ESCAPING THE PAST:
Challenges and Opportunities for a Human Rights Based Approach
to Housing in a Post- Apartheid South Africa

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02.06.2008
Acknowledgments

I would particularly like to acknowledge financial support from the Norwegian Centre for Human Rights’ South African Programme and the Norwegian-American Marshall Fund, without which, my field study in South Africa would not have been possible. I would like to express gratitude towards the individuals who took time out of their busy schedules to sit down for an interview, particularly Jan Skjerve, Odetta Crawford, and Moray Hathorn. I am also very much appreciative of the extensive consultation and advice I received from Malcolm Langford and Dr. Bård A Andreassen. A special thanks goes out to my office colleagues, fellow classmates, and family for additional support.
This thesis is dedicated to those who fight for their daily survival and wish nothing more than a safe home. Let us not forget that each one of the millions has a face and story to tell.

1 Boy in Johannesburg, Photograph taken by the author.
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1 Introduction

Armed with bulldozers they came to do a job nothing more, just hired killers. We gave way there was nothing more we could do although the bitterness stung in us and in the earth around us, (1983).  

1.1 Background

Even today, the eviction of the poor remains a far too common story in South Africa. Inequality in housing is a persisting theme in South Africa, despite its 12 years of democracy. As a result of a century of racial segregation South African cities have been constructed for the “convenience of a small minority of whites” leaving blacks to live in overcrowded townships on the periphery of urban cities. During the apartheid years, blacks seeking economic opportunities and basic survival fought the spatial segregation and illegally inhabited land surrounding the cities. As a consequence of this and government repression and lack of economic opportunity, the occupiers of both townships and informal settlements were left in the utmost deplorable conditions on the outside of urban centers. With over 12 million living in slums, South Africa is left with the enormous task of dealing with both the severe destitution caused by the former apartheid regime as well as the culture it created.

In her post-apartheid years, South Africa has sought to address housing inequality and inadequacy. The Constitution, adopted in 1996, is one of 30 around the world that

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progressively covers the right to adequate housing.4 The right is embedded in section 26 of the Constitution, which calls for progressive realization of the right to housing and protects against forced evictions. This is complimented by the 1997 Housing Act which calls for non-discriminatory access, security of tenure, and accessible housing through a series of interventions to improve the availability of affordable housing, and monitoring and evaluation of homelessness and inadequate housing. Commendably, South Africa has succeeded in building over 1.8 million basic houses for the poor and provided 10 million with potable water, electricity, and basic sanitation.5 Yet in her attempts new wounds are made while old ones refuse to heal.

Since 1996, rising poverty has caused 2 million to lose their homes and the number living in informal settlements has grown by as much as 50 percent, to 12.5 million people.6 There is an overall sense that the government has failed to deliver its promised housing services and there is growing resentment towards not only the government’s inability to provide housing but its wide use of evictions in attempting to do so.

The failure to provide a substantial turnaround in housing has resulted in South Africans fearing that it is nothing more than reshaped apartheid-type policies. The question remains; what can be done to create better policies to deconstruct apartheid housing conditions and better provide adequate housing in South Africa?

1.2 Object and Purpose of Study

While this thesis will not attempt to answer that enormous question, it will seek to identify the legal obligations to fulfill the right to adequate housing. It will highlight, through case studies, how duty-bearers, are and should be implementing the right, in attempting to answer:

5 Wines, supra #3.
6 Wines, supra #3.
What does it entail for States to fulfill their legal obligations to the right to adequate housing from a human rights based approach to housing?”

The goal of the thesis is to answer the above question. The research will begin with discussing a ‘human rights based approach’, ‘the right to housing as a legal human right’, and a ‘HRBA to housing’. An attempt will be made to create legal and conceptual clarification, culminating with the meaning and content of a HRBA to housing. These concepts will then be applied to three cases. In describing and analyzing these cases, my argument is that a focus on human rights’ principles and processes leads to better fulfillment of legal obligations regarding tenure security. My analysis aims to assess to what degree the housing policy behind these cases have been informed by human rights principles in development processes and outcomes, and if they have not explicitly been so, whether important human rights principles would have helped when things went wrong. My analysis will end with a discussion on the disadvantages and advantages of a HRBA to adequate housing and a normative discussion about state accountability for the right to housing.

1.2.1 Case Studies

International human rights oblige states to take steps, individually and through international assistance and cooperation, to the maximum available resources, to progressively achieve the full realization of economic, social and cultural rights. Both developing and developed states are required to work together and separately towards achieving the right to adequate housing. The first two case studies will illustrate South Africa attempting to fulfill the right while the second will discuss fulfilling the right through international cooperation.

1.2.1.1 The Case of In-situ Upgrading in South Africa

One important method in improving housing conditions for millions in South Africa is acknowledging the role informal settlements play in its citizen’s lives. A new Informal

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7 See section 2.1 for a full explanation of South Africa’s international human rights obligations.
8 The first case is significantly longer than the latter two as it discusses the HRBA principles at length, whereas the two latter as defined in the first case study.
Settlement Upgrading Program in 2004\textsuperscript{9} recognizes that informal land occupation plays a huge role in providing housing for South Africans.

The program attempts to upgrade informal settlements while providing the residents with immediate support to prevent them from living in deplorable conditions while the upgrading is completed.\textsuperscript{10} Upon looking at qualified settlements for upgrading, it is questionable whether residents have been or will be the beneficiaries. Some projects have resulted in eviction instead of upgrading, while other projects entirely ignore the value of in-situ upgrading. The thesis will examine the case of two informal settlements, Thembelihle and Joe Slovo where residents originally were targeted for upgrading and are currently at risk for eviction. Both development projects surrounded by controversy and corruption have revealed that the State does not want poor people in its cities.

1.2.2 International Obligations: The Role of Norwegian Development Assistance in Building Housing Cooperatives in South Africa

The second case study will discuss the role of international development assistance in the context of Norway supporting housing cooperatives in South Africa. Under Article 2 of the Convention on Economic, Social and Cultural Rights (ICESCR) and Article 8 of the Convention on the Rights of the Child (CRC) Norway is obligated to cooperate internationally in the fulfillment of economic, social and cultural rights.

Norway through the Norwegian Agency for Development Cooperation (NORAD) and the Norwegian Federation of Co-operative Housing Associations (NBBL) has played a large role in supporting housing initiatives in South Africa. Immediately following the apartheid regime, Norway began meeting with the African National Congress (ANC) in order to determine how they could best support the new democracy.\textsuperscript{11} It was determined that Norway could best help the new democracy by aiding the growing housing crisis in

\textsuperscript{9}Chapter 13 of the Housing Code, and a core element of the Department of Housing’s New Policy: A Comprehensive Plan for the Creation of Sustainable Human Settlements: Breaking New Ground, recognize that informal land occupation plays a huge role in providing housing for South Africans.

\textsuperscript{10}Huchzermeyer, Marie. \textit{The Struggle for In-situ Upgrading of Informal Settlements: Case Studies from Gauteng}. Unpublished, 2006, under heading “Signs of Stress: Conflict and contradiction in the implementation process.”

\textsuperscript{11}Skjerve, Jan, Senior Advisor, The Norwegian Federation of Cooperative Housing Associations Department of International Co-operation, Interview. Oslo, Norway. 22 October 2007.
South Africa. Partnering with Cope Housing Association, NBBL supported the NGO by providing funds and training.\(^{12}\)

Admitted openly by Norway, these projects developed slowly under much constraint from challenges such as lack of capacity, corruption and mistakes. While the projects improved the quality of life for many, it led to evictions for others. The case study will examine the story of one of the cooperatives, Newtown. Overall, the experiences of Newtown highlight the success and problems within Norwegian development assistance.

While the in-situ upgrading cases and Norwegian Cooperative project are two separate and incomparable processes, they both illustrate state effort, success, and failure in attempting to comply with their obligation to fulfill the right to adequate housing and a fundamental failure to respond to the challenges behind the housing situation. State action and programming will be analyzed accordingly in order to better gain perspective on how human rights principles were and could be used in such processes and what difference they could make.

1.3 Methodology and Sources

The thesis will use a multi-disciplinary approach by looking at both law and politics behind the South African housing crisis. It will focus on the legal aspects, mainly from a human rights perspective, as well as a social science based on qualitative research. Since I am focusing on integrating human rights into housing programming I will look at national and international hard and soft law on the right to adequate housing. Specifically, this entails an examination of law in the ICESCR, General Comment 4 on the right to adequate housing as well as Article 2 on international cooperation, Section 26 of the South African Constitution, and Chapter 13 of the Housing Code on informal in-situ upgrading. The purpose of examining these documents is to develop a clear and concise definition of the right to adequate housing, states’ duties to fulfill the right, and current legal housing protection, and their possible limits.

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The following analytical questions will be addressed in the second section in order to answer the larger question on whether a human rights based approach better fulfills the right to adequate housing:

- How to ensure that the basic HRBA principles of the approach are applied in practice, particularly that of participation?
- How to deal with the obstacles, particularly that of power and resistance that could hinder the approach?
- What obstacles prevent the implementation of housing development in South Africa?
- Can a focus on human rights in planning and programming give the expected results?

There will be a qualitative in-depth investigation on public policy and the human behavior that govern these policies. The thesis will investigate the why and how of exercising decision making and housing programming. Primarily, secondary sources will be used in this exercise, including NGO reports, legal judgments, newspaper articles, and scholarly research. Informal interviews and discussions were conducted in order to better understand different view points and collect data. Due to the different areas of experience, there was not one set of questions, but rather separate discussions on the current programming and implementation of the right to housing in South Africa. For the South Africa case study, I traveled to Johannesburg and Pretoria to interview public interest lawyers, activists and academics involved in in-situ case upgrading. I also attended a conference in Johannesburg on Economic, Social and Cultural Rights hosted by the Centre for Applied Legal Studies, on October 26-27, 2007. This included a two hour session on the current housing situation in South Africa with leading South African housing experts and activist. I was able to sit down with many of these experts, informally, and collect general opinions and facts on the current housing situation. These interviews and conversations are reflected throughout the thesis.

For the Norwegian case, I conducted interviews with NBBL, the Norwegian Embassy in South Africa and the South African Social Housing Foundation. They were asked to explain their institutions’ approach to the social housing projects and give details on the success and failures of the projects funded by the Norwegian government.
The field study was successful in gaining new knowledge on the approaches and challenges to implementing the right to housing. All interviews were held in person, in South Africa and Norway, although some follow-up questions were asked via email and phone, as noted in footnotes. Primary research was limited due to time and capacity restraints. I was not able to gain access to important case rulings regarding evictions in Newtown and significantly, the City of Johannesburg, Department of Housing, did not respond to multiple requests for an interview.\textsuperscript{13}

\textsuperscript{13} See bibliography for dates of interviews.
2 A Human Rights Based Approach and the Right to Adequate Housing

In March 2008, Mr. Miloon Kothari, UN Special Rapporteur on the right to adequate housing, gave his farewell speech on the state of fulfilling the right to housing as a component of adequate standard of living. Acknowledging the difficulties of building state capacity, the challenges of bureaucratic inefficiency, and hesitation by some to fully recognize the right, he reaffirmed his call to use a HRBA to confront “the situation of millions of people living in grossly inadequate housing conditions and those facing homelessness, landlessness, displacement, and related violence.”¹⁴ In his speech, he praised States, including South Africa, for progressive work on acknowledging access to housing as a right, but ended his speech with two poems describing that darkness was obscuring the right to housing. He expressed concern that much work was needed to be done before sunlight could reach the darkness.¹⁵

Is a human rights based approach the key to shining light onto the housing situation? Obviously, it in itself is not enough. In order to create adequate housing for millions, it takes economic planning, engineering and many other technical skills. However, it is the summation of this work that development projects will have greater chances of leading to human rights violations if human rights are not focused on during both the development process and outcome. This chapter defines a human rights based approach to development, its value added, as well as a human rights based approach to housing. The chapter argues that for the purposes of this paper it is best to limit a human rights based approach to a legal obligation for States to respect, protect, and fulfill human rights during the development process. The chapter then underlines the international legal obligations that are implicit to a human rights based approach to housing.

¹⁵ Miloon Kothari, p8, supra # 14.
2.1 A Human Rights Based Approach to Development

A human rights based approach sees development as a particular process in which all human rights and fundamental freedom can be realized. The approach puts humans at the center of development. It emphasizes the importance of relying on international human rights law in setting the achievement of human rights as an objective of development aid and integrating human rights principles into the development process. Development programming needs to ensure states work towards fulfilling the basic rights of their citizens, that communities are empowered to claim their rights, while identifying and addressing the root causes of poverty. In short, a HRBAD, is a process that puts human rights standards as defined benchmarks for desirable outcomes while human rights represent conditions for the process.\(^{16}\) They are standards of a dignified life as defined by international law that can not only be assessed by legal institutions, but by benchmarks/indicators made for public policies and development initiatives.

