To sell or not to sell? An analysis of the Tafelberg sale in the light of the right to adequate housing in the International Covenant on Economic, Social and Cultural Rights

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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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I dedicate this dissertation to all who lack the means to live their lives in dignity. May the day come when the human dignity of each single person is unconditionally and universally recognised.

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INTRODUCTION

(a) Background to the research

Since long, the City of Cape Town suffers from a lack of affordable housing options close to its Central Business District ('CBD').[1] Due to that 'housing crisis', less-wealthy inhabitants are forced to live far from the CBD, which can lead to extensive travelling costs and long travelling times between home and work.[2] That housing crisis also largely follows racial lines, with the areas further away from the CBD often being inhabited by Coloured and Black households.[3] While the current housing crisis in Cape Town has some of its roots in the racial segregation of the colonial and apartheid periods, it is exacerbated by a recent trend of housing being treated more and more as a commodity by financial markets and institutions.[4]

In recent years, a debate arose in Cape Town about the role public authorities have to play regarding addressing the current housing crisis and the continued spatial apartheid. Reclaim The City ('RTC'), a self-declared 'movement of tenants and workers campaigning to stop our displacement from well-located areas and secure access to decent affordable housing', in recent years campaigned for using well-situated public owned land that is not (longer) used by the public authorities ('surplus public land'), for affordable housing projects.[5] They are joined in this struggle by Ndifuna Ukwazi ('NU'), another organisation working around constitutional rights and social justice.[6] RTC and NU campaigned for the use of several properties in Cape Town for affordable housing purposes, amongst others the Helen Bowden Nurses' Home, the Alfred Street Complex and the Top Yard property.[7] RTC, NU and some other civic organisations furthermore called upon the national government to release military land near Cape Town's CBD for affordable housing projects.[8] Also the lease of well-located public land to private actors for a low rent by the City of Cape Town is already denounced, since such a

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[1] M W Massyn, R McGaffin, F Viruly & N Hopkins 'The challenge of developing higher density, affordable housing in the inner city of Cape Town' (2005) 8 *International Journal of Housing Markets and Analysis* 412 at 413–4.
[2] M Weber *The right to the city (centre): A spatial development framework for affordable inner-city housing in Cape Town's Foreshore* (Masters thesis, University of Cape Town, 2018) at 7-8.
[3] P Wilkinson 'City profile: Cape Town' (2000) 17 *Cities* 195 at 201.
[4] J Migozzi 'Selecting spaces, classifying people: The financialization of housing in the South African city' (2020) 30 *Housing Policy Debate* 640 at 640.
[5] See *http://reclaimthecity.org.za/*, accessed on 11 June 2021.
[6] See 'Ndifuna Ukwazi' available at *https://landportal.org/node/52292*, accessed on 11 June 2021.
[7] Reclaim The City & Ndifuna Ukwazi 'Reclaim The City – Land for People Not for Profit!', Launch Document.
[8] B Payi 'Call for release of military-owned land for Cape Town housing', *IOL* 14 June 2021, available at *https://www.iol.co.za/weekend-argus/news/call-for-release-of-military-owned-land-for-cape-town-housing-d5cac105-0f29-403c-95e1-9d3abb1a817b*, accessed on 14 August 2021.

lease often results in public land being used as golfing courses, parking lots or sport fields for an exclusive public, instead of being used for the development of affordable housing.[9] Nevertheless, the question on whether public land can be used to further housing policies is not an issue that only relates to Cape Town or South Africa. The same question is raised in, for instance, the United States of America, where the State of California adopted legislation obliging cities to make public land that is no longer needed, available to developers that are committed to reserve a certain share of the developed housing units to households with housing needs.[10]

In what follows, an analysis will be provided of the role the right to adequate housing in the International Covenant on Economic, Social and Cultural Rights ('ICESCR')[11] can play to further demands that surplus public land is used for affordable housing purposes. To concretise the issue, the focus will be on one specific property in Cape Town, the Tafelberg property. The Tafelberg property is situated in Sea Point, a suburb close to Cape Town's CBD.[12] The property is owned by the Western Cape Provincial government ('WCPG') and it contains a vacant building that was previously used by some public schools, as well as some flats.[13] Since 2010, the school building is no longer used and the last resident of the flats was evicted in 2014.[14] As such, the Tafelberg property was no longer used since 2014.[15] In 2015, the WCPG decided to sell the property to a private Jewish school, the Phyllis Jowell Day School.[16] RTC and NU however objected against the sale, arguing for the property to be used for affordable housing purposes in order to address Cape Town's housing crisis.[17]

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[9] See N Budlender, J Sendin & J Rossouw 'City leases: Cape Town's failure to redistribute land – Ndifuna Ukwazi Research Report' (2019), available at *https://www.dropbox.com/s/c524q5x89yrutcc/Ndifuna%20Ukwazi%20%28NU%29%20City-Leases-Cape-Towns-Failure-to-Redistribute-Land.pdf?dl=0*, accessed on 14 August 2021.

[10] 'Court decision means San Jose, other cities must prioritize affordable housing on surplus land' *The Mercury News* 12 March 2020, available at *https://www.mercurynews.com/2020/03/12/court-ruling-means-san-jose-other-cities-must-prioritize-affordable-housing-on-surplus-land/*, accessed on 26 May 2021; See also Sixth District Court of Appeal *Anderson v. City of San Jose* (Case No.: 16-CV-297950), 26 November 2019, available at *http://www.pilpca.org/wp-content/uploads/2019/11/2019-11-26-H045271_Opinion-Reversed-and-Remanded.pdf*, accessed on 26 May 2021.

[11] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[12] D Linde 'Understanding the groundbreaking Tafelberg judgment', 9 September 2020, available at *https://www.groundup.org.za/article/understanding-groundbreaking-tafelberg-judgment/*, accessed on 11 June 2021.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

In order to challenge the proposed sale of the Tafelberg property, RTC and NU filed an application in the High Court of South Africa, Western Cape Division.[18] Alongside several provisions of South African national law, RTC and NU invoked the right to access to land under section 25(5) of the South African Constitution ('the Constitution')[19] and the right to access to affordable housing under section 26(1) and (2) of the Constitution.[20] RTC and NU in particular targeted the inability of the WCPG and the City of Cape Town to address the spatial segregation in Cape Town by their policy measures.[21] They sought amongst others that the WCPG in its decisions regarding the Tafelberg property would take into account 'the legal obligations to provide, and the need for, affordable social housing in central Cape Town and the suitability of the Tafelberg [p]ropert[y] for social housing.'[22] The high court finally set aside the sales decision as being in violation of several statutory provisions.[23] Moreover, the high court declared that the WCPG and the City of Cape Town had failed to comply with their obligations under section 25(1) of the Constitution, amongst others due to a failure to reverse the existing spatial apartheid in Cape Town.[24] The WCPG and the City of Cape Town were also ordered by the high court to deliver a comprehensive report indicating the steps they have taken and the future steps they will take to comply with their constitutional and statutory obligations.[25] Leave to appeal against this part of the judgment was denied by a ruling of the Western Cape High Court.[26]

(b) The research

In this paper, the sale of the Tafelberg property will be analysed in light of the right to adequate housing in the ICESCR. As such, the paper is centred around the following research question:

> To which extent is the sale of the Tafelberg property in Cape Town compatible with the right to adequate housing in the International Covenant on Economic, Social and Cultural Rights?

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[18] See *Adonisi and Others v Minister for Transport and Public Works: Western Cape and Others*; *Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* (7908/2017; 12327/2017) [2020] ZAWCHC 87 (31 August 2020) para 6–17.
[19] Constitution of the Republic of South Africa, 1996.
[20] *Adonisi and Others* supra note 18 para 26–7.
[21] Ibid.
[22] Ibid, para 27.
[23] Ibid, para 507.
[24] Ibid, para 480.
[25] Ibid at 211, order 5.
[26] *Adonisi and Others v Minister for Transport and Public Works: Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* (7908/2017; 12327/2017) [2021] ZAWCHC 73 (21 April 2021).

Such an analysis is relevant from two points of view. In the first place, South Africa ratified the ICESCR on 12 January 2015.[27] As such, South Africa needs to implement and comply with the provisions of the ICESCR, including the provisions on the right to adequate housing. According to a well-established principle of international law, South Africa is not only responsible on the international level for the acts of its national government, but also for the acts of all state organs that exercise a certain sovereignty, 'whatever its character as an organ of the central government or of a territorial unit of the State.'[28] As such, a sale of the Tafelberg property by the WCPG that violates the right to adequate housing in the ICESCR, can result in South Africa's responsibility on the international level for breaching the ICESCR.

In the second place, an analysis of the case in light of the ICESCR could also be relevant on a South African national level. Section 39(1)(b) of the Constitution states that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum … must consider international law.' Accordingly, South African courts will have to take into account the ICESCR when dealing with the socio-economic rights in the Constitution's Bill of Rights.[29] South African courts thus will have to apply the right to have access to adequate housing in section 26 of the Constitution in the light of the right to adequate housing in article 11(1) ICESCR. Given the fact that calls to use surplus public land for affordable housing purposes were made with regard to several properties in Cape Town, it is not unlikely that cases similar to the *Tafelberg* case will be taken to a South African court. Clarification on the precise content of the right to adequate housing in the ICESCR can provide guidance to the courts in such cases.

In this paper, the focus will be on the right to housing in the ICESCR. The choice to limit the topic of the paper to that treaty is based on the fact that the ICESCR is the most elaborated international treaty on socio-economic rights, which is binding upon the state parties. The ICESCR, moreover, is ratified by a large majority of member states of the United Nations. Despite this paper being limited to the right to housing in the ICESCR, that same right can also be found in other international instruments.[30]

In a following chapter, the precise content and features of the right to adequate housing in the ICESCR will be examined. Attention will be paid in the first place to the concept of the

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[27] Office of the United Nations High Commissioner on Human Rights 'Status of ratification interactive dashboard' available at *https://indicators.ohchr.org/*, accessed on 28 December 2021.
[28] Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted November 2001) A/56/10(SUPP), para 76, article 4; See also J Crawford *State responsibility: The general part* (2013) at 117.
[29] See P De Vos 'Pious wishes or directly enforceable human rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67 at 76.
[30] For instance in article 25(1) of the United Nations Universal Declaration on Human Rights.

adequacy of housing, which is an important component of the right to housing in the ICESCR, which in fact is a right to adequate housing (see below at 7). Subsequently, the precise obligations of state parties under the right to adequate housing in the ICESCR will be discussed. The last part of the chapter on the ICESCR focuses on the human dignity perspective underlying the right to adequate housing in the ICESCR. An argument is made that the concept of human dignity is at the core of the ICESCR, including of its right to adequate housing. Based on the practice of the Committee on Economic, Social and Cultural Rights ('CESCR') and the drafting process of the Optional Protocol to the ICESCR, it is further argued that giving protection to the most vulnerable and disadvantaged groups should be a guiding principle when interpreting and applying the ICESCR.[2]

The last part of the paper focuses on the Tafelberg sale and applies the insights from the discussion about the right to adequate housing in the ICESCR to that concrete case. In order to get a more profound understanding of the background of the case, an overview is first given of Cape Town's current housing crisis and its historical roots. Afterwards, an analysis of the Tafelberg sale in the light of the right to adequate housing in the ICESCR is made. The chapter concludes with some short remarks on the lessons that follow from the analysis of the *Tafelberg* case for similar cases where calls are made for the use of surplus public land for affordable housing purposes. As such, the results of the research can transcend the particular context of the Tafelberg sale.

I THE RIGHT TO ADEQUATE HOUSING IN THE INTERNATIONAL COVENANT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

In the ICESCR, the right to adequate housing is recognised in article 11(1).[31] That provision states that

> [t]he States Parties to the [ICESCR] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[32]

The right to housing in the ICESCR thus is an element of the right to an adequate standard of living.[33] While the words 'for himself and his family' could be interpreted as excluding female-headed households or single persons without family, the CESCR has clarified that the right to housing belongs to everyone.[34] According to the CESCR, the 'human right to adequate housing … is of central importance for the enjoyment of all economic, social and cultural rights', and article 11(1) ICESCR 'is the most comprehensive and perhaps the most important of the [wide variety of international instruments that address the different dimensions of the right to adequate housing].'[35]

In this chapter, several aspects of the right to adequate housing will be discussed. The chapter will draw extensively on the General Comments of CESCR that deal with housing issues, in particular General Comment No. 4[36] on the right to adequate housing, and General Comment No. 7[37] on forced evictions. Although the CESCR's General Comments are not

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[31] M Kothari 'The human right to adequate housing and the new human right to land' in A von Arnauld, K von der Decken & M Susi (eds) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020) 81 at 81; I Leijten & K de Bel 'Facing financialization in the housing sector: A human right to adequate housing for all' (2020) 38 *Netherlands Quarterly of Human Rights* 94 at 97.

[32] E Grant 'Enforcing social and economic rights: The right to adequate housing in South Africa' (2007) 15 *African Journal of International and Comparative Law* 1 at 4.

[33] M C R Craven *The International Covenant on Economic, Social and Cultural Rights – A perspective on its development* (1998) at 330; S Leckie *From housing needs to housing rights: An analysis of the right to adequate housing under international human rights law* (1992) at 26.

[34] See CESCR 'General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant)' (13 December 1991) E/1992/23 para 6; See also Craven op cit note 33 at 334.

[35] CESCR 'General Comment No. 4' op cit note 34 paras 1 & 3.

[36] See note 34.

