

# HUMAN RIGHTS AND WATER INTEGRITY

IMPLICATIONS FOR  
INFORMAL SETTLEMENT  
WATER AND SANITATION



## Acknowledgments:

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Dennis Webster, SERI.

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# ENE INTRODUCTION AND PURPOSE

“The scope and severity of the living conditions in informal settlements make this one of the most pervasive violations of human rights globally. The world has come to accept the unacceptable. It is a human rights imperative that informal settlements be upgraded to meet the basic standards of human dignity.” United Nations Special Rapporteur (UNSR) on the Right to Adequate Housing, Leilani Farha August 2018.<sup>1</sup>

Despite clear international law on the human right to water, and widespread<sup>2</sup> recognition of this right, almost one billion people still do not have adequate, affordable and safe access to water and 2.4 billion people do not have access to safe sanitation.<sup>3</sup>

The world’s urban population is increasing and by conservative estimates, rates of growth will continue well into the middle of this century.<sup>4</sup> By 2050, 70% of the global population is expected to live in cities. While the proportion of the urban population living in informal settlements has gradually decreased, the absolute number of people living in informal settlements has continued to increase.<sup>5</sup>

“Since 2000, the global slum population grew on average by six million a year. This means an increase of 16,500 persons daily. In Sub-Saharan Africa, 59 per cent of the urban population lives in slums and by 2050, Africa’s urban dwellers are projected to have increased to 1.2 billion. In Asia and the Pacific, home to half of the urban population of the world, 28 per cent of the urban population resides in slums.”<sup>6</sup>

Rapid urbanisation poses challenges to city governments’ ability to meet their human rights obligations, especially in expanding informal settlements. However, safely managed water and sanitation services significantly reduce social, health, economic and financial costs, to both governments and households.

Informal settlements are generally well located with respect to economic opportunities, transportation and social facilities, and while precarious, they provide livelihoods opportunities. They provide affordable rental accommodation or land for self-built shelter. They are an entry point into an urban economy. The persistence of informal settlements is a clear indication of the state’s failure and the market’s inability to provide poor households with affordable accommodation options in well-located areas, and of the resilience and agency of poor households.

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<sup>1</sup> Leilani Farha, UN Special Rapporteur on the Right to Adequate Housing, “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context”, UN General Assembly 73rd session, New York (August 2018), A/73/310/Rev.1, p.2 and pp. 5-6

<sup>2</sup> 122 countries recognise the human right to water – see United Nations Meetings Coverage, “General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right”, *United Nations* (28 July 2010), available at: <https://www.un.org/press/en/2010/ga10967.doc.htm>.

<sup>3</sup> WHO and UNICEF, *Progress On Household Drinking Water, Sanitation and Hygiene I 2000-2017: Special Focus on Inequalities*, Joint Monitoring Programme JMP (2019)

<sup>4</sup> Daniel Hoornweg and Kevin Pope, “Population predictions for the world’s largest cities in the 21st century”, *Environment and Urbanisation*, Vol 29(1) 2016, pp. 195-216

<sup>5</sup> UN Habitat, *Slum Almanac 2015-2016: Tracking Improvement in the Lives of Slum Dwellers* (2015), available at: <https://unhabitat.org/slum-almanac-2015-2016/>.

<sup>6</sup> UN Habitat, *Slum Almanac 2015-2016*.



*Dennis Webster*

*Marikana informal settlement.*

As noted by the former UNSR on the right to adequate housing:

“Informal settlements are often an incredible accomplishment, a profound expression of individuals, families and communities claiming their place and their right to housing. They are ‘habitats made by people’, who are creating homes, culture and community life in the most adverse circumstances. The act of claiming places in cities and constructing homes challenges spatial exclusion, the appropriation of land and property by the wealthy for no purpose but speculation, the colonization of indigenous territories and attempts by authorities to render entire communities invisible by not recognizing them. In response, informal settlements are a statement: ‘we are here’ and ‘we will not disappear.’”<sup>7</sup>

“Integrity” and “human rights” are complementary frameworks, brought into focus in this paper through the lens of informal settlement water and sanitation. Findings from research undertaken in Siyanda, Marikana and Ratanang, three informal settlements in different provinces of South Africa and in Mukuru, an informal settlement in Nairobi, Kenya, are discussed. The paper shows how an integrity focus can help to achieve human rights obligations and how a human rights focus improves integrity and reduces opportunities for corruption. It concludes by discussing cross-cutting issues with respect to improved integrity and the realisation of human rights.

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<sup>7</sup> UN Special Rapporteur on the Right to Adequate Housing, Leilani Farha, UN General Assembly, (August 2018), A/73/310/Rev.1, p. 6

# TWO WATER AND SANITATION IN INFORMAL SETTLEMENTS

People living in informal settlements typically self-access poor quality, unreliable water and sanitation services. Informal settlement residents pay more per litre than high income urban users, for potentially unsafe water and, unless they dig pits or use buckets in their yards, almost invariably share what amounts to public latrines, ordinarily situated on the outskirts of unlit settlements. The failure of national and local authorities to ensure that informal settlement residents have access to safely managed water and sanitation services, and the actions of community members and entrepreneurs to fill the gaps that arise as a result, provide insights into how water integrity can result in better delivery on the human rights to water and sanitation.

Authorities often excuse their failure to provide water and sanitation to residents in informal settlements by citing technical constraints such as a lack of formal planning, safety problems, or a reluctance to expose themselves to legal challenge for investing in privately owned land. Because these are by no means insurmountable nor even consistently applicable challenges, we argue that there is more at play and that their reluctance stems from what can ultimately be traced back to stigma and discrimination. Informality is typically associated with lawlessness and criminality. Numbers of marginalised ethnic groups, foreign nationals and women-headed households tend to be higher in informal settlements. The lack of formal recognition of informal settlements and their residents, indeed until recently the focus on “eradicating” them, undermines the fulfilment of the state’s obligation to deliver services, and it negates the important social and economic role of informal settlements in cities.



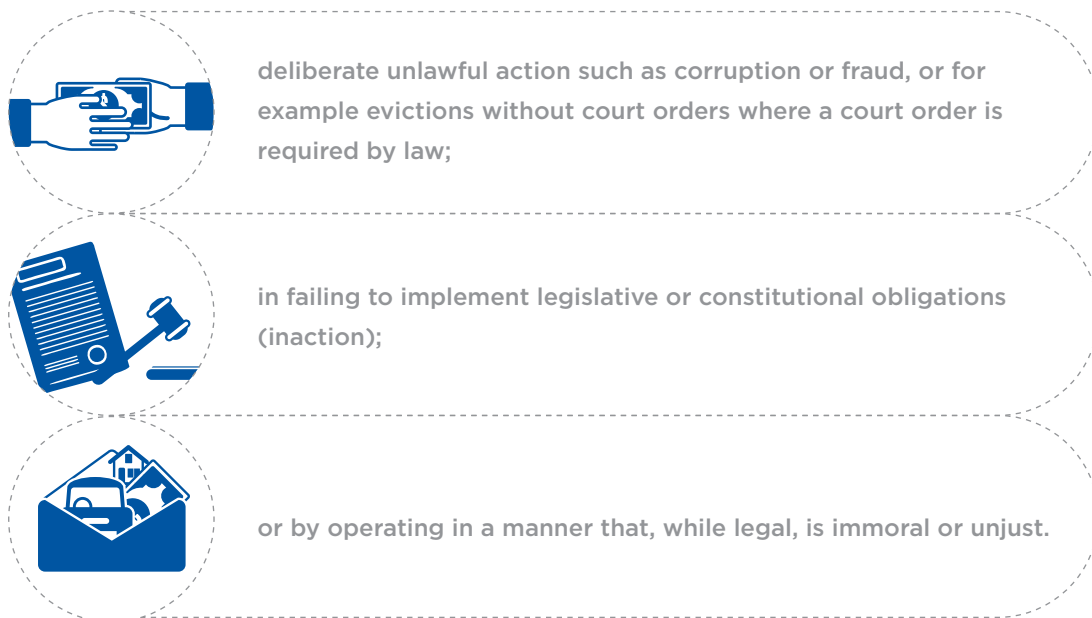
# INTEGRITY AND ANTI-CORRUPTION MEASURES

## THREE

Corruption contributes to the failure of basic services provision across the world. It exacerbates existing inequalities in access to water and sanitation, diverts resources from where they are most needed, and reduces the quality and availability of services. The Sustainable Development Goals (SDG) and water and sanitation targets will not be reached without strengthening integrity and addressing corruption, which continues to undermine the sector's performance.

In the paper, corruption is defined as the abuse of public resources or public power for personal or political gain by anyone at any level of government or in business. We define integrity as *the use of vested powers and resources ethically and honestly for the provision of sustainable and equitable water and sanitation services*. Integrity is implicit in the human rights obligations, explicit in the administrative justice laws of many countries, and operationalised in the governance principles of transparency, accountability, participation and anti-corruption.