The standards on a human rights based approach to development were elaborated in 2003 during the Second Interagency Workshop on Implementing a Human Rights Based-Approach in Context of UN Reform\(^{17}\) where the UN Common Understanding on a HRBAD was formulated. The Common Understanding built upon the above definition, focusing on the most marginalized and demanded consistent implementation of elements of good programming.\(^{18}\) The general principles elaborated in the document were participation, non-discrimination, accountability, empowerment and the interdependence and invisibility of rights.\(^{19}\) Below is a summary of the Common Understanding explanations of the principles:\(^{20}\)

\(^{19}\) Towards a Common Understanding, in *The Second Interagency Workshop*, supra #17, Annex 1.
\(^{20}\) Towards a Common Understanding, supra #17, Annex 1.
Universality and inalienability: Human rights are universal and inalienable. All people everywhere in the world are entitled to them.

Indivisibility: Human rights are indivisible. Whether of a civil, cultural, economic, political or social nature, they are all inherent to the dignity of every human person….

Inter-dependence: The realization of one right often depends upon the realization of others.

Equality and Non-discrimination: All individuals are equal as human beings and by virtue of the inherent dignity of each human person. All human beings are entitled to their human rights without discrimination of any kind.

Participation: Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized.

Accountability: States and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in human rights instruments. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law.

Arguably, there is a significantly better outcome using these principles, compared to other development schemes because a HRBA is based in law rather than just theory. Through legal and moral justification, human rights empower people at the grassroots level who are most affected by poverty. There is a shift from helpless to right-holder, from receiving charity to obtaining rights.

The benchmarks shift from economic growth to human progress; gives the individual involvement and hence control over their own rights and lives. The approach attempts to ensure that the human rights are applied to the process and outcome which adds accountability and good governance to development. Both development agencies and duty-bearers are accountable for the development programming, process, and outcome: good programming practices become obligatory. More attention must be spent towards making development programming work and address exclusion, discrimination, disparities and injustice.
A HRBAD has been shaped and reshaped for over a decade and a half now. The first reports and articles were met with mixed feelings, particularly considering that human rights scholars tended to ignore the discrepancies between their approach and traditional notions and practices of development, while development practitioners only half-heartedly attempted to link human rights to development. Yet human rights scholars continued to develop and encourage a HRBAD. By the end of the 1990’s, the UN had shifted towards making a rights based approach a normative framework for all its operations, while non-governmental organizations and international agencies began to embrace and operationalize the approach.

2.2 Scope and Challenges to a Human Rights Based Approach to Development

The question remains to what extent States, the actual duty-bearers, will use the policy and whether the approach enables them to formulate development policies that lead to more successful outcomes and fulfill their legal obligations. In the context of the case studies, a HRBAD will be limited to an analysis of State development policy. While the approach has been very successfully applied by non-state actors, this paper is of the opinion that it is only the obligation of the State to ensure that development policy leads to the fulfillment of human rather than economic growth. The opinion is similar to that of David Beethams’ that a HRBAD implies legal obligations of a limited scope. He emphasizes that the state’s obligation is negative, to do no harm, by not supporting polices that “systematically damage any of the country’s economic development, or encourage a markedly unequally form of development.” This paper agrees that a HRBAD applies to State legal obligations in regards to development, but goes one step further, arguing that a

23 Please see section 2.2 for a legal explanation on state obligations to fulfill human growth/human rights.
State also has a positive obligation to fulfill their human rights obligations and ensure that the states uses a human rights oriented process to reach the development objective.

There is a tendency by development practitioners to water down a human rights based approach to development and associate the outcome of the development process as being human rights related rather than within the development process. Others consider a human rights-based approach as not new and that it is the same as prior development practices, such as its emphasis on participation and capacity building. The critics complain that the HRBAD trivializes human rights law; it becomes nothing more than what was already prevalent in development; a process of participation and an objective for achieving a right.

Hans Otto-Sano offers a partial response to this critique, he argues one should prevent both human rights and development from losing their traditional strengths because the two developed from different fields and are driven by unlike processes. He suggests a partial integration of the human rights and development approaches so that both will retain their respective strengths.\(^{25}\) He emphasizes, initially, that human rights can serve as entitlements for people and empowerment of people. Sano is partially correct in asserting that it is important that a HRBAD should not replace technical advances in development processes nor have such wide definitions that hinder the significance of human rights and development.\(^{26}\) However, Sano goes too far in limiting the approach. As mentioned earlier, this paper uses the definition that a HRBAD is a States obligation to respect, protect and fulfill human rights both during the process and outcome of development work. Using this definition, the approach includes more than just entitlements. The principles of participation, non-discrimination, accountability, empowerment and the interdependence and invisibility of rights become rights in themselves as they ensure that civil and political and economic, social and cultural rights are respected, protected and fulfilled during the development process and outcome.\(^{27}\) This paper will therefore consider a HRBAD as

\(^{25}\) Sano, Hans-Otto, supra#21.

\(^{26}\) A HRBA incorporated all the principles of good programming but goes further by enhancing accountability whereby each claim has a correlative duty; see Jonsson, supra #16.

\(^{27}\) This author is of the opinion that this definition also de-politicizes HRBAD principles such as accountability. While such issues of accountability are of highly sensitive nature, it is no longer a debate.
nothing more or less than the States’ clear legal obligation to use human rights principles and laws during the development process as a matter of legal obligation.

2.3 International Law and the Right to Housing

Accepting the above definition, the paper moves onto the existing human rights - protecting the right to adequate housing in international law- in order to establish the states’ legal obligations and define a human rights based approach to housing.

The right is enshrined in both Article 25 of the UDHR and Article 11 (1) of ICESCR. As South Africa is one of the few counties in the world that domestically recognizes economic, social and cultural rights in its Constitution and jurisprudence, it is important to note that it has not ratified ICESCR. While Chapter three will explain the extent to which South Africa has incorporated the right internally, this section nonetheless outlines the international obligations for protecting the right. Regardless of the Declarations non-legal binding status and non-ratification of ICESCR, South Africa has recognized economic, social and cultural rights not only through domestic legislation but its participation within the UN (including inviting the Special Rapporteur on Housing to visit South Africa and ratifying CRC).

Possibly the most important outcome of international law on the right is that it specifies that it is interlinked with the fulfillment of other economic, social and cultural rights. Article 25 of the UDHR states “Everyone has a right to an adequate standard of living for the health and well-being of himself and of his family, including food, clothing and housing…”28 Article 11 (1) similarly bundles the right to housing with other economic and social rights. The articles accentuate that other social services and economic opportunities be taken into account in order to viably sustain the right to housing. Article 11 of ICESCR goes further than Article 25 of UDHR by adding that states must work towards the “continuous improvement of living conditions.” In other words, Article 11

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28 Universal Declaration of Human Rights, art 25 and International Covenant on Economic, Social and Cultural Rights art 12
specifies that fulfilling the right to housing is a constant process that the state must work unremittingly towards achieving. The Committee on Economic Social and Cultural Rights (CESCR) General Comment 4 is considered the most authoritative source on the contents of the right to adequate housing.\textsuperscript{29} It clarifies that adequate housing as defined under Art. 11 (1) of CESCR means: adequate “privacy, space, security, lighting, ventilation, basic infrastructure, all at an affordable cost within a reasonable distance from job opportunities and social services.”\textsuperscript{30} The General Comment further defines the dimensions of the right to include the seven aspects; legal security of tenure, availability of services, material, facilities and infrastructure, affordability, location and cultural adequacy.\textsuperscript{31} This is supported by Article 27(1) of the CRC which recognizes “the right of every child to a standard of living adequate” and (2) that “State parties will take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

The right to housing is complimented by the right to secure tenure. Security of tenure is vital in protecting residents against arbitrary forced evictions as well as the ability to secure adequate housing. CESCR’s General Comment 7 explains that Article 11(1) precludes that government is to refrain from carrying out forced evictions and have the obligation to protect persons from forced evictions carried out by non-state actors such as corporations, international financial institutions and landlords. The general comment concludes that all persons should have a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.\textsuperscript{32}

\textsuperscript{31} See General Comment for definitions of these terms.
\textsuperscript{32} General Comment 7 \textit{The Right to Adequate Housing; Forced Evictions} Committee on Economic, Social and Cultural Rights, 20 May 1997.
Article 2 of ICESCR expands on the nature of a state’s legal obligation: the state must fulfill its duties to the “maximum of its available resources”. General Comment 4 clarifies that in regards of recourses, there is a “minimum core obligation” regardless of available resources. Accordingly, the State must entrench minimum standards and achievements into domestic law and policy in order to fulfill its international legal obligations.

International foundations on the right to adequate housing are set and clear. This is not to say that there are not other issues to address in housing and regardless of current protections millions remain with no or inadequate shelter. Scott Leckie, founder of the Center on Housing Right and Evictions (COHRE) declares there is a need for future advancement of adequate housing norms to address areas that are currently not protected under human rights law these points range from prohibiting the criminalization of the homelessness to ensuring equal inheritance rights for women.

2.4 Extra-territoriality

Human Rights law traditionally has been regarded as a State obligation to the individuals in their territory and jurisdiction. However, the drafting history behind the Convention suggests Article 2 of ICESCR on international cooperation developed out of the recognition that states with in certain cases, even when using its resources to its maximum it would be insufficient in realizing the right. International cooperation would be necessary in order to fulfill the full realization of the rights. CESCR’s General Comment No.3 on State obligation emphasizes that full fulfillment is reliant on States utilizing “maximum resources” and that “it is particularly incumbent upon those State that are in a position to assist.” It further stresses the importance of the Declaration on the Right to

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33 International Covenant on Economic, Social and Cultural Rights, Art. 2.
35 Leckie, supra #29.
Development and need for State parties to take full account the principles of “an active program of international assistance” for full fulfillment of the right.37

Scholars note that internalization of international obligation is still far from reaching the new reality of an increasing independent/globalized world. While the Committee in recent years has taken up the issue of State’s obligation to exterritorially respect economic, social and cultural rights, (i.e. in cases of economic sanctions), the Committee and Human Rights framework’s work is limited in regards to supporting fulfillment of the international development obligations. Norway, in its concluding observations during a Committee session on ensuring compliance of ISCESCR added that extraterritorial obligations to respect applied undoubtedly in the context of international development assistance.38 While the future will hopefully show an increased understanding and expansion of extraterritorial human right obligations, in the mean time there exists at minimum an obligation to assist internationally in the fulfillment of economic, social and cultural rights. The theoretical and legal gaps of legal exterritorial obligations; however, will show it results in challenge to the application of HRBA to international development.

2.5 A Human Rights Based Approach to Housing

While international law, aside from international assistance, provides a good clarification of States’ human rights obligations it does not explain how those rights should be fulfilled. As mentioned in the previous section, housing must provide a minimum of security of tenure, availability of services, affordability, habitability, accessibility, location and cultural adequacy. Using a human rights approach one would ensure that all of these standards were goals of the development process. During the process of meeting these

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37 UN Committee on Economic, Social and Cultural Rights, The nature of States party obligations, General Comment No.3 (1990).
goals, participation, non-discrimination, accountability, empowerment and the interdependence and invisibility of rights would be mandatory. A housing project taken on by the Ministry of Housing in Northern Ireland provides a good example how this can be done: 39

In April and May 2007, the residents began to devise locally monitored human rights indicators which could measure change over a defined period. These indicators were based on issues which had been identified by the residents as possible violations of their right to adequate housing. They included: accumulation of pigeon waste in communal areas, sewage ingress and drainage problems, dampness and mould, ongoing housing of families with young children in the Towers, response of the Northern Ireland Housing Executive to reported problems and complaints, and the participation of residents in decisions which affect their housing conditions. Using the international human rights tool of progressive realization, the residents then set locally defined human rights indicators and benchmarks based on their selected issues.

The Irish approach provided opportunity for residents to take part in the development process and provided solutions to real problems that were preventing them from living in adequate conditions. It assured that the government would be accountable for programming decisions and were obligated to communicate their intentions for the project and empower the residents to be part of that project’s development. Significantly, the community was able to take part in the establishment of human rights indicators and benchmarks; this is an essential part of ensuring a human rights based approach.

