

**Beyond Bulldozing: Is Slum Upgrading a means to realise the
Right to Adequate Housing?**

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Abstract

Despite wide recognition of the human right to adequate housing, massive violations are commonplace around the world. One billion people live in slums, 2 billion are forcibly evicted from their homes every year. Urban poverty will be one of the most pressing challenges of the 21st century, with a multitude of human rights at stake. This thesis explores the legal framework of the right to adequate housing, shows the obligations of States towards its fulfilment, presents its advocates and duty-bearers, and examines the question of responsibility of the different parties. With the case of Kenya, the approach of slum upgrading, a strategy that includes physical, social, economic and environmental improvements of living conditions within existing settlements, is examined. In a further step the ability of KENSUP, the Slum Upgrading Programme of the Kenyan Government to fulfil its human rights obligations – incumbent on the State due to the treaties it has ratified – is analysed. Finally, the influence of global policy frameworks on human rights is discussed, taking the example of the Millennium Development Goals and the polemic slogan *Cities without slums* to illustrate the interrelation between public policy and economic, social and cultural rights.

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„Human poverty is a denial of basic human rights.“¹

¹ COHRE, 2000, p.4.

1.Introduction

1.1 Defining the problem

One of the characteristics of the 21st century has developed very fast – the „urbanization of poverty“.² For the first time in human history more than half of the world's population lives in cities, simultaneously the epicentre of poverty is moving to the urban environment.³ Worldwide 1 billion people live in slums, most of them in developing countries. If no serious countermeasures are taken, the number of slum dwellers will double until 2030.⁴

Regardless of the dimension of the problem, there is no universally agreed or single academically valid definition of *slums*. Karari describes them as „too multifaceted to define using a single parameter“.⁵ The definitions used are often country-specific and can relate to very different aspects such as construction materials, temporary nature, construction or land legality, access to basic services, low income, poverty etc.⁶

As a common denominator and basic parameter for this thesis the author chose to use the definition of the GTZ⁷ which defines slums as „the phenomenon of settlements with problematic legal status, inadequate infrastructure and public services that have sprung up and continue to grow in large and small cities during the process of urbanization“.⁸ Another relatively precise definition is provided by the United Nations Human Settlements Programme, UN-Habitat, which describes slums as „characterized by substandard and inadequate housing that extends beyond informal settlement, lack of access to basic services, low incomes, high unemployment rates“.⁹ UN-Habitat also

2 UN-Habitat, 2003, Foreword.

3 Share the world's resources, 2010, p.4.

4 UN-Habitat , 2003, Foreword.

5 Karari, 2009, p.2.

6 Ibid.

7 Deutsche Gesellschaft für Technische Zusammenarbeit. In January 2011, the GTZ merged with two other German institutions into the GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit; engl.: German Agency for International Cooperation).

8 GTZ, y: n/a.

9 UN-Habitat, 2009, Introduction.

developed 5 indicators to define slums: 4 of them measure physical attributes of slum conditions (lack of water, lack of sanitation, overcrowded conditions, and non-durable housing structures) whereas the fifth (security of tenure) concerns rights of slum dwellers – or the lack of them.¹⁰ The latter is of particular relevance for this thesis as it is the most important indicator to monitor the fulfilment or violation of housing rights, which part of the analysis focuses on.

Alternating with the term *informal settlement*, used by some scholars and development practitioners to emphasize the relation to property rights, the author opts to use primarily the colloquial term *slum* – conscious that in a more narrow interpretation, the term refers mainly to the infrastructure¹¹ and many authors object it stating that it carries derogatory notions. At the same time it is purposefully used – by international organisations as well as by grass-root organisations – „to draw people's attention to the many injustices that afflict the world's urban poor“¹². Alternative terms such as *low-income communities*, *squatter colonies*, *shantytowns* or country-specific names such as *barrio*, *bidonville* or *favela* were left apart because they don't reflect the global phenomenon's myriad of features in the opinion of the author. Apart from that, the choice has practical reasons too: As one purpose of the thesis is to empirically investigate the potential of slum upgrading programmes, it would be incoherent and confusing to avoid the term *slum*. Nevertheless, it is used bearing in mind its conceptual problems and the negative associations accompanying it since the days of its creation.

The origins of the term can be rooted in Victorian Britain¹³, where the first slums emerged at the beginning of the 19th century and spread rapidly during the years of cholera epidemic in the 1830s and 1840s. A generation later, they could be classified as international phenomenon.¹⁴ Today, the numbers have reached an alarming level, as almost 80 per cent of the urban population of the least developed countries and a third

10 UN-Habitat, 2009, p.3.

11 GTZ, y: n/a.

12 Share the world's resources, 2010, p.5.

13 Davis, 2006, pp.21-22.

14 Davis, 2006, p.12.

of the global urban population live in slums.¹⁵

Against the background of their widespread occurrence, the level of awareness about the reality of slums and their inhabitants is surprisingly low. Many „citizens in globalising cities like Nairobi are equally as uninformed about the slums beyond their doorsteps“¹⁶ as their counterparts in Europe or North America. Even more striking is the low priority the phenomenon has on the international agenda. As the British NGO *Share the world's resources* points out, „the issue of global poverty is now high on the international policy radar – but the issue of slums, which forms a major component of poverty in (...) cities, still fails to register in most people's concerns“¹⁷.

Not only with regard to policy makers around the world and the priorities within development cooperation, the issue of slums is somehow neglected. Also from a human rights perspective, there is a lot of catching up to do – albeit prominent players like the United Nations and many national and international NGOs have been working untiringly on solutions for the problem. Although the interrelation between human rights and development is a very complex one, particularly in the case of housing rights it is crucial to understand it and to strengthen existing ties as „a focus on the right to adequate housing is essential for the promotion of human development“ which „(...)requires both the respect for, and leads, to the further realization of human rights – economic, social, cultural, civil and political.“¹⁸ One of the objectives of this thesis is to highlight above mentioned interrelation as well as the growing intersections between development, human rights and global policy responses to challenges like urban poverty.

Slums concentrate human rights issues. They are characterized by a lack of resources as well as political and social exclusion and – most obvious – concern the right to housing.

As can be read in a publication of UN-Habitat:

¹⁵ Davis, 2006, p.12.

¹⁶ *Share the world's resources*, 2010, p.4.

¹⁷ *Ibid.*

¹⁸ COHRE, 2000, p.4.

To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognize adequate housing as a basic and fundamental human right.¹⁹

Although the right to housing is widely recognized, the gap between theory and reality is huge, as „few rights are violated on the scale or with the degree of intensity as the human right to adequate housing“.²⁰ Apart from a billion people living under inadequate conditions, millions of people every year are forcibly evicted from their homes.²¹ This problematic practice and its implications on human rights is scrutinised on a general level and in the specific case of Kenya within this thesis.

According to UN-Habitat, a „concerted action on the part of municipal authorities, national governments, civil society actors and the international community“²² is required to improve the situation and combat further growth of slums. One of the issues to be discussed in the following chapters is the role of these distinct actors and their disposition to be part of such concerted action. After elaborating on the entitlements of each individual with regard to the right to adequate housing, this thesis lays its focus on the role of the States and their obligations concerning the fulfilment of this right. What do they entail? What approaches do States use to respond to these obligations? These and other questions guide the structure of this thesis.

1.2 Research questions and methodology

For a long time forced eviction and resettlement of slum dwellers were the only response of developing countries' governments to urban poverty.²³ Today many opt for a comprehensive improvement of the living conditions within the slums to achieve

19 UN-Habitat/OHCHR, 2002, p.1.

20 Leckie, 2001, p.149.

21 Ibid.

22 UN-Habitat, 2003, Introduction.

23 GTZ, y: n/a.

poverty reduction and the realisation of economic and social rights. In 2000, the Kenyan government initiated the Kenya Slum Upgrading Programme (KENSUP), which seeks to improve the lives of 5.4 million people living and working in slums.²⁴

Taking the Kenyan case as an example, the present thesis deals with the following research questions:

- Does the national Kenyan Slum Upgrading Programme KENSUP represent a means to fulfil Kenya's obligations regarding housing rights?
- The new Kenyan constitution (2010) includes a Bill of Rights: Lip service or the basis for a stronger position for economic, social and cultural rights, including the right to housing?
- Can slum upgrading represent a sustainable strategy to encounter the global problem of slums/urban poverty and the numerous economic, social and cultural rights at stake?
- To what extent do global policy frameworks like the Millennium Development Goals (MDGs) influence the realisation of economic, social and cultural rights?

The research methodology used will reflect the inter-disciplinary approach behind the thesis. Apart from the legal method, the conclusions of the thesis are drawn from a case study research as used in social sciences to conduct an empirical inquiry investigating the potential of slum upgrading within its real-life context. The material used for the analysis comprises international, regional and national legal instruments as well as information from different stakeholders including the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and civil society organisations. The case of Kenya serves to illuminate the analytical framework and as a means to test the hypotheses resulting from the research questions. To complete the research and gain some deeper insights, three experts on housing rights and slum upgrading were interviewed.

Although Kenya is used as an exemplary case to approach the general problem, bearing in mind the individual nature of every slum and the tailored solution each of them

²⁴ Human Rights Council, A/HRC/13/20/Add.2, 2010, para.189.

requires, the author only carefully deducted generalisations from the case study. Due to constraints of time and space, the thesis does not cover further human rights at stake in slums profoundly. Furthermore, the limits of the thesis do not allow a deeper examination of the special cases of vulnerable groups (women, children, refugees, internally displaced people), although they will of course be mentioned.

While the introductory chapter at hand is meant to give a description of the problem, present the research questions and the methodology, the second chapter provides an overview of the right to housing, its legal framework, practical aspects, main advocates as well as the State obligations deriving from it. In the third chapter, the concept of slum upgrading is explained, followed by a case study of the Kenyan programme KENSUP, an analysis of its impact, shortcomings etc. The fourth chapter examines global policy frameworks like the MDGs, questions the paradigm of *Cities without slums* and the ambivalent role of the market for the realisation of housing rights. The fifth chapter provides conclusions of the research.

2. The right to adequate housing

2.1 More than “four walls and a roof”²⁵

The right to adequate housing – as part of the right to an adequate standard of living – is a right recognised in international human rights law. Reference is made in a number of international, regional and national legal instruments which will be presented in form of an overview in this chapter, in particular in subchapter 2.2. Despite a relatively strong position in the global legal system, the right to adequate housing is violated steadily around the world. In contrast to this practice of violations and omissions, the State responsibility in regard to the right to housing can be considered to be universal as „the right to adequate housing is relevant to all States as they have all ratified at least one international treaty referring to adequate housing and committed themselves to protecting the right to adequate housing through international declarations, plans of action or conference outcome documents“²⁶ In subchapter 2.5, the obligations of States, the international community and the private sector will be discussed in-depth.

Obviously, housing rights do not imply „the right of everyone to inhabit a luxurious mansion“²⁷, nor is it the obligation of a State „to build accommodation for the entire population“²⁸ But it is also not done with „four walls and a roof“.²⁹ Apart from habitable housing, the legal content covers security of tenure, guarantees protection against discrimination and access to basic public services, such as potable drinking water, sewage disposal, electricity etc.³⁰ Subchapter 2.3 contains more details on practical aspects and entitlements of housing rights.

25 See FN 29.

26 OHCHR/UN-Habitat, 2010, p.1.

27 Leckie, 2001, p.149.

28 OHCHR/UN-Habitat, 2010, p.6.

29 OHCHR/UN-Habitat, 2010, p.3.

30 Leckie, 2001.

2.2 Legal framework

2.2.1 International Instruments

In the international legal context, two of the main documents comprised by the International Bill of Human Rights³¹ have a strong reference to housing rights – the Universal Declaration of Human Rights (UDHR, adopted 1948) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted 1966). In both, the right to adequate housing is enshrined in the right to an adequate standard of living. Since the adoption of the ICESCR, it has been reaffirmed and recognised in several international documents (see figure below).

Art.11 of the ICESCR, which is „widely accepted as one of the most significant legal sources of the right to adequate housing“ and has received most consideration as foundation of housing rights in international human rights law³², describes the right to housing as „(...)the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions(...)“.³³

Other international human rights treaties have addressed the right to adequate housing in different ways. Some are of general application while others cover the rights of specific groups, such as women, children, indigenous peoples, migrant workers or persons with disabilities.³⁴

The Committee on Economic, Social and Cultural Rights (CESCR), a treaty-based human rights monitoring body, has adopted a couple of general comments regarding the right to adequate housing, of particular relevance are General Comments 4 and 7.³⁵ In its

31 The components of the International Bill of Human Rights are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and its two Optional Protocols. <http://www.un.org/rights/HRToday/declar.htm>. (25.02.2012)

32 Leckie, 2001, p.153.

33 ICESCR, 1966, Art.11(1).

34 OHCHR/UN-Habitat, 2010, p.10-11.

35 General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights also has some relevance, but is not focused on housing rights.

concluding observations and general comments, the CESCR develops authoritative interpretations of rights that tend to go much further than the original legal text.³⁶ They are of particular relevance to determine State's obligations and will therefore be examined closer in subchapter 2.5.

Relevant international covenants and conventions containing housing right standards:

- Universal Declaration on Human Rights (1948), Art.25(1)
- Convention on the Elimination of All Forms of Discrimination against Women (1979), Arts.14(2), 15 (2)
- International Covenant on Economic, Social and Cultural Rights (1966), Art.11(1)
- Convention on the Elimination of all forms of Racial Discrimination (1965), Art.5 (e)
- Convention on the Rights of the Child (1989), Arts. 16 (1), 27(3)

Mention can also be made to:

- Convention relating to the Status of Refugees (1951), Art.21
- ILO Recommendation No.115 on Worker's Housing
- ILO Convention No.117 on Social Policy, Art. 5 (2)
- ILO Convention No.169 concerning Indigenous and Tribal Peoples in Independent Countries, Arts. 14,16,17
- 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Art.43 (1)
- 2006 Convention on the Rights of Persons with Disabilities, Arts. 9, 28

Figure 1: Overview of housing right standards³⁷

Apart from treaties and conventions, other documents covered by the term „soft law“ such as guidelines and principles can be relevant for the interpretation of the right to adequate housing. Although not legally binding, in many cases they provide guidance for the implementation of housing rights, notably for specific groups. As of particular relevance for slums and forced evictions, mention should be made to the *Basic principles and guidelines on development-based evictions and displacement*.³⁸

³⁶ Muller, 2011, p.161.

³⁷ Contents of fig. 1 base on the texts of Leckie, 2001, p.151 and OHCHR/UN-Habitat, 2010, pp.10-11.

³⁸ OHCHR/UN-Habitat, 2010, pp.12-13.

Furthermore, a number of conferences and declarations were dedicated to housing rights, some of them with respectable impact on the clarification of State obligations and the Agenda-setting of the international community. Examples are the Vancouver Declaration on Human Settlements (1976), the Istanbul Declaration on Human Settlements (1996) or the Habitat Agenda (1996). Most recently, the Millennium Declaration (2000) and the subsequently adopted Millennium Development Goals (2000).³⁹ dealt with housing rights and reaffirmed States' commitments to their realisation.⁴⁰

2.2.2.Regional instruments (Africa)

At the regional level, only a few legal documents recognise the right to adequate housing explicitly: the European Convention on the Legal Status of Migrant Workers (1977), the African Charter on the Rights and Welfare of the Child (1990) and the revised European Social Charter (1996). Neither the European Convention for the Promotion of Human Rights and Fundamental Freedoms (1950), the European Social Charter (1961), the American Convention on Human Rights (1969) nor the African Charter on Human and Peoples' Rights (1981) refer to the right to adequate housing, but the mentioned regional systems are nevertheless characterized by an implicit existence of housing rights.⁴¹ Protection has been derived from other human rights in its jurisprudence, such as the right to privacy, the right to property and the right to protection of the family⁴². As this thesis focuses on the case of Kenya, no further emphasis will be given to the European and American system respectively.

Although the African Charter on Human and People's Rights (Banjul Charter) affirms the interdependence and indivisibility of human rights and contains several socio-economic rights, it has been criticised for not explicitly referring to – *inter alia* – the

³⁹ The approach to slums reflected in the MDGs was discussed very controversial in the last decade.

Chapter 4.2.1 presents the main shortcomings of the policy goals with regard to human rights.

⁴⁰ OHCHR/UN-Habitat, 2010, pp.12-13.

⁴¹ Leckie, 2001, p.151.

⁴² OHCHR/UN-Habitat, 2010, pp.12, 21.

right to an adequate standard of living and the right to adequate housing.⁴³ According to Muller, „this apparent absence of key socio-economic rights (...) is remedied by the fact that the ACHPR [*author's note*: African Commission on Human and People's Rights] is empowered to draw inspiration from international human rights law“.⁴⁴ In the famous *SERAC v Nigeria* case⁴⁵, the Commission found that, although not explicitly recognised, the right to adequate housing was implicitly entrenched in several articles and could be inferred from other rights.⁴⁶

2.2.3 National instruments: The right to adequate housing in Kenyan law

Housing right norms have also been incorporated by several States into their national legislative framework.⁴⁷ More than 50 national constitutions contain formulations of housing rights as well as corresponding governmental obligations, in many cases modelled after international standards. Moreover, a wide range of national legislation is relevant for and often recognises components of housing rights.⁴⁸

Even though all States are parties to one or more international treaties protecting housing rights, the national enshrinement remains crucial. It reflects not only the State's commitment to fulfil its obligations, but is also a step „to create legal systems that empower individuals and groups to enforce their rights“.⁴⁹ The incorporation into national law is of particular importance in countries where the judicial system requires subsequent national legislation because the direct implementation of international law is difficult or impossible. In these cases, victims of human right abuses are often prevented

43 Muller, 2011, pp.218-219.

44 Muller, 2011, pp.218-219.

45 Cited as: Communication No. 155/96. The Center for Economic and Social Rights (CESR) and the Nigerian human rights organisation Social and Economic Rights Action Center (SERAC) filed a complaint against the military regime of Nigeria before the African Commission on Human and People's Rights, highlighting the negative impact of oil exploitation on the rights to health, housing, food and livelihood of the Ogoni population. The decision in 2001 was significant as the Commission clarified obligations of the States as well as rights not mentioned as the right to food and housing/shelter. Compare: http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=404115.

