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3	Can International Housing Rights Based on	3
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5	Contemporary Housing Systems?	5
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8		8
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10		10
11		11
12		12
13		13
14	<b>(1) Introduction</b>	14
15		15
16	The concept of home advances a new basis for evaluating housing rights, 16	
17	emphasising their human and personal benefits. Housing rights address, at a 17	
18	national, regional and global level, displacement and dispossession, as well as 18	
19	access to home for all. These rights are forging a new discourse and jurisprudence 19	
20	across the world, largely based on public international law instruments. However, 20	
21	the legal liberalist approach and framework of such housing rights discourse needs 21	
22	to engage with housing systems at the <i>macro</i> , <i>meso</i> and <i>micro</i> levels. There is 22	
23	a particular and urgent challenge in addressing the structural and institutional 23	
24	elements of housing systems, such as housing finance, infrastructure, ownership 24	
25	and exchange of housing and regulation of housing systems and sub-systems. 25	
26	Ultimately, this could ensure that the contemporary revival of global housing 26	
27	finance regulation can incorporate a housing rights perspective. 27	
28		28
29		29
30	<b>(2) The Concept of Home</b>	30
31		31
32	The concept of home is widely viewed as central to housing and housing rights 32	
33	– a critical element of the basic physiological needs of food, clothing and shelter, 33	
34	established by Maslow, and in contemporary societies often relating to the safety, 34	
35	love/belonging, esteem and self-actualisation needs. <sup>1</sup> Housing and home are 35	
36	connected to health, child development, poverty and opportunity in general. The 36	
37	emotional and symbolic significance of housing and home relate to the sense 37	
38		38
39		39
40		40
41	<hr style="width: 20%; margin-left: 0;"/> 1 See A.H. Maslow, ‘Theory of Human Motivation’. Originally published in 41	
42	<i>Psychological Review</i> , (1943) 50 370–96. See also A.B. Trigg, ‘Deriving the Engel Curve: 42	
43	Pierre Bourdieu and the Social Critique of Maslow’s Hierarchy of Needs’ (2004) 62 (3) 43	
44	<i>Review of Social Economy</i> 393, 406. 44	

1 of permanence and security, as well as fixing a person's place in society and 1  
2 community.<sup>2</sup> 2

3 Of course, the idea of house is usually central in the legal treatment of home, but 3  
4 there is also a further set of factors which distinguishes the home from a physical 4  
5 structure providing shelter. Fox suggests that home needs to be conceptualised 5  
6 as house plus an 'x factor'. This 'x factor' represents the social, psychological, 6  
7 and cultural values which a physical structure acquires through use as a home.<sup>3</sup> 7  
8 Thus, 'home' can be seen as a physical structure, a territory implying security, 8  
9 control and rootedness, as identity, and as a social and cultural phenomenon or a 9  
10 base for relationships. It also acts as a geographical space from where a person or 10  
11 household can access other services, and amenities. 11

12 In a valuable and innovative examination of the way the home is treated in 12  
13 English common law Fox finds that it variously encompasses a physical space, an 13  
14 object of investment and ownership, a social and cultural unit, a 'family home', a 14  
15 'women's place', a place for children and a human right.<sup>4</sup> While housing usually 15  
16 involves the provision of a physical structure, 'home' involves housing plus the 16  
17 experiential elements of home. These include: as a valued territory, as a signifier 17  
18 and constituent of self and social identity, as a part of the social and cultural 18  
19 environment associated with a person's way of life and participation in society 19  
20 and as a base for family and children. Indeed, the concept of home has been widely 20  
21 researched in many disciplines, and there is hardly a more emotionally loaded 21  
22 word, since it epitomises situations of family, affection, love and other human 22  
23 experiences. 23

24 The women's or feminist perspective on home is clearly absent from the 24  
25 English common-law contemporary conceptual framework, and indeed, most legal 25  
26 systems across the world. The home has been correlated with a site of hierarchical 26  
27 relations and a place of oppression for women, a base of domestic violence, a 27  
28 forced workplace for cooking cleaning, nurturing and childrearing, inherently 28  
29 denying women access to wider societal participation.<sup>5</sup> 29

30 For some people, the notion of home as involving only a physical structure 30  
31 carries little or no significance. For nomads, children, some people with disabilities, 31  
32 many older people and others, the need and expectation for support, care communal 32  
33 assistance and trusting relationships usually surpasses the requirements of a 33  
34 distinct physical location. Unless there are proper safeguards in place, there is 34

35 35

36 36

37 37

38 2 See R.G. Bratt, M.E. Stone and C. Hartman, *A Right to Housing: Foundation for a* 38  
39 *New Social Agenda* (Temple University Press, Philadelphia 2006). 39

40 3 L. Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' 40  
41 (2002) 29(4) *Journal of Law and Society* 580. 41

42 4 L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart, Oxford 2007). 42

43 5 See for example, M. Eagleton (ed.) *A Concise Companion to Feminist Theory* 43  
44 (Blackwell, Oxford 2003); M.L. Adams, 'There's No Place Like Home: On the Place of 43  
44 Identity in Feminist Politics' (1989) 31(22) *Feminist Review* 33. 44

1 a danger that even the most well-intended homes provided by organisations can 1  
2 become a ‘facility’ rather than a ‘real home.’<sup>6</sup> 2

3 At another level, and drawing on the definitional shift in the concept in the 3  
4 US over the past 100 years, Retsinas traces the different but changing American 4  
5 image of home. Early immigrants to America saw home as an anchor in a safe 5  
6 harbour. The definition of home was more a state of mind rather than a physical 6  
7 structure. Retsinas describes the US and developed states phenomenon where the 7  
8 home has become a vehicle for enforced savings, a hedge against inflation and in 8  
9 more recent times a fungible investment, only to return to the ‘home as anchor’, in 9  
10 the current turbulent economic times. However, Retsinas also highlights the huge 10  
11 disparity in this concept between rich and poor in the US. 11

12 Poor-to-middle-class Americans rarely owned, much less hoped to own, such 12  
13 homes. They could not afford them – banks wrote five-year loans and demanded 50 13  
14 per cent down payments. The wealthy owned mansions, but a peripatetic class that 14  
15 summered in Newport, Rhode Island, wintered in Manhattan and toured Europe in 15  
16 between did not want anchors. Ironically, while replete with a number of houses 16  
17 the privileged of that era were ‘home-less’.<sup>7</sup> 17

18 Contemporary common law, with its feudal and legal liberalist roots has been 18  
19 unable to relate to the variety of relations people have with home, which are 19  
20 complex and changing, positive and negative. Fox points out that: 20

21  
22 Home provides the backdrop for our lives, and is often the scene or the subject 22  
23 of legal disputes...while the authenticity of home as a social, psychological, 23  
24 cultural and emotional phenomenon has been recognised in other disciplines, 24  
25 it has not penetrated the legal domain, where the proposition that home can 25  
26 encapsulate meanings beyond the physical structure of the house, or the capital 26  
27 value it represents, continues to present conceptual difficulties.<sup>8</sup> 27

28  
29

### 30 (3) Displacement 30

31  
32 Displacement from home constitutes a particular violation of housing rights. 32  
33 Displacement means compelling a person to leave their usual place of home, 33  
34 country etc, and possibly their replacement by others. Many are displaced within 34

35  
36

37

38 6 M. Kendrick ‘The Choice between a Real Home and a Program’ (1993) 2 *Progress* 38  
39 1. The Commonwealth of Massachusetts, Department of Mental Retardation, sets out 14 39  
40 points for consumers, families and staff striving towards building a proper and rich sense 40  
41 of ‘home’ for people with disabilities. The oppressive, institutionalisation of people with 41  
42 disabilities probably represents the greatest violations of housing rights today. 42

43 7 N.P. Retsinas, ‘Definitional Shifts in a Place Called Home’ (November/December 43  
44 2008) *Urban Land*. 44

44 8 L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart, Oxford 2007). 44

1 their own countries, and are known as internally displaced persons (IDPs), 1  
 2 estimated to number over 35 million people. 2

3 The UN *Guiding Principles on Internal Displacement* points out that IDPs 3  
 4 or groups of persons who have been forced or obliged to flee or to leave their 4  
 5 homes or places of habitual residence, in particular as a result of or in order to 5  
 6 avoid the effects of armed conflict, situations of generalised violence, violations 6  
 7 of human rights or natural or human-made disasters, and who have not crossed an 7  
 8 internationally recognised state border.<sup>9</sup> 8

9 Of course, the reasons behind such compulsion can be economic, with survival 9  
 10 as the imperative.<sup>10</sup> The term ‘forced migrant’, or internally displaced person, 10  
 11 distinguishes this group of people from others who move across state borders, 11  
 12 such as refugees.<sup>11</sup> A refugee is defined in the Geneva Convention as a person 12  
 13 who owing to well-founded fear of being persecuted for reasons of race, religion, 13  
 14 nationality, membership of a particular social group or political opinion is outside 14  
 15 the country of his nationality and is unable, or owing to such fear, is unwilling to 15  
 16 avail himself of the protection of that country.<sup>12</sup> 16

17

18

19

20 <sup>9</sup> ‘Guiding Principles on Internal Displacement’ (11 February 1998) UN Doc E/ 20  
 21 CN.4/1998/53/Add.2. 21

22 <sup>10</sup> The *UNDP Human Development Report 2009* points out that there are some 741 22  
 23 million internal migrants and 124 million international migrants, with migration within 23  
 24 Asia accounting for nearly 20% of all migration. 24

25 <sup>11</sup> There are an estimated 10.4 million refugees and as many as 25 million uprooted 25  
 26 civilians in their own countries, so-called internally displaced persons. See UNHCR: The 26  
 27 U.N. Refugee Agency, <http://www.unhcr.ch/> (accessed 3 April 2009). See also Centre on 27  
 28 Housing Rights and Evictions, *Forced Evictions in Bangladesh* (COHRE, Geneva 2001); 28  
 29 *Housing and Property Restitution for Refugees and Internally Displaced Persons* (COHRE, 29  
 30 Geneva 2002); *Violence – the Impact of Forced Evictions on Women in Palestine, India and* 30  
 31 *Nigeria, Forced Evictions – Violations of Human Rights* (COHRE, Geneva 2003). 30

31 <sup>12</sup> The UN Convention Relating to the Status of Refugees (adopted 28 July 1951, 31  
 32 entered into force 22 April 1954) 189 UNTS 137 defines a refugee as a person who ‘owing to 32  
 33 well-founded fear of being persecuted for reasons of race, religion, nationality, membership 33  
 34 of a particular social group or political opinion, is outside the country of his nationality 34  
 35 and is unable, or owing to such fear, is unwilling to avail himself of the protection of 35  
 36 that country; or who, not having a nationality and being outside the country of his former 36  
 37 habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to 37  
 38 return to it’. See [http://www.unhcr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhcr.ch/html/menu3/b/o_c_ref.htm) accessed 21 June 2009). 38  
 39 This definition created problems for America in the aftermath of the Katrina hurricane when 39  
 40 many thousands of black people, displaced and abandoned outside the State of Louisiana 40  
 41 and afraid to return, were described as refugees. However, President Bush responded by 41  
 42 saying 41

42 ‘The people we’re talking about are not refugees – They are Americans, and they need 42  
 43 the help and love and compassion of our fellow citizens.’ See Associated Press (7 September 43  
 44 2005) <http://www.msnbc.msn.com/id/9232071/> (accessed 21 June 2009). 44