Creating housing programs in the South in general requires different resources and programs than in the Ireland. Of course, a HRBA has to adapt to the local situation and context. Regardless, an approach in South Africa would follow the same strategy of defining benchmarks and indicators based not only on the set out definition of the right to adequate housing but in terms of what the right-holders define as obstacles preventing them from realizing this right.

3 Challenges to Fulfilling the Right to Housing in South Africa

The distinctive feature of a rights-based approach is its legal foundation in not only international but domestic law. South Africa is internationally recognized for its internalization of human rights as constitutional rights. The country has substantial law and policy that works towards fulfilling the right to adequate housing. South Africa has expended an enormous amount of energy into protecting the right. Yet there are serious policy and programming errors that circumvent the fulfillment of the right.

The next section seeks to discover what obligation South Africa has encapsulated into domestic law and what those obligations mean for national, municipal and city governments. The section further gives a narrow overview of South African policy and jurisprudence in order to place case studies in context with the current housing situation.

3.1 Law and Policy

South Africa first laid out its housing policy in its White Paper on A New Housing Policy in 1994. It meant to give order and meaning to “people-centered development.” Under the Housing Policy and Regional Development Programme White Paper (RDP), South Africa laid out a plan to address the serious housing need as a main concern of the new democracy. The RDP explains that “if democracy is to survive and flourish in South Africa, poverty and deprivation has to be tackled and made the first priority”. The Constitution went on to capsulate basic protections that would provide each citizen with the basic right to adequate and secure tenure. Section 26 (1) states everyone has a right to access adequate housing... (2) continues the state must take reasonable legislative and other measures, within its available resources… and (3) that “No one may be evicted from

their home... without considering the relevant circumstances.” Section 28 (1) c provides for the right for children to have basic shelter. The Housing Act of 1997 went on to explain how these basic rights were to be protected and fulfilled. The purpose was to recognize and define the right to housing under the Constitution while distinguishing certainty among duty-bearers on their roles and obligations. The law recognized that under the Constitution of 1996:  

- As adequate shelter, fulfills a basic human need. 
- As both a product and a process. This means, for example, that the Housing Act deals with norms and standards and also general principles is a product of human endeavor and enterprise. This recognition lays the basis of, and provides the justification for, making housing development a people-centered process—a basic tenet of our housing philosophy. 
- As a vital part of Integrated Developmental Planning.

The Housing Act goes further to establish the various roles among national, provincial and municipal government. It affirms that all sectors have an obligation and role in providing adequate housing. 

- National government must establish and facilitate a sustainable national housing development process, and determine national housing policy. 
- Provincial government must create an enabling environment, by doing everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy. 
- Municipalities must pursue the delivery of housing. Every municipality must within the framework for national and provincial housing policy seek to ensure that the right of access to adequate housing is realized. It will do this by actively pursuing the development of housing, by addressing issues of land, services and infrastructure provision, and by creating an enabling environment for housing development in its area of jurisdiction.

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42 The South African Constitution, Section 26. 
44 Integrated planning is South Africa’s attempt to compensate for the previous years of apartheid type planning. It takes form in an annual policy document which is to be used to create better “more integrated” development. At national, provincial, and local levels are to create development programming that addresses, racially divided business and residential areas and the lack of access to social services, transportations, and jobs within the traditionally black residential areas. Essentially, the IDP secures that integration, equality and alleviation of poverty are considered at all levels before while economic or human growth project are planned and formulated. 
45 The Housing Act, supra #43.
The Act excludes a housing development process that is aimed at providing secure and long lasting tenure but rather focuses on land settlement and services. Article 2(1)d of the Act attempts to ensure that all spheres of the government “encourage and support individuals and communities…. in their efforts to fulfill their own housing needs by assisting them in accessing land, services and technical assistance in a way that leads to the transfer of skills to, and empowerment of, the community.” The article merely contemplates the process of securing tenure rather than laying out operationalization and benchmarking.

Scholars argue that the ambiguity of government’s role in housing within the Act makes it uncertain whether it can function as a framework for securing housing. Notably a HRBAD could possibly better assist in ensuring that law and policy work towards lasting tenure through short and long term respect for human rights. The next section goes into the lack of focus on human rights throughout South African policy.

3.2 Gaps in Policy

Since 1994, there has been much discussion and conflict over how the right to housing is to be fulfilled. Politicians have argued over whether to direct state resources towards the construction of formal houses or to subsidize support that would only provide partial shelter, that is whether to build adequate structures that are aesthetically and environmentally better for some of the poor, or give more limited improvements to current rundown informal settlements that would reach a wider number of people. Much of the policy that came out of Constitution and Housing Act went into a National Housing Code that successfully built block homes for many people but the policy lacked a multi-dimensional assessment of the causes of the housing situation and the vast needs of the South African poor. The section below briefly covers the five main South African policies under the National Housing Code.


Up until 2005, the National Subsidy Scheme was the largest program of assistance. The government worked towards the establishment of formal homes. Over 1.5 million homes were built under the scheme between 1994 and 2003. However, locations were often isolated and the construction inadequate. Widespread local corruption hindered the ability of the program to delivery and generally the poorest were not able to meet the saving requirements and were not able to gain access to subsidies. Critics claimed that the appropriateness of housing type and tenure were not considered in the Scheme’s planning.

In October 1997, the People’s Housing Process (PHP) was identified as a strategy that could better address the housing crisis by working with communities. PHP works to make an agreement between groups of people who qualify for housing subsidies to pool their resources and contribute labor to group projects in order to make the most of their subsidies. It gives support to local NGOs active in the housing sector to assist communities in planning housing policy while acknowledging the need to develop policy to deal with informal settlements. The goal of the policy is to enable the beneficiaries to take part in the housing process while teaching them skills such as project management and building. The skills potentially could be used to help the beneficiaries get a job after the project is finished. However, the program has struggled from the allocation of unsuitable locations, bureaucratic inefficiency, and institutional gaps and does not hold the development duty holders accountable.

The Institutional Housing Subsidy was developed to deal with the spatial programs left by the apartheid regime and develop inner-city housing projects. It is considered one of the more successful programs, but has not been successful in targeting the poorest of the poor, as inner-city sites are unaffordable for them.

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48 Plessis and Wilson, supra #30, p32.
The Emergency Housing Policy was created to deal with individuals in precarious positions due to natural disaster, mass eviction or relocation for health reasons. The program is significant because it takes into account the individuals’ rights while they are waiting for housing. While the program is able to release funding to deal with emergency situations, it is not supplemented with a solid plan to either upgrade homes or provide lower income with suitable rental assistance, making the policy only good for short term tenure security.

South Africa falls far short from delivering housing to all its citizens. Patrick Bond in discussing the reasons behind policy’s failure to address urban housing development programming argues that there has not been a radical shift in politics after 1994. Prejudices and neo-liberal policies continue to dictate housing policy and programming rather than people centered policies that provide long-term tenure.

In 2006, reflecting on 10 years of democracy, South Africa sought to deal with its housing policy failures. The government launched the Comprehensive Plan for the Sustainable Development of Human Settlements (Breaking New Ground) to address problems such as the growing inner-city housing demand, lack of delivery, and down-raiding. The new plan addresses low-income housing, as well as the needs of the entire residential property market with the objective of breaking the barriers between the formal market and the informal enables flexibly in difference types of housing in meeting the needs of the poor by making access to subsidies for different kinds type of projects, such as informal settlements much easier. As the latter in-situ upgrading case will show, the affordability and sustainability of such project has not yet been addressed, creating enormous challenges for the operationalization of the approach.

3.3 Leading Jurisprudence

While the Emergency Housing Subsidy Project notably acknowledges that people are entitled to their rights during the housing process as well as the outcome, it has not always

51 Plessis and Wilson, supra #30, p.34.
52 Bond, Patrick ‘The degeneration of urban policy after apartheid’ in Harrison, Huchzermeyer and Mayekiso, supra #49, p54.
53 Bond, Patrick, supra #52, p55.
 provided effective or sufficient protection. According to COHRE, ineffective policy has led to an inability to “cater for people living in desperate circumstances while they wait in the queue for low cost housing.”  

South African courts have recognized this serious challenge to recognize people’s rights while they are waiting for housing. Through these decisions, the Constitutional Court has underlined adequate housing and other economic, social and cultural rights as during the housing process and highlights problems beyond policy gaps hindering the right.

In the landmark case the *Government of the Republic of South Africa and Others vs. Grootboom and Other*, the Municipal Court ruled that there was an immediate obligation on the state to house the community’s children and their parents with adequate temporary shelter after they were evicted from their homes. The state appealed and the original decision was tossed aside. When the case was brought to the Constitutional Court, it chose instead of focusing on protecting a child’s right to housing it focused on an individual’s general right to housing under Section 26 of the Constitution. The Court held that the State’s policy was not reasonable as it did not provide adequate living for those living in situations of crisis or who were in desperate need. The Court highlighted that housing programming must:

- Be comprehensive, coherent and effective;
- Be reasonable within the social, economic and historical context of widespread deprivation and within the availability of recourses;
- Give special attention to the needs of the most vulnerable;
- Lower administrative, operational and financial barriers over time;
- Allocate responsibilities and tasks clearly to all three spheres of government;
- Be implemented reasonably, adequate resourced and free of bureaucratic inefficiency or onerous regulations.

The decision is internationally considered one of the most important examples of the judicial enforcement of socioeconomic rights due to its judgment on what is considered reasonable steps for fulfilling the right to housing. However, the approach taken by the

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54 Plessis and Wilson, supra #30, p26.
55 Children under the Constitution are provided an extra protection under Section 28 which explicitly declares “every child has the right to shelter,” The South African Constitution.
56 Plessis and Wilson, supra #30, p26.
57 Government of the Republic of South Africa and Others vs. Grootboom and Other
Court is still considered overly cautious, since it did little to provide meaningful orders that would oblige the government to live up to these standards or provide a meaningful solution to the applicants.58 Like in many cases, the Constitutional Court is reluctant to establish precedence for other cases; rather it favors setting out very general instructions on how to remedy the violation. Nonetheless, the States obligation to develop reasonable and effective development policy is a good starting point for a HRBA to housing and will be discussed in the analysis for ensuring that human rights are respected within the housing planning and programming.

The Rand Property Ltd Case59 opens up a wider picture of South African housing problems, highlighting the City of Johannesburg’s extreme desire to keep poor people away from the City. During the eviction process of over 400 people in an old inner-city building, the City chose to use an old apartheid-era law granting a municipality the statutory power and duty to prevent dangerous living conditions within its jurisdiction. The City claimed it was for the resident and to reverse inner-city decay.60 The city chose to use this statute from the National Building Regulations and Standards Act over new legislation as it was easier to evict the residents without concern for their rights. New legislation, Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, No. 19, which provides better protection to unlawful occupiers who previously had some form of consent or right to occupy the land in question. It enforces section 26(3) of the Constitution by prohibiting arbitrary evictions.61 The High Court of South Africa focused on the right to access adequate housing under section 26 of the Constitution, and claimed it

60 Under section 12(4)(b),7 a municipality can order the occupiers to vacate any building that it considers unsafe or unhealthy. This section is regularly used in Johannesburg to clear inner city slums or other “bad buildings.”
61 PIE is the most secure in providing the most vulnerable with protection against eviction. Section 4 of the PIE requires the court to consider the rights and needs of the elderly, children, disabled persons, and households headed by women; the duration of the occupation of the land; and whether land can reasonably be made available by the municipality or state for the relocation of the unlawful occupier before ordering an eviction order.
was unnecessary to discuss either the potential unconstitutionality of the apartheid-era law or how evictions laws should be applied in order to protect the rights of the individuals, avoiding the highly political issue of how the State should handle law towards evictions.

The City appealed but the Court upheld the decision and ruled the City was mandated by 26(2) to take part in meaningful engagement before granting an order evicting people from their homes.62 The Court, dealing with the use of old-apartheid laws, addressed the National Building Regulations and Standards Act 12(6) provision which made it illegal to live in a building after an eviction notice. The provision was changed to read that it was only after the eviction order was approved by the Court was it illegal to occupy the building.

