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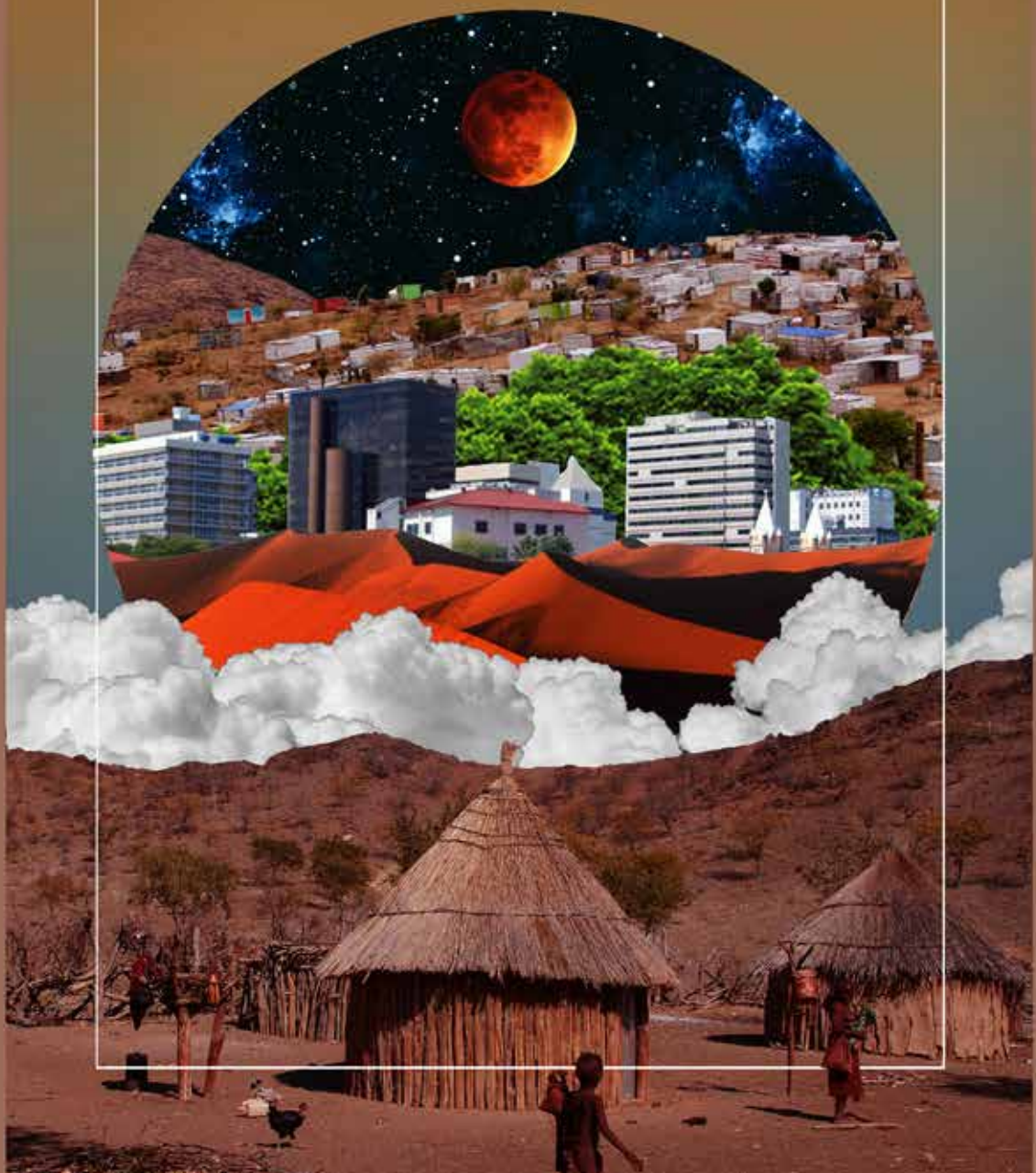
## Namibia's Housing Crisis in Perspective



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# Namibia's Housing Crisis in Perspective

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# The Right to Adequate Housing in Namibia: A Right not Vindicated

*John B. Nakuta*

## Abstract

*The right to adequate housing is guaranteed under international human rights law. This right, like many other economic, social, and cultural rights, is not expressly recognised in the Namibian Constitution though. Namibia, however, ratified some of the major human rights instruments which recognise this right. Importantly, the Constitution embraces an international law-friendly disposition towards international law. It provides, for instance, for the automatic incorporation of international agreements binding on Namibia into the Namibian legal system. This provision accordingly reads the right to adequate housing into the Namibian legal order. The right to adequate housing, however, is one of the most blatantly violated rights in the country. To this date, no claim has been instituted before the courts claiming, specifically, the right to adequate housing. The question is why*

