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FROM 'PRISONERS OF
CONSCIENCE' TO 'PRISONERS
OF POVERTY:' NAMING AND
SHAMING ECONOMIC AND
SOCIAL RIGHTS



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Political Science Honors

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Abbreviations

AI: Amnesty International

CESCR: United Nations Committee on Economic Social and Cultural Rights

COHRE: Center on Housing Rights and Evictions

CPR: Civil and Political Rights

ESR: Economic and Social Rights

HRO: Human Rights Organization

HRW: Human Rights Watch

IAI: International Alliance of Inhabitants

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic and Social Rights

KENSUP: Kenya Slum Upgrading Program

KFS: Kenya Forest Services

KNHCR: Kenya National Commission on Human Rights

KURA: Kenya Urban Roads Authority

INGO: International Non-Governmental Organization

OHCHR: United Nations Office of the High Commissioner for Human Rights

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNDP: United Nations Development Programme

UN-HABITAT: United Nations Human Settlements Programme

UNHCHR: United Nations High Commissioner of Human Rights

UNHRC: United Nations Human Rights Council

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Abstract

In this paper, I examine the effectiveness of ‘naming and shaming’ by human rights organizations (HROs) on the enforcement of economic and social rights. I ask whether this method, initially developed to address civil and political rights, contributes to the realization of economic and social rights and to the reduction of economic and social inequities. To answer my research question, I focus on the right to housing in the case of Kenya. I do a qualitative analysis of naming and shaming efforts by HROs and the varied responses of the state to these efforts. In this case, I find that while naming and shaming encourages the state to make tactical concessions and even comply with certain norms, violations continue de facto. Moreover, noting that HROs have targeted the right to housing generally as well as specific violations, I find that while Kenya moves towards more progressive policies, laws and even Constitutions in general, this does not necessarily translate into progress at the level of specific violations. My research, then, reveals the benefits and limitations of naming and shaming on the enforcement of economic and social rights that I hope will help HROs understand the effects of their actions and allocate resources accordingly.

Chapter 1: Introduction

The beginning of the twenty first century heralded the end of the Cold War. With the fall of the Soviet Union, the decades-long polarization of civil and political rights (CPR) and economic and social rights (ESR)¹ could finally come to an end. Subsequently, human rights organizations (HROs), the United Nations, and other international institutions established the ‘universal, indivisible, interdependent, and interrelated’ nature of all rights, thereby, adopting ESR more concretely in their frameworks.² Doing this, HROs and other international organizations have taken on a wide, new array of duties that would normally fall under the jurisdiction of development or private charity. ESR, formally enshrined in the Universal Declaration of Human Rights (UDHR) (1948) and the legally binding International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), run the gamut from the right to work and to form trade unions to the right to an adequate standard of living, education, and health care. A rights-based approach to ESR violations brings with it a new framework and language that alters both the perception of these problems and potentially their solutions. Problems, like poverty, are no longer blamed on the sufferers, but rather, international actors, particularly states, have a duty and an obligation to aid the poor and prevent the propagation of the problem.

Even though HROs have formally accepted ESR, they still struggle in practice to incorporate these rights into their everyday operations. Thus far, the human rights

¹ Explained in further detail in the next section.

² World Conference on Human Rights in Vienna, "Vienna Declaration and Programme of Action." United Nations Human Rights Office of the High Commissioner, June 25, 1993.

movement has sought to do this by repurposing traditional, legal-focused structures for CPR enforcement to apply to ESR. There are two major strategies HROs adopt in this regard. The first is to directly “pursue some judicial or quasi-judicial process.”³ This, most often, benefits only countries that already have constitutional provisions protecting ESR, such as South Africa, and/or have judges who are receptive to the plight of those suffering from ESR violations, such as India. Here, NGOs aid an individual or a group to lobby for their rights through national courts in selectively chosen cases, those most likely to succeed and those that set important precedent. Doing this can also allow INGOs to spread awareness of the justiciability of ESR and work to translate these rights into national law.⁴ Many empirical studies have addressed the limited efficacy of this approach, most prominently Gauri and Brinks, who inspect five cases of judicial enforcement of ESR in South Africa, Brazil, India, Nigeria, and Indonesia.⁵ They find mixed results, arguing that although judicial enforcement is often successful in the cases themselves (in that the court rules in favor of the afflicted party), this does not always translate into policies that benefit a greater number of people than those immediately involved. They note, “precisely because courts need social and political partners to change policy and distribute social and economic goods, the choices and outcomes resulting from legalization will not stray far from dominant national trends.”⁶ Legal mobilization, moreover, may not even benefit the people intended and may worsen their situation. Pieterse, for one, describes how states use the indeterminacy of the language of

³Ladawn Haglund and Rimjhim Aggarwal, "Test of Our Progress: The Translation of Economic and Social Rights Norms into Practice," *Journal of Human Rights*, (2011): 494-520.

⁴Daniel P. L. Chong, *Freedom from Poverty: NGOs and Human Rights Praxis* (Philadelphia: University of Pennsylvania Press, 2010), 40.

⁵ Varun Gauri and Daniel M. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2009).

⁶Ibid: (34-5).

rights to repurpose the aims of social movements and actively deny rights while maintaining the illusion that they guarantee them.⁷ In a prominent housing case in South Africa, in 2000, the *Government of the Republic of South Africa and others v Grootboom and others*, even as the court's decision in favor of promoting the right to housing prompted more housing policy (as various HROs have commended), the state failed to implement and enforce the court's ruling. It did not, then, even aid Mrs. Grootboom and other members of her community, let alone bolster the right for South Africans as a whole. Hohmann describes Grootboom as a "victory for the enforcement of positive, socio-economic rights, with the Constitutional Court declaring the government's long term housing plan unreasonable... (but also) a great disappointment and a wasted opportunity in the quest for social justice."⁸ Legalization, then, presents many potential costs and benefits.

The other strategy, often considered the most powerful tactic international HROs have, is naming and shaming, the practice of publicly exposing a state's violation of certain rights to hold the state accountable for its action (or inaction). Kenneth Roth, executive director of Human Rights Watch (HRW), describes that "the strength of organizations like Human Rights Watch is not their rhetorical voice but their shaming

⁷Marius Pieterse, "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited," *Human Rights Quarterly*, (2007): 796-822.

⁸Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities*, (Oxford: Hart Publishing, 2014). The case involved the state's forced eviction of a community of informal settlers for the development of an area in South Africa without making alternate provisions for the residents. The court instated the 'reasonableness approach' to evaluate the case, indicating that the state must implement measures and ensure accommodations for the displaced that are 'reasonable.' Hohmann notes, "the Court held that reasonable legislative and other measures included the creation of a public housing plan, which must take into account short, medium, and long term aim, and which must not ignore significant segments of the population, particularly those worst off" (99). However, implementation of the court's ruling and actual enforcement proved problematic, with Mrs. Grootboom herself dying in 2008, still housed waiting for 'adequate' housing from the government.

methodology—their ability to investigate misconduct and expose it to public opprobrium.”⁹ The efficacy of naming and shaming, concerning ESR, is heavily debated, though, with some, like Amnesty International’s Irene Khan and the scholar Audrey Chapman, extolling its benefits and others, prominently Roth, concerned with its significant limitations.¹⁰ Still, very little empirical research focuses on this issue. One notable exception is Hertel’s investigation of the relative success of the “Right to Food Campaign” in India.¹¹ However, Hertel focuses on local NGOs instead of shaming by INGOs even though majority of the theoretical literature on shaming recognizes it as a global phenomenon furthered by transnational networks. Centering myself in the theoretical debate and noting the lack of empirical research, then, for my honors project, I investigate the effectiveness of naming and shaming practices, as conducted by HROs, the UN and other international institutions, on the realization of ESR. My research question is: Does “naming and shaming” violations of economic and social rights contribute to the realization of these rights and reduce economic and social inequities? If it does, how effective are “naming and shaming” efforts?¹² To answer my question, I will do a qualitative analysis, focusing on the specific case of housing in the context of Kenya. Here, I trace the effectiveness of shaming by noting the extent and frequency of HROs’ shaming attempts and the state’s response to these.

⁹Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly*, (2004): 63-73.

¹⁰ More detail on this present in the Section highlighting the theoretical and empirical findings on naming and shaming

¹¹Shareen Hertel, "Why Bother? Measuring Economic Rights: The Research Agenda," *International Studies Perspectives*, (2006): 215-230.

¹²Here, I evaluate the extent to which states fulfill their economic and social rights obligations as listed in the International Covenant of Economic and Social Rights.

I choose to do a qualitative analysis for many reasons. For one, I consider the limited amount of information available, making it difficult to conduct an adequate quantitative study, but most importantly, I wish to illustrate which potential pathway or hypothesis plays out and for what reasons, requiring a more in-depth analysis of a case to generate theories. In their ability to account for details and report fully, Odell notes, “case methods allow stronger empirical grounding for a hypothesis for the cases studied. They allow greater confidence in the validity of the hypothesis for the cases studied than statistical methods can provide for the same cases.”¹³ Qualitative case studies, though, do not allow for the easy drawing of causal inferences, which is not the aim of this study but a potential for future research. While looking at attempts at naming and shaming by various HROs and the diverse responses of the state to these shaming attempts, I apply Risse and Sikkink’s prominent model (2013) on naming and shaming to my case.¹⁴

The case I select broadly is the right to housing, which appears in Article 11 of the ICESCR as a component of the right to an adequate standard of living.¹⁵ Within the right, I look to two different methods of shaming: one involves HROs shaming the entire right in general that takes into account the allocation of resources and the other, an issue closer to civil and political and negative rights, the case of evictions, involving the shaming of specific violations via urgent actions or focused news releases. I selected the right to housing in part because the media does not traditionally consider it an urgent and immediate problem as cases of health or food, for example, might be, and so it receives

¹³John Odell, "Case Study Methods in International Political Economy," *International Studies Perspectives*, (2001): 170.

¹⁴ Details of the model appear in the naming and shaming section of the Literature Review and further in the Analysis of the case of Kenya.

¹⁵ UN, *The International Covenant on Economic, Social, and Cultural Rights*, New York: United Nations Office of the High Commissioner for Human Rights, December 16, 1966.

less press outside of that led by HROs. For this reason, too, housing has received less attention from scholars who often focus on the right to health and the right to education, leaving a dearth in scholarship on the issue. More importantly, though, I selected housing because one of the most prominent international HROs, Amnesty International (AI), opted, in its campaign for the right to be free from poverty, termed the Global Campaign for Human Dignity, to operationalize poverty (and in turn ESR) as the right to adequate health care (with an emphasis on maternal health) and as the right to adequate housing.¹⁶ In practice, they have focused overwhelmingly on the latter, presumably finding the former harder to shame in the context of limited resources. The justification AI has given for their emphasis on housing is the right's close relationship and influence on the realization of other rights, including the right to safe drinking water and education. AI operationalizes violations of the right to housing narrowly, making the issue easier to shame, defining it as "forced evictions or policies that give certain people no option but to be homeless, such as dwellings becoming uninhabitable due to environmental degradation or climate change."¹⁷ In a similar vein, the other major international HRO, Human Rights Watch (HRW), focuses on shaming violations of the right to health, education, and housing in instances of "arbitrariness or discrimination."¹⁸ Notable UN bodies, including UN-HABITAT, and the Special Rapporteur on adequate housing as a

¹⁶The link between poverty, inequality and ESR is explicated later in the paper. The formal goals of the campaign are to "pressure governments and international agencies to ensure that those who live in poverty have equal access to rights, and that non-discrimination is respected, gender inequalities are eliminated and the most vulnerable are prioritised. In brief, Amnesty International's three key demands will be: accountability of those in positions of power; equal access to rights for all to redress exclusion and discrimination; and empowerment of those whose rights have been violated." Amnesty International, *HUMAN RIGHTS FOR HUMAN DIGNITY*, n.d., <https://www.amnesty.org/en/what-we-do/living-in-dignity/> (accessed January 20, 2017).

¹⁷Ibid.

¹⁸Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly*, (2004): 63-73.

component of the right to an adequate standard of living, and on the right to non-discrimination in this context also present insights into the issue and advocate for the right.

I look at housing in the case of Kenya as a typical representative state. There are many potential factors that could influence a state's responses to shaming by international organizations and actors and Kenya falls on these measures where most other countries that are shamed do (and hence, presumably responds in a similar way that most such countries would).¹⁹ For the case, I will inspect shaming by noting the press releases, the annual reports, and specific campaign documents released by major INGOs on the issue, the relationship of local HROs to the international effort, the UN's reports on the country in reference to the right being shamed, statements in the Universal Periodic Review or resolutions related to the right if any, and any references in the international news media. To trace the effects these efforts at shaming have on the country, I note the country's responses whether in press releases or by instituting laws or enforcing laws already in place. I also note any other way the country has sought to increase its emphasis on the right in general including by passing policies or creating draft guidelines related to the right to housing.

In investigating this case, I find that while shaming encourages Kenya to make tactical concessions and even comply with certain norms, violations of the right to housing continue *de facto*. Particularly, noting that HROs have two methods of shaming, either addressing the right to housing more generally or focusing on specific violations,

¹⁹I elaborate on this in the section detailing the context and background of my case.

commonly evictions, I find that while Kenya might in general move towards more progressive policies, laws and even Constitutions, this does not often translate to specific cases of violations shamed so that evictions continue unabated despite decades of shaming attempts. Although my research focuses on a particular right in one country, it has potential implications for ESR more broadly, revealing the benefits and limitations of naming and shaming ESR that I hope will help HROs understand the effects of their actions and allocate resources accordingly.

Although focusing on only the right to housing in the case of Kenya, I begin with an account of ESR more broadly as part of my literature review chapter. First, then, I delve into the background and context of the rise of ESR in the present decade, including the relative efficacies of alternative mechanisms used to enforce ESR and of using a rights-based framework to address economic and social problems at the outset. Next, I give an account of research and theories on naming and shaming, divided in two camps with the ‘optimists’²⁰ asserting its potential for change and realists and critiques resisting this assertion. Following, I go into a brief background of my case, focusing on the appearance of the right to housing in international law and in the case of Kenya more specifically. Succeeding, I outline my actual analysis of shaming attempts over the years, both in general directed at the country and in particular cases and the state’s responses to these attempts. Finally, I end with a conclusion section, summarizing my findings, and indicating their implications as well as addressing the possible limitations of my study

²⁰ A term I coin since liberal, the term used most often in the literature, does not fit all scholars that fall into this category even if it fits most.

Chapter 2: Literature Review

In this section, I begin with a brief account of the history of ESR up to HROs' current use of it to address economic and social problems. Next, I discuss the theoretical and the empirical literature on naming and shaming. Establishing this literature sets the stage for my subsequent analysis of my case.

Economic and Social Rights: background and context

I begin by describing how ESR first came about and then, depict how HROs and other international institutions interact with it. This helps explicate my subsequent discussion on naming and shaming and my analysis

Where did ESR come from?

International law first recognized ESR implicitly in 1919 with the creation of the International Labor Organization (ILO) under the League of Nations.²¹ In the Declaration, concerning the aims and purposes of the ILO, the first article establishes a commitment to addressing the problem of poverty alongside an obligation to uphold a conventional CPR, the freedom of expression. It affirms,

- “(a) labour is not a commodity;
- (b) freedom of expression and of association are essential to sustained progress;
- (c) poverty anywhere constitutes a danger to prosperity everywhere;
- (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of

²¹The ILO is now a United Nations organization dedicated to the rights of laborers.

governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.”²²

The first international human rights treaty that explicitly provided for ESR (alongside CPR), though, was the UDHR, signed in 1945. Article 17 of the declaration attests the right to own property while Articles 22 to 27 comprise all other ESR, including the right to social security and leisure and the right to an adequate standard of living and education.²³ In signing the UDHR, states implicitly affirmed the universality and importance of both ESR and CPR. Eide notes, “the realization, particularly in the West, that the political upheavals and the emergence of totalitarian regimes in the period between the two World Wars had been due to the widespread unemployment and poverty led to a genuine interest in securing economic and social rights, not only for their own sake but also for the preservation of individual freedom and democracy.”²⁴ In the United States, President Roosevelt had already elucidated the four freedoms in his 1941 State of the Union speech wherein he highlighted the importance not only of freedom of speech and expression, freedom of religion, and freedom from fear, but also freedom from want.²⁵ Still, Glendon notes, as delegates debated the draft UDHR treaty’s incorporation

²² *ILO Constitution*, May 10, 1944,

http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::No:62:P62_LIST_eNtrIe_ID:2453907:No (accessed February 10, 2017).

²³United Nations General Assembly, "Universal Declaration of Human Rights," *United Nations*, December 10, 1948, <http://www.un.org/en/universal-declaration-human-rights/> (accessed March 10, 2017).

²⁴Absjorn Eide, "Economic, Social and Cultural Rights as Human Rights," In *Human Rights in the World Community*, by Richard Pierre Claude, & Burns H. Weston, (Philadelphia: University of Pennsylvania Press, 2006): 172.

²⁵ In a later State of the Union in 1944, Roosevelt reiterated his commitments to ESR, including the right to an education, a job, medical care, and decent housing. To that effect, his first New Deal policies sought primarily to apply a relief program for unemployment. As part of the second New Deal, he instituted social security and welfare. At the same time, despite this “whole-hearted” support, as Eleanor Roosevelt put it, the United States did not consider the articles in the UDHR to “imply an obligation on governments to assure the enjoyment of these rights by direct governmental action.”

