SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Response to Questionnaire: Informal settlements and human rights

Submission to the UN Special Rapporteur on the Right to Adequate Housing

May 2018

A. Background

Section 26 of the Constitution of the Republic of South Africa, 1996 (Constitution) guarantees everyone the right of access to adequate housing, while prohibiting evictions that are not accompanied by a court order. Moreover, the Constitution obliges the South African State to adopt reasonable legislative and other measures, to progressively realise the right of access to adequate housing within its available resources. Despite these progressive and justiciable constitutional provisions, South Africa continues to face significant housing shortages. Persistent housing backlogs and widespread informal settlements are a result of the erstwhile apartheid government's policies of influx control, whereby the occupation of urban housing by Black South Africans was largely prohibited and highly regulated.

The South African Human Rights Commission (SAHRC or Commission) continues to receive complaints from members of the public regarding their inability to access formal housing, or the failure by the democratically elected government to meet the demands for housing particularly in informal settlements. Although the Commission recognises that significant progress has been made since the advent of democracy in 1994, the country continues to face significant challenges in providing access to adequate housing to poor and vulnerable persons, many of whom continue to live in deplorable conditions without access to basic services or the economic opportunities required to escape from poverty. The Commission will therefore continue to promote the protection of the right of access to adequate housing; while monitoring and assessing the implementation of various government policies aimed at realizing the right.[1]

[1] The SAHRC's constitutional mandate and powers are set out in section 184 of the Constitution of the Republic of South Africa, 1996. See also SAHRC, 'Annual Trends Analysis Report 2015/16' (2017) reflecting complaint trends to the SAHRC, where it is noted that in the 2015/16 financial year, the Commission received 290 housing-related complaints.

Information regarding informal settlements in South Africa are provided below under relevant questions posed by the Special Rapporteur on Adequate Housing.

B. Questions

1. Please provide statistical data on the numbers of people living in informal settlements, clarifying the definitions used and including disaggregated data by relevant characteristics (gender, disability, age, etc.) where available. Provide estimates of the number of households renting within informal settlements.

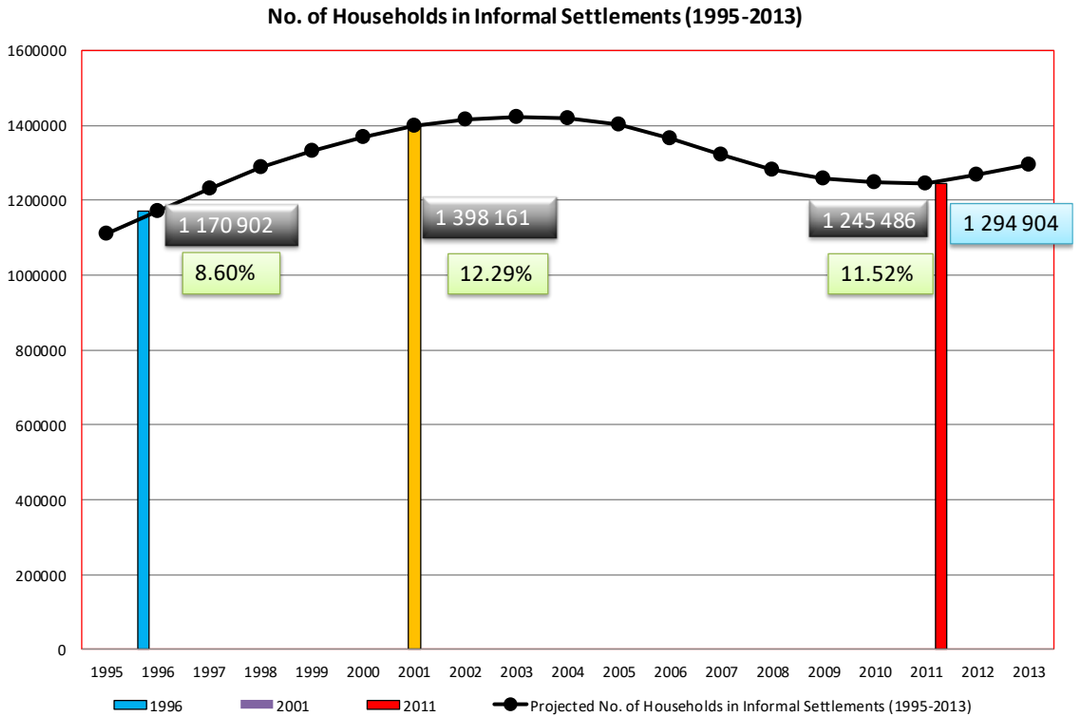
1.1. The South African National Department of Human Settlements (NDoHS) describes informal settlements using the following characteristics: illegality and informality; inappropriate locations; restricted public and private sector investment; poverty and vulnerability; and social stress.[2] In 2015, during a national investigative hearing on 'access to housing, local governance and service delivery' convened by the South African Human Rights Commission (SAHRC) the NDoHS revealed that South Africa had a total of 2 700 informal settlements with the majority of informal settlements located in the provinces of Gauteng (489), KwaZulu-Natal (635) and Western Cape (445).[3]

