**14 May 2021**

To: **Special Rapporteur on the right to adequate housing**

Office of the United Nations High Commissioner for Human Rights

United Nations Office at Geneva

Per email: registry@ohchr.org; srhousing@ohchr.org

Dear Mr. Balakrishnan Rajagopal,

**RE: NDIFUNA UKWAZI’S SUBMISSION ON  HOUSING DISCRIMINATION AND SPATIAL SEGREGATION IN SOUTH AFRICA**

**INTRODUCTION**

1. Ndifuna Ukwazi is a non-profit activist organisation and law centre[[1]](#footnote-1) that combines research, organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing towards building a more just and equal city.
2. Over the last seven years Ndifuna Ukwazi has been involved in legal, research and organising work around evictions, relocations, rental housing, the allocation of state-subsidised houses, and the promotion of social, transitional and inclusionary housing. We have published several resource guides and research reports on these issues. Ndifuna Ukwazi has also been involved in a series of important court cases dealing with the state’s constitutional and legislative obligation to combat spatial apartheid and promote spatial, economic and racial justice and equality through expanding access to land and affordable housing, occupation of land and buildings, evictions, and the provision of alternative accommodation.
3. This submission is made pursuant to the Special Rapporteur on the Right to Adequate Housing, Mr. Balakrishnan Rajagopal’s call for input on housing discrimination to inform his reports to be presented to the General Assembly in 2021, and the Human Rights Council in 2022. As our work is primarily focused in Cape Town, South Africa, our responses and the data included in this submission will stem largely from South Africa generally, and Cape Town in specific.
4. Our submission is structured as follows:
	1. First, we describe the context of housing discrimination in relation to racial, spatial and economic inequality;
	2. Second, we set out existing measures that to reduce discrimination, segregation and structural inequality in relation to segregation and structural inequality in relation to housing**;**
	3. Thereafter, we provide some concluding remarks.

**HOUSING DISCRIMINATION: RACIAL, SPATIAL AND ECONOMIC INEQUALITY**

1. It is commonplace that spatial inequality across all South African towns and cities has its historical origin in the colonial and apartheid eras. Throughout these eras, land rights regimes and exclusionary land practices were introduced in pursuit of policies of economic exclusion and absolute racial segregation. This ultimately guaranteed a grossly unequal distribution of land. The effects of spatial apartheid in the urban context were harsh and manifold: a landless class was created through legislated processes that ensured the deprivation of Black people’s[[2]](#footnote-2) rights to title, displacement and land dispossession. State induced spatial inequality was entrenched with well-established, affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure communities for Black people.
2. A 2019 report on inequality trends found that South Africa is the most unequal society in the world and concluded that inequality is deepening. Half of the population earned less than USD960 per year (roughly USD a month) and in stark contrast, the wealthiest 10% earn almost 60% of the income and own almost 95% of the country’s wealth.[[3]](#footnote-3) In our context, inequality is racial, gendered and spatial. One of the primary drivers of this structural inequality in cities are the skewed patterns of land ownership and the acute shortage of well-located affordable housing. The poor live further away from jobs, spend more of their limited resources and time on transport, and have fewer options to access healthcare, education and basic services. This pervasive fault-line – where the legacy of apartheid meets the broken promises of the current government – has become a chasm which many poor and working-class people simply cannot cross.
3. Nowhere is spatial inequality more visible than in Cape Town. Twenty-seven years after the end of apartheid, Cape Town remains the most spatially divided city in South Africa and represents two disparate worlds - in one, easy access to employment and state assisted services abounds, and isolation and desperation permeate throughout the other. While this spatial inequality has its origin in the colonial and apartheid eras, the legacy of racial and spatially segregated residential settlements is reinforced and reproduced by features of Cape Town’s contemporary urban land and housing crisis including: (i) the state’s inability to address the increasing housing backlog; (ii) exclusionary market-centered approaches to accessing land; and (iii) peripheral housing of the urban poor. All this points to a housing crisis and entrenched housing discrimination where hundreds of thousands of poor and working class people have been forced to live in peripheral townships and informal settlements because the state – at all levels – has failed to satisfy the need for housing or redistribute well-located land.