46 OHCHR/UN-Habitat, 2010, p.12.

47 UN-Habitat/OHCHR, 2002, p.35.

48 Leckie, 2001, p.152.

49 UN-Habitat/OHCHR, 2002, p.35.

from enforcing their rights or seeking redress for violations.⁵⁰

In Kenya, the new constitution that entered into force in August 2010⁵¹ brought fundamental changes regarding housing rights. The Bill of Rights contained in Chapter 4 of the constitution includes for the first time in the country's history enforceable social and economic rights – apart from the right to housing it provides *inter alia* for the right to food, sanitation, water, health, education and social security. The right to housing is defined as „the right (...) to accessible and adequate housing, and to reasonable standards of sanitation“.⁵² As the right to take action in the courts in case any of the guaranteed rights are denied is also recognised, the constitution grants victims of human rights violations access to legal remedies and allows them to hold the government accountable:⁵³ „Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.“⁵⁴

Apart from the constitution, the Kenyan legal framework contains further legislation that concerns housing: The *Housing Act*, the *Building Societies Act* and the *Sectional Properties Act* form the legal bases for financing and ownership matters⁵⁵. The *Landlord and Tenants Act* and the *Rent Restriction Act* regulate relations between landlords and tenants. The *Employers Ordinance* – an associated law – provides for the obligation of employers to subsidize the housing costs of their employees.⁵⁶

Recently, a dynamic development in the Kenyan national legislation can be observed. At

50 UN-Habitat/OHCHR, 2002, p.35.

51 A new constitution formed part of the agreement negotiated by former UN Secretary General Annan in the wake of the post-electoral violence 2007/2008, see: Palmer, 2011, p.32.

52 The Constitution of Kenya, 2010, Art.43 (1)(b).

53 Amnesty International, 2010.

54 The Constitution of Kenya, 2010, Art.22 (1).

55 The Building Societies Act regulates the formation and registration of building societies, whereas the Housing Act concerns public financing for home development and establishes the National Housing Corporation (NHC), a parastatal organization that provides loans from public funds for the construction of private dwellings. The Sectional Properties Act regulates the use and management of common properties and the division of buildings into units to be owned by individuals. Compare: Economic and Social Rights Centre (Hakijamii), 2011(a), p. 13.

56 Economic and Social Rights Centre (Hakijamii), 2011(a), p. 13.

the time of the research, several draft bills related to land or housing were in the process of parliamentary revision or about to be enacted, among them a Housing Bill⁵⁷ with the objective of coordination, facilitation, capacity building of issues related to the housing sector⁵⁸, as well as a draft bill accompanying the long awaited Eviction and Resettlement Guidelines⁵⁹. Three land bills had been adopted shortly before.⁶⁰ The impact of this new legislation on housing rights cannot be predicted at this stage. In the preparation, NGOs criticized the lack of references to forced evictions and slum upgrading in the case of the housing bill.⁶¹ Still, the new legislation can be considered as a positive signal.

2.3 Practical aspects of the right to adequate housing

2.3.1 Freedoms and entitlements

In General Comment 4⁶², the Committee on Economic, Social and Cultural Rights elaborates on practical aspects of the right to housing and clarifies State's responsibilities. The right to adequate housing applies to everyone and „should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head (...)⁶³. The Committee goes further and extends it to the „right to live somewhere in security, peace and dignity⁶⁴.

The right to adequate housing guarantees freedoms for the right-holder. Apart from protection against arbitrary interference with home, privacy or family and the right to choose the location and residence (and to freedom of movement), the right-holders should enjoy protection against forced evictions, arbitrary destruction and demolition of

57 Ministry of Housing, 2011.

58 Human Rights Council, A/HRC/13/20/Add.2, 2010, para 193.

59 See also chapter 3.4.2.3.

60 Economic and Social Rights Centre (Hakijamii), 2012.

61 Human Rights Council, A/HRC/13/20/Add.2, 2010, para 193.

62 General comments are adopted by the UN treaty bodies. Their aim is to clarify concepts and the nature of State obligations.

63 CESCR, General Comment 4, 1991, Paras. 6 and 7.

64 CESCR, General Comment 4, 1991, Para. 7.

their dwellings.⁶⁵ The latter – closely linked to the security of tenure mentioned in the next subchapter – is a key element of the right to adequate housing and of particular importance for the research focus of this thesis.⁶⁶

Furthermore, a number of entitlements can be derived from the right to adequate housing. These include security of tenure as well as housing, land and property restitution. Of utmost importance is also equal and non-discriminatory access to adequate housing as well as participation in housing-related decision-making at the national and community levels.⁶⁷

2.3.2. The concept of adequacy

A particular reference in General Comment No. 4 is made to the concept of adequacy. The Committee names seven criteria that must be met to constitute *adequate housing* and which can be considered „as fundamental as the basic supply and availability of housing“.⁶⁸

1. Legal security of tenure:

No matter what type of tenure – the Committee names a variety of possibilities reaching from rental to occupation of property –, without a certain degree of security of tenure which guarantees protection against forced eviction and other threats, housing cannot be considered as adequate.

2. Availability of services, materials, facilities and infrastructure:

Access to natural resources, energy (for cooking, heating and lighting), safe drinking water, sanitation and washing facilities, food storage, refuse disposal, drainage and emergency services form an essential part of adequate housing. Housing is not adequate if its occupants do not have safe drinking water, adequate sanitation, energy for

⁶⁵ OHCHR/UN-Habitat, 2010, p.3.

⁶⁶ See also chapter 2.3.4. on forced evictions.

⁶⁷ OHCHR/UN-Habitat, 2010, p.4.

⁶⁸ Ibid.

cooking, heating, lighting, food storage or refuse disposal.

3. Affordability:

Housing costs should be on an adequate level, so that the tenant's attainment of other basic needs is not compromised or threatened. This principle leads to a variety of obligations for States which will be referred to in chapter 2.5.1. Protection of tenants against unreasonable rent levels or increases is a fundamental part of them.

4. Habitability:

Physical safety, the provision of adequate space and protection from rain, cold temperatures, dampness, heat and other threats to health such as disease vectors constitute fundamental requirements for housing to be adequate. The Committee refers in this context to the WHO's Health principles of housing.⁶⁹

5. Accessibility:

Tenants must be granted full and sustainable access to adequate housing. Disadvantaged groups – the committee names *inter alia* children, the elderly, physically disabled, mentally ill, terminally ill persons, victims of natural disasters – need a degree of priority consideration and both law and policy should take their special needs into account.

6. Location:

Both in rural and urban areas, the location of housing has to allow access to social facilities, healthcare services and employment options. Beyond that, polluted sites or locations in immediate proximity to polluted areas are not adequate.

7. Cultural adequacy:

The expression of cultural identity must be appropriately reflected i.a. in the way of

⁶⁹ The WHO Health principles of housing, 1989 i.a. associate inadequate and deficient housing and living conditions with higher mortality and morbidity rates. World Health Organization, 1989.

construction and the use of building materials. Cultural dimensions should also be taken into account in the framework of extensive development planning or modernization of dwellings.⁷⁰

2.3.3. The link between the right to adequate housing and other human rights⁷¹

It is impossible to isolate the right to adequate housing – derived from the right to an adequate standard of living – from other human rights.⁷² In particular for the enjoyment of all economic, social and cultural rights, it has a central importance. Given the interdependence, indivisibility and interrelation of human rights, the violation of the right to adequate housing can affect the enjoyment of a wide range of other human rights and vice versa.⁷³

Adequate housing can be a precondition for the enjoyment of i.a. the right to health, work, privacy or education. Without proof of residency, persons may also not be able to vote, enjoy social services or receive health care. Schools often refuse to register children who live in settlements without an official status.⁷⁴

At the same time, the right to housing is linked to other human rights and their fulfilment is a prerequisite as stated in General Comment No. 4:

(...) the full enjoyment of other rights – such as the right to freedom of expression, the right to freedom of association (...), the right to freedom of residence and the right to participate in public decision-making – is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.⁷⁵

70 The description of the seven principles is based on the formulation within General Comment No 4.

71 OHCHR/UN-Habitat, 2010, p.9.

72 CESCR, General Comment 4, 1991, Paras.1 and 9.

73 OHCHR/UN-Habitat, 2010, p.9.

74 OHCHR/UN-Habitat, 2010, p.9.

75 CESCR, General Comment 4, 1991, Para. 9.

2.3.4 A particular human rights concern: Forced evictions

The United Nations Committee on Economic, Social and Cultural Rights defines forced evictions as “permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”⁷⁶ According to UN-Habitat, at least 2 million people worldwide are forcibly evicted every year, while millions are threatened with forced evictions.⁷⁷

Forced evictions occur both in developed and developing countries and in many cases imply a gross violation of human rights. Apart from the obvious breach of the right to housing, “the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions”.⁷⁸ In the course of forced evictions, the use of physical violence is very common, occasionally people are even subjected to inhumane treatment or killings. Also, sexual violence occurs frequently before, during and after evictions, with women and girls being particularly vulnerable.⁷⁹

The practice of forced evictions can have a variety of causes. In many cases, they are carried out in the framework of development or infrastructure projects⁸⁰ or prestigious international events, such as Olympic Games or Football World championships⁸¹. Other causes are land acquisition or expropriation, land speculation, measures of urban redevelopment or renewal etc.⁸² Forced evictions are generally attributable to the State, in a direct or an indirect way: They are either the result of decisions or policies or the

76 CESCR, General Comment 7,1997, Para. 3.

77 UN-Habitat, 2007, Foreword.

78 CESCR, General Comment 7,1997, Para. 4.

79 OHCHR/UN-Habitat, 2010, p.9.

80 OHCHR, FS 25, y: n/a, p:n/a

81 The Human Rights Council even adopted a resolution, 13/10, on adequate housing as a component of the right to an adequate standard of living, in the context of mega-events due to the problems that frequently arise in the framework of such events, e.g. in the case of the Football World Cup in South Africa.

82 OHCHR, FS 25, y: n/a, p:n/a

failure to intervene in case of forced evictions by third parties.⁸³ Invariable is instead the inclusion of an element of force or coercion. The demolition of the homes of affected persons often form part of forced evictions.⁸⁴

Under specific circumstances, forced evictions can be in accordance with international human rights standards, and therefore be classified as “legal evictions”. To distinguish these from evictions that are not consistent with legal norms, terms such as “illegal evictions”, “unfair evictions” or “arbitrary evictions” are frequently used for the latter.⁸⁵ All the terms mentioned can be considered as to some extent problematic. The term forced eviction is criticised i.a. for being a tautology. The international community and in particular the UN bodies concerned with human rights, consciously make use of it, “primarily since all suggested alternatives also suffer from many such defects”.⁸⁶ The term “illegal eviction” e.g. seems to assume that the legal norms provide adequate protection of the right to housing, which is by no means always the case. “Unfair eviction” instead does not refer to legal standards and is thus very subjective.⁸⁷

Only in particular situations, evictions can be considered to be consistent with legal norms.⁸⁸ As the Committee on Economic, Social and Cultural Rights states, “forced evictions are prima facie incompatible with the requirements of the [International Covenant on Economic, Social and Cultural Rights] and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law”⁸⁹. In cases where evictions are justifiable, States have to make sure that they are carried out in compliance with the relevant provisions of international human rights law and according to the general principles of reasonableness and proportionality.⁹⁰ Before carrying out an eviction, alternatives have to be considered and the affected persons consulted, “with a view to avoiding, or at least minimizing, the

83 OHCHR, FS 25, y: n/a, p:n/a

84 Ibid.

85 Ibid.

86 CESCR, General Comment 7, 1997, para. 3.

87 Ibid.

88 OHCHR, FS 25, y: n/a, p:n/a

89 CESCR, General Comment 4, 1991, para. 18.

90 CESCR, General Comment 7, 1997, para. 14.

need to use force”.⁹¹

2.4 Advocates of the right to adequate housing

2.4.1 Supporting the same cause

Various stakeholders dedicate their work to the promotion and protection of the right to adequate housing. Although their work has led to improvements, the need for action is unlikely to diminish soon. On the contrary, with more than one billion people living in inadequate housing conditions worldwide, the realisation of housing rights should be one of the main concerns of governments, international organisations, the private sector and civil society around the globe.⁹² The following subchapter gives an overview about the most important advocates of housing rights and a brief description of their work.

2.4.2 Within the UN system

2.4.2.1 OHCHR

Within the United Nation System, housing rights have a prominent position. Several initiatives have been founded and put continuous effort into the promotion of housing rights.

As coordinator of the human rights activities within the United Nations, the Office of the High Commissioner of Human Rights (OHCHR) has given increased attention to the promotion of housing rights. Among its main activities on the issue are the publication of background material and awareness raising among the broader public, governments etc.⁹³

⁹¹ CESCR, General Comment 7, 1997, para. 13.

⁹² UN-Habitat/OHCHR, 2002, Preface.

⁹³ UN-Habitat/OHCHR, 2002, p.9.

2.4.2.2 UN-Habitat

The United Nations Human Settlements Programme (UN-Habitat) is a specialised agency within the UN system. Founded in 1978 – in the aftermath of a first meeting in Vancouver today referred to as Habitat I – as United Nations Commission on Human Settlements (Habitat), the agency was transformed into a fully fledged programme and renamed as the United Nations Human Settlements Programme in 2002⁹⁴. Since then it works under the auspices of the Economic and Social Council (ECOSOC) which coordinates the 14 specialised agencies of the United Nations. UN-Habitat's mandate is the promotion of “socially and environmentally sustainable towns and cities with the goal of providing adequate shelter for all”.⁹⁵

The most important document for the work of the Programme is probably what is known as the *Habitat Agenda*, the outcome document of the second UN conference on the issue, Habitat II, in Istanbul in 1996. The Habitat Agenda contains over 100 commitments and 600 recommendations and has been adopted by 171 countries.⁹⁶

Closer cooperation between UN-Habitat and OHCHR had its starting point in 1996 and 1999 when both organisations convened group meetings on the right to adequate housing. The collaboration between the two also led to the founding of the United Nations Housing Right Programme (UNHRP) in 2002, “the main vehicle for advancing housing rights within the United Nations System”.⁹⁷ The Global Campaign for Secure Tenure, designed to protect housing rights by promoting secure tenure for everyone, was also started as a joint programme. It is meant to provide a mechanism for UN Member States to fulfil the Millennium Development Goal targeted at improving the lives of at least 100 million slum dwellers by the year 2020.⁹⁸

94 The transformation was enabled with resolution A/RES/56/206 of 1 January, 2002.

95 www.unhabitat.org/categories.asp?catid=10 (03.04.2012)

96 Ibid.

97 UN-Habitat/OHCHR, 2002, p.9.

98 Details on contents of the relevant MDG, their implementation and the current state of discussion are provided in Chapter 4.2.

2.4.2.3 UN Special Rapporteur on the right to adequate housing

In 1993, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities⁹⁹ appointed Rajindar Sachar as Special Rapporteur on promoting the realisation of the right to adequate housing. He concluded his mandate in 1995.¹⁰⁰

It was not until the year 2000 that a similar mandate was created: This time it was the UN Commission on Human Rights that appointed Mr. Miloon Kothari of India as Special Rapporteur on adequate housing as a component of the right to an adequate standard of living.¹⁰¹ In 2003, his mandate was renewed for a period of three years. After the replacement of the Commission through the newly created Human Rights Council, the mandate was revised and extended for one more year in 2007.¹⁰² At the 7th session of the Human Rights Council, the Brazilian architect and university professor, Raquel Rolnik, was appointed to follow Kothari as the second United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context.¹⁰³ Officially in function since May 2008, Rolnik's mandate was extended for another three years by the Human Rights Council in October 2010.¹⁰⁴

The mandate of the Rapporteur on adequate housing was established to examine, monitor and report on the status of the right to housing across the world. Furthermore, the Rapporteur provides technical assistance to governments, promotes dialogue between different stakeholders, such as residents and governments but also other UN bodies and relevant international organisations.¹⁰⁵ The responsibilities of the mandate

99 In 1999, the Sub-Commission – which mainly provided studies and recommendations to the UN Commission on Human Rights – was renamed Sub-Commission on the Promotion and Protection of Human Rights. In 2006, when the Commission on Human Rights was replaced by the Human Rights Council pursuant to General Assembly resolution 60/251, it ceased to exist. Instead, the Human Rights Council Advisory Committee was established as a think-tank for the Council.

100 UN-Habitat/OHCHR, 2002, p.9. See also: Commission on Human Rights, E/CN.4/2001/51, 2001, para.40

101 UN-Habitat/OHCHR, 2002, p.10.

102 Overview of the Mandate on:

<http://www.ohchr.org/EN/Issues/Housing/Pages/OverviewMandate.aspx> (31.03.2012)

103 Ibid. See also: <http://direitoamoradia.org> (07.04.2012)

104 Human Rights Council, A/HRC/RES/15/8, 2010, para.2.

105 http://direitoamoradia.org/?page_id=48&lang=en (07.04.2012)

are various: Individual cases of violations against housing rights can be reported to the Special Rapporteur. As possible reaction he/she can send urgent appeals or allegation letters to the government concerned, along with a request for explanation. Beyond that, the Special Rapporteur conducts country visits to investigate the status of the right to housing. The reports of these missions are presented to the UN Human Rights Council. Furthermore, annual reports are submitted to the UN Human Rights Council and the UN General Assembly.¹⁰⁶

2.4.3 Civil Society

2.4.3.1 Filling the gap

In many countries, civil society organisations hold a special place in the struggle for housing rights. Due to their work on a grass-root level, they provide indispensable information on the reality of slum dwellers, violations of housing rights through States and third parties and beyond that provide assistance to people that are out of reach of official organisations. Their increased importance is filling a gap characterizing the housing rights discussion on a national and international level:

What has been missing from most national and international documents and debates has been the views of the people and organizations who have the legitimate right to speak on behalf of the diverse groups that make up the urban poor and to negotiate on their behalf as policies are developed, recommendations made and national and international institutions set up or changed.¹⁰⁷

It's not possible within this thesis to make reference to all the organisations contributing to the realisation of housing rights in Kenya, but three of the principal players are mentioned exemplary.