1.2. In October 2017, in a briefing to the Parliamentary Portfolio Committee on Human Settlements, the NDoHS indicated that the number of households in informal settlements had increased since 1995, rising from 1 170 902 in 1995 to 1 294 904 in 2011.[4]

[2] Department of Human Settlements, National Housing Code (2009) 16. Available at http://www.dhs.gov.za/sites/default/files/documents/national_housing_2009/4_Incremental_Interventions/5%20Volume%204%20Upgrading%20Infromal%20Settlement.pdf

[3] South African Human Rights Commission, 'Access to housing, local governance and service delivery' (2015) 42. Available at https://www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf

[4] National Department of Human Settlements, 'Progress report on the Upgrading of informal settlements Programme' (2017), Available at https://pmg.org.za/committee-meeting/25299/



1.3. The NDoHS revealed that the provinces with the highest concentration of informal settlements were in the countries, Gauteng, Western Cape, Free State, and the Eastern Cape provinces.[5]

1.4. According to Statistics South Africa (StatsSA), the national statistical office of South Africa, informal settlements refers to "an unplanned settlement on land which has not been surveyed or proclaimed as residential, consisting mainly of informal dwellings (shacks)". An informal dwelling is "a makeshift structure not approved by a local authority and not intended as a permanent dwelling".

1.5. According to the statistical data available from Stats SA, 13, 9% of South Africans lived in informal households.[6]

2. Please provide information on access to water, sanitation, electricity and other services, including availability and costs. Also refer to any relevant qualitative studies or documentation of the lived experiences of residents.

2.1. A research report commissioned by the Housing Development Agency (HDA) revealed that in 2001, 26% of households living in informal settlement had piped water in their dwelling or on their yard.[7] A further 33% could obtain piped water within 200 metres of their dwellings. 32% had access to piped water in excess of 200 metres from their dwellings (there is no indication of how far away the water source is) while 9% had no access at all. 19% of households in informal settlement used flush toilets, 43% used pit

[5] Ibid.
[6] Statistics South Africa, 'General Household Survey' (2016) 30 Available at https://www.statssa.gov.za/publications/P0318/P03182016.pdf
[7] Housing Development Agency, 'Informal settlements status in South Africa' (2013) 32.

latrines, 15% used bucket latrines and 5% used chemical toilets; the remaining 19% had no access to toilet facilities. 32% of households in informal settlement used electricity for lighting and 56% had their refuse removed by the local authority.

2.2. According to the Stats SA's Community Household Survey in 2016, some 63% of households have access to sanitation facilities and 90% have access to piped water.[8]

2.3. The Commission has found that the provision of water and sanitation to households in informal settlements is particularly challenging to municipalities as these settlements do not have proper housing or water and reticulation infrastructure. Many of the complaints on a lack of services received by the Commission emanate from individuals and families living in informal settlements that have been on waiting lists for formal housing for a long period of time and continue to suffer from the impacts of a lack of access to basic services and the associated impacts on the other human rights.[9]

3. Please provide information and data on environmental, health or security concerns and experiences, including violence against women, affecting residents in informal settlements. Please include disaggregated health statistics, including life expectancy, mortality and any data on injuries or fatalities of residents of informal settlements as compared to the general population.