In terms of the judgment, it highlights the vulnerability of the people in the inner-city attempting to secure adequate housing. It shows the outright abuse of old, apartheid laws to keep the poor from entering the City. The case extensively deals with the question of participation that residents can only be evicted, after the municipality must make reasonable efforts to engage with occupiers and it is only if these reasonable efforts fail that a municipality may proceed. The Court in the advisory section of the judgment suggests that people residents themselves had a duty to act responsibly themselves during the engagement process and that civil society organization can help facilitate the engagement process.63

The case so clearly highlights the need for a development process that addresses issues of power, left over apartheid law, and participation. There is an on-going debate on how far Court’s can go without over extending their judicial authority. Without entering that debate, it is of this work’s opinion that it is the Court’s role to uphold rights in a meaningful way that obliges government to either take reasonable steps to fulfill them or avoid violating them. A HRBAD uses the Court, to ensure that rights are enforced during the development process and outcome. While this paper does not seek to analyze the practices of the South African Court, it does highlight that the Courts have done much to

62 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg, Rand Properties (Pty), para 5.1.
63 Rand Properties, supra #62, para 20.
recognize the right to adequate housing. The Court is now beginning (as seen through Rand) to overcome its struggles to deal with the government’s inability to formulate law into policy that provides meaningful solutions.

3.4 Compliance with International Law

In April 2007, after the UN Special Rapporteur on Adequate Housing visited South Africa, he praised South Africa for its recognition and prior work on fulfilling the right to housing but emphasized South Africa needed to ensure a clear implementation strategy backed by rigorous monition and evaluation and that housing policy needed to go further in supporting inclusiveness, legal aid, protection of the vulnerable, meaningful commitment and participation, and linkages to other rights.64 He was deeply concerned that these human rights principles were not being used during the process, so much that he called on a moratorium on evictions until all national, provincial and local legislation was brought in line with relevant Constitutional provisions and Court judgments.65 The fact that this report and its recommendations was largely ignored by the National Ministry of Housing remains concerning.66

64 Kothari, supra #14.
65 Kothari, supra #14, p27, para97.
66 Hathorn, Moray, Attorney of Law, Weber Wetzel and Bowens, Interview, Johannesburg, South Africa. 6 November 2007.
4 Case Study 1: A Human Rights Based Approach to In-Situ Upgrading

Among the poorest in society are the millions that live in urban informal settlements. Today, 22 million people in South Africa, half the country’s population, live in urban centers, a third of those live in adequate shelters in informal settlements. Informal settlements often fail to protect even the most basic human rights. They are deficient in water, sanitation, electricity, ventilation, food preparation and storage. Conditions in the settlements are associated with a range of health risks including infectious diseases such as HIV/AIDS, diarrhea, and respiratory diseases. The risk of fire and violent-crime is much higher. The residents often lack the most basic services and work.

In 2003, researchers, activists and politicians began seriously calling for new approaches for dealing with informal settlement to deal with their growth. Colin Marx, a lead researcher on informal settlements in South Africa, called for a change in policy that would view housing programming as a creative process that worked towards changing the quality of life, rather than merely an upgrading scheme that recognized technical rather than human aspects of development. He argued the severe levels of human deprivation in informal settlements existed not because of State unwillingness to deal with them, but technical inadequacies of response to improving the settlements. The case studies will show that non-fulfillment was a result of much more than “technical inadequacies” but what Marx was referring to is that there has been a decade of State attempt to implement policy to fulfill the right to housing and that are serious problems with South African policy that prevent them from succeeding.

68 State of the Cities, supra #67.
Supporters of the new informal resettlement policy argued that that the Ministries current policies, while non-racially based, perpetuated the growth of informal settlements and segregation patterns of urban development as they did not deal with the environmental, physical, and socio-economic factors. The government needed to change its mind frame that informal settlements were just that; informal spaces outside the formal\legal housing marking, thus ignoring the resident’s right to secure tenure on the land.

Leading this campaign to legitimize and upgrade informal settlements was Marie Huchzermeyer along with her research team who wrote recommendations for the National Department of Housing on informal settlement support. Huchzermeyer and her team argued that policies to support informal settlements needed to work towards poverty eradication, reducing vulnerability, and promoting inclusion. Many of her team’s recommendations were incorporated into the Informal Settlement Upgrading Programme, Chapter 13 of the National Housing Code. The Chapter outlines a four phase process beginning with an application to determine feasibility, then the initiation of the project involving community participation/empowerment and household surveying. Phase 3 involves implementation, project managing, formalizing land, implementation of social services and resolving disputes. The final phase includes township establishment, ownership, and registration.

The spirit of Chapter 13 is by far radical, in practical terms, it uses a HRBA to informal settlement upgrading, in particular: the principle of relocation as a last resort, the recognition of the need to strengthen social capital including community organization in and importance to minimize disruption to livelihoods, and the guarantee to access schooling and survival opportunities. The goal of the policy is to bring creative and progressive solutions to the enormous housing backlog. In-situ upgrading makes funding

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70 University of the Witwatersrand Research Team, Background Paper 1: Conceptual implications of emerging policy shifts Study into Supporting Informal Settlements, For the Department of Housing, Pretoria Hurzemeyer, 6.
71 Background Paper 1, supra#70, p6-7.
72 The Housing Code contains National Housing Policy that is binding on municipal and provincial government.
74 Chapter 13, supra #73
available for land upgrading, for municipalities within an approved Integrated Development Plan.\textsuperscript{75} It suggests that each province begin a pilot study that addresses land that in need of rehabilitation. There is no cap on how much can be spent on land rehabilitation, enabling for unique responses for unique situations.\textsuperscript{76}

It is notable that the Ministry of Housing took vast efforts to consider leading experts on the poor and housing, and shows at the very least the willingness of the Ministry of Housing to create meaningful legislation that would lead to the protection and fulfillment of adequate housing and secure tenure for the poor.\textsuperscript{77} This paper does not argue that Chapter 13 is flawless; certainly it could be improved to better secure tenure; including expanding programming guidelines to include long-term rather than just short-term support.\textsuperscript{78} Nonetheless, it is a huge step in the recognition of secure tenure in a location that works towards poverty eradication, reduction of vulnerability and promotion of social inclusion.\textsuperscript{79} The Policy requires empowerment, participation and meticulous planning. It has also become an essential piece of Breaking New Ground.

While it remains an important document and part of South African policy, getting government officials to properly apply it is another matter. At the time Chapter 13 was passed, the ANC overwhelming won the vote of the poor and saw as its mandate to intensify government policies to eradicate poverty. This movement was transferred into government policy to move towards “a shack free society.”\textsuperscript{80} This pressure to eradicate poverty has perpetuated artificial policies and beautification projects rather than capacity building for the poor. Huchzermeyer pointed out in earlier drafts of Chapter 13 that the Ministry had divided informal settlements into two categories, “the visible” and “non-visible;” the latter were to be subjected to in-situ upgrading while the former were to be


\textsuperscript{76} The New Instrument for Upgrading Informal Settlements in South Africa, supra #75, p50.

\textsuperscript{77} It should be noted though that civil society was not consulted, as the Ministry finalized the draft of the Chapter 13 before there was time for comments.

\textsuperscript{78} The New Instrument for Upgrading Informal Settlements in South Africa: Contributions and Constraint,” supra #75.

\textsuperscript{79} The New Instrument for Upgrading Informal Settlements in South Africa, supra #75, p49.

\textsuperscript{80} The New Instrument for Upgrading Informal Settlements in South Africa, quoting Lindiwe Sisulu, South African Minister of Housing, supra #75, p44.
transformed into formal/beautified social housing blocks. While fortunately this separation was not considered in the final draft. There is serious pressure on and within the Ministry to focus on improving poverty astatically, as to promote the image of economic growth, rather than true and meaningful development which focuses on eradicating poverty, of which is currently being challenged in Durban opportunities.

Between 2002 and 2004, despite all formal attempts to improve the South African housing situation, the number living in informal settlements increased from 1.049 million dwellings to 1.376. Since 2004, massive government action has sought to address, improve, and legitimize these areas. In partial response to the increase in informal slum upgrading and as a result of the UN Millennium Development Goal to improve the lives of 100 million slum dwellers by 2020, the Department of National Housing set the goal to eradicate informal settlements by 2014. Yet there is much criticism about the approach to ‘eradicate slums,’ In Durban, the Centre for Applied Legal Studies at the University of Witwatersrand has recently sent a petition to the municipal court to challenge the constitutionality of the policy, as it contradicts the basic right to secure tenure. It is also contested whether relocation strategies are necessarily beneficial for inhabitants of informal settlements.

It is no surprise that despite a decrease last year in the number of informal settlements, the rate within major urban centers, including the City of Johannesburg, continued to rise. While new pressures of economic growth emerge within South African cities, old habits of pushing out the poor persist.

In order to address these challenges, the Centre on Housing Rights and Evictions has recently emerged with a HRBA to in-situ upgrading. The program suggests that the following human right principles must be considered:

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84 Wilson, Communication, supra#83
86 The model is at the forefront of the debate on a HRBA to housing, as it’s first of its kind to provide a comprehensive human rights guide to the stark challenges of in-situ upgrading. The above approach is this
1. **Supporting local initiatives and NGO**: Government should support such groups, as they can be extremely effective in tackling serious indignities preventing residents from achieving a minimum standard of living.

2. **Access to information**: Residents should have accurate information on Government plans. The State should ensure effective communication through a memorandum of understanding between the community and government, where the government would make clear written and signed commitments.

3. **Recognition** of different levels of poverty and vulnerable groups and how special attention needs to be paid in order to secure tenure for all groups. Special attention must be paid to securing access to water and tenure for women. Also recognition of religious, cultural, economic and recreational activities and institutions within the settlement and how the development project can relate to supporting (rather than destroying) these needs and activities.

4. **Addressing Patronage, Disunity and Disempowerment** should be specifically addressed by the State, it must ensure that those (from state officials to residents) with power and are able to influence the development process do not use it solely for their benefit. The government must establish equal cooperation and communication for all beneficiaries.

5. **Emergency responses/Basic Services** should be immediately considered and supported in attempt to fulfill the minimum core, i.e. basic refuse, water and sanitation projects that are reasonably affordable and immediately benefit the lives of all the residents.

6. **Improving security of tenure** COHRE suggest that there is a serious need to develop a secure tenure model that works for in-situ upgrading, formalizing individual right to land tenure not necessarily the case. Experience in Zamia showed that a system of long term occupancy licensing held through a local office secured affordable household tenure. This includes developing financial mechanisms to support sustainability and ensure long term development partnerships.

7. **Managing High Density Areas** through using temporary relocation as a last resort and ensuring a mammal disruption to economic and social linkages during the relocation process, by ensuring relocation to a close proximity.

8. **Meaningful participation**: COHRE suggests in order to ensure effective participation the State could break down informal settlements into smaller areas, in order to avoid exposure and on job training of key players at all levels.

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87 *Listening to the Poor-Housing Rights in Kenya*, p109, supra #86.

88 *Listening to the Poor-Housing Rights in Kenya*, p124, supra #86.
The following two case studies examine South African attempts at in-situ upgrading. There is a serious struggle to shift from apartheid type mentalities and prioritize people over economic growth, COHRE’s approach is much needed.

4.1.1 Thembelihle

During the late 1990’s, an informal settlement located in Thembelihle, Lenasia had been serviced and regularized by the City of Johannesburg. The city initially sought to improve the conditions of the settlement by providing building material, water, and electricity. In 1998, the City of Johannesburg performed a study on whether informal in-situ upgrading was feasible, they found that the settlement was on top of highly erosive dolomite rock. This results in dangerous sink holes that pose a risk to buildings and the residents living there. In 2000, because of the dolomite foundation, the City formed a plan to relocate the residents to Vlakfontein.

According to interviews in 2002, city officials threatened a number of residents with the demolition of their homes if they did not consent to relocation to Vlakfontein. Consequently, a third of the inhabitants were ‘forcibly’ persuaded to relocate to Vlakfontein. The municipality denies the accusations, claiming the City “held extensive public meetings in Thembelihle during which a large number of the residents, in light of the geotechnical survey, decided to relocate.”

Tensions resulting from the threat of relocation/eviction resulted in a violent clash between the City and residents on June 22, 2002, when the City hired a security company to assist with ‘voluntary’ relocations to Vlakfontein. Both sides maintain their own account of the confrontation.