2.4.3.2 Shack/Slum dwellers international

Shack/Slum Dwellers International¹⁰⁸ (SDI) is a global platform of community-based

¹⁰⁶ http://direitoamoradia.org/?page_id=48&lang=en (07.04.2012)

¹⁰⁷ Satterthwaite, 2001, p.136.

¹⁰⁸ “Slum” and “shack” are synonyms, the latter being widely used in Africa. The organisation's name

organizations of the urban poor. It represents organizations of 33 countries in Africa, Asia and Latin America and is represented in 21 countries, among them Kenya. Launched in 1996 to strengthen the national federations of the urban poor in advocacy and tasks such as developing alternatives to evictions, it became a formally registered entity in 1999.¹⁰⁹ SDI and the organizations that constitute it are getting increased international recognition by scholars, international agencies, governments and are thus contributing to the agenda setting when it comes to urban development.¹¹⁰ SDI is an example of a so-called grassroots network with an important role for the realisation of housing rights.¹¹¹ The author chose to mention SDI because of its high level of organization as well as its involvement in partnerships and alliances, such as the Global Campaign for Secure Tenure and the below mentioned Cities Alliance.

2.4.3.3 Centre on Housing Rights and Evictions

The Centre on Housing Rights and Evictions (COHRE) is an international non-governmental, non-profit human rights organisation. COHRE is one of the principal agencies focusing on housing rights and in particular forced evictions on an international level. Among its main activities are the prevention of forced evictions, protection and promotion of housing rights and awareness-raising on the fundamental rights every individual has regarding housing. Registered in the Netherlands, COHRE coordinates its global activities from its headquarters in Geneva, Switzerland. A part of the work is carried out by regional and thematic programmes. In particular COHRE's publications are estimated by all kinds of stakeholders, including the United Nations agencies.¹¹²

varies according to the preferred terminology of the user. See also Patel et.al, 2001, p.45.

109 <http://www.sdinet.org/about-what-we-do> (16.05.2012).

110 Satterthwaite, 2001, p.138.

111 For a comprehensive guidance through the sometimes confusing terminology and the distinctions between grassroots organizations, community-based organizations and related concepts see for example: Smith et al.: Dictionary Nonprofit Terms and Concepts, 2007.

112 www.cohre.org/about-us (23.02.2012). To the date this thesis was finalized, the website of COHRE has been unaccessible for several weeks. The reason was not known.

2.4.4 Cities Alliance

In 1999, the World Bank, UN-Habitat, 10 donor¹¹³ governments and the major associations of local authorities founded the Cities Alliance. The Alliance set itself two focus areas: “the growth of slums and the management of cities where slum growth was taking place”.¹¹⁴

The Cities Alliance at the time of the research included:

- A large number of local authorities, represented by *United Cities and Local Governments* and *the World Association of Major Metropolises*.
- The governments of Australia, Brazil, Chile, Ethiopia, France, Germany, Italy, the Netherlands, Nigeria, Norway, Philippines, South Africa, Spain, Sweden, United Kingdom, and the United States of America.
- Shack/Slum Dwellers International and Habitat for Humanity International¹¹⁵
- The EU, the United Nations Environment Programme, UN-Habitat and the World Bank.¹¹⁶

The Cities Alliance aims to improve the living conditions of the urban poor through city development strategies and slum upgrading.¹¹⁷

113 The author's professional experience in development cooperation occasionally complicates the assessment of adequate terminology for the reader. Apart from States (bilateral approach), the term donors can refer to international organizations and NGOs. For additional information and a profound understanding of international development cooperation, see Degnbol-Martinussen et al., 2003.

114 Cities Alliance, Programme Flyer, y:n/a.

115 A non-profit, ecumenical, Christian organization providing low-cost housing worldwide. See Habitat for Humanity fact sheet on www.habitat.org (22.05.12).

116 Cities Alliance, Programme Flyer, y:n/a.

117 <http://www.unhabitat.org/content.asp?cid=2119&catid=25&typeid=7>

2.5 Duty-Bearers of the right to adequate housing

2.5.1 State obligations

Every member state of the United Nations is obliged to protect the right to adequate housing as it is one of the rights enshrined in the UDHR that all parties to the UN Charter are bound to respect, protect and fulfil. Furthermore – so the argumentation of many scholars – the major part of the UDHR has become customary international law and is thus binding for all States.¹¹⁸ Beyond that, as mentioned above, every State in the world has signed one or more human rights treaties that provide for the right to adequate housing.

The right to adequate housing can be considered as a *progressive* legal obligation¹¹⁹: Given the point of departure that apparently no State in the world is free of significant problems of one kind or another in relation to the right to housing¹²⁰, it is very unrealistic to expect its realisation overnight. This acknowledgement – being valid for most of the economic, social and cultural rights – is one of the main reasons behind the particular terminology used in the ICESCR to describe the nature and scope of States parties obligations.¹²¹ At the same time, the language required additional interpretative efforts.¹²²

Art. 2 (1) of the ICESCR formulates State obligations on a general level as it requires each State Party to take steps, “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all means”¹²³ The mentioned rights obviously include the right to adequate

118 UN-Habitat/OHCHR, 2002, p.2.

119 UN-Habitat/OHCHR, 2002, p.13.

120 CESCR, General Comment 4, 1991, para 4.

121 UN-Habitat/OHCHR, 2002, p.13.

122 Apart from the work of the CESCR and the Special Rapporteurs and their central role in defining the normative value of the ESC Rights, mention is made to two interpretative texts that have achieved extensive use as interpretative tools: The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights formulated by groups of experts in 1986 and 1997 respectively.

123 ICESCR, 1966, Art.2(1).

housing, but due to the vague terminology, it is very hard to specify concrete duties from this general article. Many experts acknowledge though that there has been improvement in this regard: “(...)as linguistically imprecise as these terms may be, there is now some agreement as to the general obligations of states under the Covenant, thereby establishing important principles of international law on housing rights.”¹²⁴ Even against the background of inadequate available resources, a State is not excluded from its duty to ensure the widest possible enjoyment of economic, social and cultural rights and has to demonstrate the efforts it made to satisfy minimum core obligations.¹²⁵ According to the Committee on Economic, Social and Cultural Rights (CESCR) these are fulfilled by the satisfaction of, at the very least, minimum essential levels of the relevant rights.¹²⁶ The right to housing is explicitly mentioned in the further observation:

Thus, for example, a State party in which any significant number of individuals is deprived of (...) basic shelter and housing (...) is, prima facie (sic!), failing to discharge its obligations under the Covenant.

Beyond the minimum core obligations, a State is not allowed to delay its obligations regarding housing rights indefinitely, claiming a lack of resources – although this is a common misconception of the idea of progressive realisation.¹²⁷ In fact, the clause commits States to “move as expeditiously and effectively as possible” towards realising fully the right to housing.¹²⁸

The CESCR has elaborated in a detailed manner on the State obligations that derive from Article 11 (1) of the ICESCR in its General Comments 4 and 7. Although the interpretations only refer directly to the ICESCR, they may also serve for a better understanding of other instruments dealing with housing rights.¹²⁹

The obligations imposed on States regarding the right to adequate housing can be

124 Leckie, 2001, p.154.

125 This has been underlined by the CESCR in its General Comment 3 and can be found in similar words in the Maastricht Guidelines.

126 CESCR, General Comment 3, para.10.

127 UN-Habitat/OHCHR, 2002, p.13.

128 CESCR, General Comment 3, para. 9.

129 Leckie, 2001, p.153.

divided in different categories. In particular with reference to human rights, the so called *tripartite typology* is a well-known and widely used analytical tool to assess the different levels of obligations imposed by the rights in question.¹³⁰ Whereas the point of departure are generally three main levels of obligations – to respect, to protect, to fulfil¹³¹ – there are different alterations to the model. One aspect that varies is the obligation to *promote*.¹³² As from the viewpoint of the author, the inclusion of *promotion* – requiring positive action of a long-term character – as an independent duty reflects the most complete picture the State obligations are accordingly divided:

In order to *respect* the right to adequate housing, a State – and hence all public organs and agents – is obliged “to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual”¹³³. This obligation is of particular importance with regard to forced evictions. Another vital aspect of the obligation is the duty to respect people's rights to build their own dwellings and arrange their living environments in a way that reflects their culture, skills, needs and wishes.¹³⁴ In this context, State authorities may not restrict the rights to participation, organisation or assembly, must create conditions favourable for self-help initiatives, tenants groups and dwellers organisations.¹³⁵ Principles such as non-discrimination, equality of treatment, the right to privacy and similar rights must also be respected.¹³⁶

The obligation to *protect* commits States to protect individuals from violations of their housing rights through other individuals or other third parties. Authorities must prevent abuse by e.g. landlords or land owners, such as forced evictions, discrimination or withdrawal of services. In case such infringements occur, effective measures to avoid

130 Sepúlveda, 2003, p.137.

131 e.g. UN-Habitat/OHCHR, 2002, p.22.

132 The additional category was introduced by *van Hoof* and is also included e.g. in *Steiner and Alston's* model. In other typologies, it forms a sub-category of the duty *to fulfil*. See also Sepúlveda, 2003, pp. 157-172.

133 Leckie, 2001, pp.155-156.

134 Leckie, 2001, p.156.

135 UN-Habitat/OHCHR, 2002, p.22.

136 Leckie, 2001, p.156.

further deprivations have to be established and access to legal remedies guaranteed.¹³⁷

To comply with the duty to *fulfil*, States have to deal with a wide range of issues, including public expenditure, housing subsidies, monitoring housing costs, provision of public housing and basic services, to name just a few. The core aim of the positive obligation to fulfil is to guarantee each person under a State's jurisdiction the entitlements of the right to housing.¹³⁸

The duty to *promote* housing rights compels State authorities to “ensure that no measures are taken with the intention of deliberately eroding the legal and practical status of this right”.¹³⁹ Beyond that, part of their duty is to undertake a comprehensive legislative review of their existing policies and legislation possibly affecting the enjoyment of the right to adequate housing. Apart from housing laws/tenant rights, this concerns other legal domains with a possible impact on housing rights, such as laws related to planning, land use laws, property laws and expropriation regulations.¹⁴⁰ In general, the duty to promote requires active steps from the State, including legal recognition of the right to adequate housing, the identification of short-, mid- and long-term goals as well as the adoption of national housing strategies. Furthermore, they should assess the degree of unfulfilled housing rights among their population and target their housing policies accordingly.¹⁴¹

Kenya, which is analysed as a case study in this thesis, is signatory to all of the international treaties that guarantee the right to adequate housing, and has therefore committed itself to respect, promote, protect and fulfil it.¹⁴² The assessment of its compliance with this commitment is – among other aspects – one of the aspects this thesis seeks to analyse.¹⁴³

137 UN-Habitat/OHCHR, 2002, p.22.

138 Leckie, 2001. pp.157-158.

139 Leckie, 2001, p.156.

140 Leckie, 2001, p.156.

141 Leckie, 2001, p.156.

142 Economic and Social Rights Centre (Hakijamii), 2011(a), p.12

143 See also Chapters 3.4.2.3 and 3.4.3.2.

2.5.2 International cooperation

After considering the scope and extent of State obligations within their territory, attention should also be drawn to the international dimension of duties.¹⁴⁴ The ICESCR refers to international assistance and cooperation in Art 2(1) stating the following:

Each State party to the present Covenant undertakes to take steps, individually and **through international assistance and co-operation**, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁴⁵

Like in many cases of international human rights treaties the concrete obligations to be deducted from an article remain somewhat vague. Again its due to the work of the CESCR, that the content was clarified.¹⁴⁶ Although the obligations with international character apply to all State parties to to the ICESCR, they differ for wealthier States and for those who receive assistance and are particularly incumbent upon the former ones.¹⁴⁷ Sepúlveda presents a systematic overview and analysis of the Committee's work (observations, comments, statements etc.) and divides the international obligations according to the so-called tripartite typology in *respect, protect* and *fulfil*.¹⁴⁸

Activities carried out in the framework of international development cooperation can have an impact on the realisation of housing rights. Article 11 (1) of the ICESCR refers in this regard to the "essential importance of international cooperation" which State parties are due to recognise.¹⁴⁹ Nevertheless, there is a gap between theory and reality: In General Comment 4, the CESCR states that "traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups".¹⁵⁰ According to the Committee, it's part of the State

¹⁴⁴ Sepúlveda, 2009, p.88.

¹⁴⁵ ICESCR, 1966, Art 2(1) [*Author's note: emphasis added*].

¹⁴⁶ Sepúlveda, 2009, p.88.

¹⁴⁷ Sepúlveda, 2009, p.89.

¹⁴⁸ A detailed description would go beyond the scope of this thesis. See Sepúlveda, 2009, pp.89-95 for a deeper insight.

¹⁴⁹ ICESCR, 1966, Art. 11(1).

¹⁵⁰ CESCR, General Comment 4, 1991, para 19.

obligations – both recipients and providers – to ensure that a substantial proportion of financing is devoted to creating the preconditions for adequate housing.¹⁵¹

Not only States, also international organisations have responsibilities regarding human rights. In the interpretation of the CESCR, the obligations are not only imposed on States but also on non-State entities 'in a position to assist'.¹⁵² The CESCR mentions among others international financial institutions which should ensure that the measures they promote do not interfere with the enjoyment of the right to adequate housing.¹⁵³ A huge problem in this regard is the of lack legal clarity concerning international organisations:

(...)the expansion of functions and responsibilities of international organizations has created a number of gray areas. A significant disjuncture exists between the actual powers of international institutions and the legal and political options to hold them accountable.¹⁵⁴

Although to contribute to the realisation of human rights should ideally be seen as *raison d'être* for international assistance and cooperation, this is far from being always the case. There are a number of development projects which became infamous because of gross violations of human rights.¹⁵⁵

In General Comment 2 on international technical assistance measures, the CESCR emphasizes that all United Nations agencies involved in international development cooperation should ensure that the rights contained in the ICESCR are fully taken into account in the planning as well as in the implementation phase of development projects.¹⁵⁶ It was not until a decade later that the United Nations agencies – in a common understanding – affirmed that all their programmes and in particular development assistance should aim at the realisation of human rights and therefore be guided by human rights principles and standards. Also other organizations have

151 CESCR, General Comment 4, 1991, para 19.

152 Sepúlveda, 2009, p.89.

153 CESCR, General Comment 4, 1991, para 19.

154 Brodnig, 2001, p.2.

155 Widely discussed were *inter alia* World Bank-led (s.FN 156) projects such as the Narmada Dam or the Chad-Cameroon Pipeline which raised both human rights concerns and questions of accountability. See also Brodnig, 2001, p.2.

156 CESCR, General Comment 2, 1990, para 8.

verbalized their good intentions: Two examples are the Organisation for Economic Co-operation and Development and the World Bank¹⁵⁷ that have adopted guidelines to limit the negative impact of relocation or resettlement.¹⁵⁸ All these references regarding the responsibility of international cooperation suggest the conclusion that many international organisations carry out a double role: while on the one hand they act as advocates or promoters of housing rights, on the other hand they become duty-bearers.

2.5.3 The role of the private sector

Although the primary responsibility for ensuring the enjoyment of human rights remains with the State, the private sector is an important player. With reference to housing rights, the State has different levels of influence and roles. As service providers, businesses are directly involved in construction, management and maintenance of buildings and housing. As private owners, landlords or housing agencies, representatives of the private sector can affect the enjoyment of the right to adequate housing (negative examples: forced evictions, discrimination).¹⁵⁹

Particularly in the context of large development projects (such as construction of dams, resource extraction) businesses often play a negative role, as in the course of these projects forced evictions frequently occur. There are also other negative impacts, such as environmental degradation.¹⁶⁰

Companies can also have a positive impact on housing rights. Especially in countries where the State is not capable of fulfilling its obligations the private sector can fill this gap by providing innovative low-cost housing.¹⁶¹ In general, the impact is more positive

157 The term World Bank is commonly used, but might be misleading, as the institution developed from a single institution to a group – the World Bank Group – of five development institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID). The commonly used term “World Bank” in most cases refers to the first two. See also worldbank.org/about/history (18.05.2012).

158 OHCHR/UN-Habitat, 2010, p.36.

159 OHCHR/UN-Habitat, 2010, p.36.

160 Ibid.

161 Baker et al., 2009, p.8.

if State authorities and companies work together in so called Public Private Partnerships.¹⁶²

Also, the CESCR recognises the potential of this mixed approach, mentioning it in its General Comment 4:

Measures designed to satisfy a State party's obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. (...)In most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing. The promotion by States parties of "enabling strategies", combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged.¹⁶³

In the view of the Committee, companies can be involved to realise the right to housing, but the responsibility lies within the States. At the same time, the role of the private sector and its duties is being discussed at different levels. According to the former Special Representative of the United Nations Secretary-General on business and human rights, John Ruggie, companies have a responsibility to respect all human rights, including the right to adequate housing. This is also recognised in a variety of soft law instruments.¹⁶⁴

In June 2011, the UN Human Rights Council endorsed the Guiding Principles for Business and Human Rights¹⁶⁵, which aim to ensure that companies respect human rights in the course of their transactions and provide possibilities for redress in case of violations.¹⁶⁶

162 Baker et al., 2009, p.11.

163 CESCR, General Comment 4, 1991, para 14.

164 OHCHR/UN-Habitat, 2010, p.37.

165 UN Doc. A/HRC/17/31, 2011.

166 UN News Center, 2011.

2.6 Enforcing the right to adequate housing

2.6.1 Are economic, social and cultural rights justiciable?

The justiciability of economic, social and cultural rights, their capacity to be recognised and defended legally¹⁶⁷, has been a controversial subject ever since the International Bill of Human Rights came into existence. Still it is claimed by some that by their very nature, economic, social and cultural rights – among them the right to adequate housing – cannot be enforced within a legal framework. The main argument is the vagueness of the norms and the obligations deriving from them. This opinion, however, is not supported by principles of international human rights law.¹⁶⁸ Despite the fact that it remains a very complex issue, there is a growing tendency towards increased acceptance and promotion of the justiciability of economic, social and cultural rights, and among them the right to adequate housing. One indication for this is the increasing consideration of housing rights issues in national courts¹⁶⁹ which will be discussed in subchapter 2.6.3.