1 Displacement from home can take many forms: from the dramatic and media- 1  
 2 exposed flight of residents of New Orleans in the face of Hurricane Katrina,<sup>13</sup> to 2  
 3 the less publicised homelessness of Bangladeshi flooded homes, displaced persons 3  
 4 in Palestine, Zimbabwe and Darfur, to the estimated three million silent refugees 4  
 5 of Pakistan. Migrants forced to abandon homes for reasons of fear or survival 5  
 6 have become a global phenomenon. At local levels, displacement of minorities, 6  
 7 such as ethnic groups being displaced from their home,<sup>14</sup> women fleeing domestic 7  
 8 violence, illegal evictions, people with disabilities being forcibly displaced to 8  
 9 institutions and perpetual displacement through segregated housing, or indeed, 9  
 10 lack of access to housing, all involve a denial of housing rights. 10

11 The case of *Moldovan v. Romania* in 2005, describes a violent displacement 11  
 12 from home in Europe: 12

13 13

14 As the fire engulfed the house, the brothers tried to flee but were caught by the 14  
 15 mob who beat and kicked them with vineyard stakes and clubs. The two brothers 15  
 16 died later that evening. Mircea Zoltan remained in the house, where he died 16  
 17 in the fire. It appears that the police officers present did nothing to stop these 17  
 18 attacks. The applicants alleged that, on the contrary, the police also called for 18  
 19 and allowed the destruction of all Roma property in Hădăreni...<sup>15</sup> 19

20 20

21 The applicants submitted that, in general, following the events of September 21  
 22 1993, they had been forced to live in hen-houses, pigsties, windowless cellars or 22  
 23 extremely cold and deplorable conditions: 16 people in one room with no heating; 23  
 24 seven people in one room with a mud floor; families sleeping on mud or concrete 24  
 25 floors without adequate clothing, heat or blankets; 15 people in a summer kitchen 25  
 26 with a concrete floor (Melenuța, Moldova), etc. These conditions had lasted for 26  
 27 several years and, in some cases, continue to the present day.<sup>16</sup> 27

28 Globalisation is also accelerating the movement of people across regions, states 28  
 29 and continents and much of this could be described as displacement. Of course, 29  
 30 some movements of people involve voluntary action, and are not necessarily 30  
 31 a negative experience.<sup>17</sup> However, Stuart Hall views contemporary enforced 31

32 32

33 33

34 34

35 13 Some 200,000 people were displaced and evacuated from St Louis to distant, 35  
 36 unfamiliar regions without housing assistance, or the means to return to their communities 36  
 37 or reunite with their families. See J.K. Pierre and G.S. Stephenson, 'After Katrina: A Critical 37  
 38 Look at FEMA's Failure to provide Housing for Victims of Natural Disasters' (2008) 68 (2) 38  
 39 *Louisiana Law Review* 443, 495. 39

40 14 See *Moldovan v. Romania* (App nos. 41138/98 and 64320/01) Judgment No. 2. 40  
 41 12 July 2005. 41

42 15 Ibid. para. 18. 42

43 16 Ibid. para. 69. 43

44 17 See P. Kenna, 'Globalisation and Housing Rights' (2008) 15(2) *Indiana Journal of* 43  
 44 *Global Legal Studies* 397,409. 44

1 migration as the joker in the globalisation pack and describes the experience of 1  
 2 some contemporary migrants: 2

3  
 4 Seeking by whatever means – legal or illegal – to escape the consequences of 4  
 5 globalization and the new world order, they move along uncharted routes, secrete 5  
 6 themselves in the most inhospitable interstices, mortgage their worldly goods 6  
 7 to the human traffickers, seal life-threatening contracts with gang-masters and 7  
 8 pimps, and exploit their lateral family connections in order to subvert the physical 8  
 9 barriers, legal constraints, and immigration regimes that metropolitan powers 9  
 10 are vigorously putting in place. These are the overspill of the global system, the 10  
 11 world’s surplus populations, the *sans-papiers* of the modern metropolis, who 11  
 12 slip across borders at the dead of night or stow away in the backs of lorries or 12  
 13 under trains and silently disappear into the hidden depths of the city. This is 13  
 14 the human face of the new globalization ‘from below’. The global cities of the 14  
 15 developed world are the sluice-gates of this new tidal movement.<sup>18</sup> 15

#### 18 (4) Foreclosures 18

19  
 20 Among the most highly charged examples of displacement today are the foreclosures 20  
 21 and repossessions from people who are unable to pay their mortgages. Since the 21  
 22 1990s the growth of international finance invested in housing has drawn millions 22  
 23 of people into large-scale borrowing to access housing. Today, as economies 23  
 24 internationally face recession and unemployment rises, many face the prospect 24  
 25 of losing their home. Home price growth accelerated in the US in the early 25  
 26 2000s, prompted by low interest rates, lax underwriting standards and demand 26  
 27 for mortgage-backed securities, which helped to flood the mortgage market with 27  
 28 liquidity.<sup>19</sup> The IMF stated in 2009 that by various estimates, eight to 12 million 28  
 29 homeowners are currently in negative equity, totalling about US\$600 billion. As 29  
 30 home prices continue sliding, these numbers will climb.<sup>20</sup> It is estimated that US 30  
 31 home foreclosures will probably total 6.4 million by mid 2011, and inventories of 31  
 32 foreclosed homes awaiting sale will probably have peaked in mid 2010 at about 32  
 33 two million properties.<sup>21</sup> 33

34 The UN Special Rapporteur has pointed out that the biggest bubble in history 34  
 35 which developed from the sub-prime lending on housing affected minorities 35

37  
 38 18 S. Hall, (2006) ‘Cosmopolitan Promises, Multicultural Realities’, in R. Scholar 38  
 39 (ed.), *Divided Cities, The Oxford Amnesty Lectures 2003* (Oxford University Press, Oxford 39  
 40 2006) 36.

41 19 J. Kiff and V. Klyuev, *Foreclosure Mitigation Efforts in the United States: 41*  
 42 *Approaches and Challenges* (IMF Staff Position Note February 2009 – SPN/09/02) 3. 42

43 20 Ibid., 6. 43

44 21 Bloomberg News Agency [http://www.bloomberg.com/apps/news?pid=20601103](http://www.bloomberg.com/apps/news?pid=20601103&sid=aHEpXU3Pg_oU) 44  
 &sid=aHEpXU3Pg\_oU. 44

1 disproportionately.<sup>22</sup> African Americans were five times more likely to receive a 1  
 2 sub-prime loan than whites, even when they qualified for a loan at lower, prime 2  
 3 rates. The proportion of sub-prime home loans by race was 52.44 per cent for 3  
 4 African American families, 40.66 per cent for Hispanic families and 22.20 per cent 4  
 5 for white non-Hispanic families.<sup>23</sup> 5

6 In the majority of cases, foreclosure has meant the loss of the unique home of 6  
 7 a household, often resulting in homelessness or inadequate living conditions. The 7  
 8 rise of ‘tent cities’ and encampments has been reported in some cases, apparently as 8  
 9 a direct result of foreclosures.<sup>24</sup> Rolnik points out that it is important to understand 9  
 10 the impact of foreclosure – or eviction – on a household. It pushes people into 10  
 11 more difficult situations and inadequate living conditions and impacts their ability 11  
 12 to cope with further hardship, particularly where it results in homelessness. 12

13 It is much more difficult to maintain employment while having difficulty in 13  
 14 accessing water and sanitation and basic services. A lot of effort is required to 14  
 15 cope with weather changes and administrative demands, relocating belongings 15  
 16 and maintaining an address where one can be reached. In some cases, not having a 16  
 17 permanent address leads to exclusion from certain types of aid, or results in denial 17  
 18 of civil and political rights, including the right to vote. 18

19 Following foreclosure, many families have no savings left, which makes them 19  
 20 unable to afford a rental security deposit. Even if they can afford the security 20  
 21 deposit, they are considered as less able to meet debt obligations or mortgage 21  
 22 payment, and thus they are not eligible for a new rental contract.<sup>25</sup> 22

23 The UN Special Rapporteur states that the impact of eviction and homelessness 23  
 24 on women and children can be particularly devastating, as is the reality of living 24  
 25 in constant fear of being evicted. Homelessness has a particularly negative impact 25  
 26 on both groups. 26

27 The discrimination faced by women can lead to a potentially higher impact on 27  
 28 them from eviction and homelessness. The former Special Rapporteur conducted 28  
 29 several studies on women and adequate housing and he concluded that women 29  
 30

31 <sup>22</sup> See *Report of the Special Rapporteur on Adequate Housing as a Component of* 31  
 32 *the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in* 32  
 33 *this Context*, Raquel Rolnik (4 February 2009) UN Doc A/HRC/10/7, [http://www2.ohchr.](http://www2.ohchr.org/english/issues/housing/index.htm) 33  
 34 [org/english/issues/housing/index.htm](http://www2.ohchr.org/english/issues/housing/index.htm) (accessed 21 February 2010). 34

35 <sup>23</sup> Center for Responsible Lending, ‘Updated Projections of Subprime Foreclosures 35  
 36 in the United States and Their Impact on Home Values and Communities’ CRL issue brief 36  
 37 (Washington DC August 2008). 37

38 <sup>24</sup> CBS News has reported tent cities in Seattle, Portland, Fresno, Columbus and 38  
 39 Chattanooga. There were also reports of encampments in Seattle, San Diego, Columbus, 39  
 40 Ohio and Santa Barbara and Fresno California in 2009. See [http://www.msnbc.msn.com/](http://www.msnbc.msn.com/id/26776283/) 40  
 41 [id/26776283/](http://www.msnbc.msn.com/id/26776283/) (accessed 26 June 2009). 40

42 <sup>25</sup> See *Report of the Special Rapporteur on Adequate Housing as a Component of* 41  
 42 *the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this* 42  
 43 *Context*, Raquel Rolnik (4 February 2009) UN Doc A/HRC/10/7 (available at [http://www2.](http://www2.ohchr.org/english/issues/housing/index.htm) 43  
 44 [ohchr.org/english/issues/housing/index.htm](http://www2.ohchr.org/english/issues/housing/index.htm), accessed 21 February 2010) paras 67, 73. 44



1 bear the brunt of evictions as they often lead people to live in distant places and 1  
 2 in inadequate conditions, without security of tenure, basic services, access to 2  
 3 schools, health services and employment. When families are moved to places with 3  
 4 no source of livelihood, men tend to migrate and leave women to fend for the 4  
 5 family. As another result of forced evictions women are frequently left in more 5  
 6 difficult situations than before in caring for their families. 6

7 In evictions, possessions are often destroyed, family stability jeopardised and 7  
 8 livelihoods and schooling threatened. Affected children describe the violence, panic 8  
 9 and confusion of the evictions and the painful experience of sleeping and managing 9  
 10 their lives out in the open. They also face the challenge of re-establishing a stable 10  
 11 life and dealing with frequent breakdowns in family relations as a consequence of 11  
 12 the stress and economic challenges that are the result of homelessness. 12

13 In addition to the physical and psychological trauma of eviction and 13  
 14 homelessness, households, especially women and children, lose the support 14  
 15 systems they were used to and their relations with a community. The breaking of 15  
 16 these social ties and the loss of stability lead to many other problems.<sup>26</sup> 16

### 19 (5) Displacement and Housing Rights 19

20  
 21 Housing rights address displacement and dispossession. Indeed, many cases 21  
 22 involving displacement and dispossession have led to the development of the 22  
 23 corpus of housing rights jurisprudence.<sup>27</sup> Protection from eviction legislation and 23  
 24 consequent national court decisions constantly establish the limitations of the law 24  
 25 in relation to the displacement of people from their home, even when confronted 25  
 26 by the exercise of private property owners' rights. 26

