000 households being taken out of housing need, up to 100,000 new housing units and 300,000 repaired or renewed housing units. It did not, however, explain how these goals were determined, reference any standard related to the progressive realization of the right to housing or indicate whether the legislation requiring future governments to maintain a national housing strategy would require goals and timelines to meet a standard required by international human rights law. All of that was left to the proposed legislation which would set out the requirements of a rights-based national housing strategy.

Subsequent to the release of the 2017 National Housing Strategy, exchanges took place with civil society and international human rights bodies regarding what would be required in the promised legislation to implement a rights-based approach in conformity with international human rights standards. The Special Rapporteur on the right to housing welcomed the announcement of the 2017 National Housing Strategy but sent a follow-up "Open Letter" to the Prime Minister of Canada and a number of cabinet ministers to clarify that much more was needed in the proposed legislation. "I would never support, nor can I imagine, a "human rights-based approach" that does not reference and guarantee the right to housing and that does not provide access to justice and effective remedies. With respect to obligations to monitor accountability, I made it clear in

[44] 2017 National Housing Strategy.

[45] *Ibid* p 8.

my thematic report that these must be understood in relation to "compliance with the right to housing.""[46]

Canada's Ambassador and Permanent Representative to the United Nations in Geneva responded to the Open Letter, describing the launch of Canada's National Housing Strategy as "a watershed moment" and stating that "by adopting a human rights-based approach to housing, and in upholding its obligation to progressively realize the right to adequate housing under the International Covenant on Social, Economic and Cultural Rights, the Government of Canada is striving to ensure that every Canadian has a place to call home for generations to come."[47] The Ambassador promised ongoing dialogue with the Special Rapporteur regarding the promised legislation.

b) The *National Housing Strategy Act* as Tabled for First Reading

In April, 2019 a follow-up letter was sent to the Special Rapporteur on the right to adequate housing at the OHCHR, this time directly from the Minister of Families, Children and Social Development, the Hon. Jean-Yves Duclos. The letter announced the tabling of the *National Housing Strategy Act* as part of the *Budget Implementation Act* (Bill C-97). The Minister assured the Special Rapporteur that "This important piece of legislation would not have been possible without your contribution and those of members of civil society." The letter noted that the legislation would "ensure that the voices of the most vulnerable, those who are too often left on the sidelines, are heard." It noted that the proposed legislation was "grounded in a human rights-based approach to housing" and that it "declares it a policy of the Government of Canada to advance progressively the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights."[48]

The NHSA as it was tabled in parliament at first reading could be welcomed as a step in the direction of institutionalizing a more participatory model for the development of housing policy to further the progressive realization of the right to housing, with consultation and engagement with vulnerable groups about the systemic barriers they face in accessing housing. The National Housing Council was required to include representation from those with lived experience of homelessness and housing need and would provide advice to the Minister regarding the Housing Strategy. The Federal Housing Advocate would consult with and receive submissions from vulnerable groups and those with experience of homelessness

[46] Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *Open Letter (Canada)* (22 June 2018) OL CAN 2/2018 p. 3.

[47] Minister of Families, Children and Social Development, Hon. Jean-Yves Duclos, Letter to the Special Rapporteur on adequate housing (April 10, 2019) https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=34624.

[48] *Ibid*.

regarding systemic housing issues and barriers faced in accessing housing.

However, the tabled legislation fell dramatically short of instituting a rights-based approach based on the right to housing under international human rights law. In fact, it appeared to have been carefully drafted to avoid any explicit recognition of, or accountability to, the right to housing. The National Housing Strategy would recognize "the importance of housing in achieving social, economic, health and environmental *goals* [emphasis added]. It did not link the roles of the National Housing Council and the Federal Housing Advocate to the commitment to the progressive realization of the right to housing or clarify that reports to the Minister would include findings or recommended measures in reference to that commitment. The Federal Housing advocate would only report to the Minister annually, not directly on findings and recommended measures in response to submissions on a systemic issue. The legislation as tabled did not provide any clear rights-based architecture for the Federal Housing Advocate's reviews of systemic issues or engagement with marginalized communities and it did not provide for any hearings at all.[49] In short, it did not break from Canada's historical resistance to recognizing the right to housing as a fundamental human right that requires access to hearings and effective remedies. It could easily be interpreted and applied within the dominant, exclusionary human rights paradigm in which the right to housing is viewed as a policy aspiration of governments to improve housing outcomes for marginalized groups, without any meaningful accountability to marginalized groups as rights-holders.

Submissions from a wide range of civil society organizations focused on the need for four key changes to the legislation in order to comply with Canada's obligation under international human rights law to provide meaningful accountability and access to effective remedies. These were supported by the Special Rapporteur on the right to housing, who appeared as an expert witness before the Finance Committee considering Bill C-97. She provided a brief summary of her previous interactions with the government about the legislation, noting that the government had "appeared to be reluctant to recognize the right to housing in legislation or to ensure access to effective remedies through which rights-holders could hold the government accountable to the obligation to progressively realize the right to housing." She explained that this would be at odds with Canada's international human rights obligations and urged that the legislation be amended to conform with those obligations. She supported the following four key changes that had been

[49] Bill C-97 (First Reading) April 8, 2019 available at https://parl.ca/DocumentViewer/en/42-1/bill/C-97/first-reading.

proposed by a number of civil society organizations:

- a clear articulation that housing is a fundamental human right.
- monitoring of the implementation of the progressive realization of the right to housing.
- provision for the Federal Housing Advocate to receive petitions on systemic housing issues linked to the progressive realization of the right to housing and to make specific recommendations to the Minister, requiring a response.
- a procedure for the Federal Housing Advocate to refer important systemic issues to public hearings before a panel, ensuring affected groups have a voice and that the panel's findings and remedial recommendations are considered by the minister.[50]

c) The *National Housing Strategy Act* Transformed at Third Reading

All of the essential elements identified for addition by the Special Rapporteur and civil society organizations before the Finance Committee were included in substantial amendments to Bill C-97. Many were moved and adopted at third reading, subject to a rare royal recommendation, because they had financial implications. These included provisions relating to submissions, findings and recommendations by the Federal Housing Advocate, the creation of a Review Panel to hold hearings, and the obligation of the Minister to respond to reports and recommended measures to address specific systemic issues.[51] On introducing the amendments, the Hon. Maryam Monsef noted that an amendment had been added at the Committee stage to recognize the right to adequate housing as a fundamental human right affirmed in international law, but "simply stating that housing is a human right means nothing unless there are robust accountability and reporting mechanisms in place. With these amendments, we are doing precisely that." She stated that "Today's amendments fulfill one of Canada's key international commitments. We are a signatory to the UN International Covenant on Economic, Social and Cultural Rights. As such, we have a responsibility to meet one of the covenant's core commitments: to progressively realize the right to adequate housing as part of an adequate standard of living for our citizens."[52]

The changes made by parliament to the original version of the NHSA presented at first reading radically transformed its architecture. The Housing Policy

[50] Minutes of Proceedings, Standing Committee on Finance (FINA) 42nd Parliament, 1st Session Meeting 213 (May 15, 2019).

[51] Statutes of Canada 2019, Chapter 29, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures* Assented to June 21, 2019 Bill C-97.

[52] *House of Commons Debates*, Volume 148, Number 424, 1st Session, 42nd Parliament Official Report (Hansard), (May 31 2019).

Declaration now leads with the recognition "that the right to housing is a fundamental human rights affirmed in international human rights law." All of the later components of the legislation—the purpose of the national housing strategy, the mandates of the National Housing Council, the Federal Housing Advocate and the newly added "Review Panel" all refer back, because of the amendments, to the Housing Policy, and thus to the recognition of the right to housing under international human rights law, to its link to core human rights values of the inherent dignity of the person, and the commitment to further its progressive realization as recognized in the ICESCR.

Under the adopted version of the NHSA, the Minister must maintain and implement a National Housing Strategy, not because housing is related to social and economic "goals", but because it is itself a social and economic human right, recognized as such in the Housing Policy Declaration. The National Housing Strategy must "further the housing policy, taking into account key principles of a human rights-based approach to housing." The Housing Council "is established for the purpose of furthering the housing policy and the National Housing Strategy" and will, pursuant to the amendments, include members selected for their expertise in human rights and housing as well as lived experience expertise in homelessness and housing need. The Federal Housing Advocate will "monitor the implementation of the housing policy", receive submissions on systemic issues and submit a report to the Minister on "findings" and "recommendations to take measures .... to further the housing policy, including the progressive realization of the right to adequate housing and the National Housing Strategy." The Review Panel is constituted to hold hearings into particular systemic issues referred by the Housing Advocate. In appointing the three members of the Review Panel, the Housing Council is to ensure representation of lived experience expertise and human rights expertise, and hearings are to include participation by members of affected communities as well as groups that have expertise in human rights and housing.

There can be little question that the intent of parliament in making these amendments to the legislation was to effect a fundamental transformation of the legislation from text that had been drafted on the assumption that the government wished to continue to treat commitments under the ICESCR to the right to housing as matters of policy rather than as human rights obligations to which they should be held accountable through submissions from affected groups, access to hearings and effective remedies. The amendments were not minor clarifications or additions, but a transformative response to concerns that if Canada did not fundamentally change its approach to human rights in the context of housing and homelessness, the National Housing Strategy would be ineffective. The NHSA as adopted represents a clear parliamentary intent to implement

Canada's obligation to progressively realize the right to adequate housing under the ICESCR, not as a policy aspiration, but as the realization of a fundamental human right subject to access to justice and effective remedies based on international human rights norms.

3

The Housing Policy Declaration

I. Recognizing the right to adequate housing as a fundamental human right affirmed in international human rights law

The recognition of the right to housing as a fundamental human right affirmed in international human rights law in the NHSA was transformative, not only for the text and meaning of the legislation, but for Canadian law and policy.

In international law the term "fundamental human right" is strongly associated with the right to an effective remedy and the unified architecture of the UDHR, containing both civil and political and ESC rights. The UDHR affirmed "faith in fundamental human rights" and included ESC rights as "indispensable for dignity and the free development of the person." The central guarantee of a right to an effective remedy affirmed in article 8 of the UDHR therefore applied to ESC rights as well as to civil and political rights, both of which were considered fundamental rights. "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

In regional human rights systems, the term "fundamental rights" has also been employed as an all-encompassing term for human rights in a range of categories that must be ensured access to justice and effective remedies in an appropriate manner within a State's legal systems.

The *American Convention on Human Rights* affirms the right to effective remedies for "fundamental rights recognized by the constitution or laws of the State concerned or by this Convention."[53] The *European Charter of Fundamental Rights*, which includes a right to "social and housing assistance so as to ensure a decent existence" similarly affirms the right to an effective remedy before a competent court or tribunal.[54] The *African Charter of Human and Peoples' Rights* affirms the right to a hearing and appeal to competent national organs against acts violating "fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force."[55] Recognizing the right to housing as a "fundamental human right" in the NHSA therefore indicates that it should be recognized as being on an equal footing with civil and political rights and subject to hearings, adjudication and effective remedies before competent and independent bodies.

Historically, in Canada and internationally, the neglect of the right to housing and other ESC rights has been inextricably linked to the denial of access to justice. The division of the rights in the UDHR into two covenants during the cold war years of the 1950s and 1960s led to distinctions between the two categories of rights related to their justiciability. The ICCPR commits States , in Article 2(3), to ensuring access to "competent judicial, administrative, legislative or other authorities" to determine their rights and provide "effective remedies". [56] The ICESCR, on the other hand, commits States to the progressive realization of ESCR "by all appropriate means", including legislation" and "to the maximum of available resources."[57] More significantly, the ICCPR was adopted with an accompanying optional complaints procedure to provide access to justice when domestic remedies have been exhausted or are unavailable, while the ICESCR was adopted without a complaints procedure.

Prior to the Vienna World Conference on Human Rights in 1993, these distinctions were widely viewed as suggesting that while some components of ESC rights, such as those linked to non-discrimination or the right to life, must be subject to effective judicial remedies, obligations to progressively realize ESC rights were matters of policy to be left to legislatures to implement as they saw fit. The two decades following the Vienna World Conference saw a gradual but eventually decisive renunciation of the idea that ESC rights claimants may be denied access to effective remedies and a retrieval of a unified conception of human rights as indivisible and

[53] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

[54] *Charter of Fundamental Rights of the European Union,* 2012/C 326/02 articles 34, 47.

[55] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")* (27 June 1981) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) article 7(1)(a).

[56] ICCPR art 2(3).

[57] ICESCR art 2(1).

interdependent, based on the UDHR. These historic changes in the understanding of the architecture of international human rights culminated in the adoption of a complaints procedure in the OP-ICESCR in 2008, which came into force twenty years after the Vienna World Conference, in 2013.

The demand for access to justice and effective remedies for the right to housing and other ESC rights within the international system was also a response to emerging human rights challenges and new forms of human rights practice at the community and State level. Most new constitutional democracies have included the right to housing and other social and economic rights in their constitutions, while courts in older constitutional democracies and regional human rights systems have recognized the right to housing as indivisible from the right to life and other civil and political rights.[58] International and domestic human rights institutions, local, regional and national governments, courts and civil society organizations around the world have been actively seeking better means to address emerging human rights challenges linked to homelessness, urbanization, development-based displacement, financialization of housing, eviction of low-income communities and other systemic issues. It has become clear that housing deprivation is inextricably linked to systemic patterns of marginalization and social exclusion and can only be adequately addressed through improved access to justice, participation in decision-making by those affected and more meaningful governmental accountability to the right to housing.

Until the adoption of the NHSA, this significant paradigm shift occurring within the international human rights system and in most domestic and regional legal systems, and widely affirmed within civil society in Canada, had had little effect on the dominant legal paradigm of human rights in Canada. It had not been reflected in legislation and courts in Canada had declined to recognize the connection between the right to life and the right to housing that was being increasingly recognized elsewhere. While courts such as the Supreme Court of India have interpreted the right to life as being indivisible from the right to housing, placing obligations on governments to adopt positive measures to protect the right to life of those who are homeless by ensuring access to shelter and housing, Canadian courts have taken the idea of interdependence and indivisibility of human rights in the opposite direction. They have applied what has been referred to by international human rights scholars as a false “negative inference” drawn from Canada’s recognition of rights under the ICESCR that are not contained in the Canadian Charter. They have reasoned that courts should not require

[58] Bruce Porter, "The Interdependence of Human Rights" in Jackie Dugard, Bruce Porter, Daniela Ikawa and Lilian Chenwi (eds) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Cheltenham, UK: Edward Elgar Publishing, 2020) 301.

governments to ensure access to housing, even if it is clearly required for the protection of life and security of the person that are included as rights in the Canadian Charter, because to do so would be to indirectly recognize a right to housing, which is not explicitly enumerated.

Infamously, in the *Tanudjaja* case, the Ontario Court of Appeal denied homeless claimants a hearing into alleged violations of their rights to life and security of the person under the Charter by mischaracterizing their claim to the equal protection of Charter rights in the context of homeless as "a general freestanding right to adequate housing."[59] Homeless people have thus been denied the equal protection of fundamental Charter rights on the basis that the right to housing is not recognized as a fundamental human right in Canadian law.[60] The decision in *Tanudjaja* made it clear that those who are homeless in Canada cannot yet rely on the courts to protect their fundamental rights, and this realization led directly into concerted advocacy for the recognition of the right to housing under the *National Housing Strategy Act*.