[37] CESCR 'General Comment No. 7: The right to adequate housing (Article 11, paragraph 1 of the Covenant): Forced evictions' (14 May 1997) E/1998/22.

legally binding, they are widely regarded as giving an authoritative interpretation of the rights in the ICESCR.[38]

(a) The adequacy of housing

A crucial aspect of the right to housing in the ICESCR is its link with the right to an adequate standard of living.[39] The CESCR sees the right to housing not as a right to merely have access to a shelter or 'a roof over one's head', but rather as 'the right to live somewhere in security, peace and dignity.'[40] The right to housing in the ICESCR thus must be seen as a 'right to adequate housing.'[41] The CESCR indicated two reasons for that finding:

i) The right to housing is linked to 'the inherent dignity of the human person', which underlies the ICESCR and requires that the right to housing must be guaranteed to 'all persons irrespective of income or access to economic resources.'

ii) The reference to housing in article 11(1) ICESCR means *adequate* housing, and not just housing.[42]

The adequacy of housing is according to the CESCR partly determined by contextual elements like 'social, economic, cultural, climatic, ecological and other factors'.[43] Furthermore, the CESCR has indicated in its General Comment No. 4 seven elements that are included in the concept of adequacy.[44] According to Hohmann, these seven elements constitute the most influential part of the CESCR's General Comment No. 4, and this are the elements 'to which the CESCR has turned the most part of its attention.'[45] Each of those elements must be fulfilled in order to realise the right to housing entirely.[46]

The seven elements are:

i) **Legal security of tenure**.[47] Regardless of the type of tenure (eg public/private rent, cooperative housing, lease, emergency housing, informal settlements), every person

[38] See B Griffey 'The reasonableness test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 275 at 280; J Hohmann, *The Right to Housing – Law, Concepts, Possibilities* (2013) at 20; Leijten & de Bel op cit note 31 at 97.
[39] Craven op cit note 33 at 334–5.
[40] CESCR 'General Comment No. 4' op cit note 34 para 7; Leijten & de Bel op cit note 31 at 97.
[41] Cfr. CESCR 'General Comment No. 4' para 7; Leckie op cit 33 at 26.
[42] CESCR 'General Comment No. 4' para 7.
[43] Ibid, para 8.
[44] Ibid; S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359 at 371; Leijten & de Bel op cit 31 at 98.
[45] J Hohmann op cit 38 at 21.
[46] Ibid.
[47] CESCR 'General Comment No. 4' op cit note 34 para 8(a).

must have 'a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.'[48] There will be no adequate housing if someone's house can be seized every moment or if there is a continuous threat of arbitrary eviction.[49] The CESCR considers forced evictions to be a *prima facie* violation of the ICESCR.[50] Moreover, the CESCR stressed that a state must immediately take measures to prevent forced evictions, regardless of its available resources.[51] Legislation against forced evictions should be adopted and enforced, even against private actors.[52]

ii) **Availability of services, materials, facilities and infrastructure.** [53] An adequate house is a house where facilities are present that are crucial for 'health, security, comfort and nutrition.'[54] According to the CESCR, there must be sustainable access to

> natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.[55]

That list of enumerated facilities and services must, according to Hohmann, be seen as providing minimum requirements.[56] Craven, however, indicates that the list is only illustrative, since the concept of adequate housing in the end must be defined on the national level.[57] Both authors, nevertheless, indicate that provision of those facilities and services must be seen as long-term policy aims, with the failure to make those facilities or services immediately available not necessarily being a violation of the ICESCR.[58]

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[48] Ibid.
[49] J Hohmann op cit note 38 at 21.
[50] CESCR 'General Comment No. 4' op cit note 34 para 18; CESCR 'General Comment No. 7' op cit note 37, para 1; Leijten & de Bel op cit note 31 at 98.
[51] CESCR 'General Comment No. 7' op cit note 37 para 9; Cfr. Hohmann op cit note 38 at 22.
[52] CESCR 'General Comment No. 7' op cit note 37 para 9.
[53] CESCR 'General Comment No. 4' op cit note 34 para 8(b).
[54] Ibid.
[55] Ibid.
[56] Hohmann op cit note 38 at 23.
[57] Craven op cit note 33 at 345.
[58] Ibid; Hohmann op cit note 38 at 23.

iii) **Affordability**.[59] The CESCR has held that

> [p]ersonal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.[60]

Moreover, states should take action to ensure that housing costs are proportional to income levels.[61] The CESCR furthermore indicated that states must establish housing subsidies for people that have no access to affordable housing, and other 'forms and levels of housing finance which adequately reflect housing needs.'[62] With regard to tenants, the CESCR stated that they must be protected against 'unreasonable rent levels or rent increases'.[63] If natural resources, moreover, are the main sources for building in a society, the affordability of these materials for building purposes must be guaranteed by states.[64]

iv) **Habitability**.[65] With regard to the habitability of housing, the CESCR stressed that housing must protect against physical or climatological conditions, as well against 'other threats to health, structural hazards and disease vectors.'[66] Moreover, inhabitants must have adequate space and their physical safety must be ensured.[67] States are also encouraged to apply the World Health Organisation's Health Principles of Housing[68], where the link between housing conditions and health issues is stressed.[69] Craven suggests that states should ensure that all public housing meets adequate standards related to habitability, by making sure that new housing projects take into account those standards from the start, and by projects to renew and improve old housing that does not yet meet those habitability standards.[70]

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[59] CESCR 'General Comment No. 4' op cit note 34 para 8(c).
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid, para 8(d).
[66] Ibid.
[67] Ibid.
[68] World Health Organisation 'Health Principles of Housing' (1989), available at *https://apps.who.int/iris/bitstream/handle/10665/39847/9241561270_eng.pdf?sequence=1&isAllowed=y,* accessed on 1 January 2022.
[69] CESCR 'General Comment No. 4' op cit note 34 para 8(d).
[70] Craven op cit n 33 at 346.

v) **Accessibility.**[71] The CESCR stressed that '[a]dequate housing must be accessible to those entitled to it', and that '[d]isadvantaged groups must be accorded full and sustainable access to adequate housing resources.'[72] Such groups include amongst others the elderly, children, persons with disabilities, persons with an physical or mental illness or with persistent medical problems, and victims of natural disasters.[73] According to Hohmann, the accessibility of housing is closely linked with the principle of non-discrimination regarding the right to housing, which is also laid down in article 2(2) ICESCR.[74] The CESCR indeed has recognised the importance of non-discrimination and equality in the enjoyment of the rights under the ICESCR. In that regard, the CESCR has stressed that:

> Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing … will help to overcome discrimination against … persons living in informal settlements and rural areas.[75]

Furthermore, the CESCR indicated that, in order to ensure accessibility of housing, states should make the access to land 'by landless or impoverished members of the society' a central policy goal.[76] States are also called upon to adopt '[d]iscernible governmental obligations … aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.'[77]

vi) **Location**. [78] The adequacy of housing also depends on its location. According to the CESCR, access is required to 'employment options, health-care services, schools, childcare centres and other social facilities.'[79] The CESCR furthermore explicitly

[71] CESCR 'General Comment No. 4' op cit note 34 para 8(e).
[72] Ibid.
[73] Ibid.
[74] Hohmann op cit note 38 at 23.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid, para 8(f).
[79] Ibid.

recognised that 'the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households.'[80] Housing should also not be constructed at places that can be harmful to the health of inhabitants, for instance on or near to polluted sites.[81] According to Hohmann, the location aspect of the right to adequate housing can play an important role when states provide for alternative accommodation in cases of resettlement.[82] Moreover, she indicates that the location aspect of the right to adequate housing in the ICESCR makes that forms of 'ghettoisation' constitute a violation of the right to housing in the ICESCR, in particular

> when government 'recoils' from the provision of services, facilities and infrastructure, consigning already marginalised communities to further social alienation and exclusion.'[83]

According to Craven, moreover, the CESCR seems to indicate that

> governments should not build large, low-cost housing settlements far from centres of population merely because land is cheap.[84]

vii) **Cultural adequacy**.[85] Finally, the CESCR requires that the construction of housing, the building materials that are used and the housing policies 'must appropriately enable the expression of cultural identity and diversity of housing.'[86]

(b) Obligations of state parties

The obligations of state parties under the right to housing in the ICESCR can be divided in three groups:

i) **Obligations to respect:** obligations that prohibit interference with the right to housing by states, for instance the prohibition to perform forced evictions.[87]

ii) **Obligations to protect:** obligations that require states take measures to prevent the violation of the right to housing, for instance by adopting appropriate legislation and law enforcement mechanisms.[88]

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[80] Ibid.
[81] Ibid.
[82] Hohmann op cit note 38 at 27.
[83] Ibid at 28.
[84] Craven op cit note 33 at 346.
[85] CESCR 'General Comment No. 4' op cit note 34 para 8(g).
[86] Ibid, para 8(f).
[87] Grant op cit note 32 at 6.
[88] Ibid.

iii) **Obligations to fulfil**: obligations that require states to guarantee the enjoyment of the right to housing.[89]

The point of departure regarding states' obligations under the ICESCR is article 2(1) ICESCR, which states:

> Each State Party to the [ICESCR] 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 [ICESCR] by all appropriate means, including particularly the adoption of legislative measures.[90]

A distinction that generally can be made with regard to state obligations in international law, is the distinction between obligations of conduct on the one hand, and obligations of result on the other hand.[91] While obligations of conduct in general require states to adopt a particular conduct, which is a goal in itself, obligations of result demand states to achieve a specific result, whereby the choice of actions leading to that result is left to the states' discretion.[92] Initially, the International Law Commission seemed to consider the obligations of states resulting from article 2(1) ICESCR to be obligations of result.[93] Some authors, however, argue that the obligations in the ICESCR rather cover a mixture of both obligations of conduct and obligations of result.[94] Article 2(1) ICESCR clearly indicates the result that has to be achieved, the full realisation of the right in the ICESCR, but on the other hand also indicates that that result has to be achieved 'progressively' and that states should 'take steps' into that direction.[95] If states would have a total discretion to achieve that result in the long run, there would be no basis to assess whether they adequately 'take steps' towards the full realisation of the rights, which is also required by article 2(1) ICESCR.[96] Also the CESCR itself indicated that article 2(1) ICESCR imposes both obligations of conduct and obligations of result.[97]

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[89] Ibid.
[90] ICESCR, article 2(1).
[91] Cfr. Grant op cit note 32 at 6; See also CESCR 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/C. 12/1990/8.
[92] See Craven op cit note 33 at 107.
[93] International Law Commission, 'Report of the Commission to the General Assembly on the work of its twenty-ninth session' (9 May – 29 July 1977) A/32/10(SUPP) at 20–1, para 8.
[94] Craven op cit note 33 at 107–8; P Alston & G Quinn 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 at 185.
[95] Craven op cit note 33 at 107; Grant op cit note 32 at 6.
[96] See ibid; See also CESCR 'General Comment No. 3' op cit note 91 para 2; Grant op cit note 32 at 6.
[97] CESCR 'General Comment No. 3' op cit note 91 para 1.

(i) Progressive realisation

An important aspect with regard to states' obligations under the ICESCR is the concept of 'progressive realisation'. As indicated, article 2(1) requires states to 'progressively' realise the rights in the ICESCR.[98] As such, article 2(1) ICESCR indicates that states have no obligation to entirely fulfil the rights recognised in the ICESCR immediately, but only have a duty to progressively realise those rights in function of the resources they have available.[99] As such, states have for instance no obligation to eradicate homelessness in one day or to provide free housing for every single citizen.[100] The existence of a concept of progressive realisation in article 2(1) ICESCR, however, does not mean that states have no immediate obligations under the ICESCR.[101] The CESCR has already indicated in its General Comments that the concept of progressive realisation

> should not be misinterpreted as depriving the obligation of all meaningful content … the phrase must be read in the light of the overall objective … of the [ICESCR] which is to establish clear obligations for states parties in respect of the full realization of the rights in question.[102]

According to the CESCR, states have 'an obligation to move as expeditiously and effectively as possible' towards a full realisation of the rights in the ICESCR.[103] States must not delay their actions to realise that goal, and they must move towards it as quickly as possible without duly justified backward movements.[104] The CESCR held that a state party that takes retrogressive measures, bears the burden of proof to demonstrate that these measures are justified.[105] In that regard, the CESCR also stated that

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[98] Liebenberg 'op cit note 44 at 364–5; Grant op cit note 32 at 7.
[99] Craven op cit note 33 at 330; Leijten & de Bel op cit note 31 at 99.
[100] Ibid; United Nations Commission on Human Rights 'The right to adequate housing: progress report submitted by Mr. Rajindar Sachar, Special Rapporteur appointed pursuant to resolution 1992/26 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and decision 1993/103 of the Commission on Human Rights' (E/CN.4/Sub.2/1993/15), 22 June 1993, available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G93/140/88/pdf/G9314088.pdf?OpenElement*, accessed on 19 May 2021, para 39; I Leijten & K de Bel op cit note 31 at 99.
[101] Grant op cit note 32 at 7.
[102] CESCR 'General Comment No. 3' op cit note 91 para 9.
[103] Ibid; See also B Griffey 'The reasonableness test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 275 at 280–1; I Leijten & K de Bel 'Facing financialization in the housing sector: A human right to adequate housing for all' (2020) 38 *Netherlands Quarterly of Human Rights* 94 at 99.
[104] M C R Craven *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (1998) at 131–2.
[105] CESCR, 'General Comment No. 13: The right to education (Art. 13)' (8 December 1999) E/C.12/1999/10, para 45; B Griffey 'The reasonableness test: Assessing violations of state obligations under the Optional Protocol to

> any deliberately retrogressive measures … would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the [ICESCR] and in the context of the full use of the maximum available resources.[106]

Even if the available resources of states are inadequate, moreover, states must continue to strive to 'the widest possible enjoyment of the relevant rights under the prevailing circumstances.'[107] That can include for instance a more effective use of resources, or making a shift towards a more equitable use of the budgetary means.[108] Similarly, the CESCR underscored that, even in times of severe resource constraints, the vulnerable members of society 'can and indeed must be protected by the adoption of relatively low-cost targeted programs.'[109] An economic recession, large public debts or austerity measures thus cannot automatically be used as justifications to delay the implementation of the ICESCR.[110] States will only be held accountable for a general decline in housing and living conditions if such decline is directly attributable to them and if no compensatory measures are introduced.[111]

While the CESCR gives states a certain margin of appreciation with regard to what resources they deem to be available to progressively realise the right of adequate housing, it will not simply accept the budgetary policies chosen by a state.[112] The resources that will be taken into account does not only include the national resources of a state, but also the international resources that are available.[113] The CESCR, moreover, seems of the view that the

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the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 275 at 281.