*Photo: Guillermo Delgado*

*not? Could this be because of a lack of understanding of what this right entails? This article presumptively assumes that the answer to this question is in the affirmative. It adopts a primer approach by giving a synoptic exposition of the right to adequate housing. Its prime objective is to augment potential knowledge gaps which may exist in respect of the scope, content, entitlements, and obligations imposed by the right to adequate housing.*

**Key words: basic services, housing informality, dignity, human rights, adequate housing, international law, Namibian Constitution, article 144.**

## Introduction

The housing situation in Namibia can at best be described as distressing. The said situation cuts across all classes of society but is more pronounced amongst the urban poor. Those relegated to living in informal settlements. A staggering 40 percent of those residing in urban households throughout the country are in informal settlements (NSA, 2017, p.101). The living conditions in these informal settlements can at best be described as shocking, deplorable, and intolerable. Residents of informal settlements often live without water, sanitation facilities, without security of tenure, and in constant fear of eviction. Indeed, the scope and severity of the living conditions in informal settlements, as observed by Farha, make them one of the most pervasive violations of the human rights of dignity, security, health, and life worldwide (UN General Assembly, 2018, par.12). It is critical that they be recognised as such.

This situation most certainly calls for redress. Especially, considering that the right to adequate housing is guaranteed under international human rights law. This presupposes that residents of informal settlements are equally entitled to living without discrimination, in security, peace and dignity, in housing with secure tenure, that is affordable, habitable, culturally adequate, in a decent location, accessible, and where services are available (CESCR, 1991, para. 8(a)-(g)).

The right to adequate housing, like many other economic, social, and cultural rights, is not expressly recognised in the Namibian Constitution. This void is, however, neatly filled by the self-same Constitution. The Constitution embraces an international law-friendly disposition. It provides, for instance, for the automatic incorporation of international agreements binding on Namibia into the Namibian legal system. This provision accordingly serves as an important fallback device for rights not expressly guaranteed in the Namibian Constitution. Namibia ratified most of the major human rights instruments which guarantee the right to adequate housing. The avenue for this is article 144 which incorporates the right to

adequate housing into the Namibian legal system. The right to adequate housing can equally be claimed through the indivisibility principle of human rights. For instance, it is indivisible from, and interrelated to the rights to human dignity and the right to life which are expressly guaranteed in the Namibian Constitution.

The right to adequate housing for residents of informal settlements, as noted earlier, is one of the most blatantly violated rights in the country. Yet, no claim to vindicate this right has hitherto been made. The question is why not? Could this be because of a lack of understanding of what this right entails? This seems to be the case if regard is given to the views of UN independent experts and Treaty bodies.

For instance, Catarina de Albuquerque, the former UN Special Rapporteur on the human right to safe drinking water and sanitation, made the following observation in her Mission Report following her country visit to Namibia over the period of 4 to 11 July 2011:

> *"The Special Rapporteur […] observed during the mission that there was an overall lack of awareness about economic, social, and cultural rights." (Human Rights Council, 2012, p.6).*

The Committee on Economic, Social and Cultural Rights (CESCR) expressed similar concerns in its Concluding Observations on Namibia in 2016. To this end, the CESCR stated that it is:

> *"[…]concerned at the lack of awareness of the Covenant [ESC] rights among the general public, public officials and legal professionals."*

Rights are not there to be preserved, but to be enjoyed. However, people can only claim their rights if they are aware of them.

The prime objective of this article is to augment potential knowledge gaps which may exist in respect of the scope, content, entitlements, and obligations imposed by the right to adequate housing. In doing so it adopts a primer approach by giving a synoptic exposition of the right to adequate housing. The idea is to precipitate an attitude shift towards the enforceability of the right to adequate housing, especially as it pertains to informal housing in the country.

The article commences by highlighting the legal status of the right to adequate housing at the international, African regional, and municipal level, respectively. It then proceeds to elaborate on the content, scope and claims of the rights to adequate housing. It is worth pointing out that no attempt is made to critically assess Namibia's compliance with each of the seven (7) core elements of the right to adequate housing. Time and space limitations

do not allow for that. Issues of concern in respect of each of the claims and entitlements viz. housing rights are, however, raised where applicable.

## Methodology

To capture the content, scope, and obligations of the rights to adequate housing relevant human rights instruments from Treaty bodies, independent human rights experts were collected and consulted. These include conventions, declarations, general comments, concluding observations, and country reports. It is worth stressing that great value is attached to general comments in particular as they serve primarily to clarify the content, scope, and obligations of rights international guaranteed rights.