The recognition of the right to housing as a fundamental human right in the NHSA can thus be understood as a response to a particularly severe form of human rights exclusion within the dominant legal culture in Canada. The effects of this exclusion have extended well beyond courtrooms. The denial of human rights citizenship to particular groups such as those who are homeless reverberates in multiple other forms of social exclusion and stigmatization. It distorts social policy and budgetary priorities which frequently distinguish between budgetary and program demands that are optional and those that are required for compliance with fundamental human rights. Human rights exclusion changes social interactions and perceptions. It changes the experience of walking to work or school in Canada, allowing the everyday engagement with people living and sometimes dying on frigid streets to be experienced as a confrontation with a social problem that governments may address as they see fit, rather than as an encounter with human beings experiencing unacceptable violations of a fundamental human right, which may prompt voters to demand immediate remedial measures and reorientation of budgetary priorities.[61]

Whether those in Canada who are deprived of their Charter rights by homelessness or inadequate housing will continue to be considered "constitutional castaways" by Canadian courts remains an unresolved question that will ultimately be resolved by the

[59] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, para 30.

[60] See the discussion of "negative inferentialism" in Bruce Porter, "Interdependence of Human Rights" supra note 51.

[61] This is the definition of the right to housing adopted by the Committee on Economic, Social and Cultural Rights. CESCR, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23.

Supreme Court of Canada.[62] It is to be hoped that the recognition of the right to housing in the NHSA will have a positive influence in future cases by encouraging courts to be more consistent in ensuring that the Charter is interpreted in accordance with international human rights law. The Federal Housing Advocate may consider intervening as a friend of the court in particular cases to promote interpretations of the Charter or other law, such as human rights or tenancy legislation, in accordance with the right to housing under international human rights law, in order to secure remedies to systemic issues.

The Federal Housing Advocate might also encourage the Government of Canada to review its litigation strategy in Charter cases related to housing and homelessness. The CESCR has urged Canadian governments to stop urging courts to deny access to justice under the Charter for those who are homeless. It has urged Canada to interpret rights to life, security of the person and equality under sections 7 and 15 of the Charter consistently with Canada's international human rights obligations with respect to the right to housing.[63] Yet in the *Principles guiding the Attorney General of Canada in Charter litigation* that were adopted in 2017, there is no mention of this concern or of the importance of advancing positions in litigation consistent with Canada's international human rights obligations. The 2017 Principles on litigation strategy were adopted by the previous Attorney General in response to a direction in the Prime Minister's 2015 Mandate Letter to review litigation strategy to identify "positions that are not consistent with our commitments, the Charter or our values."[64] This is an area of federal government policy that could be the subject of review and recommendations by the Federal Housing Advocate.

The CESCR's General Comment No. 9 on the Domestic Application of the Covenant emphasized that the obligation of courts to interpret domestic law in accordance with international law flows from a State's obligations to ensure the rule of law and access to justice. In addition, the CESCR clarified that ensuring access to effective remedies should provide recourse to courts when necessary but may rely on alterative means of ensuring access to adjudication and effective remedies. By requiring governments to give effect to ESC rights "by all appropriate means", the Covenant "adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to

[62] Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court." *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada, 2010) 297-328;

[63] See, for example, CESCR, Concluding Observations: Canada (2006) para 11 (b).

[64] Mandate Letter from the Prime Minister of Canada, the Hon. Justin Trudeau to Ms Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada (15 November, 2015) online http://www.davidmckie.com/Ministers%20Mandate%20letters%20Consolidated%20with%20Index%20Nov%2016%202015.pdf.

be taken into account."[65] States may rely on mechanisms outside of the courts to provide for effective remedies, as long as they are accessible, timely and effective, with recourse to courts where necessary.[66]

The NHSA may be understood within this context as providing effective remedies for some aspects of the right to housing outside of courts while others rely on judicial enforcement. It provides a unique form of access to justice and effective remedies for systemic issues in relation to the progressive realization of the right to housing under the ICESCR— a dimension of the right to housing that has been denied effective remedies by Canadian courts and has proven challenging to courts elsewhere – even where the right to housing is fully justiciable. The transformative dimension of the right to housing, linked to the obligation of progressive realization and the need to identify and address systemic issues linked to broader patterns of inequality and social exclusion raises particular challenges which may be more effectively met by a more participatory, inclusive and dialogic approach to adjudication and effective remedies than is applied in Canadian courts.

II. Housing as essential to the inherent dignity and well-being of the person

The declaration in the NHSA's Housing Policy Declaration that housing is essential to the inherent dignity and well-being of the human person firmly grounds its rights-based approach in the foundational values of international human rights. The wording resonates with the UDHR that is premised on the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" and affirms in article 1 that "All human beings are born equal in dignity and rights." The UDHR recognizes ESC rights "as indispensable for dignity and the free development of personality.'[67] The reference to the well-being of the person in the NHSA also links to the wording of the right to housing as it was guaranteed in the UDHR, as a component of the right to a standard of living adequate for the health and well-being of [the person] and of [their] family. Similarly, the ICESR states in its Preface that ESC rights "derive from the inherent dignity of the human person."

Dignity has been a central element of jurisprudence on the right to housing in international human rights law and will be a critical element in the consideration of systemic issues under the NHSA. This accords with the broad and purposive interpretation of human rights legislation, affirmed by the Supreme Court of Canada in *Ontario Human*

[65] CESCR, *General Comment No. 9: The domestic application of the Covenant* (3 December 1998) E/C.12/1998/24 para 14.

[66] CESCR, *General Comment No.* 9, para 9.

[67] UDHR art 22.

Rights Commission v Simpson Sears, where the Court noted that Ontario's Human Rights Code references the UDHR's recognition of the inherent dignity and the equal and inalienable rights of all members of the human family and affirms as "public policy" that "everyone is equal in dignity and rights."[68]

The CESCR's definitional paragraph on the interpretation of the right to housing in General Comment No. 4 on the right to housing has stood the test of time and should provide a central reference for the interpretation of the right to housing under the NHSA as inextricably linked to the right to live in dignity.

> *In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This [sic] "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing.*[69]

The Committee proceeds in General Comment No. 4 to define "adequate housing" in line with the right to live in a place to live in security and dignity, to include legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural appropriateness. As noted in the 2019 *Guidelines for the Implementation of the right to housing*, qualitative data on the experience of rights-holders linked to dignity must be built into any indicators assessing these and other aspects of the right to housing.[70]

The recognition that housing is essential to the dignity and the well-being of the person also provides a critical link to other human rights treaties which should be applied alongside the ICESCR in understanding the recognition of the fundamental human right to housing "affirmed in international law". The *UN Convention on the Rights of Persons*

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[68] *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 para 12.

[69] CESCR, *General Comment No. 4*, para 7.

[70] UN Human Rights Council, Guidelines for the Implementation of the Right to Adequate Housing: Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context (26 December 2019) A/HRC/43/43 para 79(b).

with Disabilities[71] (CRPD) will be a particularly critical source for the interpretation of the right to housing under the NHSA for persons with disabilities. The purpose of the CRPD "is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[72] The first general principle to be applied in interpreting the rights in the Convention is "Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons."[73]

The rights guaranteed in the *UN Declaration on the Rights of Indigenous peoples* (UN Declaration) are similarly focused on dignity and well-being , recognizing that Indigenous Peoples "have the right to the dignity and diversity of their cultures, traditions, histories and aspirations" describing the rights in the UN Declaration as constituting "the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world."[74]

The inherent dignity of the person has also been incorporated into the UN Human Rights Committee's interpretation of the right to life in article 6 of the ICCPR so as to place obligations on States to take positive measures to address systemic issues related to the right to housing. In its recent General Comment 36 on the right to life, the Committee states that:

> *The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include … degradation of the environment … deprivation of indigenous peoples' land, territories and resources … extreme poverty and homelessness. The measures called for to address adequate conditions for protecting the right to life include …. measures designed to promote and facilitate adequate general conditions, such as …. social housing programmes.*[75]

This is consistent with the Human Rights Committee's earlier finding in a periodic review of Canada that "homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 [the right to life] to address this serious problem."[76]

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[71] UN General Assembly, *Convention on the Rights of Persons with Disabilities* (24 January 2007) A/RES/61/106.

[72] *Ibid*, article 1.

[73] *Ibid*, article 3.

[74] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples (*2 October 2007) A/RES/61/295 articles 15(1), 43.

[75] UN Human Rights Committee, *General comment no. 36, Article 6 (Right to Life)*, (3 September 2019) CCPR/C/GC/35 para 26.

[76] UN Human Rights Committee, *Concluding Observations: Canada* (7 April 1999) CCPR/C/79/Add.105, para 12.

The concept of the right to a dignified life (*vida digna*) has been widely applied within the Inter-American human rights system in the context of housing and homelessness. It was first developed in the context of street children in the *Villagrán Morales et al v Guatemala* case, in which the court held that the right to life includes "the right not to be prevented from having access to the conditions that guarantee a dignified existence."[77] It has since been applied to Indigenous Peoples' claims to the right to housing and culture on their ancestral lands. In *Sawhoyamaxa* v *Paraguay*, a displaced Indigenous community was left to live on the side of a road without housing, potable water or sanitation.[78] The Court found that these conditions constituted a violation of the right to a dignified life which requires "an opportunity to choose our destiny and develop our potential. It is more than just a right to subsist, but is rather a right to self-development, which requires appropriate conditions."[79]

Connecting the right to housing with the inherent dignity and well-being of the person ensures that systemic issues that may be presented as social policy decisions can be addressed as human rights issues. The European Social Rights Committee applied the right to dignity as an over-riding principle in the *European Social Charter* to establish its jurisdiction in a challenge to a controversial Dutch law precluding irregular migrants from accessing emergency housing.[80] The Ugandan High Court found that the national government's failure to adopt a comprehensive legal framework to address systemic mass evictions violated the rights to dignity and life in the Ugandan Constitution, interpreted in light of the right to adequate housing in the ICESCR.[81]

The mechanisms for engaging with affected communities as rights-holders and ensuring that members of those communities participate in Housing Council, on Review Panels and in the reviews of systemic issues by the Federal Housing Advocate should constantly demonstrate the link between the right to housing and the inherent dignity and well-being of the person. This will be essential to developing a better understanding of and commitment to the right to housing within the government and among diverse members of the public.

In a workshop held by the National Right to Housing Network on International Human Rights Day, one of panellists, Victoria Levack, was a claimant in the case before the Nova Scotia Court of Appeal on the right to live in the

[77] *Villagrán Morales et al. v Guatemala* (19 November 1999), IACtHR, Series C No 77, para 188.

[78] *Sawhoyamaxa Indigenous Community v Paraguay* (29 March 2006) IACtHR Series C No 146.

[79] *Ibid*, para 18.

[80] European Social Rights Committee, *Complaint No. 90/2013*, *Conference of European Churches (CEC) v the Netherlands*.

[81] *Miscellaneous Cause No 127 of 2016*, High Court of Uganda, Civil Division (Judgment dated 25 January 2019).

community with supports.[82] She has been living in a nursing home, subjected to physical and sexual assaults by residents, and is one of many persons with disabilities in Nova Scotia still forced to live in institutional settings because of lack of funding for independent living with supports. Asked why she decided to go forward with the case and what was at stake in it for her, Victoria replied: "I don't think my government looks at me as a human being. I think they look at me as a problem. As something to be fixed. And that's not the case... I just want my humanity please. And I want a home." When rights-holders are asked about claiming their right to housing, they invariably refer to the fact that they are not seen as human beings or treated with dignity. It is in those moments that the importance of recognizing the right to housing as a human right rather than as a mere commitment to solve a social problem for government to solve on its own is clearest.

Ensuring that rights claimants are afforded the opportunity to articulate their claims as engaging the inherent dignity and well-being of the person also bridges the gap between individual rights and systemic issues. The human rights tribunal in Vicky Levack's case upheld the individual claims of discrimination but dismissed the claim advanced by the Disability Rights Coalition that the denial of access to independent living in Nova Scotia is part of a systemic pattern that constitutes systemic discrimination. The tribunal chair stated that he "resisted" the evidence of Catherine Frazee, a renowned expert, on ablism. "If I am speaking from a position of privilege and am "un-woke", then so be it".[83] He reported that he has never even seen a 'taint' of the ableism about which Dr. Frazee testified. The failure to recognize systemic human rights issues is often linked to this kind of failure to understand the lived experience of those whose rights are violated.

The NHSA is designed to hear and resolve challenges to the kinds of systemic issues linked to homelessness and inadequate housing that courts and tribunals such as the tribunal in Victoria Levack's case have failed to even acknowledge. It also challenges systemic discrimination within the justice system that has denied adjudicative space for claims such as these. The NHSA mandates a different kind of adjudication by focusing on systemic issues and relying on a different kind of panel to ensure enhanced competence to consider and understand systemic issues. The NHSA requires that members of the panel be chosen to ensure both human rights expertise and lived experience expertise in the right to housing. Rights-holders will have the opportunity, with the support of civil society organizations with expertise in human rights and the Federal Housing Advocate, to fully

[82] NSCA Case No. 486952. *Disability Rights Coalition, Beth Maclean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney on behalf of Joseph Delaney v. The Attorney General of Nova Scotia*.

[83] *Beth Maclean et al v AG Nova AG*, above, p. 60.

articulate the dignity issues at stake in systemic violations of the right to housing before a panel with the competence to hear and understand them.

III. Building sustainable and inclusive communities

The Preface to the NHSA affirms that "a national housing strategy would contribute to meeting the Sustainable Development Goals of the United Nations." The Housing Policy Declaration then recognizes that "housing is essential … to building sustainable and inclusive communities." Clearly the reference in the Housing Policy Declaration is to Goal 11 of the 2030 SDGs: "To make cities and human settlements inclusive, safe, resilient and sustainable." [84]

Human rights organizations advocated strenuously for a more robust human rights framework in the 2030 SDGs. There was considerable disappointment at the reluctance of States to explicitly link the SDGs to human rights obligations, particularly to the obligation to progressively realize ESC rights linked to achieving many of the goals.[85]

Nevertheless, there are more references to human rights in the 2030 SDGs than in their predecessor Millennium Development Goals, and it is widely acknowledged by States that a rights-based approach will be critical to achieving them. Paragraph 4 of the 2030 agenda contains what has become the central catch phrase of the 2030 SDGs "that no one will be left behind." This is affirmed in explicit human rights language: "Recognizing that the dignity of the human person is fundamental, we wish to see the Goals and targets met for all nations and peoples and for all segments of society. And we will endeavour to reach the furthest behind first."[86] The 2030 SDGs also claim to be grounded in a number of international documents and commitments, including the UDHR and human rights treaties.[87]

There is, unfortunately, a conspicuous absence of any reference to the right to housing anywhere in the 2030 SDGs.[88] However, there is an obvious connection with the realization of the right to housing in the first target under Goal 11: ""By 2030, ensure access for all to adequate, safe and affordable housing

[84] *Transforming our World: The 2030 Agenda for Sustainable Development* A/RES/70/1 ('the 2030 Agenda') available at https://sdgs.un.org/2030agenda, para 4.

[85] "The 2030 Agenda for Sustainable Development: opportunity or threat for economic, social and cultural rights?" in Jackie Dugard et al (eds) Research Handbook on Economic, Social and Cultural Rights as Human Rights (Cheltenham, UK: Edward Elgar Publishing, 2020) 366.

[86] *Transforming our World: The 2030 Agenda for Sustainable Development* A/RES/70/1 ('the 2030 Agenda') para 4.

[87] *Ibid*, para 10.

[88] The SDGs refer to the right to development, the right of self-determination, women's equal rights to economic resources, reproductive and labour rights and the right to an adequate standard of living, including food and water but not to the right to adequate housing. See UNGA, *Report of the Special Rapporteur on adequate housing* (4 August 2015) A/70/270, para 3.

and basic services and upgrade slums."[89]

The CESCR has pointed out in a special statement on the relationship between ESC rights and the 2030 SDGs that ESC rights "derive from the inherent dignity of the human person and should be seen to "underpin" the SDGs." The Committee notes that the concept of "leave no one behind" commits to prioritizing the needs of the most disadvantaged and marginalised which is a principle that is consistently applied by the CESCR in assessing progressive realization.