Mary Ann Glendon, "The Nations Have their Say: Chang and Malik Navigate the Shoals," In *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, by Mary Ann Glendon, (New York: Random House, 2001).

of ESR, tension persisted in the struggle to determine whether and to what extent states should provide ESR. Moreover, she states, “the struggles over the social and economic articles were mainly between representatives of liberal democracies such as the United States and the United Kingdom, who wanted to leave more room for individual initiative and collective bargaining, and delegates who thought the state should play a greater role in regulating wages and working conditions,” where the latter group consists not only of Communist country representatives but also of other social democracies. These early divisions would later lead to the separation of ESR and CPR. Nevertheless, at this time, despite the debate, each provision passed with an overwhelming majority.²⁶

Despite the initial acceptance of ESR, as time passed, the intensification of Cold War politics led to the separation of the two group of rights so that they became enshrined in two separate legally binding human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESCR). In an explanation of its decision to separate the two treaties, the UN outlined a distinction between “positive” and “negative” rights, where the former (CPR) involve justiciable legal obligations to refrain and the latter (ESR) are non-justiciable, programmatic commitments to provide. The document notes, “generally speaking, the former were rights of the individual ‘against’ the state, that is, against unlawful and unjust action of the state while the latter were rights which the state

²⁶ The delegate from Cuba was essential in these discussions, stressing the equal importance of CPR and ESR in the treaty. One of the most consistent supporters of these rights was a Chilean delegate. China consistently too insisted on their deep regard for ESR as did the Norwegian and French delegates. Glendon discusses, too, the dissonance created in applying the language of rights and entitlement to welfare. She describes how more often in national debates, welfare appears as obligations on the state rather than concrete entitlements and rights, but that it was the “Human Rights Commission’s desire for consistency of style” that led to the use of the language of rights for welfare.

would have to take positive action to promote.”²⁷ Here, where ESR demand significant resources to implement, CPR do not. For example, one CPR, the right to be free from torture calls on the state to stop torturing its citizens and others, and/or to halt potential third parties from torturing its residents while an ESR, the right to free and adequate education, demands the state assure the provision of the good to all its residents. Because of this divide and the contention that ESR are not legal rights, in fact, the UN considered not creating a legal treaty for economic and social rights at all.²⁸ Another factor influencing the reluctance to accept ESR is the belief that these rights are “second generation rights,” requiring first the acceptance of “first generation rights,” CPR, before their fulfilment can be addressed. Under this viewpoint, once a state grants CPR, provisions for ESR automatically follow.²⁹

A major driving force behind the creation of this dichotomy, though, was simply ideology, where ESR became relegated ‘communist’ rights, those requiring unwarranted interference with free market mechanisms, and CPR were individual rights. The US and many other Western countries (and importantly donors) subsequently proceeded to reject ESR. In turn, non-Western, communist, and Islamic countries rejected CPR on the grounds of paternalism, arguing that these rights draw too heavily from Western ideologies.³⁰ Despite their claims to neutrality, most major human rights institutions

²⁷ The document quoted in: Henry J. Steiner, Philip Alston, and Ryan Goodman, "Comment on Historical Origins of Economic and Social Rights," In *International Human Rights in Context: Law, Politics, Morals: Text and Material*, by Henry J. Steiner, Philip Alston, & Ryan Goodman, (New York: Oxford University Press, 2008), 270.

²⁸ Ibid, 262

²⁹ Katharine G. Young, *Constituting Economic and Social Rights*, (Oxford: Oxford University Press, 2012).

³⁰ Absjorn Eide, "Economic, Social and Cultural Rights as Human Rights," In *Human Rights in the World Community*, by Richard Pierre Claude, & Burns H. Weston, (Philadelphia: University of Pennsylvania Press, 2006).

legitimated the divide, by implicitly endorsing Western capitalism, and ignoring violations of ESR, in part, to sustain funding and support from primarily Western donors.

After the Cold War, scholars and activists made an opening for ESR, noting the inconsistency in the division between “negative” and “positive” rights. Just as CPR could fail if states did not expend sufficient resources on proper courts with due process provisions, ESR could be violated when governments forcibly evicted residents from their houses. Both rights, in fact, involve “positive” and “negative” obligations. Officially recognizing this, the 1993 World Conference on Human Rights in Vienna deemed both rights ‘universal, indivisible, interdependent, and interrelated.’ Despite continued opposition from certain prominent scholars, like Michael Ignatieff, both rights, the UN concluded, impose equal obligations to respect, to protect, and to promote. Here, respecting rights involves refraining “from interfering with the enjoyment of the right.”³¹ A state’s refusal to conduct medical experiments on citizens is an example of a way in which states strives to respect the right to health. Protecting rights involves preventing “others from interfering with the enjoyment of the right.” For example, protecting the right to education involves preventing third parties, such as private schools, from discriminating on racial grounds. Promoting rights involves adopting “appropriate measures towards the full realization of the right,” including both facilitation (making use of knowledge available and reforming preexisting systems), and provision (making resources available).³² For example, promoting the right to social security could involve

³¹Office of the United Nations High Commissioner for Human Rights, "Frequently Asked Questions on Economic, Social and Cultural Rights: Fact Sheet No. 33," *Office of the United Nations High Commissioner for Human Rights*, December 2008, <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf> (accessed February 10, 2017).

³²Ibid.

state provision and regulation of these benefits on a large scale. At the same time, though, ESR reduces the burden on the state as “the individual is expected, whenever possible through his or her own effort and by use of one’s own resources to find ways to ensure the satisfaction of his or her own needs, individually or in association with others.”³³ Thus, although the obligation to enforce the right rests on the state, a country may adopt mechanisms that involve the private provision of these rights by third parties rather than the state itself and still be meeting its treaty obligations.

Alongside the end of the Cold War, a reason behind the renewed acceptance of ESR is a sharp rise in inequality, beginning in the 1990s, which led to “increasingly urgent calls coming from the global South for human rights organizations to take subsistence rights more seriously.”³⁴ Subject to this pressure from developing countries, more and more HROs began to realize that what most intended beneficiaries of rights programs needed and wanted often more than CPR were ESR and that ESR, in empowering individuals (particularly women), encourage them to demand that their civil and political rights be respected as well.

Subsequently, major HROs initially only addressing CPR broadened their missions to include ESR and new organizations dedicated solely to ESR arose. The new HROs consist of FIAN International, the Center for Economic and Social Rights, the Center on Housing Rights and Evictions and others. In the early 2000s, two major HROs, HRW and AI, both officially expanded their scope to include violations of ESR,

³³ Absjorn Eide, "Economic, Social and Cultural Rights as Human Rights," In *Human Rights in the World Community*, by Richard Pierre Claude, & Burns H. Weston, (Philadelphia: University of Pennsylvania Press, 2006): 175.

³⁴ Daniel P. L Chong, *Freedom from Poverty: NGOs and Human Rights Praxis* (Philadelphia: University of Pennsylvania Press, 2010), 38.

cementing the recognition of these rights. Where HRW decided to officially shame violations of ESR along with CPR in 2003, AI had a longer process, beginning to consider ESR in the 1990s, under the leadership of Pierre Sane, but only in 2001 at its International Council Meeting in Dakar, particularly with insistence from its chapters in the global South, did AI adopt ESR. In 2007, under Irene Khan's leadership, AI's mission statement officially encompassed the "full spectrum" of rights and in 2008, the organization launched its campaign for human dignity, with a specific focus on the right to adequate housing and healthcare.³⁵

While the human rights movement accepted ESR, development organizations simultaneously sought to integrate rights more firmly in their framework. Beginning in 1986 with the passing of the Declaration on the Right to Development, this trend took root firmly in the early 2000s under the leadership of then-Secretary General of the United Nations, Kofi Annan. Annan insisted that human rights along with ESR become a part of every UN agency and program, including the UN development program, the World Health Organization, and the UN Children's Fund.³⁶ Other instances where human rights appear in development include the Millennium Development Goals, which, although do not explicitly mention human rights, take on major ESR issues.³⁷ Despite this

³⁵ Amnesty International, *HUMAN RIGHTS FOR HUMAN DIGNITY.*, n.d., <https://www.amnesty.org/en/what-we-do/living-in-dignity/> (accessed January 20, 2017).

³⁶ Under Annan too, the Office of the High Commissioner for Human Rights (OHCHR) worked with the World Bank and the International Monetary Fund (IMF) to ensure that the Poverty Reduction Strategies Papers were human rights friendly. Solidifying this shift towards a rights-based approach to development, in 2005, Kofi Annan's last action as secretary-general was the submission of the report, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, that combined Roosevelt's four freedoms to highlight the freedom from want as a key component in the UN's work in relation to human rights and development.

³⁷ The MDGs set a list of goals for states to achieve by 2015, including the eradication of extreme poverty and hunger, the achievement of universal primary education, reduction in child mortality, improving maternal health, and combating diseases such as HIV/AIDS. Haglund and Aggarwal indicate that the lack of success of the MDGs despite their subtle human rights underpinnings was due to the fact that they did

increasing recognition of ESR, though, development organizations continue to keep human rights at a distance, dealing with the language of rights and ethics only cautiously. The World Bank, the largest development organization, for example, often finds itself on the wrong side of the rights debate under pressure for encouraging violations with its over emphasis on projects to foster economic growth that often harm the most indigent. With development organizations, dependent on donors for funds to help poor aid recipients, often the needs of the latter may overtake those of the former, especially when the two have contradictory interests.

In these ways, international organizations and institutions have sought to integrate ESR in their frameworks in recent years. In the next subsection, I look at the ways local movements have incorporated ESR, the tactics they use and how successful such efforts have been.

ESR at the Local Level

National and local efforts in many countries, social movements, increasingly use rights language too to further their claims to welfare (although local HROs' use of ESR extends far before the end of the Cold War). These movements often invoke a positivist conception of law, where law is a concrete set of rules, implemented in national legislation and enforced by judges, treating courts, as Gauri and Brinks underscore, as "the paradigmatic institutions for identifying legal duties and responding to claims of

not include more of an emphasis on accountability as human rights does. In recent years, the World Bank released a new social guarantees model that advocates for the operationalization of ESR as concrete social guarantees and policies to address the relational inequality that is at the root of poverty. Ladawn Haglund and Rimjhim Aggarwal, "Test of Our Progress: The Translation of Economic and Social Rights Norms into Practice," *Journal of Human Rights*, (2011): 494-520.

violations.”³⁸ Emphasizing the importance of the rule of law to ESR, legal scholar Katherine Young notes, “Economic and social rights promise to alleviate the wrongs that a market-oriented world perpetrates on those otherwise unequipped to enjoy its gains. If that promise is delivered, ESR may become part of the law’s answer to the indignities and pain caused by the law itself.”³⁹ Even with the specific focus on legalization, for HROS seeking to promote social change, “the challenges become how best to identify those who ought to respond, how best to evaluate those who have attempted a response, and, more generally, how best to assign duties and to hold accountable those who might provide an effective response.”⁴⁰ Activists debate, here, between promoting formal or substantive law. While the former symbolically establishes a right through courts and often does not address redistribution, the latter works through the legislature to address distribution but often reproduces inequality. HROs also typically deliberate a variety of levers to encourage enforcement of ESR, including invoking CPR and treating the right as non-derogable (particularly linking the right to life and non-discrimination to violations of ESR) or encouraging the promotion of ESR in terms of progressive realization, using arguments for human dignity, or generating consensus. Each of these methods has significant benefits and limitations. Considering the tactic of treating ESR as extensions of CPR violations, Young notes that, although such arguments tend to be very powerful, they are often too minimalist, focused on only a few rights while arguments

³⁸ Gauri, Varun, and Daniel M. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2009).

³⁹ Katharine G. Young, *Constituting Economic and Social Rights*, (Oxford: Oxford University Press, 2012), 2.

⁴⁰ Gauri, Varun, and Daniel M. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2009).

instead that address human dignity risk broadly and often impractically arguing for the full realization of rights.⁴¹

More generally, social movements must determine whether to make radical claims to alter the legal structure itself or to call simply for reforming the current structure, whether to pursue litigation via courts or to lobby the government. In her study of the right to food campaign in India, Hertel finds that radical legal claims that invoke the economic right to food as a violation of the right to life in courts prove more successful than attempts made by the campaign to simultaneously reform the pre-existing system through progressive implementation by lobbying legislators.⁴² Moreover, considering the tactic of combining formal and substantive law in a process termed policy legalization, in their book, *Courting Social Justice*, Gauri and Brinks highlight the ways social movements innovatively have used courts to change government policy. They present policy legalization as a four-step process involving “legal mobilization” (where a case is brought before the court), “judicial decisions,” (where the judge decides the outcome of the case), “responses,” (where HROs decide how best to respond to the

⁴¹ Katharine G. Young, *Constituting Economic and Social Rights*, (Oxford: Oxford University Press, 2012).

⁴²Hertel discusses “a hybrid strategy” of the Campaign to target the persistent and increasing problem of hunger. This “hybrid strategy” involved a combination of both radical legal demands and more moderate demands for progressive reform, employing strategies as diverse as direct litigation in courts, garnering media attention, popular protests and lobbying of the legislature. Backed by an activist court, one victory led to others, creating spillover effects in multiple states so that court cases brought about positive change in policy. On the other hand, in the Parliament, the bill that eventually passed did not fully address any of NGOs’ major demands and was less comprehensive than the policies of many states. As reasons for this failure, Hertel cites the inherent difficulty of measuring progressive implementation, the lack of assignation of blame, budgetary constraints unable to determine how much to allocate to a right at the cost of another, legislators not willing to challenge power structures, the lack of grass-roots level mobilization designed to raise awareness on the issue, and the popularity of policies addressing the “symptoms” of inequality rather than the actual causes of problems. Hertel draws these conclusions by conduction both qualitative and quantitative analyses.

Hertel, Shareen, "Why Bother? Measuring Economic Rights: The Research Agenda," *International Studies Perspectives*, (2006): 215-230.

decision i.e. whether to lobby the legislature to encourage laws), and “follow-up litigation” (where states enact laws addressing the issue and reparations are given in accordance with the decision).⁴³ Noting this, Gauri and Brinks ask, “will giving courts a more prominent role in economic and social policy make governments and others more accountable for responding to extreme poverty and deprivation?”⁴⁴ Inspecting the use of policy legalization in four different cases, South Africa, Brazil, India, Nigeria and Indonesia, they find that, while courts do help in some instances (e.g. in South Africa), they may not be as helpful in others (e.g. India). They conclude, then, that although policy legalization provides some benefits, the tactic also imposes limitations.

Both “demand side factors” (influencing litigants’ decisions to bring cases to court) and “supply side factors” (determining the likelihood of courts responding favorably to litigants’ demands) influence the success of the process. On the demand side, the inaccessibility of laws and lawyers to those in need limits the impact and the extent to which laws can aid those most in need. Gauri and Brinks state, “the benefits will be concentrated among those who already have some level of personal resources and access to state services – urban claimants in more modernized context with a greater state presence.”⁴⁵ Limiting their impact, social movements, activists, and organizations also have limited capacity and remain divided over the best policies to realize ESR.⁴⁶ Another major limitation is that cases brought to court concerning ESR more often implicate third party providers, such as businesses, landlords, and hospitals, and not the state. On the

⁴³ Varun Gauri and Daniel M. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2009), 4.

⁴⁴ *Ibid*, 2-3

⁴⁵ *Ibid*, 21.

⁴⁶ Varun Gauri and Daniel M. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2009), 15.

‘supply side,’ the relative favorability of judges to adjudicate on matters of ESR often affects the effectiveness of policy legalization. In fact, Gauri and Brinks note, “courts...are not likely to be engaged in imperative monologues, demanding particular policies on behalf of nonrepresentative elites,” focusing instead on more popular policies, supported by the public broadly.⁴⁷ Culture and context matter too.⁴⁸ In the case of Malawi, Gloppen and Kanyongolo find that despite the existence of a pro-poor Constitution, judges often refuse to uphold ESR claims, disadvantaging the most poor because of a legal culture that interprets rights narrowly, a weak civil society and the general inaccessibility of courts.⁴⁹ Furthermore, in her study, conducting a regression analysis, and looking at all states more broadly, Kaletski et. al. investigate whether constitutionalizing ESR promotes their fulfillment, translating into actual outcomes, and finds a general positive impact of progressive Constitutions.⁵⁰ For a variety of reasons, policy legalization, then, may not alter policy as it hopes to do.

⁴⁷ Ibid.

⁴⁸For example, in the case of Indonesia, Susanti indicates the presence of a legal culture, based on a disruptive political history, that perceives the judiciary as inherently corrupt producing, from the outset, a limited number of cases filed at court with most people opting instead to pursue dispute resolution in more informal institutions.

Bivitri Susanti, “The Implementation of the Right to Health Care and Education in Indonesia,” in Varun Gauri and Daniel M. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2009).

⁴⁹ S. Gloppen, S. and F. E. Kayongolo, "Judicial Independence and the Judicialisation of Electoral Politics in Malawi and Uganda," In *Accountable Governments in Africa: Perspectives from Public Law and Political Studies*, by D.M. Chirwa, & L. Nijzink, (Cape Town: University of Cape Town Press, 2012).

⁵⁰Using data collected from 201 constitutions as their independent variable and the SERF Index as their dependent variable, they find a positive correlation between constitutional provisions of ESR and fulfillment of the right to health. They argue that, in some cases, such as with the right to health, constitutions encourage states to pass enforceable laws on the issue and thereby, improve the quality of those rights in that state, while in other cases, like with the right to food, the evidence that constitutional provisions help is less conclusive. Since, more often than not, courts tend to be reluctant and conservative instead of radical and disruptive, litigating ESR proves increasingly difficult whether the state has a progressive Constitution or not, differing depending on the laws of the context, the receptiveness of the judiciary, peoples’ general faith in the law and the ability and willingness of the state to heed the judiciary’s orders and implement the policies proposed in actuality.

As alternatives to litigating or often alongside litigating, NGOs pursue other ways to promote ESR, including raising public awareness and protesting as well as grass roots mobilization. Looking at different communication tactics, Pruce and Budabin describe three categories of information that NGOs gather, namely the juridical mode, which involves fact-finding and delivering information from an objective and impartial source, the revelatory mode which is naming and shaming itself that holds actors accountable (which I address later as the primary focus of this paper), and the activating mode where HROs simply work to raise awareness through storytelling using information as a moral force.⁵¹ In the discussion below, local groups look to the juridical mode and the activating mode more prominently, illustrating the ways activists have sought to address ESR issues separate from shaming by international NGOs.