### Failures in integrity are evident in three ways:




While there may be many reasons for inaction, not all relate to integrity. And, integrity failures are not only the result of actions, they can result from inaction.




# FOUR

# HUMAN RIGHTS TO WATER AND SANITATION

On 28 July 2010, the human rights to water and sanitation were recognised by the United Nations General Assembly and the Committee on Economic, Social and Cultural Rights, which set out the status and legal content of water<sup>8</sup> and sanitation<sup>9</sup> as human rights as follows:



The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.<sup>10</sup>



The human right to sanitation entitles everyone to sanitation services that provide privacy and ensure dignity, and that are physically accessible and affordable, safe, hygienic, secure, socially and culturally acceptable.<sup>11</sup> Sanitation is defined as a system for the collection, transport, treatment and disposal or reuse of human excreta, and associated hygiene.

Increasingly, countries have recognised the rights to water and sanitation in their constitutions, legislation and policies. Even where countries don't explicitly recognise the right to water and sanitation, international human rights law obliges states to work towards universal access to water and sanitation, and to prioritise the needs of those people who are marginalised, disadvantaged and vulnerable.<sup>12</sup>

The recognition of the human rights to water and sanitation, and of human rights in general, has been strengthened through the 2014 adoption of the 2030 Agenda for Sustainable Development, where 193 UN Member states pledged, as part of the 17 SDGs, to ensure universal access to water and sanitation by 2030, that *"no one will be left behind"*, and to *"endeavour to reach the furthest behind first."*<sup>13</sup>

People living in informal settlements are amongst the furthest behind; the human rights to water and sanitation, as well as the human rights to adequate housing and to an adequate standard of living are most relevant to informal settlement residents. The right to adequate housing entitles people to live in security, peace and dignity; protects them against forced evictions and the arbitrary destruction and demolition of their homes;

<sup>8</sup> ICESCR, General Comment No. 15: The right to water, 2002, (E/C.12/2002/11)

<sup>9</sup> ICESCR, Statement on the right to sanitation, 2006, (E/C.12/2010/1)

<sup>10</sup> ICESCR, General Comment No. 15: The right to water, 2002, (E/C.12/2002/11), para. 2

<sup>11</sup> Catarina de Albuquerque, Independent Expert, "Report of the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation", UN Human Rights Council, (1 July 2009), A/HRC/12/24, para.63

<sup>12</sup> UN Water, *UN World Water Development Report 2019: Leaving No One Behind*, (2019), available at: <http://www.unwater.org/publications/world-water-development-report-2019/>.

<sup>13</sup> UNDP, *What Does it Mean to Leave No One Behind? A UNDP discussion paper and framework for implementation*, (2019), available at: [https://www.undp.org/content/dam/undp/library/Sustainable%20Development/2030%20Agenda/Discussion\\_Paper\\_LNOB\\_EN\\_Ires.pdf](https://www.undp.org/content/dam/undp/library/Sustainable%20Development/2030%20Agenda/Discussion_Paper_LNOB_EN_Ires.pdf).



and entitles them as rights holders to security of tenure, housing land and property restitution, equal and non-discriminatory access to adequate housing, and participation in housing-related decision-making at the national and community levels.

All human rights impose three types of obligations on states: to respect, protect and fulfil these human rights. These obligations are clarified in General Comment No. 15 on the human right to water<sup>14</sup> and by an independent legal expert in the UNSR on the human rights to safe drinking water and sanitation's 2009 report on the right to sanitation.<sup>15</sup>

The obligation to respect the human rights to water and sanitation means that states may not interfere with or curtail the enjoyment of these rights<sup>16</sup>. The state may not therefore prevent residents from accessing a water source or toilets, and yet self-supply is considered unlawful and is in fact criminalised in many countries.<sup>17</sup>

Protecting the human rights to water and sanitation requires that states prevent third parties, including private persons, from interfering in any way with people's enjoyment of these rights<sup>18</sup>. This is relevant in informal settlements where small-scale providers may block access to alternative water sources in order to force people to purchase water from them, or where 'cartels' sell water at exorbitant prices to residents, increasing the price at times of scarcity and reducing access to services, for example in Kenya. Violations may also include the failure of the state to adequately regulate non-state service providers in order to ensure that they comply with standards such as quality and affordability.

The obligation to fulfil the human rights to water and sanitation requires states to ensure access to water and sanitation, and to create an enabling policy and regulatory environment for these rights to be realised and enjoyed by all, wherever they live. States are responsible to ensure appropriate institutional arrangements are in place for the provision of water and sanitation, and yet formal service provision is rare in informal settlements and service providers are inadequately supported or regulated.

International human rights law requires states to take immediate steps to progressively realise the human rights to water and sanitation for everyone. Once services and facilities have been improved, the positive change must be maintained, and retrogression must be avoided. In addition, the human rights legal framework requires that water and sanitation services are available sustainably for present and future generations: the provision of services today should not compromise the ability of future generations to realise their human rights to water and sanitation.<sup>19</sup>

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<sup>14</sup> ICESCR, General Comment No. 15: The right to water, (E/C.12/2002/11), paras. 20-29

<sup>15</sup> Catarina de Albuquerque, "Report of the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation, A/HRC/12/24.

<sup>16</sup> OHCHR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, (Contained in Document E/C.12/2002/11).

<sup>17</sup> The UN Special Rapporteur on the human rights to water and sanitation, Catarina de Albuquerque detailed violations of these human rights in her 2014 report to the Human Rights Council: A/HRC/27/55.

<sup>18</sup> OHCHR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, (Contained in Document E/C.12/2002/11).

<sup>19</sup> Catarina de Albuquerque, *Report of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation: Progress report on the compilation of good practices*, (2010), (A/HRC/15/31/Add.1), para. 6



# HUMAN RIGHTS AND WATER INTEGRITY

Human rights are universal and inalienable; indivisible, interdependent and interrelated. They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background. Human rights are inalienable because people's rights can never be taken away, and indivisible and interdependent because all rights (political, civil, social, cultural and economic) are equal in importance and none can be fully enjoyed without the others. They apply to all equally, and everyone has the right to participate in decisions that affect their lives. They are upheld by the rule of law and strengthened through legitimate claims for duty-bearers to be accountable to international standards<sup>20</sup>.

There is significant overlap between human rights principles, which are: equality and non-discrimination, participation and inclusion, accountability and rule of law, and non-retrogression (understood as sustainability), and the four pillars of water integrity as defined by Water Integrity Network (WIN) and partners, which are: transparency, accountability, participation and anti-corruption.<sup>21</sup> Common elements are participation, accountability and transparency, and access to information.

Equality and non-discrimination are the first principles of human rights law. Article 1 of the Universal Declaration of Human Rights (UDHR) proclaims that, "All human beings are born free and equal in dignity and rights". Article 2 further states that, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...".

The principles of non-discrimination and equality make it clear that no one may be discriminated against by virtue of their race, sex, ethnicity, nationality or geography. When governments opt not to provide water and sanitation to informal settlement residents because they live in an informal rather than formally planned areas, whatever the reasons, they violate the principle of non-discrimination and equality. These principles also recognise that people face different barriers and have different needs, whether because of inherent characteristics or as a result of discriminatory practices, and therefore may require differentiated support or treatment. Additional effort and resources are required to meet the obligation to provide water and sanitation to informal settlement residents.

The principle of access to information requires states to make public their plans, budgets and actions.<sup>22</sup> To be able to claim their rights, individuals and groups must know their rights and entitlements in terms of international and national law, and, importantly, how the state plans to meet its obligation to realise these rights. This principle means that states must make all relevant monitoring, budgetary, expenditure, procurement and planning information available and accessible to everyone, wherever they live and whatever languages they speak.

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<sup>20</sup> Cited in United Nations Population Fund (UNPFA), 2005.

<sup>21</sup> Water Integrity Network, "How To Promote Water Integrity", *Water Integrity Network*, available at: <https://www.waterintegritynetwork.net/integrity-walls-tap/>.

<sup>22</sup> Universal Declaration of Human Rights (1948), Article 19; International Covenant on Civil and Political Rights (1966), article 19; Convention on the Rights of the Child (1989), article 17



Bonile Bam, *New Frame*

The principle of participation requires that those affected by a decision are able to participate in a full, free and meaningful manner<sup>23</sup> in that decision, and a state violates this principle when it fails to engage communities meaningfully in decisions that impact on them.<sup>24</sup> This requires that they have access to information, and implicates the integrity principles of transparency and accountability. Courts in both South Africa and Kenya have recognised this principle.<sup>25</sup>

Accountability is the requirement that states be held accountable to meet their human rights obligations,<sup>26</sup> and includes compliance monitoring, access to justice and the enforcement of appropriate consequences for lack of compliance, for example through a comprehensive regulatory framework.<sup>27</sup> Monitoring of compliance against standards and targets requires states to not only set and be held accountable to minimum service level standards but that they monitor the differential access to water and sanitation of marginalised groups.