3.1. In 2014, a baseline study to assess the future for impact evaluation of informal settlements was commissioned by the NDoHS and the Department of Monitoring and Evaluation.[10] The baseline study used a mixed methods approach where both quantitative and qualitative data was collected at household level and at the informal settlement level. The baseline study found that informal settlements are places of multiple deprivations with residents experiencing poor levels of health and nutrition, high unemployment and under-employment levels as well as high levels of risk and vulnerability.[11]

Environmental challenges

3.2. Informal settlements were prone to experiencing fire in their dwellings due to the use of candles, paraffin or gas stoves and illegal electricity connections.[12] Another environmental challenge that residents of informal settlements faced was flooding or

[8] Statistics South Africa, 'Community Household Survey', (2016), available at http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016- Statistical-releas 1-July-2016.pdf
[9] SAHRC, 'Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa' (2014) 30.
[10] Department of human settlements & Department of planning, monitoring and evaluation report on a baseline assessment for future impact evaluation of informal settlements targeted for upgrading (2016), available at http://dhssummit.co.za/REPORT%20IUSP%20BASELINE%20ASSESSMENT.pdf
[11] Ibid.
[12] Ibid 45.

mudslides due to geographical location and some informal settlements are situated next to flood plains.[13] Also, some informal settlements were located on dolomite, shale or sand, posing serious risk to life. The baseline study reveals that some informal settlements are located near dumping sites which poses a serious health risk in terms of polluted air.[14]

Health or security concerns

3.3. The baseline study revealed that respondents surveyed indicated that toilet facilities were unsafe due to risk of assault. The baseline study indicated that residents of informal settlements faced high levels of food insecurity.[15] The majority of respondents surveyed indicated that crime was a serious problem in informal settlements.

4. What goals and timelines have been adopted to ensure that all informal settlements will be upgraded to meet the standard of adequate housing by 2030? Please provide information on plans, upgrading/resettlement policies and whether these plans include human rights standards. Please also explain how responsibilities have been allocated to different levels of government.

4.1. Upgrading of informal settlements has been among the priorities of the democratic government as is evident in policies, legislation, strategies and programmes, such as the Reconstruction and Development Programme (RDP) (1994) the Housing White Paper (1994), the South African Constitution (1996), the Housing Act (1997) and Breaking New Ground (BNG) (2004). Previously, the upgrading of informal settlements was subsumed in the general provision of subsidised housing.

Upgrading of informal settlements programme (UISP)

4.2. In 2009 the upgrading of informal settlements programme (UISP) was developed. The key objectives of the UISP are "to facilitate the structured *in situ* upgrading of informal settlements as opposed to relocation" and ensure achievement of security of tenure, health and security and empowerment.[16] The UISP can be said to be human rights oriented as it considers the option of relocation as a measure of last resort when all other options have been exhausted. The key policy objectives of the UISP which are tenure security, health and safety and empowerment reveal that the logic of the UISP is to enhance communities' social capital and economic opportunities and not diminish them.

[13] Ibid 46.
[14] Ibid 56.
[15] Ibid 65.
[16] DHS, National Housing Code (2009) 13.

Allocation of responsibilities in terms of the UISP

4.3. In terms of allocation of responsibilities, the UISP provides that the local government sphere (municipalities) has the responsibility of considering whether living conditions in an informal settlement that is located in its area of jurisdiction merits the submission of an application for assistance under the UISP. If it does, then the relevant municipality should:[17]

- Initiate, plan and formulate applications for projects relating to the *in situ* upgrading of informal settlements, which in the case of municipalities that are not accredited, must be in collaboration with and under the supervision of the Provincial Department (PD's);
- Request assistance from the PD on any of the matters concerned if the municipality lacks the capacity, resources or expertise;
- Submit the application to the relevant PD;
- Implement approved projects in accordance with agreements entered into with PDs;
- Assume ownership of the engineering services installed;
- Manage, operate and maintain settlement areas developed under this programme (UISP);
- Ensure as far as possible the availability of bulk and connector engineering services;
- Provide basic municipal engineering services such as water, sanitation, refuse removal services and other municipal services;
- A district municipality must provide inputs and assistance to a local municipality, and vice versa, in appropriate circumstances.

The responsibility of Provincial Departments is largely around funding and implementation of the programmes in partnership with municipalities. Some of the responsibilities which Provincial Departments should perform:[18]

- Collaborate with and assist municipalities in the initiation, planning and formulation of applications for projects under this programme;
- Assume the development responsibility of the municipality in cases where the municipality is clearly not able to fulfil its obligations under the programme;
- Forward applications to the Member of the Executive Committee (MEC) together with its comments and recommendations, including its views on the eligibility for assistance and the capacity of the municipality concerned to undertake and complete the project successfully;
- MECs will have decision-making authority;

[17] Ibid at 20 – 21.
[18] Ibid at 21.

- Take appropriate steps in accordance with section 139 of the Constitution, to ensure the performance of the duties and obligations provided for in section 7 of the Housing Act, 1997, if the municipality is unable to do so;
- Reserve, reprioritize and allocate funds from its annual budget allocation, and manage, disburse and control funds allocated for an approved project in accordance with an agreement with a municipality;
- Assist municipalities with the use and implementation of accelerated planning procedures; and
- Monitor the implementation of a project by a municipality.