The scholar Ibhawoh underscores the immense successes of local campaigns. Looking at a different innovative campaign, particularly one less reliant on the law and focused more on mass mobilization and education, Ibhawoh calls on INGOs and others to emulate the Ghanaian campaign in seeking to address the problem of poverty.⁵² Here, to advocate for participation by the poor in programs designed to benefit them and to call for redistribution by the state, local NGOs framed poverty as a human rights issue. Rather than lobbying legislators, though, these organizations raised awareness among service providers most concerned with the issue who, in turn, they encouraged to approach the

Elizabeth Kaletski, Lanse Minkler, Nishith Prakash, and Susan Randolph, "Does Constitutionalizing Economic and Social Rights Promote their Fulfillment?," *Economic Rights Working Paper Series*, Storrs, Connecticut: Human Rights Institute University of Connecticut, June 2014.

⁵¹ Joel R. Pruce, and Alexandra Cosima Budabin, "Beyond naming and shaming: New modalities of information politics in human rights," *Journal of Human Rights*, (2016): 408-425.

⁵² Bonny Ibhawoh, "Beyond Naming and Shaming: Methodological Imperatives of Economic, Social, and Cultural Rights Advocacy," *African yearbook of international law*, (2008): 49-67.

state to demand policy change. According to Ibhawoh, these organizations produced change, successfully, criticizing and altering not only government programs, but also the practices of international actors (particularly the World Bank) in the country.⁵³ In another study on the effectiveness of different strategies NGOs use to target the issue of women's rights, Murdie and Peksen find that, strategies like naming and shaming have little to no effect but rather, education and awareness are key tools. In these cases, they note, "governments that face pressure from advocacy groups are more inclined to promote and enforce only the rights that do not threaten their own political power and status, such as women's social and economic rights," not promoting these rights when they take on a more political content.⁵⁴

In their book, *Stones of Hope*, White and Perelman look at four main campaigns in three different African states, spearheaded by local lawyers and activists that use ESR to address the problems of poverty and structural inequality to explain when, in what ways, and for what reasons such activism succeeds and/or fails.⁵⁵ Highlighting the utility of the language of rights, they find that, "ESR activism can shift the distribution of

⁵³ Ibid.

⁵⁴ Amanda Murdie, and Dursun Peksen, "The Impact of Human Rights INGO Shaming on Humanitarian Interventions," *The Journal of Politics*, (2014): 215-228.

⁵⁵ The first largely successful case the authors take is the anti-eviction campaign led by a local NGO in Lagos that combined legal efforts with education and organizing efforts to blame multiple actors for the evictions and to demand diverse remedies, including the redistribution of power and economic resources. The second, another successful case, is the South African Treatment Action campaign that used the law to demand structural change, calling on the state to provide treatment to prevent HIV transmission from pregnant mothers to their babies, mobilizing the public around the right to health by emphasizing redistribution. The third campaign failed to produce the change it called for, addressed mass evictions in Tanzania, where the government and international donors justified evictions on the grounds that they bolster tourism and thereby, promote economic growth. With HROs unable to provide a united front, the imperatives of economic growth took precedence over those of human rights and the evictions continued unabated. The fourth and final case is the right to health movement in Ghana that sought to frame the issue as a violation of the civil and political right to freedom of movement and personal security. Jeremy Perelman and Lucie E. White, *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, (Stanford: Stanford University Press, 2010).

socioeconomic goods from rich to poor.”⁵⁶ Echoing Hertel’s finding that radical claims prove more fruitful than reformist ones, White and Perelman conclude that, “the power of these campaigns comes through the disruption of entrenched power relations – and the resulting space for renaming – that the campaigns open up.”⁵⁷ Nevertheless, noting the limitations of the rights approach, they emphasize that, while rights have transformative power, they only disrupt power structures in momentary bursts so that their actual power stems from the reproduction of such disruptions over the years as they “will be remembered and replayed in ways that can open more sustained space for ideological challenge and institutional innovation.”⁵⁸ In the process of making their argument, White and Perelman bring to the fore a variety of helpful models to conceptualize actors in local social movements. First, advocates are “pragmatic,” consciously choosing to use the rights rhetoric despite multiple alternative means of framing and addressing the same issues, indicating their considerations of the costs and benefits of the approach before adopting it.⁵⁹ Because these advocates realize that the law is not the be all and the end all, they can use multiple fora to advocate their claims, blame multiple actors, demand radical change to alter power relations. A second model White and Perelman indicate is activists’ engagement in “public performances that manifest the injustice they are fighting and enlist the empathy of multiple audiences with the people and communities they represent.”⁶⁰ Here, activists use claims of rights, disrupting pre-established power

⁵⁶Ibid, 7.

⁵⁷Ibid, 14.

⁵⁸Ibid. They indicate that ESR advocates enact change in an arc, beginning with the creation of “local generative space,” moving to building the foundation from which ESR change can occur, proceeding next to pressuring national political institutions to change their practices to become more ESR friendly. After the change in government practices occurs, ESR activists seek to spread the changes in multiples settings.

⁵⁹ Ibid,150.

⁶⁰ Ibid,153-4.

hierarchies, in large measure, as a performance. In this way, advocates invoke ESR to initiate a long struggle to change structures and alleviate injustice.

Considering activists as pragmatic and seeking performance, the use of rights to address economic and social hardship involves the weighing of the benefits and limitations of this discourse. Young describes rights as powerful, “inhabiting the space between ethical and legal arguments, rights provide a legitimate language of claim-making.”⁶¹ Unlike the framework of needs, development, charity and rivaling humanitarian appeal, rights demand action. Nevertheless, traditionally, and still today, rights are not the only or even the most prominent lens by which to view economic and social problems. Listing a few alternatives, Chong notes, “If activists’ ultimate goal is an end to extreme material deprivation, this could occur through broad-based economic growth; cultural and educational changes; changes in individual behavior...national legislation, changes in state policies and budgets,” each of which could be accomplished a variety of ways, through development, humanitarian, domestic or private charitable organizations.⁶² Yet, in adopting these rights, INGOs contend that human rights can contribute to the alleviation of immense structural problems when alternatives cannot.

Addressing the question of what a rights framework provides that other frameworks do not, Yamin outlines the many benefits of a human rights approach.⁶³ For one, rights bring accountability to the debate, inserting the political into the economic and implicating and demanding those in power to act. Considering that the signatories of

⁶¹ Ibid,14.

⁶²Daniel P. L. Chong, "Five Challenges to Legalizing Economic and Social Rights." *Human Rights Review*, (2009): 183-204.

⁶³ Alicia Ely Yamin, *Power, Suffering, and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter*, (Philadelphia: University of Pennsylvania Press, 2015).

international treaties are state parties, rights focus on holding the state accountable for its failures to respect, protect or promote a right. Nevertheless, considering their moral influence, activists can use rights to hold third party private actors and transnational organizations accountable as well. Another benefit is the empowering nature of rights, its ability to shift the burden from those in need to the state. Pieterse states, “rights-talk is empowering in that it affirms the inherent dignity of rights-bearers and awards political legitimacy to their demands for the satisfaction of their, otherwise overlooked, material needs.”⁶⁴ Where charitable and development organizations too often reduce the sufferer to a passive victim, a recipient of aid, helped less out of an obligation and more as a favor, human rights shift the blame away from the victims and implicate those in positions of power who have not done enough to help.⁶⁵ Another advantage of human rights is that its language allows for an international dialogue. In their universal applicability, human rights connect different corners of the globe and provide legitimacy to the appeals of ESR.⁶⁶

Despite all these benefits, there are many limitations of a human rights based approach in practice. Investigating directly the question of whether and how effective rights discourse is in alleviating social and economic hardship, Pieterse discusses the

⁶⁴Marius Pieterse, "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited," *Human Rights Quarterly*, (2007): 796-822.

⁶⁵ McNeill and St. Clair note, “The language of violation implies a relational approach between wealth and poverty that is difficult to ignore...moving away from the notion that poverty is the responsibility of the poor themselves, or of their states...calling for serious and immediate action and preventive measures.” Desmond McNeill and Asuncion Lera St. Clair, *Global Poverty, Ethics and Human Rights*, (New York: Routledge, 2009), 114.

⁶⁶ Hajjar emphasizes that since working within the rule of law to bolster change is so limiting as to be almost impossible in the Israel-Palestine context, lawyers instead attempt to spread issues by publicizing them using human rights, appealing to an external international community to improve a local hostile one. Lisa Hajjar, "Cause Lawyering in Transnational Perspective," In *The Law and Society Reader 2*, by Patrick Schmidt, & Erik Larson, 166-172, (New York: New York University Press, 2014).

South African court's interpretation of socioeconomic rights and its role in defeating social movements. He argues, in this context, that rights fail in their transformative function. To explain how this occurs, Pieterse first articulates the scholar Gabel's account of the way the status quo assimilates rights to defeat social movements. In this framework, rights, by their very nature, are abstract, ambiguous, politically neutral, and conceptually empty, intentionally constructed this way to facilitate consensus, leaving them open to different interpretations by the state and other parties.⁶⁷ Embedded in institutions, this non-enforceable, aspirational, quality of rights leaves them open to political abuse and instrumentalization, so that not only do they not alleviate hardship, but they also reinforce and legitimate the exclusionary status quo, silencing the vulnerable and denying the need for redistribution. Gabel contends, here, that rights simply signify "a passive locus of possible action," and states deceive their citizens into demanding these possibilities instead of the actual satisfaction of needs.⁶⁸ Expanding on this, Pieterse emphasizes instead the court's role in interpreting rights, describing it as a key factor in South Africa in delegitimizing the original transformative potential of rights and maintaining the status quo. Courts, here, interpret rights too abstractly, demanding the state "take reasonable measures aimed at the progressive realization of the right" without looking to the individual's actual needs.⁶⁹

Another objection to a human rights approach to ESR is that rights are often elite-oriented, requiring resources and lawyers to invoke, making them inaccessible to the extremely indigent or disadvantaged so that they are not as empowering as they claim to

⁶⁷Marius Pieterse, "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited," *Human Rights Quarterly*, (2007): 796-822.

⁶⁸Ibid.

⁶⁹Ibid: 809.

be. Other limitations of rights are more specific to ESR and include sustained US opposition that makes effective action towards these rights' realization difficult if not impossible, resulting in wasted funds. A related concern is that organizations and international institutions and even states are "over-stretching" in adopting ESR and "do not have the internal capacity to advocate for subsistence rights effectively."⁷⁰ McNeill and St. Clair add that HROs have little clout to bring about change where clout refers to "power in the financial/economic terms: the extent to which the organization in question can use its muscle to bring about change."⁷¹ They argue too, concerning capacity, that not only is there little experience in legislating ESR in courts, but also that human rights place too much pressure on states. This objection is especially notable, considering HROs' struggle to operationalize the unique concept and language of "progressive realization," language that provides a convenient scapegoat for governments to use to both save their reputations and render the efforts of INGOs futile. Article 2 part 1 of the ICESCR, outlines the concept:

"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."⁷²

Progressive realization, then, considers a state's resources to evaluate its obligations. Hence, a state can, to avoid recrimination for abuses of ESR, declare that they have insufficient resources and cannot fulfill said rights at the current time. Tied to

⁷⁰Daniel P. L Chong, *Freedom from Poverty: NGOs and Human Rights Praxis* (Philadelphia: University of Pennsylvania Press, 2010): 37.

⁷¹Desmond McNeill and Asuncion Lera St. Clair, *Global Poverty, Ethics and Human Rights*, (New York: Routledge, 2009), 16.

⁷² UN, *The International Covenant on Economic, Social, and Cultural Rights*, New York: United Nations Office of the High Commissioner for Human Rights, December 16, 1966.

this is prominent development discourse, outlining the ‘resource argument.’ Here, development workers often contend that economic growth will eventually, automatically lead to improvements in ESR to justify overlooking ESR.⁷³ Considering these counterarguments makes rights difficult to enforce.

This section has addressed the ways in which, for what reasons, and with what results local advocates demand an end to material deprivation using ESR. This has implications for how effective shaming ESR can or cannot be as I investigate in this paper. The next section takes a closer look at the theoretical and empirical literature concerning shaming in general.

Naming and Shaming

By its very nature, international law does not establish a supranational authority to enforce it. Due to the lack of a punitive body (an international ‘police force’) and the presence of sovereign states, a variety of mechanisms seek to enforce the law in less material or militarily coercive ways. These include mechanisms in the UN, such as special rapporteurs, treaty bodies and associated committees, individual complaints mechanisms, comments by the UN high commissioner for human rights, as well as international courts (such as the International Criminal Court), and in some cases, regional and even domestic courts, and even foreign policy. One method of international law enforcement, the focus of this paper and the major method INGOs have, is naming and shaming. In this section, I begin with an explication of the limitations and potential of international law enforcement in general. Next, I describe some of the theoretical

⁷³Irene Khan, *The Unheard Truth: Poverty and Human Rights*, (New York: W.W. Norton and Company, 2009).

discussion on shaming, before explicating some of the empirical findings on shaming CPR. Finally, I conclude with a discussion of the debate on shaming ESR.

The Limitations and Potential of International Law

Enforcing international law is difficult because, as Koh discusses, “human rights norms are vague and aspirational, because enforcement mechanisms are toothless, because treaty regimes are notoriously weak, and because national governments lack the economic self-interest or the political will to restrain their own human rights violations.”⁷⁴ Yet, there are many actual instances where human rights played a role in changing states’ attitudes and policies and many others where rights backfired. According to Koh, nations can have four different kinds of relationships with international law, including “coincidence,” a situation where they simultaneously and unintentionally happen to follow international norms, “conformity,” where states know and follow international norms consciously but only because these do not inconvenience them or cost more than alternatives, “compliance” where states follow norms to receive benefits or avoid costs, and the final stage, “obedience” where laws become internalized and part of the value system of the nation so that sanctions are unnecessary.⁷⁵ To explain why and under what conditions nations adopt human rights norms and internalize international law, Koh develops the transnational legal process theory.

Nations, Koh presents, obey for six main reasons, including to get power, out of self-interest or as a rational choice to gain benefits, to gain legitimacy and solidify

⁷⁴Harold Hongju Koh, "How Is International Human Rights Law Enforced?", *Indiana Law Journal*, 1999: 1397-1417.

⁷⁵Ibid.

political identity, simply to follow other states, or as a result of diffusion as norms move from state to state and top down from international to national. Each of these explanations stems from a different conception of law enforcement. The first emphasizes power, stresses that only coercion or bribery whether material or otherwise can force nations to comply with international law. In the second, the law is instrumental, created in the collective self-interest of states so that compliance is a rational choice.⁷⁶ The third places legitimacy in the laws themselves and nations find themselves “normatively pulled” to the rules, often influenced by their democratic political identity to adopt them. The fourth rests on the importance of states’ memberships in an international community that compels them to comply with norms so as not to appear as outsiders. The fifth and sixth emphasize the constitutive effects of law in spreading and changing institutions and structures from one level to the other.⁷⁷ Delving in greater detail in this last “horizontal” story of diffusion and the “vertical” one, Koh outlines his theory, emphasizing the pressure applied on states to accept norms, encouraging states’ compliance. He notes, “the key agents in this transnational legal process are transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, interpretive communities and law-declaring fora, bureaucratic compliance procedures, and issue linkages among issue areas.”⁷⁸ NGOs play a significant role, here, in defining, interpreting and legitimating international law to operationalize norms. Koh emphasizes, “international human rights law is enforced not just by nation-states, not just by government officials, not just by world historical figures, but by people like us, by people with the courage and

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸Ibid.

commitment to bring international human rights law home through a transnational legal process of interaction, interpretation, and internalization.”⁷⁹

For international law enforcement, then, NGOs are particularly powerful actors because they stand as neutral and objective, not tied to the concerns of a particular state and not concerned with private gain nor with earning political power.⁸⁰ An important function of theirs, arguably one of the most prominent, is their work in enforcing human rights norms through the practice of naming and shaming. The next subsection discusses this tactic in detail and the theoretical debates surrounding its efficacy.

Naming and Shaming: Theoretical Debates

The first scholar to use the term shaming in the context of international politics was Alfred Zimmern, who, in his seminal study of the League of Nations in 1936, hoped states’ use of the tactic would foster change. The strategy’s first application, though, dates all the way back to the abolition of the Transatlantic slave trade, during which public pressure rose to revolutionary heights, compelling Western states ultimately to outlaw the practice.⁸¹ A primary source of this pressure included prominent norm entrepreneurs, responsible for reframing slavery as an amoral injustice. Today, HROs rely on shaming to promote the realization of human rights, spending majority of their

⁷⁹Ibid.

⁸⁰Ibid. NGOs do a lot including “monitor human rights violations...undertake programs of information sharing and public education...sponsor programs of technical training...undertake and demonstrate the utility of rigorous technical analysis...engage in lobbying activities to influence public policy...organize advocacy campaigns to promote rights and redress wrongs...build solidarity with other domestic and international NGOs...perform service functions and provide humanitarian support...protect and vindicate human rights in litigation.”

⁸¹H. Richard Friman, "Introduction: Unpacking the Mobilization of Shame," In *The Politics of Leverage in International Relations: Name Shame Sanction*, by H. Richard Friman, 1-33, (Hampshire: Palgrave Macmillan, 2015).

resources and efforts on furthering its successful use. Yet, increasing debate surrounds the question of the efficacy of shaming with more optimistic theories under incessant scrutiny for their ‘irrational’ idealism. Although even the optimists steadily grow skeptical of the extent to which shaming can meet its goals, they still leave room for hope. In my analysis, later, I will draw on these theories, applying them to the case of economic and social rights to articulate the ways shaming functions in this overlooked context and under what conditions it can (or cannot) be effective.