Administrative justice, procedural fairness, and reasonableness and lawfulness require that official decisions and actions are reasonable, proportional and fair, that accessible recourse and complaints mechanisms are in place, and that everyone has access to courts.

The next section analyses examples from Kenya and South Africa in order to better understand the relationship between water integrity and the realisation of the human right to water and sanitation in informal settlements.

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<sup>23</sup> UDHR article 21(a); ICCPR article 25; CRC article 12; Catarina de Albuquerque, UN Special Rapporteur on the human rights to water and sanitation, presented a report on participation to the UN General Assembly in 2014, A/69/213

<sup>24</sup> Catarina de Albuquerque, Violations Report, Human Rights Council, (2014), A/HRC/27/55, paras. 68-69

<sup>25</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and others*, CCT 24/07, para. 35; *Beja and Others v. Premier of the Western Cape and Others*, (21332/10), 29 April 2011, para. 146 and note 38; and *Ibrahim Sangor Osman and Others v. the Hon. Minister Of State for Provincial Administration & Internal Security and Others*, Constitutional Petition No. 2 of 2011 (3 November 2011)

<sup>26</sup> Leo Heller, The UN Special Rapporteur on the human rights to water and sanitation, *Report on Accountability*, UN General Assembly, (2018), A/73/162

<sup>27</sup> Leo Heller, *Report on Regulatory Frameworks*, Human Rights Council, (2017), A/HRC/36/45

# SIX

# WATER AND SANITATION IN INFORMAL SETTLEMENTS IN SOUTH AFRICA

## Policy and context

South Africa has a progressive legal and policy framework which is consistent with the principles and standards of the international human rights framework, and which aims to ensure tenure security and dignified basic services for all, including people who were intentionally and structurally “left behind”, displaced and forcibly evicted by the apartheid government for nearly half a century. Section 27(1)(b) of the Constitution<sup>28</sup> says that “everyone has the right to have access to sufficient water” and section 27(2) obliges the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right of access to sufficient water and, in section 26, to the right to adequate housing.

Informal settlements have been part of the South African landscape for decades. Conservative estimates hold that between 2.9 and 3.6 million people lived in informal settlements in South Africa in 2011. In 2016, statistics showed that 1 in every 5 households lived in an informal dwelling in metropolitan areas,<sup>29</sup> but the real number is likely to be considerably higher. Informal housing increases as dysfunctional land and property markets continue to exclude the poor. As noted by the Presidential Advisory Panel on Land Reform, “fragmented, disjointed, haphazard and unclear policy implementation, including the lack of an adequate redistribution policy, combined with the densification in our urban areas, and the need for people to access services, infrastructure and economic opportunities in peri and urban areas has led to a stark increase in people occupying land illegally”.<sup>30</sup>

Government efforts have focused primarily on ‘greenfield’ housing programmes on the outskirts of urban economic centres, and on attempting to eradicate informal settlements<sup>31</sup> and to prevent so-called ‘land invasions’ through evictions, demolitions and relocations<sup>32</sup>. This discourse remains prevalent in many municipalities. The relocation of informal settlements to vacant land is a common practice.<sup>33</sup> These approaches have served to perpetuate a cycle of insecure tenure, and, ironically, only served to entrench informality.

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<sup>28</sup> Constitution of the Republic of South Africa, 1996.

<sup>29</sup> SERI, *Submission to the United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, (2018), available at: <https://www.ohchr.org/Documents/Issues/Housing/InformalSettlements/SERI.pdf>.

<sup>30</sup> Vuyokazi Mahlati, *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture*, Presidential Advisory Panel on Land Reform and Agriculture: Pretoria, (May 2019), p. 12, available at: [https://www.gov.za/sites/default/files/gcis\\_document/201907/panelreportlandreform\\_0.pdf](https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf).

<sup>31</sup> Marie Huchzermeyer, *Cities with ‘Slums’: From Informal Settlement Eradication to a Right to the City in Africa* (2011), p. 3. The participants involved in the Campaign’s second community dialogue on the implementation of socio-economic rights held in Johannesburg on 24 July 2018 also underscored the importance of informal settlement upgrading as a critical tool to address the acute lack of adequate housing in South Africa.

<sup>32</sup> See, for example, Lillian Chenwi, “Legislative and Judicial Responses to Informal Settlements in South Africa: A Silver Bullet?” (2012) 23(3) *Stellenbosch Law Review*, pp. 540-563; and Michael Clark & Kate Tissington, “Courts as a Site of Struggle for Informal Settlement Upgrading” in Liza Cirolia, Tristan Görgens, Mirjam van Donk, Warren Smit & Scott Driemé (eds), *Upgrading Informal Settlements in South Africa: Pursuing a Partnership Based Approach to Incremental Informal Settlement Upgrading in South Africa* (2016), pp. 376-391.

<sup>33</sup> Marie Huchzermeyer, “Consent and Contradiction: Scholarly Responses to the Capital Subsidy Model for Informal Settlement Intervention in South Africa, *Urban Forum*, 12 (1) (2001), p. 71.



Informal settlements pose challenges to conventional municipal service provision. Settlements may be situated on privately owned land, have unpredictable growth patterns, and may not be within easy reach of bulk municipal infrastructure. To assist municipalities to address these challenges, the Upgrading of Informal Settlements Programme (UISP)<sup>34</sup> was developed in accordance with the Housing Act 107 of 1997. The UISP has three policy objectives: tenure security (recognising and formalising the tenure rights of informal settlement residents); basic services provision, and participative processes to address broader social needs. The UISP explicitly cautions against displacement and states that relocation should only be considered as a last resort<sup>35</sup> with “minimal disruption to the affected persons” and “to a site as close as possible to the existing settlement”.<sup>36</sup> However, municipalities have consistently underspent available funds to install bulk infrastructure and to upgrade informal settlements *in situ*.

South Africa’s water and sanitation policy framework is clear: where informal settlements are located on private land, municipalities should seek to address the security of tenure issues expeditiously and to provide “interim basic water and sanitation services as appropriate, affordable, and practical in accordance with a progressive plan that addresses both land tenure and basic services”.<sup>37</sup> The Constitution and the Housing Act (section 9 (3)) empower the state to expropriate private land for the public good, for housing development in terms of any national housing programme which includes the UISP. For example, in the *Fischer case*<sup>38</sup>, the High Court ordered the City of Cape Town to expropriate the land which is home to the 60,000 residents of the Marikana informal settlement.

Despite significant infrastructure investment and development achievements since 1994<sup>39</sup>, inequalities persist, and those left behind live in rural areas and informal settlements. Public investment in water and sanitation facilities declines with the degree of formality and urbanisation of the settlement. At least 41% of informal settlements in Gauteng province have inadequate access to sanitation, as many as 90% in Kwa-Zulu Natal and 69% in Limpopo province. Of the approximately 400,000 people living in informal settlements in Gauteng, approximately 25% have ‘temporary’ chemical latrines despite 66% having lived there for five years or longer.<sup>40</sup> In the Western Cape, chemical toilets, many of which have been there for 10 years or more, proliferate on the sides of roads in informal settlements.

In terms of the Municipal Systems Act 32 of 2000, municipalities must develop indigent policies that underpin the provision of free basic services to poor households in their jurisdictions. Most municipalities identify indigent households through means-testing, using monthly household income to determine indigent status according to municipally defined thresholds. Qualifying households are required to register as indigent once or twice a year. Extensive documentation is required including a South African identity document, which excludes undocumented foreign nationals despite the constitutional provision that everyone living in the country has the right to free basic services. Proving eligibility comes at high cost to the poor and in instances where individuals are employed in the informal economy or cannot provide evidence of their residential address, is arguably impossible. Indigent registers therefore become a means to exclude rather than include genuinely poor people and subvert the poverty alleviation objective of free basic services policies.