27 The UN *Guiding Principles on Internal Displacement* sets out a number of 27  
 28 rights: 28

29  
 30 \_\_\_\_\_ 30  
 31 26 Ibid. 31

32 27 The case of *Residents of Joe Slovo Community v. Thubelisha Homes, Minister for* 31  
 32 *Housing and others*. Western Cape Constitutional Court of ZA. Case CCT 22/08 [2009] 32  
 33 ZACC 16 amplified South African constitutional housing rights, where 20,000 residents 33  
 34 of a large informal housing settlement were being displaced to make way for a housing 34  
 35 development. The court held that the evicted people should be provided with temporary 35  
 36 serviced housing and be allocated 70 per cent of the homes built on the site. In *Government* 36  
 37 *of South Africa and others v. Grootboom and others*, CCT 11/00 2001 (1) SA 46 (CC), 37  
 38 4 October 2000, 2000 (11) BCLR 1169 (CC) the court required the public authorities to 38  
 39 consider the needs of people being displaced from temporary accommodation on a site 39  
 40 being redeveloped for housing. See also: *Jaftha & Another v. Van Rooyen & Another*, 40  
 41 Constitutional Court of South Africa, 2004 Case No. CCT 74/03; *Port Elizabeth Municipality* 41  
 42 *v. Various Occupiers*, 2005 (1) SA 217 (CC). Case No. CCT 53/03; *Occupiers of 51 Olivia* 41  
 42 *Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and* 42  
 43 *Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) (19 February 2008); see van der 43  
 44 Walt in this volume. 44

1	<i>Principle 14</i>	1
2	1. Every internally displaced person has the right to liberty of movement and	2
3	freedom to choose his or her residence.	3
4	2. In particular, internally displaced persons have the right to move freely in and	4
5	out of camps or other settlements.	5
6		6
7	<i>Principle 18</i>	7
8	1. All internally displaced persons have the right to an adequate standard of	8
9	living.	9
10	2. At the minimum, regardless of the circumstances, and without discrimination,	10
11	competent authorities shall provide internally displaced persons with and ensure	11
12	safe access to:	12
13	(a) Essential food and potable water;	13
14	(b) Basic shelter and housing;	14
15	(c) Appropriate clothing; and	15
16	(d) Essential medical services and sanitation.	16
17	3. Special efforts should be made to ensure the full participation of women in the	17
18	planning and distribution of these basic supplies.	18
19		19
20	<i>Principle 21</i>	20
21	1. No one shall be arbitrarily deprived of property and possessions.	21
22	2. The property and possessions of internally displaced persons shall in all	22
23	circumstances be protected, in particular, against the following acts:	23
24	(a) Pillage;	24
25	(b) Direct or indiscriminate attacks or other acts of violence;	25
26	(c) Being used to shield military operations or objectives;	26
27	(d) Being made the object of reprisal; and	27
28	(e) Being destroyed or appropriated as a form of collective punishment.	28
29	3. Property and possessions left behind by internally displaced persons should be	29
30	protected against destruction and arbitrary and illegal appropriation, occupation	30
31	or use. <sup>28</sup>	31
32		32
33	General Comment 7 on Forced Evictions of the UN Committee on Economic,	33
34	Social and Cultural Rights points out that:	34
35		35
36	The practice of forced evictions is widespread and affects persons in both	36
37	developed and developing countries. Owing to the interrelationship and	37
38	interdependency which exist among all human rights, forced evictions frequently	38
39	violate other human rights. Thus, while manifestly breaching the rights enshrined	39
40	in the Covenant, the practice of forced evictions may also result in violations of	40
41	civil and political rights, such as the right to life, the right to security of the	41
42		42
43	<sup>28</sup> <i>Guiding Principles on Internal Displacement</i> (11 February 1998) UN Doc E/	43
44	CN.4/1998/53/Add.2.	44

1 person, the right to non-interference with privacy, family and home and the right 1  
 2 to the peaceful enjoyment of possessions (para. 4).<sup>29</sup> 2  
 3 3  
 4 However, protection from eviction is not absolute within international human rights 4  
 5 law, which respects property rights above housing rights.<sup>30</sup> The UN Committee 5  
 6 on this issue emphasised the procedural safeguards in the eviction process. 6  
 7 International human rights law does not propose countering evictions through 7  
 8 redistribution of property or housing rights. Indeed, many international housing 8  
 9 rights cases now revolve around protecting property rights from appropriation by 9  
 10 the state for a public purpose.<sup>31</sup> 10  
 11 In its 1997 General Comment the Committee explained that the procedural 11  
 12 protections it considers should be applied in relation to forced evictions include: 12  
 13 13  
 14 (a) an opportunity for genuine consultation with those affected; (b) adequate 14  
 15 and reasonable notice for all affected persons prior to the scheduled date of 15  
 16 eviction; (c) information on the proposed evictions, and, where applicable, on 16  
 17 the alternative purpose for which the land or housing is to be used, to be made 17  
 18 available in reasonable time to all those affected; (d) especially where groups of 18  
 19 people are involved, government officials or their representatives to be present 19  
 20 during an eviction; (e) all persons carrying out the eviction to be properly 20  
 21 identified; (f) evictions not to take place in particularly bad weather or at night 21  
 22 unless the affected persons consent otherwise; (g) provision of legal remedies; 22  
 23 and (h) provision, where possible, of legal aid to persons who are in need of it to 23  
 24 seek redress from the courts. (para. 15)<sup>32</sup> 24  
 25 25  
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29 See UN ECOSOC (Committee on Economic, Social and Cultural Rights), The  
 Right to Adequate Housing (Art. 11.1): Forced Evictions: CESCR General Comment 7  
 (General Comments) (20/05/97) UN Doc E/C.12/1997/10 (available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/959f71e476284596802564c3005d8d50?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/959f71e476284596802564c3005d8d50?Opendocument)).

30 See *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*, Raquel Rolnik (4 February 2009) UN Doc A/HRC/10/7. The UN Special Rapporteur on Adequate Housing has provided detailed guidance on the implementation of international human rights obligations with reference to evictions: *Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 to the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, Miloon Kothari (11 June 2007) UN Doc A/HRC/4/18, [http://www2.ohchr.org/english/issues/housing/docs/guidelines\\_en.pdf](http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf).

31 The majority of cases relating to housing at that European Court of Human Rights involve claims for compensation arising from former redistribution policies of states.

32 See UN ECOSOC (Committee on Economic, Social and Cultural Rights), The Right to Adequate Housing (Art. 11.1): Forced Evictions: CESCR General Comment 7 (General Comments) (20/05/97) UN Doc E/C.12/1997/10.

1 The Council of Europe Committee on Social Rights has defined forced eviction 1  
2 as ‘deprivation of housing which a person occupied on account of insolvency or 2  
3 wrongful occupation’.<sup>33</sup> 3

4 Legal protection for persons threatened by eviction must include, in particular, 4  
5 an obligation to consult the affected parties in order to find alternative solutions 5  
6 to eviction and the obligation to fix a reasonable notice period before eviction. 6  
7 The law must also prohibit evictions carried out at night or during the winter 7  
8 period and provide legal remedies and offer legal aid to those who are in need 8  
9 so they may seek redress from the courts. Procedural safeguards are important. 9  
10 Compensation for illegal evictions must also be provided. Even when an eviction 10  
11 is justified, authorities must adopt measures to re-house or financially assist the 11  
12 persons concerned.<sup>34</sup> 12

13 The concept of ‘unlawful occupier’ or ‘wrongful occupier’ implicit in this 13  
14 approach signifies the overriding legal priority of property ownership. 14

15

16

#### 17 **(6) Housing Rights as Promoters of Adequate Housing for All** 17

18

19 Housing rights can act as a barrier to displacement, but can they deliver adequate 19  
20 safe and secure homes? It is widely accepted that housing rights are forging a new 20  
21 discourse and jurisprudence across the world.<sup>35</sup> At an international level public 21  
22 international human rights instruments have led to a legal discourse based on human 22  
23 dignity and other universal values where states mutually agree to offer certain 23  
24 guarantees of minimum standards, in areas of public and private life, individual 24  
25 freedom and socio-economic rights, such as housing.<sup>36</sup> For example, Article 25(1) 25  
26 of the Universal Declaration of Human Rights (1948) (UDHR) states that: 26

27

28 \_\_\_\_\_ 28  
29 33 European Committee of Social Rights, *Conclusions 2003* (Sweden), 89 (available 29  
30 at [http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Sweden2003\\_](http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Sweden2003_en.pdf) 30  
31 en.pdf, accessed 18 September 2010). 31

32 34 The European Committee on Social Rights has accepted that a two-months’ 31  
32 period after formal notice has been served before the actual eviction as sufficient to protect 32  
33 housing rights. See European Committee on Social Rights *FEANTSA v. France*, Complaint 33  
34 No 39/2006, Decision on the Merits of 5 December 2007, § 88 and 89. 34

35 35 For a comprehensive collation of all these housing rights see Centre on Housing 35  
36 Rights and Evictions, Sources No. 4: *Legal Resources for Housing Rights: International* 36  
37 *and National Standards* (COHRE, Geneva 2000). See also Jeanne Woods and Hope Lewis, 37  
38 *Human Rights and the Global Marketplace: Economic, Social and Cultural Dimension* 38  
39 (Transnational, New York 2005). 39

40 36 See Matthew Craven, *The International Covenant on Economic, Social and* 40  
41 *Cultural Rights* (Clarendon Press, Oxford, 1995); Asbjørn Eide, Catarina Krause and Allan 41  
42 Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn Martinus Nijhoff 42  
43 Publishers, Dordrecht 2001). See also the UN Millennium Goals, agreed at international 42  
43 level in 2001 (<http://www.un.org/millenniumgoals/enviro.html>). Among the targets in 43  
44 Goal 7 to ensure environmental sustainability are halving the proportion of the population 44

1 Everyone has the right to a standard of living adequate for the health and 1  
 2 well-being of himself and his family, including food, clothing, housing and 2  
 3 medical care and necessary social services, and the right to security in the event 3  
 4 of unemployment, sickness, disability, widowhood, old age or other lack of 4  
 5 livelihood in circumstances beyond his control'.<sup>37</sup> 5

6  
 7 Housing rights within international human rights law have developed through the 7  
 8 UN system, largely since 1945 and establishing a general hegemony of human 8  
 9 rights principles throughout the world.<sup>38</sup> Donnelly points out that this moral 9  
 10 universality of human rights must be realised through the particularities of action 10  
 11 at national level, in order to be effective. The rights are based on the inherent 11  
 12 dignity and possessed by every human being, and provide a moral compass for 12  
 13 the development of law and policy across the globe. Housing rights are viewed as 13  
 14 an integral part of economic, social and cultural rights within the UN, European, 14  
 15 Inter-American and African human rights instruments. These include the Universal 15  
 16 Declaration of Human Rights (1948) Article 25(1), the International Covenant on 16  
 17 Economic, Social Cultural Rights (1966) Article 11, Convention on the Rights 17  
 18 of the Child (1989) Articles 16.1 and 27.3, Convention on the Elimination of All 18  
 19 Forms of Discrimination against Women (1979) Article 14.2 and the Convention 19  
 20 on the Rights of Persons with Disabilities (2008),<sup>39</sup> as well as many International 20  
 21 Labour Organisation Conventions and Recommendations. The UN Committee 21  
 22 on Economic, Social and Cultural Rights' General Comment 4, issued in 1991, 22  
 23 clarifies the international human rights obligations in relation to housing. It sets 23  
 24 out the essential elements of housing rights as legal security of tenure, availability 24  
 25 of services, materials and infrastructure, affordability, habitability, accessibility, 25  
 26 suitable location and cultural adequacy.<sup>40</sup> 26

27 International housing instruments translate to a requirement on a state to meet a 27  
 28 minimum core obligation in terms of the rights concerned, without discrimination 28  
 29  
 30 without sustainable access to safe drinking water and basic sanitation and, by 2015, to have 30  
 31 achieved a significant improvement in the lives of at least 100 million slum dwellers. 31

32 <sup>37</sup> The housing provision is elaborated in the International Covenant on Economic, 32  
 33 Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 33  
 34 993 UNTS 3 (1967)(ICESCR) 34

35 at Article 11, which states, 'The States Parties to the present Covenant recognize the right 35  
 36 of everyone to an adequate standard of living for himself and his family, including adequate 36  
 37 food, clothing and housing, and to the continuous improvement of living conditions. The 37  
 38 States Parties will take appropriate steps to ensure the realization of this right, recognizing 38  
 39 to this effect the essential importance of international co-operation based on free consent.' 39

40 <sup>38</sup> See Jack Donnelly, *Affirming Universal Human Rights* (Cornell University Press, 40  
 Ithaca NY, 2003) 40.