The National Department is tasked with the following:[19]

- Actively participate in project conceptualization, assist with project applications and evaluations and participate in project management with the PDs and municipalities;
- Maintain the policy and programme, and assist with interpretation;
- Monitor programme implementation;
- Negotiate the apportionment of funding for the programme, and allocate such to provinces for project execution and release allocated funds on a cash flow basis, and
- Provide implementation assistance.

National Upgrading Support Programme (NUSP)

4.4. There is also the National Upgrading Support Programme (NUSP) which was designed to provide support to the NDoHS in upgrading informal settlements. Given that the local government sphere (municipalities) are the key implementers of UISP, NUSP facilitates the technical support of the Housing Development Agency (HDA)[20] and the NDoHS and PDs in the process.[21] The NUSP has developed a toolkit that municipalities can use for the upgrading of informal settlements.

4.5. The Urban Settlements Development Grant (USDG) is transferred to 8 accredited metropolitan municipalities and cities to fund human settlement related infrastructure development, and is intended particularly for the upgrading of informal settlements and increased provision of housing opportunities for the poor in urban areas.

[19] Ibid at 22.
[20] In terms of section 7 (1) (k) of the Housing Development Agency Act No. 23, 2008, the HDA is mandated to assist organs of State with the upgrading of informal settlements.
[21] See http://www.upgradingsupport.org/

Outcome 8 of South Africa's National Development Plan

4.6. Outcome 8 of South Africa's National Development Plan is the Programme of Action aimed to create sustainable human settlements and improved quality of life. The key challenges sought to be addressed include the fact that 1, 2 million poor households are in approximately 2700 informal settlements across the country, but largely concentrated in the major metropolitan areas and that many informal settlements lack security of tenure and/or access to adequate basic and social services.[22]

4.7. The major outputs in terms of Outcome 8 included the upgrading of 400 000 households in well located informal settlements with access to basic services and secure tenure, implementation of a National Upgrading Support Programme (NUSP), delivery of 80 000 well-located and affordable rental accommodation, declaration of restructuring zones, accreditation of 27 municipalities to undertake human settlements functions, efficient utilisation of state land for human settlements development and improved property market by putting into place the Mortgage Default Insurance Scheme and Finance Linked Individual Subsidy as well as loans granted by Finance Development Institutions.

Draft White Paper for the Development of Human Settlements legislation

4.8. The NDoHS is currently in the process of drafting a White Paper for the development of human settlements legislation.[23] The draft white paper highlights that the upgrading of informal settlements continues to be part of the agenda for the department of Human Settlements. According to the white paper "greater resources shall be shifted to support informal settlements upgrading on condition that they are located in areas close to jobs."[24]

5. What are the primary reasons for people living in informal settlements? (e.g. rapid urbanization, gap between housing costs and income; loss of ancestral land; internal displacement; immigration; lack of titled land; etc). Please refer to relevant research or reports.

5.1. The primary factors for the rise in informal settlements in South Africa include *inter alia* government policies, urbanisation and economic variables (poverty, unemployment and unaffordability).

[22] Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life, available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/131105outcome_8.pdf
[23] Department of Human Settlements, 'Draft White Paper for the Development of Human Settlements legislation', available at http://www.dhs.gov.za/sites/default/files/documents/TOWARDS%20POLICY%20FOUNDATION%20FOR%20THEHUMAN%20SETTLEMENTS%20LEGILATION%20-%2001%20NOVEMBER%202015%283%29%20%281%29.pdf
[24] Ibid at 34.

Urbanisation and migration

5.2. South Africa is also beset by rapid pace of urbanisation and migration which continues to place significant pressure on the existing infrastructure of cities and towns, as it has to contend with an influx of migrants between urban centres seeking new opportunities and access to basic services. South Africa is 65% urbanised and it is estimated that by the year 2030, about 71.3% of the South African population will live in urban areas, reaching nearly 80% by 2050. Thus, existing infrastructure is failing to keep pace with rapid urbanisation, which contributes to people living in informality due to the undersupply of housing, particularly in urban areas. Informal settlements are "transitory phenomena"[25] serving as initial points of entry into the urban environment for incoming migrants, or for those moving from other parts of the city.[26]