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<sup>34</sup> Department of Human Settlements (DHS), *Part 3 Vol 4 of the National Housing Code*, (2009)

<sup>35</sup> DHS, *Incremental Interventions: Upgrading Informal Settlements, Part 3 of the National Housing Code*, (2009), p.13

<sup>36</sup> SERI, *Towards a Synthesis of the Political, Social and Technical in Informal Settlement Upgrading in South Africa*, (2011) p.14

<sup>37</sup> DWAF, *Strategic Framework for Water Services*, (2002), p.43

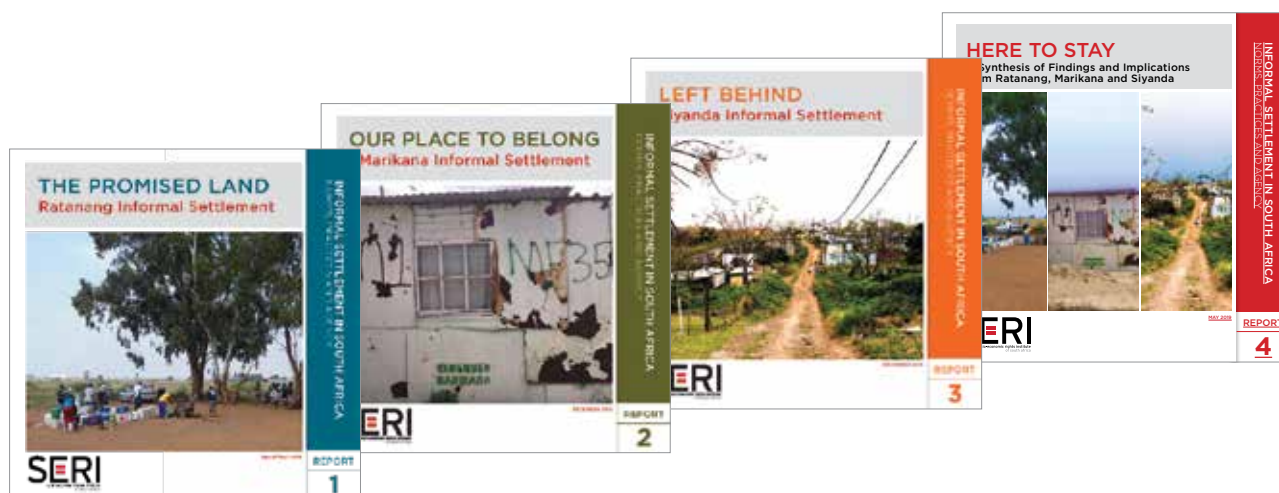
<sup>38</sup> *Fischer v Unlawful Occupiers*, Erf 150, Philippi (“Fischer eviction application”), <http://www.seri-sa.org/index.php/19-litigation/case-entries/491-fischer-v-unlawful-occupiers-erf-149-philippi>

<sup>39</sup> Department of Water and Sanitation (DWS), *Water and Sanitation Masterplan (2019)* states that “South Africa has a substantial existing water and sanitation network valued at an estimated R 1 362 billion in 2017 at capital replacement value”

<sup>40</sup> Housing Development Agency, *Gauteng: Informal Settlements Status*, (2013), available at: [http://www.thehda.co.za/uploads/files/HDA\\_Gauteng\\_Report\\_Ir.pdf](http://www.thehda.co.za/uploads/files/HDA_Gauteng_Report_Ir.pdf).

## Informal settlement action research

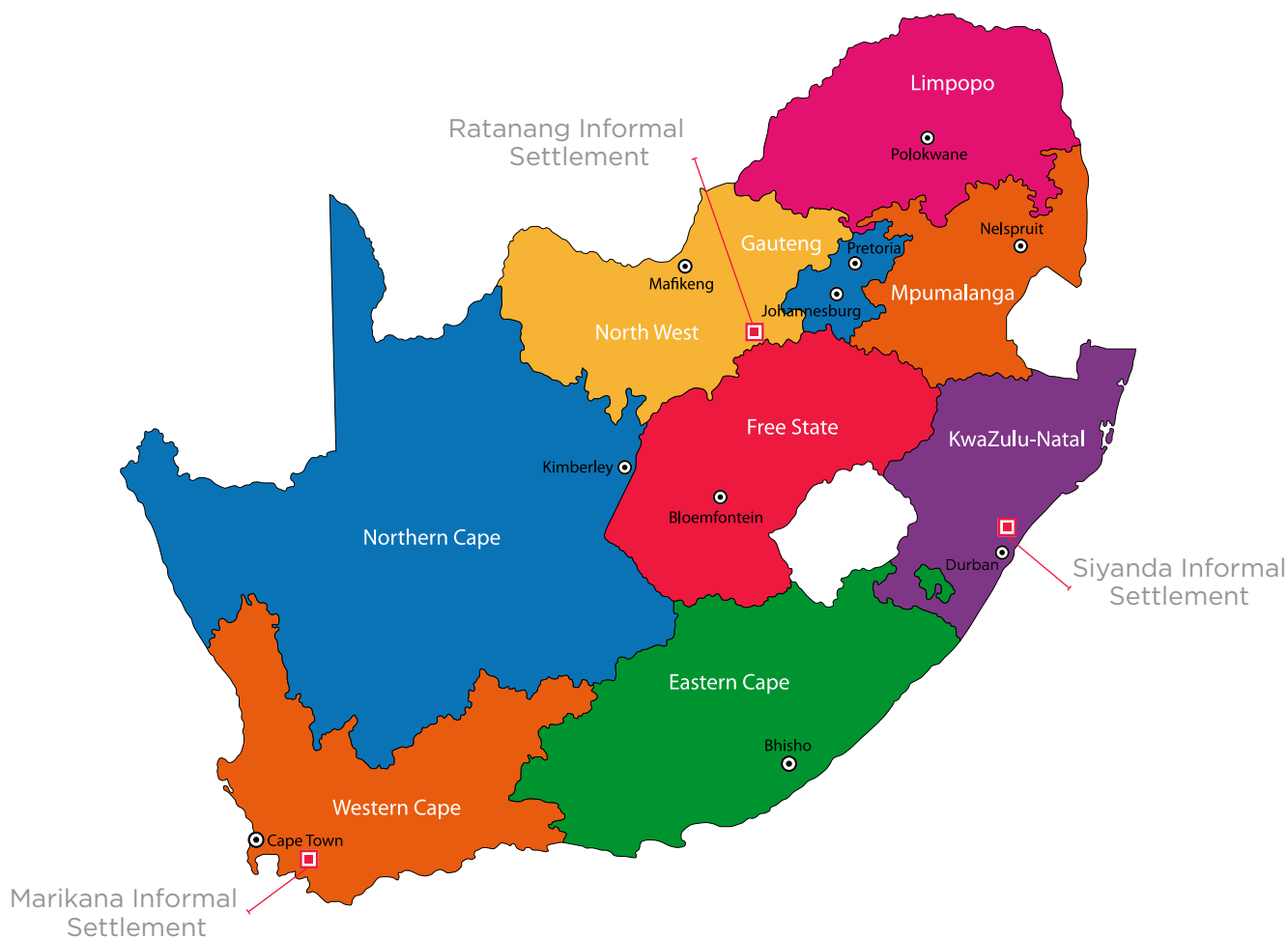
Between 2016 and 2019, the Socio-Economic Rights Institute of South Africa (SERI) undertook in-depth research<sup>41</sup> in three informal settlements to provide qualitative, evidence-based insights to assist government officials, practitioners, planners and community members to strengthen the implementation of in-situ upgrading.



### THE THREE SITES WERE:

- ✓ **Ratanang informal settlement** in Klerksdorp in the North West province, in existence since 2012 and home to 1,800 people whose access to water and sanitation is entirely self-organised through unimproved pit latrines and a single hand pump on the periphery of the settlement.
- ✓ **Marikana informal settlement** in Philippi in the City of Cape Town, in existence since 2013 and home to at least 60,000 people, whose access to water is through less than 200 communal standpipes and access to sanitation is through a combination of approximately 400 chemical latrines which line the roads on the periphery of the settlement and portable flush toilets (PFTs) which are emptied three times a week by the municipality.
- ✓ **Siyanda informal settlement** in KwaMashu in the eThekweni Municipality, in existence since the early 1990s and home to some 13,300 people who access water and sanitation through 22 communal ablution facilities fashioned from shipping containers, each with two showers, two flush toilets and hand basins, and two fitted urinals in the male containers. Attached to the outside of each container are four basins used for washing clothes and a stand-alone tap.

<sup>41</sup> Informal Settlement: Norms, Practices and Agency, <https://www.seri-sa.org/index.php/latest-news/931-new-publications-seri-launches-four-new-publications-on-informal-settlements-in-south-africa-5-july-2019>



## Water and sanitation arrangements

There was marked variability in the provision of water and sanitation services in the three settlements: no services were provided in Ratanang and insufficient services in Marikana and Siyanda. While services in Siyanda met interim basic standards, they posed specific challenges related to human rights standards and principles. The 50-100 functional communal standpipes in Marikana were wholly inadequate for the at least 60,000 residents.<sup>43</sup> Preventative maintenance was seldom undertaken, and repairs were often slow and sub-standard.

The research showed that, where municipal services were not provided or were unaffordable, inadequate or insufficient, households drew on their own resources to fill the gap, whether by maintaining the only water point themselves in Ratanang, by making unauthorised water connections in Marikana and Siyanda, or by digging their own pit latrines - a practice which was prevalent in all sites.