The City’s official website claims that the relocations were voluntarily and that the confrontation began when an “the unruly mob [who wanted to stop the relocation] went on a rampage…throwing petrol bombs at a school, looting businesses, robbing shop owners,

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89 Plessis and Wilson, supra #30, p86.
90 Plessis and Wilson, supra #30, p87.
91 Plessis and Wilson., supra #30, p89.
throwing stones at police cars and beating innocent bystanders.” 92 Thembelihle’s community representative described to COHRE that the City sent:

A large numbers of Red Ants were sent in to remove people... as a result a large group of residents gathered to… resist the attempted forced relocation... the Red Ants fired shots at the community. Three people were shot... stones were thrown by some of the residents in this incident. 93

In April 2003, the City applied to the High Court for the eviction of the residents and their relocation to Vlakfontein. Moray Hathorn, heading the pro-bono/public-interest division of Weber Wetzel and Bowens (WWB) has assisted the residents with legal representation since the eviction order in 2003. Hathorn hired a consultation firm to look into the 1998 geo-study findings. The consolation concluded that the 1998 test showed that habitation was feasible, providing a further study of the water table of Lenasia. The investigation showed that large areas of Thembelihle were low risk or of low- to medium risk for dolomite, for the purposes of the establishment of housing. The major part of the settlement fell within the low- to medium-risk categories. Only a limited area of Thembelihle was high risk and uninhabitable. 94

The City’s development plan for Thembelihle residents is quiet concealed and hard to understand. On the City’s webpage, remains a quote from the former mayor claiming that the reason for relocation was due to residents “living over a volcanic plug of some sort which (could) erupt anytime.” 95 Yet as the hired consulters had discovered; the original report commissioned by the City provided no evidence that the dolomite within Thembelihle was as dangerous as the City had claimed. 96 The City expressed no concern towards their legal obligation under Chapter 13.
There was very little effort by the City to establish relationships or empower individuals to participate in the housing programming targeted for the residents as stipulated under Chapter 13. Maureen Mnisi, from the Landless People’s Movement, speaking on behalf of the community, argued that people would not have had marches and picketing if they had been included in the decision process. While the statement is speculative, it illustrates the community’s desire to be involved in the process of their development. While the State maintains that representatives of the community were consulted; other than holding these consultations there was no effort to have them take part in the development, no way to ensure their participation, or empower them in a meaningful way.

In filing papers answering the eviction order, WWB argued that neither participation nor in-situ upgrading had been considered before deciding to evict residents. The law firm argued that instead of using project-linked subsidies the City should consider using the dolomite challenges as a Chapter 13 pilot project that would design infrastructure which would be appropriate for informal settlements which were located on low to medium risk dolomite.97 It was the City’s obligation to look into this request because under Chapter 13 paragraph 4 displacement can be used only as a last resort, and the City was obligated to preserve community cohesion and minimize disruption as these networks were often essential for their livelihoods and survival.98 The City had not considered the economic and social advantages of Thembelihle. That the community was well serviced by several primary schools whereas Vlakfontein had just one fully operational primary school, with another under construction.99 Access to transport to the inner city and to jobs was considered to be much better in and around Lenasia than in Vlakfontein.”100 Johannesburg had not considered the impact of destroying the economic linkages; social services and network would be considerable.

Hathorn particularly voiced concern that the act to remove thousands of residents from an economically integrated and prosperous community to a location that was on the

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97 Hathorn, interview, supra #66.
98 Chapter 13, supra #73, para 4.
99 Hathorn, interview, supra #66.
100 Plessis and Wilson, supra #30, p87.
periphery of society, was contrary to basic Constitution principles of equality and integration. Thembelihle’s filing paper was not responded to until July 2005, 26 months since the eviction have been ordered, and over 5 years since the Thembelihle had been originally considered for informal upgrading. The City said it would consider revisiting its decision to relocate the residents, depending on the results of a new geo-study it intended to commission.

During 2005 the community reported to WWB that they were under pressure to relocate to Lehae, a new ‘model’ low-income township development on the outskirts of Lenasia. The law firm acknowledged that this was preferable to Vlakfontein, but contrary to the requirements under Chapter 13 of the Housing Code which requires in-situ upgrading when feasible.

WWB continued to request meetings with the City of Johannesburg to discuss conducting a study on the feasibility of in-situ upgrading. In order to carry out this study a further 80 boreholes at a cost of about R800 000 would be necessary. The Johannesburg Mayoral Committee met in January 2008, and decided not to allocate funding to dig the boreholes. WWB is now considering appropriate legal response. Hathorn claims that they may have to resort to litigation to ensure compliance with Chapter 13.

4.2 Using a Human Rights Based Approach in Thembelihle

The tragedy of Thembelihle is that the City of Johannesburg recognized the inhabitants’ right to adequate housing and sought to fulfill it, but eight years later the majority of residents live in the same squalid conditions they lived in when the housing project began. Throughout these eight years and even prior to that they have lived in fear of being evicted, and of loosing their systems they depend on for survival.

South Africa has developed fine standards in ensuring the City provides comprehensive housing, particularly Chapter 13 but it is yet to be implemented in a

101 Hathorn, Moray, Interview.
103 Hathorn, Moray, Attorney of Law, Weber Wetzel and Bowens, Email, 28 March 2008.
104 Hathorn, Moray, Email, supra #102.
coherent, reasonable and effective manner, free of bureaucratic onerous regulations.\textsuperscript{105} A human rights based approach could add significant value to the housing programming to in-situ upgrading. Not one of COHRE’s in-situ upgrading principles was used. The following section briefly highlights a few of the in-situ upgrading principles, particularly participation, indivisibility of rights and accountability.

4.2.1 Dealing with Power and Resistance: Empowerment and Participation

Power imbalance between the local government and residents is one of the top obstacles preventing the realization of the right. A human rights based approach addresses the issue of power that is currently not fully being addressed under the City’s development planning.

Dominic Mahlangu noted that Gauteng Province was rapidly running out of land and that very little land is left can be used for development, highlighting that it was in the interest of the City to make use of dolomite land when possible, particularly when it is of only low to medium risk and suitable for habitation.\textsuperscript{106} Yet the City continues to do everything in its power to continue on its path to relocate the Thembelihle residents to peripheral areas rather than even consider improving their location within a more economically prosperous area. Why?

Hathorn argues that the City’s ‘fundamental turn around in housing’ is “nothing more then an extension of the apartheid regime.”\textsuperscript{107} Huchzermeyer\textsuperscript{108} echoes Hathorn’s disillusionment. She argues that many cities, including Johannesburg have “dug their heels into the dictates of orderly development…using every imaginable reason to justify relocation of the informal settlements through the project-linked subsidy, rather than apply or even consider the Informal Settlement Upgrading Program.”\textsuperscript{109} While, it is impossible to truly understand the motivation of the municipal leaders, their policy sadly does resonate

\textsuperscript{105} See South Africa and Others vs. Grootboom and Other
\textsuperscript{107} Hathorn, \textit{interview}, supra #66.
\textsuperscript{108} She done extensive research on the struggle to get municipalities to recognize in situ upgrading under Chapter 13
\textsuperscript{109} Debating Informal Settlement Policy, supra #96.
that of the apartheid-era; moving individuals further from integrated economic prosperous areas.

Stephen Greenberg, researching an agriculture project within Thembelihle, further records the City’s attempt to disempower the residents. While at a mall opening outside Thembelihle in March 2006, Greenberg discovered that while “The mall was meant to employ local people as part of its social responsibility…when Thembelihle residents arrived to see what jobs were available; the Mall management showed them a letter from the local ANC councilor… which said the management must not hire anyone from Thembelihle.”110

The City prevented the residents from getting jobs in order to forcibly persuade them to relocate. This power imbalance between the community and City is a fundamental target of the HRBA. A HRBAD would involve a process of empowering both the City to meet its obligations and the community to realize their rights. Since it is the State which has the legal obligation to fulfill the right to housing, the process of empowerment should be overseen by the Department of Housing. It could begin by the Department ensuring that local authorities have the capacity and understanding to fulfill their obligations and to not abuse their power but use it to empower.

An interesting question is to what extent local failure to apply the new housing standards is based on resistance and to what extent it is simply a lack capacity and education. Either way, the State is responsible for discerning reasons for lack of fulfillment and ensuring that the City is empowering rather than disempowering the community. Essentially, the State is responsible for ensuring that the provincial and municipal leaders have the capacity to do their job, and remove those who are unable to do it.

At a conference on Power, Rights and Poverty reduction, the Empowerment Team led by Lisa VeneKlasen defined empowerment as “increasing the capacity of individuals

and groups to make choices and to transform these choices into desired outcomes.”\textsuperscript{111} She clarified that empowerment involved “a process of challenging and transforming power relations and creating new relationships… a participatory process that engages people in reflection, inquiry and action.”\textsuperscript{112} This involves establishing better relationships and roles between the government and community. The key being to create a process that encapsulates all three: reflection, inquiry, and action. This begins with the State recognizing that exclusion and power issues at the local level are serious problems and that the legislation and policy on empowerment are not sufficient alone. This would include a capacity building process for both the duty bearers and beneficiaries.

Capacity building for residents would include ensuring that legal standard requiring participation and empowerment were put into action. The current legal standards on empowerment and participation are encouraging, particularly within Chapter 13. Section 13.2 has an entire section on empowerment and that the process must be transparent and participatory.\textsuperscript{113} Chapter 4 of the City of Johannesburg’s Integrated Development Plan for 2008 goes into further details on the City’s process of outreach and community development. They stress the City’s commitment to empowerment and participation for the right -holders. In 2007, the MEC for Local Government in Gauteng, in fact praised the City of Johannesburg for improvements’ it made in the participation and consultations of its residents.\textsuperscript{114} To what extent “participation” has improved in Johannesburg differs, depending on which residents, government officials or NGO one asks, but it is notable there has been a significant effort within the City to increase participation. Yet is this participation meaningful? The City is well equipped at reciting the general principles of participation and the dates in which they meet with residents, but not really what that participation entails, or what participation means other than strictly meeting with residents.

\textsuperscript{112} VeneKlasen, Lisa and Miller, Valerie, ‘Rights-Based Approaches and Beyond: Challenges of Linking Rights and Participation’ in \textit{Power Rights and Poverty}, supra #111.
\textsuperscript{113} Chapter 13, supra #73
However progressive laws and policies are, they do little to protect housing rights without an approach that works towards their enforcement.

Participation and empowerment under a HRBAD would mean that government policies were used in a way that meaningfully empowered the residents to participate, rather than enabling City officials to apply the principles as they wished. Under a HRBAD, participation and empowerment means that residents have a meaningful role within the development project which is supported, not resisted by the City. Plan Act, an organization working to achieve full participation and involvement of local communities in the development planning process, stressed the need for a strict plan for implementation for the participation process.  

The Department of Housing has to provide strategic leadership and oversight of local government. The local level needs to carry out a process of a “systematic, on-going and well managed consultative process of choosing and implementing development priorities in conditions of scarce resources.” There is a need to develop institutional framework for public participation that addresses the decentralization of leadership representing communities. There needs to be a restructuring that allows for a true representative involvement of the community in plan and decision-making process. This process would mean new decision-making and operational structures as wells new skills for local government to oversee such structures.

Plan Act works to train local city officials in building their capacity and how to develop such an institutional framework. While this paper excludes the tremendous effort civil society has in improving housing-delivery using a HRBAD, this author is of the opinion that the value-added of the HRBAD is not that Plan Act uses the HRBAD to build capacity for local municipalities, but that the State has a legal obligation to do so in order to fulfill the rights of its citizens. As stated under the HRBA section, rights lead to entitlements in which the government is legal obligates to take on a process that respects,

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116 Moloi, Tsepiso, supra note #115.

117 Moloi, Tsepiso, supra #115.
protects and fulfill those rights and entitlements. The approach transfers good development practices, such as participation, into a meaningful process.

4.2.2 Interdependence and Indivisibility of Rights

One way to ensure that the development process is people-centered and that the City is not abusing its power is to respect the interdependence and indivisibility of human rights. The principle of indivisibility and interdependence of human rights means that civil and political, economic, social and cultural rights are interrelated and equal. They are indivisible in the sense that only a full protection of all rights upholds human dignity.

Thembelihle illustrates how the City’s violation of tenure security, affected many of the residents’ other rights. A few days after the protest at the mall, Greenberg spoke with the operational manager of poverty alleviation in Johannesburg metro’s region 11, who said that “the food gardens in Thembelihle should not invest in any permanent infrastructure because residents were to be relocated…” 118 This ‘relocation’ has taken over eight years and still has not happened and meanwhile prevented residents from fulfilling their economic and social rights. In regards to the gardens, Greenberg concluded that the tenure insecurity within the settlement contributed to the ultimate failure of an agriculture project that was to enhance food security. 119 He further commented that the collapse of the LPM agriculture network was due to the state repression of arresting activists even though no crimes were committed, and by isolating the movement and provoking it to adopt tactics that further fuelled its isolation. Resources dried up as support organizations and funders disassociated themselves from such a risky movement. This ultimately led to the weakening of the organizational structure and support for the project. The City’s action led to an entire slew of violations for the Thembelihle residents, including the right to food, and the right not to be discriminated against, and the right to collective organize without subjugation from the government.