The more optimistic theorists predicate their models on Hedley Bull’s conception of international relations. Herein, the possibility exists that states will respond favorably to social pressure, but as Friman states, even then, “Bull discusses moral sanction as an effective measure in and of itself only in the case of homogenous primitive stateless societies.”⁸² In parallel, although optimists aver that shaming is effective, they do so while imposing significant limitations on its chance of success and citing its successful application only in certain (arguably) non-representative cases. Keck and Sikkink make the first such argument in their book, *Activists Beyond Borders*, wherein they outline a theory of ‘transnational advocacy networks’ that recounts the many ways ‘transnational networks’ can enforce and spread norms. The transnational human rights network consists of “1) parts of intergovernmental organizations at both the international and regional level 2) international NGOs 3) domestic NGOs 4) private foundations and 5) parts of some governments.”⁸³ The members of the transnational network have a number of strategies at their disposal, including “information politics,” (essentially a process of

⁸²Ibid, 14.

⁸³ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Ithaca: Cornell University Press, 1998), 80.

spreading awareness where organizations gather information), “symbolic politics” (wherein activists use conferences and other events to strategically frame issues and spread knowledge and recognition of them), “accountability politics” (where they hold actors accountable for the promises they have made), and “leverage politics” (where organizations use the threat of moral or material power to demand compliance).⁸⁴

Although Keck and Sikkink do not explicitly articulate this, naming and shaming encompasses all the forms of “politics” in practice. Organizations need to be able to gather objective information to name violations, need to use human rights norms to frame issues as violations and thereby, hold states accountable to international treaties and to finally convince the state to hear their objections, they need moral leverage.

In Keck and Sikkink’s theory, the process of halting violations occurs in a vertical ‘boomerang’ pattern, beginning from the bottom with domestic NGOs, who find themselves unable to convince their respective states to adopt/stop violating certain norms.⁸⁵ Not finding a domestic solution, NGOs turn to the international community for assistance, most prominently to international HROs, who, after some investigating of their own, ordinarily identify a violation and start to pressure the state from the top. The recent case of Myanmar is an example of a potential ‘success’ story under this model. The state, having received criticism for its human rights record for decades, plagued by the pressures of economic and trade sanctions, in recent years, responded to shaming by taking some measures (though limited) to comply with human rights, most prominently

⁸⁴ Ibid, 200-1.

⁸⁵ Ibid.

releasing many prisoners of conscience, including Aung Sun Suu Kyi, and ameliorating their image as a democracy in the international community.

However, noting instances where the network does not function as expected, Keck and Sikkink outline certain conditions that make it likely to succeed. For one, since their theory relies on domestic NGOs, the number and strength of these significantly influences the extent to which shaming itself will occur.⁸⁶ Moreover, the international actors who take on the cause must both be able “to mobilize their own members and affect public opinion” and have “powerful allies.”⁸⁷ HROs, then, need to have both sufficient moral legitimacy and capital to make claims, invoking powerful connections and using reliable information, as well as the backing of other actors, such as third party states, to succeed. While prominent HROs, like AI, do have moral capital, shaming ESR fails to have the backing of any third-party actors. The state being shamed, in turn, must ‘care’ about the effects shaming might have on its reputation in the international community, with the theory resting “on the assumption that governments value the good opinions of others” or failing that do not wish to lose trade connections or other material benefits that compliance with human rights might provide.⁸⁸

To illustrate their theory, Keck and Sikkink rely on selective case studies. They begin with an inspection of the ‘historical precursors’ to present-day shaming, taking the cases of the campaign to abolish slavery in the United States in the 19th century, the international movement for women’s suffrage in the 20th century, and early campaigns against foot-binding in China and female genital mutilation in East Africa. Proceeding

⁸⁶ Later in my paper, then, I account for local NGOs as well as international ones in my case.

⁸⁷ Ibid, 23.

⁸⁸ Ibid.

this analysis, they look to modern cases of human rights violations, referencing multiple Latin American countries, but focusing particularly on the Argentine violations in the 1970s and the largely successful campaign that halted those, and consistent abuses in Mexico with a partially successful campaign that has produced limited change.⁸⁹ They posit that Mexico's extended resistance to international pressure exists in large part because of the weakened network, a result of the limited number of domestic human rights NGOs in the country. Since their theory is intended to be applicable to contexts wider than the human rights movement, they take some cases of the environmental advocacy network as well and present some speculations on the campaign on violence against women. Considering the final selection of cases, Jetschke and Liese note that the model is only intended for a limited number of states, those that are "authoritarian, repressive states with little political legitimacy but considerable state authority, hardly any experience of transnational advocacy, and with material and social vulnerability...this is so because these are the conditions under which we would expect transnational advocacy to be effective."⁹⁰ Most states shamed today, though, do not match all or any of these criteria, having ratified treaties and the model would not necessarily apply to these cases.

Expanding and modifying Keck and Sikkink's model to better explain the ways international norms influence domestic politics, Risse and Sikkink outline the five-phase

⁸⁹ Anja Jetschke and Andrea Liese, "The power of human rights a decade after: from euphoria to contestation?," In *The Persistent Power of Human Rights: From Commitment to Compliance*, by Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp, (New York: Cambridge University Press, 2013).

⁹⁰Thomas Risse and Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction," In *The Power of Human Rights: International Norms and Domestic Change*, by Kathryn Sikkink, Thomas Risse, & Stephen C. Ropp, 1-38. (New York: Cambridge University Press, 1999), 27.

spiral model. To sketch their theory, they look at “paired cases of countries with serious human rights situations from each region of the world” including both “well-publicized success stories” of international human rights like Chile, South Africa, the Philippines, Poland, and the former Czechoslovakia,” but also “a series of more obscure and apparently intractable cases of human rights violations such places as Guatemala, Kenya, Uganda, Morocco, Tunisia, and Indonesia.”⁹¹ Here, they sustain all the limitations of the ‘transnational advocacy network’ theory, including its applicability to only a few cases. I consider the details of this prominent model in the naming and shaming literature in my analysis where I indicate what I learn from the optimists and realists to explain and apply to my study of the right to housing in Kenya.

To exert pressure and ensure compliance, in Risse and Sikkink’s framework, HROs and other international actors can adopt four mechanisms of interaction, including “coercion,” “changing incentives,” “persuasion and discourse” (echoed from Keck and Sikkink), and “capacity building.” ‘Coercion’ is the direct use of military force to enforce international laws and in the case of gross violations of human rights law, like genocide, can take the form of humanitarian intervention. ‘Changing incentives’ involves the use of material sanctions and rewards, relying on a more powerful third party. These need not simply mean economic sanctions, but rather, human rights can bolster trade agreements and exist as conditions for aid. A prominent party in most of these transaction is the US, a world power and one most willing and able to exert this pressure. The tactic, “persuasion and discourse,” though, is where naming and shaming itself comes in as an attempt by

⁹¹ Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp, *The Persistent Power of Human Rights: From Commitment to Compliance*, (New York: Cambridge University Press, 2013).

HROs to reason and convince the state that it is in their best moral, legal, or even economic interests to comply with human rights and internalize their validity.⁹² Shaming, also, may prompt third parties to act by coercion or changing incentives. Finally, INGOs can aid in capacity building, particularly in states where human rights are violated not out of malicious intent of the authorities, but rather, because the state lacks the capacity to enforce the norms.

Further expanding on Risse and Sikkink's model to include additional considerations, Goodman and Jinks introduce potential 'crowding out effects.'⁹³ Correcting for Risse and Sikkink's assumption that shaming can work together in harmony with coercion and other mechanisms of enforcement, Goodman and Jinks introduce the possibility that one mechanism may undercut the other. For example, coercion may undermine persuasion. They state, "the employment of material incentives is often incompatible with the employment of social and cognitive "incentives.""⁹⁴ In particular, if greater emphasis is paid to material sanctions, the value of the social might decrease. This is what they call the 'separability fallacy.' A second fallacy they note is the 'additive fallacy,' assuming that adding different incentives will automatically increase the likelihood of attaining the desired ends.⁹⁵ Applying both economic sanctions and coercion, though, might not halt violations. For example, then, as the network strengthens, Kenya may not improve its human rights record. Other complications of the

⁹²Ibid.

⁹³Ryan Goodman and Derek Jinks, Social mechanisms to promote international human rights: complementary or contradictory?," In Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp, *The Persistent Power of Human Rights: From Commitment to Compliance*, (New York: Cambridge University Press, 2013).

⁹⁴Ibid,106.

⁹⁵Ibid.

mechanisms include the fact that they may legitimate a practice unintentionally by emphasizing how prevalent it is, and in reference to monetary incentives, in particular, states may face a declined self-perception and a 'bitterness' in finding themselves 'forced' to comply with norms, instead of choosing to do so as sovereign entities. If repeated enough, states may stop to 'care' about sanctions and further violate norms, like North Korea. Goodman and Jinks, then, argue for the addition of these considerations to modify the spiral model.⁹⁶

Other optimists, including Schulz, similarly, espouse the efficacy of shaming with limitations, particularly noting the contingency of powerful third party support. Schulz argues that violator-states will decide to comply (or not to) on the basis of a cost-benefit analysis. He states, "repressive governments may calculate that formally aligning themselves with virtue brings rewards that far outweigh the danger of simple criticism."⁹⁷ He insists that, in practice, if the only punishment is a "mere loss of face or honor," shaming will not change state practices.⁹⁸ Adding to this contention, Franklin focuses on why governments choose to violate human rights, creating the "political repression theory."⁹⁹ Violations, he contends, must provide some benefit to the state and the state will only, then, cease to commit them should the potential cost outweigh the benefit. In this context, shaming may provide a cost not simply by hurting reputations, but also in the form of "increased domestic opposition, declining investment and tourism and

⁹⁶Ibid.

⁹⁷William F. Schulz, "Caught at the Keyhole: The Power and Limits of Shame," In *The Politics of Leverage in International Relations: Name, Shame, and Sanction*, by H. Richard Friman, (Hampshire: Palgrave Macmillian, 2015), 38.

⁹⁸Ibid, 39

⁹⁹ Ibid, 46

international sanctions.”¹⁰⁰ If the resultant costs of shaming, then, are heavy, the state, a rational actor, will comply.

However, Schulz proceeds to reframe the debate slightly too by defining the primary purpose of shaming not as enforcement, but rather, as an educative tool, used to spread norms. Taking a psychological perspective, Schulz argues that although shaming will need an external third party to back its claims to be effective in terms of enforcement or to act as a deterrence mechanism for a specific violation, a more important function of the practice is its effect in raising issues to the agenda, in creating and spreading norms, and not in enforcing their immediate implementation. He states, “the critical factor in whether the laws will be followed is less likely to be the immediate presence of law enforcers and more likely to be whether people decide to conform their behavior to the requisite norm.”¹⁰¹ As “norm promoters,” to be most effective, organizations need to be “powerful, well-funded, and legitimate... (rather) than illegitimate, hypocritical, underfunded or weak.” Schulz places most weight, then, on big HROs, like AI (who “has for years taken the candle wrapped in barbed wire as its logo and “shining light into darkness” as its commanding metaphor”) and HRW, and some prominent donors, such as the Ford Foundation.¹⁰² Schulz, then, presents an area of hope where HROs can be effective, independent of other powerful entities and without immediately enforcing norms.

The other major camp of scholars, the more pessimistic camp often termed the (neo)realists, though, argue that human rights in general and shaming in particular is

¹⁰⁰Ibid

¹⁰¹ Ibid, 40.

¹⁰² Ibid, 33-34.

ineffective. These theorists draw on the work of Hans Morgenthau (in *Politics among Nations*) to insist that shaming is nothing more than empty threats and cheap talk, that expecting states to comply with public opinion is excessively idealistic.¹⁰³ In more concrete terms, shaming does not work because “NGOs and the media lack authority over states and the UNHRC, packed full of despots, lacks legitimacy.”¹⁰⁴ For them, there is no instance where shaming could work, especially as simple ‘persuasion.’ As Neumayer puts it, “things happen if powerful countries want them to happen.”¹⁰⁵ In fact, some realists, like Hafner-Burton does, argue that shaming may actually exacerbate the problem, increasing human rights abuses, even providing incentives to abuse. Hafner-Burton takes the case of Nigeria in the late 1990s to illustrate this, where the ousting of the president and the institution of military rule led to a tremendous surge in human rights abuses.¹⁰⁶ AI and HRW proceeded to shame the country heavily alongside other actors, including Western news agencies and states. In response, Nigeria denied all allegations. When the next general came to power, he strategically used human rights, instituting some measures of freedom to protect some rights, what Risse and Sikkink would see as tactical concessions, while increasing the repression and abuse of its citizens to blindside the international community. In making these claims too, other realists question the legitimacy of HROs themselves, as entities that “have selectively enforced rules to

¹⁰³ H. Richard Friman, "Introduction: Unpacking the Mobilization of Shame," In *The Politics of Leverage in International Relations: Name Shame Sanction*, by H. Richard Friman, 1-33, (Hampshire: Palgrave Macmillan, 2015).

¹⁰⁴ Emilie M. Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem," *International Organization*, (2008): 691.

¹⁰⁵ Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" *Journal of Conflict Resolution*, (2005): 936.

¹⁰⁶ Emilie M. Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem," *International Organization*, (2008): 692.

support friends and punish adversaries.”¹⁰⁷ Realists, then, argue that the human rights movement perpetuates and reinforces power relations in all its aspects, including when shaming.

Concerning Risse and Sikkink’s prominent spiral model directly, realists often attack its truth. Critiquing the model, Jetschke and Liese argue that the spiral model does not take into account that the country being shamed may present powerful counterarguments to potentially attack the persuasiveness of HROs (the US’ national security discourse in response to the violation of the right to be free from torture is the most apparent example). Moreover, they note, echoing Simmons, that commitment does not always lead to rule following so that a state may ratify an international human rights treaty only to continue to violate norms, as did Tunisia and Nigeria. Moreover, democracies have a greater ability to counter shaming since “their policies are legitimized by voter approval even if these policies result in human rights violations.”¹⁰⁸ This contests the important assumption that public opinion is always on the side of the dispossessed. For example, in the case of welfare rights in the US, politicians continue to overlook the system in large part due to the prevalent belief that the poor deserve their poverty and particularly that black matriarchs, so-called “welfare queens,” cheat the system to escape having to work for their living. In summary, Jetschke and Liese state, “The spiral model not only failed to take note of the dialogic character of the logic of persuasion, but lacked a concept of persuasion allowing for the possibility that various

¹⁰⁷ James H. Lebovic and Erik Voeten, "The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR," *International Studies Quarterly*, (2006): 862.

¹⁰⁸ Anja Jetschke and Andrea Liese, “The power of human rights a decade after: from euphoria to contestation?,” In Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp, *The Persistent Power of Human Rights: From Commitment to Compliance*, (New York: Cambridge University Press, 2013): 34.

domestic and international audiences might actually accept the argument of norm-violating governments.”¹⁰⁹ This severely limits the type of human rights that can be effectively shamed since “human rights campaigns are more effective when the violations are targeted against innocent citizens and, hence, the public fears that anyone could become the next victim.”¹¹⁰ Not every vulnerable group, though, can readily be framed as ‘innocent’ victims.

Realists, though, still fail to take into account and persuasively explain instances where human rights do succeed. Keck and Sikkink note, “realism offers no convincing explanation for why relatively weak non-state actors could affect state policy, or why states would concern themselves with the internal human rights practices of other states even when doing so interferes with the pursuit of other goals.”¹¹¹ In fact, if power determined every action, many countries’ adoption and internalization of human rights and their integration of it into foreign policy, even the mere creation of international human rights treaties, is unexplainable.

A third potential camp takes inspiration from the institutionalists in International Relations theory, to articulate naming and shaming (and human rights) as ineffective or effective depending on their interpretation of the group. The perspective focuses on the ‘community’ nature of the ‘international community’ where states help each other with mutual and long term benefits. Although the perspective is more optimistic, as Neumayer notes, “it is somewhat questionable whether there are substantial mutual benefits from

¹⁰⁹ Ibid: 35.

¹¹⁰ Ibid: 41.

¹¹¹ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Ithaca: Cornell University Press, 1998), 119.

greater respect for human rights across countries.”¹¹² Refining this concept and shifting the focus from compliance to management of international order, Neumayer contends that under this outlook, one could argue that to maintain order, conformity to human rights may be advisable and should some countries violate norms, the regime would still survive as long as most states conform. He states, “full compliance is neither a necessary nor a sufficient condition for the effectiveness of an international regime. Instead, what matters is that overall compliance is at an acceptable level.”¹¹³ This perspective, then, although not a concrete model, presents some opportunity to modify the pessimistic perspectives and accommodate for human rights.

Cited in the section above and the final model discussing the place of human rights in the international community, accepting the efficacy of human rights, but potentially lessening the importance of shaming, is the “transnational legal process model.” This model consists of a three-step process including “interaction, interpretation and internalization,” and recognizes that actors have collectively come together to agree to human rights treaties, making them ‘universal,’ and so will hold themselves accountable to these treaties. There will be some norm violators, here, but most will obey and perceiving others obey, more will join the rule consistent path. Here, then, “it is not so much persuasion – a form of rational acceptance – that matters but that regular interactions lead to cognitive social pressures for state actors to conform with treaty norms.”¹¹⁴ States, then, will eventually comply without necessitating naming and shaming. These “pressures,” it is acknowledged, though, may promote “conformity rather

¹¹² Eric Neumayer, “Do International Human Rights Treaties Improve Respect for Human Rights?” *Journal of Conflict Resolution*, (2005): 927.

¹¹³ Ibid: 928.

¹¹⁴ Ibid: 929-30

than...acceptance and internalization,” which comes over time as norms spread vertically and horizontally.¹¹⁵ Following Schulz, then, a more important function of naming and shaming, here, is to spread and legitimize norms instead of enforcing them.