[106] CESCR 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/C. 12/1990/8 para 9; I Leijten & K de Bel 'Facing financialization in the housing sector: A human right to adequate housing for all' (2020) 38 *Netherlands Quarterly of Human Rights* 94 at 99.

[107] Ibid para 11.

[108] M C R Craven *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (1998) at 139.

[109] CESCR 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/C. 12/1990/8 para 12; B Griffey 'The reasonableness test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 275 at 282; See also S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359 at 366.

[110] See I Leijten & K de Bel 'Facing financialization in the housing sector: A human right to adequate housing for all' (2020) 38 *Netherlands Quarterly of Human Rights* 94 at 99.

[111] M C R Craven *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (1998) at 333; I Leijten & K de Bel 'Facing financialization in the housing sector: A human right to adequate housing for all' (2020) 38 *Netherlands Quarterly of Human Rights* 94 at 99.

[112] See ibid at 137; B Griffey 'The reasonableness test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 275 at 282.

[113] Ibid at 138; B Griffey 'The reasonableness test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law*

realisation of economic, social and cultural rights, as well as human rights in general, cannot be set aside in order to stimulate economic growth.[114] Economic growth should be combined with the realisation of such rights, who should be 'built in' in development policies.[115]

Despite the fact that article 2(1) ICESCR only requires states to progressively achieve the full realisation of the rights in the ICESCR, the CESCR held that states have some obligations with immediate effect. The CESCR in the first place indicated that the ICESCR entails for states an '"undertaking to guarantee" that relevant rights "will be exercised without discrimination…"'[116] According to the CESCR, states moreover have an obligation to prioritise social groups that already live in unfavourable conditions when implementing the right to adequate housing.[117] As such, housing policies and legislation should not be designed 'to benefit already advantaged social groups at the expense of others.'[118] This obligation does not only extend to people that face discrimination, but to all disadvantaged groups.[119] These obligations continue in times of economic contraction.[120] Secondly, states must start to implement the ICESCR from the moment they ratify it.[121] Article 2(1) ICESCR expresses 'an undertaking to … "take steps", which in itself, is not qualified or limited by other considerations.'[122] Those words imply that states must take steps towards the realisation of the rights expressed in the ICESCR within a reasonable period after having ratified the ICESCR, even when the full realisation of those rights may be reached progressively.[123] The CESCR

Review 275 at 283; S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359 at 366.

[114] Ibid at 139–40.

[115] Ibid at 140; See also B Griffey 'The reasonableness test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 275 at 282.

[116] CESCR 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/C. 12/1990/8 para 1; S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359 at 367; I Leijten & K de Bel 'Facing financialization in the housing sector: A human right to adequate housing for all' (2020) 38 *Netherlands Quarterly of Human Rights* 94 at 100.

[117] CESCR 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (13 December 1991) E/1992/23, para 11; I Leijten & K de Bel 'Facing financialization in the housing sector: A human right to adequate housing for all' (2020) 38 *Netherlands Quarterly of Human Rights* 94 at 100.

[118] Ibid; B Griffey 'The reasonableness test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 275 at 282.

[119] M C R Craven *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (1998) at 337.

[120] CESCR 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (13 December 1991) E/1992/23, para 11.

[121] See S Leckie *From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing Under International Human Rights Law* (1992) at 29.

[122] CESCR 'General Comment No. 3' op cit note 91 para 2.

[123] Ibid; Griffey op cit note 38 at 281.

moreover stated that '[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the [ICESCR].'[124]

(ii) Minimum core obligations

An important aspect of state parties' obligations under the ICESCR are the so-called 'minimum core obligations'. Despite the fact that state parties must not immediately fully realise the rights in the ICESCR, the CESCR seems to indicate that states have an obligation to immediately realise the rights in the ICESCR to a certain minimum level:

> [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of … basic shelter and housing … is, prima facie, failing to discharge its obligations under the [ICESCR]. If the [ICESCR] were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être.[125]

However, the CESCR at the same time seems to indicate that such an obligation to fulfil certain minimum core obligations, is not absolute, but can depend on the financial resources available to a particular state:

> [I]t must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.[126]

With regard to the right to adequate housing, General Comment No. 3 of the CESCR made clear that in order to fulfil their minimum core obligations with regard to the right to adequate housing, states must ensure that there is no 'significant number of individuals … deprived …

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[124] CESCR 'General Comment No. 3' op cit note 91 para 2; See also Leijten & de Bel op cit note 31 at 99.
[125] CESCR 'General Comment No. 3' op cit note 91 para 10. See also CESCR 'General Comment No. 14: The right to the highest attainable standard of health (art. 12)' (11 August 2000) E/C.12/2000/4 para 43; CESCR 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) E/C.12/2001/10 para 15–8; Cfr Griffey 'op cit note 38 at 281; P Lange 'Taking dignity seriously – Judicial reflection on the Optional Protocol to the ICESCR' (2009) 29 *Tidsskrift for Menneskerettigheter* 29 at 37; Liebenberg 'op cit note 44 at 366.
[126] CESCR 'General Comment No. 3' op cit note 91 para 10. See also CESCR 'General Comment No. 14' op cit note 125 para 43 & 47; CESCR 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) E/C.12/2001/10 para 15–8.

of basic shelter and housing.'[127] According to Chenwi and Chirwa, the concept of 'basic shelter' is not yet defined.[128] However, according to Chapman, the CESCR already found some states in violation of their minimum core obligations with regard to the right to adequate housing when:

- There is a shortage of housing options to meet the demand and the most vulnerable groups are disadvantaged due to high rents;
- There is no indication that a government's initiatives to address housing shortage are adequate to meet the needs;
- The governments does not possess statistical information regarding homelessness.[129]

States parties to the ICESR thus seem to have a minimum obligation to provide for at least some basic needs of their population.[130] The exact contours of those minimum core obligations, however, are not always clear. In its General Comment No. 3, the CESCR seemed to indicate that the mere failure to not fulfil the minimum core obligations, leads to a violation of the ICESCR.[131] However, such failure only leads to a '*prima facie'* violation, and thus creates a rebuttable presumption of guilt.[132] Later on, the CESCR seemed to have changed its position on justifying failures to fulfil minimum core obligations. In its General Comment No. 14[133], the CESCR stated that the minimum core obligations for states under the ICESCR are non-derogable, and thus cannot depend on the limited financial resources of states.[134] As such the CESCR seemed to have changed its approach in General Comment No. 3, by giving the minimum core obligations in the ICESCR a more absolute character.[135] In General Comment No. 19 (2007), however, the CESCR seemed to take up again its approach from General Comment No. 3, stating that

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[127] CESCR 'General Comment No. 3' op cit note 91 para 10; See also CESCR 'The Maastricht guidelines on violations of economic, social and cultural rights' (27 November 2000) E/C.12/2000/13, para 9.
[128] L Chenwi & D M Chirwa 'Direct protection of economic, social and cultural rights in international law' in D M Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 33 at 55.
[129] See A R Chapman 'A violations approach for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23 at 52.
[130] Craven op cit note 33 at 141; Grant op cit note 32 at 7; Liebenberg op cit note 44 at 366.
[131] CESCR 'General Comment No. 3' op cit note 91 para 10; Liebenberg op cit note 44 at 366.
[132] See ibid; See also Craven op cit note 33 at 143; Griffey op cit note 38 at 287.
[133] CESCR 'General Comment No. 14' op cit note 125.
[134] Ibid, 'General Comment No. 14' op cit note 125 para 47; See also CESCR 'Substantive issues arising in the implementation of the International Convention on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights.' (4 May 2001) E/C.12/2001/10, para 16 & 18; K Lehmann 'In defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22 *American University International Law Review* 163 at 184, note 96.
[135] See also Chenwi &Chirwa op cit note 128 at 56.

> 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 disposal in an effort to satisfy, as a matter of priority, these minimum obligations.[136]

In its practice, the CESCR requires states to adopt specific goals or 'benchmarks' against which the realisation of the rights in the ICESCR on the national level can be measured.[137] The CESCR however does not use those benchmarks as the sole criterion of assessing states' implementation of the ICESCR, but rather as an indication that can be supplemented with international data.[138]

(iii) By all appropriate means

Article 2(1) ICESCR indicates that each state party has to take steps towards the progressive realisation of the rights in the ICESCR 'by all appropriate means.' The CESCR indicates that the mere allocation of resources or the development of general policies is not sufficient, but that formal legislative and administrative measures also have a role to play.[139] Besides legislation, other appropriate measures are needed, like procedures for judicial remedies, financial measures or social measures.[140] While it is in first instance for the state parties to determine what means are the most appropriate, it is for the CESCR to make the final assessment.[141] In that regard, the CESCR held that the most suitable measures for fulfilling the right to adequate housing can differ from one state party to another, as long as each state party takes all necessary steps towards the full realisation of the right to adequate housing.[142]

In order to comply with their obligations under the CESCR, state parties must furthermore adopt a national housing strategy that identifies the available resources and sets out the goals to be reached.[143] That strategy moreover should reflect consultation with and participation of all affected groups, like the homeless, the inadequately housed etc.[144] States should also take measures to ensure coordination between the different levels of government in order to align the different policies with the right to adequate housing in the ICESCR.[145] Furthermore, an

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[136] CESCR 'General Comment No. 19 'The right to social security (art. 9)' (5–23 November 2007) E/C.12/GC/19, para 60.
[137] Craven op cit note 33 at 118; Griffey op cit note 38 at 288.
[138] Craven op cit note 33 at 119.
[139] CESCR 'General Comment No. 4' op cit note 34 para 16.
[140] CESCR 'General Comment No. 3' op cit note 91 para 7.
[141] Ibid para 4; Griffey op cit note 38 at 284; Leijten & de Bel op cit note 31 at 99.
[142] CESCR 'General Comment No. 4' op cit note 34 para 12.
[143] Leijten & de Bel op cit note 31 at 99.
[144] CESCR 'General Comment No. 4' op cit note 34 para 12.
[145] Ibid.

effective monitoring system regarding housing must be established, as well as a mechanism to ascertain the full extent of homelessness and inadequate housing within a state's territory.[146] Such monitoring procedures should give special attention to vulnerable and disadvantaged groups in society.[147]

[146] CESCR 'General Comment No. 4' op cit note 34 para 13; Leijten & de Bel op cit note 31 at 100.
[147] Craven op cit note 33 at 117; Cfr. CESCR 'General Comment No. 1: Reporting by States parties' (17 February 1989) E/1989/22 Annex III para 3.

II THE HUMAN DIGNITY PERSPECTIVE OF THE RIGHT TO ADEQUATE HOUSING IN THE ICESCR

The above description of state parties' obligations under the ICESCR makes clear that under the ICESCR, the right to housing is understood in a broader way than only entailing the obligation to provide some kind of shelter. According to Leilani Farha, former United Nations 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, states should '[g]uarantee the right to housing as a fundamental human right linked to dignity and the right to life.'[148] According to Farha, housing should not be considered as a mere physical shelter, but 'the right to housing should be understood in relation to the inherent dignity of the human person.'[149] Also in the ICESCR, the concept of human dignity lays at the core of the rights enshrined in it. This is not surprising, since the concept of human rights itself is based on the inherent dignity of every single human being, as is made clear in the United Nations Universal Declaration of Human Rights ('UDHR').[150] Also the preamble of the ICESCR makes a reference to human dignity, and indicates that the rights in the ICESCR 'derive from the inherent dignity of the human person.'[151] Arguments in favour of the conclusion that the concept of human dignity underlies the right to adequate housing in the ICESCR, moreover, can be found in both the CESCR's interpretation of that right and the ICESCR in general, and in the reasonableness standard in the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ('OP-ICESCR')[152] and its drafting history. In the following paragraphs, both points will be elaborated on further.

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[148] See United Nations 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 non-discrimination in this context' (24 February – 20 March 2020) A/HRC/43/43, para 12 et seq.

[149] United Nations Human Rights Council op cit note 148 para 15.

[150] See United Nations Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III), preamble, which states that 'recognition of the **inherent dignity** … of all members of the human family is the foundation of freedom, justice and peace in the world' (own emphasis), and UDHR, article 1, which proclaims that '[a]ll human beings are born free and equal **in dignity** and rights' (own emphasis); See also C R Beitz 'Human dignity in the theory of human rights: Nothing but a phrase?' (2013) 41 *Philosophy & Public Affairs* 259 at 259.

[151] ICESCR, preamble. Like the UDHR, the ICESCR also states in its preamble that 'recognition of **the inherent dignity** … of all members of the human family is the foundation of freedom, justice and peace in the world' (own emphasis).

[152] United Nations General Assembly 'Optional Protocol on the International Covenant on Economic, Social and Cultural Rights' (10 December 2008) A/RES/63/117.