Essential to respecting the interdependence and indivisibility of rights under HRBAD is respecting civil and political rights; particularly the right to freedom of

118 Greenberg, supra #110, p22.
119 Greenberg, supra #110, p22.
expression and information, access to information and freedom of assembly and association. In most recent years, the South African government has experienced massive protests against lack of service delivery. These protests end with residents burning tires, and throwing stones while South African police and military force shoot rubber bullets and tear gas into the crowds while arresting and prosecuting the protestors. Many of the NGOs representing the people argue that this is clear suppression of opposition to the ANC’s rule while the government maintains they are trying to subdue to the violence. The South African Freedom of Expression Institute expressed particular concern about increasing police repression from the protests – arresting leaders in order to prevent from them talking from the media.120

The human rights based approach requires that more attention is paid to other rights; in this case freedom of expression, to ensure meaningful participation in the formation of housing policy. Freedom of information is equally important in securing a human rights based process and outcome. The ability to secure other rights is very much dependent on secure tenure. Without information on the City’s plans and intention for Thembelihle, the residents lack not only ability to comment and participate in their own development but the ability to plan for the future; to improve their homes, find jobs, make gardens, or register for schools for their children.

4.3 Accountability

In order to ensure that development programming properly respects and incorporates all rights and rights based principles requires accountability. Jeremy Holland and Simon Brook in a paper written to discuss “Power and Human Rights” for a work session for the World Bank and the United Kingdom Department for International Development argued that development projects should use “measuring household surveys with qualitative probing of institutional processes to general information on empowerment.”121 This would entail the City of Johannesburg collecting disaggregate data based on the conditions and

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needs of the residents of Thembelihle. Based on the results, Johannesburg should formulate (with the residents) target indicators that can be used to hold the municipality accountable. This kind of analysis is unique to a human rights-based approach. Indicators from a HRBAD would go beyond merely measuring delivery but measure the development process, and use human rather than economic growth as benchmarks. The indicators are able to measure to what extent the municipality had carried out its obligations and programming.

The City of Johannesburg has sought to address the issue of accountability. Under the 2008 Housing Integrated Development Plan, regions in Johannesburg must now report to a central housing body, resulting in a single accountability for all housing functions within the City rather than reporting to Regional Directors across the administrative regions. Accordingly, the City has sought means to improve the efficiency and accountability of reporting. However, the reporting is based solely on delivery. See below:

<table>
<thead>
<tr>
<th>FIVE-YEAR STRATEGIC OBJECTIVES</th>
<th>FIVE-YEAR IDP PROGRAMMES AND KEY PROGRAMME ACHIEVEMENTS</th>
<th>2007/08 DELIVERY AGENDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formalise all settlements located on state land 50% of informal settlements formalised or upgraded to a minimum level of basic services…</td>
<td>• Complete township registration in affected areas • Ensure fencing of individual stands to promote home ownership and pride Informal Settlement Management and Upgrade Programme… • Provide water and sanitation to agreed City level • Provide adequate road and storm water infrastructure…</td>
<td>Conduct 50 feasibility studies in the targeted informal settlements for upgrading • Formalise 50 informal settlements by end of the reporting year…</td>
</tr>
</tbody>
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123 Housing, supra #122.
Using human rights based indicators; the monitoring process would not only look at the quality and quantity of delivery but the development process itself. It would hold the City of Johannesburg accountable for fulfilling its legal obligations (i.e. to take measurable actions to see that person’s are targeted for in-situ upgrading before considering reallocation). Practitioners as well as an independent review board would under a HRBA review that:

1. The City used cooperation and constructive dialogue in the development process
2. Complied by appropriate laws and hr rights principles
3. Were meeting targeted indicators (as decided with the residents)
4. Whether the principles of General Comment 4 applied and evaluated?
5. How any possibly delay in housing affected the residents other rights?

Why an independent review board? In a ruling within the High Court of South Africa on Property Lodging investments vs. the Unlawful Occupiers of Halfway Gardens the Court ruled on an eviction order under section 4(7) of PIE that stipulates that before considering eviction the Court “must have regard to all relevant factors, including the period the unlawful occupier and his or her family”. The City of Johannesburg claimed that the

The City is able to partially assist people in desperate need with some measure of relief; funds and resources permitting… the City appreciate the people have the right to adequate housing… the City however prays for patience and understanding whilst it endeavors to attend to thousands upon thousands of desperate people’s needs.

The Court appropriately and progressively responded that this was not acceptable because there were no dates for future implementation or measures to assist the respondents. In the Court’s opinion asking the responded to wait ‘prays for patience’ for the City to do something ‘when available sources and funds are available’ was in breach of the City’s responsibilities, as it did not provide relief for any of the parities.124

This is why a HRBAD requires housing programming to develop indicators and goals that can be used to hold the City accountable. While Thembelihle may have to

124 *Lodging investments vs. the Unlawful Occupiers of Halfway Gardens*, High Court of South Africa Property, The High Court of South Africa, Transvaal Provincial Division, Pretoria, Case No: 6292/06.
litigate in order for the City to recognize its rights to upgrading, Courts are not easily accessible for the poor nor should it be the Courts responsibility to oversee the development process, but to interpret and apply the law. A human rights based approach, while upholding the important role of the Court, would include the review system which would ensure that every development program was evaluated and had developed a proper plan for the development process. The review would be available to the public and could be used in a Court of Law, if the City was found not be to living up to its obligations. There would be legal consequences for non-compliance.

This accountability mechanism, however it would take form, is by far one of the biggest gaps in housing policy in South Africa. Aside, from taking the City to Court, Thembelihle has little options to complain about non-delivery of housing services. Moray Hathorn when asked what measures he took when the City refused to discuss Chapter 13, he relayed that there was very little he can do, aside from take the case to Court. The City of Johannesburg was blatantly unwilling to engage with the community or the owner of the land. When asked what alternatives Hathorn had, or whether he could go to the Ministry of Housing, he paused. He had not gone further because there were no mechanisms to deal with non-compliance. He admitted it was a possible mistake not going to the Ministry of Housing, but that it was not set up to deal with complaints and was preoccupied with planning a national housing development scheme and placed no interest in intertwining itself with such difficulties. This is a failure in part of the Ministry, as it is Ministry of Housing, as the State’s housing body obligation to ensure that the right to housing is fulfilled and supervise municipal\provincial plans. 125

4.4 In-situ Upgrading Future Prospects: Joe Slovo a Comparative Case

Thembelihle’s story is far too often heard in South Africa. The current crisis under Breaking New Ground’s pilot project in Cape Town echoes the failures of Thembelihle. What originally was intended to rehabilitate land under Chapter 13, now appears will not benefit the occupiers that current resident in Joe Slovo. Joe Slovo is a large informal settlement along the N2 Gateway near Cape Town. The plan is to build and sell houses on

125 Hathorn, email, supra #103.
the settlement and while some of the current residents will be eligible for these homes, the majority will be moved to other housing sites further from jobs. The project intends to build apartments for the more affluent who can afford paying rent and bring general prosperity to the City. In 2007, there was an interim eviction order for over 6000 residents from the settlement in order for the project to begin. The project was planned with very little consultation with the residents. The eviction was ordered by the High Court of South Africa which found that the residents were illegal occupants and that the government had not violated eviction legislation. Notably, the Court concluded that the residents of Joe Slovo did not have a right in law to occupy the land. The decision continued that it was not a mass eviction but “relocation.” Western Cape was merely “complying with a constitutional obligation to provide adequate housing”. As if justifying the City’s earlier broken promise to provide at least 70% of the residents with the homes that were to be built on top of their residents and the failure to secure tenure, the judgment concluded that

(Within) pilot projects… mistakes are expected, corrections to mistakes are inevitable, and from here the persons responsible for the implementation of the project and similar ones at a later stage must learn.

The ruling echoes the City’s defense used in the Halfway Gardens case: residents have to bare with the failures and mistakes of the City, rather than consider their right to progressive realization of housing. In the appeal responding to the decision, the attorneys representing the community highlighted the Court wrongly defined that the residents as “unlawful occupiers;” that the City had it at least ‘tacitly’ recognized the rights of the residents to the land, as they provided service to the area and residents for over 15 years. Additionally, the Minister of Local Government and Housing, Western Cape had no authorization to request an eviction under eviction legislation (PIE) as it had no (admissible) proof of its ownership of the land. Current development programming within Joe Slovo results in only a small minority of the current residents being housed on

127 Thubelisha Homes v Various Occupants, High Court of South Africa, Cape of Good Hope Provincial Division, case no: 13189/07, p38. p 84.
128 Thubelisha Homes v Various Occupants, supra #127, p 81.
130 Application for Appeal, supra #129 para1.3.
the site, leaving out a clear plan for the permanent accommodation of Joe Slovo residents of whom are to be relocated/evicted. There is a lack of concern towards providing these residents with secure tenure, there is no consideration towards in-situ upgrading, although Joe Slovo land is as far as known suitable for it. The appeal will be heard by the Constitutional Court in August 2008, and hopefully provide relief for the residents but sadly echoes the case of Thembelihle, the State’s perpetuation of exclusion of the poor from inner-city locations. The project is deeply burdened with delayed delivery, cost over-runs, and severe lack of consultation. The State keeps bumping into the same obstacles in housing: evicting thousands to make way for new housing programs and economic growth. In-situ upgrading is not easy, it is expensive, requires long term support, capacity building and monitoring. Yet as the South African on paper has recognized, it is the only current solution that covers the full extent of need among the millions of severely impoverished. There’s a real unwillingness to let go of the apartheid mentality and apply a process that focuses on a human rights approach, its principles, and holds the duty-bearer accountable for these actions.

4.5 Additional Challenges

These case studies have so far only discussed the challenges with getting the municipal government to fulfill the right to adequate housing. The local government’s obstinacy is not the only factor behind the failure to deliver housing for Thembelihle and the rest of the poor in South Africa. There are many additional outside factors, in which a human rights based approach, may or may not be able to handle. This next section analyzes those challenges and to what extent a human rights based approach could deal with them.

In 2008, Johannesburg listed the major challenges they perceived to be the blocking them from fulfilling the right to adequate housing. One of those challenges was the difficulties in managing internal growth within the informal settlement. Internal growth in informal settlements remains one of the challenges facing the City. Immigrants,
refugees, and rural citizens relocate to find jobs and better living conditions. They are particularly attracted to move into areas that are targeted for development in order to benefit from planned projects. This makes it extremely difficult to manage projects with set budgets, as numbers increase, and discrepancies on who is eligible for the programs arise.

Another challenge that should not be underestimated is working with the residents in informal settlements. It is important to remember that the residents and communal leaders of Thembelihle are not neutral beings; some are good, some are bad, some fight for the interest of the community, while other seek and exploit power for themselves. Greenberg in discussing the agricultural civil moment within Thembelihle discussed that aside from state repression and insecure tenure, the agricultural movement inside Gauteng and Thembelihle collapsed due to internal conflicts, sharp divisions within the group, lack of capacity, manipulations by those with personal agendas, and hostility within the group.\textsuperscript{134} Corruption, conflict and lack of education among poor communities make it extremely difficult to work within these communities. It greatly hinders the City’s ability to negotiate and create a participatory plan that is understood and fair for all the residents. It is relevant to mention that recently in the news residents living within informal settlements around Johannesburg, frustrated with their economic deprivation and lack of jobs and services, have targeted their frustration by attacking and killing immigrants and refugees who are fleeing from desperate situations in neighboring lands. Over 6000 immigrants have been chased from their homes, and over 30 killed.\textsuperscript{135} It is a tragic turn of events, in South African history, and while, not all have partook in the violence, the event illustrates that within informal settlements live the poorest, most uneducated population within the country and there is a tendency for violence and corruption. Power struggles and resistance must be addressed not only within the State but right-holders themselves.

A case study on a Brazilian informal settlement discussed that an attempt to establish partnership between local government and a housing settlement resulted in the community much better understanding the limits of government, budget-setting and the

\textsuperscript{134} Greenberg, supra#110, p5.
contract making process, and the judicial system. The knowledge enabled the groups to understand the long process of housing policies and bureaucratic departments causing the long wait to turn policy into social oriented projects, and enabled residents to pressure the government for faster service in a productive and cooperative manner.136

While participation and empowerment will improve the resident’s ability to participate in the development process, the process of capacity building is not a complete answer to resolving challenges behind informal upgrading. A human rights based approach has no duties or obligations on the individuals, only on the State. Securing that each resident will equally be able to participate and benefit from the development process is not an easy task. In the Rand case, it was noted that the residents were obligated to act in good faith, in order for the City to be able to provide meaningful participation. This is concerning for the residents of Joe Slovo, as this has not always been the case. Some residents have been extremely destructive, while others have invaded the housing projects before they have been finished, destroying parts of the new developments.137 It is interesting to hear what the Court will say about the role of the residents, hopefully the Court will not make letting poor choices by some let the State out of its obligations to meaningfully engage and fulfill housing.