The CESCR proposes that the commitment to the progressive realization of ESC rights as required by the ICESCR is the best means to seek to meet the 2030 SDG goals. "By creating legally binding human rights obligations for States Parties, the Covenant requires that those left behind have access to legal remedies and redress mechanisms at both national and international levels. This flows from the basic principle that to be meaningful, a legal right must be accompanied by effective, accessible remedies."[90] The Committee proposes that "States should adopt a participatory, all-inclusive, transparent national strategy and plan of action to advance the full realisation of Covenant rights. This strategy and plan should be adequately resourced, include indicators and benchmarks by which progress can be closely monitored, and pay particular attention to the barriers faced by disadvantaged or marginalized groups in enjoying Covenant rights."[91]

A revised National Housing Strategy that complies with the requirements of the NHSA should provide an ideal vehicle for Canada to commit to and reach Goal 11.1. Unfortunately, the indicators used to measure progress toward this goal for all nations are not refined enough for the purposes of the NHSA or the Canadian context. This reflects a general problem with SDG indicators that tend to be too quantitative and not adequately disaggregated to provide information on systemic inequality or a clear sense of who in fact has been left behind. The global indicators for housing do not even include the number of people who are homeless.[92] Canada has used core housing need as a relatively close proxy indicator for the Global indicator of "Proportion of urban population living in slums, informal settlements or inadequate housing".[93] This does not mean, however, that the commitment to ensuring access for all to adequate housing by 2030 in Goal 11.1 cannot be made meaningful in the Canadian context, assessed on the basis of more

[89] *Ibid*.

[90] Committee on Economic, Social and Cultural Rights: *The Pledge to "Leave No One Behind": The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development* (8 March 2019) E/C.12/2019/1, paras 9 – 10.

[91] Ibid, para 12 (c).

[92] Indicator 11.1.1: Proportion of urban population living in slums, informal settlements or inadequate housing Institutional information. (2020) https://unstats.un.org/sdgs/metadata/files/Metadata-11-01-01.pdf

Government of Canada, *Goal 11: Making Cities and Human Settlements resilient, safe, inclusive and sustainable*. https://www144.statcan.gc.ca/sdg-odd/goal-objectif11-eng.htm#fn1.

refined, human rights-based indicators under the NHSA. Such an approach has been proposed in the paper submitted for the National Right to Housing Network.[94] The NHSA provides the ideal mechanism for Canada to implement that approach.

The post-covid, post-Trump world will hopefully be returning to multi-lateral institutions and global commitments to address unprecedented inequality and environmental challenges. It is appropriate and helpful that federal legislation committing to the right to housing has been linked in the Housing Policy Declaration to global commitments for sustainable development. The Federal Housing Advocate will be assisted by drawing on a renewed commitment to multilateralism and the explicit link made in the legislation between a commitment to progressive realization of the right to housing and achievement of target 11.1.

Those working in Ottawa on domestic social and economic or housing policy have often been unaware of how their work bears on Canada's international commitments and reputation and how it may be reported in international venues. The 2030 SDGs have bridged the divide between domestic policy and international commitments in ways that international human rights mechanisms have not. It will be important for the Federal Housing Advocate and the National Housing Council to insert themselves into the 2030 SDG interdepartmental work, promote the importance of target 11.1 and ensure that the NHSA is recognized as a key component of Canada's SDG undertakings, based on a rights-based approach that has been widely promoted internationally but rarely implemented. Engaging directly with 2030 SDG processes will also provide a vehicle for engaging provinces, territories and local governments in goals and timelines under the NHSA, since all orders of government have been recognized as key partners in the national plans and commitments under the 2030 SDGs.

At the same time, it will be important not to let the work of the Federal Housing Advocate and the National Housing Council be drawn into a non-human rights based, data driven approach that has characterized much of the work on the 2030 SDGs. The SDGs are often associated with quantitative social development approaches, which tend to lose sight of the fact that the right to housing is the right to a place to live in peace, security and dignity requires respect for context and the particular experiences of rights-holders. The human rights framework of the NHSA focuses on giving voice to rights-holders to address systemic issues of marginalization and exclusion that may not show up in statistics. This is entirely consistent with the commitment to leaving no one behind, however, and should be promoted as the appropriate

[94] *Implementing the Right to Housing in Canada: Expanding the National Housing Strategy* p.13.

mechanism for meeting Goal 11 by means of a rights-based approach.

IV. Furthering the progressive realization of the right to housing as recognized in the ICESCR

a) Progressive Realization and the National Housing Strategy

The progressive realization of the right to adequate housing as recognized in the ICESCR in s.4(d) of the NHSA refers article 2(1) of the ICESCR.

> *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

The CESCR has noted that the meaning of "to take steps" can be clarified in light of the official text in other languages. The corresponding French text is "s'engage à agir" "to act" and the Spanish is "a adoptar medidas" – "to adopt measures". The word "measures" seems the most suitable and current term, and it is the term used in the NHSA for recommendations from the Federal Housing Advocate and the Review Panel. Omitting the references to international co-operation and assistance, then, the components of the obligation of progressive realization in s. 4(c) of the NHSA are:

- Adopt measures [take steps]
- To the "maximum of available resources
- Applying all appropriate means, including the adoption of legislative measures
- With a view to achieving progressively the full realization of the right to adequate housing.

The CESCR explains that reference to progressive realization "must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."[95]

The CESCR established in General Comment 4 on the Right to Adequate Housing that a rights-based housing strategy will almost invariably be required to give effect to the commitment to progressively realize the right to housing under the ICESR.[96] Such a strategy defines objectives, identifies necessary resources and "sets out the responsibilities and time frame for the implementation of the necessary

[95] CESCR, General Comment No. 3, para. 9.

[96] CESCR, General Comment No. 4, para 12.

measures."[97] It "should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives."[98] It must include provision for independent monitoring and the collection of necessary data and information, particularly regarding those who are homelessness or inadequately housed. The strategy must satisfy the standard established in article 2(1) of utilizing all appropriate means and the maximum of available resources. "In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources."[99]

The changes made by parliament to the NHSA described above clarified that the legislative requirement imposed on the Minister is not simply to develop a National Housing Strategy but rather, to develop and maintain a National Housing Strategy to further the progressive realization of the right to housing as required under the ICESCR, "taking into account key principles of a human rights-based approach to housing."

The requirements of rights-based national housing strategies have been clarified by the Special Rapporteur on the right to housing in her 2018 Report to the UN Human Rights Council, describing ten key principles for the development and implementation of rights-based national housing strategies, based on the commentary of the CESCR and other treaty bodies and informed by national experiences.[100] The paper prepared on behalf of the National Right to Housing Network has outlined these principles and applied them to the 2017 National Housing Strategy, in order to identify some of the changes that need to be made.[101]

There are other experiences to draw on, as well, to flesh out the progressive realization standard that must be met in the National Housing Strategy. Article 31 of the European Social Charter requires States to adopt positive measures to promote access to adequate housing, to prevent and reduce homelessness with a view to its gradual elimination, and to ensure affordable housing for those without adequate resources.[102] The European Social Rights Committee has established that to comply with progressive realization, States must maintain meaningful statistics on needs, resources and results; undertake regular reviews of the impact of the strategies adopted; establish a timetable; and pay

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid,* para 15.

[100] UN Human Rights Council, Report of the Special Rapporteur on adequate housing (15 January 2018) A/HRC/37/53.

[101] See National Right to Housing Network, *Implementing the Right to Housing in Canada: Expanding the National Housing Strategy,* pp 13 – 23.

[102] Council of Europe, *European Social Charter (Revised)* (3 May 1996) ETS 163.

close attention to the impact of policies on the most vulnerable.[103] It has found that planning processes must balance the public interest considerations that usually dominate with the obligation to ensure the right to housing and prevent homelessness;[104] that housing assistance must ensure that the amount spent on rent by the most disadvantaged is commensurate with their resources;[105] and that decentralization of housing and social programs must not be allowed to weaken the protections of the right to housing.[106] The Committee has also found that States have failed to take appropriate measures to address the needs of particular marginalized groups, failing to ensure the right to housing of the traveler community in Ireland,[107] of the Roma Community in the Czech Republic,[108] failing to provide adequate family housing in Ireland,[109] and failing to provide adequate housing to unaccompanied children in France.[110]

b) Progressive Realization and the Consideration of Systemic Issues

Assessing compliance with the progressive realization standard under the NHSA will be the central component of the consideration of systemic issues by the Federal Housing Advocate and the basis for findings and recommended measures submitted to the Minister. It will also be the focus of hearings into systemic issues that are referred to the Review Panel for hearings. These processes implement Principle 8 of the ten principles for rights-based housing strategies identified by the Special Rapporteur's Report, providing access to justice for marginalized groups to apply human rights standards and "to identify unmet housing needs, draw attention to circumstances that have been neglected or ignored and identify laws, policies or programmes that deny access to adequate housing."[111]

Under the submission procedures, the Federal Housing Advocate or the Review Panel will be called upon to make findings as to whether a particular issue identified in a submission has been adequately addressed "by all appropriate means" and "to the maximum of available resources" and if not, what measures are required. Those that fall within the jurisdiction of parliament will be submitted to the Minister as recommended measures. The process is analogous to the consideration of communications submitted to the

[103] *International Federation for Human Rights (FIDH) v. Ireland, Complaint No.* 110/2014 (ECSR), para 109, citing *FEANTSA v. France*, Complaint No. 39/2006, decision on the merits of 5 December 2007, para 54,

[104] *European Roma Rights Centre v. Bulgaria Complaint No. 31/2005* (ECSR).

[105] FEANTSA v. Slovenia Complaint No. 53/2008 (ECSR).

[106] *European Roma Rights Center (ERRC) v. Italy*, Complaint No. 27/2004 *Feantsa v. The Netherlands*, 2014.

[107] *European Roma Rights Center* (ERRC) v Ireland, Complaint No., 100/2013 (ECSR).

[108] *European Roma and Travellers Forum (ERTF) v. Czech Republic*. Complaint No. 104/2014 (ECSR).

[109] *FIDH v Ireland* Complaint No 110/2014 (ECSR).

[110] *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France* Complaint No. 114/2015 (ECSR).

[111] *Ibid*, para 110.

CESCR under the OP-ICESCR.[112] Both determinations assess whether, in the context of particular facts and circumstances, the government has met its obligations under the ICESCR to realize the right to housing by all appropriate means and to the maximum of available resources.

There are also import differences between communications under the OP-ICESCR and submissions under the NHSA to bear in mind. Complaints procedures under international human rights treaties are more formally structured as allegations of violations of rights of alleged victims. Either individuals or groups of individuals may submit a petition under the OP-ICESCR but in order to have standing, they must allege that they are victims of a violation of one or more rights under the Covenant. That is not the case with submissions under the NHSA, where there is no requirement that submissions originate from people who are directly affected and there is no requirement of an explicit allegation of a violation. The wording in the NHSA does not set up an adversarial opposition between a victim and a violator of rights. It is a more dialogic process focusing on systemic issues.

However, in spite of the more formal language of violations and alleged victims, the communications procedure at the CESCR has dialogic elements that are different from adversarial court proceedings. The group or individual alleging a violation of a right under the ICESCR is referred to as "the author" and the Committee issues "Views" at the end of the process. If the State is required by the Views to adopt measures for compliance with the ICESCR, the Committee enters into dialogue with the State and the author about their implementation. The NHS, by comparison, does not provide a name for those who make submissions to the Federal Housing Advocate, but "author" may well be appropriate. Moreover, although the language of the NHSA avoids any reference to victims or violations, the legislation makes it clear that the consideration of submissions is to focus on the rights-holders affected by the systemic issue being reviewed. The Federal Housing Advocate is to consult with members of vulnerable groups, persons with lived experience of housing need and persons with lived experience of homelessness to assess the impact of systemic issues and barriers they face.[113]

The Advocate's mandate to "conduct a review of any systemic issue raised in a submission", and to report to the Minister any findings and recommended measures is not intended to be an academic inquiry but rather an active engagement with those affected as rights-holders. The Federal Housing Advocate will likely want to convene community-based hearings to hear from members of affected communities

[112] For a description of the procedures for filing petitions, see *Guidance for Submitting an Individual Communication to the UN Treaty Bodies* available at https://www.ohchr.org/Documents/HRBodies/Guidance-note-for-complaints-form-E.docx.

[113] NHSA, s 13(e).

about the impact of a systemic issue under review. Similarly, if a systemic issue is referred to a Review Panel , the Review Panel is required under the NHSA, to facilitate the participation of members of affected communities as well as groups that have expertise in human rights and housing.[114] It may be assumed that as a matter of principle, no findings or recommendations will be made by either the Federal Housing Advocate or the Review Panel without having heard from those who are directly affected by the systemic issue under consideration.

Where a systemic issue is referred to a Review Panel for a hearing, individuals and members of affected communities will likely be encouraged and supported by the Federal Housing Advocate to explain their experiences of the systemic issue, explain how it impacts them, including how it relates to dignity, personal well-being,and to the commitment to progressively realize the right to housing. Those affected by the issue should be encouraged to self-identify as rights-claimants, articulating a claim to dignity and inclusion based on the right to housing. That is the essence of the rights-based approach that is affirmed in the legislation. Hearing from those affected, as rights-holders ensures the reliability of findings and recommendations and creates a vibrant human rights culture around housing issues that will enhance the quality of decision-making. One consideration to be applied in determining which issues to refer to a Review Panel for hearings will be an assessment of the importance of oral hearings to an understanding of the issue, and whether the affected communities desire to be heard in a more public setting.

Consideration of communications under the OP-ICESCR work in the opposite direction, determining first whether an author's individual right to adequate housing has been violated, considering dignity issues in that context and considering whether the State has failed to comply with the obligation to adopt all appropriate measures and apply available resources to address the issue that resulted in the violation of the individual's right to housing. The NHSA by contrast, does not require any finding with respect to individuals – only in relation to a systemic issue under consideration. However, as a matter of principle, the CESCR, in every case identifies the systemic issues that invariably lie behind individual circumstances and requires the respondent State to adopt measures to address them. This is based on the principle in international human rights law that an effective remedy to an individual violation should ensure the non-repetition of the violation. Under the OP-ICESCR the systemic issue is engaged by way of an individual's experience of a violation, while under the NHSA, individual experiences are considered in order to understand the dignity issues involved and to ensure that rights claimants participate in

[114] NHSA, s.16.3(b).

identifying solutions to any systemic issue.

The text of the OP-ICESCR acknowledges the fact that violations of ESC rights are invariably systemic in nature so the Committee requires access to a wide range of information and perspectives. Unlike other optional complaints procedures, the OP-ICESCR was drafted to permit submission of information from "third parties" – sources other than the author and the responding State. It also invites the Committee to "consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned."[115] The CESCR has adopted a procedure for the submission of third party submissions or amicus briefs to address legal and systemic issues arising in cases and has granted third party status to NGOs and to the Special Rapporteur on the right to housing under this procedure.[116]

Similarly, in its description of the mandate of the Federal Housing Advocate to conduct reviews of systemic issues, the NHA encourage the consideration of a wide range of information from multiple sources, through research on systemic housing issues, including barriers faced by members of vulnerable groups, studies into economic, institutional or industry conditions that affect the housing system and consultations with affected groups. The Review Panel is to be public and accessible and it is to encourage participation of members of affected communities and groups that have expertise in human rights and housing. Moreover, the NHSA explicitly notes that the Federal Housing Advocate is entitled to make presentations and propose recommendations, either independently or by working collaboratively with affected groups.