2.6.2 International enforcement: Complaint procedures and monitoring

Apart from domestic courts, also regional judicial bodies such as the European Court of Human Rights contributed to the growing acceptance of the justiciability of socio-economic rights.¹⁷⁰ Although in a traditional view, the European Convention on Human Rights is a classical civil and political rights treaty and does not protect socio-economic rights, the case-law comes to a different conclusion:

The Strasbourg Court has, to its credit, rejected the argument that the European Convention on Human Rights is a treaty solely concerned with civil and political rights.¹⁷¹

Although the European Convention does neither make direct reference to health, social

167 Leckie et al, 2006, Introduction xix.

168 UN-Habitat/OHCHR, 2002, p.63.

169 Leckie, 2001, p.158.

170 Clements et.al., 2008, p.409.

171 Clements et.al., 2008, p.409.

security or housing (although existing homes are protected under Art.8), the interpretation of the Convention by the Court requires States to protect socio-economic rights – at least to a certain extent. For instance in cases of *gross socio-economic deficits* the Court refers to a State's obligations under Art. 3 and/or 8.¹⁷² Accordingly, complaints regarding violations of socio-economic rights – i.a. housing rights – can be brought like other complaints by “any person, non-governmental organisation or group of individuals”¹⁷³ within the jurisdiction of any contracting State – subject to the condition that the deprivation had (or threatens to have) gross consequences for the victim.¹⁷⁴ The Court has considered a number of cases regarding housing rights, in particular with regard to deprivation of housing.¹⁷⁵

The European Convention's complaint and enforcement procedures are unique within international human rights treaties. When it comes to the two sister Covenants, the situation is very unequal: While the ICCPR allows for individual complaints, the “historical lack of a complaints mechanism within the context of the ICESCR”¹⁷⁶ made advocates of socio-economic rights demand the adoption of an Optional Protocol to the ICESCR for decades. In December 2008, it was finally adopted and once entered into force¹⁷⁷ it provides for a complaint mechanism, both for individuals and groups.¹⁷⁸

For the time being, one of the most important tasks of the CESCR is monitoring – i.a. on the basis of the Periodical Reports submitted by the State parties and additional information provided by NGOs – whether a State is meeting its obligations. In the case

172 Article 3 of the European Convention on Human Rights refers to the prohibition of torture and inhuman or degrading treatment or punishment, Article 8 includes the right to respect for private and family life. See ECHR, 1950.

173 ECHR, 1950, Art.34.

174 Requirements for individuals to make a complaint are that he or she (1) claims to be a victim of a violation of the Convention, (2) has exhausted all domestic remedies and (3) files the complaint within 6 months after the last document/hearing of the domestic remedy. If the complaint is admissible, the complainant is entitled to a court judgement which the State party concerned is obliged to respect. See Clements et.al, 2008, p.411.

175 Since the focus of this thesis lies on Kenya, it is not possible to elaborate further on their content and the Court's decisions at this point. For details see Clements et.al., 2008, pp.413-417.

176 O'Connell, 2012, p.40.

177 A minimum of 10 ratifications are required for the Protocol to enter into force. As of May, 2012, the protocol has 8 ratifications and 40 more signatories.

178 O'Connell, 2012, p.42.

of housing rights, it is essential to monitor if State parties are progressively improving housing conditions of the population. The outcome of such measurements can be presented in quasi-judicial fora as provided by the Committee. One important procedural feature is that it allows NGOs to submit parallel reports – so called shadow reports – which are considered alongside the official periodic report States have to submit. Beyond that, NGOs can submit additional written information during the meetings of the working groups that precede the actual sessions¹⁷⁹ whereas during the sessions, NGO representatives have the possibility to make oral interventions with regard to the periodic reports.¹⁸⁰

Especially with respect to forced evictions, the procedures of the CESCR have served as effective remedies.¹⁸¹ Also, other treaty-bodies have contributed to the construction of an international housing rights jurisprudence, such as the Committee on the Elimination of Racial Discrimination (CERD).¹⁸²

2.6.3 National enforcement: Domestic remedies

According to Yeshanew, domestic courts are the best option or the justiciability of human rights “mainly because of their relative accessibility and their power to pass binding judgements”.¹⁸³ There are two criteria that are decisive for the realisation of socio-economic rights within a country:

(...)Empirical research supports the view that those countries with both constitutionally entrenched socio-economic rights and strong powers of judicial review have been shown to devote more of their national wealth towards the realisation of socio-economic rights.¹⁸⁴

179 The working group serve to identify the questions that will be raised in the session with the representatives of the State parties. Written or oral information on behalf of the NGOs are welcomed by the Committee, as long as it relates to the issues on the agenda of the working group. See UN-Habitat/OHCHR, 2002, p 75.

180 UN-Habitat/OHCHR, 2002, p 75.

181 For instance, in 1994, the Committee on Economic, Social and Cultural Rights issued a *de facto* injunction against the Government of the Dominican Republic requiring the Government to refrain from their practices of evictions. Habitat/OHCHR, 2002, pp. 76-77.

182 For cases, see UN-Habitat/OHCHR, 2002, p.80.

183 Yeshanew, 2011, p. 67.

184 O'Connell, 2012, p.7.

The importance of constitutional protection has already been mentioned in chapter 2.2.3. What implications the new constitution in the case of Kenya might have on the realisation of housing rights will be discussed in chapter 3.

In many cases of housing rights violations, judicial remedies can be sought, for example injunctive orders for victims of discrimination with regard to housing or persons facing forced evictions. Also, legal remedies are available for victims of past violations, e.g. damage compensation.¹⁸⁵ Other cases of housing rights violations can be related to equal access to adequate housing or services, housing affordability, landlord-tenant relations, property rights, to name just a few.¹⁸⁶

This brief overview illustrates how judicial and quasi-judicial mechanisms can be a useful tool for civil society to protect and enforce the right to adequate housing.

¹⁸⁵ UN-Habitat/OHCHR, 2002, p.72.

¹⁸⁶ Leckie, 2001, p.158.

3. Slum upgrading

3.1 Facing the challenge of slums

Urban poverty is a global phenomenon and to find suitable ways to deal with it is a fundamental concern shared by many States. Although the individual context of every informal settlement demands a discerning response, there are some general lessons that can be learned from successful attempts and cross-boundary-methodologies that may prove sustainable in Indonesia as well as in South Africa. After decades of what can be denominated as the method of *trial and error*, slum upgrading is widely seen as best practice among the strategies with regard to urban poverty. Many experts share the view that it represents an effective means of improving the housing conditions of the poor without removing them from their homes.¹⁸⁷ Notwithstanding this global acknowledgement, its implementation remains rather an exception than a rule, as Huchzermeyer points out:

“(...)the improvement of conditions in existing 'slums' remains an exception that has to be fought for from below, but is seldom granted and at times is deliberately reversed.”¹⁸⁸

This can be attributed to global forces which in the form of campaigns and urban policies shape national strategies. According to Huchzermeyer, these forces “have particular relevance for understanding the situation in many African cities”.¹⁸⁹ This chapter, after presenting a brief analysis of root causes for informal settlements, presents the different approaches chosen by State authorities and international organisations in the course of time. Beyond that, it examines the concept of slum upgrading, the issues this approach addresses, as well as its human rights implications. In a further step the Kenyan government's policy regarding housing and informal settlements is examined, including the Slum Upgrading Programme KENSUP, its achievements and shortcomings.

187 Centre on housing rights and evictions, 2005, Introduction.

188 Huchzermeyer, 2011, p.15.

189 Ibid.

3.2 Causes and characteristics of slums

The introduction chapter of this thesis dealt with the problem of finding valid definitions for a multifaceted phenomenon like slums. Drawing inference from this, to generalize about informal settlements – even within one country – is not an easy task as they display as many differences as similarities: They emerge from individual historical and political backgrounds, are established against a different legal framework and with unique socio-cultural and socio-economic compositions. Further distinguishing marks are for example size, density, quality of the land and the man made environment or exposure to natural disasters.¹⁹⁰

Nevertheless, slums do have aspects in common wherever they occur, and these include the economic, social and spatial factors that create and determine them and differentiate them from the rest of the respective cities.¹⁹¹

Despite the prevalence of slums worldwide, there has not been much research done on the causes, and again this is particularly valid for the African continent, Huchzermeyer concludes. Analysing possible causes for this she argues that in accordance with the current development focus – measurable symptoms instead of causes – the governments tend to blame simplistic problems for the existence and growth of slums.¹⁹² In many cases, appropriate, tailored strategies are hindered by a lack of recognition that slums are not isolated problems that need to disappear, but an indication for a larger dis-functionality of an entire urban system.¹⁹³

190 Centre on housing rights and evictions, 2005, Introduction.

191 UN-Habitat, 2003, p.17.

192 Huchzermeyer, 2011, p.23.

193 Centre on housing rights and evictions, 2005, Introduction.

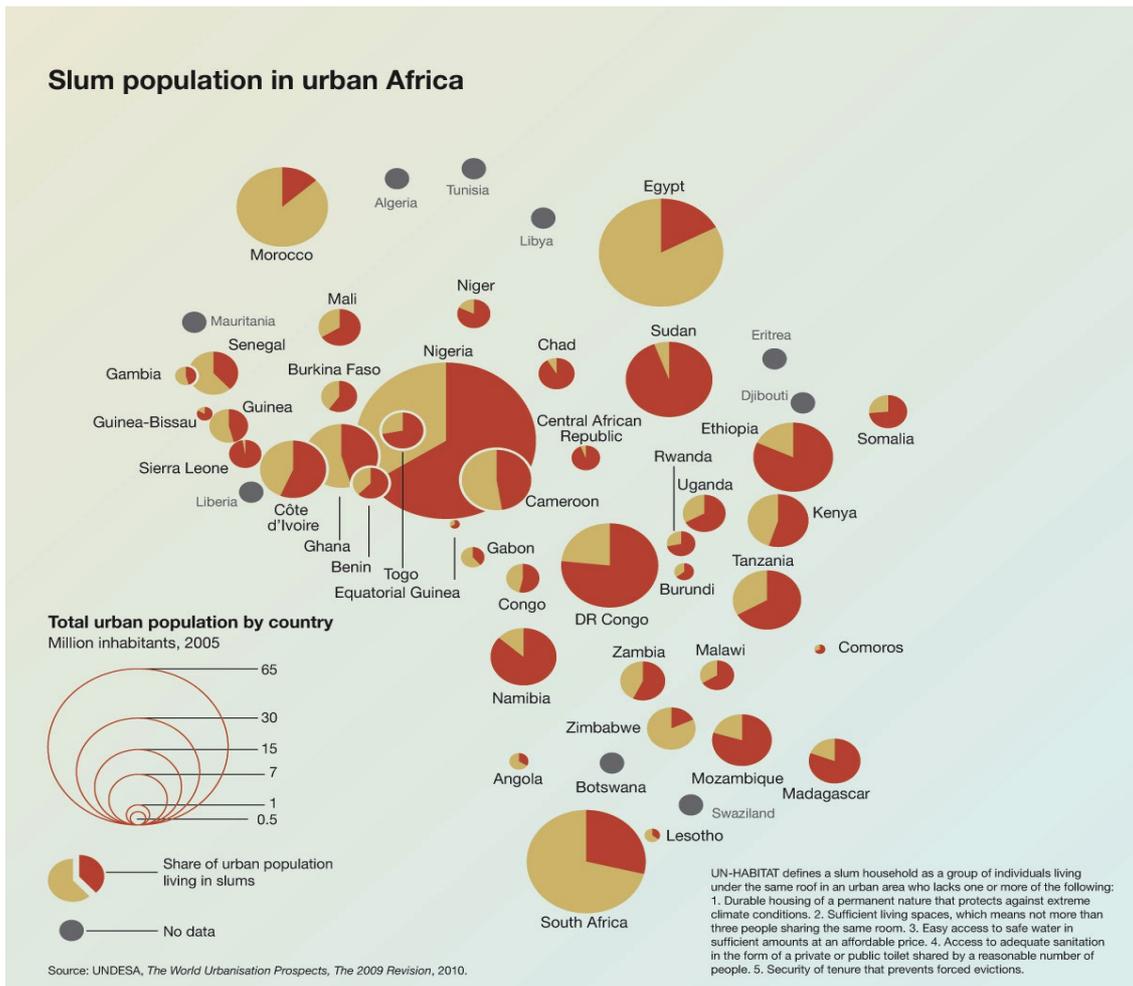


Figure 2: Slum population in Africa¹⁹⁴

The dimension of the problem becomes tangible on the African continent: In some African cities, over 50% of the population lives in slums, “the fact that 'urban growth' in Africa is almost synonymous with 'slum formation' indicates just how many constraints exist to provision of adequate housing”.¹⁹⁵ Despite the difficulties to give general reasons, among the main reasons frequently mentioned to explain the formation of slums are access to suitable land – due to i.a. increasing competitiveness of housing markets, lack of access to financing for poor people, corruption – and lack of political

¹⁹⁴ Pravettoni, UNEP/GRID-Arendal, http://www.grida.no/graphicslib/detail/slum-population-in-urban-africa_d7d6 (03.07.2012).

¹⁹⁵ UN-Habitat, 2011, p.8.

will to address the problem in a comprehensive manner.¹⁹⁶

3.3 Strategies of States towards slums¹⁹⁷

3.3.1 Ignore, demolish or improve: Past and present approaches

Since slums became part of urban reality in many countries, different strategies and policies were used to deal with them. During the course of the last decades, a range of approaches was applied, most of them subject to controversial discussions: the spectrum reaches from eradication or clearance over ignorance to interventions trying to improve the conditions within the slum.¹⁹⁸ The *lessons learned* from these attempts seem to be limited against the background of evictions of slum dwellers and demolitions of their settlements still being commonplace in many countries: It is striking that the same approaches to slums that were used more than a century ago, such as slum clearances and mass evictions in European cities, are still part of the authorities portfolio to confront urban poverty in many parts of the world.¹⁹⁹

3.3.2 Negligence

The predominant strategy in many developing countries until the 1970s followed the assumption that slums were “an unavoidable but temporary phenomenon” that could be overcome by economic development. Frequently, informal settlements – being considered as illegal – were not even recognised on maps and in planning documents. The negation of the existence came along with complete ignorance of the rights of the slum-dwellers. Influenced by the reconstruction policy in European countries after the Second World War, many developing countries provided formally low-cost housing, but

¹⁹⁶ UN-Habitat, 2011, p.8.

¹⁹⁷ For the following subchapters (3.3.1-3.3.6), the main reference are UN-Habitat documents. The author is conscious that the inclusion of alternative sources, e.g. academic publications, would have been desirable but for the explanation of different approaches to slums it turned out to be impossible to find such. However, in particular the UN-Habitat publication *The challenge of slums* is renowned and frequently cited by scholars.

¹⁹⁸ UN-Habitat, 2003, p.128.

¹⁹⁹ UN-Habitat, 2003, pp.128-129.

instead of the initially targeted low-income group, the resources were allocated to the middle class, government employees and clientele. Despite of high costs, the housing needs of the poor population were not met with this approach.²⁰⁰ Particularly in Sub-Saharan Africa, the situation was additionally influenced by economic constraints after reaching independence which “resulted in increased social inequalities and spatial segregation in cities”.²⁰¹

3.3.3 Eviction and demolition

When governments had to acknowledge that economic development didn't solve the problem, many authorities recurred to repressive alternatives. Evictions – both of individuals and large groups – was a common response to the growing informal settlements in almost all developing countries. Seen as a legitimate practice since the 1950s²⁰², it reached its peak during the 1970s and 1980s.²⁰³ The situation was aggravated i.a. by a lack of legal protection against forced evictions. The slum-dwellers were not included in the decision processes, and only in rare occasions were they offered viable alternatives or compensation for damages. This strategy – although still used around the globe – didn't contribute to a solution of the problem, but shifted it to the periphery. Furthermore, it led to side effects as the continuing growth of urban centres brought about a seemingly endless cycle of evictions and the creation of new informal settlements. The demand of suitable housing for the poor in contrast to the insufficient offer from the government added to the rapid development of the informal market, especially in the 1970s and 1980s. One of the effects of this development can be described as a commodification of housing provision systems, including those in slums.²⁰⁴

200 UN-Habitat, 2003, pp.129-130.

201 UN-Habitat, 2003, p. 30.

202 UN-Habitat, 2011, p.17.

203 UN-Habitat, 2003, p.130.

204 Ibid.

3.3.4 *In situ* upgrading and self-help – first steps

In the late 1970s, a new approach evolved due to the failure of the repressive responses to the phenomenon of slums. The recognition of slums as a lasting and structural problem, together with increased awareness of human – and housing – rights and an emerging civil society opened the space for a new strategy: *In situ* upgrading, which refers to improvements of the physical, social and economic environment of an existing settlement, without displacing the people living there.²⁰⁵

The new approach was based on three pillars:

- Provision of basic services
- Secure tenure for slum dwellers
- Access to financing (e.g. innovative, adapted solutions for credits)

Many governments were particularly attracted to the model because of cost effectiveness: Slum upgrading was by far cheaper than other strategies.²⁰⁶ International Organizations like the World Bank also focused on the new approach.²⁰⁷ Still, early slum upgrading projects were not sustainable²⁰⁸:

Cheap solutions can have poor outcomes. Like other aid projects that focus purely on construction, the projects (...) existed in isolation from both government and the communities. Governments did not follow through with services, communities did not maintain the facilities, and governance structures disappeared once the international experts were gone.²⁰⁹

By the mid-1980s, the upgrading approach had encountered heavy critics.²¹⁰ Also within the World Bank, the euphoria was replaced by sobering. There was a “point where 'slum upgrading' disappeared from World Bank documents”.²¹¹

205 UN-Habitat, 2011, p.18.

206 UN-Habitat, 2003, p.130.

207 <http://web.mit.edu/urbanupgrading/upgrading/case-examples/overview-africa/country-assessments/index.html> (25.05.12).