The challenges behind creating effective informal upgrading programming go on almost indefinitely; including resource constraints, lack in technical capacity, lack in land, competition between human and economic growth etcetera. A HRBAD is not set out to resolve all of these problems, but it ensures a legal process that does not violate any human rights.

137 Rand Case, supra #62.
5 CASE STUDY 2 Norway and a Human Rights Based Approach to International Development: the Case of Building Housing Cooperatives

Under the 1994 Memorandum of Understanding and the 1999 Declaration of Intent, Norway committed itself to providing NOK100 million a year between 1994 and 1999 and a further 80 million annually from 2000-2004. In December 1994, the South African Minister for Reconstruction and Development visited the Norwegian Ministry of Foreign Affairs in order to discuss how Norway could assist South Africa’s new democracy. The director of the Norwegian Federation of Housing Cooperatives Association (NBBL) was invited to speak on the Norwegian Social Housing Cooperative Model. The South African Minister was very interested and suggested Norway assist in housing development. The Ministry of Foreign Affairs instructed Norad to support NBBL financially so that it could provide assistance and training to the social housing sector in South Africa.

In 1994 and 1995, NBBL met with an NGO called Cope Affordable Housing in Johannesburg to discuss a partnership. Norad sponsored a pilot program between 1997-2001, providing NOK16.5 million. From 1999-2005 the project was suppose to receive another NOK10 million. The overall objective was to develop a housing co-operative model that would be suitable for low income households in South Africa. By 2001, Cope was seen as a success story. Seven hundred homes were built with another 150 on the way. Cope had registered seven housing co-operatives within a newly founded co-

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139 Funding was cut short in 2004, as the program shut down.
140 This paper defines social housing cooperatives as rent to own co-operatives for low income persons which require institutionalized management. (As taken from the Social Housing Foundation Interview). Co-operatives are associations of persons united voluntarily to meet their common needs and aspirations through jointly owned and democratically controlled enterprises. Also see International Co-operative Alliance http://www.nabco.ie/definition.htm, (accessed 15 April 2008).
141 Sommerfelt, supra #138, p19.
operative association, it won developer of the year in 2001 and received the best social housing project award from the South African Institute of Housing in 2002. Both the Norwegian Review on Development Assistance and NBBL’s project review reported that, amongst turbulent times, the Norwegian housing project was a success.

Social housing cooperatives appeared to offer an alternative to individual and rental tenure that provided access to services and work in a well-designed and safe environment in inner-city areas that were previously difficult or impossible for the poor to access due to affordability. While the benefits of the housing cooperatives were significant, the development process was not as smooth and led to the evictions of many of the residents, defaults on loans, the collapse of Cope, tenure insecurity, and the exclusion of the poorest. While Norway had concerned itself with achieving human rights goals, this was not supplemented with a human rights based process that saw participation and other key development features as legal entitlements.

The next section discusses the experiences of Newtown, the largest housing-cooperative sponsored by Norway. It discusses how a HRBA could potentially address some of the project’s failures. The analysis does not intend to diminish the severe challenges faced by Norway nor the innovation and hard work by Cope/NBBL or Norwegian international assistance at large. Both Norwegian housing and general international assistance consist of in-depth development planning, a series of consultations, training, and a thorough review process. In the case of NBBL, the project “assisted in developing new policies, planning institutional reform and the creation of an enabling environment.” Yet the project ultimately resulted in human right violations. More concerning is that Norway was not as concerned with these problems as it was with achieving its overall objectives.

145 From Aid to Partnership, supra #144, p viii.
146 Skjerve, supra #11, Interview.
5.1 Newtown

In February 2000, 1,000 residents lined up to celebrate the finishing of Newtown Housing Cooperative.\(^{147}\) Newtown was considered the big test on the functionality and appropriateness of housing co-operatives in South Africa. So significant was the pilot project that both the Norwegian Prime Minister, Kjell Magne Bondevik, and the South African Minister of Housing, Sankie Mthembi-Mahanyele were there to hand over keys to the residents on opening day. The project initially appeared to be successful, but initial experiences afterwards were not as celebratory.

5.1.1 Financial Difficulties

South Africa was not built to service its poor non-white citizens and therefore Cope struggled immensely to create a financially stable social housing market that worked for the poor. Unlike Norway, where shares and a rental contract within a housing cooperative are enough to qualify for loans with a low interest rate, this is not the case in South Africa.\(^{148}\) Between 1999-2000 the residents subsidies’ (that provided funding for the project), value decreased 25% due to fluctuating interest rates (between 14-25%) and skyrocketing land and construction costs. Therefore the money to pay off bonds from the National Housing Finance Corporation was much more difficult than Cope had expected. On top of this, there was a high default rate on rental payment by the residents, over 25% in general in Cope’s housing cooperatives and a similar percentage existed in Newtown.\(^{149}\) Cope was supposed to become independently sustainable by collecting property management fees within the new cooperatives.\(^{150}\) However, as Cope’s costs went up and payment defaults increased, Cope’s financial situation was severely in trouble. This created a huge dependency on Norwegian and other international assistance.

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147 Sommerfelt, supra #138, p39.
148 Sommerfelt, supra #138, p47.
149 Sommerfelt, supra #138, p47.
150 Lessons from Cope Housing Association and Twelopele Housing Co-Operative, GJM Consulting Services for the Social Housing Foundation, April 2005, p.19.
5.1.2 Governance and Capacity Problems

Beyond financial difficulties, Cope struggled with serious governance and capacity issues. Financial problems, along with mismanagement, and lack of capacity led to serious problems and conflict within the cooperative. The only training the residents and board received was a short one day seminar on basic housing cooperative principles.151 There was no thorough attempt to ensure their understanding and capability to manage a housing cooperative, not to attempting training once the cooperative was up and running.152 In a survey of Newtown and Cope’s other cooperatives, it was found that there was very little understanding of the objectives of the cooperative models, nor their rights or obligations.153 Many in fact associated the housing cooperative with either communism or the agriculture cooperative movement in South Africa which had a history of failure. Therefore, many of the residents were resistant to living in a cooperative and worked towards its downfall.154 Overall, there was a poor understanding and conflict over how the housing cooperative should be managed. It was admitted by Cope that social housing required additional funding for capacity building and training. This was a hidden cost, which Cope and Norway had not adequately prepared for.155

This lack of understanding and management led to further complications. Cope was supposed to hand over authority to the cooperative, as its goal was to make the cooperative independent and self-managing.156 However, Cope, uncertain of the board’s ability to manage refused to hand over the signing papers to the board which caused extreme animosity between Cope and the board.

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153 Lessons from Cope Housing Association, supra #150, p13.


155 Evaluation of USN Co-operative Housing Models, supra 152, p35.

156 Cooperative Support Institutions, supra #151, p90.
Meanwhile Cope had to deal with the defaults on non-payment. Cope needed the Board to sign papers for an eviction, which the Board refused to do, and therefore Cope illegally overturned the board. Cope then went to court to seek an eviction order. This process took over four years and drained both the cooperative and Cope of its financial resources. After four separate horrendous legal battles, Cope succeeded in September 2003 in evicting non-paying residents. COHRE reported in November 2004, that the same security company that had attempted to evict the residents of Thembelihle succeeded in evicting 95 of the residents from the Newtown Cooperative, including many families and single mothers.\(^{157}\) Illegal subletting and overcrowding were also huge problems. The relationship between Board members and residents, and the residents with Cope, was extremely hostile and chaotic. After the evictions there was yet another election of new board members that were supposed to be friendlier to Cope. This resulted in vengeful accusations and wrongful arrests of old members; the new board claimed the old board were the ones responsible for the missing NOK13 million (see next section for more details on the missing money). Further problems of illegal subletting, over occupancy, general confusion, and disorganization plagued the housing cooperative.

5.1.3 Cope’s Collapse

The residents had difficulties not only understanding but accessing their financial situation. At first, Cope simply refused to provide them with financial statements only later to admit that their entire financial system had disintegrated and records were no longer existent.\(^{158}\) The residents claim that the R13 million which was meant for the paying off Cooperative and was given to NBBL to pay of the bonds disappeared.\(^{159}\) It is speculative whether this money was pocketed by Cope directors. In 2005, *Bistandsaktuelt* sensationally reported that Cope had walked off with millions of Norwegian kroners. NBBL, clarified that NBBL had stopped funding to Cope due to Cope’s financial mismanagement and


\(^{159}\) *Jo’burg development*, supra #158.
refusal to update NBBL on its progress. It is not certain that the money was used for personal use, but remains a possibility. What is certain is that it was that the overall lack of capacity and financial difficulties that led to the collapse of Cope, not the pocketing of donor money. When, in 2005, Cope collapsed the housing cooperative was turned over to be managed by the National Finance Housing Cooperation which had provided the bonds for project. Newtown is now over R14 million in debt. The Cooperative claims this is due to financial mismanagement and corruption on behalf of Cope and is not entirely their responsibility. NFHC has dissolved the cooperative’s board and Newtown is no longer able to function as a democratic cooperative.\textsuperscript{160} Uncertainty remains at what comes next for the cooperative and whether the residents will be evicted.

5.1.4 Success

It should not be forgotten that Newtown was originally considered a success case for legitimate reasons. While there were problems within the cooperative, the cooperative functioned and improved the lives of the residents. Rent within Newtown started at R710 for a flat compared to R2,200 across the street.\textsuperscript{161} It is boasted that there are and never have been problems with racial or ethnic tensions or with violence or break-ins.\textsuperscript{162} The cooperative was successful in creating a safe living area that successfully produced a higher quality of life for its residents and possibility for ownership for many of the poor that otherwise could not afford it. Up until 2008, Newtown had a democratically elected board that met once a week with the residence to work towards improving the quality of life for the residents. It also worked towards negotiating with residents that did not pay, rather than proceed towards immediate eviction.\textsuperscript{163}

\textsuperscript{161} Evaluation of USN Co-operative Housing Models, supra 152, p35-50.
\textsuperscript{162} Evaluation of USN Co-operative Housing Models, supra 152, p35-50.
\textsuperscript{163} Evaluation of USN Co-operative Housing Models, supra 152, p40.
5.2 Using a Human Rights Based Approach to Housing Cooperative Programming

Norwegian goals were very much grounded in human right principles. Norway’s goal was to provide a collective tenure that would seek to meet the economic, social and cultural needs of the residents.\(^{164}\) NBBL worked to achieve this by creating and building capacity within Cope. NBBL’s larger program was to support democracy and empowerment through promoting equality, justice, and solidarity.\(^ {165}\) This philosophy was seen as relevant to the development’s outcome not the process.\(^ {166}\) NBBL was solely concerned in training Cope to assist transforming Cope into a viable housing association that could better secure tenure for poor communities though developing housing stock for co-operative ownership, property management, resident training, and capacity building\(^ {167}\) rather than considering whether these policies and programming were compatible with its objectives.

5.2.1 Exclusion and Eviction versus Interdependence and Indivisibility of Rights

As a result, Norway overlooked its unintentional exclusion of the poorest. NBBL originally targeted those just below the poverty line, but only succeed in providing housing for those just above the poverty line.\(^ {168}\) The program intended to target families with incomes between R1200-3500. Twelve hundred rand is just above the poverty for households for three or more people, and just below for more than three. The majority of the homes occupied had six people; with an average income of R3500. Due to higher building costs, NBBL had been forced to recruit those that were just above the poverty line rather than below it.\(^ {169}\) Even many of those who qualified faced serious financial difficulties as a result of genuine economic hardship and health related problems (particularly HIV and AID related illnesses). The poor were not in any position to manage the new burden of payments as part of being responsible for ‘home ownership’ particularly those who had come from informal settlements and were not used to formal payments for housing and as a result were evicted. An interdependence and indivisibility of rights would

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164 Lessons from Cope Housing Association, supra #150, p16.
166 Skjerve, interview, supra #11.
167 Lessons from Cope Housing Association, supra #150, p5.
168 Evaluation of USN Co-operative Housing Models, supra #150, p40 and Sommerfelt, supra #138, p20.
169 NBBL was however successful in targeting a large percentage of female households.
have notably ensured that Norway did not overlook these mistakes. While it is uncertain whether a HRBAD could have led to a development programming that would have included them in the housing cooperative programming is questionable, but it would ensure at the very least that their rights were not violated and that the development process did not exclude them. It should be noted that Cope did develop a fund for those who could not pay due to loss of employment or medical problems, but this was not enough for a group who were not accustomed to the higher costs of owning.