Drawing on these theories, several hypotheses can be drawn about the effects shaming might have in the context of ESR. If third party influence is essential to the effectiveness of shaming, considering the US’ persistent denial of these rights, violating ESR and receiving shaming in turn may not affect one’s standing in the international community to any significant extent and so may not provoke change. For this reason, it is unlikely that shaming a state would provide costs that outweigh the benefits of violating human rights. Counter discourses, too, for ESR may be as powerful as the national security discourse proves to be for many civil and political rights violations because allegations that HROs are acting against the country’s interests and in a ‘communist’ fashion may appear more logical in the neoliberal climate that states make these claims in. Since most victims of ESR violations are the ‘poor,’ the public may agree to sacrifice them for the ‘greater good’ of economic growth. A challenge to the self-perception of the state, though, may still be effective if talk is not, in fact, cheap since a state that considers itself or strives to be a norm-follower may feel the need to change if shamed for violating even an ESR norm.

Of naming and shaming, Pruce and Bubadin state that, “Information is a key form of exchange here: Northern advocates obtain first-rate intelligence while stakeholders in the South gain a platform for sharing their stories and building influence.”¹¹⁶ To an

¹¹⁵ Ibid: 930.

¹¹⁶ Joel R. Pruce, and Alexandra Cosima Budabin, "Beyond naming and shaming: New modalities of information politics in human rights," *Journal of Human Rights*, (2016): 408-425.

audience of journalists, policymakers, and the public, HROs present a case of a violation of a right and demand remedies. Coming to diverse conclusions, the results of this action remain debated. In the section below, I look at empirical findings on the effectiveness of naming and shaming CPR before delving into the specifics of ESR.

Naming and Shaming CPR: Contradictory Empirical Findings

Since the 1950s, HROs have focused on the ‘violations approach’ to name and shame CPR with immense success, criticizing state failure in specific cases to bolster larger change. However, empirical studies come to contradictory conclusions about the efficacy of shaming in enforcing CPR. Nevertheless, studies increasingly establish a positive relationship between improvements in human rights and shaming, particularly when disaggregating and interacting the shaming variable with other factors that might influence human rights in a country. In this section, I outline some of the scholars’ works that look at quantitative regressions to investigate the effects of shaming on the realization of CPR.

The first quantitative study, attempting to decipher the relationship between human rights and shaming, comes to a pessimistic conclusion. In her study, Hafner-Burton conducts a regression analysis between the quality of human rights in a country in a year (using CIRI and the Freedom House Index) and the extent of naming and shaming (coding for AI press releases and background reports¹¹⁷, shaming by the news media¹¹⁸, and a dummy variable for shaming by the UNHRC¹¹⁹). She finds a statistically

¹¹⁷ Her data comes from Ron Ramos et. al’s study

¹¹⁸ Focusing on the Economist and NewsWeek articles.

¹¹⁹ Operationalized as whether a resolution is passed against a country for a violation

significant, positive relationship between shaming and abuses of civil rights (termed political terror), but a negative, statistically insignificant relationship between shaming and abuses of political rights.¹²⁰ Theoretically, her research takes the realist frame and contends that governments strategically use human rights, continuing to violate certain rights while appeasing the international community by marginally improving others so that any improvements in human rights that the international community notes are only illusory, masking greater violations of other rights.

Other studies come to more optimistic conclusions, applying Keck and Sikkink's model. Using new events based data for more than 400 HROs, Murdie and Davis, in their regression analysis, find that shaming by HROs improves the quality of human rights (calculated using the CIRI Index) when interacted with the domestic presence of HROs.¹²¹ Meernick et al., similarly, note that the states that are shamed the most (subject to the most Urgent Actions released by AI) are those with a large domestic presence of HROs.¹²² These scholars highlight, then, the importance a domestic presence of HROs has on the efficacy of shaming, adding credence to Keck and Sikkink's theory described earlier. Other scholars move away from analyses of shaming on all human rights to focus on specific ones. This includes Krain and DeMerritt, who both extol the merits of disaggregation in providing a more comprehensive and thorough picture of the effects of HRO shaming. While Krain establishes a statistically significant positive relationship between increases in naming and shaming (calculated in a similar way to Hafner-Burton)

¹²⁰ Emilie M. Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem," *International Organization*, (2008).

¹²¹ Amanda M. Murdie, and David R. Davis, "Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs," *International Studies Quarterly*, (2012): 1-16.

¹²² James Meernick, Rosa Aloisi, Marsha Sowell, and Angela Nichols. "The Impact of Human Rights Organizations on Naming and Shaming Campaigns." *Journal of Conflict Resolution*, 2012: 233-256.

and decreases in the severity of genocides/politicides (using data from the Political Instability Task Force), DeMeritt finds a statistically significant, negative relationship between shaming by NGOs (coding data for 432 HROs) and the UNHRC (creating a severity scale) and government killings (using data from the Political Instability Task Force's Worldwide Atrocities dataset and major international press agencies).¹²³

DeMerritt also finds that shaming by the media is ineffective, even as shaming by HROs is effective. Focusing on the UNHRC, where governments name and shame one another, Lebovic and Voeten find that targeting and punishment by the commission is decreasingly part of a 'meaningless' political exercise, as increasingly states shame one another to hold each other accountable to their promises.¹²⁴

Still, other scholars outline mixed results, noting that although shaming is limited in many ways, it also aids in others. Inspecting whether signing human rights treaties improves the quality of human rights, Neumayer notes when analyzing the results of his regression that improvements in rights depend on the conditions of the country (whether it is democratic or authoritarian, the number of nongovernmental organization its citizens participate in etc.). He finds that, treaty ratification benefits more democratic countries with strong civil society organizations although it worsens the overall human rights record for all countries taken together.¹²⁵ Similarly, Clark conducts a time-series analysis

¹²³ Mathew Krain, "J'accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?" *International Studies Quarterly*, (2012): 574-589.

Jacqueline DeMeritt, "International Organizations and Government Killing: Does Naming and Shaming Save Lives?" *International Interactions*, (2012): 597-621.

¹²⁴ James H. Lebovic and Erik Voeten, "The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR," *International Studies Quarterly*, (2006).

¹²⁵ Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" *Journal of Conflict Resolution*, (2005).

Although he does not explain why the record worsens, one possible explanation, presented by Hafner-Burton indicates that often repressive nondemocratic countries sign international human rights treaties to

and in her findings on the effects of shaming on domestic human rights norms, claims that although ratification of the Convention Against Torture when interacted with shaming improves human rights, ratifying the ICCPR, shaming by itself, and ratifying the Convention Against Torture on its own, all do not provide any benefits and may even worsen the human rights record of a given country. She states, “the act of ratification, on its own, was associated with either no change in human rights, or a slight worsening of rights in the ratifying countries. Similarly, shaming, on its own, was always associated in this model with a slight worsening of human rights in the targeted country.”¹²⁶ As an explanation for this result, Clark indicates the importance both of pressure from international actors to be accountable to treaties and the agreement by states to commit to the treaties themselves, so that lacking one factor gives states greater incentives to disobey than to obey international law. Likewise, Kim inspects the effectiveness of shaming, considering just AI country reports on human rights practices and deciphers that whether a target government is a member of a human rights intergovernmental organization plays a significant role in the effectiveness of the practice. She notes, “third parties’ commitment to the promotion and protection of human rights is key to the effectiveness of AI’s efforts.”¹²⁷ In many cases, too, shaming leads to the increased probability of sanctions and humanitarian interventions by third party states, what Murdie

legitimate their political identity, give the façade of being free, and appease the international community. Having signed a treaty, then, such states feel less pressure to comply with norms.

¹²⁶ Ann Marie Clark, “The normative context of human rights criticism: treaty ratification and UN mechanisms,” In *The Persistent Power of Human Rights: From Commitment to Compliance*, by Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp, (New York: Cambridge University Press, 2013): 142-143.

¹²⁷ Dongwook Kim, “Mobilizing “Third-Party Influence”: The Impact of Amnesty International’s Naming and Shaming,” In *The Politics of Leverage in International Relations: Name Shame Sanction*, by H. Richard Friman, 1-33, (Hampshire: Palgrave Macmillan, 2015).

and Peksen term the “Amnesty Effect,” which in turn reinforces the efficacy of the practice.¹²⁸

Moreover, although usually HROs assign blame to the state and this is the focus of my study, INGOs increasingly shame non-state actors and while in the cases of some of these, like terrorist organizations, the response is often hostile, others like businesses, especially under consumer pressure, respond more positively. For example, taking the case of Nike developing human rights friendly practices under consistent shaming attempts, Deietlhoff and Wolf note, “under certain considerations, corporations can be observed transforming themselves from norm-consumers to norm-entrepreneurs as agents in a socialization process.”¹²⁹ Naming and shaming, then, can go beyond a state focus and recognize the non-state actors involved in human rights violations.

These findings, for the most part, indicate that shaming when interacted with some other variables, such as the signing of treaties, the presence of domestic NGOs, and third parties fosters the realization of CPR. Most studies, then, find that, NGOs’ efforts in this arena are not wasted. Subsequently, following their acceptance of ESR, NGOs sought to apply this well-tested tactic to this new case. The next section elaborates on this trend.

Naming and Shaming in the Context of ESR

¹²⁸ Amanda Murdie, and Dursun Peksen, “The Impact of Human Rights INGO Shaming on Humanitarian Interventions,” *The Journal of Politics*, (2014): 215-228.

In the case of ESR and in many cases of CPR, however, powerful actors are often not willing to back human rights and INGOs must rely solely on their moral leverage.

¹²⁹ Nicole Deietlhoff and Klaus Dieter Wolf, “Business and human rights: how corporate norm violators become norm entrepreneurs,” In *The Persistent Power of Human Rights: From Commitment to Compliance*, by Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp, (New York: Cambridge University Press, 2013), 223.

Shaming is a prominent tactic for ESR realization because, as Kenneth Roth notes, of the many ways HROs can promote ESR, shaming, in holding states accountable and in countering their power, is the most persuasive and influential tactic.¹³⁰ To make this claim, Roth considers two main alternatives to shaming, dismissing them as significantly less potent. The first, the litigation approach of promoting rights in courts, he argues, is insufficient because the international community cannot appropriately take such concerted domestic action (though domestic NGOs may approach the issue in this way). Likewise, with the other alternative, providing technical assistance, he claims, simply providing the assistance may legitimize a violating government, “providing a façade of conscientious striving that enables a government to deflect pressure to end abusive practices.”¹³¹ Rubenstein adds to these other ways INGOs may address the issue of ESR that he contends are more “future oriented, designed to protect and promote human rights in the long term.”¹³² These include collaborating and lobbying local governments, partnering with local HROs, and advocating for resources from wealthy countries. Yet, since INGOs still rely most apparently on shaming today and considering the importance of this tactic to ESR as well as to human rights more broadly, I focus on the effectiveness of this tactic rather than the many other ways INGOs may promote ESR.

The Violations Approach

¹³⁰Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly*, (2004): 63-73.

¹³¹ Ibid: 67.

¹³²Leonard S. Rubenstein, "How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth," *Human Rights Quarterly*, (2004): 845-865.

Today, as INGOs grow to use the ‘violations approach’ for ESR, questions about its efficacy arise with some scholars searching for alternative, nontraditional ways to name and shame these ‘new’ rights. In “Advancing Economic, Social, and Cultural Rights: The Way Forward,” Mary Robinson, a previous United Nations High Commissioner for Human Rights, records how shaming has traditionally involved the legal-centered ‘violations approach,’ demarcating a violator, a violation, and a remedy closely using international law with the utmost clarity.¹³³ Encapsulating this view, Katarina Tomasevski, a previous Special Rapporteur on the Right to Education, notes, “that economic and social rights are not about poverty, but policy.”¹³⁴ Here, the state is often the violator of rights, the violation an unjust policy (or lack thereof) and the solution a change in policy. Moving firmly away from issues of progressive realization and distribution of resources, these scholars and activists articulate ESR enforcement in exclusively legal terms and emphasize their justiciability.

In AI’s primer on ESR, the organization outlines cases where they shamed ESR and the beneficial results of these efforts to promote the realization of these rights.¹³⁵ Rather than focusing on the statistics that cover the overwhelming number of deprived people, they focus on individual stories. The primer encourages other HROs to shame ESR, even explicating what constitutes a violation of ESR. Understanding that “initial resistance to the recognition of economic, social and cultural rights as human rights

¹³³Mary Robinson, "Advancing Economic, Social, and Cultural Rights: The Way Forward," *Human Rights Quarterly*, (2004): 866-872.

¹³⁴Katarina Tomasevski, "Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998–2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson," *Human Rights Quarterly*, (2005): 709-720.

¹³⁵ Amnesty International, *Human rights for Human Dignity: A primer on economic, social and cultural rights*, (London: Amnesty International Publication, 2005).

stemmed in part from the perceived difficulty of monitoring and assessing the ‘progressive realizations’ of these rights,” AI draws on the Limburg Principles to argue that not only are there obligations to progressively realize rights, but that the ICESCR articulates certain immediate obligations, including both the minimum core¹³⁶ and the obligation to ‘take steps’ towards full realization, as well as the non-retrogressive principle that protects the current level of rights in the country from worsening. The Limburg Principles define a violation of ESR as “a failure by a State party to comply with an obligation contained in the Covenant (ICESCR),” which includes the obligation to respect as well as to fulfill. States may themselves violate certain rights, then, for example, by forcibly evicting a group of people, especially those who are vulnerable.¹³⁷ Recognizing the plight of the evicted, homeless now, HROs would, then, point to the violator and articulate a clear policy change. Violations, here, are not the result of a lack of resources, but of “unwillingness, negligence or discrimination” on the part of the state.¹³⁸ Roth notes that, “the nature of the violation, violator, and remedy is clearest when it is possible to identify arbitrary or discriminatory governmental conduct that causes or substantially contributes to an ESC rights violation.”¹³⁹

Chapman, the first theorist to articulate the ‘violations approach’ for ESR, argues that this approach is significantly easier to monitor and more exact than a progressive

¹³⁶“Protection from starvation, primary education, emergency healthcare, and basic housing are among the minimum requirements to live a dignified life and it is the duty of governments to ensure these at all times.”

ESCR-Net, *Minimum Core Obligations*, n.d, <https://www.escr-net.org/resources/minimum-core-obligations> (accessed March 17, 2017).

¹³⁷ "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly*, (1987): 122-135.

¹³⁸ Amnesty International, *HUMAN RIGHTS FOR HUMAN DIGNITY.*, n.d., <https://www.amnesty.org/en/what-we-do/living-in-dignity/> (accessed January 20, 2017).

¹³⁹ Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly*, (2004): 69.

realization approach, making it not only more effective, but also more feasible.¹⁴⁰ Similar to AI, Chapman recommends a way to ‘quantify violations’ with a threefold classification, encompassing “violations resulting from acts by the government,” “violations related to discrimination,” and “violations due to the state’s failure to fulfill minimum core obligations” (1996). Each violation can be an act of “commission or omission.”¹⁴¹ The first, an act directly performed by the state, is most similar to CPR, Chapman claims, where a state commits a violation or fails to halt a third party from violating another’s rights. Acts of omissions, less commonly shamed, are failures by state parties to meet all their obligations including taking steps to progressively realize rights and fulfilling the minimum core. Noting the difficulty of clarity in the progressive realization approach further, Roth claims that focusing on resources makes it difficult to establish a remedy to the violation (with debate over what policies are best to realize rights and how much a government should allocate to these).¹⁴² With violations, on the other hand, the remedy for the state is simply to halt its activities, to stop forcibly evicting or to stop discriminating in health care provision. As outlined in detail in the Maastricht Guidelines, acts of commission, the focus of this paper, include:

“(a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;

(b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;

¹⁴⁰Audrey R. Chapman, "A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly*, (1996): 23-66.

Following Chapman’s cue, other scholars and activists, including Leonard Rubenstein (2004), Irene Khan (2009), and Kalantry et.al (2010) too insist that a ‘violations approach’ can produce substantial change in ESR.

¹⁴¹ Ibid.

¹⁴² Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly*, (2004): 63-73.

(c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;

(d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;

(e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;

(f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;

(g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.”¹⁴³

Here, a failure to comply because of a lack of resources does not constitute a violation. The Maastricht guidelines note, “in determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a state to comply with its treaty obligations.”¹⁴⁴ In this clear articulation, the violations approach involves a heavily legalistic framework, giving priority to instances where HROs can make a consistent deductive argument with a hypothesis that assigns blame and responsibility to a single perpetrator to halt a single violation.

Today, HROs continue to use the violations approach. With the recent creation of an individual complaints mechanism for ESR in an Optional Protocol (2008), Kalantriy et.

¹⁴³ Urban Morgan Institute for Human Rights, International Commission of Jurists (1952-), Rijksuniversiteit Limburg. Centre of Human Rights, "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," *Human Rights Quarterly*, (1998): 691-704.

¹⁴⁴ Urban Morgan Institute for Human Rights, International Commission of Jurists (1952-), Rijksuniversiteit Limburg. Centre of Human Rights, "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," *Human Rights Quarterly*, (1998): 691-704.

al illustrate how the violations approach gains increasing salience.¹⁴⁵ However, there are many limitations to the approach, particularly its ignorance of the importance of resources for the full realization of ESR. The violations approach squarely focuses on the obligations to respect and promote ESR, without acknowledging or committing much to the obligation to fulfill. Noting this, other scholars suggest alternatives to encompass this last obligation. In the next subsection, I look at these limitations.

Limitations and Alternatives to the Violations Approach

In the case of CPR, a violator, violation, and remedy is often clear. For example, in the case of torture, the government exists as an apparent violator with the violation the act itself and the remedy halting the torture. This does not necessarily apply to ESR. For example, a case where such clarity is apparently missing is that of the right to education. Here, the violator could range from the state to private actors and within these large groups, many other subgroups are all potentially blameworthy. Then, there is consistent debate on who should provide education, through what programs and in what capacities. According to Roth, a lack of clarity occurs because ESR inherently involve questions of “distributive justice” that CPR do not. INGOs are not well-equipped to address structural inequality and, Roth insists, nor should they have the power to influence the allocation of resources and public goods in a way that does not correspond to the wishes of the domestic public. He notes, when it comes to matters of distributive justice, “given that respect for ESC rights often requires the reallocation of resources, the people who have the clearest standing to insist on a particular allocation are usually the residents of the

¹⁴⁵Sital Kalantry, Jocelyn E. Getgen, and Steven Arrigh Koh, "Enhancing Enforcement of Economic, social and cultural rights using Indicators: A Focus on the Right to Education in the ICESCR," *Human Rights Quarterly*, (2010): 253-310.

country in question.”¹⁴⁶ For example, if a given country does not meet its minimum core obligation for free and compulsory primary education for all children because it allocates resources to other avenues, this is a question for local state officials and their constituents. For an HRO to shame said country successfully would be a difficult, if not an impossible, feat.