(a) The CESCR's attention for human dignity

The concept of human dignity has a central position in the CESCR's interpretation of state obligations under the ICESCR. According to the CESCR, the right to housing 'should be seen as the right to live somewhere in security, peace and dignity.'[153] Moreover, as seen above, the CESCR clearly states that the ICESCR does not just contain a right to housing, but instead entails a right to adequate housing (see above at 7). The CESCR clearly indicates that that adequateness requirement is grounded in 'the inherent dignity of the human person.'[154]

Another illustration of the CESCR's commitment to promote human dignity can be found in its attention for vulnerable and disadvantaged groups in society. In a statement of 2001 on poverty, the CESCR for instance affirmed that the ICESCR can play a role in poverty eradication and 'can empower the poor and enhance anti-poverty strategies.'[155] In the statement, the CESCR defined poverty as 'the lack of basic capabilities to live in dignity', and indicated that '[t]his definitions recognizes poverty's broader features, such as hunger, poor education, discriminations, vulnerability and social exclusion.'[156] When elaborated on how the international human rights framework, including the ICESCR, could contribute to the eradication of poverty, the CESCR stressed the special focus on vulnerable groups in international human rights law, which is derived from the principles of non-discrimination and equality, and could help combatting poverty:

> [N]on-discrimination and equality are integral elements of the international human rights normative framework, including the [ICESCR]. Sometimes poverty arises when people have no access to existing resources because of who they are, what they believe or where they live. Discrimination may cause poverty, just as poverty may cause discrimination. Inequality may be entrenched in institutions and deeply rooted in social values that shape relationships within households and communities. Accordingly, the international norms of non-discrimination and equality, which demand that particular attention be given to vulnerable groups and individuals from such groups, have profound implications for anti-poverty strategies.[157]

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[153] CESCR 'General Comment No. 4' op cit note 34 para 7.
[154] Ibid.
[155] CESCR 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights – Statement adopted by the Committee on Economic, Social and Cultural Rights' (4 May 2001) E/C.12/2001/10, para 3.
[156] Ibid, para 7.
[157] Ibid, para 11.

The CESCR made a similar link between non-discrimination and paying attention to vulnerable and disadvantaged groups of society in its General Comment No. 20 on non-discrimination.[158] In General Comment No. 20, the CESCR stated that

> the effective enjoyment of [ICESCR] rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.[159]

Furthermore, the CESCR indicated that '[n]on discrimination is an immediate and cross-cutting obligation in the [ICESCR].'[160] As such, the special attention paid to vulnerable and disadvantages groups should apply to all rights in the ICESCR.[161] The CESCR indeed stated that states do not have full discretion in deciding their priorities in implementing the ICESCR (see above at 14). In fact, the CESCR prioritises the interests of vulnerable and marginalised groups in society over those of more privileged groups. While those last groups' interests may be served by state policies implementing the ICESCR, and while the ICESCR does not prevent a state from improving the protection of privileged groups' socio-economic rights, that should not be the main priority when a state's financial resources are limited. As seen above, the CESCR indicated that in times of lack of resources, states still must conduct relatively low-cost targeted programs to protect the most vulnerable members of society (see above at 14).[162] In its General Comment No. 4 on the right to adequate housing, the CESCR stated that states 'must give due priority' to deprivileged social groups by adopting relevant legislation and policy measures.[163] Moreover, the CESCR indicated that '[p]olicies and legislation should … not be designed to benefit already advantaged social groups at the expense of others.'[164] According to the CESCR, moreover, monitoring mechanisms regarding homelessness and inadequate

[158] CESCR 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights' (2 July 2009) E/C.12/GC/20.
[159] Ibid, para 8(b).
[160] Ibid, para 7; Griffey op cit note 38 at 283.
[161] CESCR 'General Comment No. 20' op cit note 158 para 7.
[162] See also I Nifosi-Sutton*, The Protection of Vulnerable Groups under International Human Rights Law* (2017) at 128.
[163] CESCR 'General Comment No. 4' op cit note 34 para 11; See also I Nifosi-Sutton op cit note 162 at 128–9.
[164] CESCR 'General Comment No. 4' op cit note 34 para 11.

housing should give a special attention to vulnerable and disadvantaged social groups and should not only focus on the population as a whole.[165]

Also in its general comments that do not deal with the right to housing, the CESCR indicates its concern for the protection of the most vulnerable and disadvantaged groups in society. General Comment No. 12 on the right to adequate food[166], for instance, suggests that state parties under the right to food in the ICESCR have a non-derogable core obligation 'to mitigate and alleviate hunger … even in times of natural or other disasters.'[167] Also General Comment No. 13 on the right to education pays attention to the fact that 'education must be accessible to all, especially the most vulnerable groups.'[168] In General Comment No. 14 on the right to the highest attainable standard of health, the CESCR indicated that the state parties' core obligations include the protection of vulnerable and disadvantaged groups, which affirms that the situation of those groups is of particular importance under the ICESCR.[169] General Comment No. 14, moreover, demands that in times of disasters or emergencies, international aid should prioritise 'the most vulnerable or marginalized groups of the population.'[170] Similarly, General Comment No. 15 on the right to water indicates that state parties to the ICESCR have a non-derogable core obligation to immediately ensure 'the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalised groups.'[171] Finally, in several of its comments on reports submitted by state parties, the CESCR addressed the needs of vulnerable and disadvantaged groups, recommending states to focus their policy measures in particular on vulnerable and disadvantaged groups amongst their population.[172]

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[165] Ibid, para 13.
[166] CESCR, 'General Comment No. 12: The right to adequate food (Art. 11)' (12 May 1999) E/C.12/1999/5.
[167] Ibid, para 6; See I Nifosi-Sutton op cit note 162 at 133.
[168] CESCR, 'General Comment No. 13: The right to education (Art. 13)' (8 December 1999) E/C.12/1999/10, para 6(b).
[169] CESCR, 'General Comment No. 14: The right to the highest attainable standard of health (Art. 12)' (11 August 2000) E/C.12/2000/4, para 43 (a) & (f); See I Nifosi-Sutton op cit note 162 para 135.
[170] CESCR, 'General Comment No. 14' op cit note 169 para 40 & 65.
[171] CESCR, 'General Comment No. 15: The right to water (Arts. 11 and 12 ICESCR)' (20 January 2003) E/C.12/2002/11, para 37(b) & 40.
[172] See eg CESCR 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel' (14 November – 2 December 2011) E/C.12/ISR/CO/3, para 24; CESCR 'Concluding observations on the fourth periodic report of Austria' (4 – 29 November 2013) E/C.12/AUT/CO/4, para 20; See also I Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law* (2017) at 143 *et seq*.

(b) Human dignity in the OP-ICESCR's reasonableness standard

On 10 December 2008, the OP-ICESCR was adopted unanimously by the United Nations General Assembly.[173] The OP-ICESCR gives individuals and groups of individuals a right to address complaints to the CESCR regarding violations of the ICESCR.[174] Moreover, the CESCR can deal with such complaints made by other states and can start an inquiry procedure when there is an indication of grave or systematic violations of the rights in the ICESCR, but only when states ratifying the OP-ICESCR make an express declaration allowing for those procedures.[175] State parties to the ICESCR are in no way obliged to ratify the OP-ICESCR. South Africa for instance has not yet ratified the OP-ICESCR and thus is not bound by its obligations.[176] However, a short description of the OP-ICESCR can be useful in the context of this research, since it clarifies how the economic, social and cultural rights in the ICESCR have to be understood.

An important aspect of the ICESCR is the reasonableness standard that is formulated by article 8(4) OP-ICESCR, which states that

> [w]hen examining communications under the [OP-ICESCR], the [CESCR] shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the [ICESCR]. In doing so, the [CESCR] 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 [ICESCR].[177]

That reasonableness standard is an attempt to address concerns about the justiciability of socio-economic rights, and to provide some guidance in that regard.[178] The standard indicates that when implementing the ICESCR, national governments maintain the freedom to make legitimate policy choices, but that freedom is not unlimited and the CESCR is given the task to assess these choices so that they do not exceed the limits of what can be considered as

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[173] M Langford 'Closing the gap – An introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 1 at 1.
[174] OP-ICESCR, Article 1 & 2.
[175] Ibid, Article 10 & 11.
[176] Office of the United Nations High Commissioner on Human Rights 'Status of ratification interactive dashboard – Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', available at *https://indicators.ohchr.org/*, accessed on 12 September 2021.
[177] Ibid, Article 8(4).
[178] See Griffey op cit note 162 at 294; See also B Porter 'Reasonableness and Article 8(4)' in M Langford, B Porter, R Brown et al (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) 173 at 173.

reasonable.[179] When choosing the wordings of article 8(4) OP-ICESCR, the drafters tried to find a middle ground between affirming the freedom of states to determine their policies on the one hand, and assuring the effective enforcement of the ICESCR on the other hand.[180] Inspiration for the reasonableness standard in article 8(4) OP-ICESCR was eventually found in the *Government of the Republic of South Africa and others v. Grootboom and others* judgement[181] of the South African Constitutional Court ('the Constitutional Court'), which was consulted during the negotiations.[182]

In the *Grootboom* case, the Constitutional Court clarified the precise content of section 26 of the Constitution, which recognises the right to housing.[183] The Constitutional Court had to deal with the situation of Mrs Irene Grootboom and a large group of other respondents[184] that had become homeless after they were evicted from their informal houses.[185] The houses were located on private land earmarked for formal low-cost housing.[186] Before moving to the private land from which they were now evicted, Mrs Grootboom and the other respondents lived in an informal squatter settlement, which mainly consisted of shacks without water, sewage or refuse removal services and with only 5 per cent of the shacks having electricity.[187] They applied to the municipality for subsidised low-cost housing and were put on the waiting list for seven years.[188] Since the municipality gave no clear answer after a long waiting period, Mrs Grootboom and the other respondents moved to the vacant private land earmarked for low-cost housing, from which they were finally evicted by the owner who obtained an eviction order in the magistrate's court.[189] The group of evicted people went to the Cape of Good Hope High Court to apply for an order obliging the government to provide them with adequate emergency shelter until permanent accommodation and a certain relief would be provided to them.[190] That claim was based on the right to adequate housing in section 26 of the Constitution and on section

[179] Porter op cit note 178 at 187–8.
[180] Ibid at 174–6.
[181] *Government of the Republic of South Africa and others v. Grootboom and others* 2001 (1) SA 46 (CC).
[182] C de Albuquerque 'Chronicle of an announced birth: The coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The missing piece of the International Bill of Human Rights' (2010) 32 *Human Rights Quarterly* 114 at 175; op cit note 38 at 302; Porter op cit note 178 at 183 & 186.
[183] *Government of the Republic of South Africa and others v. Grootboom and others* 2001 (1) SA 46 (CC); See Hohmann op cit note 38 at 96.
[184] In total 510 children and 390 adults, see *Grootboom* supra note 183 para 4.
[185] Ibid, para 4.
[186] Ibid.
[187] Ibid, para 7.
[188] Ibid, para 8.
[189] Ibid, para 8–9.
[190] Ibid, para 4.

28(1)(c) of the Constitution, which gives children the right to shelter.[191] The high court delivered an order requiring the government to provide the children and their parents with shelter that at least would include 'tents, portable latrines and a regular supply of water.'[192] The order was challenged by the relevant national, provincial and local authorities, and the case was brought before the Constitutional Court.[193]

The Constitutional Court in *Grootboom* developed a so-called 'reasonableness approach' regarding socio-economic rights in the Constitution, in particular the right to housing in section 26.[194] The Constitutional Court indicated that the right to housing entails three key elements: the state has an obligation to (1) 'take reasonable legislative and other measures', (2) 'to achieve the progressive realization' of the right, (3) 'within available resources.'[195] With regard to the 'reasonable legislative and other measures' that must be taken, the Constitutional Court stressed that while the concrete content of the adopted measures must primarily be determined by the legislature and the executive, they will be assessed on their reasonableness by the judiciary:

> [i]n any challenge based on section 26 [of the Constitution] in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2) [of the Constitution], the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[196]

According to the Constitutional Court, the social, economic and historical context of housing problems is one of the factors that must be taken into account in assessing whether adopted housing measures are reasonable.[197] Moreover, the Constitutional Court states that in assessing

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[191] Ibid, para 13. Section 28(1)(c) of the Constitution states : '(1) Every child has the right … (c) to basic nutrition, shelter, basic health care services and social services.'
[192] Ibid para 4.
[193] Ibid, para 4.
[194] Hohmann op cit note 38 at 97.
[195] *Grootboom* supra note 183 para 38.
[196] Ibid, para 41.
[197] Ibid, para 43.

the reasonableness of housing policies, the general context of the South African Bill of Rights must be taken into account:

> Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. 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. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[198]

Moreover, the Constitutional Court also indicated that when assessing the reasonableness of state measures, the concept of human dignity that underlies the Constitution must be taken into account:

> It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. 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. This is the backdrop against which the conduct of the respondents towards the appellants must be seen.[199]

The Constitutional Court in *Grootboom* thus stressed that in order to be reasonable, state policies must sufficiently take into account the needs of the most vulnerable and desperate groups in society, and must duly take into account the inherent human dignity of every single

[198] Ibid, para 44.
[199] Ibid, para 83.

person. As such, the approach of the Constitutional Court resembles the CESCR's practice, which also stressed the importance of those two points (see above at 21).