[115] OP-ICESCR, article 8(3)

[116] Committee on Economic, Social and Cultural Rights, *Guidance on third-party interventions* Adopted by the Committee at its fifty-ninth session (19 September- 7 October 2016). *Ben Djazia et al v Spain* E/C.12/61/D/5/2015.

4

The Reasonableness Standard under the OP-ICESCR

There was considerable debate at the UN Working Group constituted to draft the OP-ICESCR about the standard to be applied in the consideration of communications under the OP-ICESCR, focused on the obligation of progressive realization under article 2(1).[117] Canada was joined by the United States (one of the very few States in the world that has not ratified the ICESCR!) and some other States that were not supportive of the OP-ICESCR in arguing that progressive realization was a matter of policy choice that should be left to governments. These States originally proposed restricting the OP-ICESCR to issues of extreme deprivation and non-discrimination, essentially issues that were already covered in the ICCPR's protections of the right to life and non-discrimination. When it became clear that the majority of States favoured of a comprehensive approach, covering all obligations under the ICESCR, Canada and its allies proposed additional text to instruct the Committee to grant a "wide margin of discretion" for States to

[117] Bruce Porter,"Reasonableness and Article 8(4)", in M Langford, B. Porter, R Brown and J Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Capetown: Pretoria University Law Press, 2016).

determine their own economic and social policy.[118]

Other State and civil society delegations pushed back, noting that while States should certainly be free to identify and choose the best policies through which to realize ESC rights, excessive deference to governments' policy choices had too often been used by courts to deny any remedy or meaningful accountability to ESC rights at all, allowing issues such as homelessness to be defined as policy choices rather than addressed as human rights violations. In the end, the deferential standard was rejected and replaced by a standard of reasonableness, using wording taken from the South African Constitutional Court's decision in the famous *Grootboom* case on the right to housing.[119] Article 8(4) of the OP-ICESCR as adopted reads as follows:

> *When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.*[120]

The reasonableness standard for assessing compliance with the right to housing must be distinguished from rationality or administrative law reasonableness review applied in other legal contexts in Canada and elsewhere. Social rights reasonableness review is not a procedural standard as may be the case with administrative law review of a specific government action or decision. Proposals for this kind of standard of review under the OP-ICESCR that would assess whether the measures taken to realize ESC rights were "unreasonable" were firmly rejected during the negotiation of the OP-ICESCR. The reasonableness standard under the OP-ICESCR is somewhat analogous to the obligation under human rights legislation to adopt positive measures to address systemic accessibility barriers and accommodate distinctive needs of persons with disabilities based on an "undue hardship" standard, or under a minimum impairment standard of "reasonable limits" under section 1 of the Canadian Charter.[121] While reasonable accommodation is considered in reference to an individual claim, remedies and assessment of reasonableness often engages systemic

[118] Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session U.N. Doc E/CN.4/2004/44 (2004), 23 February – 5 March 2004, paras 65-66; Bruce Porter, "The Reasonableness of Article 8(4) – Adjudicating Claims From The Margins" (2009) 27:1 *Nordic Journal of Human Rights* 39.

[119] Bruce Porter,"Reasonableness and Article 8(4)"

[120] OP-ICESCR, article 8(4).

[121] UN General Assembly, Report of the Special Rapporteur on the right to housing, A/72/128; Andrea Broderick, "Harmonisation and cross-fertilisation of socio-economic rights in the human rights treaty bodies: disability and the reasonableness review case study", Laws (Special Issue Disability Human Rights Law), vol. 5, No. 4 (2016) p. 14.

issues, such as the *Eldridge* case, where the Supreme Court went beyond accommodation of the individual claimants to require the provision of interpreter services for hearing impaired individuals in all public healthcare settings and assessing whether the budgetary implications would justify a failure to provide these.[122] It has unfortunately become more of a challenge in recent years for persons with disabilities to convince courts and tribunals to engage with systemic issues linked to individual claims. In the case of *Moore v British Columbia*, under human rights legislation, the Supreme Court overturned a tribunal's systemic remedy, restricting the remedy to Jeffrey Moore, the individual claimant. This precedent was relied upon by the respondent and the tribunal in the Nova Scotia case referred to above to deny systemic remedies to persons with disabilities requiring access to supports and housing for independent living.[123]

Reasonableness review of social rights decision-making under international human rights standards takes as its starting point the need to take positive measures to realize rights by addressing systemic or policy issues that result in violations of individuals' rights. It therefore challenges a legal culture in Canada that has been resistant to adjudicating rights claims that may require governments to adopt positive measures to address systemic inequality and disadvantage disproportionately affecting particular groups. Social rights reasonableness review does not need to be applied to challenge a particular law, policy or government action, as the Ontario Court of Appeal found to be required for a Charter challenge to inaction on homelessness to be justiciable. Rather, reasonableness review based on ICESCR standards is applied to assess compliance with the positive obligation under article 2(1) of the ICESCR to take reasonable measures to realize the right to housing, by all appropriate means, and to the maximum of available resources.

Dominant legal culture tends to identify human rights violations when they involve government action but is less inclined to consider a failure to act as a human rights violation, even if the consequences for rights claimants are equally or more severe. This accords with the dominant conception of human right in the U.S as focused on liberty interests and protecting the individual from interference by government. Even

[122] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R.624 paras 79, 94. In *Eldridge* the Court held that the assessment of what positive measures may be required to satisfy the duty to accommodate based on an undue hardship standard may be considered under section 1 of the Charter as an assessment of reasonable limits, proportionality and minimal impairment. For an analysis of the convergence of reasonableness review of ESC rights and proportionality, see Young, Katharine. "Proportionality, Reasonableness, and Economic and Social Rights" in Vicki Jackson & Mark Tushnet (eds.), *Proportionality: New Frontiers, New Challenges., Cambridge University Press, 2017)*.

[123] See, for example, *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 paras 54-71; *Beth MacLean, Sheila Livingstone, Joseph Delaney and Mafty Wexler, for the Disability Rights Coalition (Complainants) - and - The Attorney General of Nova Scotia (Respondent) - and - The Nova Scotia Human Rights Commission* Decision of the Board of Inquiry on the prima facie case (HRC Case No. 1414-0418) (March 4, 2019) (*Beth Maclean et al v AG Nova AG*) pp 98-105.

in countries where constitutional social and economic rights explicitly require governments to take action and adopt measures, there is still a tendency for rights claims to focus on challenging government action, such as in evictions, rather than challenging inaction or inadequate responses to systemic issues such as homelessness. Most of the cases on the right to housing in South Africa have been commenced as challenges to evictions, though the decisions in these cases have increasingly focused on the positive obligations to provide alternative housing where eviction has been unavoidable. Similarly, most petitions submitted in relation to the right to housing under the OP-ICESCR have challenged evictions. The Committee has clarified positive obligations to address systemic issues in these cases as well, by considering the State's obligations to address the systemic issues giving rise to widespread evictions and to ensure access to housing after an eviction.[124]

While evictions are widespread and serious, both in South Africa and in Canada, and will certainly be an important systemic issue to be addressed under the NHSA,[125] it will be important to encourage affected groups to move beyond the dominant human rights paradigm that focuses on challenging government actions. Submissions should be encouraged to raise systemic issues of inaction or neglect that have tended to escape human rights review in the past. Public education around the NHSA and the submissions procedure should try to encourage submissions from communities affected by failures to take measures to realize the right to housing, rather than focusing on challenges to particular actions or laws.

[124] See the discussion of *Ben Djazia et al v Spain* E/C.12/61/D/5/2015 below.

[125] See the submission under the NHSA from the Centre for Equality Rights in Accommodation and the National Right to Housing Network, *Addressing the Evictions and Arrears Crisis: A Proposal for a Federal Government Residential Support Benefit* (18 February, 2021) available at https://housingrights.ca/wp-content/uploads/CERA-NRHN-2021-Addressing-the-Evictions-and-Arrears-Crisis.pdf.

5

Principles of Reasonableness: Lessons from Grootboom v. South Africa

The decision of the Constitutional Court of South Africa in *Grootboom v. South Africa* has become the most influential decision in ESC rights and in the adjudication of cases involving the right to housing. Because the decision was the first to define a reasonableness standard for assessing compliance with progressive realization of the right to housing, and because its general approach was subsequently incorporated into the OP-ICESCR as an international standard, it provides essential guidance for the consideration of submissions on systemic issues under the NHSA.

The *Grootboom* decision does not, of course, provide the last word on reasonableness review. It is more appropriately viewed as the first foray into a new form of adjudication that is still being refined. The international standard incorporated from the judgment now has a life of its own under the OP-ICESCR, and courts, human rights institutions and claimants of the right to housing around the world will continue to develop new approaches – including in Canada under the NHSA. It is helpful, however, to explore a few of the key principles of reasonableness review that emerged from the *Grootboom* case that should be recognized as essential principles of reasonableness review under

international human rights law as applied under the NHSA.[126]

Grootboom was the first case in which the Constitutional Court of South Africa was called upon to assess compliance with the obligation in section 26 of the South African Constitution to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right to access adequate housing]."[127] The case was brought by 900 plaintiffs, including 510 children, who were living under plastic sheets on a sports field in Wallacedene without access to water or sanitation or secure shelter from the wind and rain. The community had been forced to vacate an informal settlement, then evicted from private land prior to setting up their makeshift shelters on the sports field. Irene Grootboom was one of the community's leaders and an advocate for the right to housing. The plaintiffs did not challenge government action, such as the evictions from their previously occupied land. Rather, they invoked the constitutional commitment to take reasonable measures to realize the right to housing in order to challenge their governments' failure to respond to their dire circumstances. That is why the decision was particularly helpful in developing a standard for assessing compliance with the positive obligations under Article 2(1) of the ICESCR.

The first principle of reasonableness review emerges from this basic structure of the *Grootboom* claim. The starting point of reasonableness analysis should be the circumstances of claimants or affected communities understood in relation to the promises of dignity and equal worth at the core of human rights. Program, policy, legislative or other responses to systemic issues must be viewed through the lens of the claimants' experience of their circumstances.

This principle supports the emphasis in the NHSA on facilitating participation of rights-holders in the adjudication of systemic issues linked to the right to housing. Encouraging and facilitating affected groups to make submissions and participate in hearings before the Review Panel or engaging with the Federal Housing Advocate in the course of a review of a systemic issue will be

[126] The history of reasonableness review in South Africa also has had some low points in subsequent applications, where greater deference to governments and less attention to the dignity interests of claimants has led to different results. One such case was *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28, in which an important claim to the right to water in informal settlements was unsuccessful. Lucy Williams has compared the approach to reasonableness review in *Mazibuko* with that of the German Federal Court (FCC) in the *Hartz IV* case. In the latter case, the German Federal Court found that a reduction of the level of subsistence income was incompatible with the dignity clause of the German Basic Law and required the government to recalculate it based on a sound empirical basis and rational methods rather than random estimates. (BVerfG 05.11.2019, 1 BvL 7/16). Lucy Williams finds that the difference in the quality of the adjudication arose from the enhanced engagement by the German Federal Court with the dignity interests of the affected community and the acceptance of a more dialogic relationship with the government. (Lucy Williams, "The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study, 3 *Constitutional Court Review* 142 (2010))

[127] *Constitution of the Republic of South Africa*, 10 December 1996 section 26.

critical to ensuring the appropriate grounding of the reasonableness analysis in the experiences of those affected. Where the authors of submissions are not themselves members of affected communities, it will be imperative for the Federal Housing Advocate to identify and reach out to those who are directly impacted, to ensure that their experiences are considered, that they define in their own terms the meaning of a right to a home in which to live in peace, security and dignity and identify the appropriate measures required to realize that right.

The second principle, related to the first, is that reasonableness must be assessed in reference to human rights values, particularly the inherent dignity of the person. The *Grootboom* decision is often referenced for the general characteristics of reasonable housing policy, but it was not just a review of housing policy. It was more fundamentally an assessment of various governments' response to human beings living in "intolerable conditions" whose circumstances demonstrated all too clearly that "the Constitution's promise of dignity and equality for all remains for many a distant dream"[128] and whether it was consistent with the positive obligations to progressively realize the right to housing under the new Constitution. Dignity was central to this dimension of the reasonableness analysis:

> *The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.*[129]

A third key principle is that housing policies and programs must prioritize the needs of marginalized and vulnerable groups and engage directly with the needs and rights of those who have been left behind. General indicators of over-all progress in achieving housing outcomes are helpful, particularly if they include disaggregated data to capture the circumstances of particular groups, but statistics do not capture the experience of social exclusion or stigmatization or the root causes of systemic inequality. The Court in *Grootboom* noted that: "It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right ..... the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to

[128] *Grootboom*, para 2.

[129] *Ibid,* para 83.

the needs of those most desperate, they may not pass the test."[130]

A fourth principle that can be derived from *Grootboom* is that the assessment of reasonableness must address systemic racism and other forms of discrimination, recognizing the interdependence of the right to housing with other rights, in particular the right to equality and non-discrimination. In the South African context, that meant ensuring that reasonableness was assessed in the context of the transformative goals of the Constitution and the imperative of addressing the legacy of apartheid in deep social inequality and the central role that the right to housing can play in that transformative project.[131] In the Canadian context, this will mean ensuring that systemic issues are addressed as a component of a broader transformative project to address colonialism, systemic racism, increasingly entrenched economic inequality, class segregation and the destruction of precarious communities through financialization. Measures to address systemic issues for the realization of the right to housing must be fashioned to support the realization of all human rights, taking into consideration other social movements and struggles for equality.

A fifth principle is that while reasonableness requires meaningful responses to issues brought forward by particular communities and rights claimants, it must also be informed by the need for comprehensive policy responses that address the needs and circumstances of other groups. This relates to concerns regarding the "polycentricity" of governments' resource allocation and policy decisions. Meeting the needs of particular rights claimants or addressing one systemic issue that is the subject of a submission may have repercussions for the government's ability to address others.

The polycentricity of resource allocation decisions has been cited in support of arguments that governments are best placed to assess and respond to competing needs and rights – to choose, for example, whether to put funds into childcare, pharmacare or social housing. Experiences of recent decades have shown, however, that governments are only well placed to respond to competing needs and rights if they are committed to the broader human rights project and if there are processes in place to ensure that the human rights of those whose needs and interests are likely to be ignored are being adequately considered. The NHSA provides mechanism through which rights claimants can be heard when their rights have been neglected so that appropriate measures can be identified and implemented. Nevertheless, the findings and recommendations of the Federal Housing Advocate and the Review Panel will need to ensure that

[130] *Ibid*, para 44.

[131] *Ibid*, paras 22-25. For an excellent analysis of *Grootboom* as the beginning of a project of transformative constitutionalism in South Africa, see Sandra Liebenberg. *Socio-Economic Rights. Adjudication under a Transformative Constitution*. (Claremont: Juta, 2010)

they have incorporated diverse perspectives, considered the interaction of various interests, some of which may be competing needs and rights, and considered how a systemic issue may play out differently across the country, in different communities.

The non-adversarial process under the NHSA will rely on the willingness of governments to provide necessary information about current policies and competing demands. This dialogic process should avoid situations where the government may reject findings and recommended measures on the basis that they were not adequately informed by an understanding of competing demands and resource constraints. It will be up to the government to provide any information that is necessary to consider the reasonableness of its program and policy responses to systemic issues. Under a more formal adversarial approach, the onus is on the authors of submissions to establish a prima facie violation of the right to housing and then shifts to the government to justify the limitations of its response. The dialogic approach under the NHSA should allow for more back and forth, but the basic principle will apply – that it is up to the government to provide information that is needed to assess the reasonableness of its programs and policies.