41 <sup>39</sup> Articles 2, 5.3., 9.1., 19, 22.1 and 28. 41

42 <sup>40</sup> UN ECOSOC (Committee on Economic, Social and Cultural Rights), The Right 42  
 43 to Adequate Housing (Art.11.1): Forced Evictions: CESCR General Comment 4. (General 43  
 44 Comments) (13/12/91) UN Doc E/C.12/1771/4. 44

1 – a minimum threshold approach, below which no person should have to endure. 1  
 2 This minimum core obligation corresponds to a level of distributive justice 2  
 3 assessing the evenness of the distribution of socially guaranteed minimal levels 3  
 4 of certain goods and benefits among individual groups within a country.<sup>41</sup> In 4  
 5 terms of housing rights, the minimum core obligations of states would involve a 5  
 6 guarantee that everyone enjoyed a right to adequate shelter and a minimum level 6  
 7 of housing services, without discrimination. Indeed, these principles of minimum 7  
 8 core obligation and progressive realisation form a major contribution to housing 8  
 9 rights discourse. While the minimum standards or core obligations approach is 9  
 10 well developed in housing law, the concept of progressive realisation, based on 10  
 11 increasing normative standards is interpreted within housing systems as arising 11  
 12 from increased development, and is widely incorporated into political and 12  
 13 consumerist norms. 13

14 In Europe, the Council of Europe has developed a range of normative housing 14  
 15 rights standards, although not directly corresponding to the minimum core 15  
 16 obligations and progressive realisation models of the UN.<sup>42</sup> The Social Charter 16  
 17 contains important rights to social and medical assistance for those without 17  
 18 adequate resources, establishing housing obligations in relation to physically and 18  
 19 mentally disabled persons, migrant workers, children and young persons, and 19  
 20 rights to social, legal and economic protection for families, those who are poor 20  
 21 and socially excluded, homeless and those unable to afford accommodation; it 21  
 22 includes a state obligation to provide family housing.<sup>43</sup> Indeed, in 2009, clarifying 22  
 23 further the actual extent of state obligations arising from its housing rights 23  
 24 instruments, the Council of Europe Commissions for Human Rights has published 24  
 25 *Recommendation of the Commissioner for Human Rights on the Implementation* 25  
 26 *of the Right to Housing*.<sup>44</sup> 26  
 27 27  
 28 28

29 \_\_\_\_\_ 29  
 30 41 See Sigrun I. Skogly, 'Human Rights Reporting: The 'Nordic' Experience' (1990) 30  
 31 12 *HRQ* 513. 31

32 42 This is not the same organisation as the European Union. See Council of Europe, 31  
 33 *About the Council of Europe* (<http://www.coe.int/aboutCoe/default.asp>, accessed 19 32  
 34 September 2010), giving a brief summary of the Council, its history, and its aims. The 33  
 35 European Social Charter and Revised Charter have been adopted to some degree by all 34  
 36 members states of the Council of Europe. 35

36 43 Articles 13, 15, 16, 17, 19, 23, 30 and 31. The European Court of Human Rights 36  
 37 of the Council of Europe develops housing rights in an indirect and oblique way through 37  
 38 its articles on prevention of inhuman and degrading treatment, protection for home, family 38  
 39 life and correspondence, fair procedures and non-discrimination. See *Botta v. Italy* (App 39  
 40 no 153/1996/772/973) (1998) 26 EHRR 241; *Marzari v. Italy* (1999) 28 EHRR CD 175; 40  
 41 *Lopez-Ostra v Spain* (1991) 14 EHRR 319; *Geurra v Italy* (1998) EHRR 357; *Fadeyeva v* 41  
 42 *Russia* (2007) 45 EHRR 10; *Moreno-Gomez v Spain* (2005) 41 EHRR 40. 41

42 44 Strasbourg, 30 June 2009, CommDH(2009)5 <https://wcd.coe.int/ViewDoc.jsp?id> 42  
 43 =1463737&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B 43  
 44 &BackColorLogged=FFC679. 44

1 The European Union protects some fundamental rights which address housing 1  
 2 and provides housing rights protection through its Charter of Fundamental Rights,<sup>45</sup> 2  
 3 as well as laws prohibiting discrimination in public or private access on grounds of 3  
 4 migrant workers status,<sup>46</sup> race or ethnicity<sup>47</sup> and gender.<sup>48</sup> 4

5 The Organization of American States (OAS) Charter of the Organization of 5  
 6 American States (1948) and the American Declaration on the Rights and Duties 6  
 7 of Man (1948) recognize housing rights.<sup>49</sup> The Protocol to the African Charter 7  
 8 on Human and Peoples' Rights on the Rights of Women in Africa of the African 8  
 9 Union reaffirms housing rights.<sup>50</sup> 9

10 At national level housing rights are widely enshrined in constitutions, legislation 10  
 11 and established case law. Approximately 40 percent of the world's constitutions 11  
 12 refer to housing or housing rights including: 12

- 13 13
- 14 • *Belgium (1994) Article 23(3)*: Everyone has the right to enjoy a life in 14  
 15 conformity with human dignity. Towards this end, the law, the decree 15  
 16 or rules established under Article 134 guarantee, taking into account the 16  
 17 corresponding obligations, economic, social and cultural rights of which 17  
 18 they determine the conditions for their implementation. These rights 18  
 19 include, in particular, the right to adequate housing. 19
- 20 • *Russian Federation (1993) Article 40(1)*: Each person has the right to 20  
 21 21

22 \_\_\_\_\_ 22

23 45 Charter of the Fundamental Rights of the European Union, art. 34(3), Dec. 18, 23  
 24 2000, 2000 O.J. (C364) 1. The Charter has now been incorporated into Part II of the Treaty 24  
 25 Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C310) 41. 25

26 46 Council Regulation 1612/68, art. 9, 1968 O.J. (L257) 2 (EEC), amended by 26  
 27 Council Regulation 2434/92 1992 O.J. (L245) 1. See Case 249/86 *Commission v. German* 27  
 28 [1989] ECR 1263; Case 63/86 *Commission v. Italy* [1988] ECR 29. 28

29 47 See Council Directive 2000/43, 2000 O.J. (L180) 22. Article 13 of the Amsterdam 29  
 30 Treaty conferred to the European Community the powers to take measures to fight 30  
 31 discrimination on grounds of sex, race/ethnic origin, religion/belief, disability, age and 31  
 32 sexual orientation. 32

33 48 See Council Directive 2004/113, 2004 O.J. (L373) 37, 38 (EC) (implementing the 33  
 34 principle of equal treatment between men and women in the access to and supply of goods 34  
 35 and services). Unfair contract terms in housing contracts are prohibited across Europe 35  
 36 under the 1993 Directive on Unfair Terms in Consumer Contracts. See Report from the 36  
 37 Commission on the Implementation of Council Directive 93.13.EEC of 5 April 1993 on 37  
 38 Unfair Terms in Consumer Contracts, COM (2000) 248 final (27 April 2000). 37

38 49 Article 31; See also The Additional Protocol to the American Convention on Human 38  
 39 Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" 39  
 40 (adopted 17 November 1988, entered into force 16 November 1999). OAS Treaty Series, 40  
 41 No. 69 (<http://www.oas.org/juridico/english/signs/a-52.html>, accessed 18 September 2010). 41

42 50 Article 16 on the Right to Adequate Housing states: 'Women shall have the right 42  
 43 to equal access to housing and to acceptable living conditions in a healthy environment. To 43  
 44 ensure this right, States Parties shall grant to women, whatever their marital status, access 44  
 45 to adequate housing'. 45

1 housing. No one may be arbitrarily deprived of housing.<sup>51</sup> 1  
 2 • *South Africa (1997) Section 26(1)*: Everyone has the right to have access to 2  
 3 adequate housing. *Section 26(2)*: The state must take reasonable legislative 3  
 4 and other measures, within its available resources, to achieve the progressive 4  
 5 realisation of this right. *Section 26(3)*: No one may be evicted from their 5  
 6 home, or have their home demolished, without an order of court made 6  
 7 after considering all the relevant circumstances. No legislation may permit 7  
 8 arbitrary evictions. *Section 28(1)(c)*: Every child has the right to basic 8  
 9 nutrition, shelter, basic healthcare services and social services.<sup>52</sup> 9

10  
 11 Many countries have introduced legislation granting specifically enforceable 11  
 12 housing rights. The Housing (Scotland) Act 1987 (as amended) provides a 12  
 13 right to accommodation for homeless persons, including a right to temporary 13  
 14 accommodation for all homeless persons, and a right to long-term accommodation 14  
 15 for broadly defined categories, encompassing the majority of homeless applicants. 15  
 16 By 2012, the right to long-term accommodation will be extended to all. This right 16  
 17 is enforceable in the civil courts and courts may order in appropriate cases that 17  
 18 accommodation be provided to homeless persons. In France, an enforceable right 18  
 19 to housing has also been established through the DALO Act of 5 March 2007,<sup>53</sup> 19  
 20 which provides for a two-tier remedial mechanism with regional mediation 20  
 21 committees and the possibility to take a case before administrative courts. The use 21  
 22 of planning law to achieve integration of social/affordable and private housing, 22  
 23 control of land use and quality of infrastructure and amenities is now becoming 23  
 24 widely recognised as a somewhat lateral, but practical, means of realising housing 24  
 25 rights.<sup>54</sup> Courts across the world have developed housing rights in such areas as 25  
 26 security of tenure, respect for home, non-discrimination, decent physical standards 26  
 27 and fair procedures in evictions.<sup>55</sup> A legacy of judicial activism has led to a corpus 27  
 28 of jurisprudence in many countries which has established housing rights, even 28  
 29 within common law principles.<sup>56</sup> 29

30  
 31 51 The Housing Code of the Russian Federation (29 December 2004, entered into 31  
 32 force 1 March 2005) offers some of the best definitions of minimum core obligations in 32  
 33 relation to housing with standards of not less than five square metres of living space per 33  
 34 each person. 34

35 52 See COHRE, *Legal Resources for Housing Rights* (COHRE, Geneva 2000). 35

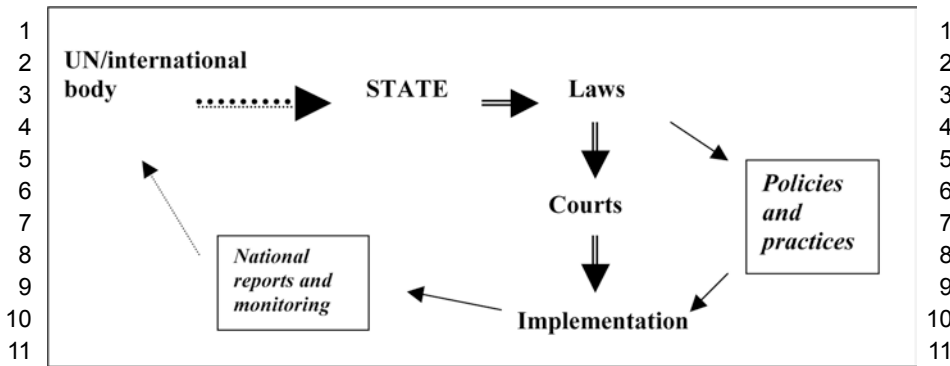
36 53 Droit au logement opposable (DALO) Act 2007. 36