Garnering public support for the violation itself may be difficult because, as in this example, perhaps those not attaining education by and large belong to already disadvantaged groups for whom the domestic population has no sympathy and perceiving domestic opposition, the international community of states and the United Nations feels loath to impose. Moreover, the remedy itself is difficult to allocate. What program should receive less funding so that more of the government’s resources may go into building quality schools? Some would even argue that growth will eventually eradicate the problem and that education should be a private rather than a public good. In the face of this opposition, HROs can simply request inexpensive policy changes such as commitments not to discriminate in schools because of gender or race. Highlighting these problems with the violations approach, Ibhawoh states incredulously, “sections of a population living in poverty would have to be living in poverty because of a state’s discriminatory practices...in order for the condition to be considered a human rights violation within the scope of the organization’s mandate.”¹⁴⁷ Arguments based on the justiciability of ESR, then, have a limit.

¹⁴⁶ Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly*, (2004).

¹⁴⁷ Bonny Ibhawoh, "Beyond Naming and Shaming: Methodological Imperatives of Economic, Social, and Cultural Rights Advocacy," *African yearbook of international law*, (2008): 49-67.

Nevertheless, unlike Roth, other scholars propose different avenues, encouraging INGOs to expand and take on more, proposing more of a reacceptance of progressive realization and suggesting quantitative methods that would make naming and shaming ESR in its complexity easier to address. Khan, for example, argues that HROs need to recognize material deprivation as well as discrimination, without disproportionately focusing on one to the exclusion of the other. She notes, “the human rights response to poverty cannot be partial, focusing only on people’s right to inclusion and security, while neglecting deprivation and voicelessness, or vice versa.”¹⁴⁸ Echoing this sentiment, Donnelly calls for a shift away from the violations approach with ESR to an approach that recognizes social allocations and provisions, although he does not discuss the details of such an approach and what it would mean for human rights. He states, “We certainly want states to stop violating human rights. But we want much more. And even stopping violations is largely a matter of creating effective systems of protection and provision.”¹⁴⁹ Another scholar, Fiona Robinson, similarly, argues that although AI and the human rights movement’s acceptance of ESR is prominent especially in the context of globalization, simply adding ESR to CPR will lead to a failure to fulfill ESR and instead scholars need to re-conceptualize rights as a collective rather than an individual property.¹⁵⁰ Likewise, Chong, resisting what he sees as the hegemony of the law in human rights, advocates for an emphasis towards the moral, away from the legal since “legalization is not the only or even the most natural way of understanding and engaging in human rights politics.”¹⁵¹

¹⁴⁸ Irene Khan, *The Unheard Truth: Poverty and Human Rights*, (New York: W.W. Norton and Company, 2009):18.

¹⁴⁹Jack Donnelly, "Human Rights and Social Provision." *Journal of Human Rights*, (2008): 123-138.

¹⁵⁰Fiona Robinson, "NGOs and the Advancement of Economic and Social Rights: Philosophical and Practical Controversies," *International Relations*, (2003): 79-96.

¹⁵¹ Chong, Daniel P. L, *Freedom from Poverty: NGOs and Human Rights Praxis* (Philadelphia: University of Pennsylvania Press, 2010): 5, 27.

The legal system too has little to no experience tackling cases of ESR violations and other traditionally used, more economic, frames resist the legal articulation of economic concepts. St. Clair and McNeill write, “treating poverty as a violation of human rights simply does not fit the analytical perspectives, cognitive and policy instruments of economics.”¹⁵² Another argument against the violations approach for ESR is that INGOs risk spreading themselves too thin and compromising their independence. *The Economist* in its critique of AI’s acceptance of ESR, for example, notes that although “Cases do exist where violations of political rights and of economic ones are hard to separate...the new Amnesty is surely open to the charges both that it is campaigning on too many fronts, and that the latest focus comes at the cost of the old one.”¹⁵³ Here, *The Economist* insists that AI’s adoption of ESR takes too many resources away from their commitment to CPR.

Considering these limitations of the violations approach, some scholars propose ways HROs can operationalize progressive realization instead. Yamin, for example, promotes the use of large scale data, statistics and indicators¹⁵⁴ in shaming efforts to underscore the immensity of the problems, moving away from HROs’ traditional emphasis on individual stories. To allow for this, Fukuda-Parr et. al. create the Social and Economic Rights Fulfillment Index (SERF).¹⁵⁵ Adding further support to the progressive

¹⁵²Desmond McNeill and Asuncion Lera St. Clair, *Global Poverty, Ethics and Human Rights*, (New York: Routledge, 2009): 127.

¹⁵³ The Economist, *Amnesty International: Many rights, some wrongs*, March 22, 2007, <http://www.economist.com/node/8888792> (accessed March 1, 2017).

¹⁵⁴ “Human rights indicators are tools that are intended to expose violations of and monitor compliance with legal commitments.”

Alicia Ely Yamin, *Power, Suffering, and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter*, (Philadelphia: University of Pennsylvania Press, 2015), 12.

¹⁵⁵ This is an aggregate indicator composed of individual disaggregated rights including the right to adequate food (malnutrition prevalence, and for OECD countries low birth weight for babies), the right to

realization approach, in a direct response to Roth, Rubenstein notes that, in fact, “while budget decisions can theoretically pit funds to realize one right against funds for another in a zero-sum game, diverting resources from one program to another where a dollar for health may mean a dollar less for education, that is not how these decisions tend to play out. Instead, pressure to realize one right tends to enlarge the pot.”¹⁵⁶ He notes that this is the case because of international assistance where international audiences upon learning of the severity of problems from INGOs contribute monetary resources for their alleviation. He contends too that a commitment to violations where countries with less resources are simply not shamed because they lack resources will prompt some of the worst violators to continue with their violations unchecked.¹⁵⁷

The violations approach, then, presents a variety of benefits and limitations that activists must consider when deciding whether to adopt the approach and that have implications for the effectiveness of the naming and shaming. At the moment, HROs primarily use this approach in practice. In the next section, I look at another potential

housing (improved sanitation (% population with access), rural improved water (% rural population with access), improved water (% population with access)), the right to education (primary school completion rate, gross combined school enrollment rate, gross secondary school enrollment rate, for OECD countries average of average math and science program for international student assessment scores), the right to social security, the right to health (contraceptive prevalence rate, survival to age 65, life expectancy at birth, child mortality rate), and the right to decent work (poverty head count, for OECD long term unemployment rate, relative poverty rate). To account for progressive realization, they use Achievement Possibilities Curve (that work similarly to Production Possibilities Curves) which they claim allow “apples-to-apples comparisons across countries” so that countries’ commitments to ESR can be recorded while taking into account their differing resources.

Sakiko Fukuda-Parr, Terra Lawson-Remer, and Susan Randolph, *Fulfilling Social and Economic Rights*, (New York: Oxford University Press, 2015).

¹⁵⁶ Leonard S. Rubenstein, "How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth," *Human Rights Quarterly*, (2004): 858.

¹⁵⁷ Ibid.

limitation of shaming that scholars have yet to address in the context of ESR, namely its potential to further an ‘imperial’ project before describing my case.¹⁵⁸

Applying Economic Rights in the International Context: Hegemony and Imperialism

A prominent critique of the international legal regime is its contribution to the propagation of hegemony. ESR has the potential to back the imperial project or to exist as a counterhegemonic force, which, in turn, influences its effectiveness. In *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (2003), activist-doctor Paul Farmer argues for an understanding of the ways in which human rights are politicized. Farmer claims, “promoting social and economic rights is the most important struggle of our time, but we can no longer speak of rights in a depoliticized way. If we forget that human rights are a struggle for shifting power relations and that human rights are fundamentally a question of structural violence, all the new rhetoric of rights will lead our generation to simply ‘manage social inequality’.”¹⁵⁹ ESR itself in its ties with justice politicizes economic and social issues, in challenging the Western emphasis on CPR, placing, as Khan describes it, ‘bread before ballots.’¹⁶⁰ One must, then, understand rights

¹⁵⁸ Practically, too, in the process of naming and shaming, to refrain from propagating hegemony, activists must ensure that they treat those they attempt to aid with full dignity and respect. This includes guaranteeing that representations and photographs of those in poverty, circulated among a largely Western donor public, do not propagate stereotypes or turn bodies into spectacles. Pruce and Budabin state, “We insist on the centrality of representation as a key variable because human rights advocates must prioritize the autonomy and dignity of the individuals for whom they purport to work.” Thus, HROs must remain cognizant of the indirect effects of their actions in shaming ESR.

Joel R. Pruce, and Alexandra Cosima Budabin, “Beyond naming and shaming: New modalities of information politics in human rights,” *Journal of Human Rights*, (2016): 408-425.

¹⁵⁹ Desmond McNeill and Asuncion Lera St. Clair, *Global Poverty, Ethics and Human Rights*, (New York: Routledge, 2009), 52.

¹⁶⁰ Irene Khan, *The Unheard Truth: Poverty and Human Rights*, (New York: W.W. Norton and Company, 2009).

in the context of international political relations to fully appreciate their effects. In this section, I outline the ways in which rights, particularly ESR, can and do contribute to hegemony and counterhegemony.

In her seminal article, “Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy,” Balakrishnan Rajagopal asks whether international law can aid developing countries and if it can, what would help it do so better. Rajagopal stresses the separation between the hegemonic and the counterhegemonic in international law, providing “a critical analysis of the hegemonic nature of human rights and development discourses in contemporary international law” to allow the field to aid developing countries better.¹⁶¹ Considering contemporary uses of international law, Rajagopal illustrates the history of human rights’ use as a counterhegemonic weapon against apartheid, to fight for Palestinian sovereignty and for the self-determination of many postcolonial nation-states while, at the same time, stressing its consistent, recent use in legitimating the ‘imperial project,’ particularly as it materializes in humanitarian interventions and development.¹⁶² This last is the most pertinent to this paper. Rajagopal states, “The coalescing of different, often contradictory, agendas under the name of development, and the highly ideological role that development has performed since its inception, make it clear that it is a prime source of

¹⁶¹Balakrishnan Rajagopal, "Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy," *Third World Quarterly*, (2006): 767-783.

¹⁶² Imperialism is the process by which countries create and maintain the Empire. The Empire is a structure, involving a number of powerful countries (the Global North) controlling other less powerful countries (the Global South. Imperialism can and, in the past has, taken the form of territorial control. Today though, imperialism is non-territorial, a “more informal and anonymous” project, that creates power relations through global networks of communication and informal networks of power. “Cultural imperialism” or “hegemony” works as the West proliferates its cultural ideas to ‘liberalize’ the world and by asserting the supremacy of its values including human rights, secures economic and political power for itself. J. Roberts, "The State, Empire and Imperialism," *Current Sociology*, (2010): 833-852.

hegemonic international law.” The logic of hegemony and the hold of imperialism is important in this thesis because INGOs potentially play a powerful counterhegemonic role in adopting ESR as a check on the hegemonic development, despite US opposition.¹⁶³ INGOs shame not simply states but also international agencies including the World Bank and the UN in response to the needs of and with the participation of victims of ESR violation. Doing this, INGOs may control the hegemonic hold of the former.

This is also important for the issue of effectiveness because the success of a human rights campaign particularly as it clashes with culture and traditional ways of handling issues has often depended on whether it is perceived as a hegemonic power or not. For example, in the international campaign against female genital mutilation in Kenya, the perception that the campaign was nothing more than “a symbol for colonial attempts to impose outside values and rules upon the population” was apparent and prevalent and led to the increased resistance to the campaign.¹⁶⁴ Reversing this, the perception, then, that, in espousing ESR and rejecting continued US opposition to it, HROs are committing a counterhegemonic act suggests perhaps that the global South might be more receptive to correcting violations of ESR than they would be to tackling violations of CPR. Keck and Sikkink note, “The doctrines of sovereignty and nonintervention remain the main line of defense against foreign efforts to limit domestic and international choices that third world states (and their citizens) can make,” especially noting that, “the issue of sovereignty, for third world activists, is deeply embedded in the

¹⁶³ Balakrishnan Rajagopal, "Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy," *Third World Quarterly*, (2006): 767-783.

¹⁶⁴ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Ithaca: Cornell University Press, 1998), 70.

issue of structural inequality.”¹⁶⁵ By circumventing the issue of sovereignty and emphasizing the needs of the people of a particular state as opposed to ‘universal,’ moral, (assumedly) Western values, INGOs encourage states to comply with their recommendations.

Taking ESR’s counterhegemonic potential even further, some scholars, like Ravlich, use ESR to address large structural issues inherent in the international system itself. ESR can keep neo-liberalism in check, control the effects of the free market economy, correcting for its ‘negative externalities’ so to speak, to reduce structural violence and the inequality between rich and poor.¹⁶⁶ In his book, *World Poverty and Human Rights*, Pogge argues that the structure of the global economy and its institutions create poverty. They do this by taking resources from the poor without compensation and aiding corrupt local elites. He states, the “citizens of the affluent countries, in collusion with ruling elites of most poor countries, are harming the global poor.”¹⁶⁷ ESR can call into question this international system of inequality.

In this section, then, I have outlined the ways in which shaming can contribute to the realization of ESR, the ways it may harm, and the limitations of this approach. This literature review contributes to my subsequent analysis of the right to housing in the case of Kenya. Considering that the right to housing is an ESR and more broadly a human right, much of the debate that surrounds naming and shaming human rights and approaches to ESR advocacy applies to this context and this case. Particularly the

¹⁶⁵ Ibid: 251

¹⁶⁶Anthony George Ravlich, *Freedom from our Social Prisons: The Rise of Economic, Social and Cultural Rights*, (Lanham: Lexington Books, 2008).

¹⁶⁷Thomas Pogge, *World Poverty and Human Rights*, (Malden: Polity Press, 2012), 55.

theories and empirical studies on shaming broadly and on ESR explicitly present a variety of lenses by which to look at my case to decipher its efficacy and present many potential options for the results. In the analysis of my paper, then, I apply Risse and Sikkink's spiral model to my case and use a realist lens to counter some of the assumptions of the model. This allows me to situate my findings firmly in the naming and shaming literature as I emphasize in my conclusion. Before exploring this in greater detail, though, in the next chapter, I develop a background to introduce my case.

Chapter 3: Case Background

I begin this section with a brief outline of the international law related to the right to housing, with an account of the ICESCR before describing the right to housing itself in detail and how international HROs and other international institutions have sought to operationalize the right by focusing on forced evictions as a major violation of the right. Next, I give a brief background on the case of Kenya.

The Case of Housing as part of ESR

A specific look at the ICESCR

The ICESCR is the main international treaty that addresses questions of ESR.¹⁶⁸ In 2008, an Optional Protocol added an individual complaints mechanism to the treaty making it easier to monitor these rights. Prominent guidelines and addendums clarified violations of the ICESCR.¹⁶⁹ In its basic composition, the treaty is divided into five parts. The first part establishes, as does the ICCPR, the right to self-determination. The second part includes general provisions to realize every right. The third part lists the actual rights themselves, including prominently the right to work and social security, the right to an adequate standard of living, to basic health care, and to education. The fourth part discusses international assistance, implementation of treaties progressively and establishes the Committee on Economic, Social and Cultural Rights (CESCR) to monitor

¹⁶⁸ Although ICESCR includes cultural rights, I do not address these because they are more often addressed under the nondiscrimination clause of the ICCPR rather than the ICESCR.

¹⁶⁹ Other treaties also have some provisions for ESR, including the Convention on the Elimination of all Forms of Discrimination Against Women (1979) and the Convention on the Rights of the Child (1989) as well as many regional treaties, such as the African Charter on Human and Peoples Rights (1981), the African Charter on the Rights and Welfare of the Child (1990), the European Social Charter (1996), the American Convention on Human Rights (1969) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988).

their realization. The final part is general restrictions and notes on the interpretation of the treaty. The ICESCR for each right enshrined provides the dual imperatives of “freedom from the state” and “freedom through the state.”¹⁷⁰ There are 161 state parties who have signed and ratified the ICESCR.

The primary method to enforce ESR, then, takes the form of monitoring by the CESCR. This treaty body has four main functions, namely to periodically review reports on the State’s implementation of treaties, to articulate the contents of rights and obligations through general comments, to examine individual complaints, and to conduct inquiries if it receives reliable information of grave or systematic violations of ESR. The UNHRC also implements special procedures, particularly Special Rapporteurs on a variety of ESR issues, including one on the right adequate housing, health, safe drinking water and sanitation. The Special Rapporteur’s tasks include investigating and publicly reporting the general situation of each right, responding to individual complaints by discussing them with state representatives, carrying out country visits in certain places and reporting and making recommendations to the UNHRC. From 2005, the UN also established a Universal Periodic Review, which involves an interactive dialogue between states about issues concerning their human rights records. Regional mechanisms can enforce ESR, including the African Commission and Court on Human and Peoples’ Rights (which though it has the potential to enforce ESR has taken very little measure thus far), the European Committee of Social Rights, and the Inter American Commission

¹⁷⁰ UN, *The International Covenant on Economic, Social, and Cultural Rights*, New York: United Nations Office of the High Commissioner for Human Rights, December 16, 1966.

and Court on Human Rights, which has a special unit on economic social and cultural rights.