A sixth principle affirmed in *Grootboom* is that all spheres of government must work together to develop a co-ordinated plan, with the national level government assuming responsibility to exercise leadership in this regard. "Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the State's section 26 obligations."[132] A national strategy or plan must be comprehensive, and clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.[133]

Finally, a seventh principle is that reasonable housing policies and programs must be flexible and responsive to changing needs and circumstances and be constantly open to corrections based on participatory governance. Under the NHSA, this means that the Housing Strategy must be responsive to new issues brought to light through the Federal Housing Advocate's reviews of submissions and to findings and recommended measures emerging from these or from hearings before the Review Panel.

Some have questioned whether the approach adopted by the Constitutional Court in South Africa should be followed, given the mixed results of housing programs in South Africa. When Irene

[132] *Grootboom*, para 40.

[133] *Ibid*, para 39. See also the statement by the CESCR on reasonable programs and policies. United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007)

Grootboom was reported to have died "houseless" it was suggested that a more traditional approach that would provide an individual remedy was needed. In fact, the Constitutional Court had ensured at the time of its hearing of the case that Irene Grootboom and others in the community had been provided with basic shelter, water and sanitation. When she died, Ms. Grootboom was on a waiting list, based on the prioritization of those most in need. A street next to the permanent housing that has now been constructed is named Grootboom Street. Most municipalities in South Africa now have "Grootboom allocations" built into housing programs to ensure that those in the most desperate circumstances are not ignored. An assessment of the outcome of the case which deems it a failure because it did not provide an individual remedy is perhaps too much rooted in a traditional paradigm of rights.

There is no question, however, that South Africa has failed to live up to the requirements of progressive realization or reasonableness standards. As Justice Yacoob, who authored the judgment acknowledges, the realization of the right to housing relies on the good faith and moral integrity of governments. While the Grootboom judgment has been the basis of some of the world's leading jurisprudence on the right to housing, the realization of the right to housing in South Africa still relies on governments there meeting their obligations. Last year, on the twentieth anniversary of the Grootboom judgment, Justice Yacoob reflected:

> *Grootboom was a judgment which gave opportunity and gave guidance to government to comply with its housing obligations. Grootboom was drafted on the assumption that we had a bona fide government, a government composed of people who would be aware of their public responsibility, a government who would have sympathy for poor people, a government who at every level understands the suffering of people with lack of housing, who understand the suffering of people in poverty, and will do what they can to fix it.*
>
> *Grootboom has failed not because of Grootboom [the judgment], but because we could never have foreseen and could do nothing about the corruption, greed, selfishness and lack of attention to poor people that we have witnessed on the part of government up to now. I am ashamed."*[134]

South Africa is struggling but it still has an incredibly vibrant human rights culture from which Canada can learn. Things would have become significantly worse in South Africa if there were no constitutional right to housing, and no Irene Grootboom to demand it on behalf of those in the most desperate circumstances. One of the lessons for Canada from the challenges faced in South African is how difficult it is to

[134] Matthew Wilhelm-Solomon, "Irene Grootboom's Unbuilt House." *New Frame*.(5 October 2020).

reverse embedded inequality and how important it is to prevent socio-economic inequality and segregation from becoming entrenched in Canada. As Canadian advocates have learned in Geneva, it is also important to be able to feel shame for one's country when it fails to live up to its commitment to human rights, as Justice Yacoob does for his. It is difficult to measure the practical effects of recognizing the right to housing or any other fundamental human right. And it is somewhat dangerous to suggest that protections of universal human rights in domestic law should be questioned if they have not translated into verifiable socio-economic outcomes, where governments have failed to live up to them.

6

Meaningful Engagement

One of the important offshoots of the reasonableness approach developed in the *Grootboom* decision has been a turn to more participatory, inclusive and dialogical approaches to social rights adjudication. This turn fits well with the NHSA model of participatory adjudication and remedy based on the submissions procedure and the role of the Federal Housing Advocate.

Sandra Liebenberg has suggested in her seminal analysis of the *Grootboom* decision and "transformative constitutionalism" that reasonableness analysis can address the challenge of polycentric policy issues by adopting a more dialogic approach to rights adjudication, bringing rights-based participatory strategies into governance and enabling civil society to become an agent of social change in a way that is less likely to occur when the focus is on a court order.[135] She has found that the challenge, however, is not to lose sight of firm human rights norms in the process of "democratizing" their implementation. There is still a need for authoritative judgments from the Constitutional Court in South Africa, which, Liebenberg argues, should provide substantive interpretations of the right to housing and elaborate on what its realization requires.[136]

[135] Sandra Liebenberg, Sandra Liebenberg, "ParticipatoryJustice in Social Rights Adjudication, *Human Rights Law Review* (2018) 623–649.

[136] Ibid, pp 40-41.

An approach developed by the Constitutional Court of South Africa in the context of right to housing cases facilitates a more inclusive and community-based model of social rights adjudication based on the reasonableness standard and what has been labelled "meaningful engagement." The concept has now become widespread in its application to define rights-based participation and will be a useful concept to apply in the context of the NHSA.

Meaningful engagement was first introduced in the 2004 case of *Port Elizabeth Municipality v Various Occupiers*[137] in which the municipality moved to evict a group of families occupying private land. The occupying residents were willing to leave if they could be provided with alternative land but the municipality had refused to provide land, on the grounds that it should not give preferential treatment to these families over others on the waiting list for housing and land. The Constitutional Court declined to order the eviction because the occupiers had no place to go, but instead of ordering the provision of alternative housing, the court ordered the municipality to meaningfully engage with the occupiers in a manner that respected their rights. This required a change in the power relationship and in the way the authorities interact with residents of informal settlements. The court wrote that "those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity."[138]

In a subsequent case, *Occupiers of 51 Olivia Road,* the Constitutional Court established that any municipality wishing to evict people must first ensure meaningful engagement through which to seek practical solutions.[139] In the case *of Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, the concept was extended to cover an entire process of relocation and housing development.[140] An eviction order was authorized to facilitate the development of affordable housing on the site, but it required that the residents and applicants be allocated 70% of the new houses to be built on the site and ongoing meaningful engagement with residents regarding the process of relocation, throughout the entire process.[141] The court's decision

[137] *Port Elizabeth Municipality v Various Occupiers* (2004). 12 BCLR 1268 (CC).

[138] *Port Elizabeth Municipality v Various Occupiers* (2004). 12 BCLR 1268 (CC) paras 39, 41, 43,

[139] *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* (2008) 5 BCLR 475 (CC) paras 14, 17–18, 20, 24–30.

[140] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] 9 BCLR 847 (CC) paras 117, 202.

[141] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] 9 BCLR 847 (CC); Lilian Chenwi, 'Implementation of Housing Rights in South Africa: Approaches and Strategies' (2015) 24 *Journal of Law and Social Policy* 68, 78–80.

sought to change what had appeared to have become a top-down approach in which consultation with residents had simply meant that they were provided with information and reports on decisions made by others. It required a different type of process based on meaningful engagement, in which the residents would be made partners in the decision-making processes.

Meaningful engagement requires that participatory rights be more than procedural. It includes substantive rights to outcomes of rights-based processes that are consistent with the right to housing, interpreted and applied in a manner that respects the dignity and rights of the members of the affected community. Rights-informed negotiation and dialogue thus becomes the means to determine what is reasonable and therefor in accordance with the right to housing.

The core dignity interests that are central to the reasonableness standard can only be assessed in the context of the lived experience of those whose rights are to be vindicated. So it is important to establish processes outside of the courtroom to allow this assessment to proceed through meaningful aengagement. Or in more concrete terms, it is the members of the affected community who are best able to determine what relocation option is consistent with their dignity and other interests. The court does not need to make that determination – it only needs to clarify what needs to be achieved for the result to be consistent with the right to housing. That clarification changes the power dynamic between the authorities and the residents, because now it is the residents' dignity interests and their right to choose where they want to live which, to some extent at least, will drive the process toward a rights-compliant result.

Meaningful consultation and meaningful engagement are often used interchangeably, but meaningful engagement can be distinguished from consultation in two ways. First, meaningful engagement requires actual partnership in decision-making while consultation may occur prior to decisions being made by others. And second, consultation does not require any particular result while meaningful engagement must achieve compliance with the right to housing. The role of the court is changed when it relies on meaningful engagement so that it is no longer arbitrating after the fact to determine if rights have been violated and instead clarifies rights at the beginning and throughout the process, so that negotiation and community participation can be made consistent with the right to housing. This allows the right to housing to be realized in more local initiatives, with residents engaged as rights-holders to work out the details of relocation in a manner that addresses their circumstances, respects their dignity and leads to results that are consistent with their right to housing in

the given circumstances.[142] If such processes become embedded in local decision-making, there is no need for court involvement in most cases.

Concerns have been expressed about meaningful engagement in the South African context, suggesting that the court should not abdicate its responsibility for enforcing normative rights of disadvantaged groups in order to rely on processes in which power imbalance may invariably remain an issue. As noted by Liebenberg, "marginalized and disadvantaged groups face the risk that these normative values will be diluted in stakeholder deliberations in which they lack political, economic or alternative sources of power compared to better resourced public and private participants."[143] The challenge in meaningful engagement is to ensure that the normative framework of the right to housing is firmly entrenched throughout the process and that rights-holders have access to resources, information and knowledge necessary to ensure that they are able to adequately defend their rights.

The concept of meaningful engagement may be useful in the implementation of the NHSA. The Federal Housing Advocate, in facilitating participation and engagement with members of vulnerable groups or persons affected by systemic housing issues may empower communities to use the NHSA as a framework for meaningful engagement with governments or private actors. This means that it may be important for the Federal Housing Advocate to clarify the requirements of the right to housing at the beginning and throughout the process of engagement with affected communities rather than applying a more traditional approach of engaging the community to assess the facts prior to applying human rights norms to make findings and recommend measures. Engagement with communities might be better defined as a process through which they are able to advocate for their right to housing and negotiate solutions to systemic issues. In some cases, they may rely on the Federal Housing Advocate or a Review Panel to make findings and recommend measures but in others, rights-based solutions may emerge from the process of meaningful engagement itself.

Bearing in mind the concern raised by Sandra Liebenberg about the normative framework being "diluted", it will be important for the Federal Housing Advocate and communities involved in direct engagement to rely on a coherent set of findings and recommendations. As noted above, guidelines, statements, protocols or comments that clarify the requirements of the right to housing may provide a framework for rights-holders to advocate for themselves. This

[142] For elaboration of the idea of meaningful engagement see Lilian Chenwi & Kate Tissington, *Engaging meaningfully with government on socio-economic rights A focus on the right to housing* (Community Law Centre University of the Western Cape, 2010),

[143] Sandra Liebenberg, "ParticipatoryJustice in Social Rights Adjudication, *Human Rights Law Review* (2018) 623–649.

approach would recognize the important difference, discussed above, between the commitment in the 2017 Housing Strategy and the original tabled version of the legislation, providing for consultation with affected groups and participation on the National Housing Council but without any clear normative human rights framework, and the final version of the legislation, committing to engaging with affected communities as rights-holders, based on a clear mandate to further the progressive realization of the right to housing.

Using the analogy of reasonable accommodation of disabilities, the application of the reasonableness standard based on a firm normative framework recognizes that what the right means in each case will be different, to be determined through a process of engagement and negotiation, but the rights themselves are not negotiable and the approach has to be coherent and consistent so that there is a clear sense of what constitutes human rights compliance.

In concrete terms, this might mean, for example, that in response to a submission on increasingly unaffordable rent in many cities, or on widespread evictions, the Federal Housing Advocate might engage with communities, civil society, experts and government officials in an open process of dialogue and exploration of alternatives that are informed by international human rights norms. Existing processes would be assessed and alternatives identified based on international human rights norms. This would mean that the dignity and rights and experiences of those affected must be central to the analysis, that eviction should only be a last resort, that there must be meaningful engagement with those affected, that eviction should not result in homelessness and that all necessary procedural protections, including access to courts, would be protected. The informal "adjudication" of compliance with the right to housing would become a participatory process rather than one that is restricted to the Federal Housing Advocate alone.

The assessment of reasonableness may, through meaningful engagement, generate a collaborative, open and inclusive exploration, facilitated in some cases by the Federal Housing Advocate but driven as much as possible by rights-holders, on how to implement the right to housing in concrete terms. The measures recommended to the Minister or other actors to further the progressive realization of the right to housing may emerge from meaningful engagement with communities, supplemented by research and consultation with experts. This kind of open and participatory process may help to generate consensus around the normative standards and the recommended measures. They may not simply be findings and recommendations of the Federal Housing Advocate but rather measures for the realization of the right to housing around which communities are mobilizing and which already enjoy some consensus and commitment. This allows the informal adjudicative process to better integrate with political

processes, so that recommended human rights measures are reinforced by politically empowered rights claimants. As mentioned above, however, in relation to international human rights mechanisms, this process relies on civil society and community-based organizations having access to funding and other supports in order to facilitate meaningful engagement.

Adjudicating the right to housing under the OP-ICESCR

The development of the reasonableness standard under the OP-ICESCR is in its early stages. The OP-ICESCR has only been in force for seven years and only 26 States having ratified it. By contrast, the OP-ICCPR has been in force for forty-four years and it has been ratified by 116 States. Nevertheless, the CESCR's decisions on the merits in two cases relating to the right to housing (many others have failed to meet admissibility requirements) provide a good indication of how the reasonableness standard is being applied. This early jurisprudence may guide the consideration of submissions under the NHSA.[144]

In the case of *I.D.G. v Spain*[145] the Committee considered an allegation that the author had not been afforded adequate notice or access to courts prior to an eviction resulting from a mortgage foreclosure. As the first case under the OP-ICESCR on the right to housing, the Committee took the opportunity to reaffirm that the "human right to adequate housing is a fundamental right" that "should be ensured to all persons irrespective of income or access to economic resources, and States parties shall take whatever measures are necessary to achieve the full realization of this right."[146]

In this case, the CESCR applied the reasonableness standard to assess compliance with the obligation to ensure access to effective remedies. The Committee emphasized that progressive realization under article 2(1) does not only impose obligations to be fulfilled in the future, it also imposes obligations that are of immediate effect, and subject to effective remedy. State parties must realize the rights in the Covenant "by all appropriate means, including particularly the adoption of legislative measures."

> *This requirement includes the adoption of measures that ensure access to effective judicial remedies for the protection of the rights recognized in the Covenant, since, as the Committee noted in its General Comment No. 9, there cannot be a right without a remedy to protect it." Therefore, by virtue of the obligation contained in article 2, paragraph 1, of the Covenant, States parties must ensure that the persons whose right*

[144] For an analysis of the full jurisprudence to date under the OP-ICESCR, see Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol." *Human Rights Quarterly* 42.1 (2020) 48.

[145] *I.D.G. v Spain* E/C.12/55/D/2/2014.

[146] *Ibid.*

> *to adequate housing may be affected by, say, forced evictions or mortgage enforcements have access to an effective and appropriate judicial remedy.*[147]

The Committee's Views reaffirmed the obligations of States to ensure procedural protections from evictions, clarifying that they equally apply to cases of foreclosed mortgages. The required protections include adequate and reasonable notice for all affected persons and access to legal aid to ensure that persons affected have the opportunity to participate in legal proceedings in defence of their rights.[148]

The CESCR also took the first step in this case toward instituting a more open and participatory process under the OP-ICESCR than is available in other complaints procedures. It authorized the first third party "amicus" submission from the international organization ESCR-Net, in coalition with three other prominent ESC rights organizations to provide information about the wider context of the crisis of evictions and mortgage foreclosures in Spain. The NGOs proposed that the CESCR take this case as an opportunity to clarify Spain's obligations to address the systemic issue of widespread mortgage foreclosures.