37 54 See Juli Ponce-Sole (ed.), *Land Use Law, Housing and Social and Territorial* 37  
 38 *Cohesion* (Rocky Mountain Institute, Denver 2006). 38

39 55 See D.B. Bryson, 'The Role of Courts and a Right to Housing', in R.G. Bratt, M.E. 39  
 40 Stone and C. Hartman (eds), *A Right to Housing: Foundation for a New Social Agenda* 40  
 41 (Temple University Press, Philadelphia 2006). 41

42 56 See for example the development of housing rights using local and state provisions 42  
 43 and common-law principles in the US in Beth Harris, *Defending the Right to a Home* 43  
 44 (Ashgate Publishing, Aldershot 2004). See also the historic decision in England of *R v* 43  
 44 *Sec of State ex parte Adam and Others* [2005] UKHL 66, where the highest appeal court in 44





**Figure 6.1** 'Transmission belt' approach of public international human rights law

All of this suggests that there now exists a matrix of housing rights on implementing such across the world, drawing on a variety of precedents, legislation, constitutions, ratifications of international instruments and measures from other law applying indirectly to housing rights. The internationally accepted UN minimum core obligations and progressive realisation obligations on ratifying states, as well as the obligations to recognize, to respect, to protect and to fulfil these obligations are influencing new lawmaking. UN General Comments have clarified obligations, while many national and local laws and cases have defined standards and rights at local level. Consumer and other national private and public laws grant further housing rights in relation to housing provided by markets. Yet, without diminishing the significance of democratic participation as a means of implementing housing rights, much remains to be done in properly defining these concepts in actual contemporary housing law and policy terms.

### (7) Transposing International Housing Rights

International public law instruments are voluntary agreements between states which undertake to perform certain obligations. In relation to housing rights, appropriate policies and laws must underpin the minimum core obligations, without discrimination, progressive realisation of rights and the requirement to

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England had to define what level of abject destitution such homeless individuals must sink before their suffering or humiliation reaches the 'minimum level of severity' to amount to 'inhuman or degrading treatment' under Article 3 of the ECHR, prompting positive state action under the Convention.

1 recognise, respect, protect, promote and fulfil the required obligations.<sup>57</sup> This 1  
 2 ‘transmission belt’ model of international human rights (see Figure 6.1), where 2  
 3 states accept certain obligations at international level, and transpose these to 3  
 4 national law, guaranteeing rights to individuals, faces a number of obstacles. 4  
 5 Ideally, these rights must integrate the norms, standards and principles of 5  
 6 the international human rights system into the laws, policies, budgets and 6  
 7 administration of the state, based on principles of equality, accountability, 7  
 8 empowerment, participation and attention to vulnerable groups. 8

9 Effective implementation of housing rights through this ‘transmission 9  
 10 belt’ approaches raises issues of dualism/monism in national legal systems, 10  
 11 the specificity, clarity<sup>58</sup> and contextual definition of rights terminology,<sup>59</sup> as 11  
 12 well as the relationship between human rights law and the systems it seeks to 12  
 13 address.<sup>60</sup> Indeed, there is a major question as to whether such human rights can 13  
 14 be incorporated at all into liberal economic systems.<sup>61</sup> At UN level there has 14  
 15 been extensive analysis of transposing legally defined standards for housing 15  
 16 rights on to national housing systems and standards, through indicators and 16

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57 UN ECOSOC (Committee on Economic, Social and Cultural Rights), The Right to Adequate Housing (Art.11.1): Forced Evictions: CESCR General Comment 4. (General Comments) (13/12/91) UN Doc. E/C.12/1771/4.

58 Much work has been carried out on defining the specific rights contained in the Covenant especially by the UN Committee on Economic, Social and Cultural Rights in its Conclusions and Reports. See generally Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, <http://www.unhchr.ch/html/menu2/6/cescr.htm> (listing examples of Committee on Economic, Social and Cultural Rights documents).

59 See Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 (4) *EJIL* 655, 724. See also P. Carozza, ‘Human Dignity and Judicial Interpretation of Human Rights: A Reply’ (2008) 19 (5) *EJIL* 931, 944.

60 For a discussion on the role of law *viv-à-vis* other systems see Niklaus Luhmann, *Law as a Social System* (Oxford University Press, Oxford 2004); Gunther Teubner, *Autopoietic Law: A New Approach To Law And Society* (Walter de Gruyter, Berlin 1987).

61 See Paul O’Connell, ‘On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights’ (2007) 3 *HRLR* 483, 509.

1 benchmarks.<sup>62</sup> Yet, many UN monitoring processes can amount to little more 1  
 2 than reports illustrating mere creative compliance by recalcitrant states.<sup>63</sup> 2

3 At the level of progressive realisation of rights, Robertson has pointed out 3  
 4 that such words as ‘maximum’ in relation to the level of resources to be devoted 4  
 5 to realising rights, form the sword of human rights rhetoric, while words like 5  
 6 ‘available’ facilitate ‘wriggle room’ for the state.<sup>64</sup> Hunt has highlighted the 6  
 7 variable and elusive nature of such terms as ‘progressive realisation’, and 7  
 8 ‘maximum of their available resources.’<sup>65</sup> These imply that some state obligations 8  
 9 could vary over time: ‘[T]hese variable elements of States parties’ obligations 9  
 10 under ICESCR contribute to the sense of uncertainty which remain a feature 10  
 11 of international economic, social and cultural rights.’<sup>66</sup> Jheelan has highlighted 11  
 12 the imprecision and vagueness, aspirational nature and ultimately reliance on 12  
 13 a ‘reasonableness’ curial test which acts a delimitation on the effectiveness of 13  
 14 universal minimum core obligations.<sup>67</sup> 14

15 Other limitations on the legal liberalist ‘transmission belt’ approach are 15  
 16 highlighted in legal realism, critical legal studies and feminist analyses, as well 16  
 17 as the myopic treatment of formal over substantive equality. Indeed, legal liberal 17  
 18 models of individually enforceable rights may act to displace, restructure or 18  
 19 19

20 62 *Report of Secretary General on Indicators and Benchmarks* UN Doc. E/EN4/2000/47; 20  
 21 UNGA, Report of the Seminar on Appropriate Indicators to Measure Achievements in the 21  
 22 Progressive Realization of Economic, Social and Cultural Rights (Geneva, 25–29 January 22  
 23 1993) UN Doc. A/CONF.157/PC/7; UN Doc. E/EN4/2000/47; UN Doc. E/C.12/1994/11; UN 23  
 24 Doc. E/CN.4/Sub.2/1994/20; UN Doc. E/C.12/1991/SR.21; UN Doc. E/CN.4/Sub.2/1991/15; 24  
 25 Round-Table Discussion Organized by the High Commissioner for Human Rights (Geneva, 25  
 26 25 March 1998); Report by Office of the High Commissioner for Human Rights (Geneva, 26  
 27 1998); UNCHS Official UN Guidelines for Monitoring Progress in Implementing the Habitat 27  
 28 Agenda (<http://www.unhabitat.org/>, accessed 18 September 2010); Housing and Urban 28  
 29 Indicators, Report of the Secretary-General, UN Doc. A/CONF.165/CRP; UN Millennium 29  
 30 Development Goals Indicators ([http://mdgs.un.org/unsd/mdg/Host.aspx?Content=Indicators/](http://mdgs.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm)  
 31 [OfficialList.htm](http://mdgs.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm), accessed 18 September 2010); Methodology for Monitoring the Human 30  
 31 Right to Adequate Housing. The Housing and Land Rights Network ‘Toolkit’ ([http://www.](http://www.hlrn.org/english/home.asp)  
 32 [hlrn.org/english/home.asp](http://www.hlrn.org/english/home.asp), accessed 18 September 2010). 32

33 63 See A.F. Bayefsky, *The UN Human Rights Treaty System in the 21st Century: 33*  
 34 *Universality at the Crossroads* (Kluwer, The Hague 2001). 34

35 64 R. Robertson, ‘Measuring State Compliance with the Obligation to Devote the 35  
 36 Maximum Resources to Realizing Economic, Social and Cultural Rights’ 16 *HRQ* 693, 714. 36

37 65 See UN Committee on Economic, Social and Cultural Rights, *State Obligations, 37*  
 38 *Indicators, Benchmarks and the Right to Education* (16 July 1998) UN Doc. E/C.12/1998/11/, 38  
 39 background paper submitted by Paul Hunt, para. 3. 39

40 66 UN Committee on Economic, Social and Cultural Rights, *Report of the 19th 40*  
 41 *Session. State Obligations, Indicators, Benchmarks and the Right to Education*, para. 4, 41  
 42 UN Doc. E/C.12/1994/11; ‘State Obligations, Indicators, Benchmarks and the Right to 42  
 43 Education’, background paper submitted by Paul Hunt, para. 3. 42

43 67 See N. Jheelan, ‘The Enforceability of Socio-economic Rights’ (2007) 2 *EHRLR* 43  
 44 146, 157. 44

1 reprioritise innovative or radical programmatic approaches to state provision. 1  
 2 Many acclaimed housing rights cases involve only the prioritisation of access 2  
 3 to new homes, or more responsive ‘decanting’ procedures, ultimately leading 3  
 4 to no increase in or improvement in housing. Housing rights cases, corralled 4  
 5 within the legal liberalist discourse, often only differentiate socio-economic 5  
 6 rights from civil and political rights, or reduce legal arguments to juxtaposing 6  
 7 the role of politicians and courts in allocating resources in society. Indeed, the 7  
 8 esoteric, exclusive and often intimidating language of law, combined with the 8  
 9 costs and lack of universal access to courts, as well as the alienation of many of 9  
 10 those in housing need from state institutions, all act to diminish the impact of 10  
 11 enforcement of legally based housing rights. In any case, there is no effective 11  
 12 enforcement of penalties for housing rights violations at international level, 12  
 13 despite some very valuable principles and guidelines in this area.<sup>68</sup> 13

14 While the ‘transmission belt’ approach also proposes that rights be 14  
 15 incorporated into policies and administration, this leaves a wide area of discretion 15  
 16 in policy making and interpretation of obligations. Despite the development of 16  
 17 the Human Rights Based Approach (HRBA),<sup>69</sup> and National Action Plans,<sup>70</sup> the 17  
 18 language of human rights can easily be incorporated into public administration 18  
 19 and management systems of consultation, participation and strategies for service 19  
 20 delivery, often acting to buttress existing policies and processes. Effective 20  
 21 implementation of housing rights requires a deconstruction of the elaborate 21  
 22 context within which these rights are being advanced.<sup>71</sup> Implementation can 22  
 23 involve a complex process or sub-process. Indeed, ‘[T]he longer the chain of 23  
 24 \_\_\_\_\_ 24

25 \_\_\_\_\_ 25  
 26 68 See the Limburg Principles on the Implementation of the International Covenant 26  
 27 on Economic, Social and Cultural Rights (June 1986) UN Doc E/CN.4/1987/17; Maastricht 27  
 28 Guidelines on Violations of Economic, Social and Cultural Rights (January 1997) 20 *HRQ* 28  
 29 691, 705. See also Housing and Land Rights Network, (Habitat International Coalition) 29  
 30 Housing Violations database at <http://www.hlrn.org/english/home.asp> . 30