According to Porter, the fact that the reasonableness standard in article 8(4) OP-ICESCR is inspired by the *Grootboom* judgment, can be taken into account when interpreting that provision.[200] As such, the reasonableness standard in article 8(4) OP-ICESCR must be seen against the background of the 'substantive conception of reasonableness based on the obligation to realise socio-economic rights consistently with the foundational value of human dignity' that was developed in *Grootboom*.[201] Porter indicates that the reasonableness standard must not be seen as only a limit to the fulfilment of socio-economic rights, but rather 'as a guarantee of rights'.[202] The reasonableness standard in the first place serves to monitor compliance with the obligation to progressively monitor socio-economic rights, an obligation that is shaped by fundamental rights and the concept of human dignity.[203] As such, Porter emphasises that the fact that policies does not ignore the needs of the most marginalised or vulnerable groups of society, is of crucial importance in order for those policies to be reasonable.[204] The reasonableness test in article 8(4) OP-ICESCR would not be limited to an assessment of the justifications given by governments that indicate the restraints that limit their ability to take further policy measures.[205] Rather, the test looks at whether the chosen policies take into account the needs of the most vulnerable groups or historically disadvantaged groups in society, and are compatible with the concept of human dignity.[206]

The fact that the needs of the most vulnerable and disadvantaged groups have to be taken into account in assessing whether policy measures are reasonable in the sense of article 8(4) OP-ICESCR, is a further indication of the priority role that is assigned to the protection of vulnerable and disadvantaged groups under the ICESCR framework. Of course, state parties to the ICESCR that have not ratified the OP-ICESCR, are not bound by its provisions.[207] However, given the fact that a large amount of state parties participated in the drafting of article 8(4) OP-ICESCR, the drafting process can be used as an additional guidance to understand the precise

[200] Porter op cit note 178 at 191. As was indicated above and will be indicated below, the interpretation of the reasonableness standard in the OP-ICESCR is relevant in the context of this research since it can provide a better insight in the way the ICESCR itself has to be applied and understood.
[201] See ibid at 192.
[202] Ibid at 191.
[203] See ibid at 192.
[204] Ibid.
[205] See ibid at 194–5.
[206] See ibid at 194–5; See also Griffey op cit note 38 at 312.
[207] As was indicated above, South Africa did not yet ratify the OP-ICESCR and, as such, is not bound by it (see above at 24).

content of the rights in the ICESCR. After all, the OP-ICESCR introduces procedures for a more effective enforcement of the ICESCR and both instruments thus do not stand totally independent from each other. The fact that the OP-ICESCR indicates that compliance with the ICESCR must be measured by a test that takes into account the needs of the most vulnerable and disadvantages social groups, ie a reasonableness test inspired by *Grootboom*, is a further argument to state that the concept of human dignity and the resulting attention for the most vulnerable and disadvantaged groups in society are at the core of the rights and obligations in the ICESCR.

III THE CAPE TOWN HOUSING CRISIS

While the previous chapters focused on the right to adequate housing in the ICESCR, the second part of the paper will focus on the local context of Cape Town. As was mentioned above, an analysis of the *Tafelberg* case in the light of the right to adequate housing in the ICESCR will be conducted in the final chapter. The controversy about the Tafelberg sale, however, is not an isolated issue, but must be viewed against the lasting housing crisis in Cape Town. As such, a short overview of the housing situation in Cape Town will be provided for in this chapter. Since the current housing crisis in Cape Town has some historical roots, it is useful to start with an overview of some historical developments.

(a) The history of Cape Town's segregation

Cape Town's history is characterised by an increasing racial and spatial segregation. The City of Cape Town developed around a fort built by Jan van Riebeeck in 1652 to supply the trade ships of the Dutch East India Company (*Vereenigde Oostindische Compagnie,* 'VOC').[208] According to some scholars, the city at that time was already characterised by segregation, with the indigenous Khoikhoi people living in houses physically separated from the land of the European settlers, who exploited them as slaves.[209] Later on, former European employees of the VOC were given pieces of land taken away from indigenous communities, and slaves from regions like Mozambique, Madagascar, India and South East Asia were brough to the Cape for infrastructure development.[210] The number of European settlers at the Cape increased in later decades, leading to a further expansion of the settlement on Khoikhoi land.[211] When the Cape became British in 1806, the imported slave population and the enslaved Khoikhoi population mainly lived in the city alongside the Europeans, although they were subjected to differential social treatment.[212] On the contrary, only few Black Africans lived in the city.[213] Under British rule, the different treatment of Khoikhoi and Black Africans continued.[214] While the treatment

[208] J van Rooyen & C Lemanski 'Urban segregation in South Africa: the evolution of exclusion in Cape Town' in S Musterd (ed) *Handbook of Urban Segregation* (2020) 19 at 20.
[209] For a summary of literature on this issue, see van Rooyen & Lemanski op cit note 208 at 20.
[210] Van Rooyen & Lemanski op cit note 208 at 20.
[211] Ibid; See also T A Eidelmann, *Reclaiming Cape Town: Spatial justice and the (post)apartheid city* (Doctoral dissertation, Vanderbilt University, 2021) at 11.
[212] Van Rooyen & Lemanski op cit note 208 at 20.
[213] Ibid.
[214] Ibid at 21.

of the slave population slightly improved during British colonial rule, the inequalities between them and the settlers remained.[215]

In the early twentieth century, the existing racial segregation in Cape Town was strengthened by the introduction of legislation authorising the development of residential areas for Black Africans outside of the city, and prohibiting ownership of land by Black Africans outside specific 'reserves'.[216] Racially mixed neighbourhoods continued to exist in the centre of Cape Town, but they consisted of poor White and Coloured inhabitants.[217] In 1923, the Native (Urban Areas) Act was introduced, which formally separated residential areas for Black Africans and Whites and introduced 'passes' for Black Africans to be carried outside of their residential area.[218] During this period, the Black African population was primarily targeted by such segregating legislation, rather than the Coloured and Indian/Asian population.[219]

The urban segregation from the colonial period was further strengthened during the apartheid era.[220] After the National Party's electoral victory of 1948, legislation was adopted to strengthen White dominance by a systemic classification and separation of citizens.[221] In 1950 and 1966, moreover, Group Area Acts were adopted to allocate specific urban areas to different racial groups, separated by barriers like railways or plots of open land.[222] The urban areas allocated to the different racial groups reflected the existing socio-political realities: while Whites were allocated large areas in the city centres, Black Africans were allocated townships located on the urban peripheries.[223] In Cape Town, Coloureds were allocated areas between the White and Black African areas.[224] While a good transport infrastructure, accessible commercial opportunities and qualitative housing with a low density characterised the White residential

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[215] Van Rooyen & Lemanski op cit note 208 at 21.
[216] Eg the Native Reserve Location Act of 1902 and the Native Land Act of 1913; See van Rooyen & Lemanski op cit note 208 at 21; C Besteman *Transforming Cape Town* (2008) at 5; See also M Houssay-Holzschuch & A Teppo 'A mall for all? Race and public space in post-apartheid Cape Town' (2009) 16 *Cultural Geographies* 351 at 354.
[217] Van Rooyen & Lemanski op cit note 208 at 21.
[218] W Dooling '"Cape Town knows, but she forgets": Segregation and the making of a housing crisis during the first half of the 20th century' (2019) 44 *Journal of Southern African Studies* 1057 at 1065; Van Rooyen & Lemanski op cit note 208 at 21; See also Eidelmann op cit note 211 at 13.
[219] Van Rooyen & Lemanski op cit note 208 at 21.
[220] Ibid.
[221] C Besteman *Transforming Cape Town* (2008) at 6; T A Eidelmann, *Reclaiming Cape Town: Spatial justice and the (post)apartheid city* (Doctoral dissertation, Vanderbilt University, 2021) at 11–2; Van Rooyen & Lemanski op cit note 208 at 22.
[222] Van Rooyen & Lemanski op cit note 208 at 22; See also F Miraftab 'Governing post apartheid spatiality: Implementing City Improvement Districts in Cape Town' (2007) *Antipode* 602 at 603.
[223] Eidelmann op cit note 211 at 12; Van Rooyen & Lemanski op cit note 208 at 22.
[224] Van Rooyen & Lemanski op cit note 208 at 22; I Turok, J Visagie & A Scheba 'Social inequality and spatial segregation in Cape Town' in M van Ham, T Tammaru, R Ubarevičienė & H Janssen (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 71 at 74.

areas, the Black townships were extremely overcrowded due to the scarcity of housing and land access.[225] Moreover, 80 per cent of the jobs in the Cape Town metropolitan area were situated in the mainly White northern and southern suburbs.[226] Towards the end of the apartheid era, the segregating rules were somehow relaxed, and in 1991, the Group Area Act was repealed.[227] During the last years of apartheid, however, shortage of adequate housing for the poor remained an issue, with the South African government focusing primarily on public housing for the Coloured and Indian population, instead of the Black African population.[228] At South Africa's transition to democracy in 1994, the country was economic instable and strongly divided along socio-economic and racial lines.[229]

(b) Cape Town's current housing crisis

South African cities during apartheid were characterised by racial segregation and separation.[230] Until today, the consequences of the spatial policies under the apartheid governments are still felt in many South African cities.[231] The 2014 Report of the South African Reconciliation Barometer Survey for instance states that

> [t]he majority of the poor continue to be black and segregated from the multiracial, urban middle class. This pattern is witnessed on the geographical landscape of South Africa, where our cities may demonstrate increasing racial integration, but townships and rural settlements continue to be poor, black and segregated as was intended by apartheid planners.[232]

That pattern is also present in Cape Town. While groups with a higher income mainly live around Cape Town's City Business District ('CBD') and in its northern and southern suburbs, groups with a lower income are mainly situated in the south-eastern periphery of the city.[233]

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[225] Van Rooyen & Lemanski op cit note 208 at 22.
[226] Van Rooyen & Lemanski op cit note 208 at 22; Cfr Turok, Visagie & Scheba op cit note 224 at 75.
Van Rooyen & Lemanski op cit note 208 at 24.
[228] Ibid at 25.
[229] Van Rooyen & Lemanski op cit note 208 at 22; See also Eidelmann op cit note 211 at 13.
[230] See A Lemon 'The Apartheid City' in A Lemon, R Donaldson & G Visser (eds.) *South African Urban Change Three Decades After Apartheid: Homes Still Apart?* (2021) 1–16; See also M Strauss & S Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' (2014) 13 *Planning Theory* 428 at 429–30.
[231] S Berrisford 'Unravelling apartheid spatial planning legislation in South Africa – A case study' (2011) 22 *Urban Forum* 247 at 248; Van Rooyen & Lemanski op cit note 208 at 19–35.
[232] K Wale 'Reflecting on reconciliation: Lessons from the past, prospects for the future (SA Reconciliation Barometer Survey: 2014 Report)' (2014) *Institute of Justice and Reconciliation* available at *http://ijr.org.za/home/wp-content/uploads/2017/02/IJR-SA-Reconciliation-Barometer-Report-2014.pdf*, accessed on 6 May 2021 at 23–4.
[233] Weber op cit note 2 at 5; H S Geyer Jr. & F Mohammed 'Hypersegregation and class-based segregation processes in Cape Town 2001-2011' (2006) 27 *Urban Forum* 35 at 49.

Often that pattern follows racial lines, with White people generally having a higher income than Coloured or Black African people.[234] Moreover, Cape Town is affected by a shortage of formal housing, with many households living in informal settlements.[235] The most affordable housing units are often situated in the urban periphery.[236] Most employment opportunities in the city, however, are situated in less populated neighbourhoods, forcing many employees to overcome a significant commuting distance and high transport costs every day.[237] Affordable housing areas are also often not satisfactory from a qualitative point of view since they are for instance overcrowded.[238] As such, one can speak of a 'housing crisis' in Cape Town.[239]

The housing crisis in Cape Town is exacerbated by some phenomena linked to the financialisation of housing. The concept 'financialisation' is defined as

> the increasing dominance of financial actors, markets, practices, measurements and narratives, at various scales, resulting in a structural transformation of economies, firms (including financial institutions), states and households.[240]

Accordingly, the term 'financialisation of housing' is used to describe and evolution whereby financial markets and institutions play an increasingly important role in the area of housing.[241] As a result, housing is more and more treated as a commodity, and is being deprived of its primary social function.[242] Rather than being considered as an asset allowing people to live in adequate conditions, housing is seen as an interesting tool to accumulate wealth and to make profits.[243] The financialisation of housing is characterised by 'a subversion of housing and land as social goods in favour of their value as commodities for the accumulation of wealth.'[244]

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[234] Weber op cit note 2 at 5; See also P Wilkinson 'City profile: Cape Town' (2000) 17 *Cities* 195 at 201.
[235] Weber op cit note 2 at 6.
[236] Ibid at 35; City of Cape Town, 'State of Cape Town report 2016' (2016), available at *https://resource.capetown.gov.za/documentcentre/Documents/City%20research%20reports%20and%20review/16429%20COCT%20State%20of%20Cape%20Town%20Report%202016%20FINAL.pdf*, accessed on 21 January 2022 at 63.
[237] Weber op cit note 2 at 7-8.
[238] Ibid at 35; See also Wilkinson op cit note 234 at 198.
[239] See eg J Horber 'Cape Town Housing Crisis "more complex than it seems"' *GroundUp* 6 July 2020, available at *https://www.thesouthafrican.com/opinion/city-of-cape-town-housing-crisis-qolani-khayelitsha-6-june-2020/*, accessed on 28 December 2021.
[240] R Fernandez & M Aalbers 'Housing Financialization in the Global South: In Search of a Comparative Framework' (2020) 30 *Housing Policy Debate* 680 at 681.
[241] 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' (A/HRC/34/51), 18 January 2017, available at *https://undocs.org/A/HRC/34/51,* accessed on 10 April 2021, para 1.
[242] Ibid.
[243] Leijten & de op cit note 31 at 94.
[244] 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'

Worldwide, a trend can be seen towards the financialisation of housing.[245] Some phenomena linked to the financialisation of housing, can also be found in Cape Town. For instance, an increasing number of corporate landlords on the private market apply strict conditions for acceptable tenants while excluding disadvantaged groups.[246] Disadvantaged groups also experience difficulties in getting a mortgage, due to the criteria used by the risk-averse financial institutions like income level, employment status or being located in a 'good' or 'bad' area of Cape Town.[247] The fact that housing is being considered as an object of speculation, moreover, leads to an increase of housing prices, making many well-located properties unaffordable.[248]

The housing crisis in Cape Town is also reflected in housing statistics. According to the City of Cape Town's 2021 Human Settlement Strategy[249], Cape Town had 4 604 986 residents in 2020, divided among nearly 1.44 million households.[250] Approximately 270 000 of those households lived in informal dwellings, defined as 'a makeshift structure, not erected according to approved architectural plans, typically built with found materials (like corrugated iron, cardboard or plastic).'[251] Around 60-65 per cent of those informal dwellings were situated in informal settlements, 'unplanned settlement[s] on land that has not been surveyed or proclaimed as residential, consisting mainly of informal dwellings.'[252] Most households living in informal dwellings in a backyard have access to basic services as piped water, the ability to flush toilet on the public sewage system, refuse removal and electricity.[253] For households in informal dwellings that are not located in a backyard, that access to basic services is significantly more difficult.[254] Moreover, 18 per cent of the households in Cape Town stayed in BNG/RDP houses

(A/HRC/34/51), 18 January 2017, available at *https://undocs.org/A/HRC/34/51,* accessed on 10 April 2021, para 6.