In practice, when shaming, activists most often conceptualize ESR as linked to poverty. UN Special Rapporteur on Poverty, Philip Alston notes that, poverty leads to many major human rights issues, including violations of both CPR and ESR.¹⁷¹ This is because the most vulnerable to such violations tend to be the poorest, particularly in reference to the right to an adequate standard of living. In fact, the move to accept ESR in the twentieth century comes from the development of a less income-centered definition on poverty that became popular at the end of the Cold War.¹⁷² Here, moving beyond defining poverty as a simple lack of income or wealth, the economist-philosophers Amartya Sen and Martha Nussbaum establish poverty as a lack of capabilities. Sen notes, “poverty has to be seen...as failures of certain basic capabilities (rather than of lowness of income per se)” where capabilities are the “various things that people are able to do or

¹⁷¹Henry J. Steiner, Philip Alston, and Ryan Goodman, "Is Poverty a Violation of Human Rights?" In *International Human Rights In Context*, by Henry J Steiner, Philip Alston, & Ryan Goodman, 308-313, (New York: Oxford University Press, 2008).

¹⁷²A large factor starting the trend in human rights, in particular, was the 2003 United Nations Educational, Scientific and Cultural Organization (UNESCO)'s campaign, that ultimately failed at the time, but eventually led to an increasing appreciation of ESR, titled 'Poverty as a Human Rights Violation.' This campaign was set to involve a gathering of scholars to discuss the issue at prominent academic institutions. Spearheaded by a previous Secretary General of AI, Pierre Sane, then Assistant Director-General of UNESCO, the campaign sought tools to bring about a radical reframing of poverty. Yet, after the first gathering at Oxford, which centered on a discussion by the speaker, Thomas Pogge, on his then-recent, influential book, *World Poverty and Human Rights*, with persistent disagreements between academics, under increasing pressure to tone down its language, and facing a cut in funding, UNESCO cancelled future events. UNESCO lacked clout because the US deemed it a hyper-left wing organization hostile to the free market. This reputation allowed for easy backlash against the body. Still, many practitioners and activists of human rights subsequently started inspecting poverty and other ESR problems through the lens of human rights. For example, former High Commissioner for Human Rights, Mary Robinson, began to refer less to the need for poverty reduction and more to demanding a halt in the 'violation of' the right to be free from poverty. Desmond McNeill and Asuncion Lera St. Clair, *Global Poverty, Ethics and Human Rights*, (New York: Routledge, 2009).

be” that life consists of.¹⁷³ Capabilities look to the actual quality of life and freedoms of citizens, necessary for well-being.¹⁷⁴ Reframing poverty as the lack of opportunities, HROs treat it as a multidimensional issue.¹⁷⁵ Echoing this sentiment, the CESCR describes poverty as “a human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political, and social rights.”¹⁷⁶ The denial of ESR, then, often moves beyond the immediate violation of a right, creating a cycle. For example, denied the right to an education, many children find themselves trapped in a cycle of poverty, unable to find or keep work, lacking the resources to provide for an adequate standard of living so that the violation of one right also often involves the violation of many others. For example, if denied the right to adequate housing, women face an increased risk of harm in the form of domestic

¹⁷³Amartya Sen, "Conceptualizing and Measuring Poverty," In *Poverty and Inequality*, by D. Grusky, & R. Kanbur, (Stanford: Stanford University Press, 2006), 34.

¹⁷⁴ Nussbaum ties the capabilities approach more closely to rights. She claims, “capabilities, I would argue, are very closely linked to rights, but the language of capabilities gives important precision and supplementation to the language of rights.”

Martha C. Nussbaum, "Poverty and Human Functioning: Capabilities as Fundamental Entitlements," In *Poverty and Inequality*, by David B. Grusky, & Ravi Kanbur, (Stanford: Stanford University Press, 2006), 52.

¹⁷⁵ Politicizing it further, they connect the presence of it to the convergence of manifold global and national forces that maintain inequalities consistently. According to Alston, “Economic and social inequalities are often categorized as “vertical inequalities”, referring to the distribution of something such as income, health or power.” Although most ideologies would accept as inevitable and even desirable a degree of social and economic inequality, there is widespread agreement on access to equal opportunity. “It is clear therefore that the most impoverished suffer the most extreme effects of inequality for a variety of reasons. In part, this is because their influence and capacity to exercise rights is diminished relatively, even if not absolutely, as others become wealthier and gain greater political and economic power, and in part because they are more vulnerable to the harms associated with social unrest, crime and violence.”

Philip Alston, *Promotion and Protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, Human Rights Council Report, New York: United Nations General Assembly, 2015.

Nevertheless, the link between poverty and inequality is debatable. For this see Beteille, Andre, “Poverty and Inequality,” *Economic and Political Weekly* 38, no. 42 (2003): 4455-463.

<http://www.jstor.org/stable/4414161>.

¹⁷⁶ Henry J. Steiner, Philip Alston, and Ryan Goodman, "Comment on Historical Origins of Economic and Social Rights," In *International Human Rights in Context: Law, Politics, Morals: Text and Material*, by Henry J. Steiner, Philip Alston, & Ryan Goodman, (New York: Oxford University Press, 2008)

abuse. ESR also affects a large number of people where inequalities in ESR lead to discrimination and even arguably ‘cause’ certain conflicts.¹⁷⁷

This interpretation of the ICESCR presents important implications for the specific right to housing present in the treaty

The right to housing

In this subsection, then, I begin by noting the international law related to the right to housing, including its explanation in General Comments 4 and 7. I record the ways in which international institutions initially sought to operationalize the right narrowly as ‘forced evictions.’ I proceed to give an account of the limitations of law concerning the right. When shaming the right, HROs draw on this law, making it essential for my project.

First articulated in 1948, the right to housing appears in Article 25 of the UDHR and Article 11 of the ICESCR. Article 11 states,

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”¹⁷⁸

Over the decades, state parties to the UN consistently solidified the right by including it in other major international treaties such as the Convention on the

¹⁷⁷ To that effect, Irene Khan, the previous Secretary General of AI, highlights four main ‘causes’ and consequences of poverty that limit capabilities, including discrimination, bias often hidden behind formal equality; a lack of political and legal power, making the poor “voiceless;” and constant insecurity, making every day a struggle for survival.

Irene Khan, *The Unheard Truth: Poverty and Human Rights*, (New York: W.W. Norton and Company, 2009).

¹⁷⁸ UN, *The International Covenant on Economic, Social, and Cultural Rights*, New York: United Nations Office of the High Commissioner for Human Rights, December 16, 1966.

Elimination of all forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

In practice, since the 1987 International Year of Shelter for the Homeless, international institutions, the UN, and NGOs often operationalize the right to housing in a limited manner, though, solely as the right to be free from forced evictions. The CESCR holds a prominent place in this trend, explaining and elaborating on the specificities of forced evictions in General Comments No. 4 and 7 that serve as comprehensive guidelines against the practice. The CESCR also works to focus on the issue when reviewing country reports.¹⁷⁹ The UN Special Rapporteur, in 2007, presented some Basic Principles and Guidelines for Development-Based Evictions.¹⁸⁰

In General Comment 4, the CESCR establishes an expansive definition of housing as “the right to live somewhere in security, peace, and dignity,” noting some specific essential components for its full realization.¹⁸¹ To meet the right to housing, a state must ensure legal security of tenure, availability of services, materials, facilities, and infrastructure,¹⁸² affordability, habitability, accessibility,¹⁸³ and cultural adequacy. The

¹⁷⁹ du Plessis, Jean, and Malcolm Langford, *Dignity in the Rubble? Forced Evictions and Human Rights Law*, (Oslo: University of Oslo, 2004).

¹⁸⁰ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, "BASIC PRINCIPLES AND GUIDELINES ON DEVELOPMENT-BASED EVICTIONS AND DISPLACEMENT," *United Nations*, 2007, http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf (accessed April 1, 2017).

¹⁸¹ UN Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)," *refworld*, December 13, 1991, <http://www.refworld.org/docid/47a7079a1.html> (accessed December 13, 2016).

¹⁸² *Ibid.* Those that are “essential for health, security, comfort and nutrition,” including “sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.”

¹⁸³ to employment, health care, schools, childcare and social facilities

Comment defines “adequate” housing as housing that is “habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors.” The CESCR recognizes that although implementation of these components will vary country to country with a mix of public and private actors providing services, the state should promote the right’s fulfillment by multiple, particularly legal means.¹⁸⁴ Drawing on previous discussions on the importance of protecting people from unfair evictions, such as those by the United Nations Conference on Human Settlements (1976), the Global Strategy for Shelter to the Year 2000 (1988), the Habitat Agenda, and a statement by the Commission on Human rights, General Comment 7 establishes forced evictions, in particular, as a clear violation of the right to housing, stating the necessity of searching for appropriate alternative solutions in cases where it proves necessary.¹⁸⁵ According to AI, “A forced eviction is the removal of people against their will from the homes or land they occupy without legal protections and other safeguards.”¹⁸⁶ Although states are the main party responsible, others involved, particularly the World Bank and third party corporations, also find themselves subject to pressure. International law articulates that evictions should only occur as a last resort when all other alternatives have been explored and procedural protections are in place, including after consultation of those to be

¹⁸⁴Ibid. Including through “(a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions.”

¹⁸⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions," *refworld*, May 20, 1997, <http://www.refworld.org/docid/47a70799d.html> (accessed January 20, 2017).

¹⁸⁶ Amnesty International, *DRIVEN OUT FOR DEVELOPMENT: FORCED EVICTIONS IN MOMBASA, KENYA*, Amnesty International, (2015).

affected by the eviction, deliverance of notices to the people prior to the eviction attempt, availability of information on the eviction to all parties involved, the presence of government officials during the evictions, identification of those carrying out the evictions, assurance that evictions do not take place in bad weather or at night, and a guarantee of resettlement or compensation is assured.¹⁸⁷

There are multiple potential causes of evictions. COHRE lists some including “development and infrastructure projects,” “large international events, “urban redevelopment and ‘beautification’ initiatives,” “property market forces,” “deteriorating economic conditions” and “political conflict.”¹⁸⁸ A prominent cause, development induced displacement, involves the removal of groups of people (often those who have lived in the area for decades and have cultural ties to the land) for the purposes of modernization and industrialization.¹⁸⁹ These evictions work under the façade of ‘serving the “public good”’ with projects intended to bolster economic growth and improve cities.

¹⁸⁷ It is essential to note, however, that, “not every eviction that is carried out by force constitutes a forced eviction – if all the legal safeguards and protections required under international law are complied with, and if the use of force is proportionate and reasonable, then the eviction would not violate the prohibition on forced evictions.” In the exceptional cases in which evictions do occur, they must be “(a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines.” A state must deliver “(a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives; (b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups; (c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.” The sites for relocation of the evicted must be adequate. Full participation and agreement of the resettled is required as well as restitution if applicable, as outlined under the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

¹⁸⁸ du Plessis, Jean, and Malcolm Langford, *Dignity in the Rubble? Forced Evictions and Human Rights Law*, (Oslo: University of Oslo, 2004).

¹⁸⁹ Globalization leading to the growing privatization of housing makes it difficult for the poor to find affordable housing, resulting in displacement of the marginalized.

Many such projects are supported by international development assistance, implicating foreign governments and banks in violations of the human right. As time progresses, more and more INGOs gain an increasing recognition that the World Bank can help shame the state and itself deserves shaming for the part it plays in many of these development projects that lead to evictions.

The CESCR solidified its commitment to halting forced evictions when it consistently looked to the issue in its review of country reports. The first instance where the committee declared evictions in a state a violation of ESR successfully stopped the attempt. Here, from 1985 to 1995, the Dominican Republic sought to forcibly evict hundreds of thousands of slum-dwellers to ‘beautify’ the capital. Local NGOs appealing to international human rights NGOs, including the Center on Housing Rights and Evictions were able to prompt the CESCR to condemn the state’s actions in 1990 and persuade the state in 1991 to not evict 70,000 more dwellers.¹⁹⁰ In another instance, in its review of Nigeria, the CESCR expressed concerns for the problems of homelessness and forced evictions in the state and recommended the state halt this practice.¹⁹¹

Forced evictions too emphasize the ‘interdependency of human rights’ since not only is the act a violation of ESR but also of CPR including the right to be free from discrimination, “the right to respect for the home, right to privacy, right to life and right to freedom of movement and right to property,” as present in the ICCPR.¹⁹² In fact,

¹⁹⁰ *MODULE 13: The Right to Adequate Housing*, n.d,
<http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module13.htm> (accessed March 10, 2017).

¹⁹¹ *Ibid.*

¹⁹² A report by COHRE describes the spillover effects of evictions, claiming, “the practice of forced eviction can result in the violation of a number of other rights including: • The right to non-interference with privacy, family and home • The right to be protected against the arbitrary deprivation of property • The right to the peaceful enjoyment of possessions — many forced evictions occur without warning, forcing people to abandon their homes, lands and worldly possessions • The right to respect for the home •

Article 17 of the ICCPR implicitly directly calls on states to protect and respect the home. It states, “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”¹⁹³ In his 2004 report, the Special Rapporteur on the right notes, “The issue of forced evictions necessitates the examination of a range of issues related to adequate housing, including land, property, access to water and sanitation, health, poverty, gender, children, indigenous people, minorities and vulnerable groups, with security of tenure, security of the home and security of the person at the core.”¹⁹⁴ In his seminal book, *Evicted*, Desmond describes the impact a lack of housing can have on the creation and sustenance of poverty. Without a home, those evicted find themselves in shelters or on the streets, suffering depression.¹⁹⁵ Desmond finds that simply having a home motivates people to work harder, be happier and more civically engaged.¹⁹⁶ Forced evictions, then,

The right to freedom of movement and to choose one's residence • The right to education — often children cannot attend school due to relocation • The right to water — as evicted people often find it far more difficult to access potable water • The right to life — violence during the forced eviction which results in death, is a common occurrence. • The right to security of the person — implementing authorities rarely provide evicted persons with adequate homes or any form of compensation, thus rendering them vulnerable to homelessness and further acts of violence. • The right to effective remedies for alleged human rights violations... Women suffer disproportionately from the practice of forced eviction, given the extent of statutory and other forms of discrimination against women.

COHRE Africa Programme Fact-Finding Mission, Langford, Malcolm, du Plessis, Jean; Stuart, Rob, *Listening to the Poor? Housing Rights in Nairobi, Kenya*, (Utrecht: The Centre on Housing Rights and Evictions (COHRE), 2006).

¹⁹³United Nations, *International Covenant on Civil and Political Rights*, New York: United Nations, December 16, 1966.

¹⁹⁴Miloon Kothari, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: Adequate housing as a component of the right to an adequate standard of living. Report by the Special Rapporteur, Miloon Kothari Addendum: Mission to Kenya (9-22 February 2004)*, (New York: United Nations Economic and Social Council, 2004).

¹⁹⁵Matthew Desmond, *Evicted: Poverty and Profit in the American City*, (New York: Crowblishers, 2016): 5.

¹⁹⁶ For Desmond, in the crisis of housing, human rights principles, “two freedoms,” are at odds with each other, namely “the freedom to profit from rents and the freedom to live in a safe and affordable home” with the government protecting the latter over the former consistently (308).

in combining ESR and CPR are particularly appealing for INGOs looking to illustrate the fundamental justiciability of ESR.

Regional treaties address the right to housing.¹⁹⁷ The African charter on Human and peoples' rights adjudicated in a prominent case in 2001 against forced evictions, *SERAC and CESR v Nigeria*.¹⁹⁸ A non-human rights initiative that addresses housing rights includes the MDGs, particularly in the commitment to achieve improvements in the lives of 100 million slum dwellers by 2020 as well as the World Summit for Sustainable Development where states agreed to halve the proportion of people without access to adequate sanitation by 2015. Considering the Constitutions of particular countries, South Africa was the first to explicitly contain the right.

However, international law's articulation of the right to housing, as Hohmann indicates, has its weaknesses and characteristic difficulties.¹⁹⁹ One issue is the definition of the right and a house itself, which leads to a lack of understanding about when and who can claim the right so that law remains vague and undefined. A second issue Hohmann points to is concern that "the right's interpretation is overly procedural, even 'programmatic,' privileging means at the expense of ends, and resulting in a right that appears to recede from potential claimant's grasp."²⁰⁰ Here, most jurisdictions list out

¹⁹⁷ such as the revised European Social Charter, the European Convention of Human Rights in Article 8, Article 9 of the American Declaration of the Rights and Duties of Man, the Arab Charter and the African charter on Human and peoples' rights

¹⁹⁸ The case was brought against Nigeria by the Ogoni leaders based on the actions of the State oil company. The African Commission explicitly mentioning General Comment Nos. 4 and 7 to rule in favor of the plaintiffs.

African Commission on Human and Peoples Rights, *155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria*, http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30_155_96_eng.pdf, Banjul: African Commission on Human and Peoples Rights, 2001.

¹⁹⁹ Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities*, (Oxford: Hart Publishing, 2014).

²⁰⁰ *Ibid*, 2.

procedural steps to realize the right rather than establish substantive outcomes for the actual enjoyment of the right. Also, the legal articulation of the right does not express the conditions of the violation of the right and its associated suffering and marginalization sufficiently. Because of this, Hohmann notes, that while international actors have addressed and defined the right to housing in terms of respecting and protecting it from the threat of forced evictions, they have not sufficiently addressed the state's duty to fulfill. She states, "Although the Committee has dealt extensively with the issue of forced evictions in relation to security of tenure, it has not paid sufficient attention to the systemic issues underlying the inability of large proportions of the world's population to enjoy security of tenure."²⁰¹ The right to housing in international law, then, comes with some problems.

Nevertheless, in recent years, advocates, prompt the state not simply to halt evictions and put procedural protections in place, but also to reform the system to ensure adequate housing, prompting substantive change. On 3 October 2005, World Habitat Day, Kofi Annan connected the negative right of freedom from forced evictions to the positive right of freedom from homelessness in stating that, the 'build-up of slums and informal settlements occurs in large part because of policies and exclusionary practices that deny public services and basic facilities...to informal settlements' and that 'evictions and demolitions are not the answer to the challenges of rapid urbanization. We must have pro-poor, participatory urban development... with respect for human rights.'²⁰² This

²⁰¹ Ibid, 135.