Complementary to the above, statistical data, court decisions and newspaper articles were also collected to gain an impression of the prevailing outcomes in respect of informal housing in the country.

## A Legally Guaranteed Right

The human right to adequate housing is defined as "the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity" (Commission on Human Rights, 2001, par.8). The Committee on Economic, Social and Cultural Rights (CESCR) has stressed that the right to housing should not be interpreted in a narrow or restricted sense. Importantly, the right to adequate housing should not be equated to merely having a roof over one's head. Neither should it exclusively be viewed as a commodity. Commodification in the context of housing, as explained by Kenna, refers to the transformation of housing as a home to a commodity of exchange or investment, where its value is determined by the market (Kenna, n.d, p.2).

The African Commission on Human and Peoples' Rights (the African Commission) similarly held that the right to housing embodies the individual's right to be left alone and to live in peace, whether under a roof or not. The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (the Principles and Guidelines) as released by the African Commission, capture and reaffirm the same understanding of the right to adequate housing. The Principles and Guidelines define the right to adequate housing as the:

> *"right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity" (African Commission, 2010, par.77).*

All human rights are said to be universal, indivisible, interdependent and interrelated. The right to adequate

housing is therefore significant to the enjoyment of many other economic, social, cultural, civil and political rights. For instance, access to employment, training, education, the absence of discrimination, crime or segregation, the enjoyment of opportunities and communal facilities are all, as pointed out by Kenna, dependent on the realisation of housing rights. For example, people who experience homelessness, poor housing and lack of shelter are often victims of violence and crime as well as persistent poverty. Similarly, social rights of participation and political rights are often linked to housing status. Enfranchisement is frequently linked to home ownership, housing history, and having a residential address. This can mean the denial of such participation to homeless people (Kenna, n.d, p.3).

The right to adequate housing is explicitly entrenched in several international and regional human rights instruments. The most prominent international legal instruments guaranteeing this right include the Universal Declaration of Human Rights (UDHR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both the UDHR and the ICESCR recognise the right to adequate housing as a component of the right to an adequate standard of living. The ICESCR, widely considered as the central instrument for the protection of the right to adequate housing, endows every person with the right 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" (ICESCR, 1966, art. 11(1)).*

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) frames the enjoyment of adequate living conditions in relation to aspects such as housing, sanitation, electricity, and water supply. Furthermore, various other thematic conventions and declarations, for example on racial discrimination, children, refugees, migrants, people with disabilities, indigenous peoples, labour, war, and development similarly guarantee and affirm the right to adequate housing.

The right to adequate housing has also been recognised by the regional human rights instruments such as in the European Social Charter, the European Convention on the Protection of Human Rights and Fundamental Freedoms, as well as the American Declaration of the Rights and Duties of Man. For instance, article XI of the American Declaration of the Rights and Duties of Man proclaims that:

> *[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing,*

> *housing, and medical care, to the extent permitted by public and community resources.*

The African Charter on Human and Peoples' Rights (African Charter) does not expressly recognise the right to adequate housing. To fill this void, the African Commission has creatively, and consistent with the indivisibility principle of human rights, interpreted other rights in the Charter to include a right to adequate housing (Chenwi, 2013, p.345). In this regard, the African Commission in the *Social and Economic Action Centre and the Centre for Economic and Social Rights v Nigeria* (SERAC case) unambiguously clarified that:

> *Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 […], the right to property [Article 14], and the protection accorded to the family forbids [Article 18] the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the [African] Charter a right to shelter or housing which the Nigerian Government has apparently violated (SERAC, 2001, par. 60).*

Although the right to adequate housing is not explicitly provided for under the African Charter, the African Commission (2010, par.77) made it clear that housing rights are protected and guaranteed therein through the combination of provisions protecting the right to property (art 14), the right to enjoy the best attainable standard of mental and physical health (art 16), and the protection accorded to the family (art 18(1).

Other group-specific African human rights instruments also contain express provisions and references to the right to adequate housing. Key amongst these are the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, and the African Youth Charter. For instance, Article 16 of the African Protocol on the Rights of Women (Maputo Protocol) guarantees to women the right to equal access to adequate housing and imposes a positive duty on State parties to the Protocol to ensure this right to all women in their territory. Article 20 of the African Children's Charter, on its part, obliges State parties to assist parents and other persons responsible for the child, and to provide material assistance and support programmes viz. nutrition, health, education, clothing,

and housing in specific cases of need. Similarly, article 14(3) of the African Youth Charter requires State parties to take special measures when the security of food, tenure, clothing, housing, and other basic needs of young persons are compromised.