[245] 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' (A/HRC/34/51), 18 January 2017, available at *https://undocs.org/A/HRC/34/51,* accessed on 10 April 2021.

[246] Migozzi op cit note 4 at 648.

[247] Ibid at 646.

[248] Leijten & de Bel op cit note 31 at 102; See also 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' (A/HRC/34/51), 18 January 2017, available at *https://undocs.org/A/HRC/34/51,* accessed on 10 April 2021, para 28.

[249] Cape Town City Council 'Human Settlement Strategy – Final' (May 2021), available at *https://resource.capetown.gov.za/documentcentre/Documents/City%20strategies,%20plans%20and%20frameworks/Human_Settlements_Strategy.pdf*, accessed on 14 August 2021.

[250] Ibid at 17.

[251] Ibid.

[252] Ibid.

[253] Ibid at 18.

[254] See ibid.

or state subsidised dwellings.[255] The number of applicants that are 'awaiting a housing opportunity' on the City's Housing Needs Register is 344 084.[256] While annually an average of 20 328 new housing opportunities are developed in Cape Town, there is a shortfall in the development of housing opportunities of around 22 970 – 27 980 per year.[257] According to the City's Human Settlement Strategy ('HSS'), between 47 920 and 52 930 housing opportunities per year are needed to meet the housing demand by 2028.[258] The HSS also indicates that

> given the current level of demand and state capacity to build supply, it is not possible that the various government housing subsidy programmes can satisfy the housing demand, on their own … incentives must be created to enable the delivery of affordable homes by the private sector in order to avert Cape Town's housing crisis.[259]

According to the 2020 Cape Town Housing Market Report[260], 41 per cent of the residential properties in Cape Town belong to the so-called 'luxury market' segment, having a value over R1.2 million.[261] Only 19 per cent of residential properties, however, are worth R300 000 or less, belonging the so-called 'entry market' segment.[262] Approximately 18 per cent, 13 per cent and 10 per cent of the residential properties in Cape Town belong respectively to the 'affordable market' (value of R300 000 – R600 000), 'conventional market' (value of R600 000 – R900 000) and 'high-end market' (value of R900 000 – R1.2 million) segments of the residential property market.[263] Compared to other metropolitan municipalities in South Africa, the Cape Town residential property market is the second largest after Johannesburg, but has the highest value of all South African metropolitan municipalities.[264] Cape Town, moreover, has the largest share of properties valued over R1.2 million (ie the abovementioned 'luxury market').[265]

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[255] Cape Town City Council 'Human Settlement Strategy – Final' (May 2021), available at *https://resource.capetown.gov.za/documentcentre/Documents/City%20strategies,%20plans%20and%20frameworks/Human_Settlements_Strategy.pdf*, accessed on 14 August 2021 at 17.
[256] Ibid.
[257] Ibid at 22.
[258] Ibid.
[259] Ibid at 2.
[260] Centre for Affordable Housing Finance in Africa 'Cape Town Housing Market Report – 2020' (2020), available at *https://housingfinanceafrica.org/app/uploads/2020/10/Cape-Town-Property-Report-2020.pdf*, accessed on 14 August 2021.
[261] Ibid at 1.
[262] Ibid.
[263] Ibid.
[264] Ibid at 11.
[265] Ibid.

Between 2010 and 2015, the number of properties in the luxury market segment has increased, while the number of affordable houses has decreased.[266]

Another issue contributing to the housing crisis in Cape Town relates to social housing. Although around 20 per cent of the total metropolitan population in South Africa is located in Cape Town, the city only has approximately 10 per cent of the total social housing stock in South Africa.[267] Around 75 per cent of social housing units in Cape Town, moreover, are situated in peripheral areas.[268] According to Scheba, Turok and Visagie, no social housing was built in Cape Town's CBD after the democratic transition in 1994, but instead 'there has been a "spatial drift" of isolated projects towards the outer city over the past decade.'[269] They moreover indicate that 'the biggest and most significant social housing projects in the city so far … are all in the "outer suburbs", far from the jobs and amenities of the central city.'[270] That trend would be exacerbated by two new social housing projects under construction, in Belville and Mitchell's Plain.[271] Scheba, Turok and Visagie moreover indicate that 'social housing's spatial drift into outer suburbs and townships' is a common trend in South Africa's metropolitan municipalities, that does 'little to bring about spatial restructuring and social integration.'[272] Since most tenants that move into social housing, come from the immediate neighbourhoods, such projects have a limited 'transformative impact on households, neighbourhoods and the city.'[273] They however also indicate that some improvement is visible in the plans for some future social housing projects in Cape Town, which are located closer to the inner city, in Woodstock, Maitland, Goodwood station and Pinelands.[274] However, a 'gaping hole' still exists

[266] K Hazell, R Park-Ross & M Clark (Ndifuna Ukwazi) 'Spatial justice delayed? Understanding the obstacles to social transitional housing in central Cape Town' (July 2021), available at *https://jumpshare.com/v/ePjrXQuVHNIv01QIFdCz*, accessed on 14 August 2021 at 5; Centre for Affordable Housing Finance in Africa 'Cape Town's Residential Property Market – Size, Activity, Performance'(February 2018) available at *https://housingfinanceafrica.org/app/uploads/Cape-Town-Residential-Property-Market-FINAL-REPORT-Feb-2018-2.pdf,* accessed on 14 August 2021 at 45.
[267] Scheba, Turok & Visagie op cit note 224.
[268] Centre for Affordable Housing Finance in Africa 'Cape Town's Residential Property Market – Size, Activity, Performance'(February 2018) available at *https://housingfinanceafrica.org/app/uploads/Cape-Town-Residential-Property-Market-FINAL-REPORT-Feb-2018-2.pdf,* accessed on 14 August 2021 at 54.
[269] Scheba, Turok & Visagie op cit note 224.
[270] Ibid.
[271] Ibid; However, Scheba, Turok and Visagie also indicate that some improvement can be seen by current plans for social housing projects in Woodstock, Maitland and Goodwood, closer to central Cape Town.
[272] Ibid.
[273] Ibid.
[274] Ibid.

with regard to social housing in and around Cape Town's CBD, including Sea Point and the Atlantic Seaboard, with no planned social housing projects on this location at all.[275]

(c) Spatial and housing policies in post-apartheid Cape Town

Since the end of apartheid, several political initiatives were taken to address the housing crisis in Cape Town, as well as in the whole of South Africa. The first democratic South African government aimed at the physical, social and economic integration of South Africa's cities.[276] To achieve that aim, the government especially tried to develop affordable housing for low-income households near to employment opportunities, as well as to promote economic activities in the townships.[277] To address the inequalities of the past, the Reconstruction and Development Programme ('RDP') was adopted in 1994 by the first democratic government.[278] The programme aimed amongst others at compaction and densification of the cities.[279] In 1994, the South African government also launched a new housing policy with the White Paper on a New Housing Policy and Strategy for South Africa[280], which was based on the principles of the RDP and aimed at creating

> viable, socially and economically integrated communities situated in areas allowing access to economic opportunities as well as health, educational and social amenities, within which all South Africa's people will have access on a progressive basis to:
>
> - A permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; and
> - Potable water, adequate sanitary facilities including waste disposal and domestic electricity supply.[281]

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[275] Ibid; That 'spatial gap' with regard to social housing in Cape Town is not only problematic from a practical point of view (eg the need to have transport to work and the higher transport costs), but also from a moral/political point of view. In fact, some existing social housing is situated near to public transport facilities or smaller business hubs. However, social housing in the more upmarket areas of Cape Town like Sea Point and the Atlantic Seaboard, would contribute to achieving spatial transformation and creating a less segregated city.

[276] I Turok 'Persistent polarisation post-apartheid? Progress towards urban integration in Cape Town?' (2001) 38 *Urban Studies* 2349 at 2354.

[277] Ibid.

[278] Van Rooyen & Lemanski op cit note 208 at 25.

[279] A Todes 'Urban spatial policy' in U Pillay, R Tomlinson, & J du Toit (eds), *Democracy and Delivery: Urban Policy in South Africa* (2006) 50 at 55.

[280] White paper: A new housing policy and strategy for South Africa' (1994), available at *http://www.dhs.gov.za/sites/default/files/legislation/Policies_Housing_White_Paper.pdf,* accessed on 2 December 2021.

[281] Department of Housing 'White paper: A new housing policy and strategy for South Africa' (1994), available at *http://www.dhs.gov.za/sites/default/files/legislation/Policies_Housing_White_Paper.pdf,* accessed on 2 December 2021, at 19; See also K Tissington 'A review of housing policy and development in South Africa since

That aim was for instance pursued by introducing a subsidy scheme for low-income families to finance the construction of basic 'starter houses'.[282] The White Paper of 1994 was later on reflected in the Housing Act 107 of 1997, which amongst others lays down the responsibilities and tasks of the different spheres of government with regard to housing.[283]

Urban policies, however, started to evolve from a state-led redistributive approach towards more market-driven policies.[284] In 1996, the South African government replaced the abovementioned RDP by the Growth, Employment and Redistribution strategy ('GEAR').[285] That strategy was developed against the broader political shift of the national government towards a more neoliberalist orientated macro-economic policy with a focus on economic growth and private investment.[286] Around the end of 2004, however, policies shifted their attention again towards changing the spatial organisation of South African cities and to move towards more compact and integrated cities, although in a more moderate way than in the early years after apartheid.[287] With regard to housing, the national Department of Housing adopted a new policy document, named Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements[288], which dealt with, amongst others, a densification policy, obligations for developers to reserve a certain amount of units for affordable housing, and access to well-located public or private land.[289] The new housing policy, however, also wanted to deal with some negative effects of the previous housing policy,

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1994' (September 2010), available at *http://spii.org.za/wp-content/uploads/2013/12/review-of-the-right-to-housing.pdf*, accessed on 2 December 2021 at 33.

[282] See K Tissington 'A review of housing policy and development in South Africa since 1994' (September 2010), available at *http://spii.org.za/wp-content/uploads/2013/12/review-of-the-right-to-housing.pdf*, accessed on 2 December 2021 at 34.

[283] In Part 2–4 of the Housing Act 107 of 1997, the responsibilities for housing are divided between the national, provincial and local governments. While the national government is required to design a sustainable housing development process, the provincial governments need to do everything in their power to promote and facilitate the provision of adequate housing in their respective provinces within the national framework, and the local governments (the municipalities) must actively deliver adequate housing by all reasonable and necessary means withing the housing frameworks set on national and provincial level; See Housing Act 107 of 1997, preamble; See also Tissington op cit note 282 at 34–6.

[284] Van Rooyen & Lemanski op cit note 208 at 28.

[285] Department of Finance 'Growth, employment and redistribution: A macroeconomic strategy' (1996) available at *https://www.gov.za/sites/default/files/gcis_document/201409/gear0.pdf*, accessed on 21 December 2021; Van Rooyen & Lemanski op cit note 208 at 29.

[286] Van Rooyen & Lemanski op cit note 208 at 29; See also M Houssay-Holzschuch & A Teppo 'A mall for all? Race and public space in post-apartheid Cape Town' (2009) 16 *Cultural Geographies* 351 at 352; Todes op cit note 279 at 56.

[287] See Todes op cit note 279 at 63.

[288] Department of Human Settlements, '"Breaking new ground": A comprehensive plan for the development of sustainable human settlements' (2004), available at *http://www.dhs.gov.za/sites/default/files/documents/breaking%20new%20ground%202004_web.pdf,* accessed on 21 December 2021.

[289] See Todes op cit note 279 at 63–4.

for instance the high amount of housing development in the urban peripheries, the poor quality of delivered houses or the continued construction of informal settlements.[290] Todes, however, indicates that those policies were often marginalised by the national and local authorities in the years that followed.[291]

Also the City of Cape Town's administration showed a desire to address the legacy of apartheid after South Africa's transition to democracy. The first democratic government of Cape Town adopted the Metropolitan Spatial Development Framework ('MSDF') in order to restructure the city in a more equitable and inclusive way.[292] The MSDF provided for the development of 'economic "nodes" in key locations around the city, connected via transport corridors', in order to promote 'mixed use and higher-density residential and retail developments.'[293] Moreover, provision was made for the use of vacant well-located land for housing of the poor.[294] That policy however was also criticised since it could not bring about real spatial changes.[295] Cape Town maintained a city with dominantly White 'affluent suburbs and economic centres' near the city centre, and mainly Black African 'poverty-stricken and overcrowded settlements' at the peripheries.[296] However, van Rooyen and Lemanski also indicate that during the first years after the democratic transition, some changes towards desegregation and integration happened.[297] Those changes included for instance the movement of Black African people into former White areas, or the development of state-subsidised housing settlements at the city peripheries with a mixed Black African and Coloured population.[298] Nevertheless, at the start of the 21st century, the segregation and polarisation in Cape Town was said to have increased compared to the 1980s, in the sense that a larger socio-spatial divide now exists between the impoverished townships and the more well-off areas of Cape Town.[299]

The shift towards neoliberalism that was described above (see above at 38), was also reflected in urban governance in Cape Town.[300] Van Rooyen and Lemanski for instance

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[290] See Tissington op cit note 282 at 41.
[291] Todes op cit note 279 at 63–4.
[292] Turok op cit note 276 at 2354; Van Rooyen & Lemanski op cit note 208 at 27.
[293] Van Rooyen & Lemanski op cit note 208 at 27–8.
[294] Turok op cit note 276 at 2354.
[295] Van Rooyen & Lemanski op cit note 208 at 28.
[296] Ibid.
[297] Ibid.
[298] Ibid.
[299] Ibid; I Turok & V Watson 'Divergent development in South African cities: Strategic challenges facing Cape Town' (2001) 12 *Urban Forum* 119 at 136.
[300] See Van Rooyen & Lemanski op cit note 208 at 29–30.