While self-supply reflects residents' resourcefulness, resilience and organisational capacity, it comes at high socio-economic and financial cost to extremely poor people. In addition, unauthorised water connections pose water quality risks, and self-dug or poorly maintained pit latrines pose significant safety risks, as of course do self-made electricity connections. Ironically, although the lack of municipal supply is the reason residents

<sup>42</sup> SERI, "Our Place to Belong: Marikana Informal Settlement", in *Informal Settlement in South Africa: Norms, Practices and Agency* (2019)

<sup>43</sup> SERI, "Our Land to Keep: Marikana Informal Settlement", in *Informal Settlement in South Africa: Norms, Practices and Agency* (2018) (on file with SERI)



*Alana Potter*

*Unimproved pit latrine, Ratanang.*

self-supply, self-supply itself undermines municipal service provision because it affects flow rates, billing and metering, and places unpredictable demand on municipal systems.

In Ratanang, community members struggled to collect or save sufficient funds to keep pace with the repairs and maintenance required on the single hand pump available. Elderly or disabled residents had to pay others to collect water and to dig their pit latrines, and the more resourced a household, the better able they were to construct safe pit latrines.

In Siyanda, access to water and sanitation was also not easily accessible to everyone. The steep topography of the settlement made access to communal ablution blocks (CABs) more difficult for the elderly, disabled or children who needed assistance in using the facilities. Some households were able to negotiate access to CABs which were locked after hours, others could not.

The eThekweni water and sanitation department undertook maintenance and repair of the CABs, but the functionality and quality of the service lay in the hands of part-time caretakers, supported by supervisors at district level and finance officers and maintenance teams at metro level. Caretakers also undertook a regulatory role, preventing and reporting theft, crime and vandalism, reporting faults, and overseeing the use of the facilities.

The caretakers were predominantly women, but at the time of the research, community leaders were considering appointing men instead because they were more accepted by the community in the regulatory aspect of the role of caretaker, and less likely to be harassed than women. Caretaker selection is a delicate issue: employment rates are low and there is anecdotal evidence in the literature to suggest that where there has been insufficient public participation during the selection process, community members vandalise the CABs in order to disrupt the caretaker's job and cause the caretaker to look unprofessional.<sup>44</sup> From the research in Siyanda, caretaker selection appeared to be well managed and engagement with ward councillors effective. In less organised settlements, caretakers could pose a fundamental constraint to the entire services delivery model.

Ward councillors were key to the selection of caretakers and to providing labour opportunities for residents. While this selection process was undertaken in close collaboration with the Siyanda committee members, the approach presents a fragility in which the vagaries of political patronage could easily advantage particular individuals or groups in communities with less cohesive or accountable leadership.

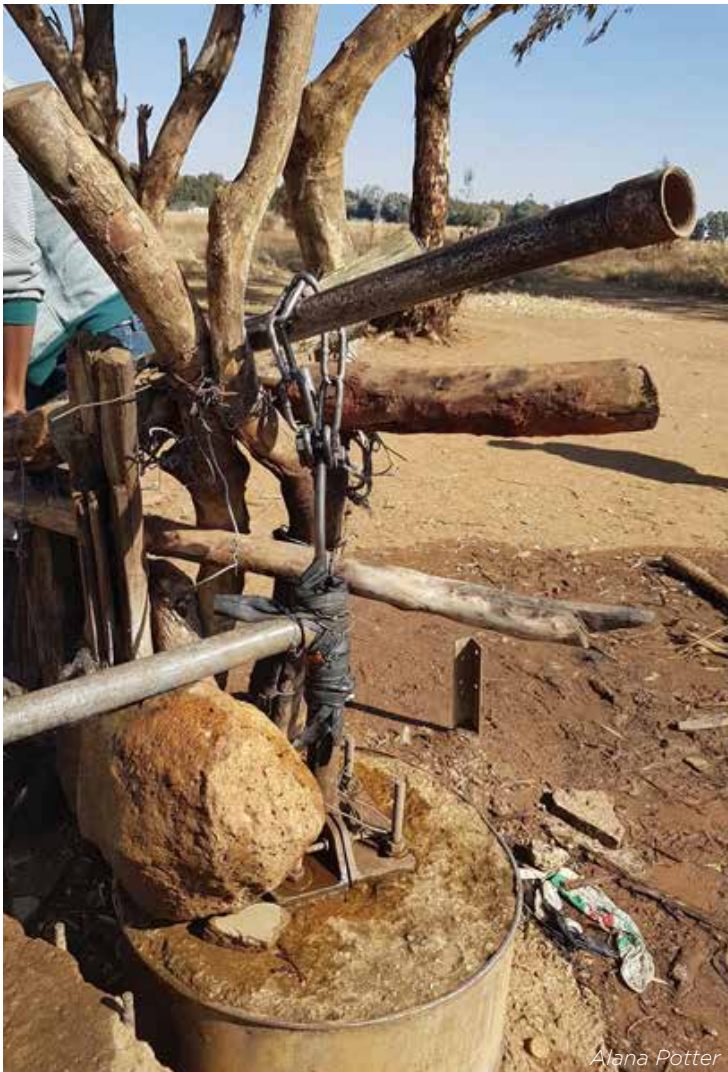
<sup>44</sup> Pieter Andries Crous, *Communal Ablution Facilities as Interim Measure for the Upgrading of Informal Settlements*, PhD, Faculty of Engineering and the Built Environment, University of Johannesburg (2014)



In all sites, shared latrines were locked by the residents living nearest to the latrine in an effort to ensure privacy and to manage the complexities of cleaning and maintaining shared latrines, which is one of the reasons shared latrines are not considered “improved” by global standards.

Water quality was also a concern. In Ratanang, situated near disused and dewatered gold mines, the quality of the water in the aquifer feeding the hand pump was uncertain. Water could also become contaminated at any point, from the two litre plastic bottle used as a spout on the hand pump, to the jerrycans used for collection, to the buckets used to store water within households, to the cups and jugs used to ‘skeep’ the water from these containers and use it for drinking or cooking. The further away a household lives from the water point, the less *water they collect and the lower the water quality at point of consumption.*

In all three settlements, inadequate services affected women disproportionately, both because the burden of collection and caretaking falls to women and because shared or public facilities combined with no lighting rendered all residents, especially women and children, vulnerable to crime and violence.



*Ratanang handpump in June 2017.*



*A two litre beverage bottle used as a spout to fill a jerrycan.*

## Weaknesses in equality, transparency, accountability and participation

The law places the obligation for universal services provision (“to everyone, everywhere”) squarely within the remit of municipalities. It also requires municipalities to upgrade informal settlements *in situ* in as far as that is technically and environmentally feasible. The state’s failure to upgrade informal settlements and provide adequate services represents a violation of people’s rights and discriminates against the residents of informal settlements.

As the UNSR on the human right to adequate housing has noted, informal settlements are places of both rights violation and rights claiming. This is clear in the South African examples. That government has failed to provide adequate housing and services, is a human rights violation. That residents of informal settlements have organised themselves individually and collectively to secure access to land and water where the market, the economy and the state were failing, is a claiming of human rights.

The research found that residents organised their own residential and economic land uses, they self-provisioned access to water, sanitation, electricity and solid waste management, and imposed their own order on an environment that existed without formal recognition. They have defended themselves against eviction, often brutal and on multiple occasions. Despite a shrinking economy and limited opportunities for productive income, they have found ways to make a living. They have organised local representation and leadership, and engaged actively with the state, in formal public participation processes, with municipal structures, in protest and in the courts.

Yet mechanisms for community participation in informal settlement upgrading, including enumeration and socio-economic data gathering and analysis, settlement categorisation, service delivery and *in situ* layout planning and implementation, are constrained by a lack of recognition of this self-organisation and of the existing leadership structures, by a lack of local government leadership of participative upgrading processes, and by a lack of effective non-partisan ward level representation<sup>45</sup>.

Across the three settlements there was a distinct lack of service provision accountability. In Marikana, for example - where municipally appointed service providers emptied chemical toilets and dumped emptied portable flush toilets into the open space for anonymous collection three times a week and reportedly repaired tap stands from time to time - there were no consumer accountability or communication systems in place, no contacts or contracts between consumers and service providers, and nowhere to report faults or lay complaints.

The only means of engagement available to residents was through local committees which in turn engaged with decentralised political structures such as ward committees. As a result, residents that were dissatisfied with services or wanted improvements either stepped in to create their own (generally unsafe) connections to water and electricity, built their own household latrines, sought legal assistance and/ or resorted to protest and other invented means of participation.

In Ratanang, the responsible municipality accepted the hand pump self-supply solution that the residents had come up with, even though the water quality was uncertain. However, the state has a clear obligation to ensure access to safe water, stemming both from the human right to water and from existing legislation and national policy.

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<sup>45</sup> Informal settlement upgrading matters: a submission to the new human settlements policy, Cape Town NGO Collaborative Initiative, October 2019.



*Community meeting in Marikana.*

In Marikana, the provision of temporary services took no account of the needs of residents. Both the services and the manner in which they were provided in Marikana communicated to residents that the services were temporary; that the residents didn't belong; that government and providers were not accountable to them. Although these were government appointed providers, the provision was in itself dehumanising and anonymising.