From the above it is clear that the right to adequate housing is an internationally guaranteed right which accrues to all persons without discrimination. Sachar (Commission on Human Rights, 1995, par.11), importantly, clarified that the right to adequate housing does not imply that Governments are duty-bound to provide free housing to all citizens on request. The legal recognition and obligations inherent in the right to adequate housing do not imply that the State is required to build houses for the entire population, neither that housing is to be provided free of charge by the State, or that the State must necessarily fulfill all aspects of this right immediately upon assuming duties to do so. It also does not mean that the State should exclusively entrust either itself or the free market to ensure the enjoyment of this right by all. Neither does this right manifest itself in precisely the same manner in all circumstances or locations. This, however, should not be misinterpreted by States as a pretext for non-compliance to abrogate State responsibility. The obligations flowing from the recognition of the right to adequate housing, in the most general sense, imply that the State will undertake a series of measures i.e., policy and legislation to give recognition to each of the constituent aspects of the right to adequate housing soon after the ratification of the applicable human rights instrument (Commission on Human Rights, 1995, par.12 (c)).

## The Legal Status of the Right to Adequate Housing in the Namibian Legal System

The Namibian Constitution, unlike that of countries such as South Africa and Kenya, does not expressly guarantee the right to adequate housing. This does not mean that the right cannot be claimed in Namibia. This was clarified by several scholars, UN Special Rapporteurs, UN Treaty Bodies, the African Commission, including the former Minister of Justice and Attorney-General (at the time when the two portfolios were combined).

For the sake of brevity, it suffices to state that Namibia ratified both the ICESCR and the African Charter. These instruments are automatically incorporated into the Namibian legal system by virtue of article 144 of the Constitution. This article clarifies the status of international law in Namibia as such:

> *"Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law*

> *and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.*"

The Supreme Court in 1995 in the *Kauesa v Minister of Home Affairs & Others* clarified the legal status of the African Charter, and by extension other international treaties/ conventions in the Namibian legal system. The court held that:

> "*The Namibian Government has, as far as can be formally established recognised the African Charter in accordance with art 143 read with art 63(2)(d) of the Namibian Constitution. The provisions of the Charter have therefore become binding on Namibia and form part of the law of Namibia in accordance with art 143, as read with art 144 of the Namibian Constitution*" *(Kauesa, par.86).*

It follows, to echo Tshosa (2010, p.22), that Namibia's ratification of the African Charter meant that it was directly applicable in Namibian national law. The Charter, could accordingly be given domestic effect by Namibian courts. The same logic applies to the ICESCR and all other international treaties and conventions which Namibia ratified and acceded to.

Several UN Special Rapporteurs and Treaty Bodies have hailed the utility of article 144 in filling the void for rights not expressly provided for in the Namibian Constitution. The statement of the former UN Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, is most relevant in this regard. In her country mission report on Namibia in 2011 de Albuquerque rightfully noted that whilst the rights to water and sanitation are not explicitly provided for in the Namibian Constitution they can be read into the country's legal system by virtue of article 144. She accordingly asserted that the ICESCR should be the relevant standard to uphold in Namibia for the full realisation of the rights to water and sanitation, and by extension other rights such as the right to adequate housing (UN Human Rights Council, 2012, par.6).

The foregoing sections clarified two (2) important things. First, the right to adequate housing is internationally guaranteed and legally protected. Second, even though not explicitly provided for in the Namibian Constitution, the right is fully invokable in the country's legal system.

It is worth stressing that the right to adequate housing, like any other right, it is not just an abstract slogan (UN HRC, 2008, p.2). It has, like any other right, a specific content and create enforceable claims. The next section elaborates of these aspects.

## The Content, Scope and Claims of the Right to Adequate Housing

The CESCR (1991, par.8.) identified seven (7) essential components of adequacy which combine to inform the rights to adequate housing. These elements are legal security of tenure, availability of services, materials, facilities and infrastructure; affordability, habitability, accessibility, location, and cultural adequacy. Each of these essential elements is clarified in the following sub-sections.

## Security of Tenure

Security of tenure is a central component of the right to adequate housing. In fact, it is listed as the first of the seven main elements of the right to adequate housing as guaranteed under international human rights law. Raquel Rolnik (2014, par.5), the former UN Special Rapporteur on adequate housing, defined security of tenure as a set of relationships with respect to housing and land which can either be established through statutory, customary law, informal or hybrid arrangements, that enables one to live in one's home in security, peace and dignity. Rolnik importantly emphasised that security of tenure takes a variety of forms such as rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. States are accordingly urged to promote, strengthen, and protect diverse forms of tenure such as possession rights, use rights, rental, freehold, and collective arrangements.