31 69 Five interconnected principles have been internationally recognised as forming 31  
 32 the core of HRBA: express application of the international human rights framework; 32  
 33 empowerment; participation; non-discrimination and prioritisation of vulnerable groups; 33  
 34 and accountability. See J. Kirkemann Boesen and T. Martin, *Applying a Rights Based* 34  
 35 *Approach: An Inspirational Guide for Civil Society* (The Danish Institute of Human Rights, 35  
 36 Copenhagen 2007); André Frankovits, *UNESCO Strategy on Human Rights, The Human* 35  
 36 *Rights Based Approach and the United Nations System* (2006) 12 (available at [http://www.unssc.org/web/programmes/LS/unep-unssc-precourse-material/12\\_UNESCO%20HRA%20and%20Evaluation.pdf](http://www.unssc.org/web/programmes/LS/unep-unssc-precourse-material/12_UNESCO%20HRA%20and%20Evaluation.pdf), accessed 18 September 2010). 37  
 37 38

38 70 This framework developed from the Office of the High Commission for Human 38  
 39 Rights and its promotion of national human rights plans of action. See *Handbook on National* 39  
 40 *Human Rights Plans of Action* (OHCHR, Geneva 2002) Professional Training Series No. 40  
 41 10. 41

42 71 For a critique of rights-based approaches generally, see Duncan Kennedy, ‘The 42  
 43 Critique of Rights in Critical Legal Studies’ in W. Brown and J Hally (eds), *Left Legalism/* 43  
 44 *Left Critique* (Duke University Press, Durham NC and London 2002). 44

1 causality, the more numerous the reciprocal relationships among the links and 1  
 2 the more complex implementation becomes'.<sup>72</sup> Comparing what is achieved and 2  
 3 what was expected can lead to the observation of an 'implementation gap'.<sup>73</sup> 3  
 4 4  
 5 5

### 6 **(8) Macro, Meso, Micro** 6 7 7

8 A fundamental weakness in the implementation of housing rights instruments 8  
 9 is the failure to appreciate that in market societies, access to basic and higher 9  
 10 standard housing is initially more dependent on a person's labour market position 10  
 11 than the prevalence of state obligations. There is often a tendency to equate 11  
 12 housing rights with shelter and social housing, alongside a perception that 12  
 13 housing rights involve creating an obligation on the state to provide a minimum 13  
 14 level of shelter and housing for all.<sup>74</sup> Equally, there can be a tendency to shun 14  
 15 the structures and dynamics of the housing systems, in favour of more complex 15  
 16 definitions and descriptions of failures of housing rights implementation. 16  
 17 Housing rights must be directed to the whole of housing systems, rather than 17  
 18 merely social housing entitlements.<sup>75</sup> Of course, the basic right to shelter will 18  
 19 always remain a minimum core requirement of the implementation of housing 19  
 20 rights. But housing rights must involve more than this minimalist proposition. 20  
 21 Effective implementation of international housing rights requires their integration 21  
 22 into the macro, meso, micro framework of housing systems.<sup>76</sup> What follows is an 22  
 23 23

24 \_\_\_\_\_ 24  
 25 72 J.L. Pressman and A. Wildavsky, *Implementation* (3rd edn University of California 25  
 26 Press, Berkeley, Los Angeles 1984) xxiv. 26

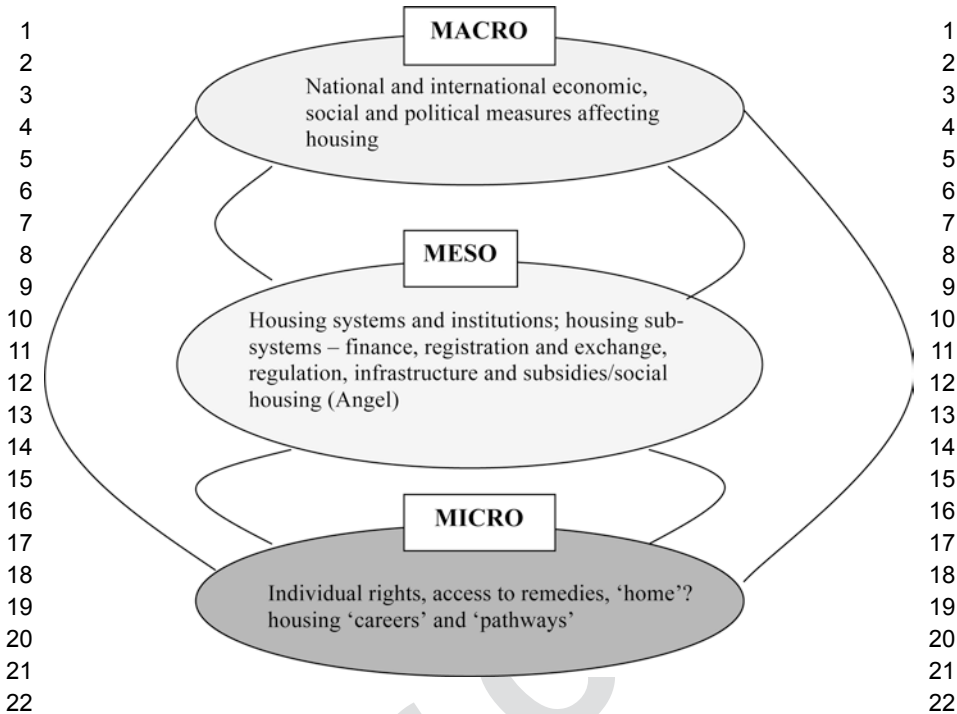
27 73 See A. Dunsire, *The Execution Process, Vol. 1: Implementation in a Bureaucracy* 27  
 28 (Martin Robertson, Oxford 1978). 28

29 74 See Schlomo Angel, *Housing Policy Matters; A Global Analysis* (Oxford 29  
 30 University Press, New York 2000) at 74, where he points out that ' 30

31 there is little merit in a housing policy that's solely focuses on the poor, hoping against 31  
 32 hope that "the market" will take care of the rest, without paying any attention to whether 32  
 33 the market is functioning properly. When the market is not functioning properly, the poor 33  
 34 are squeezed as well.' 33

34 75 There is a process referred to as 'mainstreaming' within the language of New Public 34  
 35 Management, where new policies and perspectives, laws and obligations are integrated into 35  
 36 policy documents and are intended to be incorporated into service delivery etc. However, 36  
 37 here we are referring to a greater impact on states, power, large-scale institution reform, 37  
 38 changing and inventing new social practice. See Pierre Bourdieu, *Outline of a Theory* 38  
 39 *of Practice* (Cambridge University Press, Cambridge 1977). Bourdieu's 'habitus' is the 39  
 40 ideological unconscious practice which creates a 'common-sense', world, and has the 40  
 41 ability to create and engender practices whose limits are set by historically determined 41  
 42 conditions of its production. 41

42 76 The analytic framework and terminology of macro, meso, micro are widely used 42  
 43 to denote different of society or systems. See for instance K. Dopfer, J. Foster and J. Potts, 43  
 44 'Micro-meso-macro' (2004) 14 *Journal of Evolutionary Economics* 263, 279. This is an area 44



**Figure 6.2 Macro meso micro perspectives on housing rights implementation**

attempt to develop this implementation model, which requires an interdisciplinary but non-compromising approach to housing rights.

Housing rights must be engaged at all three levels – the *micro* (the level of individual aspirations, interactions and micro political struggles), the *meso* (including the housing systems, its sub-systems and institutional contexts) and the *macro* (broadly the national, regional and international context within which housing systems interact with other systems (see Figure 6.2).

*Macro Level*

Integrating housing rights at macro level of housing systems requires a focus on national and international economic, social and political measures impacting on housing systems.<sup>77</sup> Indeed, this also requires an understanding that states have entered

where there is a dearth of research and where there is great potential for an interdisciplinary approach.

<sup>77</sup> While many national macro housing system measures, such as housing rights legislation, may actually address housing rights and home, these may be coincidental or unrelated to international human rights law.

1 an era when the processes of government have been transformed into ‘governance’. 1  
 2 Simple hierarchical concepts of command and control, involving the establishment 2  
 3 and implementation of laws and policies, have given way to the involvement of a 3  
 4 broader range of ‘actors’ in the implementation process.<sup>78</sup> The idea of governance 4  
 5 was described by the World Bank as the ‘process by which authority is exercised 5  
 6 in the management of a country’s economic and social resources for development, 6  
 7 and the capacity of governments to design, formulate and implement policies and 7  
 8 discharge functions.’<sup>79</sup> In reality, it involves taking a perspective from outside the 8  
 9 state, to effectively observe and evaluate progress. Governance ‘describes the 9  
 10 hybridity of legal interferences within a society’.<sup>80</sup> It accepts a fusion of public and 10  
 11 private institutions, and brings an approach to public institutions primarily oriented 11  
 12 towards efficiency and output in achieving goals. These goals, which largely relate to 12  
 13 profit and capital enhancement, are already widely described in neo-liberal economic 13  
 14 literature and seldom include the realisation of housing rights. 14

15 In many ways this model of supra national governance, evaluating the 15  
 16 outcomes of institutions, laws and other measures of states in terms of results 16  
 17 can be appropriated to the monitoring and development of housing rights. The 17  
 18 template for this approach, being results oriented, is less concerned with actual 18  
 19 laws and measures, but how they ensure that the objectives of housing rights 19  
 20 are achieved. An obligation of results, rather than obligation of conduct in the 20  
 21 implementation of housing rights is required. Of course, the UN monitoring 21  
 22 systems, especially the UN Committee on Economic, Social and Cultural 22  
 23 Rights, regularly examine and evaluate broader outcomes, alongside legislative 23

24 \_\_\_\_\_ 24  
 25 \_\_\_\_\_ 25  
 26 <sup>78</sup> For an examination of the many uses of the term see M. Hill and P.L. Hupe, 26  
 27 *Implementing Public Policy* (2nd edn Sage, London 2009) 13, 14. Some new approaches 27  
 28 such as the Open Method of Coordination of the EU have sought to overcome this problem, 28  
 29 where internationally accepted guidelines are consolidated into agreed national plans, in 29  
 30 areas of employment, pensions and social inclusion. See <http://ec.europa.eu/social/main.jsp?catId=753&langId=en>, accessed 18 September 2010. 30

31 <sup>79</sup> See World Bank, *Governance: The World Bank’s Experience* (Washington, World 31  
 32 Bank 1994) XIV. The concept was first used in World Bank, *Sub-Saharan Africa: From Crisis 32  
 33 to Sustainable Growth* (Washington, World Bank 1989). The bank’s Worldwide Governance 33  
 34 Indicators (WGI) project reports aggregate and individual governance indicators for 212 34  
 35 countries and territories over the period 1996–2007, for six dimensions of governance: voice 35  
 36 and accountability, political stability and absence of violence, government effectiveness, 36  
 37 regulatory quality, rule of law and control of corruption. Its current definition of governance 37  
 38 is: ‘Governance consists of the traditions and institutions by which authority in a country 38  
 39 is exercised. This includes the process by which governments are selected, monitored and 39  
 40 replaced; the capacity of the government to effectively formulate and implement sound 40  
 41 policies; and the respect of citizens and the state for the institutions that govern economic 41  
 42 and social interactions among them.’ See <http://info.worldbank.org/governance/wgi/index.asp>, accessed 18 September 2010. 42

43 <sup>80</sup> See Christopher Mollers, ‘European Governance: Meaning and Value of a Concept’ 43  
 44 (2006) 43 *Common Market Law Review* 313–36 at 316. 44

1 provisions in its regular monitoring of states.<sup>81</sup> Indeed, the national level and 1  
 2 future individual level monitoring systems of this UN Committee are ideally 2  
 3 placed to address housing rights at the macro level, although resource constraints 3  
 4 have inhibited this to date.<sup>82</sup> The recent approach of the European Committee of 4  
 5 Social Rights, applying the European Social Charter, in the *FEANTSA v. France*<sup>83</sup> 5  
 6 collective complaint is advancing this approach in relation to laws, policies and 6  
 7 measures applying to all aspects of housing systems and outcomes arising from 7  
 8 other systems. 8