*A failure to address the housing backlog*

1. The acute affordable housing shortage is a direct result of apartheid era policies and influx control limiting the African occupation of urban areas and access to economic opportunities. But the City has done little to mitigate the legacy of spatial apartheid in the 27 years since apartheid formally ended. The Western Cape has a housing backlog of just under 600 000,[[4]](#footnote-4) with more than 365 000 being attributable to the City of Cape Town. These figures only refer to the families that qualify for fully state-subsidised homes, approximately 75% of the population of Cape Town qualify for some form of housing assistance. The City itself acknowledges that the current housing backlog is insurmountable at its current rate of delivery. In the City’s Draft Human Settlements Strategy, the City projects that it needs to create approximately 50 000 affordable homes every year for the next decade in order to address the backlog. However, the public and private sector combined develop less than 20 000 new homes on average per year, with the provision of serviced sites at 5 500 on average per year. In the 2018/2019 financial year, the City provided and upgraded only 5 692 homes. The overwhelming scale of the need means that the City itself believes it will take more than 70 years before it can eradicate the housing backlog.

*A failure to regulate land and property markets*

1. The dire shortage of affordable housing stands in stark contrast to the oversupply of exclusive accommodation. According to the Centre for Affordable Housing Finance, the average sale price for a home in Cape Town in 2019 was USD107114,19 (the highest in South Africa), a price that less than 5% of households are able to afford, with 41% of the Cape Town’s residential property market aimed at developing luxury properties valued at over USD84940,81. Knight Frank projects that Cape Town is set to have the highest year-on-year property inflation in the world this year (in line only with Shanghai, China).[[5]](#footnote-5)The effect of property inflation is even more worrying when broken down by market share as property prices in middle-income and lower-income markets continue to increase thus pricing lower-income earning families out of the market.  Many working Capetonians cannot reasonably afford to buy a home in the City due to ‘stratospheric’ prices indicative of a market failure that is fueled by rampant speculation.[[6]](#footnote-6) The state’s failure to regulate land and property markets to ensure a more spatially just city has resulted in stubbornly high rents and property prices that have excluded poor and working-class families (and has disproportionately affected Black families).In practical terms, this means that the number of available affordable housing units in Cape Town has actually decreased in recent years.

*The effects of peripheral housing*

1. Where one lives in the city matters – it determines a person’s access to opportunities and the quality of services. Many peripheral areas in Cape Town have limited access to basic services, forcing families to share an insufficient number of temporary outdoor toilets and collect water from communal standpipes. The schools in these areas generally perform worse, gang violence is rife, substance abuse is more common, and social amenities such as hospitals and clinics are not easily accessible. Over the years, Ndifuna Ukwazi has warned that those on the “waiting list” for state-subsidised or affordable rental housing have lost hope.[[7]](#footnote-7) Where public housing is built, it is invariably located on the outskirts of the city on cheaper land far from economic opportunities and amenities, and where there is public transport, the costs are high.
2. Poor and working-class people spend a disproportionate component of their income and time on unreliable transport – the City itself has found that poor people in Cape Town spend up to 45% of their income on transport, well over the global average of 5-10%. Critically, research conducted by the Socio-Economic Rights Institute shows that there is a direct relationship between where people live in South African cities and the likelihood that they will find employment. Living on the urban periphery in South Africa therefore ends up trapping the impoverished in a cycle of structural poverty.[[8]](#footnote-8) Without a concerted effort to redistribute land closer to the city centre, apartheid spatial planning will continue to be replicated, further entrenching racialised patterns of inequality.
3. The economic fall-out following the COVID-19 pandemic has exacerbated existing social and spatial inequalities. According to the South African National Income Dynamics Study – Coronavirus Rapid Mobile Survey (NIDS-CRAM), the economic impact of the COVID-19 pandemic led to significantly higher rates of unemployment, diminished incomes and higher rates of hunger. Between February and April 2020, 3 million South Africans lost their jobs, and a further 1.5 million lost their income (through being furloughed). The vast majority of these job losses were concentrated among already disadvantaged groups. Womxn were particularly hard affected, accounting for up to 2 million of the 3 million job losses. The second wave of the NIDS-CRAM survey shows that the economic impact of the COVID-19 pandemic was unevenly distributed spatially – with people in rural and peri-urban areas (on the outskirts of cities) being twice as likely to experience unemployment when compared to people living in the suburbs.