In Namibia tenure insecurity is more pronounced amongst residents of informal settlements. Many of these residents occupy land on which they do not have a strong right to remain on (Weber and Mendelson, 2017, p.26). They accordingly do not have legal security of tenure over the land on which they have erected their homes. They are thus permanently in a situation where their tenure status can be questioned by public authorities (2017, p.26).

To respond to the demand for secure tenure in informal settlements, the government conceptualised and developed the flexible land tenure system. This culminated into the very innovative piece of legislation – the Flexible Tenure Act (No.12 of 2004). The Act only became operational in 2018. The prime objective of the Act is to bestow security of tenure to residents of informal settlements in the form of starter title and land hold title, respectively. Local authorities have shown resistance to the full implementation of the flexible land tenure system/scheme introduced by the Act. To this day, only three (3) local authorities signed up to the pilot project to implement the Act. Furthermore, the Act is jointly administered by the two ministries responsible for

land and housing. Under the current situation of overlapping and colliding responsibilities it is difficult to ensure accountability.

A sub-component of the right to security of tenure entails the prohibition of forced evictions. Forced evictions are '*prima facie* incompatible' with the right to adequate housing (CESCR, par.1). To this end, the General Comment 7 of the CESCR is specifically dedicated to the issue of forced evictions. In addition, both the UN Special Rapporteur on the right to adequate housing, and the African Commission each issued principles and guidelines aimed at minimising forced evictions. In this context, the 2007 "Basic principles and guidelines on development-based evictions and displacement" of the UN, and the 2010 "Principles and Guidelines of the African Commission", referred to earlier, are the guiding instruments relevant to evictions. These instruments are complementary. The following are some of the common principles and guidelines for evictions laid down in these instruments. They both dictate that evictions should:

- only be carried out in exceptional circumstances and in strict compliance with human rights standards and principles;
- not result in individuals being rendered homeless. States are therefore obliged to provide evictees with alternative accommodation;
- be preceded by actively consultations with all potentially affected persons;
- not take place in bad weather, at night, during festivals or religious holidays, prior to elections, or during or just prior to school examinations, and
- those being evicted should not be forced to demolish their own dwellings or other structures.

The Namibian law that governs evictions is the Squatters Proclamation 21 of 1985, an apartheid-era law which remains in force. In 2013 certain provisions of this Act were declared unconstitutional by the Supreme Court in the *Shaanika* case. The sections declared unconstitutional were sections 4(1) and 4(3). Section 4(1) provided for the eviction of persons and demolition of their structures illegal erected on municipal of land. Such evictions and demolitions could occur without a court order and without prior notice to the affected persons. Furthermore, section 4(3) precluded such "illegal occupants" from claiming redress in a court of law.

Petrus Shaanika and 13 other people settled themselves on land belonging to the Windhoek municipality upon which they erected makeshift houses. They were subsequently informed by the municipality that they were illegal squatters and requested to vacate the land. The settlers refused to comply

with this request asserting that they were not wilfully defying the law but were occupying the piece of land out of desperation for housing. The Windhoek Municipality proceeded to demolish their shacks. Shaanika and others petitioned the High Court for an order restraining the City of Windhoek from demolishing their homes and evicting them. They further requested the court to declare sections 4(1) and 4(3) of the Squatters Proclamation unconstitutional.

The High Court, adhered to a strict interpretation of the 'doctrine of clean/ dirty hands' and did not bother to entertain the merits of the case. It ruled that all the residents of the informal settlement in question could be forcibly evicted.

The Supreme Court, upon appeal, viewed the matter fundamentally differently. First, it refused to apply the 'doctrine of unclean hands' to this matter. In the view of the upper Court, there was no evidence of dishonesty, fraud, or mala fides in the conduct of petitioners. The Court then went on to consider the constitutionality of sections 4(1) and (3) of the Squatter Proclamation. These sections were declared inconsistent with articles 12 and 13 of the Constitution, respectively. They were found to be overly invasive and in breach of article 13 of the Constitution which prohibits 'interference with the privacy of one's home'. The ousting of the court's power to review the action of private landowners and/or local authorities, as professed by the impugned provisions, was also found contrary to the right to access to courts as recognised and guaranteed under article 12 of the Constitution. It was also found to run foul to one of the foundational values of the Constitution, namely the rule of law as entrenched in article 1(1). In fact, section 4(3) amounts to an ouster clause, a remnant of the apartheid and colonial era. Through the inclusion of ouster clauses in legislation, parliament could, based on the doctrine of parliamentary supremacy, preclude judicial review of certain administrative actions. Parliamentary supremacy has, however, been replaced with constitutional supremacy in terms of article 1(6) of the Namibian Constitution. In addition, access to courts is also explicitly recognised and guaranteed in articles 12, 18 and 25, of the Constitution amongst others.