The CESCR outlined in its views the submissions made by the NGOs with respect to foreclosure of 400,000 mortgages in Spain and a legal framework that continues to favour financial institutions over the interests of the persons concerned. The views described how the NGOs had referred the Committee to its previous commentary as a basis to insist that Spain take measures to ensure that in foreclosures, evictions "may take place only in exceptional circumstances; after having weighed up all the possible alternatives — including other ways of paying the debt — in consultation with the community or individual concerned; giving all due process guarantees, such as an effective remedy and an adequate and reasonable period of notice; and ensuring that the eviction will not leave the person concerned with no home or at risk of other human rights violations."[149] The Committee declined, however, to engage with the broader systemic issues raised by the interveners, focusing instead on the lack of procedural protections of due notice that were more directly at issue for the author.

As observed by Sandra Liebenberg, this first decision on the right to housing "represents a cautious, incremental approach by the Committee to the building of its normative legitimacy. In the absence of a frontal challenge to the substantive compatibility of Spanish mortgage enforcement law with article 11 of the Covenant, the Committee sought to advance accountability for the right to housing through a rigorous interpretation of the requirements of procedural fairness in evictions arising

[147] *Ibid*, para 11.3 – 11.4.

[148] Ibid.

[149] Ibid, paras 6.1 – 6.5.

from mortgage foreclosure proceedings."[150]

The Committee did, however, address systemic issues related to access to justice in its outline of the remedial measures required to ensure non-repetition of the denial of access to justice in the author's case. The State party should ensure that its legislation governing evictions and foreclosures complies with obligations under the ICESCR, including accessibility of legal remedies, legislative or administrative measures to ensure notices are served in person and enhanced protections from the auction of a dwelling or an eviction proceeding without proper notice.[151]

It is worth noting that even though the CESCR did not adopt the proposals made by the NGOs given amicus standing to address broader systemic issues related to widespread mortgage foreclosures in Spain at the time, the detailed description of the NGO submissions, provided an important forum for the voice of civil society to be heard and disseminated. The NGOs involved welcomed the decision, however limited its scope, and invoked it in support of a campaign for a stronger commitment to access to justice for ESC rights in the 2030 SDGs.[152]

This approach to the role of amicus in the consideration of petitions is consistent with the CESCR's aspiration toward a more participatory model of adjudication. It is an approach that should also be applied under the NHSA, which similarly emphasizes the importance of engagement with and participation of affected groups and "groups that have expertise in human rights and housing." The NHSA recognizes that, as with international procedures for adjudicating the right to housing, it is important to engage many other actors to promote compliance with the right to housing and to build support for a shared understanding of its requirements. Views from Treaty Monitoring bodies are more dialogic in their reporting of decisions, explaining in detail the submissions of the parties before describing the treaty body's decision. The CESCR was able to provide a platform for submission by NGOs to raise broader issues while at the same time restricting its own findings and recommendations to issues that were more squarely raised by the petition itself. It will be similarly important for the Federal Housing Advocate and the Review Panel to ensure that rights claimants and advocates are able to raise important issues and make strategic demands of government at the same time as maintaining the independence of the Federal Housing Advocate and the Review Panel, ensuring that findings and recommended measures are responsive to submissions, based on international

[150] Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol." *Human Rights Quarterly* 42.1 (2020): 48

[151] Ibid, para 17.

[152] Daniela Ikawa and Chris Grove, *Historic step towards access to justice for ESCR violations at UN* (openDemocracy, 1 December 2021)

human rights norms and grounded in the evidence.

In the subsequent case of *Djazia and Bellili v Spain*, the CESCR was able to engage more directly with the substantive obligations of States to address systemic homelessness and affordability issues. The case involved a family with two young children that became homeless after being evicted at the end of a lease for a privately owned apartment. The Committee also made further advances in "participatory justice". It granted intervener status to a coalition of eight international human rights and housing organizations, including Amnesty International and ESCR-Net as well as to the UN Special Rapporteur on the right to housing to make submission on systemic dimensions of the case. The role of the Special Rapporteur in making submissions on a systemic issue under consideration by the Committee has obvious parallels to the provision in the NHSA for the Federal Housing Advocate to make submissions to the Review Panel in hearings on a systemic issue.

The *Djazia and Bellili* decision established a number of normative standards for the assessment of State obligations with respect to the right to housing. First, the Committee firmly rejected arguments advanced by Spain that because the eviction in this case was related to the termination of a private contract, the right to housing under the ICESCR does not apply. The Committee established that "If a State party does not take appropriate measures to protect a Covenant right, it has a responsibility even when the action that undermined the right in the first place was carried out by an individual or a private entity. Thus, although the Covenant primarily establishes rights and obligations between the State and individuals, the scope of the provisions of the Covenant extends to relations between individuals."[153]

This will be an important principle to apply in the consideration of systemic issues under the NHSA. There is often a tendency to think of State obligations with respect to the right to housing as they relate to direct government involvement through programs to create housing supply or to provide assistance with rent. However, systemic issues frequently relate to failures of governments to regulate private investment or development, and the requirement to realize the right to housing "by all appropriate means" includes the requirement to regulate private actors. As noted by the former Special Rapporteur on the right to housing in her report on the financialization of housing:

> *The tripartite obligations of States in relation to the management of financial markets and the regulation of private actors are often interpreted too narrowly. Under international human rights law,*

[153] *Ben Djazia et al v Spain* E/C.12/61/D/5/2015 (*Djazia*), para 14.2.

> *States' obligations in relation to private investment in housing and the governance of financial markets extend well beyond a traditional understanding of the duty to simply prevent private actors from actively violating rights. The assumption, bolstered by neo-liberalism, that States should simply allow markets to work according to their own rules, subject only to the requirement that private actors "do no harm" and do not violate the rights of others, is simply not in accordance with the important obligation to fulfil the right to adequate housing by all appropriate means, including legislative measures. The State must regulate, direct and engage with private market and financial actors, not simply to ensure that they do not explicitly violate rights, but also to ensure that the rules under which they operate and their actions are consistent with the realization of the right to adequate housing.*[154]

The decision in *Djazia and Bellili* also reaffirmed the principle in reasonableness analysis that the dignity interests and particular circumstances of those affected must be the starting point of the analysis. In this case, the circumstances of a family with young children, who became homeless, sleeping in their car for several nights, with two very young children, led the Committee to affirm that "State obligations with regard to the right to housing should be interpreted together with all other human rights obligations and, in particular, in the context of eviction, with the obligation to provide the family with the widest possible protection (art. 10 (1) of the Covenant)."[155]

The Committee described the application of the reasonableness standard to the particular circumstances of the authors, clarifying that eviction into homeless is a *prima facie* violation of the right to housing and would have to be justified by the State as being unavoidable in the circumstances.

> *In the event that a person is evicted from his or her [their] home without the State granting or guaranteeing alternative accommodation, the State party must demonstrate that it has considered the specific circumstances of the case and that, despite having taken all reasonable measures, to the maximum of its available resources, it has been unable to uphold the right to housing of the person concerned. The information provided by the State party should enable the Committee to consider the reasonableness of the measures taken in accordance with article 8 (4) of the Optional Protocol.*[156]

The Committee described the reasonableness standard as requiring the State to make "all possible effort, using all available resources, to realize, as a matter of urgency, the right to housing

[154] UN Human Rights Council, Report of the Special Rapporteur on the right to adequate housing (18 January 2017) A/HRC/34/51.

[155] *Djazia*, para 15.4.

[156] *Ibid*, para 15.5.

of persons who, like the authors, are in a situation of dire need."[157] This requires measures to address systemic issues and structural causes of evictions as well as the individual circumstances of the authors. "The lack of housing is often the result of structural problems, such as high unemployment or systemic patterns of social exclusion, which it is the responsibility of the authorities to resolve through an appropriate, timely and coordinated response, to the maximum of their available resources."[158] As remedy, therefore, the State party was required to engage in "genuine consultation" with the family and ensure that they were afforded access to adequate accommodation as well as to develop a comprehensive plan, with the necessary resources, indicators, time frames and evaluation criteria for the progressive realization of the right to housing for low-income persons.[159]

There are several aspects of this early jurisprudence of the CESCR under the OP-ICESCR that may provide some guidance for the approach taken by the Federal Housing Advocate and Review Panel to reasonableness review. The first is the importance attached by the Committee to building what Liebenberg refers to as its "normative legitimacy." The Committee has been rigorous in referring back to previous commentary on the right to housing and applying it carefully to circumstances presented in particular cases, so as to develop a coherent jurisprudence that can be relied upon by States and civil society to identify the requirements of the progressive realization of the right to housing. The Committee has welcomed interventions by human rights NGOs and by the Special Rapporteur on the right to housing and included substantial summaries of their submissions in the Views. This is consistent with the move toward a more dialogic and participatory approach to adjudication that engages other actors in promoting an accepted normative framework, while continuing to maintain the Committee's independence from any of the parties.

In the consideration of written communications, the CESCR is constrained by the more formal procedures at UN treaty bodies and is unable to institute the kind of community engagement and participatory adjudication that is envisaged under the NHSA. Nevertheless, within its own institutional limits, the CESCR has taken important steps in opening up the petition procedure and pointed the way toward a more inclusive and dialogic model of adjudication, focused on addressing systemic issues and facilitating the realization of the right to housing. All of this provides significant support for the project undertaken by Canada with the adoption of the NHSA.

[157] *Ibid,* para 17.5

[158] *Ibid.*

[159] *Ibid.*

7

Maximum of Available Resources

Budgetary implications of social rights claims have often been the basis for courts and governments denying hearings and access to justice for ESC rights claimants, arguing that human rights bodies or courts are not competent to interfere with complex budgetary decisions properly made by legislatures. Analysis of submissions under the NHSA will frequently engage questions of whether measures which might be required can be considered reasonable from a budgetary standpoint and the budgetary implications of recommended measures could easily become the basis for governments declining to implement them. The federal government may consider itself better placed than the Federal Housing Advocate or the Review Panel to assess competing budgetary needs and on that basis reject recommendations emerging from the NHSA processes. This would entirely undermine the effective accountability envisaged in the NHSA.

Growing socio-economic inequality and the acceptance of the need for social rights claimants to have access to justice has encouraged a more active engagement with human rights-based budgeting and analysis of how the "maximum of available resources" standard is to be applied.[160] The CESCR

[160] See, for example, OHCHR and the International Budget Partnership, *Realizing Human Rights through Government Budgets (*OHCHR 2017); (Allison Corkery and Ignacio Saiz, "Progressive realization using maximum available resources: the accountability" in Jackie Dugard et al (eds) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Cheltenham, UK: Edward Elgar

has made some progress in assessing compliance with the maximum of available resources standard, drawing on a wide range of sources to identify concerns related to resource allocation by States in the context of periodic reviews. The Committee has relied on goals and targets to which the State has committed in international agreements, or in national policies, programs or plans; recommendations from UN agencies and other organizations or experts that have assessed comparative resources; targets advocated by experts, civil society groups, affected communities and other rights-holders; and comparisons of data between similarly situated countries, or for different population groups within a country[161] Recent years have also seen a number of initiatives to assess progress in realizing ESC rights based on available data that compares States ' progress in relation to economic output and available resources. These include the Social and Economic Rights Fulfilment (SERF) Index[162] that has now been incorporated into the Human Rights Measurement Initiative[163] and the OPERA framework developed by the Centre for Economic and Social Rights.[164]

As noted in the paper prepared on behalf of the National Right to Housing Network, budget allocations for housing and related programs will be important indicators of whether updated National Housing Strategies comply with the commitment to progressive realization. The CESCR has made it clear that "available resources" include resources that could be made available by changes in the tax system and it will be important to consider the effects of the tax system on the right to housing, both in terms of the effect on housing markets through tax subsidies such as those provided to Real Estate Investment Trusts or to homeowners, and in terms of foregone revenue that could have been applied to housing related programs.[165] Comparisons of budgets allocated to housing among

Publishing, 2020); Ann Blyberg, 'Government Budgets and Rights Implementation' in Jody Heymann (ed), *Making Equal Rights Real: Taking Effective Action to Overcome Global Challenges* (Cambridge University Press 2012) 198–201; Radhika Balakrishnan, James Heintz and Diane Elson, *Rethinking Economic Policy for Social Justice: The Radical Potential of Human Rights* (Routledge 2016); Aoife Nolan 'Putting ESR-based Budget Analysis into Practice: Addressing the Conceptual Challenges' in A Nolan, R O'Connell and C Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013), 41–57; Olivier de Schutter 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation' in KG Young (ed) *The Future of Economic and Social Rights* (2019) 527–623; R Uprimny, S Chaparro Hernández & AC Araúo 'Bridging the Gap: The Evolving Doctrine on ESCR and 'Maximum Available Resources'" in KG Young (ed) The Future of Economic and Social Rights (2019) 624–653.

[161] Allison Corkery and Ignacio Saiz, "Progressive realization using maximum available resources: the accountability" n. 87 p. 292.

[162] Sakiko Fukuda-Parr, Terra Lawson-Remer, and Susan Randolph, *Fulfilling Social and Economic Rights* (Oxford: Oxford University Press, 2015).

[163] Human Rights Measurement Initiative https://humanrightsmeasurement.org/ and https://rightstracker.org/en/page/about?as=hi

[164] CESR, 'The OPERA Framework: Assessing Compliance with the Obligation to Fulfill Economic and Social Rights' (2012). See also case studies at http:// cesr .org/ opera -practice -case -studies - applying -cesrs -monitoring -framework.

[165] CESCR, General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (23 June 2017) E/C.12/ CG/24 paras. 15, 23, 37.

comparable countries can be useful, as can examples of other countries to show, for example, that homelessness can be eliminated in countries with similar or fewer resources.

In many cases, it is possible to apply the maximum of available resources standard without an extensive budgetary analysis. In the *Djazia and Bellili* case, for example, Spain argued that there was a scarcity of public housing units and this constraint justified the State's inability to secure housing for the family when it became homeless. The Committee found the State's arguments "insufficient to demonstrate that it has made all possible effort, using all available resources, to realize, as a matter of urgency, the right to housing of persons who, like the authors, are in a situation of dire need."[166] It noted that the Madrid Housing Institute, where Djazia and Bellili had applied, had sold almost 3,000 houses to investment companies, thereby reducing the availability of public housing through a retrogressive measure.[167]

As noted above, it will be up to the government to provide relevant budgetary information necessary to assess cost consequences of measures proposed by affected communities, the Federal Housing Advocate or the Review Panel. Within the more participatory and dialogic approach under the NHSA, this may take the form of a commitment from the Minister to provide any information needed for the consideration of submissions or assistance from the Parliamentary Budget Officer in providing estimates of costs upon request. What needs to be avoided is a situation where the Federal Housing Advocate or a Review Panel recommends a measure, only to have it rejected on the basis of budgetary concerns that were not conveyed earlier.

[166] *Ibid*, para 17.5

[167] *Djazia* para 17.5

8

Minimum Core and Non-Retrogression

In its commentary on the obligation of progressive realization in General Comment No. 3, the CESCR identified two circumstances that constitute a *prima facie* violation article 2(1) and require a significantly higher standard of justification. One is known as the "minimum core" principle and the other the principle of non-retrogression.

In its discussion of a "minimum core" of ESC rights, the CESCR stated in General Comment No. 3 that States have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights."[168] While the Committee does not refer to the concept of minimum core in either General Comments Nos. 4 or 7 on the right to housing, it does state in General Comment No. 3 that "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant."[169] The Committee expresses this as a view it has developed on the basis of its extensive experience reviewing State reports. It is not, however, justified by any reference to the text of the ICESCR and it was not incorporated into the text of the OP-ICESCR.

Advocates in South Africa urged the Constitutional Court to adopt the concept of minimum core obligations in the *Grootboom* case. The Court,

[168] CESCR, General Comment No. 3.