Unemployment

5.3. South Africa continues to grapple with high unemployment and struggles to generate sufficient jobs. Unemployment figures currently stand at 27.7 % and soars to 36.8% if the expanded definition is taken into cognisance.[27] Poverty remains deeply entrenched in South Africa.[28]

Affordability

5.4. The socio-economic profile of South Africa is highly variable with 65% of households in South Africa earning less than R38 000 per year and therefore classified as indigent. These low incomes of large proportions of South Africa's population imply that many people are unable to afford adequate housing using their own financial resources alone.[29] Only 30% of South Africans can afford to purchase a home costing more than R500 000 due to applicant affordability (over-indebtedness) and lack of affordable housing. In 2017, the cheapest, newly built house was estimated at about ZAR392 500 (US$28 634), affordable at current mortgage rates to households earning about ZAR15 000 (US$1 094) per month – estimated at about 15 percent of the population.[30]

Location of housing

5.5. South Africa has provided over 2, 8 million completed houses, more than 216 000 rental, social and community residential units, and over 1 million serviced sites, were delivered,

[25] Turok, 'Myths and realities of informal settlements: poverty traps or ladders?', available at http://www.hsrc.ac.za/en/review/hsrc-review-july-to-sept-2015/myths-and-realities-of-informal-settlements
[26] Sibiya *at al*, 'Barriers to Informal Settlements Upgrading in the Gauteng Province of South Africa'(2013)
[27] Statistics South Africa, 'Quarterly Labour Force Survey' (2017), Available at http://www.statssa.gov.za/?p=10658
[28] See the Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015, which notes that poverty levels are now at 55, 5% of the population. Available at http://www.statssa.gov.za/?p=10334
[29] Marutlulle, K, 'Causes of informal settlements in Ekurhuleni Metropolitan Municipality: An exploration. Africa's Public Service Delivery & Performance' (2017), Available at https://apsdpr.org/index.php/apsdpr/article/view/131/175
[30] See http://housingfinanceafrica.org/countries/south-africa/

allowing approximately 20 million people access to accommodation and a fixed asset.[31] However, most of government's housing has largely been built in peripheral areas situated far away from the economic nodes. This has resulted in people illegally selling their homes[32] and staying in informal settlements which are closer to economic nodes.

6. What laws are in place to protect and ensure the rights of residents of informal settlements, before, during and after any upgrading, if it takes place? Have these laws been effective? Please provide references to any important court decisions.

Prevention of Illegal Eviction from Unlawful Occupation of land Act (1998)

6.1. Prevention of Illegal Eviction from Unlawful Occupation of land Act (1998) (PIE) (amended in 2008) protects illegal occupants of land, such as informal dwellers, from being arbitrarily evicted from land without arrangements for alternative accommodation being made.

Upgrading of Informal Settlement Policy (UISP)

6.2. The UISP provides that informal settlements are to be upgraded *in situ* in partnership with their residents. The intent of the policy is to provide tenure security and a healthy environment to people living in informal settlements. The UISP intends "a holistic development approach with minimum disruption or distortion of existing fragile community networks and support structures and encourages engagement between local authorities and residents living within informal settlements".[33] The UISP expressly states that "relocation of informal settlements should be the exception and not the rule."[34]

6.3. However, the challenge lies in the fact that most informal residents do not necessarily have proof documenting their right to occupation and guaranteeing tenure security. This renders informal settlements dwellers at risk of being arbitrarily evicted. The baseline study[35] recommends that to ensure security of tenure for households in informal settlements, registers that not only have the names of the household heads but also their beneficiaries should be created.[36] According to the baseline study, this "would give informal dwellers the comfort and assurance that they cannot arbitrarily be evicted when their names are in a register that is held by the community and also the local authority."[37]

[31] See South Africa's initial report on the ICESCR available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en
[32] Section 10A of the Housing Act 107 of 1997 prohibits the sale of subsidised housing for a period of eight years from acquisition, unless it is first offered to the relevant provincial housing department.
[33] *Melani and Others v City of Johannesburg and Others* 2016 (5) SA 67 (GJ) para 34.
[34] Ibid at para 35.
[35] Op cit note 9.
[36] Ibid 121.
[37] Ibid.