With that said, the Municipality of Windhoek and the city police were accordingly interdicted and restrained from demolishing the homes and/ or removing material and content belonging to the petitioners. The Court, importantly, went on to rule that in Namibia no forced evictions linked to the unlawful occupation of land may henceforth be carried out without a court order in Namibia. This ruling is undoubtedly welcomed and important

in extending the protection against forced evictions to residents of so-called unlawful informal settlements. The ruling, however, is limited in certain respects. For instance, it does not address the issue of alternative accommodation, the timing of evictions, consultations, etc. The Court cannot be faulted though. Admittedly, the petitioners did not argue the violation of their right to adequate housing. Specifically, the right claimed was not to be subjected to forced evictions in 'inclement weather' as pointed out by the African Commission (African Commission, 2010, par.79 (z) (dd). The evictions in question were to take place in July – the coldest month in the country.

## Habitability

Habitability is listed as one of the core dimensions of housing adequacy. The habitability aspect requires that housing units provide the inhabitants with adequate space, physical safety, and protection against cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors (CESCR, par. 8(d)). Inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates. The CESCR accordingly encourages State parties to refer and apply the 1989 Health Principles of Housing of the World Health Organisation (WHO) as a way of complying with the habitability aspect. To this end, protecting against communicable diseases, protecting against injuries, poisonings, and chronic diseases, reducing psychological and social stresses to a minimum, improving the housing environment, making informed use of housing, and lastly protecting populations at risk fall under these principles (WHO, p.1).

This aspect of housing adequacy is very relevant to the situation of informal settlements in the country. The Namibia Inter-censal Demographic Survey Report shows that by 2016 about 40 percent (39.7%) of urban households throughout the country reside in informal settlements (NSA, 2017, p.101). The living conditions in these informal settlements are, generally, shocking, and intolerable and 'devoid of minimum decent living conditions' (UN Human Rights Council, 2011, par.21). Residents of informal settlements, generally, reside in dwellings made from corrugated iron/zinc. These corrugated iron shacks reportedly get unbearably hot during the daytime and unbearably cold at night (LAC, not dated, p.15). Such inadequate housing exposes these residents to harsh weather conditions which makes them more prone to opportunistic infections. Those largely affected by housing informality include the poor, the sick, children, the elderly, women, and people with disabilities. These people spend most of their time in their home setting and are, therefore, most vulnerable and in most need

of safe, healthy, and habitable living environments as noted by the WHO (2010, p.3).

A detailed analysis and critique of the compliance of the Government of the Republic of Namibia (GRN) with the habitability element is a topic for a separate study. Suffice it to say that the current situation in the context of housing informality raises serious human rights concerns.

## Availability of Public Services, Materials, and Infrastructure

An adequate house, according to the CESCR (1991, par. 8(b)) must contain certain facilities essential for health, security, comfort, and nutrition. This requires that all households should have sustainable access to natural and common resources, such as safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

The African Commission (2010, par.78) embraces the same understanding in respect of this aspect of housing adequacy. The South African Constitutional Court (ConCourt) in the seminal Grootboom case (2000, par.35) similarly pointed out that housing:

> *[…] requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these […] [thus], [f]or a person to have access to adequate housing all these conditions need to be met, [namely], there must be land, there must be services, there must be a dwelling.*

The CESCR (2016, par.56) expressed concern about the poor housing conditions associated with informal settlements in Namibia and particularly that residents of informal settlements live without security of tenure, access to water, electricity, and sanitation facilities. It is indeed concerning that as much as 26 percent of people in urban areas, invariably those residing in informal settlements, are practising open defecation (NASA, 2016, p.112).

Lack of access to safe drinking water and an adequate sanitation facility not only violates the dignity of the poor, but also affects their health (UN HABITAT, 2006, p.vii). The outbreak of Hepatitis E in Windhoek, Khomas region, declared by the Ministry of Health and Social Services on 14 December 2017 serves as an ample proof of this (Ministry of Health and Social Service, 2020, p.2). By April 2018, the outbreak had reportedly engulfed ten regions, affecting mainly the informal settlements found in Havana, Okuryangava**,** Hakahana**,** and Goreagab in Windhoek, the DRC informal settlement in Swakopmund, and Kuisebmund in Walvisbay. The state of access to potable water, sanitation,

and limited hygiene in these and similar settings have been singled out as the main drivers of the outbreak. It is worth stressing that a disproportionate share of the labour and health burden of inadequate sanitation falls on women and girls. They are the ones who have to wait for long periods to gain access to public toilets or have to bear the indignity of defecating in the open (UN-HABITAT, 2006, p.vii).