[169] *Ibid.*

however, rejected the idea that a minimum content of the right to housing can be determined in a manner that would apply in all circumstances.[170] It noted that housing needs are diverse and would require different definitions for different groups. The Court concluded that the question for the purposes of the Constitution is not whether the government has met some hypothetical minimum, but "whether the measures taken by the State to realise the right afforded by section 26 are reasonable."[171]

Some of confusion with respect to the controversial concept of minimum core arises from the suggestion that the minimum core is an immediate obligation in all circumstances regardless of resource constraints. In fact, what the CESCR said in General Comment No. 3 is that "In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[172] In other words, it is subsumed by what would later become the reasonableness standard, which demands that those in the greatest need receive priority attention and that a failure to meet the most basic needs will be very difficult for a State to justify on the basis of the maximum of available resources standard.

In addition to the obvious challenges and pitfalls of attempting to identify a "one size fits all" minimum requirement of the right to housing, there are serious risks involved in relying on the concept, particularly in an affluent country such as Canada. The progressive realization and reasonableness standard rejects the idea that compliance with the right to housing in Canada can be measured by the same standards as in impoverished countries. Yet the minimum core concept may suggest a kind of universal floor. In the Canadian context, the caution voiced by the CESCR in General Comment No. 4 is particularly applicable: "the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity."[173] It is certainly appropriate in the Canadian context, however, that a very stringent standard of justification be required for failures to address the most egregious violations of the right to housing, such as homelessness or institutionalization of persons with disabilities. This kind of application of the minimum core approach can be incorporated into reasonableness analysis, to require urgent action to address those in the most desperate circumstances.

[170] *Grootboom*, para 33

[171] *Ibid.*

[172] CESCR, General Comment No. 3.

[173] CESCR, General Comment No. 4, para 7.

The other circumstance which the Committee has identified as a *prima facie* violation requiring a more rigorous justification by the State is what are referred to in the Committee's general comments as "deliberately retrogressive measures" or the principle of "non-retrogression". This concept addresses any backward movement in relation to the enjoyment of the right to housing, either empirically, as may be demonstrated by indicators of homelessness or core housing need, or through the removal or weakening of legislative or programmatic protections, such as by weakening protections of security of tenure or rent affordability. Such measures, including austerity measures resulting from broad budgetary restraint, can only be justified in exceptional circumstances. The State must demonstrate that any decision to roll back protections or enjoyment of the right to housing is based on the most thorough consideration possible, justified in respect of all other human rights and that all available resources were used to mitigate any negative effects. In times of severe economic and financial crisis, all budgetary changes or adjustments affecting policies must be temporary, necessary, proportional and non-discriminatory.[174]

Application of the non-retrogression principle will at times be helpful under the NHSA as a way to identify changes to programs or policies which have a directly negative impact on vulnerable groups or set back progress in meeting goals and timelines for the elimination of homelessness and the realization of the right to housing. It will be particularly important to identify changes in legislation that have the effect of removing rights-based protections on which rights-holders rely. The CESCR identified a deliberately retrogressive measure in its 1998 review of Canada in the revoking of the Canada Assistance Plan Act and the consequent removal of the requirement on provinces to provide social assistance at a level that would provide for basic requirements, including housing and the termination of social housing programs.[175] This was the most damaging form of retrogressive measure, as it created the structural changes that led to many of the systemic issues that now must be addressed under the NHSA.

[174] *Djazia*, para 17.6.

[175] CESCR, Concluding Observations: Canada (1998) para 19.

9

Systemic Discrimination: The ICESCR and Other Human Rights Instruments

The right to non-discrimination and equality is a central component of the right to housing under the ICESCR and the assessment of reasonable measures required for its progressive realization. Article 2(2) of the ICESCR requires that the right to housing be exercised without discrimination of any kind. The CESCR has recognized a broad range of grounds of discrimination, including some that have not been fully recognized under section 15 of the Charter such as undocumented immigration status, homelessness and economic and social condition.[176]

The CESCR has also emphasized that the right to housing is interdependent with rights in other human rights treaties and must be interpreted as such. The NHSA refers to human rights more broadly than the ICESCR when it recognizes the right to housing as a fundamental human right "affirmed in international human rights law." The NHSA's commitment to the progressive realization of the right to housing as recognized in the ICESCR therefore subsumes commitments to substantive equality that go beyond what may have been recognized in Canadian courts as prohibited discrimination.

The right to housing in the NHSA as well as in parallel distinctions-based strategies must be interpreted

[176] CESCR, General Comment 20.

consistently with the *UN Declaration on the Rights of Indigenous Peoples* (the UN Declaration), including the right to the improvement of housing conditions, without discrimination, and to be actively involved in developing and determining housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.[177] Jurisprudence on the right to housing of Indigenous women under the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) through both its petitions and inquiries procedures under the Optional Protocol to CEDAW (OP-CEDAW) which Canada has ratified will also be relevant.

One decision by the CEDAW Committee under the OP-CEDAW engaged with the right to housing of Cecelia Kell, an Indigenous woman belonging to Behchokǫ̀ community in the Northwest Territories. Kell admirably submitted, unrepresented, a communication describing how she had been evicted from her home by a violent spouse and deprived of housing designated for Indigenous households by the local housing authority, on which her violent spouse was a board member. While she and her children were recovering in a women's shelter from violence her spouse had inflicted on them, he had changed the locks and then used his position with the Housing Authority to remove her name from the lease.

In her struggle to regain her home Kell encountered a racist and sexist legal system and legal culture within courts and among lawyers. For over a decade she sought to regain her home through domestic courts without success. Having exhausted domestic remedies, she filed a communication under the OP-CEDAW, alleging intersecting discrimination on the basis of sex, cultural heritage and marital status. Her complaint was upheld by the CEDAW Committee, which recommended as remedy that she be:

(i) Provided housing commensurate in quality, location and size to the one that she was deprived of; and

(ii) Provided appropriate monetary compensation for material and moral damages commensurate with the gravity of the violations of her rights.

Canada was additionally required to:

(i) Recruit and train more aboriginal women to provide legal aid to women from their communities, including on domestic violence and property rights;

(ii) Review its legal aid system to ensure that Indigenous women have access to adequate representation.

[177] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, articles 21, 23. See also UN General Assembly, *Report of the Special Rapporteur on adequate housing* (17 July 2019) A/74/183.

The Kell case has been welcomed as an advance in the recognition of Indigenous women's right to housing, and Cecelia Kell herself felt vindicated after such a long struggle.[178] However, as pointed out by Lolita Buckner Inniss, Jessie Hohmann and Enzamaria Tramontana in their introduction to their "rewriting" of the CEDAW decision, the CEDAW Views failed to address the way in which the Canadian legal system "had not treated Kell as a subject of rights and as having full capacity as a legal actor" and failed to engage effectively with her as an Indigenous woman engaging with a legal system that refused to hear her claim to her right to her home. The Committee in its Views also failed to address the way in which the procedural history through which Celia Kell met the requirement of "exhaustion of domestic remedies" was inextricably intertwined with discrimination that was considered in relation to access to housing.[179]

The important feminist critique and rewriting of the CEDAW decision serve as a reminder of how important it will be to fully hear the voice and consider the circumstances of affected individuals and groups in relation to submissions under the NHSA. Women's and Indigenous experiences of violations of the right to housing must be fully heard. On the other hand, the rich discussion that the case has provoked, all resulting from her proceeding, unrepresented, to file a communication and supporting submissions before the CEDAW Committee, is a measure of the importance of mechanisms through which petitions can be advanced and adjudicative space claimed, when the Canadian legal system fails marginalized, colonized or racialized women. None of that would have been possible if Canada had not ratified the OP-CEDAW. The NHSA must similarly function as an important corrective mechanism when the more formal system of justice in Canada fails women, Indigenous Peoples and others.

Another important source for the development of normative standards around the right to housing of Indigenous women under the NHSA and distinctions-based strategies will be the various inquiries and recommendations with respect to Missing and Murdered Indigenous Women and Girls. The Inquiry initiated under CEDAW's Inquiry Procedures on this issue points to the interconnection between systemic discrimination in the legal system, the inadequacy of on-reserve housing, Indigenous women's homelessness and their experience of grossly disproportionate violence, all critically important systemic issues that will need to be addressed under the NHSA and under distinctions-based strategies.[180]

[178] J Hohmann, The Right to Housing: Law, Concepts, Possibilities (Oxford, Hart Publishing, 2013) 39–41.

[179] Jessie Hohmann, Lolita Buckner Inniss and Enzamaria Tramontana, "Cecilia Kell v Canada" in Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law* (Hart 2019)

[180] Committee on the Elimination of Discrimination against Women, *Report of the inquiry concerning Canada under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (30 March 2015) CEDAW/C/OP.8/CAN/1, para 112.

Another critical source for interpreting the right to hosing under the NHSA will be the UN *Convention on the Rights of Persons with Disabilities*. As noted in the UN Special Rapporteur's Report on the right to housing of persons with disabilities, there is a tremendous opportunity for cross-fertilization between the "disability human rights paradigm" in the CRPD and the substantive obligation to realize the right to housing under the ICESCR.[181] Many of the concepts that have been developed to understand systemic discrimination experienced by persons with disabilities, such as the "social construction of disability", can enrich the understanding of systemic issues under the NHSA. Similarly, approaches that have been developed under the ICESCR to understand positive obligations and progressive realization can help to assist the disability rights movement better address issues such as disproportionate homelessness among persons with disabilities.

A particularly important provision in the CRPD that must be directly incorporated into the understanding of the right to housing in the NHSA is Article 19 of the CRPD, guaranteeing the right to live independently and be included in the community. Article 19 requires that persons with disabilities have the opportunity to choose where and with whom they live and access to a range community support services to facilitate inclusion in the community and prevent isolation or segregation. The standard to be applied in assessing the implementation of this right is similar in wording to the "all appropriate means" standard in article 2(1) of the ICESCR. In Article 19, however, this is an immediate obligation, not subject to progressive implementation over time. States must adopt "effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right."[182]

In its most recent review of Canada's compliance with article 19, the Committee on the Rights of Persons with Disabilities recommended that Canada adopt a national guideline on the right to live independently in the community; adopt a human-rights based approach to disability in all housing plans; ensure that provinces and territories establish a timeframe for closing institutions and create a comprehensive system of support for community living; ensure that accessibility legislation facilitates inclusion in the community; and implement appropriate service provision within First Nation communities.[183]

The *Convention on the Elimination of All forms of Racism* (CERD) is unique among international human rights treaties in that it affirms the right not only to non-discrimination in access to housing but also the substantive right to the equal enjoyment of the *right* to

[181] UN General Assembly, Report of the Special Rapporteur on adequate housing (12 July 2017) A/72/128.

[182] *Ibid*, article 19.

[183] Committee on the Rights of Persons with Disabilities, Concluding observations: Canada (8 May 2017)

CRPD/C/CAN/CO/1.

housing and other ESC rights.[184] The CERD Committee has recommended greater attention to the right to housing and other ESCR rights of Indigenous peoples and to poor housing as a root causes of displacement of children.[185] The CERD Committee has not yet addressed in any focused way the significant issues of racial segregation and discrimination in housing in Canada in the way it has in reviews of the United States of America.[186]

The *Convention on the Rights of the Child* (CRC) is also a relevant source for the interpretation of the right to housing under the NHSA, particularly as the Supreme Court of Canada has recognized that the "best interests of the child" principle in the CRC should be considered when exercising discretion based on a reasonableness standard. This would apply to evictions cases in which children are forced from their homes and often, as a result, from their schools and friends. The CRC has expressed concern about the extent of homelessness among families with children and about the circumstances of "street children" in Canada, noting that many are Indigenous.[187]

It will be important for the work of the Federal Housing Advocate to support and benefit from the work of the various human rights treaty bodies that have been engaged in assessing and making recommendations with respect to Canada's compliance with the right to housing and other rights under international human rights law. And in reverse, findings and recommended measures for compliance with the right to housing under the NHSA can help to inform the work of international treaty bodies. The Federal Housing Advocate may consider presenting reports to human rights treaty bodies during reviews of Canada and follow up on concluding observations or views to ensure that they are implemented.

[184] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965.

[185] UN Committee on the Elimination of Racial Discrimination *Concluding observations: Canada*, (4 April 2012) CERD/C/CAN/CO/19-20 para 19; and Concluding Observations: Canada (13 September 2017) CERD/C/CAN/CO/21-23 para 28.

[186] UN Committee on the Elimination of Racial Discrimination (CERD), C*oncluding observations: United States of America* (8 May 2008) CERD/C/USA/CO/6 paras 16, 31.

[187] UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 October 2003, CRC/C/15/Add.215 paras 40, 42, 54, 55.

10

International Human Rights and Federal Jurisdiction

One of the most troubling issues at reviews of Canada before the CESCR has been the challenge of provincial/territorial jurisdiction over many areas of ESC rights, including many aspects related to the right to housing. It does not go over well in international human rights venues when the federal government, representing the State party, response to concerns about widespread homelessness or inadequate social assistance rates by stating simply that these matters are within provincial jurisdiction. From an international human rights perspective, the State may not, pursuant to article 27 of the *Vienna Convention on the Law of Treaties* "invoke the provisions of its internal law as justification for its failure to perform a treaty." In the case of the rights under the ICESCR the issue is even clearer. Article 28 of the ICESCR states that: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." One can have some sympathy with the federal government representatives in these invariably tense exchanges, however. Article 27 of the *Vienna Convention* likely does not hold much sway in federal/provincial/territorial meetings and concerns expressed by treaty monitoring bodies do not get much attention in provincial and territorial capitals.

The focus of the CESCR's concern is that when inquires are made into the procedures in place through which

different spheres of government in Canada co-ordinate the implementation of ESC rights, it is clear that they have been ineffective, non-transparent and unaccountable. The Committee has consistently recommended improving these procedures but they have invariably been disappointed at the lack of response.[188]

How then, can the NHSA, as federal legislation committing to the progressive realization of the right to housing, a commitment that can never be fulfilled without co-operation and engagement of provinces and territories, avoid the kind of spinning of wheels around federalism that happens in Geneva?

The NHSA is federal legislation and must be interpreted and applied as such. It could not, for example, have required provincial and territorial ministers of housing to respond to findings and recommended measures in the way that this is required of the federal minister. But beyond these obvious restrictions, the legislation should be interpreted broadly, in light of its purposes and content, and recognizing that all orders of government are committed to the right to housing affirmed in international human rights law, even if they have not declared this in legislation.

The NHSA restricts the content of recommended measures that the Federal Housing Advocate will make to the federal minister to matters within federal jurisdiction. That makes sense. There is no point in recommending measures for which the federal government lacks jurisdiction to implement. In addition, the NHSA describes the studies initiated by the Federal Housing Advocate into economic, institutional or industry conditions that affect the housing system as "respecting matters over which Parliament has jurisdiction." That makes less sense. The housing system is not something that can be analysed properly through a singular lens of federal jurisdiction. The latter restriction was put in place, apparently, to assuage concerns among provinces about a federal appointee "investigating" their governments. Yet the Federal Housing Advocate does not have any special investigative powers.

The important point, however, is that the NHSA does **not** restrict submissions received to areas of federal jurisdiction and does not restrict any of the other elements of the Advocate's mandate, including monitoring the progressive realization of the right to housing or assessing progress in meeting goals and timelines (which surely must engage provincial/territorial plans and timelines); analyzing and conducting research on systemic housing issues, consulting with affected groups and civil society organizations with respect to systemic housing issues, receiving submissions or providing advice to the Minister.

The core of the Federal Housing Advocate's mandate is related to

[188] Concluding Observations 2006, para 12; 1998, para 52; E/C.12/CAN/CO/6 23 March 2016 paras 7-8.