As SERI notes in its joint submission on Informal Settlements and Human Rights in South Africa<sup>46</sup>, information on basic services in informal settlements is rarely available except in isolated pockets. This is largely because basic services data are generally collected on a household basis and then aggregated to the metro, district or provincial level. As dwellings in informal settlements are not considered formal households, this data is rarely collected. Instead, provinces and municipalities collect data on informal settlements using survey and non-survey methodologies, most typically through aerial photography<sup>47</sup> providing little qualitative information on service level standards. Some municipalities gather information in order to contract services providers such as chemical latrine providers and emptiers. Where temporary services exist, little is known about the functioning and reliability of these services.

This issue was identified by the Human Rights Commission in 2014,<sup>48</sup> which states that, "a lack of access to information and the lack of responsiveness of government departments remains a huge problem for communities" and recommends that the "Presidency must provide solutions to this problem or alternatives so that communities and individuals can engage effectively with government in the short and long term."<sup>49</sup> The

<sup>46</sup> Informal Settlements and Human Rights in South Africa: Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (SERI with Members of the Steering Group of the South Africa's Ratification Campaign of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol), May 2018.

<sup>47</sup> Housing Development Agency, *South Africa: Informal settlements status*, (2014).

<sup>48</sup> South African Human Rights Commission, *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa*, (2014).

<sup>49</sup> South African Human Rights Commission, *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa*, (2014), p.16

same report also noted that, “Some information should be made automatically accessible to communities and civil society organisations as opposed to being available only through PAIA applications.” To date, however, little improvement has been achieved. This limits the possibility for real transparency due to the lack of reliable data, which in turn, reduces the possibility of holding service providers truly accountable.

Transparency and accountability are further constrained by the opaque nature of service provision arrangements, particularly to residents. It is difficult to access municipal budget and expenditure information related to informal settlement services provision. Data can be obtained where non-governmental organisations (NGOs) have dedicated project funds for budget tracking and social audits, which is limited to a number of informal settlements in the City of Cape Town, Ekurhuleni and the City of Johannesburg.<sup>50</sup> Obtaining budgetary information from the City of Cape Town required a legal request in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), which was enacted to give effect to the constitutional right of access to information. PAIA requests generally takes many months to years to be processed.



Tshepiso Mabula, *New Frame*

*A tap at the home of activist Andries Tatane, who was killed by police during a protest against the lack of access to potable water in Ficksburg, a small town in South Africa*

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<sup>50</sup> Albert Van Zyl, “Social Audits in South Africa: Can They Deliver?”, *International Budget Partnership*, (2016)



# WATER AND SANITATION IN INFORMAL SETTLEMENTS IN KENYA

## Policy and legislative context

As in South Africa, access to basic water services is a constitutional right in Kenya.

Section 43 of the 2010 Constitution of Kenya<sup>51</sup> stipulates that universal access to water is a human right and entrusts the responsibility of water provision to the 47 county governments. Article 56 addresses the need for marginalised and minority groups to access basic services through affirmative action. The Constitution further charges national government with the responsibility of regulating water resources and services as well as cross-county public works. Section 204 of the Constitution elaborates the Equalisation Fund whose purpose is to improve access to basic services and amenities to marginalised areas that have been underserved.



**County governments are commissioned with developing a County Water Policy and a County Water Act in which guidelines for water management are stipulated.**

The Water Act 43 of 2016<sup>52</sup> addresses both water resources and water services management and recognises that the responsibility for water is shared between the national and county governments. It also stipulates the powers and functions of the Water Resources Authority (WRA), Water Services Regulatory Board (WASREB), Water Works Development Agencies (WWDAs), and Water Services Providers (WSPs). The WRA is responsible for formulating guidelines and regulations for water resource use and management, while the WASREB, as the national regulator of the water sector, is mandated to issue licenses to WSPs as well as to protect customers from exploitation by approving water tariffs and monitoring water standards. The WWDAs provide technical support and capacity building to county governments so that they can execute their duties. Finally, the WSPs are charged with provision of water services in their respective jurisdictions as stipulated in their licences<sup>53</sup>.

Section 114 of the Water Act highlights the conditional and unconditional grants given by the Water Sector Trust Fund to counties, meant to enhance the development and management of water services in marginalised and underserved urban areas. Section 116 stipulates the function of the Trust in managing grants received for projects for the underserved and urban poor areas.

<sup>51</sup> Constitution of Kenya, 2010.

<sup>52</sup> The Water Act, 2016.

<sup>53</sup> 2030 Water Resources Group (WRG), "Understanding the Kenyan Water Act 2016", World Bank Group, available at: <https://www.2030wrg.org/wp-content/uploads/2016/12/Understanding-the-Kenyan-Water-Act-2016.pdf>.



A satellite image of the precincts in Mukuru informal settlement .  
(Source: <https://www.muungano.net/mukuru-spa-second-level>)

## Water scarcity and irregularity in Mukuru

Mukuru, in Nairobi, is possibly the fastest growing informal settlement in Kenya, with a population that has doubled in the last 10 years. The settlement occupies approximately 280 ha of land, 80% of which is privately owned. There are about 101,000 households and an estimated population of half a million dwellers. In August 2017, the County Government of Nairobi declared Mukuru a Special Planning Area (SPA)<sup>54</sup> in a gazette notice, indicating that it is an area requiring urgent developmental attention by government due to the deplorable state of basic service delivery. The declaration of the SPA was informed by a research study conducted by the International Development Research Centre (IDRC) to estimate the price penalty of basic services for the residents of Mukuru, which revealed that water in Mukuru cost 72% more than in formal precincts.<sup>55</sup>

While there are several sources of water in Mukuru, the dominant source is the Nairobi Water and Sewerage Company (NWSC), which functions primarily through metered chambers located at strategic supply points on the periphery of the settlement from which the water utility sells bulk water to community groups and individuals for resale to residents.<sup>56</sup>

Since less than 0.3% of the population have a NWSC household connection, they rely on water vendors to meet their daily water requirements<sup>57</sup>. However, the high and unregulated price of water restricts how much water each household can afford, which in turn leads to water only being available for the most necessary functions such as cooking and drinking. Residents are forced to limit their use of water for other purposes such as washing, cleaning and economic activities.

<sup>54</sup> Muungano wa Wanavijiji, "Mukuru Special Planning Area", available at: <https://www.muungano.net/mukuru-spa>.

<sup>55</sup> International Development Research Centre, "Unlocking the Poverty Penalty and Upscaling the Respect for Rights in Kenya's Informal Settlements", available at: <https://www.idrc.ca/en/project/unlocking-poverty-penalty-and-upscaling-respect-rights-kenyas-informal-settlements>.

<sup>56</sup> Based on an interview with a Mukuru Community Based Organization (CBO) Chairman, 10 October 2018.

<sup>57</sup> Based on an interview with a NWSC official 5, 29 September 2018.

The NWSC disconnects household connections due to outstanding bills often without serving sufficient notice. This presents NWSC officials an opportunity for economic gain since the residents and water vendors have to pay bribes to avoid disconnection or to be reconnected.<sup>58</sup>

Much like in South Africa, the reason given by NWSC for not providing basic services directly to residents is that the settlement is built on private land and it can only provide limited services to the periphery of the settlement.<sup>59</sup> The chamber model was developed in order to deal with this issue. The expectation was that *master meter operators* would then apply for connections from the chamber to houses or business premises.<sup>60</sup>

Master meter operators are organised community groups or individuals who are responsible for delivering water to residents in Mukuru. However, after the installation of the chambers, NWSC realised that the chambers had been taken over by a small group of water vendors, referred to as cartels,<sup>61</sup> each of which controlled several chambers. Many of the 'cartels' are landlords in Mukuru who charge exorbitant prices for the services while threatening residents with violent evictions and demolitions, thus leaving them with no alternative other than to purchase water from them.<sup>62</sup>

The cartels have maintained market dominance due to a number of factors such as strong connections to NWSC officials, their ethnicity, which reinforces their links to the state, financial resources, technical knowledge and their proximity to the water services business. The connection to the state is by far the most critical factor in their success in creating a 'monopoly' in the business. The links of cartels to the state resonates with the argument that informal actors of this type cannot exist without relations with the state and work with the latter's feigned ignorance or implicit consent.<sup>63</sup> The links to the state facilitate illegal connections made by the cartels, increasing the levels of non-revenue water (NRW), which are allowed to continue without action by the state.

During periods of 'normal supply', residents spend an average of 20 to 30 minutes (round trip to the water point and waiting time) to procure two jerrycans of water (average of 40 litres). In periods of prolonged water scarcity, residents (often women and children) walk to neighbouring settlements and factories looking for water, sometimes having to run across busy highways and streets with full jerrycans on their heads and backs. Additionally, the search involves navigating through parts of the settlement where they are vulnerable to crime and violence.<sup>64</sup>

Often, after an interruption of water supply, the water returns at night requiring residents to disrupt their sleep to fetch water. Residents depend on their social networks and connections to be informed when the water comes back at night. Accessing water during this time poses increased risks to personal safety since there are no streetlights.