208 UN-Habitat, 2003, p.130.

209 UN-Habitat, 2003, pp.130-131.

210 <http://web.mit.edu/urbanupgrading/upgrading/case-examples/overview-africa/country-assessments/index.html> (25.05.12).

211 UN-Habitat, 2003, p.131. For further discussion of the *Slum Upgrading Myths* and its theoretical

Parallel to the first *in situ*-models and intertwined with its inherent logic, the self-help-approach emerged. Instead of seeing the State as provider of shelter²¹², the perception of its role shifted towards that of a facilitator of the efforts of the poor to help themselves. One form of this that received wide-spread approval are so called sites-and-services schemes, with the authorities providing plots and basic services whereas the people build their own houses.²¹³ Again, the World Bank became a strong advocate of this strategy and provided finance for a large number of projects as many countries in Africa, Asia and South America took up the concept. In particular due to fundamental misconceptions of housing needs of the poor, many of the projects failed and the sites-and-services approach faced strong opposition. Some of these elements still remain in use and have support among donors and experts, inter alia the basic idea to make use of the resources of low-income households – even if they are scarce – and provide affordable housing options for this segment of the society has found its replication in the last decade. One very positive aspect that still deserves support in the view of the author was the recognition of the ability of people to establish housing for themselves.²¹⁴

3.3.5 Resettlement

Resettlement is a strategy that can have a wide range of implications: If carried out with an agreement and in cooperation with the people concerned, it can be a suitable solution, especially in cases where it is unavoidable.²¹⁵ In the worst case, it is undertaken in complete denial of the socio-economic consequences and is only slightly better than eviction.²¹⁶ Generally speaking, resettlement should never be the first option as removing people from their homes causes a lot of collateral damage. It destroys

background, see also Werlin, 1999.

212 The argument behind this shift was the State's "inability" to provide shelter for all the people who needed it. Still, the author of this thesis is not convinced that accepting that inability should be the preferred option.

213 UN-Habitat, 2011, p.38.

214 <http://www.gdrc.org/uem/squatters/s-and-s.html> (05.06.2012).

215 *Unavoidable* is a relative term. According to UN-Habitat, only in about 20 per cent of the cases the land inhabited by slum dwellers is genuinely needed for public development, such as roads, flood control projects etc. See UN-Habitat, 2011, p.19.

216 UN-Habitat, 2003, p.131.

communities, breaks up social networks, reduces people's income opportunities, increases their transport costs, interrupts their children's school attendance and often increases their poverty.²¹⁷ Without any accompanying measures (like low-cost housing or large-scale slum upgrading programmes), the housing and living conditions of the poor tend not to improve after resettlements, particularly because in many cases people are relocated to sites at the periphery with limited or no access to infrastructure or services.²¹⁸ In many African cities, thousands of slum dwellers have been evicted in the last decade to make way for large development projects, often financed by International Finance Institutions such as the World Bank. Despite their organisation-intern codes of conducts and norms, the majority of these projects have not gained the cooperation or support of those being resettled, but were carried out against their will.²¹⁹

3.3.6 Upgrading the upgrading-approach

The different approaches described above continue to be in use, including those with problematic implications, such as forced evictions or negligence. After decades of trial and error, the living conditions of the urban poor have not improved significantly in the majority of countries. In the vast majority of cities in developing countries, the number of slum dwellers remain static or increase, the growth of existing or the formation of new slums is part of urban development in many regions. The only exceptions are “countries that combine large-scale slum upgrading and tenure regularization programmes with the production of serviced sites and low-cost housing programmes”.²²⁰

UN-Habitat in its landmark publication *The challenge of slums* concludes “that there has been an evolution of policy approaches to slums” and a “recognition that effective approaches must go beyond addressing the specific problems of slums (...) and must deal with the underlying causes of urban poverty”.²²¹ This optimistic conclusion is almost 10 years old – and despite the fact that strategies and policy approaches are

217 UN-Habitat, 2011, p.30.

218 UN-Habitat, 2003, p.131.

219 UN-Habitat, 2011, p.30.

220 UN-Habitat, 2003, p.131.

221 Ibid.

developing, as mentioned at the beginning of chapter 3, approaches that deal with the underlying causes are still rare. Nonetheless, the approach of slum upgrading has been refined in the last 40 years. One important step forward was the awareness that the residents of the settlements concerned were to be involved in the decision-making. Making use of one of the favourite terms of development cooperation, the *enabling approach* was introduced. This approach is based on the subsidiarity principle and emanates from the assumption that for decisions – with regard to resource allocation within development processes – to be efficient, they have to be taken at the lowest effective level.²²²

With regard to the improvement of slums, the lowest level is that of communities and neighbourhoods. Although there are many examples for successful enabling strategies, the implementation remains very complex, on one hand because they require a lot of additional measures like training and financial assistance, on the other hand because communities are rarely united.²²³ Stein delineates them as strong community involvement as “always tricky” as interests are often homogenous. According to him, different methods have to be tried.²²⁴

3.3.7 The state of slum upgrading

In many publications promoting slum upgrading formulations like this can be found:

(...) there is now an international consensus that comprehensive improvement of the living conditions in informal settlements (slum upgrading) is necessary in order to create conditions for longterm poverty reduction and to gradually raise the quality of life in poor neighbourhoods.

Obviously, the advocates of slum upgrading tend to have a very positive picture of this *international consensus*. As described above, States still use different approaches to face the challenge of slums – and in many cases they do not opt for the participatory, inclusive approach of slum upgrading. Two of the decisive factors for this might be time

222 UN-Habitat, 2003, p.131.

223 UN-Habitat, 2003, p.131.

224 Interview A.Stein, 15.06.2012.

and effort. Since every slum upgrading project requires a detailed analysis of the local situation and coherently adaptation to suit its unique circumstances²²⁵, there is often no political will to invest the amount of time and money required. Also, the individual circumstances of every informal settlement make it impossible to just replicate a successful model unchanged from one settlement to the other.²²⁶

3.3.7.1 Issues addressed by slum upgrading

Slum upgrading means “improving the physical, social and economic environment of an existing informal settlement”²²⁷. These improvements should be “undertaken by the local government with the participation of all parties — residents, community groups, businesses, and national authorities.”²²⁸

Slum upgrading ideally goes beyond physical improvements and promotes policy changes, “recognising that slums are not isolated problems, but indicative of an entire urban system that is not functioning and must therefore be addressed through city-wide planning processes”.²²⁹

What slum upgrading in a specific case involves, varies. Some of the common issues addressed are:

- Tenure Security: Legalisation of status of residents, including regulation of rental agreements.
- Physical improvement, including existing dwellings; sometimes construction of new housing.
- Provision or improvement of basic services e.g., water, waste management, sanitation, electricity, road pavement, street lighting, etc.
- Provision or improvement of social infrastructure and public services such as schools, healthcare facilities, community centres, playgrounds, green areas, etc.

225 Centre on housing rights and evictions, 2005, p.4.

226 Centre on housing rights and evictions, 2005, p.5.

227 UN-Habitat, 2011, p.18.

228 Cities Alliance Fact Sheet, y.n.a.

229 Centre on housing rights and evictions, 2005, Introduction.

- Official recognition of settlements and inclusion in extended urban development plans.
- Implementation of densification measures (e.g. multiple-story houses), e.g. to protect fertile land from being occupied.²³⁰

Although the different settlements require adapted solutions, the purpose of slum upgrading is usually the same: to improve the conditions in informal settlements, formalise them and incorporate them into the city.²³¹

3.3.7.2 Slum upgrading and human rights

From a human rights perspective, slum upgrading seems to be a promising tool: Apart from the key rights at stake – the right to housing and protection from forced evictions – it can help in the realisation of other human rights such as access to water, sanitation, healthcare and other services.²³² Also, protection against discrimination can be a positive repercussion of slum upgrading.

However, slum upgrading can have an adverse impact on human rights if poorly planned or implemented.²³³ Unfortunately, a wide range of examples proves this. Some of the negative results of slum upgrading with regard to Kenya will be discussed in chapter 3.4.3.2.

Experience shows that slum upgrading projects are far from being easy to organise, plan, and implement, especially not in a context of poverty. There are some essential rules that have to be followed, such as long-term planning, and management. Particularly required are political commitment as well as respect for local conditions and the sustainability of the project. Community involvement and participation – beyond mere consultation – have proved to be a *conditio sine qua non*. Effective protection from forced evictions, harassment or discrimination as well as respect for and

²³⁰ Centre on housing rights and evictions, 2005, p.4.

²³¹ Cities Alliance Fact Sheet, y.n.a.

²³² Centre on housing rights and evictions, 2005, p.5.

²³³ Centre on housing rights and evictions, 2005, Introduction.

protection of all the human rights at stake are other vital ingredients.²³⁴

In the last decade, the improvement of slums has found increased support after being set down in writing as one of the (sub-)targets of the Millennium Development Goals. This is a mixed blessing as on one hand it helped to raise awareness on the problem of slums while on the other hand the targeted result turned out to be very low. Further discussion on the influence of the MDG agenda in the strategies against urban poverty and the intricate relationship between MDGs and human rights can be found in chapter 4.

3.4 The case of Kenya

3.4.1 Human rights situation: General remarks

The human rights record of Kenya can be considered as ambivalent. On one hand, the Kenyan State shows visible efforts to comply with its human rights obligations²³⁵ and recent developments strengthened the position of human rights in the legal framework. One of the largest achievements for Kenya with regard to human rights was the new constitution, promulgated in August 2010. The reform process that had started in the aftermath of the escalation of violence following the 2007 elections²³⁶ is a spark of hope for many human rights protagonists and was welcomed by the UN as well as the civil society. Following repeated recommendations of the CESCR²³⁷, economic, social and cultural rights were included in the new constitution²³⁸. Of course, the mere existence of a bill of rights doesn't erase human rights violations. Hence – not surprisingly – on the other hand violations of different kinds are still common in the East-African country. Among the main issues at stake are violence against women and girls, housing rights – repeatedly violated through evictions – the treatment of refugees and asylum seekers

234 Centre on housing rights and evictions, 2005, p.5.

235 The CESCR welcomed e.g. the establishment of a National Commission on Human Rights in 2002, see CESCR, UN Doc. E/C.12/2008/3, 2008, para 357.

236 The most violent interethnic killings in Kenya's history following the December 2007 presidential elections resulted in more than 1.000 victims and between 300.000 and 500.000 internally displaced people. See also Chege, 2008 and Jacobs, 2011. The ICC in 2010 opened an investigation to clarify the responsibility for the violence. See also <http://www.icckkenya.org/background/timeline/> (27.06.2012).

237 See i.e. CESCR, U.N.Doc. E/C.12/2008/3, 2008, para 362. and E/C.12/KEN/CO/1, 2008 para. 9.

238 See Chapter 2.2.3.

and the death penalty which despite a de-facto abolition is still imposed by many courts. Another main concern is impunity, both for current human rights violations, as for the past ones, with the post-election violence of 2007/08 still casting its shade.²³⁹ Only few perpetrators had to face trials for crimes committed in the aftermaths of the election and while the International Criminal Court incriminated six suspects with crimes against humanity, the Kenyan government has not kept its promises of prosecuting other cases, as Human Rights Watch indicates.²⁴⁰

In the national report submitted in the framework of the Universal Periodic Review²⁴¹, the Human Rights Council names the following as some of the key challenges for Kenya: Poverty and inequality, bad governance and lack of respect for the rule of law, weak institutions, lack of public awareness, corruption.²⁴² All of them need to be tackled also for the realisation of the right to adequate housing which will be scrutinized in the next chapter.

3.4.2 Housing rights and their violations in Kenya

3.4.2.1 A permanent crisis?

Although the occurrence of slums is spread all over the world, some countries are particularly affected. Kenya – although in comparison with other African countries without a particular large share of slum population (see figure 2) can be considered as a prime example displaying the largest annual growth of informal settlements.²⁴³ All its major cities were constantly “facing a housing crisis with implications on a social, political and economic level.” during the last decade.²⁴⁴ Nairobi alone is home to more

239 Amnesty International, 2012, pp.201-203.

240 Human Rights Watch, <http://www.hrw.org/africa/kenya> (05.06.2012).

241 The Universal Periodic Review (UPR), established in 2006 with resolution 60/251, is one of the main elements of the Human Rights Council. The unique mechanism was established to review the human rights records of all UN Member States (once every four years). See <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (10.06.2012).

242 UN Human Rights Council, A/HRC/WG.6/8/KEN/1, 2010, paras. 53-67. On corruption see also Akech, 2009 and Bannon, 2007.

243 Mutisya et al., 2011, p.198.

244 Bodewes et al., 2003, p.221.

than 100 slum communities scattered within the city.²⁴⁵ More than half of the capital's population²⁴⁶ lives in slums, many with lack of water supply, electricity, waste management, access to health facilities.²⁴⁷ Apart from the in many cases deplorable and inadequate living conditions, maybe even more critical is the lack of tenure security which turns forced evictions and demolitions carried out by State authorities or third parties into a constant threat for the slum dwellers.²⁴⁸

In the second half of the past year, a number of cases of large-scale forced evictions, mostly in the areas around the airports, rendering thousands of people homeless, were reported by NGOs.²⁴⁹ According to Amnesty International, these were carried out despite a temporary court order in the framework of a pending court case concerning land ownership.²⁵⁰

Many of the violations of housing rights during the last decades can be rooted in the State policy: For a long time, the problem was ignored, which materialized for example in the government's refusal to recognise informal settlements as inhabited land. With the view of the public land as vacant, the residents could be thrown off at any time.²⁵¹ The practice of forced evictions and demolitions was a common response of the State authorities. Furthermore, the Kenyan State didn't provide any housing for the poor.²⁵² Fortunately, the government has changed its attitude and recently drafted strategies that acknowledge “the existence of slums and the need to improve them”.²⁵³ Chapter 3.4.3.1 discusses the current status of these strategies, their achievements and shortcomings.

245 Kenyas total population was 38,6 million in 2009, the year the last census took place. With a population growth of about 3%, the estimate of a total population equaled 41 million in 2011. See National Coordinating Agency for Population and Development, y: n/a.

246 Population of Nairobi is estimated to be currently 3.375 million. See CIA World Factbook online: www.cia.gov/library/publications/the-world-factbook/geos/ke.html (29.5.12).

247 Mutisya et al., 2011, p.200.

248 Bodewes et al., 2003, p.221.

249 See e.g. Amnesty International Report 2012, p.203.

250 Ibid.

251 Bodewes et al., 2003, p.222.

252 Bodewes et al., 2003, p.221.

253 Mutisya et al., 2011, p.198.

3.4.2.2 Historical development of Kenya's slums

Informal settlements have a long history in Kenya, dating back to the colonial period²⁵⁴, when most Kenyans were expropriated and expelled from their land, because the designated urban areas were reserved for Europeans and Asians.²⁵⁵ Especially in the second half of the 19th century, this was a common practice. According to Bodewes et al., this influenced both the so called *Mau Mau* Uprising – a military conflict between 1952 and 1960 – and the struggle for independence. After the independence in 1963, the first government didn't make any serious attempts to address the problem. Land was not returned, instead the original residents were required to purchase it which only a small number of Kenyans could afford to do. This way, millions of Kenyans became landless squatters. In the years after independence, the situation was aggravated through heavy migration flows to the cities and a rapidly growing population.²⁵⁶ Due to the insufficient housing policy and lack of other measures on behalf of the young republic's government, the construction of settlements on vacant government land was the only means of shelter.²⁵⁷ Many slums can be traced back to this period.²⁵⁸

The land quality of the occupied areas was poor and in many cases not suitable for dwellings: Often, the only recourse the people in search for shelter had were areas along riverbanks, swamps, steep slopes, refilled quarries and garbage dumps. Furthermore, settlements spread in other improper or dangerous locations like railway safety zones, land under high voltage power lines and on road reserves.²⁵⁹

Until the late 1970s, the government – like that of many developing countries – almost exclusively resorted to the demolition of slums scattered around the urban areas, this approach was eventually replaced by a mixed approach of tacit acceptance combined with negligence. The authorities refrained largely from demolitions, but also didn't

254 For further insights into the link between the current state of socio-economic rights in Africa and the colonial period, see also Udombana, 2006.

255 Mutisya et al., 2011, pp.198-199.

256 Bodewes et al., 2003, p.222.

257 Bodewes et al., 2003, p.223.

258 Pamoja Trust, 2006, p.10.

259 Pamoja Trust, 2006, p.11.

come up with any mitigation measures. This led to a dramatic growth of slums and the informal sector.²⁶⁰ The challenges that came along with the rapid urbanization intensified, while poverty increased. Another influential factor was the change of paradigm accompanying the newly established multi-party system:

With the introduction of competitive politics, land was used to purchase political favours and to oil the wheels of a patronage system.²⁶¹

In many cases, the beneficiaries of this system realised that their land was already occupied. With the assistance of the authorities, the residents were forcefully evicted. The new wave of evictions incurred the wrath of those affected and the general public. First attempts to systematize the protest were carried out by an emerging civil society.²⁶² Also, legal instruments were used increasingly to hinder forced evictions.