9 There is a powerful interdependency between rights and regulation.<sup>84</sup> 9  
 10 Regulation and governance measures and the reform of the international financial 10  
 11 institutions offer the potential to integrate housing rights into housing systems 11  
 12 at macro level. Surprisingly, the language of ‘home’ often already appears at 12  
 13 this level within international proposals. The new international regulation and 13  
 14 governance approaches to global finance offer an opportunity for implementing 14  
 15 housing rights at macro level. Indeed, the UN Special Rapporteur on Adequate 15  
 16 Housing has proposed that housing rights are integrated at the international level 16  
 17 in the regulation of financial markets: 17

18  
 19 The Special Rapporteur believes that the current crisis represents also an 19  
 20 opportunity for reflection and to consider how to improve housing systems, 20  
 21 policies and programmes so as to ensure adequate housing for all. (para. 75) 21  
 22 22

23 States should ensure appropriate regulation of international financial activities in 23  
 24 order to avoid future financial crises and their subsequent effect on human rights 24  
 25 and adequate housing. (para. 89)<sup>85</sup> 25  
 26 26  
 27 27

28  
 29 81 Detailed reports on monitoring of the implementation of the ICESCR by the UN 28  
 30 Committee on Economic, Social and Cultural Rights may be found at <http://www2.ohchr.org/english/bodies/cescr/>, accessed 18 September 2010. 29  
 30 30

31 82 See United Nations High Commissioner for Human Rights (UNHCHR) and the 31  
 32 United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), *Plan 32*  
 33 *of Action to Strengthen the Implementation of the International Covenant on Economic, 33*  
 34 *Social and Cultural Rights* (New York, 1997); the Optional Protocol on Economic, Social 34  
 35 and Cultural Rights allows individual complaints of violations of such rights including 35  
 36 housing rights (see <http://www2.ohchr.org/english/issues/escr/intro.htm>, accessed 18 36  
 37 September 2010). 37

38 83 [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC39Merits\\_ 38](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC39Merits_en.pdf)  
 39 en.pdf, accessed 18 September 2010. 39

40 84 See B. Morgan, *An Introduction to Law and Regulation* (Cambridge University 40  
 41 Press, Cambridge 2006); B. Morgan (ed.), *The Intersection of Rights and Regulation: New 41*  
 42 *Directions in Socio-legal Scholarship* (Ashgate, London 2007). 42

43 85 *Report of the Special Rapporteur on Adequate Housing as a Component of the 43*  
 44 *Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this 44*  
 44 *Context*, Raquel Rolnik (4 February 2009) UN Doc A/HRC/10/7. 44



1	The Global Plan for Recovery and Reform Global Plan, which failed to mention	1
2	housing, issued by the G20 leaders in April 2009, states:	2
3		3
4	We have today also issued a Declaration, <i>Strengthening the Financial System</i> .	4
5	In particular we agree:	5
6		6
7	• to establish a new Financial Stability Board (FSB) with a strengthened	7
8	mandate, as a successor to the Financial Stability Forum (FSF), including	8
9	all G20 countries, FSF members, Spain, and the European Commission;	9
10	• to reshape our regulatory systems so that our authorities are able to identify	10
11	and take account of macro-prudential risks;	11
12	• to extend regulation and oversight to all systemically important financial	12
13	institutions, instruments and markets. This will include, for the first time,	13
14	systemically important hedge funds;	14
15	• to take action, once recovery is assured, to improve the quality, quantity,	15
16	and international consistency of capital in the banking system. In future,	16
17	regulation must prevent excessive leverage and require buffers of resources	17
18	to be built up in good times... <sup>86</sup>	18
19		19
20	The G20 statement pointed out that it accepts that the current crisis has a	20
21	disproportionate impact on the vulnerable in the poorest countries and	21
22		22
23	recognise our collective responsibility to mitigate the social impact of the crisis	23
24	to minimise long-lasting damage to global potential. To this end:	24
25		25
26	• we reaffirm our historic commitment to meeting the Millennium Development	26
27	Goals and to achieving our respective ODA pledges, including commitments	27
28	on Aid for Trade, debt relief, and the Gleneagles commitments, especially to	28
29	sub-Saharan Africa...	29
30	• we call on the UN, working with other global institutions, to establish an	30
31	effective mechanism to monitor the impact of the crisis on the poorest and	31
32	most vulnerable. <sup>87</sup>	32
33		33
34	<i>Meso Level – Housing System and Institutions</i>	34
35		35
36	Even the most elaborate and comprehensive national housing rights legislation	36
37	and policies do not always result in the anticipated level of international housing	37
38	rights implementation. Many explanations have been given for this, such as the	38
39	dichotomy of symbolic versus instrumental laws, bureaucratic inertia, problems	39
40		40
41	86 G20. <i>The Global Plan for Recovery and Reform</i> 2 April 2009 (see <a href="http://www.g20.org/Documents/final-communique.pdf">http://www.g20.org/Documents/final-communique.pdf</a> , accessed 18 September 2010).	41
42		42
43	87 Ibid. See also US measures such as Hope for Homeowners Act 2008 and Helping	43
44	Families Save Their Homes Act of 2009.	44

1 of interpretation and deference to the state in the courts etc. Indeed, the weakness 1  
 2 of the human rights model is illustrated in its failure to recognise that access 2  
 3 to housing and increased enjoyment of socio-economic rights is almost always 3  
 4 directly related to income and labour market position. A fundamental structural 4  
 5 requirement for the effective implementation of such measures is that the 5  
 6 systems on which they rely are addressed appropriately. Thus measures which 6  
 7 rely simply on lawmaking or policy can fail to realise the outcome intended. 7  
 8 There is a requirement to understand the system through which housing rights 8  
 9 will have to permeate. This requires and understanding of the meso level of the 9  
 10 housing system, positioned between the macro level and micro level. It requires an 10  
 11 examination of the institutional elements and behaviour of the actors within those 11  
 12 institutions. It must also be recognised that the legal aspects of housing systems, 12  
 13 and the protection of property rights, constitute a significant of the workload and 13  
 14 income of lawyers worldwide, in all capitalist countries. 14

15 Housing systems around the world today are predominantly organised around 15  
 16 the market system or enablement approach. One influential international writer 16  
 17 identifies the components of the contemporary 'enabling policy' model of housing 17  
 18 markets systems as encompassing five essential elements, sub-systems or regimes: 18

- 19  
 20 • property rights regime 20  
 21 • housing finance regime 21  
 22 • residential infrastructure regime 22  
 23 • regulatory regime 23  
 24 • housing subsidies/public housing regime.<sup>88</sup> 24

25  
 26 The establishment of individual and enforceable property rights in land and 26  
 27 housing are seen as the cornerstone of this enabling housing policy regime. 27

28  
 29 A functional and effective property rights regime must evolve a set of 29  
 30 transparent, predictable, non-discriminatory and stable rules that preserve the 30  
 31 rights of individuals to use, invest, maintain, rent, mortgage and sell their land 31

32  
 33

34 <sup>88</sup> See S. Angel, *Housing Policy Matters; A Global Analysis* (Oxford University 34  
 35 Press, New York 2000). International housing rights discourse has yet to engage properly 35  
 36 with the reality of access to housing finance as a means of securing housing rights. However, 36  
 37 this 'enabling policy' model fails to adequately consider the role of rented housing and its 37  
 38 impact on other parts of the system, such as first-time buyers and social housing. Rent 38  
 39 control and regulation measures have been imposed by governments of all hues since the 39  
 40 1800s. Kemeny argues that genuine market competition can be fostered by encouraging 40  
 41 cost rental housing to compete directly with profit renting, thereby dampening rents, raising 41  
 42 housing standards and increasing security of tenure. Segregating cost renting into a state- 42  
 43 run public rental (or social housing) sector shelters private renting from competition from 43  
 44 the costs rented or social housing sector. See J. Kemeny, *From Public Renting to the Social 43  
 44 Market: Rental Policy Strategies in Comparative Perspective* (Routledge, London 1995). 44

1 and housing properties without hindrance and with the full protection against 1  
 2 arbitrary action by the authorities.<sup>89</sup> 2  
 3 3  
 4 Housing is by far the most widely distributed form of private wealth, and 4  
 5 investment in housing requires law facilitating certainty, exclusivity, transferability 5  
 6 and constitutional protection. Complex legal ownership arrangements involving 6  
 7 family law systems, with rules on ownership and division of property on marriage, 7  
 8 separation, divorce, death and co-habitation are required. Innovative legal 8  
 9 mechanisms have also been developed to deal with unregistered land, transfer 9  
 10 and conveyancing procedures, disputes and the regulation of actors involved in 10  
 11 housing markets. 11  
 12 The housing finance regime requires the creation and maintenance of an 12  
 13 effective, enforceable lending and regulatory regime for housing finance, as well 13  
 14 as the development of housing finance institutions and sustainable mortgage 14  
 15 markets.<sup>90</sup> This regime involves legal measures relating to mortgages, equity 15  
 16 release, charges, consumer credit legislation and regulation of lenders, as well as 16  
 17 market liberalisation and competition. The third requirement for the enabling market 17  
 18 approach is an effective residential infrastructure regime. This requires legislation 18  
 19 and regulation in relation to zoning, planning, public health, control of nuisance 19  
 20 and sanitation measures, and planning controls on urban land development and 20  
 21 supply. Detailed legislation and case law have developed in relation to roads and 21  
 22 walkways, water, sewage, drainage, transport, public facilities and other services, 22  
 23 which contribute to housing quality. The fourth and most important element of 23  
 24 this approach for industrialised countries is the regulatory regime for quality in 24  
 25 housing systems.<sup>91</sup> Building control measures exercised by the state are critical 25  
 26 elements in the development of housing markets. Indeed, these markets actually 26  
 27 require a legal and regulatory framework that only governments can provide.<sup>92</sup> 27  
 28 Housing subsidies are a central element of housing enablement policies.<sup>93</sup> 28  
 29 The presence or absence of housing subsidies (and tax incentives) cannot be 29  
 30 understood outside the broader framework of overall fiscal policy. The largesse of 30  
 31 the state in enhancing land values through planning and zoning decisions, and the 31  
 32 contemporary 'capitalisation' or subsidies to banks involved in reckless mortgage, 32  
 33 33  
 34 34  
 35 89 Ibid., 95. 35  
 36 90 Ibid., ch. 8. 36  
 37 91 See for example *Housing Regulation in Victoria – Building Better Outcomes* 37  
 38 (2005) (available at [http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/VCEChousingfinalreport/\\$File/VCEC%20housing%20final%20report.pdf](http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/VCEChousingfinalreport/$File/VCEC%20housing%20final%20report.pdf), accessed 18 38  
 39 September 2010). 39  
 40 92 See UNECE, *Compendium of Model Provisions for Building Regulations* (UNECE, 40  
 41 Geneva 1996) UN Doc ECE/HBP/81/Rev.1. 41  
 42 93 See Schlomo Angel, *Housing Policy Matters; A Global Analysis* (Oxford 42  
 43 University Press, New York 2000) at ch. 9; R.M. Buckley and J. Kalarickal, *Thirty Tears of* 43  
 44 *Shelter Lending: What Have We Learned?* (World Bank, Washington 2006). 44

1 are rarely compared with the lesser costs involved in politically resisted minimum 1  
 2 core obligations of housing rights. Similarly, investment of capital in housing is 2  
 3 part of overall government investment policy (percentage of GDP). Other state 3  
 4 legal measures include control of interest rates, curbs on public expenditure, and 4  
 5 stimulation of demand through public spending on housing, tax reliefs, etc. These 5  
 6 can be either supply side (subsidising producers) or demand side (supporting 6  
 7 purchasers), such as through grants for new homes. Social housing is part of a 7  
 8 market support system and an integral part of political largesse. 8