The lack of public services in informal settlements and the challenges that this poses was also revealed during the COVID-19 pandemic. The principle approaches for reducing COVID-19 transmission, as noted by Wilkinson (2020, p.1) are the same in any context. These include hand washing, physical distancing, self-quarantine, self-isolation, or community-wide lockdowns. Many of these measures and protocols are often impossible to observe in informal settlements. The reason for this is self-explanatory. In the words of the World Health Organisation (WHO): people do not have running water at home and must travel outside the home to collect water. They use shared toilets or practise open defecation. They live in crowded conditions and families often share just one or two rooms (WHO, p.1). Informal settlements have accordingly emerged as hotspots for COVID-19.

The lack of public services, materials and infrastructure in informal settlements and the deplorable living conditions therein violate and or threaten a wide range of rights. These include the right to adequate housing, the right to human dignity, the right to health, and the right to life.

## Housing Affordability

Affordability constitutes another core element of housing adequacy. Housing is not adequate if its cost threatens or compromises the occupants' enjoyment of other human rights (OHCHR, n.d, p.4). Personal or household financial costs associated with housing should as such not be so high that the attainment and satisfaction of other basic needs are thereby threatened or compromised (CESCR, 1991, par.8 (c)). In other words, housing should not be so expensive that it leaves little room in one's budget for utilities, food, clothing, transportation, health care and other basic needs (UN-Habitat and OHCHR, 2003, p.13). This consideration is vital if one considers that the lack of affordable housing places poor people, particularly, as noted by Gómez, Thiele, and Tegeler (2005, pp. 2-5), in the impossible position of having to choose between the most basic of human necessities i.e., housing or food, housing or health care, housing or clothing.

The obligation to ensure the realisation of affordable adequate housing does not oblige Governments to provide publicly built housing for all though. This obligation does, however, require the State to provide

social housing or low-rental housing units to low-income households who are particularly deprived (CESCR, 2008, par.70). This is what the CESCR stated in its Concluding Observations on India. The Committee called on the Indian Government to address the acute shortage of affordable housing in that country by, inter alia, building or providing low-cost rental housing units, especially for the disadvantaged and low-income groups, including those living in slums. In a similar vein, the Committee recommended that the Kenyan Government take actions to:

> *"[…] ensure that slum upgrading projects give priority to the construction of social housing which is affordable for disadvantaged and marginalized individuals and families and that affected communities are effectively consulted and involved in the planning and implementation of such projects" (CESCR, 2008, par.30).*

The principle of affordability also requires that tenants be protected against unreasonable rent levels or rent increases (CESCR, 1991, par. 8(c)). This duty flows from the State's obligation to protect against abuses of human rights by third parties. In this context, Rolnik (2013, par.38) called on States to regulate the private rental market to protect against human rights abuses such as forced evictions or economic eviction and rental price "bubbles". Kalim (1990, pp.186-188) argues that rent legislation, regulation and control are major means of securing affordability and tenure security for low-income tenants in private rental arrangements.

It will be foolhardy to assume that rent control is supported by everyone. Scanlon and Kochan (2011, p.11) for instance, regard rent and security regulation as impediments for investors. Rent control and regulation measures, from this vantage point, allegedly produce inefficiencies, distort market values, reduce the housing supply, and encourage corruption and low housing maintenance. Rent regulation has also been criticised for not targeting low-income households since controlled rents and protected tenancies usually favour those who have lived in rental housing for years over potential new tenants (1990, pp.104-113). A further criticism against rent control is that there is no mechanism to ensure that those benefitting from rent control are the low-income households (Kumar, 1996, pp. 768-769).

Rent control/regulation, despite the criticisms cited above, has produced some positive results, in some countries and cities. In this context, the 2013 Guiding Principles on security of tenure for the urban poor flags certain countries and cities as examples of good practice. These countries include Austria, Germany, Switzerland, and the cities of New York and San Francisco

in the United States. Rent and security regulation in these countries and cities are reportedly stabilising the system and reducing the risks for both parties as well as facilitating and maintaining access to urban housing that is well located for low-income households (UN General Assembly, 2014, paras. 14-16).

Housing is generally considered unaffordable in Namibia. This is the case for both house prices and rentals. Suffice it to state that the time is ripe to conduct an in-depth human rights impact assessment viz. the prevailing situation regarding unaffordability of housing in Namibia.

## Accessibility

Adequate housing must be accessible to all those entitled to it, especially to the disadvantaged and marginalised groups in society (CECSR, 1991, par.8(e)). This confirms that the right to adequate housing is closely related to the right to non-discrimination. This notwithstanding, many persons are subjected to homelessness, informal accommodation, and inadequate housing where they are relegated to the most marginal and unsafe areas (UN HRC, 2020, par.44). Those disproportionately affected in this regard reportedly include refugees, asylum seekers, migrants, especially those who are undocumented, persons with disabilities, children, youth, indigenous peoples, women, lesbian, gay, bisexual, transgender and intersex persons (UN HRC, 2020, par.44).