In 1990, the government demolished the two large slums Muoroto and Kibgare, displacing over 30.000 people.²⁶³ In response to the rising threat of being *wiped off* the urban landscape, the slum-dwellers started to organize themselves. The emerging “lobby against forced evictions”²⁶⁴ mobilized and began to rely on new methods to defend the rights of slum-dwellers²⁶⁵. The second half of the 1990s was characterized by advocacy campaigns using a rights-based approach to support the urban poor.²⁶⁶

Although the State authorities changed their strategy in the new millennium, as mentioned above, the proliferation of slums continues to be a huge problem. Among the top causes are the lack of formalization of land tenure and the lack of effective housing policy for the urban poor which perpetuate the situation of insecurity and social segregation.²⁶⁷ Another aggravating factor is what Karari calls the “politicization of

260 Bodewes et al., 2003, p.223.

261 Pamoja Trust, 2006, p.11.

262 Pamoja Trust, 2006, p.11.

263 Bodewes et al., 2003, p.223.

264 Pamoja Trust, 2006, p.11.

265 The increasing mobilization also led to the founding of *Muungano wa Wanavijiji*, the Kenyan slum dwellers foundation, which turned into an important player at the grassroot level. See also mustkenya.org (28.06.2012).

266 Ibid.

267 Karari, 2006, p.3.

development²⁶⁸:

The slum has become a political resource for votes in exchange for the much needed basic needs.²⁶⁹

Critics of a number of Slum Improvement programmes including provision of low-income housing state that these measures benefited the middle class instead of the urban poor.²⁷⁰ Whether this is the result of a systematic failure or rather a collateral damage due to inadequate planning is difficult to determine.

The next subchapter presents the obligations of the Kenyan State under the treaties it has ratified. Following that, the policy of the Kenyan State towards the informal settlements will be examined, with a particular emphasis on KENSUP, the Kenyan Slum Upgrading Programme jointly launched by the Kenyan government and UN-HABITAT.

3.4.2.3. Kenya's obligations with respect to housing rights

Kenya is a State party to almost all the core human rights treaties²⁷¹, the Rome Statute of the ICC and many other international instruments, such as most ILO Conventions. Furthermore it has ratified the most important regional instruments, i.a. the African Charter on Human and People's Rights, the Protocol to the Charter on the Establishment of an African Court on Human and People's Rights and the African Charter on the Rights and Welfare of the Child.²⁷²

After having acceded to the ICESCR in 1972, the Kenyan State is required by law to comply with its terms.²⁷³ As a dualist State, international instruments have to be integrated into the national legislation by the Parliament. While a number of instruments have been domesticated through single laws, the ICESCR, like other treaties such as

268 Karari, 2006, p.3.

269 Ibid.

270 See Chapter 3.4.3.2.

271 The only exception is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which has been under consideration for a couple of years. See UN Human Rights Council, A/HRC/WG.6/8/KEN/1, 2010, para 28.

272 UN Human Rights Council, A/HRC/WG.6/8/KEN/1, 2010, para.29.

273 Bodewes et al, 2003, p.224.

CEDAW and ICERD, is reflected in a number of national laws.²⁷⁴

Still, there are several areas in which the State fails to comply with its obligations: Especially with regard to forced evictions, Kenya continues to violate human rights. Although the government declared before the UN Human Rights Commission in 2004 to halt evictions in all informal settlements until compliance with international human rights standards was guaranteed, the latest report of the Special Rapporteur on adequate housing that dealt with Kenya indicated that widespread forced evictions were still taking place. Even if they were justified as claimed by the government, in many cases reports indicate that there was no adequate warning, consultation or compensation beforehand and that the evictions themselves were characterized by violence and inadequate resettlement plans.²⁷⁵ In this context, it has been repeatedly criticized by both the CESCR and NGOs that the Kenyan government has still not published national guidelines on forced evictions despite having pledged to do so in various occasions. Such guidelines should be based on General Comment No.7 of the CESCR and would be an important step towards compliance with international human rights standards.²⁷⁶ By the end of 2011, the government had still not accomplished this task²⁷⁷, but it is likely to be realised this year. As of late, a draft version of the Eviction and Resettlement Guidelines, together with a draft bill, is accessible.²⁷⁸ Human Rights NGOs hope that the legislation will be enacted during 2012.²⁷⁹

The Special Rapporteur on adequate housing has underlined that the failure of various governments to respect and protect the right to adequate housing has been accentuated by corruption and mismanagement. There are reports indicating that these factors do

274 UN Human Rights Council, A/HRC/WG.6/8/KEN/1, 2010, paras.30-33.

275 UN Human Rights Council, A/HRC/13/20/Add.2, 2010, para.192.

276 CESCR, E/C.12/2008/SR.35, 2008, para.33.

277 Amnesty International, 2012, p.203.

278 A task force coordinated by the Ministry of Lands has produced the first draft guidelines in 2010 already. Following the decision that an enforceable legal instrument would be required, a bill was drafted subsequently. In the view of the author it is indicative for the priorities that mention of the bill (see following FN) at the time being can only be found on websites of the civil society but not on the Ministry's. Since february 2012, a link to the Draft Eviction Guidelines is provided: http://www.lands.go.ke/index.php?option=com_docman&task=doc_download&gid=126&Itemid=46 (28.06.2012).

279 Economic and Social Rights Centre (Hakijamii), 2012, pp.4-5.

play a role in the case of Kenya as well.²⁸⁰

The next chapter outlines the different initiatives by which the Kenyan government tries to address the housing problem and examines some of the strengths and weaknesses of their efforts.

3.4.3 Government policies and housing rights

3.4.3.1 The Kenyan Slum Upgrading Programme and beyond: a paradigm change?

Kenya can for several reasons be regarded as a prime example for the research topic of this thesis: Boasting one of the highest disparities of wealth in the world²⁸¹, it has a high rate of urban poverty. Half of the capital's population lives in slums which account for some of the “most dense, unsanitary and insecure” worldwide.²⁸² Beyond that, the East-African country serves as an interesting example when it comes to possible State's responses to urban poverty. In the year 2000, the Kenyan government – jointly with UN-Habitat and the Cities Alliance – decided to start a slum upgrading programme, first to be implemented in Kibera, Nairobi's largest slum, and to be expanded subsequently. KENSUP, the Kenyan Slum Upgrading Programme, was born. Target of the programme is to improve the lives of more than 5 million people²⁸³ living and working in slums across the nation by delivering effective slum upgrading, including affordable housing, urban infrastructure and the access to social services. Forced evictions of residents should be avoided or reduced to a minimum.²⁸⁴ In early 2003 the preparation phase started, since 2004, the Government has put slum improvement measures high on the agenda as a core poverty eradication programme.²⁸⁵ In the same year, the *National Housing Policy for Kenya* was adopted to “comprehensively address(...) the shelter

280 CESCR, E/C.12/2008/SR.35, 2008, para.33.

281 Bodewes et al, 2003, p.224.

282 <http://www.unhabitat.org/content.asp?cid=668&catid=206&typeid=13> (01.06.2012)

283 Interestingly, this number, although previously submitted to the Special Rapporteur for the right to adequate housing, is not displayed on the government's website. Instead, a reference to the Millennium Development Goals, specifically Goal No 7 target 11, of improving the lives of 100 million slum dwellers by the year 2020, can be found. More on the significance of this number can be found in Chapter 4.2.

284 UN Human Rights Council, A/HRC/13/20/Add.2, 2010, para.189.

285 Ibid.

problem”.²⁸⁶ One of the six aims explicitly stated in the first part is “encouraging integrated, participatory approaches to slum upgrading, including income-generating activities that effectively combat poverty”.²⁸⁷ This commitment was welcomed by NGOs as well as UN-Habitat, which complimented the Government of Kenya on the paradigm change of instead of treating slums as illegal recognising them within the policy.²⁸⁸

Chapter 2 names goals and objectives of the housing policy. Interestingly, the first objective refers to the State's legal obligation:

To facilitate progressive realisation of the right to adequate housing by all²⁸⁹

Despite the government's commitment to fulfil its obligation with regard to housing rights, evictions don't seem to have a place among the top-ranking priorities. The National Housing Policy contains 43 pages, evictions are mentioned only once. With regard to *Rental Housing*, the document states that

the Government will endeavour [sic!] to protect the interests and rights of the poor and marginalized groups against unjustified evictions (...).

Particularly striking in the view of the author is the wording in this context. An explanation of what constitutes an *unjustified* eviction is not given, besides that the text (indirectly) only refers to evictions carried out by third parties. A commitment from the State authorities to refrain from the practice of forced evictions is missing.

Another policy document worth mentioning is Vision 2030, the government's “key development blueprint”.²⁹⁰ The strategy was launched in 2008 and aims at reshaping urban planning processes to create the conditions necessary for an “adequately and decently housed nation [living] in a sustainable environment”²⁹¹ This aim is supposed to

286 Republic of Kenya, 2004, p.ii.

287 Republic of Kenya, 2004, p.ii.

288 COHRE, 2007, p.18.

289 Republic of Kenya, 2004, para 13.

290 Economic and Social Rights Centre (Hakijamii), 2011(a).

291 Ministry of State for Planning, National Development and Vision 2030, p.19.

be realised by three means: Firstly, Vision 2030 proposes a consolidated new legislation covering all aspects related to housing in one law. Secondly, the *Housing Development Initiative* should boost the production of housing units (from 35.000 in 2008 to 200.000 by the end of 2012²⁹²). Thirdly, new facilities to provide affordable financing are to be created with the *Mortgage Financing Initiative*. Although not referring to human rights explicitly, Vision 2030 covers several aspects that have a relevance for the realisation of some of the rights such as housing, water, infrastructure.

3.4.3.2 Current status and assessment of KENSUP

The vision behind KENSUP sounds compelling: Its primary goals are to improve the livelihood of people working and living in the informal settlements in the urban areas of Kenya and to reduce poverty. Another reasons for its creation was the aim of the Kenyan government to fulfil MDG 7, target 11.²⁹³ The key values include “sustainability, transparency and accountability, democratization and empowerment, secure tenure, partnership and networking”.²⁹⁴ Its main objectives reflect a modern understanding of slum upgrading as it aims at developing a nationwide slum upgrading framework, providing social and physical infrastructure as well as security of tenure and improved housing. Furthermore it wants to establish good urban governance, promote environmental protection, enhance opportunities for income generation and employment, attract private sector financing of and investment in slum upgrading.²⁹⁵ So what is the assessment almost a decade after the launch of the first project?

The Human Rights Council in the National Report for the UPR (2010) named KENSUP and the upgrading activities within the programme as best practice with regard to the right to adequate housing.²⁹⁶ However, the general assessment is not so positive: When examining the sources, there are repeated patterns with regard to critics by civil society actors. In the first year after the start of the KENSUP pilot project, NGOs like COHRE

292 Attempts by the author to ascertain the status quo of this undertaking were not successful.

293 See Chapter 4.2.2. and Karare, 2009, p.3.

294 Karare, 2009, p.3.

295 Karare, 2009, p.3.

296 UN Human Rights Council, A/HRC/WG.6/8/KEN/1, 2010, para. 50.

were criticizing among other aspects the lack of participation and the continuing practice of forced evictions.²⁹⁷

Huchzermeyer in 2006 named as some of the biggest challenges of slum upgrading Nairobi's distorted housing market²⁹⁸ and the "extreme levels of commercialisation of basic needs provision in Kenya"²⁹⁹ Scrutinizing KENSUP with regard to the seven criteria provided by the CESC as components of adequacy³⁰⁰, Huchzermeyer concludes that conventional slum upgrading in the Kenyan case does not lead to the realisation of these criteria. While *habitability* and *physical accessibility* as well as *access to services and infrastructure* are improved, *affordability* and *tenure security* are undermined by market competition and in many cases slum dwellers are pushed away which leads to a loss of a probably more convenient *location*.³⁰¹

Instead of improving the lives of slum dwellers by enabling access to adequate housing, poorly targeted slum upgrading improves the lives of the better-off and displaces the original residents into expanding or newly forming slums.³⁰²

Its particular dynamic needs to be taken into account if adverse impact is to be avoided. To benefit the slum dwellers, slum upgrading needs to outmanoeuvre both landlords at the bottom end of the market who aim at maximizing profits while providing inadequate housing and lower middle class households whose interest in many cases is to purchase the new units targeted at the poor. *Cultural adequacy* can be an important element in the planning phase to prevent the application of inappropriate standards, such as too big housing units that are unaffordable to slum dwellers but interesting for above mentioned middle class households.³⁰³

Special Rapporteur Raquel Rolnik refers to the same problems in her latest report dealing with Kenya, stating that it was likely for upgraded properties to be allocated to

297 COHRE, 2006 (b), p.12.

298 Huchzermeyer, 2006, p.11.

299 Huchzermeyer, 2006, p.22.

300 See Chapter 2.3.2.

301 Huchzermeyer, 2006, pp.15-16.

302 Huchzermeyer, 2006, p.15.

303 Huchzermeyer, 2006, p.15.

“well connected and middle class people” instead of the slum dwellers that form the target group. In the worst case, this leads to “forced displacement and homelessness” for the former slum residents. The Kibera-Soweto project, the pilot project of KENSUP launched in 2004 according to Rolnik is in danger of having this outcome.³⁰⁴

Good intentions don't necessarily guarantee the desired outcome: The Kenyan government's minimum standard for adequate housing in the framework of KENSUP were two-room units. Since “market pressures simply do not permit a poor family to inhabit two rooms”³⁰⁵, they would sub-rent the other room while occupying only one themselves. This “circumvention of official standards of habitability” is a common phenomenon.³⁰⁶

By “attracting sub-letting and encouraging landlordism” slum upgrading definitely fails its objectives, which also Rolnik underlines. Also, the common and to a certain extent accepted practice of commercialising basic services such as provision of water and garbage collection has to be overcome according to the Special Rapporteur.³⁰⁷

In a report submitted to CESCR by COHRE, the concern about a lack of participation as well as possible evictions in relation to slum upgrading projects was repeated.³⁰⁸ Rolnik's last assessment of KENSUP was a critical one, stating that

Despite the existence of the KENSUP Programme, information from other sources indicates that Kenya does not have a clearly defined or codified slum upgrading policy or legislative framework in place.³⁰⁹

The government seems to have a different point of view. In March 2012, President Kibaki launched the *Kibera Peoples Settlement Development project*³¹⁰, the second phase of the Kibera pilot project started in 2004. During the opening ceremony, he said:

304 UN Human Rights Council, A/HRC/13/20/Add.2, 2010, para.190.

305 Huchzermeyer, 2006, p.19.

306 Huchzermeyer, 2006, p.19.

307 UN Human Rights Council, A/HRC/13/20/Add.2, 2010, para.190.

308 COHRE, 2007, p.2.

309 UN Human Rights Council, A/HRC/13/20/Add.2, 2010, para.190.

310 The project includes the construction of more than 900 housing units and a range of additional facilities. According to Kibaki, the budget for this financial year is 850 million Kenya Shilling (around 8 million EUR at the time of the research). See Presidential Press Service, 2012.

I am particularly happy that the programme I inaugurated in October 2004 has turned another leaf in realising the government's objective of ensuring better housing standards for our people.”³¹¹

The second phase of the project will include *inter alia* measures to regularize tenure and the provision of physical and social infrastructure. Kibaki underscored that the government would “fully uphold the principles of the right of the poor to the city” by undertaking projects like this. Prime Minister Odinga added that transparency and accountability were prioritized to ensure that the slum dwellers benefit from the project. Additionally he reassured the participatory character stating that the government would at all stages of implementation consult the people involved.³¹² A critical reflection of the shortcomings of the first phase was missing. Opposed to the government officials' optimistic perception of the achievements of KENSUP is the understanding of Hakijamii's Executive Director Opiata who expresses that the country's slum upgrading happened in a “policy vacuum” resulting in a very small number of low-income people benefitting from it “in spite of the millions of shillings used”.³¹³ He criticised the corruption resulting from an absence of effective institutional mechanisms, but saw positive signs for future projects as the Housing Ministry showed efforts to develop a comprehensive slum-upgrading policy following the recommendations of the National Land Policy and the Constitution.³¹⁴ In the next chapter the capability of the constitution to contribute to the realisation of housing rights will be scrutinized.

3.4.4 The new constitution as a promotor for housing rights?

Since it entered into force, hopes were great that the new Kenyan constitution could contribute to the realisation of economic, social and cultural rights in the country. As mentioned before, the Bill of rights was a significant step recognizing many human rights that were absent in the former constitution. Almost two years after its promulgation the author makes the attempt to find out if it can keep up the promises or

311 Presidential Press Service, 2012.

312 Presidential Press Service, 2012.

313 Standard Digital, 2012.

314 Ibid.

if it should be considered as a lip-service.

Langford describes the inclusion of economic, social and cultural rights into the new constitution as – to some extent – the reflection of the will of the people. In the preparation of the constitution a consultation process took place and ESC rights were prioritized by large parts of the population.³¹⁵ The inclusion of the rights into the new constitution is an important step, their true impact will only be visible at a later stage though. As Langford analyses, “the way they have effect can be anywhere on a scale between huge change and no change at all”.³¹⁶ A first success can be claimed with a ruling of the High Court in Embu, an administrative district in the Eastern Province of Kenya. The decision dating from November 2011, is according to Hakijamii “a landmark ruling that has dramatically changed the direction of economic and social rights jurisprudence in the country”.³¹⁷

The case which was brought to the Court by Hakijamii and a number of *amici curiae*³¹⁸ concerned a mass eviction of over 1.000 residents in the town of Garissa (North-Eastern Kenya) in 2010.³¹⁹ In its verdict, the Court found that said eviction, carried out by Government officials, was not in compliance with the constitution as it violated several fundamental rights.³²⁰

(...) this forced eviction was a violation of the fundamental right of the Petitioners to accessible and adequate housing as enshrined in article 43(1) (b) of the Constitution of Kenya 2010. More important, the eviction rendered the Petitioners vulnerable to other human rights violations.³²¹

315 Interview with M.Langford, 14.06.2012.

316 Interview with M.Langford, 14.06.2012.

317 Economic and Social Rights Centre, 2011(b).

318 The term *Amicus curiae* refers to a professional person or organization that although not a party to a particular litigation is permitted by the court to advise with regard to some matter of law that directly affects the case in question. See also [www.merriam-webster.com/dictionary/amicus curiae](http://www.merriam-webster.com/dictionary/amicus%20curiae). In the present case, these were a group of international organizations, such as Global Initiative for Economic, Social and Cultural Rights, Socio Economic Rights Institute, and economic and social rights expert Malcolm Langford. See Economic and Social Rights Centre , 2011(b).