**MEASURES TO REDUCE DISCRIMINATION, SEGREGATION AND STRUCTURAL INEQUALITY IN RELATION TO HOUSING**

*The Constitution: The right of access to land on an equitable basis and the right to adequate housing as a means to combat spatial inequality*

1. The Constitution of the Republic of South Africa, 1996 (“the Constitution”) recognises South Africa’s history of forced removals and dispossession and places obligations on the state to proactively redress past injustice.
2. Section 25(5) of the Constitution enshrines an obligation on the state to ensure that citizens progressively gain access to land on an equitable basis, and section 26 of the Constitution sets out the state’s obligation to progressively realise the right to access to adequate housing. These obligations cannot be divorced from, but rather give context to, the state’sresponsibility, at all levels of government, to advance spatial justice.[[9]](#footnote-9)
3. In the case of *Government of the Republic of South Africa v Grootboom[[10]](#footnote-10)* (“*Grootboom*”), the Constitutional Court had to decide whether the national housing programme was sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. In addressing this issue, the Court considered the obligations imposed on the state by section 26. Section 26 provides that everyone has the right to have access to adequate housing and section 26(2) provides an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources. The Court found that a reasonable housing programme must make provisions to provide immediate relief for those individuals living in intolerable or crises situations and ordered the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.
4. The state’s obligations have recently been affirmed by the Western Cape High Court recent decision in a case brought by Ndifuna Ukwazi concerning these issues - *Adonisi v Minister for Transport and Public Works: Western Cape; Minister of Human Settlements s v Premier of the Western Cape Province* (“*Adonisi*”)[[11]](#footnote-11). Judge Gamble wrote:

*“[I]t is fair to say that the statutory and policy framework which finds its origins in the Constitution and the legislation mandated thereunder, renders it necessary for [the state] to redress the legacy of spatial apartheid as a matter of constitutional injunction.  The constitutional and statutory obligations of ... government to provide access to land and housing on a progressive basis, encompass the need to urgently address apartheid’s shameful and divisive legacy of spatial injustice and manifest inequality.”*

1. When read together, these rights imply that the state has a duty to do more than simply building homes wherever – the location of housing delivery becomes a crucial component of the realisation of this right. It is therefore not sufficient for the state to claim that it has fulfilled its obligations to provide housing by developing housing opportunities on cheap land on the periphery of the cities, as this type of housing is likely to replicate the very spatial inequality that these constitutional provisions seek to redress.
2. The obligation to combat spatial injustice is not just an abstract future promise, it is a constitutional duty that needs to be urgently prioritised. Section 273 of the Constitution provides that all constitutional obligations must be performed diligently and without delay as failing to do so “not only undermines [the Constitution] but also deprives the bearers of constitutional rights of timeous performance of the obligations owed to them”. This means that the state could be in breach of its obligations to redress spatial apartheid every time it fails to use underutilised well-located land that it owns for the development of housing.
3. The obligations imposed by sections 25(5) and 26 of the Constitution require the state to take positive steps to redress spatial inequality by proactively managing all public land. This means that the state is required to review its largest and most well-located parcels of public land, proactively identify the public land it owns that would be suitable for the development of housing, proactively rezone these parcels of land, negotiate the end of leases or other legal encumbrances, and decline to encumber state land where such land is needed for the development of housing.
4. In addition, section 7 of the Constitution mandates the state to “respect, protect, promote and fulfil” the rights contained in the Bill of Rights, which includes the rights to gain access to land on an equitable basis and adequate housing. Although these obligations are interconnected, the duties they place on the state differ in practice. The obligation to “respect” places a duty on the state not to impair a person’s existing rights. In other words, the state must refrain from interfering directly or indirectly with the rights to land and housing that people have realised for themselves. The state would fail to comply with this obligation if it were to pass legislation or take other measures that weaken the rights that people have that enable them to gain access to land and housing. The obligation to “protect” requires the state to take measures to prevent others, including individuals, groups and corporations, from interfering with rights. It is to give effect to this obligation that the state adopted the Prevention of Illegal Evictions and Unlawful Occupation of Land Act, 19 of 1998 (“PIE Act”). However, this obligation does not end with the enactment of protective legislation, it also requires that the state ensures that such protective legislation is effectively implemented in practice. The obligation to “promote” and to “fulfil” the rights to housing and to gain access to land on an equitable basis require that the state “adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realisation of [these] right[s]”.