mention the introduction of Business/City Improvement Districts ('BIDs/CIDs') in South African cities as an example of neoliberal ideas that entered post-apartheid urban planning.[301] The concept of BIDs, which are called CIDs in South African cities, originates from North America and refers to 'self-taxing schemes financing additional services to promote the attractiveness of a district and enhance its commercial and business activities.'[302] In 2000, the Central City Improvement District ('CCID') was established in Cape Town by a non-profit partnership (the Cape Town Partnership ('CTP')) originating from an initiative of the South African Property Owners Association and the Regional Chamber of Commerce and Industry.[303] The CTP was established as a partnership for the regeneration of Cape Town's central city and the stimulation of business, investment and retail.[304] The partnership included representatives of both the private sector and the several governments on local and provincial level.[305] While the original reasons to establish the CCID primarily related to security, the focus later on shifted towards urban regeneration in general.[306] The aim was to encourage business, investment, retail, entertainment and leisure in the central city of Cape Town.[307] Property owners in the CCID had to pay an additional contribution, which created resources that were used 'to "clean up" the city in terms of crime', amongst others by appointing security managers and officers, patrol teams, parking marshals and a CCTV system.[308] In the years after the start of the project, an increase in private investment, developments and lease agreements by businesses could be seen.[309]

In their shift towards more neo-liberal policies, cities like Cape Town not only aimed at realising more economic growth, but at the same time they pursued pro-poor policies together with their policies aiming at more economic growth.[310] Nevertheless, Lemanski indicates that the increased spatial polarisation that was the result of the more neo-liberal policies, undermined the pro-poor policy goals of the City.[311] That increased spatial polarisation was

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[301] Ibid.
[302] S Didier, M Morange & E Peyroux 'The adaptive nature of neoliberalism at the local scale: Fifteen years of City Improvement Districts in Cape Town and Johannesburg' (2013) 45 *Antipode* 121 at 122.
[303] Ibid at 125; G Visser & N Kotze 'The state and new-build gentrification in Central Cape Town, South Africa' (2008) 45 *Urban Studies* 2565 at 2575.
[304] C Lemanski 'Global cities in the South: Deepening social spatial polarisation in Cape Town' (2007) 24 *Cities* 448 at 451.
[305] Ibid.
[306] S Didier, M Morange & E Peyroux 'The adaptive nature of neoliberalism at the local scale: Fifteen years of City Improvement Districts in Cape Town and Johannesburg' (2013) 45 *Antipode* 125.
[307] G Visser & N Kotze 'The state and new-build gentrification in Central Cape Town, South Africa' (2008) 45 *Urban Studies* 2565 at 2575.
[308] Ibid at 2577.
[309] Lemanski op cit note 304 at 451; Visser & op cit note 303 at 2577.
[310] Lemanski op cit note 304 at 456.
[311] Ibid.

caused by the fact that investments and developments primarily remained limited to a few areas and neighbourhoods in the City.[312] Lemanski also indicates that 'the drive for global competitiveness' behind the activities of the CTP has negatively affected both the poor and the small businesses, since the poor and other disadvantaged groups in general were pushed towards the city peripheries, and there was an increase in rent prices for commercial properties.[313] Apart from an increase in rent prices, the abovementioned caused a further increase in demand for both office space and residential properties, leading to strong competition and increased property prices.[314] Moreover, the creation of a CID would, according to Lemanski, not have contributed to a redistribution of resources between different areas of Cape Town, since under such CID framework, the contributions paid by residents of the central city are actually used to improve that same central city.[315] As such, this creates the risk of further segregation and exclusion.[316]

[312] Ibid.
[313] Ibid.
[314] Ibid at 452.
[315] Ibid at 455.
[316] See ibid at 455.

IV THE TAFELBERG SALE AND THE RIGHT TO ADEQUATE HOUSING

Developing affordable housing units on the Tafelberg property surely would contribute to the realisation of the right to adequate housing in Cape Town. Given the shortage in affordable housing close to Cape Town's CBD, constructing affordable housing units on the property which is situated in Sea Point near Main Road and approximately 5 km from Cape Town's City Bowl, would be very welcome in the light of the abovementioned housing crisis in Cape Town. Due to the property being situated close to Cape Town's CBD, housing units situated on it are more likely to match the criteria for adequate housing as described by the CESCR than housing units located at the City's periphery. In particular the requirement in the ICESCR that housing must be located so that inhabitants have access to services, facilities and infrastructure, or the requirement that there must be access to employment opportunities, healthcare, education and childcare (see above at 8) are more likely to be met at locations close to the CBD than at locations at the edges of Cape Town. As such, the calls of RTC and NU to use the property for the development of affordable housing are understandable in the light of the serious housing crisis in Cape Town. Hence the question arises whether the WCPG's decision to sell the Tafelberg property instead of using it for affordable housing development, is compatible with the right to adequate housing in the ICESCR.

In this chapter, an analysis of the decision to sell the Tafelberg property will be made in light of the right to adequate housing in article 11(1) ICESCR. First, an argument is made for the qualification of the sale as a retrogressive measure that in principle is not allowed under the ICESCR. Secondly, the Western Cape Province's argument that the decision is necessary due to the Province's limited financial resources is discussed in light of the ICESCR, taking into account the ICESCR's focus on vulnerable and disadvantaged groups in society (see above at 21)

(a) A retrogressive measure

As indicated above, a state party under the ICESCR has no obligation to immediately provide adequate housing for its entire population, but rather has to progressively realise the right to adequate housing in the ICESCR (see above at 13). As such, a person cannot directly claim a right to housing on a particular piece of land like the Tafelberg estate. State parties to the ICESCR, however, do have an obligation 'to move as expeditiously and effectively as possible towards [the full realisation of rights in the ICESCR]', and must use the resources that are available in a way as to ensure 'the widest possible enjoyment of the ICESCR rights' (see above

at 14). As such, states cannot delay that full realisation or take retrogressive measures without justification (see above at 13–4).

The sale of the Tafelberg property can be seen as a retrogressive measure with regard to the full realisation of the right to adequate housing in the ICESCR, especially when one takes into account the broader context of Cape Town's housing crisis. As was indicated above, the market price of real estate situated close to Cape Town's CBD is very high. In the Tafelberg case, the High Court indicated that it is not realistic that public authorities are able to acquire land that is situated so closely to Cape Town's CBD as the Tafelberg property, due to the high market prices of such land and public authorities' limited financial means. As such,

> the only meaningful way in which [the] shortage of land for social housing projects can be addressed by the State, is to make use of such pockets of state-owned land as exist in and around the CBD… Simply put, the procurement by the State of privately owned land in the inner city has become prohibitively expensive. Indeed, at the end of the day, there is no dispute between the Province and the City, on the one hand, and RTC on the other, over the shortage of state-owned land in or near the inner city which is available for the development of affordable housing and, in particular, social housing projects. In the result, unless meaningful attempts are made by the authorities to redress the situation, spatial apartheid will be perpetuated, not only in the inner city areas but across the greater Cape Peninsula.[317]

The sale of the Tafelberg property thus may have a significant impact on the future realisation of the right to adequate housing in Cape Town. One can argue that the sale of the Tafelberg property jeopardises the ability of the relevant governments to fully realise the right to adequate housing in Cape Town in future. While an argument could be made that the financial means obtained by the sale can be used to construct affordable housing on land that is situated further away from the CBD, and thus is less expensive to acquire by public authorities, such an argument is not satisfactory if one looks to the content of the right to adequate housing in the ICESCR. As was indicated above, the right to housing in the ICESCR is a right to adequate housing. Housing not only must provide shelter, but must also provide sufficient access to services, employment or transport. Public authorities could build affordable housing units at the city peripheries, or even tens of kilometres away from Cape Town's CBD, but such projects are less likely to fulfil the requirements of for instance access to services and

[317] *Adonisi and Others* supra note 18 para 101–2.

employment that are included in the notion of adequate housing in the ICESCR. As was noted by the high court in its *Tafelberg* judgment, the City of Cape Town is characterised by the presence of many employment opportunities in the CBD combined with a lack of public transport, the inadequateness of existing public transport, and the high transport expenses and loss of time for working class commuters.[318] These issues will not be addressed by affordable housing projects at the edges of Cape Town. The WCPG's argument that adequate and affordable housing could be provided for more easily at locations further away from Cape Town's CBD thus is not convincing in light of the right to adequate housing in the ICESCR.

In its General Comment No. 19 on the right to social security[319], the CESCR moreover indicated that in assessing whether retrogressive measures can be justified, it will take into account, amongst others, whether

> the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security.[320]

The CESCR thus implicitly indicates that measures sustainedly impacting the fulfilment of a right in the ICESCR can be considered to be retrogressive measures, and that such sustained impact on the fulfilment of a right in the ICESCR is a factor that makes measures less likely to be justified. Given the fact that the sale of the Tafelberg property takes away one of the scarce plots of surplus well-located public land in Cape Town on which affordable housing projects could be realised, the WCPG will have to show particular good reasons if it wants to justify the sale against the ban on retrogressive measures in the ICESCR. As indicated above, the CESCR holds that when a state takes retrogressive measures, that state bears the burden of proof to demonstrate that such measures can be justified (see above at 13). As such, the decision to sell the Tafelberg property will be considered a violation of the right to adequate housing in article 11(1) ICESCR, unless the WCPG can show that the decision is reasonably justified.

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[318] Ibid para 479.
[319] CESCR, 'General Comment No. 19' op cit note 136.
[320] Ibid para 42; See also N Moons, *The Right to Housing in Law and Society* (2018) at 174.

(b) The lack of resources

Article 2 ICESCR only obliges a state party to achieve the progressive realisation of the rights in the ICESCR 'to the maximum of its available resources' (see above at 13).[321] As such, states can argue that a full realisation of the right to adequate housing is not possible due to the lack of available resources. In the *Tafelberg* case, the WCPG tried to justify the sale of the Tafelberg property by pointing at its limited budgets. The WCPG argued for instance that it is a state organ with only a very restricted capability to generate its own resources.[322] Its income primarily comes from the central government 'with all the vagaries that central government's income generation may embrace as the economy and revenue streams change course from time to time.'[323] The WCPG also argued that it was 'obliged to distribute that income in accordance with its own budgetary constraints.'[324] While around 70 per cent of its income was spent on health and education, the remaining 30 per cent was spread over several other policy domains like housing, roads and infrastructure.[325] According to the WCPG, the sale of redundant properties is a way to increase its own resources.[326] As such, the offer the WCPG received for the Tafelberg site (R135 million, while the commercial value of the site was around R108 million) was a 'no-brainer'.[327]

Initially, the WCPG also confirmed that the sale of the Tafelberg property would enable it to 'extract the maximum value from the most valuable inner-city properties to create an income stream from which projects for the poor can be cross-subsidised.'[328] The WCPG moreover stated with regard to its Regeneration Programme, of which the Tafelberg sale is part, that the programme was

> set up to extract maximum value from the most valuable inner city properties to create an income stream and a development fund from which projects for the poor can be cross-subsided. The Programme in essence focuses on two mutually inclusive objectives, namely value extraction (specifically in relation to generating an income stream) and urban regeneration (improving the precincts) where we own land in terms of socio-

[321] See ICESCR, Article 2(1).
[322] *Adonisi and Others* supra note 18 para 51.
[323] Ibid.
[324] Ibid.
[325] Ibid.
[326] Ibid para 52.
[327] Ibid.
[328] Parliament of the Province of the Western Cape 'Questions for written reply: Mr L H Max to ask Mr D A C Grant, Minister of Transport and Public Works' (26 March 2016), available at *https://www.groundup.org.za/media/uploads/documents/Tafelberg/Donald%20Grant%2C%20Reply%20to%20Parliamentary%20Inquiry.pdf*, accessed on 7 August 2021.

> economic imperatives. Inherent is the imperative to repopulate the central city areas at much higher levels of both density and representivity.[329]

Despite the fact it was later on revealed that the income from the sale would be used for the development of a new government building[330], the WCPG continued to argue that the sale would benefit social projects since using the income from the sale for the development of that building, would free 'resources to be used in other projects like housing infrastructure.'[331]

In essence, the abovementioned arguments of the WCPG thus indicate two points by which the government tries to justify its decision to sell the Tafelberg estate:

- The resources of the WCPG are limited, and the sale of the Tafelberg estate is necessary (in the WCPG's opinion) to increase those resources;
- It is implicitly argued that by selling the property, the WCPG can use its financial means as effectively as possible. The increase in resources obtained by the sale will outweigh the loss of affordable housing space. It is implicitly argued that by selling the property the WCPG can achieve much more social progress, or at least can better support affordable housing policies, than when the property would not be sold and used to create additional affordable housing.