319 Economic and Social Rights Centre , 2011(b).

320 *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security*, eKLR [2011]

321 *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security*, eKLR [2011]

As a consequence of the ruling, the government must return the land the people were evicted from and provide shelter and basic amenities for the residents correspondent to the standard given before the eviction.³²²

Amnesty International named further three cases in 2011 in which the High Court's decision underlined that Art. 43 (1) of the Kenyan constitution includes a prohibition of forced evictions.³²³

The significance of these cases lies in the application of international human rights standards to the domestic level in Kenya. This leads to the conclusion that the new constitution provides a basis for the justiciability of the right to housing, and economic and social rights. Also, Kenya finally complies with its obligations under the ICESCR. Before the constitutional reform the fact that the Kenyan government had never incorporated the rights contained in the ICESCR had caused severe criticism.³²⁴

Another important signal of the *Embu Case* was the interpretation of the Court that the accountability of State authorities has to be seen as a constitutional obligation. Hakijamii and other representatives of the civil society hope “that this case will open new opportunities for citizens to meaningfully translate constitutional rights and freedoms into concrete benefits especially for the most marginalized”.³²⁵

Langford paid deference to the progressive decisions of the courts. Their concrete and the concrete and quick up-taking of the constitutional rights give reasons to expect a lot more progressive litigation in the next five to ten years³²⁶. Still, too high expectations might be inappropriate as “court rulings are not enough”.³²⁷ What is also needed to realise economic and social rights in countries like Kenya are adoption and implementation of the correspondent public policies and mobilization of the civil

322 Economic and Social Rights Centre (Hakijamii), 2011(b).

323 Amnesty International, 2012, p.203.

324 Bodewes et al., 2003, p.225.

325 Economic and Social Rights Centre , 2011(b).

326 Interview with M.Langford, 14.06.2012.

327 Ibid.

society.³²⁸

The latter seems to make use of the new opportunities. A consortium of local organisations assisted by international NGOs as amici curiae brought a case to the High Court of Kenya claiming that the Lamu Port-Southern Sudan-Ethiopia transport project violates various human rights including the right to housing.³²⁹ The decision in this case, which will be taken after this thesis is finalized, can be anxiously awaited as the multi-billion dollar project³³⁰ at the historic Lamu archipelago is a crucial figurehead of Kenya Vision 2030³³¹ – and with elections looming late 2012, the government will probably not be delighted about a legal challenge led by human rights organisations threatening to put a halt to this mega-project. Chapter 4.7 will examine the potential of what can be denominated as the new advocacy for economic and social rights, a coalition of different actors challenging the justiciability of economic, social and cultural rights.

328 Interview with M.Langford, 14.06.2012.

329 http://www.escri-net.org/news/news_show.htm?doc_id=1635602 (29.06.2012)

330 According to BBC reports, the project which includes the construction of a port, an oil refinery and pipeline, as well as rail- and motorway will cost 23 billion USD. See BBC News Africa, 2012.

331 http://www.information.go.ke/index.php?option=com_content&task=view&id=591 (29.06.2012).

4. Cities without slums: Visionary strategy or paradigmatic failure?

4.1 Cities with(out) slums

The previous chapter included considerations on the interrelation between legal provisions and public policy. Decisions taken on the national level, like both the policy approaches as the enacting of new laws in Kenya, have a large impact on the enjoyment of human rights. In addition, also policy on what can be denominated as the *macro-level* affects the realisation of concrete rights. Global players, global forces and global policy trends play a role in the promotion of certain human rights. The right to adequate housing can serve as an example to illustrate this: The adoption of the Millennium Declaration³³² and the according goals as well as the activities of the Cities Alliance were two factors that put urban poverty back on the international agenda and catalysed actions taken by States, international organisations and the civil society to improve the conditions within slums. Simultaneously, a stronger position of housing rights in the international legal framework compelled governments, particularly those of developing countries, to adopt strategies to face the challenge of slums within their countries.

When reading official reports produced by national governments about their enabling housing strategies or their commitment to upgrading or to providing (...) basic services, one can easily be beguiled into thinking that things are getting better for the urban poor.³³³

Chapter 3 has examined some of the causes and characteristics of slums and the different approaches States have chosen to face them, has shown good and bad practice and presented the current state of slum upgrading which is considered to be one of the best means to improve the lives of slum residents. Against the background of all the groundwork, commitments, strategies, initiatives, why do slums continue to exist?

According to Stein, the existence and growth of slums can not be seen as an inevitable

³³² See next subchapter.

³³³ Satterthwaite, 2001, pp.135-136.

consequence of urbanisation neither as result of a lack of financial resources, but as a product of failed policies, inappropriate legal and regulatory frameworks, dysfunctional markets and unresponsive financial system, corruption and lack of political will.³³⁴ In particular the last factor is decisive and runs like a thread through the world map.

Huchzermeyer names the growing pressure on cities to be competitive as another factor. This tendency is explained by her as both a response to economic globalisation and the main objective of urban planners. In this context, few governments make adequate housing for the poor their main concern. Public expenditure in this context is always far from meeting the demand. Instead, investing in housing for the poor is seen as an obstacle to prosperity and economic growth.³³⁵ A multifaceted problem needs an accordingly complex response, most states do not acknowledge this. Instead, governments are prone to use simple solutions without high costs, a way to get rid of the problem without addressing the underlying causes. The next subchapters aim at depicting the interplay of the before mentioned factors in shaping a global trend to respond to urban poverty. For this purpose, the point of departure is the discussion about the MDG framework and its relation to human rights, the critical role of MDG 7 and the paradigm of “Cities without Slums” for the mainstreaming of housing rights and the promotion of slum upgrading. Following that, the role of new actors making use of human rights rhetoric, methods and mechanisms to combat poverty is examined.

4.2 MDGs and Human Rights

4.2.1 The eight goals

The adoption of the Millennium Declaration by 189 heads of State following a UN Summit in 2000 and the subsequent establishment of eight so-called Millennium

³³⁴ Stein, Presentation, 2009.

³³⁵ Huchzermeyer, 2012, p.47.

Development Goals³³⁶ (MDGs) in 2001 promised to open a new chapter for the international development discourse and the fight against poverty.³³⁷ The “largest and most ambitious development programme ever envisioned”³³⁸ provided the world with a timeline and concrete targets³³⁹ to fulfil in order to face the most critical challenges. Among other goals, poverty had to be halved, maternal and child poverty significantly reduced, and the spread of HIV/AIDS halted and reversed. All that and more until 2015. While the new agenda raised international awareness on poverty and a number of deprivations, there was no explicit reference to human rights, despite the fact that the Millennium Declaration underlined the importance of and commitment to a large number of them.³⁴⁰

- Eradicate extreme poverty and hunger
- Achieve universal primary education
- Promote gender equality and empower women
- Reduce child mortality
- Improve maternal health
- Combat HIV/AIDS, malaria and other diseases
- Ensure environmental sustainability
- Develop a global partnership for development

Figure 3: The Millennium Development Goals³⁴¹

336 See Fig. 3.

337 Langford et al., 2012, p.1.

338 Dorsey et al., 2010, p. 516.

339 Each goal is subdivided into targets, see also www.un.org/millenniumgoals (10.06.2012).

340 Langford et al., 2012, pp.1-2.

341 www.un.org/millenniumgoals (10.06.2012).

The ambivalent relation between the Millennium Development Goals and human rights has been discussed extensively – and with very different assessments. A comprehensive picture of that discussion goes beyond the scope of this thesis, nevertheless some points are essential for an understanding of the complex circumstances socio-economic rights face and the contribution of the MDGs to their realisation. A number of analyses tend to see the positive factors by claiming that the MDGs have positively influenced development work and indirectly also human rights. The positive role is seen in particular with regard to socio-economic rights, of which the MDGs allegedly help to realise a “small, but significant number”.³⁴² In the same line of argumentation it is stated that MDGs have strengthened the position of some socio-economic rights to become binding norms within customary international law.³⁴³ On the other end of the interpretative spectrum are the critiques, especially out of what is denominated as the *human rights community*: Among other weaknesses, a frequent reproach towards the drafters of the MDGs is their failure to take into account the legal obligations affiliated with socio-economic rights.³⁴⁴ Langford summarizes the perception of the outcome of the Millennium summit as a whole by many commentators a “betrayal of (...) international human rights commitments”.³⁴⁵

Some of the goals instead of strengthening international human rights standards may even undermine them or result in conflict with them.³⁴⁶ The next chapter illustrates this with the example of the MDG being directly relevant for slums.

4.2.2 The role of MDG 7 for housing rights

Under Goal 7, aiming at ensuring environmental sustainability, Target D (or 11) requires the achievement of “significant improvement in the lives of at least 100 million slum

342 Darrow, 2012, p.3.

343 Ibid.

344 Darrow, 2012, p.5.

345 Langford, 2010.

346 Darrow, 2012, p.12.

dwellers, by 2020”.³⁴⁷ Darrow calls it “perhaps the most inappropriately framed and unambitious of all MDG targets”, as the targeted number of people represents only 10 percent of the actual number of slum-dwellers worldwide.³⁴⁸ The indicator, originating in the “Cities Without Slums” initiative as stated in the Millennium Declaration³⁴⁹, “was set too low, based on too small an estimated number of people living in sub-standard conditions” as even the UN itself admits 10 years later.³⁵⁰ Although according to UN-HABITAT 227 million slum-dwellers could leave the inadequate conditions behind, the total number of people living in slums has actually increased during this period, to over one billion people.³⁵¹ The rapid growth of slums outpaces the target: The number of slum-dwellers in the developing countries was estimated to be 828 million in 2010, compared to 657 million in 1990 and 767 million in 2000.³⁵² The lack of ambition of this goal is aggravated by the fact that the rate of world's slum inhabitants is likely to grow well beyond 1 billion if current patterns of uneven development persist.³⁵³ Alfredo Stein, member of the task force of MDG 7, defends the target stating that the number was chosen only for reduction, but the measures foreseen aimed at prevention as well. Taken together, the number amounts to 670 million people. Beyond that, the inclusion of the target per se was a success as it had to be established against the resistance of many States.³⁵⁴

Target 7 D doesn't include any reference to secure tenure which is considered as a major failure by housing rights experts as it constitutes one of the most important aspects of housing rights for residents of informal settlements. Furthermore, the slogan “Cities without Slums” has been taken as the target and from a number of countries even

347 www.un.org/millenniumgoals (10.06.2012).

348 Darrow, 2012, p.13.

349 UN General Assembly: Millennium Declaration, 2000, para.19.

350 UN Department of Public Information: MDGs Factsheet 7, 2010.

351 Darrow, 2012, p.13.

352 UN Department of Public Information: MDGs Factsheet 7, 2010.

353 Di Muzio, 2008, p.306.

354 Interview with A.Stein, 15.06.2012.

evictions and demolitions in the name of MDG7 have been reported.³⁵⁵ And this is not due to a single misinterpretation but a repeated pattern the given formulation is likely to incite if not actively counter-acted:

This language might lead to slum clearance policies unless the need for slum upgrading and the security of tenure are stated more explicitly.³⁵⁶

The Outcome Document of the UN World Summit in 2005 tried to correct the tendency to slum clearances by stating that slum prevention and upgrading were to be prioritized.³⁵⁷ Darrow underlines the importance of reaffirming this commitment and future provision for interpreting the duties in accordance with the “minimum procedural and substantive guarantees associated with the right to adequate housing under the ICESCR”.³⁵⁸

Huchzermeyer goes even further in her critique, stating that Target D of MDG 7 manifests a “reductionist and system-oriented approach to poverty and informality” encouraged by global governance bodies who are at the same time promoting human rights and the implicit norm that cities should not have slums.³⁵⁹ Also in her analysis, the language used in the framework of MDG 7 Target D is fundamental as it deliberately – or “carelessly”, as she describes it – changed from one that centred on the improvement of the lives of slum dwellers to one that implies that because of this purpose they had to move out of the slums. What was initially a slum *improvement* target, has been transformed into a target of slum *reduction*.³⁶⁰ It is more than worrisome to see that both the Cities Alliance slogan and MDG 7, Target D could be used as the argumentative basis for evictions to eradicate slums in hundreds of cases³⁶¹, and it leaves a range of

355 Darrow, 2012, p.13.

356 Darrow, 2012, p.21.

357 UN General Assembly, A/RES/60/1, 2005, para 56 (m).

358 Darrow, 2012, p.21.

359 Huchzermeyer, 2012, p.23.

360 Huchzermeyer, 2012, p.4. Space does not allow to enter deeper into the discussion, but the book of Huchzermeyer is hereby strongly recommended by the author of this thesis.

361 Huchzermeyer, 2012, pp. 5 and 54.

open question about the intentions behind them.

4.2.3 Towards Millennium Development *Rights*?

Many of the critics of the MDGs put their hopes into the post-2015 period: Dorsey et al. call for a transformation of the Millennium Development Goals into Millennium Development *Rights*, defined as “the full body of indivisible human rights, that contribute to and are necessary for human development”.³⁶² Even neglecting the reasons behind the absence of human rights standards in the framework of the MDGs, the disconnection was a failure – for different reasons. First of all, the lack of accountability of the governments for the achievement of the MDGs is a great shortfall. In September 2010 the world leader's met again in New York to assess the status of the MDGs five years before the deadline, and the prognosis was far from optimistic.³⁶³ UN Secretary-General Ban Ki-moon detected a lack of commitment to be the cause of this negative outlook.³⁶⁴ And that's the great disadvantage of *Goals* instead of *Rights*: If human rights are violated and obligations not fulfilled, the citizens are entitled to remedies³⁶⁵, which is not the case in the MDG framework.

Furthermore, the logic of the chosen targets and indicators allows relative achievements to be hailed as the realisation of certain MDGs.³⁶⁶ Out of a variety of examples to illustrate this point, one is Brazil, where MDG 1, aimed at eradicating extreme poverty and hunger, has been met already. Nevertheless, 45 million Brazilians still live in poverty. This is representative for an inherent problem: The MDGs, widely accepted as dominant policy goals for development, could be realised while disregarding the poorest 20 percent of the people.³⁶⁷

362 Dorsey et al., 2010, p. 520.

363 Dorsey et al., 2010, p. 517.

364 Ibid.

365 That particularity in the case of ESC rights it will still be a long way until this entitlements are implicit in every country goes without saying.

366 Dorsey et al., 2010, p. 519.

367 Dorsey et al., 2010, p.517-519.

MDRs instead of MDGs could be a solution for a sustainable and equal development model and, with the obligations to prioritise the most vulnerable and marginalised segments of the population, prove to be a stronger tool to improve the lives of the poor. Target D of MDG 7 can be used as an example: In addition to be extremely modest as it was pointed out before, the target disregards the importance of providing security of tenure. Provided for by international human rights law, this measure has proven to be successful, even against the background of limited resources of the State in question.³⁶⁸

However, there is a lot to be discussed and improved for post-2015. To expect a simple solution might be naïve, especially because the lack of political commitment is the biggest obstacle to it. Even if the full integration of human rights standards into international development policy is “an idea whose time has not yet come”³⁶⁹, an early lesson of the MDGs, three years before the timeframe is reached, could be that the project to end poverty without integrating human rights is doomed to failure.³⁷⁰

4.3 Changing advocacy for economic and social rights

Not only the introduction of global policy goals like the MDGs can influence the attention certain human rights receive, but also their inclusion on the agenda of actors who did not necessarily concentrate on them before. In the case of economic and social rights, a very dynamic process can be witnessed in this regard. One example is the introduction of the so called (human) rights based approach which receives increased attention within development cooperation³⁷¹. It has been astonishing for the author of this thesis while working for a development NGO to be confronted with the “worlds” that divide *human rights* and *development*, despite sharing many priorities and aims. According to Nelson and Dorsey, this “curious separation” started in the aftermaths of

368 Dorsey et al., 2010, pp.520-521.

369 Langford, 2010, p.90.

370 Dorsey et al., 2010, p.522.

371 Nelson et al., 2008, p.89. The human rights based approach has been promoted strongly by UN agencies such as the UNDP. See also UNDP, 2006.

the UDHR when cold war reality made the creation and ratification of a single treaty with legally binding human rights obligations for the State parties impossible.³⁷² The two fields both developed individually, with different concepts and methodologies. It was not until the 1990s until this trend started to be reversed and the two areas “separated almost at birth” started to converge.³⁷³ The reasons for the increasing intersections are multiple, but at the core one can detect the fight against poverty.³⁷⁴ International NGOs as well as national and local civil society organizations have begun to embrace human rights standards and methods to create new, more effective responses to tackle poverty and inequality. Increasingly, the focus has been shifted towards the violations of human rights aggravating the conditions of poverty, such as lack of access to adequate housing, water or sanitation.³⁷⁵

More recently, also scholars have discovered this trend and started to analyse a “new generation of (...) activists who have seized upon human rights values, language and tactics to challenge the realities of extreme poverty”.³⁷⁶

But the growth of new organisations and movements³⁷⁷, linking deprivations to social and economic rights are only one part of the changing picture. Also a number of the most important and influential international NGOs, such as Amnesty International, put new policies and strategies on their agenda and try to realise their goals in new alliances and with new methodologies.³⁷⁸ These modified agendas, alongside with the introduction of the rights-based approach into development work and the emergence of new coalitions and “hybrid activist organisations” point in the direction of a new

372 Nelson et al., 2008, p. 13.

373 Nelson et al., 2008, p. 14.

374 Nelson et al., 2008, p.3.

375 Nelson et al., 2008, p.4.

376 White et al., 2010, Foreword.

377 One example mentioned by Nelson et al. is SERAC (*Serac v Nigeria*, see Chapter 2.2.2.). Many of these organisations are connected in the International Network for ESC rights, founded in 2003. See also www.escr-net.org(28.06.2012).