Water scarcity often generates conflicts both within and between households as people try to access, use and dispose of water.

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<sup>58</sup> Based on interviews with residents and water vendors in Mukuru, August to November 2018.

<sup>59</sup> Vivien Castro and Alain Morel, "Can delegated management help water utilities improve services to informal settlements?", *Waterlines*, 27 (4) (2008)

<sup>60</sup> Ben Crow, and Edmond Odaba, "Access to water in a Nairobi slum: women's work and institutional learning", *Water International*, 35 (6) (2010), 733 – 747

<sup>61</sup> 'Cartels' are groups of market players who in collusion with state officials act as a single producer of a good or service with the aim of maximizing collective profits through anti-competitive mechanisms such as price fixing, limiting supply or actively undermining competitor businesses.

<sup>62</sup> International Development Research Centre, "Improving Access to Justice and Basic Services in the Informal Settlements of Nairobi", available at: <https://www.idrc.ca/en/project/improving-access-justice-and-basic-services-informal-settlements-nairobi>.

<sup>63</sup> Thomas Blom Hansen and Finn Stepputat, "Sovereignty Revisited", *Annual Review of Anthropology*, Vol. 35 (2006), pp. 295-315

<sup>64</sup> Based on interviews with residents in Mukuru, August to November 2018.





*Water pipes running in unsanitary conditions in Moto Moto Village in Mukuru.*

The regular violation of the human right to water in terms of accessibility to water in Mukuru is exacerbated by the cost of water. The disposable income spent on water ranks third after housing and food which leaves the residents of Mukuru with little income to procure other basic services such as education and health.<sup>65</sup>

Direct costs of water cover the price of a jerrycan of water, or payment for a metered connection and the tariff to be paid for water use. However, the expenses associated with a metered connection are out of reach for most residents who earn less than 2 dollars a day. A metered connection also requires investment in pipes to connect water from the chamber to the house. Often these pipes are of poor quality and require frequent repairs.

For those collecting water, the additional indirect costs include time spent queuing and looking for water. Often the water is contaminated so that extra costs must be incurred to treat it.

The residents of Mukuru have little or no control over the price of water which is set by the water vendors. The prices are fluid, rising and falling with the availability of water. The “pay as you go” system penalises residents who are not able to take advantage of the water tariff lifeline of 0 to 6 kilolitres prescribed by the water regulatory board.

Moreover, water is distributed through low quality pipes constructed by the cartels, which snake through unsanitary conditions in the sewerage trench. Several pipes are joined in order to cover the distance. These pipes leak at the joints leading to water contamination which can potentially result in outbreaks of diseases such as cholera and typhoid. The likelihood of water contamination is higher in periods of water shortage as vendors tend to procure water from unprotected sources including open wells in nearby quarries. Poor sanitation and the use of “flying toilets”<sup>66</sup> by residents makes the practice of rainwater harvesting untenable. Flying toilets are plastic bags that are used for defecation and disposed of on rooftops.

The research in Mukuru revealed that women and girls are more likely to search for water during periods of water scarcity. The long collection time reduces the productivity of women in income generating activities. It also affects the attendance of girls at school and, if they have been collecting water at night, often affects their ability to pay attention and learn. The elderly and people with disabilities in Mukuru have to pay someone to procure water for

<sup>65</sup> International Development Research Centre, “Unlocking the Poverty Penalty and Upscaling the Respect for Rights in Kenya’s Informal Settlements”

<sup>66</sup> Irene Karanja, “An enumeration and mapping of informal settlements in Kisumu, Kenya, implemented by their inhabitants”, *Environment and Urbanisation*, Vol. 22 (2010), pp. 217–39



them, resulting in additional costs to secure water, unless they are lucky enough to have a neighbour who provides water to them.

WASREB, the Kenyan regulator, has encouraged the formation of Water Action Groups (WAGs) so that they can get feedback from the residents about water services.<sup>67</sup> While there has been effort to include residents in decision-making processes, the situation has not improved. This may be due to the fact that members of the cartels are present in these meetings, making residents uncomfortable about speaking freely. As a result of these frustrations, residents, in many cases, use protests as a way of getting attention from NWSC and getting their opinions heard.

#### Mukuru Kwa Njenga residents challenge Sonko to intervene as cartels cut off County water pipes

In July 2019, irate residents at Maziwa area in Mukuru-Kwa Njenga located in Embakasi South, Nairobi county protested of acute water shortages as taps ran dry. A resident, James Malonza said they have been disconnected while water is being channelled to vendors who sell 20 litre Jerri can at Sh20. Bodaboda operators are also affected after the spill of water from burst pipes have rendered an access road impassable. A business lady Lydia Chepkemboi claimed business is affected since customers cannot access shops due to the muddy and dilapidated road attributed to a water spill. Source: Daily Nation Newspaper Online

<https://www.nation.co.ke/video/news/4146788-5210182-c9s33/index.html> 26-07-2019

## Weaknesses in equality, transparency, accountability and participation

As with South Africa, in the Kenyan case the principles of non-discrimination and equality, transparency, accountability and participation are not respected.

The lack of adequate services in informal settlements relative to those in formal settlements demonstrates clear discriminatory practices, which is a violation of the human rights principles. It also does not comply with national legislation and as such is a failure of integrity of the state in relation to its responsibility to ensure that everyone has access to water and sanitation, regardless of who they are and where they live.

In terms of participation, community-based organisations (CBOs) and self-help groups (SHGs) in Mukuru strategically collaborate with NGOs to initiate community projects in a bid to ameliorate the water situation in the settlement and are therefore an avenue through which collective agency can be leveraged. The CBOs and SHGs in Mukuru provide water services mainly through ablution blocks which are a one stop shop for potable water, showers and sanitation services.<sup>68</sup> Even though the participatory approach of the CBOs and SHGs should ensure that local communities are involved in the planning and implementation of the projects, this is not possible in Mukuru since the cartels threaten the community and sabotage their activities. The creation of SHGs and CBOs in Mukuru was a tactic for fighting the cartels but the SHGs and CBOs realised that they were dependent on the cartels who disconnected their meter connections, leaving them no alternative but to procure water directly from them.

<sup>67</sup> Water Integrity Network, "Water Action Groups in Kenya", available at: <https://www.waterintegritynetwork.net/2012/03/05/water-action-groups-in-kenya/>.

<sup>68</sup> Based on an interview with a Kenya Integrated Water, Sanitation and Hygiene (KIWASH) Senior Manager, August 2018



*The main wastewater disposal tunnel in Zone 48.*

For formal services, residents in Mukuru can use *Mmaji*, a mobile phone-based application, for information about water supply interruptions, to check water bill balances as well as to monitor their consumption levels. Additionally, *Majivoice* is an online system that the NWSC uses to get feedback from customers especially regarding complaints. The NWSC also uses its website to communicate the rationing schedule in which residents of certain areas get water on specific days. However, residents claimed that publishing the schedule was a mere formality because water was rarely supplied to the settlement and even if it was the cartels always took over the supply. Moreover, the rationing schedules, *Mmaji* and *Majivoice*,<sup>69</sup> are often inaccessible given that they depend on internet availability - the majority of residents cannot afford to buy data and consider the expense a luxury, making access to information highly discriminatory. Further, NWSC only responds to complaints about legal connections, and as the majority of the connections are illegal, this complaints system is insufficient.

As there is no reliable data available on self-supply services compared to formal services in the settlement, the extent of the problem remains unknown, demonstrating the problem of a lack of access to information and ensuing impact on the ability to hold states to account.

The Mukuru case presents evidence of a breakdown in the realisation of the human rights to water and sanitation for residents, in part due to corruption. The failure of the state to curtail (and in some cases, the state actively supports) the activities of cartels who exploit the residents through exorbitant prices amounts to a failure to protect the right to water of the residents. According to Lapper, when

“credible allegations of corruption are linked with human rights violations, the state would be under a duty to demonstrate that it has taken all appropriate measures to ensure the realization of the right in question. ... The absence of any steps taken or blatantly inadequate measures to investigate or tackle alleged acts of corruption would constitute a prima facie case of a human rights violation”.<sup>70</sup>

<sup>69</sup> Hilda Moraa, *Water governance in Kenya: Ensuring Accessibility, Service delivery and Citizen Participation*, iHub Research (July 2012)

<sup>70</sup> Richard Lapper “Understanding corruption in education as a human rights issue”, in Transparency International’s, *Global Corruption Report: Education*, (Routledge, 2013), pp. 16-20

## Corruption inverts the human rights to water and sanitation

A recently published WIN/Corruption Watch report notes the pervasive nature of corruption in South Africa's water sector, specifically drawing attention to the creation of perverse incentives for chemical latrines which are extremely common in the informal settlement sanitation landscape.<sup>71</sup>

These state failures place people in the invidious position of needing to access inadequate, unsafe or expensive services or to self-supply. In doing so, further issues of state failure arise, whether through the criminalisation of communities and households (South Africa) or through the lack of regulation of those stepping into the gap for profit (the water cartels in Kenya). In addition, the cases show that where people create their own access to services, access becomes discretionary and renders vulnerable groups such as women, the disabled, children or people without access to social networks or social capital, more vulnerable.