Court rulings

6.4. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) the Constitutional Court handed down a judgment in a case concerning the eviction and temporary relocation of thousands of residents of the Joe Slovo informal settlement. Although five separate judgments were handed down, the Court agreed that eviction was a just and equitable order in the circumstances. Furthermore, the eviction was subject to temporary relocation, and the Court specified in detail the nature and quality required for alternative accommodation. Moreover, the Court ordered that at least 70% of new houses built should be allocated to the current residents of Joe Slovo informal settlement. Finally, the Court required on-going meaningful engagements with residents regarding various aspects of the eviction and relocation project. Meaningful engagement should have occurred before the eviction application was brought to court, since important questions regarding the feasibility of *in situ* upgrading – which would be significantly less disruptive than mass evictions – could have been explored. Ultimately, the Constitutional Court subsequently discharged relevant portions of its judgment since organs of State changed their strategy to pursue *in situ* upgrading of the Joe Slovo informal settlement.[38]

6.5. In *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) the Constitutional Court held that provincial government's three-year delay in taking a decision in respect of a municipality's application for upgrading of the Harry Gwala informal settlement into a township, was inconsistent with section 237 of the Constitution as well as not being reasonable as required by section 26(2) of the Constitution. The relevant government authority was accordingly ordered to make a decision within 14 months of the date of the Court's order.

6.6. The Gauteng Local Division of the High Court in *Melani and Others v City of Johannesburg and Others* 2016 (5) SA 67 (GJ) ruled that the UISP was binding on the City of Johannesburg. The case related to the residents of Slovo Park Informal Settlement who had been promised that their informal settlement would be upgraded to formal housing. Although plans were developed, environmental impact assessments completed and steps taken to formally declare Slovo Park a township, no action was taken to upgrade Slovo Park *in situ*. The Court found that the decision of the City of Johannesburg to completely ignore the policy in favour of its own plan to evict and relocate the Slovo Park residents was in breach of the section 26 (2) of the Constitution and the Housing Act 107 of 1997, as it was unreasonable and not inclusive. The Court set aside the City of Johannesburg's plan to relocate the residents, and directed the City of Johannesburg to make the appropriate application to the provincial Minister for Human Settlements (MEC) for a grant to upgrade the Slovo Park Informal Settlement *in situ*.

[38] *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2011 (7) BCLR 723 (CC).

7. Please provide information about successful upgrading or resettlement projects or experiences that could provide good practices elsewhere. Please also share lessons learned from unsuccessful projects or approaches.

7.1. A qualitative research study which analyses three upgrading projects, located in different neighbourhoods in the city of Cape Town, finds that physical improvements and a full package of basic services (electricity, water, sufficient and well-maintained sanitation facilities, improved physical layout of sites, pathways and public spaces) are absolutely crucial to improve the living conditions, reduce vulnerabilities and improve the safety of informal settlement dwellers.[39] However, these need to be supported by social and economic programmes in order to bring about the settlement transformation.[40]

7.2. The research study also confirms that a one-size-fits-all approach to informal settlement upgrading is not the best, because the "context is markedly different across informal areas and certain upgrading approaches, e.g. reblocking might be more appropriate in certain contexts than others".[41]

7.3. The study also reiterates the importance of community participation in upgrading.[42] The study concludes that upgrading of informal settlements should be a "component of a much wider strategy to eradicate poverty and inequality by addressing structural conditions like unemployment and a lack of appropriate skill development programmes which contribute to substance abuse as well as interpersonal and community-based violence."[43]

7.4. The South African Human Rights Commission has noted that the UISP appears to have been implemented in a "fragmented manner, reinforcing seemingly 'top down' approaches that reflect how the State believes people ought to be living, rather than allowing people to inform that decision-making process on the basis of their daily lived realities."[44] In addition, informal settlements continued to be viewed by the State as temporary and thus not suitable for the investment of basic services.[45]

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[39] Luthango *et al*, 'Informal settlement upgrading and safety: experiences from Cape Town, South Africa' (2016). Available at http://www.saferspaces.org.za/uploads/files/Informal_settlement_upgrading_and_safety_-_experiences_from_Cape_Town%2C_South_Africa.pdf
[40] Ibid.
[41] Ibid.
[42] Ibid. See South African Human Rights Commission, 'Access to housing, local governance and service delivery' (2015) 72. Available at https://www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf where the South African Shack/Slum Dwellers International Alliance lamented the fact that government appeared disinterested to engage with communities and when government does engage with communities, such engagements are mostly for ticking the boxes. This attitude has led to the stifling of communities' plans and aspirations to actively improve their situation.
[43] Ibid.
[44] Op cit note 3 at 49.
[45] Ibid.

7.5. The South African Human Rights Commission has advised that all housing developments should put integrated human settlements at its centre.[46] Thus, "prior to constructing a housing development, a full picture must be established of what the outcome of the development will be."[47]

END

[46] Ibid at 50.
[47] Ibid.