378 Nelson et al., 2008, p.21.

tendency to apply human rights to the policy sphere.³⁷⁹

The *New Rights Advocacy*, as denominated by Nelson and Dorsey, draws from the experience of decades of advocacy of civil and political rights to address social challenges. Examples for this new tendency with regard to housing rights in Kenya were mentioned in Chapter 3.4.4. Jeffrey Sachs, US-American economist and special adviser of the UN Secretary General on the MDGs, sees an important role of economic and social rights (abbreviated by him and others as ESR) in confronting challenges faced by the poor, also referring to a modified function:

The pressing challenge of ESR for our generation is not so much in defining their contents – which have been elaborated in the International Bill of Human Rights (...) as well as dozens of treaties, global agreements, and national laws over the past half century – but rather in maximizing their usefulness as a means of leverage for spreading human survival, dignity, and hope (...).³⁸⁰

This view also extends to an assessment of litigation as one of the tools in a broader and strategic approach to promoting ESR, and – according to Sachs – courts are primarily used to enhance the visibility and effectiveness of more extensive political and social efforts.³⁸¹

The author of this thesis does not necessarily agree with Sachs' analysis of a subsidiary role of courts, but with the view regarding the potential of a broader coalition. Also Nelson and Dorsey underscore the advantages of the convergence of human rights and development, acknowledging that the shortcomings of the conventional approaches are most evident at the disciplinary boundaries where organisations are increasingly in contact with each other. The interrelation of the protagonists of the different fields makes them challenge each other, adapt their strategies and find new coalitions.³⁸²

379 Nelson et al., 2008, p.167.

380 White et al., 2010, Foreword.

381 White et al., 2010, Foreword.

382 Nelson et al., 2008, p.6.

Not only the relation between human rights and development is currently subject to fundamental changes, also the possible influence of this new advocacy on the States requires attention. The use of new, i.a. legal methods, is a response of NGOs to economic globalisation. At the same time, it can be seen as a contribution to a broader accountability, “shifting from a sole focus on the 'violating state' and assigning responsibility to actors that may create obstacles to the fulfilment of human rights in a global economy”³⁸³ Nelson and Dorsey interpret this as an attempt to give concrete meaning to the concept of international accountability for economic, social and cultural rights enshrined in Article 2 of the ICESCR. The shift away doesn't remove the State's obligations, but reflects on a changing picture of a global economy in which to attribute responsibility to business corporations, international organisations and other States becomes increasingly important.³⁸⁴ All the mentioned actors can have influence on housing rights, but to hold them accountable will still require a lot of efforts.

Concerning the role of NGOs and CBOs for the realisation of slums there is also a downside. Di Muzio warns of an over-reliance on them. Taking the example of slums, he detects a “misguided view” given the scale of the problem that these organisations can be a kind of panacea.³⁸⁵ Despite their important work and contributions, a mounting problem like this needs a broader and long-term solution.³⁸⁶

4.4 Future challenges for slum upgrading: The ambivalent role of the market

While Chapter 3 uses the example of Kenya to point out some practical obstacles for slum upgrading to unfold its full potential, Chapter 4 is dedicated to connect developments on a global policy level with the human right to housing. One tendency is quite influential in dealing with urban poverty: the dominant position of the private sector. Critics of the current global governance orientation state that neoliberal

383 Nelson et al., 2008, p.173.

384 Ibid.

385 Di Muzio, 2008, p.305.

386 Di Muzio, 2008, p.306.

principles dominate even in the measures targeted at the urban poor. Gruffydd Jones describes e.g. the Slum Upgrading Facility, a recent initiative of UN-HABITAT as a historically specific initiative based on the premise that slum upgrading was *bankable*: The objective of improving the living conditions of slum dwellers is to be achieved within the sphere of the market, on the basis of the efforts of the poor themselves and supported with private finance.³⁸⁷ A lot of effort has been dedicated to the development of housing finance systems for the poorer segments of society. The idea, consistent with the logic of micro-credits³⁸⁸ is to empower poor people via offering them access to markets, credits etc. Summarizing the last years' experience, Stein said that housing micro-finance was a good opportunity, but after a while the logic of the market prevailed over the logic of housing finance. The target group which is more interesting than the poorest are the low- and middle income households. This tendency is clearly visible with the amount of average loans are three to four times higher than they were 15 years ago.³⁸⁹

Depending on the location, the market has different interests in slums. While in the specific case of Nairobi, the housing sector itself is highly commercialized and dominated by the specific phenomenon of absentee-ownership³⁹⁰ and the success of slum upgrading is impeded by this among other factors, another problem arises in cases where slums are old and located on so called *prime land* like in Mumbai, India. Often the people are pushed away from the land they have inhabited for generations, because e.g. businesses want to purchase it.³⁹¹ Particularly in African countries, *land grabbing* turns increasingly into a problem, often with destructive consequences for the local communities.³⁹² As commercial pressure on land increases, the threat of human rights

387 Gruffydd Jones, 2012, pp.769-770.

388 Muhammad Yunus won the Nobel Peace Prize for this concept of promoting loans to the poor.

389 Interview with A.Stein, 15.06.2012.

390 The term refers to the fact that the owners of slum dwellings don't live there themselves, a factor that changes the dynamic and expectations towards slum upgrading completely. Both M.Langford and A.Stein referred in the interview conducted on 14 and 15 June 2012 respectively to this particular setting.

391 Interview with A.Stein, 15.06.2012.

392 Tran, 2011.

violations rises.³⁹³ These enormous market forces should be taken into consideration when designing a slum improvement facility, which is rarely the case.³⁹⁴

While the private sector can play a very beneficiary role in providing housing for the urban poor, relying exclusively on the market is far from being a perfect solution. As Raquel Rolnik, Special Rapporteur on the right to adequate housing set out in a public statement, the crisis on the housing market was indicative for a failure of the belief that markets could provide adequate housing for all.³⁹⁵

(...)adequate housing for all is a public goal whose achievement requires a wide variety of arrangements, from tax advantages to buy a home to better legal protection for tenants and rent control areas; from direct subsidies to the poor to publicly owned housing and a range of tenure arrangements. Markets, even with appropriate regulation, cannot provide adequate housing for all: in any case an active public sector is needed.

The over-reliance on the private sector to take care of the informal settlements, can also be interpreted as an expression of the before mentioned tendency to blame the existence and growth of informal settlements on simplistic problems. According to Huchzermeyer this trend is fuelled by *Cities without slums* campaign which also links its promotion of neoliberalism to the notion of competitiveness as a maxim for cities in developing countries. Even if *In situ* upgrading is included in official housing policies, it does not really comply with the logic of global competitiveness because it makes little economic sense.³⁹⁶

The end of both this thought and the chapter is illustrated by a photo taken outside of a slum in Manila. The government had constructed a wall to hide one of its largest slums for the occasion of a conference on poverty, hosted by the Asian Development Bank. If

393 To deal with the phenomenon of land grabbing as thoroughly as it deserves, would fill a doctoral thesis. Unfortunately the scope of this thesis doesn't allow further discussion.

394 Interview with A.Stein, 15.06.2012.

395 Rolnik, press statement 2008.

396 Huchzermeyer, 2012, pp.23-30.

there are cases where pictures are worth the proverbial thousand words, this is almost certainly one of them.



Figure 5: Cities without slums – The ultimate goal?³⁹⁷

³⁹⁷ AP, in: <http://www.spiegel.de/panorama/gesellschaft/konferenz-zu-armut-in-asien-manila-versteckt-slum-hinter-mauer-a-831127.html> (03.05.2012).

5. Conclusions

Against the background of the alarming numbers, slums are one of the most rapidly emerging form of human settlements in the 21st century. Slums and urban poverty – which in many cases, but not in all are synonyms – are very complex issues, with implications on various levels. Both are an issue legally and politically, a difficult task for urban planners and architects, a challenge for human rights defenders, local governments and international organisations. Last but not least, they are the manifestation of a billion people's crude reality, with a range of human rights at stake. After decades of trial and error, the existence of an easy solution to handle the phenomenon can be excluded. For every slum that was removed, a new one spread, maybe a few kilometres away. States around the globe tried for decades different strategies. They ignored and neglected if not demolished and eradicated the settlements and evicted its inhabitants, implicitly declaring them *personae non gratae* in their own countries, without resolving the problem. That various human rights violations came along with the practice of evictions – which is still in use today – has been explained in the previous chapters. When slum upgrading in its original form appeared on the agenda of international organisations, it seemed to provide a solution with relatively low costs (both financial and human). The vast majority of governments received this cost-effective way to get rid of the slums very positively and slum improvement projects were started in many countries. After some difficult experiences, the initial euphoria faded. Slum upgrading didn't prove to be a magic key, a panacea for the world's informal settlements. What were the reasons?

One determining factor for the mixed result of the first attempts was the presumption that generalisations could be made based on single experiences. Slums cannot be lumped together, they differ in size, density, socio-economic circumstances, legal and political backgrounds. That is why slum upgrading programmes, as successful as they might have proven in one country cannot simply be transferred to another one. A

multifaceted problem like slums needs an accordingly tailored solution for each and every settlement. The characteristics of the community, specific national circumstances (like the commercialized housing sector in the case of Nairobi) and most important of all, the people whose very lives are to be improved, must be taken in consideration. In order to be successful, slum upgrading should be based on a participatory, bottom-up approach. Only then, it can be a means to the realisation of human rights, above all the right to adequate housing.

The topic chosen to examine in this thesis with its interdisciplinary approach shows the connection between an (at least in the origin) abstract human right and the concrete implications for the lives of millions of people. After months of conducting research, collecting facts and talking to experts, many new facets which would deserve particular consideration, continued to arise. Some of the issues linked to it have to remain unmentioned due to the limited scope of this thesis, others are only touched superficially. As it has just been mentioned, the topic turned out to be much more multifaceted than expected, representing a point of intersection between human rights law, State policy, NGO dedication, private sector interest etc. Sometimes the thesis took a *detour* and explained aspects that were at first sight not directly linked to human rights, but they all form part of one *puzzle*. In practice, the different disciplines need to work together in a joint effort to understand the challenge of slums and be able to find a solution for it. This is reflected in the present academic piece of work as well. For the standards of a legal text, Chapter 4 took a rather unusual perspective. Hence, in the view of the author, the interrelations between what is the global agenda around the MDGs and the realisation of housing rights need to be highlighted to understand the multitude of interests competing around possible solutions. Furthermore, the present reliance of many governments on the market to provide housing as well as the tendency to promise *Cities without slums* as the final goal needed to be pointed out. Taking into account that it might also be seen as rather unusual to deduct from a concrete legal framework and a specific country situation to considerations on the macro-level, the author is convinced

that this was the adequate structure for the topic. Another core topic which runs like a thread through this work, are the obligations of States for the fulfilment of housing rights. Subsequently, the conclusions with regard to the research question are presented:

Does the national Kenyan Slum Upgrading Programme KENSUP represent a means to fulfil Kenya's obligations regarding housing rights?

After examining the case study, it has to be stated that slum upgrading in the East-African country for the time being is only theoretically a means to realise the right to adequate housing. The efforts to improve the living conditions of Kenyan slum dwellers in Nairobi and other epicentres of urban poverty in the framework of the national slum upgrading programme KENSUP have so far rather resulted in adverse impacts on the right to housing than caused the positive effects intended. Many of the housing provided mainly benefitted middle-income population instead of the original target group, as explained in Chapter 3.4.3.2. Applying the standards of the CESCR with its seven criteria as explained in Chapter 2.3.2 to measure the housing rights compatibility of KENSUP, it can be stated that at least security of tenure and affordability were undermined instead of realised. Poorly planned slum upgrading programmes thus do not provide a means to realise the right to adequate housing. Instead of improving the living conditions of slum dwellers, those intended to benefit by the upgrading are forced away from their residences into newly formed or expanded settlements.

Beyond that, the Kenyan government continues to violate housing rights, by still carrying out forced evictions – considered as *prima facie* violation of housing rights – and additionally failing to enact guidelines for their human rights compatibility although repeatedly requested to do so by the CESCR. The obligation to *respect* according to the tripartite typology is definitely not fulfilled due to the continued practice of evictions. The obligation to *promote* housing rights lacks the final steps of implementation for the time being. The adoption of the pending legislation within 2012 would fundamentally

change this picture.

Experience has shown that slum upgrading often fails due to the lack of good laws. But even when the legal framework exists, many difficulties occur. In Kenya a particularly complex system of power relations, an extreme commercialisation, corruption and lack of participation are to be named among the main obstacles to reach the intended outcome. In order to realise successful slum upgrading that respects and promotes housing rights, these factors need to be dealt with which requires strong political will. The Kenyan government shows on one hand commitment to its slum upgrading programme and the according legislative sphere, on the other hand many of the activities seem to happen without tackling these sensitive issues or reflecting on the experiences and possible shortcomings pointed out by NGOs.

The new Kenyan constitution (2010) includes a Bill of Rights: Lip service or the basis for a stronger position for economic, social and cultural rights, including the right to housing?

The new Kenyan constitution and in particular the inclusion of a bill of rights was a large step forward for economic, social and cultural rights. At least on paper. To assess the gap between the theoretical provisions and the practical impact was one of the aims of this work. The real effect they will have on the realisation of human rights remains to be seen, and can range anywhere between huge change and no difference at all. The research for this thesis fell into an interesting period, as there were a couple of court cases either recently decided or in the process dealing with housing rights. The assessment was astonishing. The Kenyan courts took the newly included rights up immediately and in a number of landmark cases evictions were stopped or the victims compensated. The attitude of the high courts can be assessed as quite progressive and interestingly with reference to constitutional rights. But of course court rulings are not enough, policy need to be implemented to really make a significant and lasting

difference. Also with regard to this aspect, movement can be observed. Among other laws and policies, the long awaited guidelines on eviction and resettlement with an according law are hopefully to be adopted within this year.

What is valid not only for the Kenyan example is the realisation that slums are a more complex problem that cannot be dealt with by curing only symptoms without taking into account the underlying causes. The State authorities in question need to understand that there is a need for legislative action, not only housing laws but also i.a. land laws. Advocacy of a mobilized civil society is needed to push and influence both legislation and policies.

Can slum upgrading represent a sustainable strategy to encounter the global problem of slums/urban poverty and the numerous economic, social and cultural rights at stake?

Slum Upgrading can represent a sustainable strategy to deal with urban poverty and slums, if it involves consultation and participation of all groups. There are many pitfalls that need to be avoided, lessons learnt from previous attempts need to be included in national and international planning schemes. Enormous market forces have to be taken into consideration when designing a slum improvement facility. Another crucial aspect for the success of slum upgrading is the inclusion of the civil society, with their indispensable expertise, the contact to the people. In particular also because the proponents can provide the government representatives with the knowledge necessary to understand root causes and dynamics of slums, essential to deal with slums. Interestingly the movement increasingly centres their claims on a rights-based approach. A broader coalition resorts on human rights than ever before. The so called new rights advocacy is one of the very interesting developments that could provide space for further research.

The focus of all slum improvement measures should lie on human rights not on market

orientation. Very important is the commitment of the State in question to fulfil its obligations according to international human rights treaties and not the attempt to leave it to other actors, like the civil society or the private sector. Still, there is a need to include their expertise in the conception, financing, resource mobilization, implementation and management to create successful strategies to deal with slums. Beyond the measures that are required immediately to improve the lives of slum-dwellers, the future growth of slums needs to be planned as they will continue to form part of most cities.

To what extent do global policy frameworks like the Millennium Development Goals (MDGs) influence the realisation of economic, social and cultural rights?

On the influence of global policies trends and governance orientation, it can be said that it is very important to understand the cross-cutting issues that are created between the former and the concrete enjoyment of human rights. The *cities without slums* campaign and its implications illustrate this interrelations. If global trends shift away from approaches that deal with or base on human rights, they need to be challenged in order not to lose out of the focus the needs of the people who are supposed to be the beneficiaries. This is a possible reading of what happened in the context of the Millennium Development Goals. It remains to be seen if the post-2015 agenda includes a renewed commitment to human rights, and in particular economic, social and cultural rights. In the view of the author this would be a fundamental requirement for the priorities of the international community for the next decades. The inclusion of a human rights perspective and methodology by a broad coalition consisting of partly new actors – as pointed out in Chapter 4.3. – can be interpreted as a positive step into that direction.

The ultimate ambition should probably not be cities without slums, but cities with improved slums where the respect for human rights of all citizens is implicit. Besides from the many efforts by human rights advocates to reach this goal, a new perception is

necessary: The understanding that slums are not inevitably places of despair and deprivation, but also innovative environments from which a lot can be learned thus encouraging an end of the stigmatisation of their inhabitants. This, in the author's point of view, is an important step away from today's less comforting reality. Prerequisite, however, is political will. Slum upgrading is a topic which must be continuously questioned, analysed and reassessed; a multi-faceted problem demanding a dynamic and constantly adapting approach which engages different actors (i.a. public institutions, NGOs, companies, the international community) and often conflicting interests. Such complexity may at times lead astray, but the underlying fundamentals, in this case the right to housing, must never be put aside, for the difference between a problem and a challenge is substantial, and the author is convinced that this finding applies for slum upgrading.

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7. Annexes

7.1 List of abbreviations

CBO(s)	Community-based Organisation(s)
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
COHRE	Centre on Housing Rights and Evictions
CSO(s)	Civil Society Organisation (s)
ECHR	European Convention on Human Rights
ESC rights	Economic, social and cultural rights
i.a.	<i>inter alia</i>
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
KENSUP	Kenya Slum Upgrading Facility
MDGs	Millennium Development Goals
NGO(s)	Non-Governmental Organisation(s)
OHCHR	Office of the High Commissioner for Human Rights
SDI	Shack/Slum Dwellers International
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN-HABITAT	United Nations Human Settlements Programme
UNHRP	United Nations Housing Right Programme
UPR	Universal Periodic Review
WHO	World Health Organization

7.2 List of figures

Figure 1: Overview of housing right standards

Figure 2: Slum population in Africa

Figure 3: The Millennium Development Goals

Figure 4: Cities without Slums – The ultimate goal?