In the South African cases, we see that there does not have to be a direct case of corrupt action on the part of either the municipality or the service provider to prevent access to services: inaction has an equally negative impact on residents, and is counter to both the human rights to water and sanitation and national legislation and policies.

However, there is no doubt that widespread corruption has reduced the state's fiscal resources to respect, protect and fulfil its human rights obligations. South African municipalities' consistent underspending of grants to upgrade informal settlements<sup>72</sup> and provide basic services indicates an unwillingness to fulfil the obligation to do so. This unwillingness may be related to the complexity of time-consuming participative processes required for built environment work, but the legal obligation and the means are at the disposal of municipalities; it is simply underutilised.

Informal settlements generally arise due to state failure to plan for growth and migration, and to the compounding housing backlogs. While not planned by authorities, informal settlements are not sites without planning. Communities develop their own clear norms and practices, and this agency is a valuable resource for upgrading informal settlements through meaningful community participation. The South African research found clearly that over and above the material needs for access to land and services, achieving recognition and a sense of belonging are fundamental, non-material priorities for informal settlement residents. In Siyanda, residents expressed a profound sense of exclusion, of being "left behind". Marikana occupiers identified their struggle as being as much about land as it was about belonging and they actively built a sense of community to assert it, while in Ratanang, residents strove for recognition. Inclusive participatory processes in which the state and residents engage in a meaningful way about the future are prerequisites for meeting these non-material needs.

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<sup>71</sup> Money down the drain, Corruption in South Africa's water sector, Water Integrity Network and Corruption Watch, March 2020.

<sup>72</sup> "We note the persistent challenges with provincial expenditure on the Human Settlements Development Grant (HSDG) by metros in terms of the Urban Settlements Development Grant (USDG) over the 2014-2019 MTSF period (DHS 2015: 11), Informal Settlement Upgrading Matters: A submission into the new human settlements policy, Cape Town NGO Collaborative Initiative, October 2019.

The provision of water by non-state actors calls for increased vigilance on the part of the state to protect the residents from exploitation by private vendors, particularly where the usual regulatory framework for water and sanitation services does not apply due to the informal nature of the services.

## Criminalising informal settlement residents impedes rights

The cases in both Kenya and South Africa show that where residents resort to self-supply, services seldom meet adequate standards and access becomes discretionary. Vulnerable groups such as women, people with disabilities, children, migrants or people without access to social networks and social capital are rendered increasingly vulnerable.

Further, where communities provide their own services in the absence of state supply, the state, or the landowners, rather than responding with support to improve these services, react with aggression. Informal settlement residents have often had adversarial, recalcitrant or brutalising engagements with government and other authorities. Such experiences build perceptions which shape future engagements. These need to be actively overcome if the principles and standards of international and local human rights frameworks are to be realised.

By not providing adequate services or housing, the state places people in the invidious position of needing to self-supply services and then delegitimises or criminalises them for this. Where services are provided, there is often a profound disconnect between residents as users of services and municipally-appointed providers of services. This, together with the provision of temporary services with no reference to individuals, households or to human dignity, contributes to apathy, disdain and a lack of care or ownership of the facilities on the part of residents. Essentially, the manner in which services are delivered delegitimises residents as users of a service.

## Constitutionalising the human rights to water and sanitation is desirable but not sufficient

As noted by Schiel, Langford and Wilson<sup>73</sup> recognising the human right to water (and other economic, social, and cultural rights) in national constitutions does not, on its own, ensure access to water for all. However, it can improve services when accompanied by democratic governance and rights claiming. It is apparent that the recognition of the rights is not enough, and that more needs to be done to strengthen democratic and accountable governance. It is necessary to remove the stigma that residents of informal settlements suffer and to eradicate discriminatory approaches that leave informal settlements out of planning processes. It is also essential to find better solutions to issues arising from questions of land tenure and to strengthen resolve in addressing technological difficulties to ensure that everyone gets access to the services to which they are entitled – to protect their health, their dignity and to enable better functioning cities that take all the residents' needs into account.

## Strengthening integrity within water and sanitation

A culture of improved water integrity is needed, which protects the residents of informal settlements, through stronger complaints mechanisms, better monitoring, dedicated engagement by local governments that hold the budgets for service delivery, anti-corruption measures and more effective legal processes that are able to respond to the needs of residents. Beyond this, many countries, including South Africa and Kenya, have active national human rights commissions, able to respond on economic social and cultural rights such as the right

<sup>73</sup> Rebecca Schiel, Malcolm Langford and Bruce M. Wilson, "Does it Matter: Constitutionalisation, Democratic Governance, and the Human Right to Water", *Water Journal*, Vol. 12(2) (2020).





*Self made electricity connections, Marikana.*

to water, and a parliament that can hold the government accountable for the delivery of policy and legislative mandates to the poorest and most vulnerable, particularly those in informal settlements.

Enhanced transparency and participation in decision-making, as well as social monitoring by civil society and other relevant independent institutions provide the kind of environment necessary to address corrupt practices and violations of integrity and of human rights of the kind presented in the cases studies provided here.<sup>74</sup>

Despite enabling legislative and policy frameworks, residents of informal settlements continue to live with insecure tenure and inadequate services. In government's efforts to reach those "left behind" or "in the last mile" there is little evident attempt to build on the agency, self-organisation and initiative of local residents. Instead, resources are targeted at "doing too much" by eradicating, relocating or redeveloping informal settlements, or "doing too little" by simply not acting to upgrade services in informal settlements. In the process, decades of community organisation are erased, local livelihoods are flattened and relocated residents are often left worse off than they were before.<sup>75</sup>

A framework of water integrity, which promotes human rights and protects non-discrimination and equality, participation, transparency, accountability and anti-corruption would support improved delivery of water and sanitation in informal settlements and would allow such communities to more effectively hold government to account for any failure to deliver services.

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<sup>74</sup> International Council on Human Rights Policy and Transparency International, *Integrating human rights in the anti-corruption agenda: Challenges, possibilities and opportunities*, (2010), p. 4

<sup>75</sup> Between 2016 and 2019, the Socio-Economic Rights Institute of South Africa (SERI) undertook in-depth research ("Informal Settlement: Norms, Practices and Agency") in three informal settlements in order to provide qualitative, evidence-based insights to assist government officials, practitioners, planners and community members to strengthen the implementation of in-situ upgrading. The three sites were: Ratanang informal settlement in Klerksdorp (City of Matlosana in the North West province); Marikana informal settlement in Philippi (City of Cape Town in the Western Cape) and Siyanda informal settlement in KwaMashu (eThekweni Municipality in Kwa-Zulu Natal), and a fourth Synthesis Report that pulls together findings in each of the themes (tenure security and land use management; political space; access to basic services and economic life) across the three sites.



# CONCLUSION

Human rights apply to everyone regardless of who they are, what they do or where they live. In this paper, we have used the examples from Kenya and South Africa to illustrate that people in informal settlements are unable to enjoy their human rights to water and sanitation, despite countries having recognised these rights in their constitutions and legislation and despite binding international law, covenants and treaties. The failure to ensure adequate water and sanitation services demonstrates a failure on the part of the state to respect, protect and fulfil these human rights, as well as other fundamental rights such as those pertaining to health, housing, dignity and an adequate standard of living. This failure also represents a violation of the principle of nondiscrimination and equality.

The two country stories further reveal significant failures in transparency and participation, and demonstrate how difficult it is for residents in informal settlements to hold government and service providers to account. In the Kenyan case, the failure of the state to realise the human right to water and sanitation opened the door for corrupt cartels to hold residents hostage, and to compel them to pay excessive amounts for water. These corrupt practices are allowed to continue unchecked, despite efforts by residents and advocates highlighting the impact of the cartels' behaviour on access to services.

On the other hand, interventions by unserved households to provide their own services is criminalised in many countries. In both South Africa and in Kenya, people are prevented from providing their own services, often using spurious reasoning, such as that the standard of the services cannot be regulated, that the services are of a poor quality, while ignoring that in the absence of adequate and affordable services, households must find alternative ways of fulfilling their need for water and sanitation.

The two case studies indicate how states fail to make use of all of the tools at their disposal to respect, protect and fulfil the human rights to water and sanitation of people living in informal settlements. States often hide behind the concern that the land on which the informal settlement is built is private, too difficult to construct services on, or otherwise inaccessible for basic service provision. It is nonetheless a government obligation to ensure access to basic services and most governments are legally empowered to expropriate land in the public interest, particularly to provide housing and essential services.

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*Abandoned chambers in Mukuru in Zone 48.*



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