*Spatial Planning and Land Use Management Act*

1. The Spatial Planning and Land Use Management Act 16 of 2008 (“SPLUMA”) is national legislation which aims to advance spatial transformation. It articulates the obligations on the state to advance and support the development of spatially just cities. These obligations are reinforced in provincial legislation, including the Western Cape Land Use and Planning Act 2014 (“LUPA”).
2. The Spatial Planning and Land Use Management Act and the Western Cape Land Use and Planning Act 2014 set out progressive development principles which must apply to spatial planning, development and land use management when considering any application that impacts on or may impact on the use and development of land at all levels of government, including at the national, provincial or local level. These principles include spatial justice, spatial sustainability and spatial efficiency.
3. As the Western Cape High Court noted in the Adonisi case:

*“SPLUMA is the very legislation that seeks to advance the breaking down of the barriers of apartheid spatial planning, and [the state is] duty bound to implement it to the best of their abilities.  While they may not have done so in the past, they are obliged to do so, both presently and in the future.”*

1. Importantly, SPLUMA and LUPA should not only apply to how the state governs how others use land, but also to how it uses its own land. Land use and land management should be guided by the same principles, whether driven by the private or public sector.
2. The overall effect of these provisions is that the national government is also required to use its own land to give effect to spatial transformation and should proactively review the land that it owns, and consider how this land could be used to more actively to give effect to the principles of spatial justice; and social, economic and racial inclusion.

**CONCLUSION**

1. We appreciate the opportunity to have made the inputs contained in this submission, and hope that our submission will assist the Special Rapporteur in formulating his reports. Please do not hesitate to contact us should you require clarification or further information.
2. Please do not hesitate to contact us should you require clarification or further information.

Yours Faithfully,

**NDIFUNA UKWAZI**

**Per: Mandisa Shandu (Director)**

 **Michael Clark (Headd of Research and Advocacy)**

1. Ndifuna Ukwazi was founded in 2011 and is a non-governmental organisation (registered as a non-profit organisation in terms of the Non-profit Organisation Act, 71 of 1997 (Registration No. 094-737-NPO)), based in Cape Town, South Africa. NU is also registered and accredited as a law clinic with the Legal Practice Council: Western Cape (the number allocated to the clinic is F7640). [↑](#footnote-ref-1)
2. Save as otherwise stated, ‘Black people’ refers to, and includes African people, people of Mixed Descent and classified as ‘Coloured’ under the apartheid system, and Indian people (as per the definitions in equity legislation such as the Employment Equity Act, 55 of 1998). [↑](#footnote-ref-2)
3. See Statistics South Africa with Agence Francaise de D*é*velopment, Southern Africa Labour and Development Research Unit, and African Centre of Excellence for Inequality Research, *Inequality Trends in South Africa: A multidimensional diagnostic of inequality*, November 2019. Available online:[Publication | Statistics South Africa (statssa.gov.za)](http://www.statssa.gov.za/?page_id=1854&PPN=Report-03-10-19&SCH=7680) (Accessed May 2021). [↑](#footnote-ref-3)
4. See Western Cape Provincial Parliament Adjustment Budget Vote Speech by Minister Tertuis Simmers. Available at: <https://www.westerncape.gov.za/speech/adjustment-budget-vote-8>. Accessed May 2021. [↑](#footnote-ref-4)
5. South Africa Affordable Housing, May 2019, “Can More Houses Fix Cape Town’s Backlog”, Available online: <https://saaffordablehousing.co.za/can-more-houses-fix-cape-towns-backlog/>. (Accessed May 2021) [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. Ndifuna Ukwazi, “I Used To Live Here: a Call for Transitional Housing for Evictees in Cape Town”, June 2017. Available online: <https://www.landportal.org/library/resources/i-used-live-there>. (Accessed May 2021). [↑](#footnote-ref-7)
8. SERI, “Edged Out: Spatial Mismatch and Spatial Justice in South Africa's Main Urban Centres”, SERI Research Report (December 2016), available at <http://seri-sa.org/images/SERI_Edged_out_report_Final.p> [↑](#footnote-ref-8)
9. See enclosed thesis authored by Mandisa Shandu *Advancing Urban Land Justice in Cape Town: The intersection between the right of access to urban land on an equitable basis and the right to access adequate housing* (LLM thesis, University of Cape Town, 2019), regarding the relationship between these sections of the Constitution and further strategies to advancing urban land justice as a means to address structural racial and spatial inequality. [↑](#footnote-ref-9)
10. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46; 2000. [↑](#footnote-ref-10)
11. *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* (7908/2017; 12327/2017) [2020] ZAWCHC 87 (31 August 2020). [↑](#footnote-ref-11)