(c) The prioritisation of vulnerable and disadvantaged groups

It is questionable, however, whether those arguments can justify the sale of the Tafelberg property from a ICESCR perspective. As was indicated above, the protection of vulnerable and disadvantaged groups in society lays at the core of the ICESCR and states need to prioritise them in their policies. In principle, states have a margin of appreciation in deciding which policies they want to pursue, which includes a state's decisions about which resources it has available and how they can be best used (see above at 14).[332] However, a state's margin of appreciation is not absolute and will be reviewed by the CESCR.[333] During such review, the CESCR will give attention to the needs of vulnerable and disadvantaged groups, as is for

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[329] D Grant – Minister of Transport and Public Works 'Joint submission to the Western Cape Government of Transport and Public Works (Reply to D Kramer, Deputy General-Secretary Social Justice Coalition)' (11 June 2014), available at *https://www.groundup.org.za/media/uploads/documents/Tafelberg/June%202014%20Donald%20Grant%2C%20Letter%20to%20Ndifina%20Ukwazi%20%26%20SJC%20Objection.pdf*, accessed on 7 August 2021.
[330] See R Bejoy & A Furlong 'State offices instead of housing for the poor' *GroundUp* 24 July 2016, available at *https://www.groundup.org.za/article/province-plan-use-r135-million-tafelberg-sale-new-government-offices/*, accessed on 20 July 2021.
[331] Ibid.
[332] See Craven op cit note 33 at 137.
[333] Cfr Griffey op cit note 38 at 290.

instance clear from its review of a Canadian periodic report, where the CESCR indicates that insufficient resources are allocated to the fight against homelessness and the improvement of living conditions:

> Given the evidence of homelessness and inadequate living conditions, the [CESCR] is surprised that expenditures on social housing are as low as 1.3 per cent of Government expenditures.[334]

That practice is in line with the abovementioned finding that human dignity lays at the core of the ICESCR. As such, the WCPG's arguments that the sale of the Tafelberg property was a 'no-brainer' due to the high sales value also must be assessed in the light to that focus on human dignity and the prioritisation of vulnerable and disadvantaged groups in society. When such assessment is made, the sale of the Tafelberg property no longer seems to be a 'no-brainer'. As was indicated and illustrated above, Cape Town is affected by a long-lasting and severe housing crisis, resulting in a large shortage of affordable housing opportunities close to the CBD (see above at 32). Moreover, as was indicated above, that housing crisis primarily affects vulnerable and historically disadvantaged groups (see above at 33). As such, providing for affordable housing opportunities close to Cape Town's CBD contributes to addressing the needs of those groups. The fact that vulnerable and disadvantaged groups should be given attention and even have to be prioritised under the ICESCR (see above at 21), thus provides for a strong argument that the sale of the Tafelberg property is incompatible with the obligations under the right to adequate housing in article 11(1) ICESCR.

In the *Tafelberg* judgment, it was made clear that the Tafelberg property was primarily put on sale to provide the necessary financial resources for the construction of a new building for the Western Cape Education Department ('WCED').[335] The Head of Department in the Western Cape Provincial Department of Transport indicated that the relocation of the WCED was prompted by concerns about the high rental prices the Western Cape Province paid for the current office buildings.[336] To work on a less costly alternative, a public/private partnership ('PPP') was established. [337] However, since the capital contribution that the Province had to make to that PPP appeared much bigger than what was initially estimated, the decision was

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[334] CESCR 'Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights, Canada' (10 June 1993) E/C.12/1993/5 at para 20.
[335] *Adonisi and Others* supra note 18 para 271.
[336] Ibid para 168.
[337] Ibid.

made to sell the Tafelberg property in order to generate the required extra resources.[338] Those reasons, as genuine as they might be, does not seem to outweigh the importance that is given to addressing the needs of the most vulnerable and disadvantaged under the ICESCR. As was indicated above, the plots of land located close to the CBD that are available for affordable housing projects are very scarce (see above at 36 & 43). As such, the argument of the WCPG that the sales price of the Tafelberg property would enable it to allocate more of its resources towards affordable housing projects elsewhere, is not convincing. Furthermore, the CESCR has stressed before that a lack of resources, for instance due to an economic recession, does not automatically imply that states are exempted of their obligations under the ICESCR. States still need to strive '[t]o ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.'[339] In the viewpoint of the CESCR, states still can improve the situation of the most vulnerable and disadvantaged groups in society, even despite their restricted financial resources or economic hardship, for instance by using the existing resources more effective and equitable.[340] As Craven indicates, the CESCR seems to hold the opinion that human rights cannot be traded off for economic growth.[341] Similarly, one could say that the prospect of high financial gains cannot automatically justify the choice for a sale of the Tafelberg property, especially not if it comes at the expense of one of the few remaining options to adequately realise the right to housing for the most vulnerable and disadvantaged groups in Cape Town.

The WCPG furthermore does not demonstrate how it would be able to meet the needs of the most vulnerable and disadvantaged groups in society in a way that meets the requirements of the ICESCR. One can even wonder whether the WCPG really is willing to prioritise the needs of the most vulnerable and disadvantaged members of its population. In the *Tafelberg* judgment, the high court indicated that some high political functionaries of the Western Cape Province persistently seemed to adhere to a policy of 'no RDP in the CBD'.[342] Later on, the WCPG would have adopted a more inclusive approach towards housing, without however giving any reasons for its change of approach, making it difficult to assess whether the change

[338] Ibid para 168–9.
[339] CESCR 'General Comment No. 3' op cit note 91 para 11.
[340] Craven op cit note 33 at 139.
[341] Ibid.
[342] See *Adonisi and Others* supra note 18 paras 302, 364, 400 & 440; 'RDP' is and abbreviation of Restructuring and Development Programme, a programme of the first South African post-apartheid government. This programme provided in subsidised housing for impoverished South Africans. The concept is however also broader used to refer to cheap and small houses of poor households.

resulted from a genuine commitment to address the existing segregation.[343] Moreover, the high court stressed that departmental functionaries and political functionaries of the Western Cape Province's administration seems to contradict each other as to the desirability of affordable housing projects close to the CBD.[344] As such, the WCPG does not sufficiently show the intention to pursue a coherent policy towards meeting the needs of vulnerable and disadvantages inhabitants to have access to affordable housing close to Cape Town's CBD. Against that background, it is hard to see how a sale of the Tafelberg property would be compatible with the ICESCR's requirement that states must prioritise vulnerable and disadvantaged members of their population, especially in the context of Cape Town's lasting housing crisis that has its roots in the historical racial and spatial segregation.

As such, the decision to sell the Tafelberg property can be qualified as a retrogressive measure with regard to the right to adequate housing in the ICESCR, which in principle is not compatible with the ICESCR. Moreover, the WCPG does not provide for convincing arguments that would justify such a retrogressive measure. As such, the sales decision is incompatible with the right to adequate housing in article 11(1) ICESCR.

(d) Observations from the Tafelberg *case*

From the analysis of the *Tafelberg* case above, some general observations can be drawn relating to the underlying issue of the case: the use of surplus public land for affordable housing purposes. As was indicated in the introduction of the paper, calls to use surplus public land for housing purposes are also made with regard to other locations in Cape Town. Moreover, those calls are also made in for instance the Unites States. The issue of using surplus public land for affordable housing is thus not unique to the *Tafelberg* case. As such, it is useful to derive from the analysis of the *Tafelberg* case in this paper some observations about how the right to adequate housing in the ICESCR can support calls for the use of surplus public land for affordable housing. The analysis of the *Tafelberg* case made clear that while governments in principle are free to decide how to use public land, the right to adequate housing in article 11(1) ICESCR can limit that freedom. In particular, two observations can be made about how the right to adequate housing in the ICESCR can be used to support affordable housing demands related to surplus public land.

[343] Ibid para 387–9.
[344] Ibid para 440.

In the first place, the question of whether a government should use surplus public land for affordable housing purposes, should always be posed against the background of the adequacy requirement that is contained in the ICESCR's right to adequate housing. As was indicated above, the CESCR interprets article 11(1) ICESCR not only as containing a right to shelter, but also as containing a right to housing that meets certain adequacy requirements. In the analysis of the *Tafelberg* case above, it was argued that the decision to sell the Tafelberg property constitutes a retrogressive measure with regard to the right to adequate housing, since it takes away one of the few opportunities for the WCPG to create affordable housing opportunities close to Cape Town's CBD. The WCPG tried to justify the sale by stating that it would provide affordable housing opportunities elsewhere, so as to 'compensate' for the loss of the affordable housing potential of the Tafelberg property. However, that justification appeared not to be convincing in the light of the ICESCR's right to adequate housing, since it was highly unlikely that the WCPG could ever acquire another plot of land that is as well-situated as the Tafelberg property. As such, not only the potential of developing housing on a particular plot of land plays a role, but also the potential of developing housing that is adequate in the sense of article 11(1) ICESCR. Housing under the ICESCR is more than shelter alone, and includes an adequate place to live in dignity. When a particular plot of public land is one of the few options in which such adequate housing can be realised, this is thus a strong argument under the ICESCR to argue in favour of using that land for affordable housing purposes.

A second observation that follows from the analysis above, is the attention that must be given to the needs of the most vulnerable and disadvantaged groups in society. In the *Tafelberg* case, the WCPG argued that the decision to sell the Tafelberg property was a 'no-brainer' given the high incomes that would be generated by the sale. However, as was indicated above, the ICESCR requires that state parties address the needs of vulnerable and disadvantaged groups by priority, within their available resources, but also irrespective of the available resources. The housing crisis in Cape Town particularly affects the most vulnerable and disadvantages members of the population. In the *Tafelberg* case, no convincing indications could be found that would demonstrate the WCPG's priority concern for the needs of vulnerable and disadvantaged groups. Rather, the sale was intended to provide the administration with extra resources for the construction of a new administrative office building (see above at 46). While the WCPG argued that the process would allow it to reserve more of its existing resources for social housing projects, that argument was not convincing with regard to the fulfilment of the ICESCR's right to adequate housing, since it would be difficult for the government to acquire

land as well-located as the Tafelberg property for the development of affordable housing. As such, the second observation that can be drawn from the analysis of the *Tafelberg* case is that governments must respect the fact that the most vulnerable and disadvantaged groups are given priority under the ICESCR. In principle, governments of course are free to decide how to use surplus public land, and as such cannot be forced to use it for affordable housing. However, such choices must be compatible with a policy that gives priority to the needs of the most vulnerable and disadvantaged groups in society.

CONCLUSION

In this paper, the sale of the Tafelberg estate in Cape Town by the WCPG was discussed in the light of the right to adequate housing in the ICESCR. Civil society organisations RTC and NU had successfully challenged the sales decision before the high court, invoking amongst others the right to housing in the South African Constitution. They argued that instead of selling the Tafelberg property, the WCPG should use it for the development of affordable housing opportunities, in order to address Cape Town's long-lasting and severe housing crisis. Despite the fact that the high court did not assess the case against the background of the right to housing in the ICESCR, such assessment could be useful since South Africa is bound by that instrument, and since the Constitution states that the constitutional right to housing should be interpreted in the light of international law. As such, this paper aimed at making an assessment of the Tafelberg sale in the light of the right to housing in the ICESCR.

The first part of the paper focused on a description of the ICESCR. The first chapter of the paper contained an overview of the right to housing in article 11(1) ICESCR and its several elements. In the first place, the important concept of 'adequate housing' was reflected on. In the ICESCR, the right to housing contains more than just a right to shelter, but requires instead that housing fulfils certain requirements of adequateness. Housing must for instance be easily accessible, not too far away from essential services, and connected to a reasonable transport network. The right to housing in the ICESCR thus in fact is a right to adequate housing. Secondly, an overview was given of the several obligations state parties have under the ICESCR. It was set out that while state parties are not required to immediately fully realise all rights in the ICESCR, they should take steps towards the progressive realisation of those rights. Moreover, the concept of minimum core obligations was elaborated on, as well as on which concrete measures state parties have to take when implementing the ICESCR. In the second chapter, the focus was on the concept of human dignity. It was argued that both the practice of the CESCR and the drafting history of the OP-ICESCR indicated that the concept of human dignity is at the core of the ICESCR. More particular, the importance of human dignity in the ICESCR results in a focus on the needs of the most vulnerable and disadvantaged groups in society. That focus can also be seen in the way the CESCR applies the right to adequate housing in the ICESCR.

In the second part of the paper, the current housing situation in Cape Town was discussed. Before an analysis was made of the Tafelberg sale against the background of the housing rights in the ICESCR, an overview was given in the third chapter of the paper of the current housing

crisis in Cape Town, as well as an overview of its historical roots and the policy measures that were taken by the post-apartheid governments in an attempt to address housing issues. In the last chapter of the paper, subsequently, the Tafelberg sale was analysed against the right to adequate housing in article 11(1) ICESCR. It was argued that the sales decision could be qualified as a retrogressive measure with regard to housing rights when a closer look was taken to the context around the sale. Due to the high market prices of real estate situated close to Cape Town's CBD, it is unlikely that the WCPG will be able to acquire such property in future. Since the plots of surplus public land close to the CBD are scarce, the decision to sell the Tafelberg property takes away one of the rare plots of public land that could be used for the development of affordable housing opportunities. As such, it was argued that the sales decision jeopardises the future ability of the WCPG to realise the right to adequate housing in the ICESCR. After all, the right to housing in the ICESCR requires housing to be adequate, and that requirement is more likely to be achieved if affordable housing is developed close to the CBD. As such, the Tafelberg sales decision is a retrogressive measure that, in principle, is not allowed under the ICESCR. However, under the ICESCR framework, retrogressive measures can be allowed if the state party in question shows that it is reasonably justified.

In the *Tafelberg* case, the WCPG tried to justify its sales decision by stating that it was necessary in order to complement its limited financial means, so that a new administrative building could be constructed. Moreover, the government indicated that the extra financial means would allow it to allocate more resources to affordable housing projects on other locations than the Tafelberg estate. It was argued, however, that those arguments do not convincingly justify the decision to sell the Tafelberg property. When assessing the decision against the right to adequate housing in the ICESCR, one should take into account the importance that is attached to the protection of vulnerable and disadvantaged groups under the ICESCR. As such, the importance that the Tafelberg property can have for realising affordable housing for vulnerable and disadvantages groups in Cape Town, seems to outweigh the WCPG's wish to collect resources to build a new administrative building. In the *Tafelberg* case, moreover, the WCPG does not demonstrate how it would otherwise meet the housing needs of the vulnerable and disadvantaged groups in Cape Town.

It was concluded that the Tafelberg sales decision is incompatible with the right to adequate housing in article 11(1) ICESCR. From the discussion of the *Tafelberg* case, two general observations were drawn that could provide guidance in how to assess calls for the use of surplus public land in the light of the ICESCR's right to adequate housing. In the first place, it

was argued that when making such assessment, the ability to provide housing that is sufficiently adequate, should be taken into account. Secondly, the importance of protecting the needs of the most vulnerable and disadvantaged groups in society under the ICESCR should always be taken into account.

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