These groups often experience intersectional discrimination because of their housing status which exacerbates and reinforces their socio-economic inequality. This calls for the enactment and implementation of laws to address entrenched systemic discrimination in housing instead of eliminating inequality. After all, States are obliged to prohibit all forms of discrimination in housing by public or private actors (CESCR, 2009, par. 37). States are obliged to ensure the full enjoyment of both formal and substantive equality. The latter, in the context of housing, would require that positive measures be taken to address housing disadvantages to ensure equal enjoyment of the right.

This would, for instance, require a revision of the Flexible Land Tenure Act which stipulates that starter titles and land hold titles be registered in the name of the head of the household. This seemingly neutral stipulation indirectly perpetuates gender inequality in the housing sector. The 2016 Namibia Inter-censal Demographic Survey Report shows that most households in the country are headed by men. By 2016 some 54 percent of households were reportedly headed by men compared to 46 percent headed by women (NSA, 2017, p.90). The effect of the head of household stipulation in the Act will therefore result in the fact that most

title holders registered under the Act will be men.

## Adequate Location

The CESCR clarified that adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres, and other social facilities (1991, par.8(f)). The financial costs of getting to and from the place of work as noted by CESCR can place excessive demands upon the budgets of poor households. In addition, housing should also not be situated near hazardous areas that threaten the right to health of the inhabitants. Phrased differently, housing is not adequate if it is cut off from employment opportunities, health-care services, schools, childcare centres, and other social facilities, or if located in polluted or dangerous areas (UN HRC, n.d, p.4).

In Namibia it is commonly observed that new low-income houses, as pointed out by the Shack Dwellers Federation of Namibia (SDFN) and the National Housing Action Group (NHAG), are located far away from the means of livelihood of the low-income population (SDFN and NHAG, 2019, p.29). These low-income earners thus face in addition to limited job opportunities, long travelling distances and high transport costs (SDFN and NHAG, 2019, p.29). Finally, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants (CESCR, par. 8(f)).

## Cultural Adequacy

The way housing is constructed, the building materials used and the relevant policies informing these must enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernisation in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured (CESCR, 1991, par.8(f)).

The relevance of the cultural appropriateness of housing is aptly demonstrated in respect of 200 houses built for the !Xun, #Akhoe and Hai||om San communities residing in the Ekoka and Oshanashiwa villages in the Ohangwena Region in 2005. This housing project was reportedly initiated by the former Deputy Prime Minister, Libertina Amathila. In February 2017, the Namibian Sun newspaper published a story about these 'modern homes' standing idle whilst their occupants prefer sleeping outdoors. When quizzed on this, San elders explained that according to their cultural norms when someone died in a house, they vacate it to escape the roaming spirit of the deceased. That is why they do not stay in permanent structures. The project has been branded as a wasteful expenditure because of a failure

to consult by government officials (Nandjato, 2017)

In a similar vein, residents of informal settlements in Windhoek are reportedly objecting to the idea of living in flats as part of the City of Windhoek densification strategy. Their primary objection relates to the cultural adequacy of flats for most of them. The multi-storey flats constructed by the National Housing Enterprise (NHE) in Otjomuise, Windhoek, has also proved unpopular (Remmert and Ndhlovu, 2020, p.68).

The housing officials are well advised not to treat these objections lightly. They must be cognisant that housing is not adequate if it does not respect and take into consideration the expression of cultural identity of potential beneficiaries (UNHRC, n.d, p.4).

## Conclusion

The main thrust of this article was to give an exposition on the right to adequate housing as guaranteed under international human rights law. It focused on the scourge of housing informality in the country. It argued that whilst residents of informal settlements are equally entitled to all aspects of the right to adequate housing this is not the case in practice.

There is a strong argument to be made that the prevailing crisis of housing informality in the country violates every single aspect of the right to adequate housing of those relegated to reside in informal settlements throughout the country. It is inconceivable why such flagrant violations have not yet been challenged.

The article reaches some simple but urgent conclusions. Paraphrasing Farha, the scope and severity of the living conditions in informal settlements make this one of the most pervasive violations of human rights in the country. As a nation we have come to accept the unacceptable (UN General Assembly, 2018, p.2). This cannot be allowed to continue uncontested. It is a human rights imperative that residents of informal settlements be empowered to claim their birth right to adequate housing. There is need to educate and train a cadre of paralegals to precipitate an attitude shift towards the enforceability of the right to adequate housing of residents of informal settlements in the country.

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