"systemic issues" related to the right to housing. Systemic issues are not defined by governmental jurisdiction. As described by the OHCHR Handbook of ESC rights of national human rights institutions:

> *Violations of human rights can be either individually based or system based. The two types of violation require different remedial approaches. An individual violation affects one person or a small number of persons and is often perpetrated by one or a small number of individuals. Economic, social and cultural rights are generally more often the subject of systemic violations. Systemic violations have broad causes and effects, often arising from the ways in which society is organized politically, socially and economically. It is often difficult to identify individual perpetrators who bear individual responsibility for systemic violations. The State as a whole will be responsible.*[189]

Consistent with this, and as noted above in relation to the reasonableness standard, the Federal Housing Advocate's analysis and research into systemic issues and engagement with affected groups and civil society will take as its starting point the need to understand the circumstances of the groups affected – not a particular law or action by a particular government. The process of consultation, review, meaningful engagement with those affected and dialogue with governments will lead, in the end, to recommended government measures. Some may involve areas of shared jurisdiction, and some may fall within areas of exclusive jurisdiction. Only those that fall within exclusive or shared federal jurisdiction will be submitted to the federal minister. But there will be other recommendations that emerge from assessments of systemic issues that related to other dimensions of the housing system: investors, landlord groups, tenants, provincial/territorial/municipal governments, planners, researchers, etc. There is nothing in the NHSA to prevent the Federal Housing Advocate from communicating those recommendations to those to whom they apply and to fail to do so would often undermine the commitment to the furthering the progressive realization of the right to housing and the review of systemic issues in this context. The role of the Federal Housing Advocate should be interpreted in light of the purpose of the NHSA and the Housing Policy Declaration.

One restriction that will have to be managed is the restriction of the content of a systemic issue to be considered by Review Panels to an issue within the jurisdiction of Parliament. In that case the Federal Housing Advocate is required to prepare a summary of the information that formed the basis for identifying the systemic housing issue. The Federal Housing Advocate will

[189] OHCHR, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*.

therefore need to identify the aspects of a systemic issue being referred to a panel that may warrant measures by the federal government. But the definition of "measures" must be broad. A "measure" could be that the Minister should encourage provinces and territories to work with the federal government to develop a joint strategy on urban Indigenous homelessness.

The commitment to the right to housing under international human rights law requires co-ordination of various spheres of government. That co-ordination is largely the responsibility of the national level government. It is within the federal government's jurisdiction, and it is its responsibility, to engage with provinces in order to give effect to Canada's international human rights obligations. So federal jurisdiction should not be seen in relation only to federal programs. It should be assessed in relation to the role of the federal government to work with provinces and territories in the context of co-operative federalism and the respect for international human rights.

There are many recommendations that would be within federal "jurisdiction" even thought the area of housing policy is formally within provincial and territorial jurisdiction. An investigation into widespread evictions, for example, might lead the Advocate to recommend that the Minister act through the FPT Housing Council to develop a shared standard or co-ordinated response to affordability, arrears and evictions across the country, drawing on international human rights norms. Evidence of inadequate shelter components for social assistance in major cities might lead to a recommendation to convene a meeting of FPT Ministers or other officials to develop a common strategy. In other words, it is always within federal jurisdiction for the federal government to act in a leadership capacity to ensure a co-ordinated, collaborative approach to progressively realizing the right to housing in areas of provincial jurisdiction.

The federal government may also play a critical role in ensuring the progressive realization of the right to housing under the NHSA by attaching conditions to federal funding for housing or other provincial/territorial programs. Questions about what kinds of conditions should be attached to funding in order to achieve the federal government's Housing Policy are well within the scope of measures that may be addressed to the Minister, by either the Federal Housing Advocate, or the Review Panel.

It is worth remembering that the social housing deficit confronting the federal government dates back to the same 1995 budget in which the *Canada Assistance Plan Act* (CAP) was revoked. CAP was a central pillar of the implementation of the right to adequate housing and other ESC rights in Canada. Under CAP, provinces and territories were required to provide anyone in need, regardless of the cause, sufficient financial assistance to cover the cost of basic requirements, including housing, as a condition of federal cost-sharing. If a province did not meet this requirement,

the Supreme Court had determined that an individual affected by alleged provincial non-compliance should be granted "public interest" standing to bring the question of compliance before the courts. If the amount of social assistance was not reasonably consistent with the costs of housing and other necessities, the court could order the federal government to withhold transfer payments until the problem was remedied. So under CAP, there was, at least based on Supreme Court of Canada jurisprudence, a right to an effective remedy for anyone who found themselves without adequate financial assistance to secure housing.

The social housing deficit that was created by the federal withdrawal from social housing programs after 1995 was reinforced by a social rights deficit created at the same time. These are the historical antecedents to the present crisis. It would not make sense to restrict the solutions to systemic issues that are the legacy of the 1995 budget by focusing only on the social housing deficit and not engaging with the parallel social rights deficit.

The CESCR has continually urged Canada to reinstate standards attached to cost-sharing or funding agreements with provinces in relation to ESC rights, grounding such recommendations in the obligation to use "all appropriate means" to realize ESC rights. It is arguably a contravention of the ICESCR to provide funding to provinces without taking appropriate measures to ensure that the funding will be spent in a manner that accords with shared obligations under international human rights law. It is certainly something that should be considered among the measures within federal jurisdiction that the Federal Housing Advocate might want to propose in response to a submission.

There are, in fact, already bilateral housing partnership agreements with all of the territories and provinces. All of the agreements, except Quebec's, commit the province or territory to implement three-year action plans that will:

> *include support for those in greatest need, will be consistent with the principles of participation and inclusion; equality and non-discrimination; and accountability, and will speak to the federal human rights-based approach to housing. In so doing, the Action Plan will complement the NHS goal of helping advance the progressive realization of Canada's obligations in relation to housing under the International Covenant on Economic, Social and Cultural Rights (ICESCR).*[190]

Issues raised in submissions may well give the Federal Housing Advocate cause to recommend that the Minister make a more concerted effort to promote compliance with this provision, or if it is not proving to be effective, that

[190] See, for example, CMHC – Ontario Bilateral Agreement Under the 2017 National Housing Strategy made as of April 1, 2018, Schedule C.

provisions in future agreements be strengthened.

Finally, it will be important for the federal government to take advantage of the fact that any requirements on provinces and territories to align cost-shared or other programs with the NHSA does not, in fact, impose a federal requirement. On the contrary, it should be understood as an agreement to comply with shared obligations and commitments to human rights that already exist for provinces and territories. This should allow recommendations to be framed in a manner does not provoke resentment about federal intrusion into provincial/territorial jurisdiction.

Quebec, in particular, has a distinctive commitment to the ICESCR and is much more likely to agree to comply with its own obligations under international human rights law than to agree to a condition imposed by the federal government. In 1976, when Canada ratified the ICESCR, Quebec sent a signed copy to Ottawa notifying the federal government that Quebec had "ratified" the ICESCR. The Bloc Quebecois was convinced by human rights organization in Quebec to support a private members bill, Bill C-400, requiring the development of a National Housing Strategy based on the right to housing under the ICESCR, after a provision was added to distinguish Quebec on this basis. Article 4 of Bill C-400 stated that: "Quebec may, having ratified the International Covenant on Economic, Social and Cultural Rights, use the benefits of this Act with respect to its own choices, its own programs and its own approach related to housing on its territory." [191]

[191] BILL C-400 1st Session, 41st Parliament, 60-61 Elizabeth II, 2011-2012.

11

Conclusion

As described above, when the Canadian delegation at the UN General Assembly refused to welcome "human rights made whole" by the adoption of the OP-ICESCR on the 60th anniversary of the UDHR, it insisted that governments should be free to choose what they deem to be the most reasonable policies and that rights such as the right to housing are "defined in a broad manner and could not be subjected easily to quasi-legal assessments." Similarly, courts in Canada have insisted that "there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless."[192]

In examining how international human rights law frames the NHSA's historic recognition of the right to housing as a fundamental human right, this paper has argued that the NHSA represents an historic and decisive rejection of the denial of access to justice for the right to housing. The paper has not contested, however, that the right to housing is defined in a broad manner, as suggested by Canada at the UN. What could be more broadly defined that a "right to a home in which to live in peace, security and dignity." Nor has the paper claimed that evolving jurisprudence and commentary in international law has

[192] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, para 33.

precisely defined what the right to housing means, so that courts or the government can find in a General Comment or a UN document a precise definition of what constitutes adequate housing in all circumstances so that it knows exactly what is required.

What the paper has attempted to demonstrate is that as a fundamental right inextricably linked to the right to a dignified life and core human rights values affirming equality in dignity and rights, the right to housing is a right whose meaning must be clarified by engaging meaningfully with rights-holders. This is no different from other fundamental rights, like the right to life, security of the person or equality under the Charter. We do not know what these rights mean until rights claimants take ownership of them and apply them to their lives, courts hear and adjudicate claims that bring to light particular circumstances, and governments reshape and rethink policies and programs in light of a growing understanding of how the rights apply in different contexts.

Elaborating the content of the right to housing under the NHSA will rely, in part, on important norms that have been recognized in commentary and jurisprudence, particularly by the CESCR in its general comments, its concluding observations on Canada and in jurisprudence under the OP-ICESCR and the UN Special Rapporteur's thematic and mission reports. But all of the norms and principles that have clarified how the right to housing is to be applied under international law must be interpreted and applied in particular contexts under the NHSA, in relation to systemic issues. It is the processes that the NHSA has put in place, the "robust accountability mechanisms" as they were described to the House of Commons, that will give content and meaning to the fundamental right to housing under the NHSA.

There are still many in government and elsewhere who are mystified as to what a right to housing means in practice. They understand the value of a rights-based approach if it means consulting with vulnerable and marginalized groups in order to allow governments to better design programs and achieve better housing outcomes for constituents. But they are less clear on what it means to recognized the right to housing as a right that can be claimed, adjudicated and made subject to effective remedies. Even in the dialogic and participatory procedures under the NHSA, the idea of claiming a right to housing still seems to create fears of irresponsible and unmanageable demands that the government provide housing for everyone.

Will the federal government and other orders of government relinquish their past resistance to recognizing housing as a fundamental right and their insistence that housing policy should be left to governments? That is the challenge raised by the NHSA. And although it would be an entirely incorrect reading of the NHSA to treat the findings and recommendations of the Federal Housing Advocate and the Review Panel as mere policy advice

rather than measures deemed to be required for compliance with a fundamental right, a failure by governments to implement the transformative human rights architecture of the NHSA is not something that can be easily challenged. As noted above, the obligation of good faith implementation of international human rights obligations constitutes a peremptory norm of international human rights law and as such is a legal obligation on the federal government. However, the fulfillment of this legal obligation under the NHSA is not something that a court is very likely to order.

Ultimately, the NHSA is a unique opportunity to implement the right to housing that can be thwarted if a government is intent on doing so. But even the Canadian Charter has a notwithstanding clause. We ultimately rely on faith that governments either believe in human rights, or they believe that it would be politically damaging to turn their backs on them. The challenge with the NHSA is to turn the legislative affirmation of the right to housing under international human rights law into what the Supreme Court refers to as "a moral imperative and a legal necessity."

How do we make sure this democratic experiment in dialogic human rights implementation succeeds? The lessons learned by civil society engaging with international human rights mechanism suggest that the best way to make the right to housing meaningful is to utilize procedures that provide an adjudicative space in which it can be claimed.

Modern commitments to the right to housing have emerged from new human rights practice that recognizes a previously excluded category or rights claimants as entitled to claim their right to dignity in rights and to recognize that the right to housing requires meaningful accountability, access to justice and effective remedies.

That is the unique opportunity afforded by the NHSA. Not only does it introduce to Canada the first federal legislative commitment to realizing the right to housing, but it provides procedures to ground a new human rights practice that will give this right meaning and content and bring it to life. The "judicially discoverable standard" on the basis of which to assess compliance with progressive realization id the reasonableness standard which entirely relies on hearing from claimants and meaningfully engaging with affected communities– precisely as the NHSA mandates.

One thing that is striking on reviewing the concerns of UN treaty bodies and their recommendations with respect to the right to housing over the years is that they are largely in line with the current consensus on what needs to be done to address homelessness and housing need in Canada. One wonders how much better off Canada might be if at least some of the recommendations had been implemented. Of course, the procedures at treaty bodies are fraught with limitations, growing ever more serious with resource constraints at the U.N. However, the reliability of the findings and recommendations that

have emerged from the CESCR is evidence of the fact that if human rights experts, housing advocates, lived experience experts, members of affected communities and international human rights experts come together within a rights claiming space, and both rights claimants and the government are given fair hearings, even for a day in a crowded room with everyone suffering jet lag, good quality, evidenced based, reasonable recommendations are likely to emerge. That augers well for the procedures under the NHSA.

The Federal Housing Advocate, the Review Panel and the Housing Council created by the NHSA do not need to start from scratch or re-invent the wheel with respect to the right to housing. There is a lot of momentum, knowledge and a solid normative framework at the international level from which to draw both content and inspiration. The two key challenges at the international level, however, will need to be addressed in the implementation of the NHSA. Affected communities must be provided with the resources necessary to organize, with the support of civil society and human rights advocacy organization, and they must be treated with respect and dignity, recognized as absolutely necessary to any assessment of compliance with international human rights norms.

Governments, on the other hand, must be convinced to recognize the value of affirming a new human rights framework for policies and decision-making, both as a recommitment to core values of Canada's constitutional democracy and as the most effective means to address the housing crisis and realize the commitment to ensure access to housing for all by 2030 and beyond.

In her thematic report on rights based housing strategies, the Special Rapporteur on the right to housing identified a number of advantages of a rights based housing strategy based on the right to housing that should become evident if the NHSA is properly implemented.

First, recognizing the right to housing means that human rights problems are identified and addressed as such. Vicky Levack explained this well when she said her government sees her as a problem to be fixed rather than as a human being whose capacities have not been appreciated.

Second, the right to housing changes the way governments interact with people who need housing. Rather than recipients, beneficiaries or "objects" of government programmes, rights-holders are engaged as active subjects who can assist in ensuring that strategies are responsive to their lived experiences and are made more effective. Active human rights-based citizenship solves problems that governments on their own cannot solve.

Third, recognizing the right to housing enables rights-holders to identify gaps and structural weaknesses in housing systems and programs. The accountability procedures addressing systemic issues under the NHSA are corrective mechanisms. They ensure

that no one is left behind. Many of the problems that come to light, when solved, save money, because unsolved problems like homelessness or exclusion cost money.

Fourth, recognizing the right to housing clarifies lines of democratic accountability. Rather than considering housing policy as a matter of choice that governments have a right to make, the right to housing clarifies that governments are accountable to people as rights-holders. That enhances democracy and leads to more coherent and effective decision-making.

Fifth, recognizing the right to housing as a fundamental right as affirmed in international law allows it to inform any decision-making that may affect access to housing. It provides a principled framework that brings coherence and co-ordination to multiple areas of law and policy.

And sixth, most fundamentally, the right to housing is transformative. The processes put in place under the NHSA will identify systems, structures, and barriers that obstruct the realization of human rights and open up avenues through which the right to housing can be realized. The accountability is not a rigid accountability to fixed standards but rather an accountability to a purpose, a commitment to move toward the fulfillment of a human right. The reasonableness standard requires that policies be capable of fully realizing the right to housing. The National Housing Strategy is required under the NHSA to set out a long-term vision. Recognizing the right to housing as a fundamental human right help us get to where we are trying to go as a society.

Of course, the best way to convince people of the value of a human rights approach is through effective human rights practice. As the Constitutional Court of South Africa noted when it required governments to meaningfully engage with informal settlement residents as rights-holders, it will take commitment and good faith from all actors. But then, that is the challenge and the beauty of human rights.

IMPLEMENTING THE RIGHT TO ADEQUATE HOUSING UNDER THE NATIONAL HOUSING STRATEGY ACT:

THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

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