5.2.2 Power versus Participation and Empowerment

NBBL supposed that as long as it worked towards establishing a democratic cooperative, this in itself would ensure participation.\textsuperscript{170} Norway was not interested in local participation in the development process. This lack of participation resulted in the enormous misunderstanding and hostility between Cope and the residents. In a UNDP pilot project in Bosnia-Herzegovina and Macedonia participation and inclusion for stakeholders generated greater legitimacy, acceptance and accountability.\textsuperscript{171} This also resulted in bringing other social and economic issues to the forefront of the development programming. In the case of Newtown, it is reasonable to surmount that a better focus on participation throughout the development process could have better addressed capacity gaps, conflicts between the duty holder and right bearer, and other economic and social issues. Rather than empower, Cope used the resident’s lack of capacity against them by severely abusing its power over the cooperative by overturning the board, preventing it from managing the cooperative, and secretively handling the Co-ops’ affairs without consultation. Norway and Cope had the best intentions and thought it was doing what was best for the residents but as the residents’ needs and voices were excluded there were disastrous results. This is why, as in the case of Thembelihle, that translating participation into a meaningful process is vital, in order to empower residents, rather than use their lack of capacity against them.

\textsuperscript{170} Skjerve, interview, supra #11.
\url{http://www.regeringen.se/content/1/c6/08/49/42/0828c635.pdf}, p3.
5.2.3 Accountability

A better program would have insured that Norway was accountable for better capacity building, empowerment, participation, non-discrimination and overseeing power abuses. This would have meant that Norway was responsible for Cope’s actions, as well as the development process and outcome. Norad currently conducts independent reports on all its development projects. As suggested in the other case, it is excellent that they use an independent review process but in the case of the NBBL\Cope’s review, and in the majority of its reviews, it discusses development outcome rather than the process.

5.2.4 Additional Challenges

While these human rights principles are argued to bring a better development process, there are enormous challenges that are not necessarily addressed by HRBA. As mentioned in the UNDP participation study, making participation processes light, sustainable and mainstream in the overall planning processes and not dependent on external donor support; is extremely difficult, particularly where resources were already under such constraint. 172

Additionally, there were legitimate reasons that Norway had chosen to exclude participation in the development process. Jan Skjerve, who oversaw the program, said the reason that the beneficiaries were not consulted during the development process was because they were difficult to work with and that the programming involved complicated technical issues and NBBL already had an enormous task of getting these issues solved and training Cope on a limited budget. 173 At an initial public meeting for eligible residents there was a serious threat of violence when the meeting got out of hand. 174 Again, as discussed in the Thembelihle case, the residents were not necessary for the good of the development project (or the fulfillment of housing for all the cooperative residents) but for their own interests, and were potentially violent when they didn’t get their own way, making genuine participation very difficult. In the Newtown case many of the residents

172 Mejias, supra #171.
173 Skjerve, Interview, supra # 11.
174 Skjerve, Interview, supra # 11.
deliberately misunderstood the cooperative-model assuming (or pretending to assume) that the subsidy covered ownership and that they did not need to pay rental fees. They knew the eviction process was long and took the years of “free” accommodation to their advantage.\textsuperscript{175} These challenges were extremely difficult and are not necessarily solved through a HRBA.

5.2.5 Lessons Learned

Regardless of these challenges, Norway should better ensure that its process match its goal. Norad’s most important task then and now is to contribute towards the international effort to combat poverty. It is questionable whether a program that results in the eviction of the poorest actually meets that goal and whether the planning behind the cooperative program was even set up to target the poorest. Human Rights scholars often critique development programs for leaving out the poorest in development schemes. It is much easier to create development programs that work for those just on the poverty line then those far below it. A human rights based approach, must target those whose rights are most lacking and create sustainable programs for all.

The goal of Norwegian endeavor was to see if the Norwegian Housing model could work in a South African context. The Norwegian cooperative movement emerged from the post-war period in a homogenous population after only a short period of conflict and oppression after Nazi occupation. This is compared to the South African situation-where the project emerged after a century of severe oppression, war, and government policies that purposely sustained the poverty and indignity of the poor. Odette Crawford, director of the Social Housing Foundation, who directly worked with Norway and other States on developing a Cooperative-Model for South Africa, cautiously commented that Norway and other States were overly zealous, at first to see their model work in South Africa.\textsuperscript{176} Later, the Norwegian and other States were willing to work in trying to find a model that suited South Africa. Results showed that a cooperative model based on the European/Canadian model could work, but according to the South African Department of Housing, based on these experiences, unlike in Norway, it was not an option for the very poor in South

\textsuperscript{175} Evaluation of USN Co-operative Housing Models, supra 152, 38.
\textsuperscript{176} Crawford, Odette, Director, Social Housing Foundation. Johannesburg, South Africa, Personal Interview. 6 November 2007.
Empirical results showed that the poorest were often evicted and could not sustain the high cost of a cooperative. The consequence of Newtown and the Housing Co-Operative experience show serious problems with discourse and critical thinking on the part of Norway. Today, NBBL continues to work towards fulfilling the right to housing through international assistance, mostly by using their Norwegian cooperative-housing model, but they have also begun to recognize that this in itself is not enough and currently have a pilot in-situ upgrading project in Tanzania. While Norway appears, at least in some part to address that its cooperative program is both ahistorical and acontextual, the fact that it is continued to be used shows that there still remains a deeper imbedded issue of Norway’s role in assisting South Africa in the right to housing as it has not yet addressed the issue of excluding the poor.

This paper, while highlighting the general flaw in the housing-cooperative is hesitant to say that it is wrong for NBBL to continue its use. There appears to be tremendous opportunities and potential with social housing. Notably an appeal during the Rand case stressed that the serious lack of inner-city social housing was only widened by the collapse of Cope and at the very least Cope had provided better social housing in the inner-city than what had previously existed. A housing expert at the Social Housing Foundation commented during the housing session at a conference on economic, social and cultural rights that the current Minister of Housing was particularly excited with social housing. As it’s potentially a huge way of providing secure tenure, empowering residents, providing safe living environments and addressing discrimination, as well as residential accessibility in intercity locations for the poor. However, under a human rights based approach, the cooperative model needs to be address why these models cannot work for poor. A Swedish master’s thesis, analyzing a different cooperative in South Africa concluded that possibly a housing-cooperative program that first worked towards finding

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177 Crawford, interview, supra #176.
178 Wilson, Stuart, Affidavit dated 7 March 2007, para 6.1 for the Rand Properties Case see supra#61.
179 Session on Housing Rights, South Africa.
jobs for the poor, could better work.\textsuperscript{180} Norway needs to address its failure to incorporate the poorest into it housing development programming.

6 Conclusion

The paper now shifts back to its original question; what does it mean for States to fulfill their legal obligations to the right to adequate housing under a human rights based approach? It entails using a normative legal framework that adds entitlements and accountability during the development process and outcome. It was discovered in the three cases that without the approach, development programming resulted in unsustainable projects that caused serious human rights violations. Violations which a human rights based approach could have potentially addressed through the meaningful use of human right principles. Possibility more interesting, were the many challenges a human rights based approach was not necessarily able to address.

6.1 Power Struggles versus Empowerment and Participation

The case studies highlighted that there were severe power abuses by not only the duty-bearer but the right-holders themselves. Herbert Werlin, a former editor of a newsletter for the World Bank’s Urban Projects Department, highlights that insitu-upgrading is not sustainable without a combination of “authoritarian and humanistic administration”.\(^{181}\) He discusses that getting residents to comply with housing development plans, helping with care and management of facilities and paying bills is much the exception rather than the rule due to deep-rooted social and economic division, political unrest, struggles for power, corruption and economic hardship.\(^{182}\) Werlin suggested that ensuring effective community participation and developing an administrative capacity within the informal settlement helped overcome the challenges of


\(^{182}\) Werlin, Herbert, supra #181, p.1525.
securing tenure. Participating and training proved to be the useful in the Brazilian case and potentially in the two informal settlements and Newtown housing cooperative. Werlin argued that beyond empowerment and participation that there needed to be tough penalties for non-payment and non-compliance and community responsibility. Werlin’s suggestion holds true in all three cases that there is a need for community responsibility, but this should not trump that the State needs to address the difficulties of the poor not being able to pay or participate and that it is State obligation to address these issues along with patronage, disunity and disempowerment. COHRE suggests using a HRBA can address these issues by dividing development projects into smaller areas, but as we saw in Cope, it was a relatively small group that struggled with these same issues. A human rights based approach has yet to operationalize a plan that enables the State to ensure community responsibility and still remain loyal to its human rights obligations to promote participation rather than authoritarian control.

6.2 Inner-City Challenges

The case studies specifically addressed problems with securing housing in inner-city locations. Rapid economic growth, increasing inequality, high interest rates, lack of affordable housing options, unplanned and involuntary urban migration, competition with large-scale development led to serious challenges in securing the right to tenure that a human rights based approach did not address. A HRBA adds to development, but is not suppose to replace traditional development practices. What happens when human rights competes with development programming? Cope had limited resources, and while Cope discovered that cooperative projects required additional funds for training, the approach didn’t explain how Cope was suppose to address these additional costs, particularly when facing rising building costs. Furthermore, in-situ upgrading compared to building block housing is extremely complex and requires extra skills and resources. Further research needs to address the consequences of human rights programming potentially taking resources away from traditional practices, as development capacities and budgets are already extremely tight. As all three case studies showed, human rights programming

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183 Werlin, Herbert, supra #181, p.1534.
require a significant amount of additional skills, money, and time which may not always be available.

6.3 Legal Accountability?

The definition of HRBA ran into some trouble with the principle of accountability. It was found that an independent review better ensured that a HRBA was properly considered and applied. Yet the HRBA definition used in this thesis was a legal obligation for States to respect, protect, and fulfill human rights during the development process. (Thus principles of participation became legal entitlements). While an independent review process works to ensure that human rights and legal entitlements were considered, the process itself was not legal, complicating the concept that a HRBA is strictly a State’s legal obligation. In the case of South Africa, the review board could refer violations to the Courts or the National Ministry of Housing, making the process, at least semi-legal. However, to what extent can Norway be held legally accountable? Is it not responsible for excluding/evicting the poor? What does it mean that Norway abruptly stopped funding on the project, putting the residents’ tenure in jeopardy? The fact is that it means nothing. There are no international human rights mechanisms to deal with Norway violating human rights through development assistance particularly considering that the right to international assistance is not even well recognized internationally.

Many development scholars, namely Arjun Sengupta, in attempting to address this gap have suggested a development compact, an agreement between the State receiving and the State giving assistance on the nature of assistance. But this is not legal either. This author believes that it is acceptable that Norway holds itself accountable for its development assistance, and has no suggestion for this gap in accountability. The paper only wants to highlight that there is a gap within holding States accountable for international assistance within the international human rights framework and that Norway.
6.4 Value Added

The cases showed that Norway and South Africa have recognized the right to housing and economic, social and cultural rights. Yet the recognition of human rights has not led to their fulfillment. South Africa and Norway, in practice, show less interest for protecting the right to adequate housing as their law and policies would suggest. Many South Africans criticize recent crack downs on protests, freedom of expression, media and the rising evictions of the poor. Norway’s policies end with the same result as South Africa with the exclusion of the poor from inner-cities. Meanwhile, Norway is distancing itself from its former role as a leading player in advocating economic, social and cultural rights. This is most evident after a recent session at the UN, where Norway withdrew its support for the optional protocol on economic, social and cultural rights. Norway essentially has weakened the development process and the rights in general by ignoring that the interdependence and indivisibility of all rights brings enormous value to the development process and the achievement of all human rights.

A human rights based approach, regardless of these trends as well as the current movements in globalization, economic/political interests, and the popularity or lack there of of human rights, secure that human rights are meaningfully applied and not just rhetoric. Further, a human rights based approach seemed to address the underlying issue of the South African tendency to uphold apartheid practices and the Norwegian lack of critical discourse and critical thinking, policies that led to the exclusion of the poor. A human rights based approach helps distinguish development policy distinguish from looking like the development practices of South Africa’s apartheid past.
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