9 At a meso level, regulatory norms that establish minimum standards and 9  
 10 equality of access to goods and services are widespread, although more often based 10  
 11 on historical public health legislation than international human rights.<sup>94</sup> In relation 11  
 12 to housing, there are detailed legal regulations and regulatory systems on land use, 12  
 13 housing occupancy and maintenance, building standards, housing costs, eviction 13  
 14 procedures, facilities and equipment, and almost all have legally enforceable 14  
 15 sanctions for violations, and compensation for breaches. This regulation machinery 15  
 16 seeks to protect, preserve and promote the physical and mental health and social 16  
 17 well-being of people, control nuisances, prevent and control communicable diseases 17  
 18 and regulate privately and publicly owned dwellings in order to maintain adequate 18  
 19 sanitation and public health.<sup>95</sup> Indeed, in some circumstances, it can go so far as 19  
 20 delimit and deny property rights, such as granting extended rights of occupancy for 20  
 21 tenants which override the legal owners powers to sell. McCrudden has outlined 21  
 22 the extent of measures and regulatory mechanisms across the contemporary world 22  
 23 which act to achieve socially desirable outcomes, and in many cases override civil 23  
 24 and property rights.<sup>96</sup> 24

25 The integration of international housing rights norms and jurisprudence into 25  
 26 national housing regulatory systems represents the next step in the realisation of 26  
 27 these rights. Thus, all draft legislation on housing systems can be housing rights 27  
 28 proofed. House planning and building regulatory agencies, such as local authority 28  
 29 and institutional housing finance regulators, can incorporate housing rights objectives 29  
 30 into their regulatory systems. Equally, all development plans and zoning approvals 30  
 31 could be required to demonstrate how they address housing rights criteria. Regulatory 31  
 32 agencies could refer violations, as set out in the Limburg Principles and Maastricht 32  
 33 Guidelines, to the courts to be adjudicated and appropriate sanctions enforced for 33  
 34 violations of housing rights across all elements of housing systems. 34

35 Some legal measures can involve controls on prices or rents, deemed necessary 35  
 36 when the market fails to meet a social norm and the state should intervene. Statutory 36  
 37 provision of social and affordable housing, with elaborate legal precedents and 37  
 38 38

39 \_\_\_\_\_ 39  
 40 94 Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 40  
 (Harvard University Press, Cambridge MA 1990).

41 95 S. Angel, *Housing Policy Matters: A Global Analysis* (Oxford University Press, 41  
 42 New York 2000) 155, 160. 42

43 96 C. McCrudden, *Buying Social Justice: Equality, Government Procurement, and* 43  
 44 *Legal Change* (Oxford University Press, Oxford 2007). 44

1 legislation on allocation, management, control, sale and inheritance, also play 1  
 2 a significant role. However, the neo-liberalist inspired contemporary ‘enabling 2  
 3 housing subsidy regime’ involves a retreat from public housing production, 3  
 4 towards privatisation of such stock and abolition of subsidies.<sup>97</sup> Therein lies 4  
 5 a major challenge to contemporary housing rights advocates, who have yet to 5  
 6 tailor housing rights standards to the nuances and dynamics of housing market 6  
 7 systems. 7

8 8

9 *Micro Level* 9

10 10

11 One of the key issues in ensuring the effective enjoyment of housing rights is 11  
 12 justiciability. Contrary to what is sometimes suggested, neither the far-reaching 12  
 13 nature of housing rights obligations, or their character as social or economic 13  
 14 rights, presents a major obstacle to conferring justiciable housing rights on 14  
 15 persons within national legal systems. Courts have regularly enforced housing 15  
 16 rights derived from case law, legislation and constitutional provisions. Indeed, 16  
 17 a significant overlap exists between international housing rights and rights 17  
 18 conferred by national private and public constitutional, legislative and case law.<sup>98</sup> 18  
 19 However, there are many areas where national laws do not provide the equivalent 19  
 20 protection to that set out within international legal instruments, although there 20  
 21 is an established international consensus on the adoption of housing rights and 21  
 22 the internalisation of associated supranational standards into domestic law and 22  
 23 policy. 23

24 The Council of Europe *Recommendations of the Commissioner for Human* 24  
 25 *Rights on the Implementation of the Right to Housing* strongly proposes that 25  
 26 housing rights be made individually justiciable at local level and highlights the 26  
 27 benefits of this approach: 27

28 28

- 29 • specific legislation is more likely to clarify who precisely (i.e. which 29  
 30 government agencies or private parties) is/are responsible for implementing 30  
 31 international obligations; 31
- 32 • specific legislation is more likely to result in the creation of effective 32  
 33 remedies for violations of housing rights; 33
- 34 • national judicial institutions are more likely to treat questions relating to 34  
 35 housing rights as justiciable when given the task of interpreting specific 35  
 36 legislation rather than the more broadly stated provisions of treaty 36  
 37 obligations or constitutional guarantees; 37
- 38 • the process of enacting legislation focuses the attention of the political 38  
 39 authorities on the conditions needed to ensure effective realisation of rights 39  
 40 in practice, e.g. the resources required and allocation of responsibilities; 40

41 41

42 97 P. Cammack, ‘Attacking the Poor’ (2002) 13 *New Left Review* 125. 42

43 98 See Centre on Housing Rights and Evictions, *Sources No. 4: Legal Resources for* 43  
 44 *Housing Rights: International and National Standards* (COHRE, Geneva 2000). 44

- 1 • the existence of specific legislation better enables states to assess the 1  
2 extent of their compliance with international standards.<sup>99</sup> 2

3  
4 Hammarberg points out that housing rights can be made justiciable in a variety of 4  
5 ways, but there are important issues to be considered: 5

6  
7 Most obviously, there is a distinction between, on the one hand, relying on 7  
8 administrative bodies to enforce housing rights – whether by administrative or 8  
9 judicial procedures or a combination of both – and on the other providing legal 9  
10 remedies which may be invoked by individuals or by groups/NGOs acting on 10  
11 their behalf. Whilst administrative enforcement may be highly effective, the 11  
12 provision of both administrative and individual enforcement should prove even 12  
13 more effective in practice. The reasons for this are: 13

- 14  
15 • administrative bodies may have limited resources for monitoring and detecting 15  
16 violations and for taking enforcement action; 16  
17 • individual and group/NGO enforcement broadens the range of those engaged 17  
18 in enforcement, allows people to take the initiative in protecting their own 18  
19 rights, and harnesses the resources of civil society; 19  
20 • the possibility of individual enforcement increases the likelihood that 20  
21 violations will be detected and remedies sought; 21  
22 • the greater frequency with which remedies for violation are sought will feed 22  
23 through into greater incentives for both public bodies and private parties to 23  
24 respect housing rights.<sup>100</sup> 24  
25 25

26 To facilitate instrumental rather than formal or symbolic implementation of 26  
27 housing rights at national level the Human Rights Commissioner proposed a 27  
28 number of measures in 2009, addressing the 47 States of the Council of Europe. In 28  
29 implementing the right to housing member states should: 29

- 30  
31 • Enact specific legislation which clarifies how the housing rights guaranteed 31  
32 by international law are to be made effective in a national jurisdiction 32  
33 without discrimination. National laws should spell out housing rights, 33  
34 identify those who are responsible for their implementation at different 34  
35 levels, and provide for effective remedies when they are violated... 35  
36 • Include housing rights in the scope of general non-discrimination legislation 36  
37 both in the public and private sectors and specify that positive measures 37  
38 38

39  
40 <sup>99</sup> Council of Europe, Commissioner for Human Rights, *Recommendation of* 39  
41 *the Commissioner for Human Rights on the Implementation of the Right to Housing,* 40  
42 *CommDH(2009)5* ([https://wcd.coe.int/ViewDoc.jsp?id=1463737&Site=CommDH&Ba](https://wcd.coe.int/ViewDoc.jsp?id=1463737&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679) 41  
43 [ckColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679,](https://wcd.coe.int/ViewDoc.jsp?id=1463737&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679) 42  
44 accessed 18 September 2010). 43

44 <sup>100</sup> Ibid. 44

1 are justified in order to promote full and effective equality provided that 1  
 2 there is an objective and reasonable justification for such measures. Those 2  
 3 countries which have not yet done so should ratify Protocol No. 12 on 3  
 4 the general prohibition of discrimination to the European Convention on 4  
 5 Human Rights. 5  
 6 • Establish minimum standards in all areas of housing provision for 6  
 7 accessibility, adequacy and affordability in accordance with the European 7  
 8 standards developed by the European Committee of Social Rights and the 8  
 9 European Court of Human Rights. 9  
 10 • Prevent and reduce homelessness through general and targeted policy 10  
 11 measures designed to promote access to housing. Such measures include 11  
 12 legal protection of tenants against unfair and disproportionate contractual 12  
 13 conditions, indiscriminate termination of contracts and forced eviction, as 13  
 14 well as the availability of a sufficient stock of rental housing and temporary 14  
 15 shelters to provide housing for disadvantaged and vulnerable groups. 15  
 16 • Adopt and implement a national housing strategy which incorporates 16  
 17 targets to be achieved for the realisation of housing rights to an extent 17  
 18 consistent with the maximum use of available resources. A national housing 18  
 19 strategy should also apply a gender perspective, identify disadvantaged and 19  
 20 vulnerable groups and include positive measures for ensuring their effective 20  
 21 enjoyment of the right to housing. 21  
 22 • Enable the individual enforcement of the right to housing. The individual 22  
 23 enforcement of housing rights should be accompanied by other measures 23  
 24 aimed at providing sufficient accommodation to meet the demand from 24  
 25 persons classified as homeless.<sup>101</sup> 25  
 26 26  
 27 Other methods of making housing rights applicable at local level transcend the 27  
 28 transmission belt approach, and rely on the HRBA, where ‘rights holders’ are 28  
 29 involved in the development of policies which affect them, advanced within an 29  
 30 international human rights framework, where they are empowered and effectively 30  
 31 participate in the process, which is non-discriminatory, prioritises vulnerable 31  
 32 groups and is publicly accountable. 32  
 33 33  
 34 34

### 35 **(9) Conclusion** 35

36 36  
 37 The concept of home and displacement from home offer powerful justifications for 37  
 38 the strengthening of housing rights protection. In modern societies housing rights 38  
 39 jurisprudence is growing in its content, relevance and sophistication, reflecting 39  
 40 new principles of personal and social development, as well as the influences of 40  
 41 public international human rights law. State action is transcending traditional civil 41  
 42 and political rights guarantees towards giving effect to contemporary expectations, 42  
 43 43

44 <sup>101</sup> Ibid. 44

1 through legal and other intervention in housing systems.<sup>102</sup> However, there are 1  
2 limitations to the international human rights approach in enforcing rights within 2  
3 contemporary housing systems. Housing rights now need to be integrated, not 3  
4 just into political policies and laws, with their traditional emphasis on social 4  
5 housing solutions, but into the macro, meso and micro frameworks of the housing 5  
6 field, involving all these elements of housing systems. This may yet provide 6  
7 an appropriate basis for the evolution of an effective international and national 7  
8 governance model for the advancement of these rights. 8

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41 102 *The Vienna Declaration* (1993) states that both civil and political rights and 41  
42 socio-economic rights, such as housing rights are 'universal, indivisible, interdependent 42  
43 and interrelated'. See The Secretary-General, *Report of the Secretary General on the Vienna 43*  
44 *Declaration Programme of Action* (13 October 1993) UN Doc A/CONF 157/24 (Part I). 44



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