²⁰² Kofi Annan, "IN MESSAGE TO MARK WORLD HABITAT DAY, SECRETARY-GENERAL STRESSES IMPORTANCE OF PRO-POOR, PARTICIPATORY URBAN DEVELOPMENT IN LINE WITH HUMAN RIGHTS," *United Nations: Meetings Coverage and Press Releases*, September 27, 2005, <http://www.un.org/press/en/2005/sgsm10130.doc.htm> (accessed March 1, 2017).

considering that, according to UN-HABITAT, as of 2015, one in eight people or around a billion people live in slums where dwellings are often inadequate.²⁰³

The focus of this paper, civil society organizations, including the Centre for Housing Rights and Evictions (COHRE), Amnesty International, Habitat International Coalition - Housing and Land Rights Network (HIC-HLRN) and the World Organization Against Torture seek to address this problem of adequate housing in many ways. They use “urgent actions” to disseminate information in the media and among members, conduct ‘fact-finding missions’ to gather information on the case at hand, document and survey individuals affected to attain impartial information, mobilize locals (individuals and organizations), prompt international and regional human rights bodies to act such as by submitting reports to treaty bodies and commissions and aiding with litigation at the local, national and regional level. There is also a consistent attempt to prioritize vulnerable groups, particularly women, children, and indigenous groups. Having explicated the law INGOs invoke in these attempts, establishing a base for my later discussion, below, I begin with a background of my case, Kenya.

Kenya

I begin this subsection with an explanation of why Kenya makes a good case for my analysis and conclude with a brief history of the state’s relationship with housing rights.

Context of Kenya: Background

²⁰³ "Slum Almanac 2015-2016," *UN-HABITAT*, n.d, <https://unhabitat.org/slum-almanac-2015-2016/> (accessed March 20, 2017).

I take the case of Kenya as a representative typical case of countries INGOs most often shame.²⁰⁴ Risse and Sikkink outline five factors that influence shaming and Kenya stands at about the same level as many other shamed countries on these factors.²⁰⁵

The first factor establishes whether the regime is democratic or authoritarian. As are most countries in the world today, Kenya (according to the Freedom House Index) classifies as “partly free.”²⁰⁶ Although it is officially a democracy with elections, the state lacks many civil and political liberties that would ensure the country’s full freedom. Whether a state is democratic or authoritarian has significant impact on whether it will comply with shaming with different theories suggesting that democracies can be either more or alternatively less likely to respond to shaming. More likely because they are not outliers like authoritarian regimes and are more attuned to complying with international norms to maintain their self-image as law abiding states. However, in some cases, perhaps particularly with many ESR, democracies can be less likely to comply with human rights because having already complied with one set of international norms simply with their democratic status, states are often loath to address others, especially if their image in the international community will not change significantly if they refuse to

²⁰⁴ Conducive to shaming, Kenya is party to a number of international and regional human rights treaties, including the ICCPR (as of 1976), the ICESCR (as of 1972), CEDAW (as of 1984), CRC (as of 1990), including the Optional Protocol on the Involvement of Children in Armed Conflict as of 2002 and on Prostitution and Pornography as of 2000), ICERD (as of 2001), ICRPD (as of 2008), CAT (as of 1997), The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (as of 2003), CSR (as of 1966), the Rome Statute of the International Criminal Court (as of 2005), the African Charter on Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child (as of 2000) and on the Rights of Women in Africa (as of 2003). Kenya has also ratified 49 ILO Conventions. In 2000, Kenya committed to achieving the Millennium Development Goals.

²⁰⁵ Thomas Risse and Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction," In *The Power of Human Rights: International Norms and Domestic Change*, by Kathryn Sikkink, Thomas Risse, & Stephen C. Ropp, 1-38. (New York: Cambridge University Press, 1999).

²⁰⁶ Ibid.

comply. Also, for a lot of third party nations that may contribute to the shaming effort like the US, a commitment to democracy may seem more important than one to human rights and many may believe that over time, democracy will inevitably lead to improvements in quality of life including human rights. On the other side of the coin, autocratic regimes too may either be more or less likely to respond favorably to shaming attempts. They may be unlikely to commit to human rights since they already possess a 'bad' reputation and shaming would have no significant costs. Alternatively, these same regimes may be more likely to comply with human rights norms to gain some credibility, legitimacy, and reputation in the international community.

A second factor that would significantly influence a state's compliance with human rights is whether it has consolidated or limited statehood. Statehood signifies the institutional capacity of states. In "Human Rights in areas of limited statehood: the new agenda," Borzel and Risse note that many states fail to enforce laws and cannot implement human rights norms not out of a lack of political will, but rather, out of a lack of resources and infrastructure. In these instances, states are unable to respond to shaming and fail to enforce international law out of no or little fault of their own. Commitment, here, may not lead to compliance.²⁰⁷ In their study, Risse and Borzel decipher a means to measure statehood, using Stephen Krassner's (1999) definition of "domestic sovereignty" as "the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity." Risse and Borzel rank countries on their relative level of statehood according to three broad

²⁰⁷Tanja A. Borzel and Thomas Risse, "Human rights in areas of limited statehood: the new agenda," In *The Persistent Power of Human Rights: From Commitment to Compliance*, by Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp, (New York: Cambridge University Press, 2013).

indicators the “failure of state authority,” the “portion of country affected by fighting,” and “bureaucratic quality.” According to the Bertelsmann Transformation Index, Kenya has a “defective democracy,” one that is not fully consolidated but not fully autocratic either.²⁰⁸ Kenya is not a failed state and not a completely consolidated one, representative of majority of the states in the world that NGOs will seek to shame. Many NGOs have circumvented the issue where the state has limited authority by appealing to international donors, funding many operations in the country and often complicit in violations of rights. In the case of Kenya, INGOs shame both the state and external actors to bring about change.

Like most other countries shamed too Kenya’s population, GNI per capita, and annual GDP growth continue to rise over the years. As of 2015, Kenya’s GNI per capita is \$1,340, its annual GDP growth is 5.6% and its population is up to 46.1 million people.²⁰⁹ The poverty rate in 2005²¹⁰ was 33.6%, up from 21.5% in 1997.²¹¹ The poverty headcount ratio at national poverty lines, though, is 45.9% of the population. An indication of increasing economic growth, unemployment is low and decreasing at 9.2% as of 2014. According to a study conducted by the Institute for Security Studies, termed “Reasonable Goals for Reducing Poverty in Africa – Targets for Post 2015 MDGs and Agenda 2063,” Kenya is sixth among the “top 10 countries in Sub-Saharan Africa with

²⁰⁸ Bertelsmann Stiftung. *BTI 2016 — Kenya Country*. Gütersloh: Bertelsmann Stiftung, 2016.

²⁰⁹ All statistics from the World Bank

World Bank, *Kenya*, 2016, <http://data.worldbank.org/country/kenya> (accessed March 1, 2017).

²¹⁰ Poverty headcount ratio at \$1.90 a day. With the poverty headcount at less than \$3.10 a day instead, the percentage of people in poverty increase to 58.9% of the total population.

²¹¹ This, however, might be more an indication of improvements of the measure rather than an actual increase in poverty.

large populations living in extreme poverty.”²¹² Despite Kenya’s increasing economic growth, the state has failed to translate this into poverty reduction, refusing to implement pro-poor policies. According to UN-HABITAT, “depending on the city, 60-80 percent of Kenya’s urban population live in slums that are characterised by lack of access to water and sanitation, insecure tenure, lack of adequate housing, poor environmental conditions, and high crime rates.”²¹³ Many other countries failing to meet the right to housing are in a similar condition.

A third factor that influences the effectiveness of naming and shaming, according to Risse and Sikkink, is whether the state is centralized or decentralized. In Kenya, as in most countries, particularly democracies around the world, the state is largely decentralized and continues to be more so, presenting a powerful problem to naming and shaming as a tactic.

The fourth and fifth factor that influence a state’s response to the effectiveness of shaming are material and social vulnerability. Kenya is a lower middle income country, indicating a degree of material vulnerability, making it more susceptible to shaming by powerful donors who, in turn, might be prompted to the cause by INGOs. Social vulnerability indicates an actor’s “desire to be an accepted member of a social group or a particular community.”²¹⁴ This varies from state to state and is a subjective measure that

²¹²Samuel Karanja, *Kenya ranked sixth on extreme poverty index*, February 18, 2015, <http://www.nation.co.ke/news/Poverty-Africa-Index-Kenya-Inequality/1056-2628224-vqlg4v/index.html> (accessed February 10, 2017).

²¹³Raakel Syrjänen, Tom Osanjo, and UN-HABITAT KENSUP Team, *UN-HABITAT and the Kenya Slum Upgrading Programme: Strategy Document*, (Nairobi: United Nations, 2008).

²¹⁴ Thomas Risse and Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction," In *The Power of Human Rights: International Norms and Domestic Change*, by Kathryn Sikkink, Thomas Risse, & Stephen C. Ropp, 1-38. (New York: Cambridge University Press, 1999).

is difficult to measure. A factor that influences the extent to which shaming occurs in a country too is the presence and the number of domestic NGOs in that country.

Having noted the factors that make Kenya a typical case, next, I move into a subsection that looks at the history of housing rights in the case.

History of Housing Rights in Kenya

The first forced eviction in Kenya was the elimination of a bazaar as a health hazard in Nairobi in 1904 by the British colonial government.²¹⁵ Following this initial attempt, the government proceeded to forcibly evict thousands of indigenous peoples from their homelands with the promise of resettlement, overlooking the fact that land for many Kenyans has special cultural, social, political, and economic significance. In doing this, the British created a massive displacement, placing natives on marginal lands so that a small group of white settlers could exploit their fertile agricultural land, ignoring communal land ownership, imposing private ownership and hefty taxes. In the 1950s, the land crisis reached its apex and as reserves (where Kenyans were placed) proved increasingly difficult to survive in, one of the factors that drove the move towards independence was the problem of adequate housing. After independence, though, the new government elite replaced the British elite and maintained the latter's discriminatory policy.²¹⁶ With increasing urbanization and globalization, more people moved to the cities, resulting in an increase in slums. An AI report notes, "Between 1971 and 1995, the

²¹⁵Kefa M. Otiso, "FORCED EVICTIONS IN KENYAN CITIES," *Singapore Journal of Tropical Geography*, (2002): 252-267.

²¹⁶The Moi government of 1978 to 2002 exacerbated the problem by following the British trend of irregularly privatizing public lands, and transferring native lands to well-connected individuals and land-buying companies. Jacqueline M. Klopp, "Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya," *africaTODAY*, (2000): 7-26.

estimated number of informal settlements grew from 50 to over 130, and their population rose tenfold, from some 100,000 to over 1 million people.”²¹⁷ In the late 1970s and 1980s, the government responded with a policy of demolition, working to destroy informal settlements on the grounds of health hazards or for beautification (following British standards of viewing slums as “eyesores”), rendering many who were already poor and vulnerable homeless. Moreover, government public policy overlooked informal settlements in city planning projects. However, later, taking a firm step in the right direction, the government moved towards improving slum conditions rather than attempting to eliminate them altogether (at least in rhetoric). Nevertheless, starting in the late 1990s and into the 2000s, evictions for the ‘greater good’ of development increased.²¹⁸

Today, in Kenya, evictions and inadequate housing in informal settlements arise for a variety of reasons including “widespread poverty,” “over-urbanisation,” “shortages of decent low income housing,” “iniquitous patterns of land ownership,” “lack of land and absence of tenure for the urban poor,” “poor enforcement of building and zoning laws leading to the deterioration of formal residential areas” and “use of inappropriate urban planning policies and standards that limit sufficient supply of and access to good quality housing.”²¹⁹ The perpetrators of evictions are most often central governments,

²¹⁷ Amnesty International, *KENYA: THE UNSEEN MAJORITY: NAIROBI'S TWO MILLION SLUM-DWELLERS*, Amnesty International, 2009.

²¹⁸ Ibid.

²¹⁹ Considering the origins of forced evictions, Otiso argues that violations of housing rights result from “factors embedded in the country’s political economy, in particular, the grossly inequitable land ownership structure which makes it difficult for the poor to access land and decent shelter,” calling for Kenya to “make its political economy more inclusive, implement land reform, domesticate its municipal planning and related by-laws and create a proactive slum settlement policy.”

Kefa M. Otiso, "FORCED EVICTIONS IN KENYAN CITIES," *Singapore Journal of Tropical Geography*, (2002): 252-267.

private organizations, state corporations and foreign businesses. Most evictions involve the use of force and violence by police forces.

Communities have responded to the crisis of evictions primarily with legal action. Multiple local NGOs have responded to the issue, often offering legal advice, dedicated in large part to ending forced evictions, including Muungano wa Wanavijiji Maskini (Federation of the Urban Poor), and Kituo Cha Sheria (Legal Aid Centre). Government opposition to change, though, has limited the power of local NGOs and campaigns, prompting the need for international assistance and shaming.

Chapter 4: Analysis

In response to human rights violations and atrocities, INGOs can shame the state from the top down in a variety of ways. In this section, I look at the ways in which international organizations have sought to shame Kenya for its violations of the right to housing. When first beginning my analysis, I compared the state's responses to shaming of negative rights such as evictions and positive rights, such as to improve the quality of housing in slums, looking at whether the question of resources influences the policies the state chooses to implement, considering the theoretical arguments. I recognized, though, that addressing evictions themselves can involve both negative rights in the form of short term immediate aid and an instant call to halt the practice and end the violence/harassment as well as a more positive right related to long term reallocation, rehabilitation, and reparations if applicable. What I found to be a more pertinent distinction instead, in the course of my analysis, was the separation of shaming attempts themselves. I found that INGOs shame either specific attempts at evictions by the state in urgent actions and press releases, calling for immediate action, or shame the state's treatment of the right to housing more broadly in a sustained manner. Where Kenya often responded to the latter by implementing new laws and policies to address the issue, it rarely if ever halted evictions in response to the former.

In this section, then, I begin with an account of a few cases of specific violations INGOs addressed and the state's responses to those attempts. I, then, present some analysis. Next, I look at INGOs' attempts to shame the state in general and the state's responses to that, following with some analysis. Before I go into these, though, I briefly indicate some nascent attempts at shaming when INGOs and other international

institutions had just started to consider the potential of ESR and many still noted violations of the right to housing as violations of the ICCPR rather than ICESCR.

Nascent Attempts at Shaming

While some early attempts at shaming Kenya looked to the right to housing, particularly defined as evictions, as enshrined in the ICESCR, most shaming attempts instead labelled evictions violations of the ICCPR. In this subsection, I mention some such attempts.

Although delivering only one comment specific to the right itself, the CESCR prompted one of the earliest shaming attempts by an international body in the case of the right to housing in Kenya. On the occasion of Kenya's first periodic review, in 1993, the Committee noted "with great concern that practices of forced evictions without consultation, compensation or adequate resettlement appear to be widespread in Kenya, particularly in Nairobi."²²⁰ At this early stage, then, the CESCR began to define the right to housing closely with a right to be free from forced evictions. This concern is the product of a report from Foodfirst Information and Action Network (FIAN)²²¹ submitted to the committee that documented "large-scale, forced evictions of hundreds of thousands of ethnic groups." Moreover, though not specific to housing, the CESCR insists that development itself can be discriminatory, involving disparities in the treatment of different regions of the country, leaving the vulnerable continually dispossessed. Later,

²²⁰ Committee on Economic, Social and Cultural Rights, *Summary Record of the 12th Meeting*. Record, Geneva: United Nations: Economic and Social Council, 1994.

²²¹ "FIAN International was founded in 1986 as the first international human rights organization to advocate for the realization of the right to adequate food and nutrition." FIAN International, *A human rights organization*, 2017, <http://www.fian.org/who-we-are/who-we-are/> (accessed March 30, 2017).

INGOs and international institutions will note the prominence of development based evictions.

Nevertheless, for the most part, the shaming of evictions (and the right to housing) in the 1990s was connected to and de-emphasized in the face of the violation of other more fundamental, often civil, and political, rights. For example, the 1995 US State Department Report on Human Rights describes the forcible eviction of the Kikuyus by the Maasai from the Rift Valley region of the country where they had been living. However, rather than emphasizing the resultant violation of the right to housing, the State Department lists the case as an example of the use of excessive force in internal conflicts and the discriminatory treatment of minority ethnic groups.²²² Similarly, HRW and the UNDP highlight the discriminatory treatment of internally displaced persons that lead to evictions as violations instead of the act itself, noting the lack of security and protection. HRW notes, “The government is slowly, but surely, consolidating and legalizing the illegal gains from the “ethnic” violence in such a way as to reduce permanently land ownership of certain ethnic groups in the areas which it has promised to its supporters.”²²³ This follows the trend set by the Vienna Declaration in the World Conference on Human Rights in 1993, centering on the violent and persecutory nature of forced evictions to stress its fundamental civil and political injustice as a facet of ESR.²²⁴

Seeing an opening with the regime change from authoritarian to democratic that occurred in 2002 when President Moi Kibaki stepped down, considering the expectation

²²² U.S. Department of State, *Kenya Human Rights Practices, 1994*, U.S. Department of State, 1995.

²²³ Human Rights Watch, *Government Undermining of the UNDP Program*, 1997, <https://www.hrw.org/reports/1997/kenya2/9.htm> (accessed March 1, 2017).

²²⁴ World Conference on Human Rights in Vienna, "Vienna Declaration and Programme of Action," United Nations Human Rights Office of the High Commissioner, June 25, 1993.

that democracies are more receptive to human rights than dictatorships, international shaming intensified. The emphasis, though, remained on viewing ESR through the lens solely of discrimination connected to CPR. By the start of the 21st century, international human rights bodies described evictions more concretely as major violations. For instance, in 2003, HRW released a report and related news releases on the issue of property rights violations and their link to AIDS, evictions, and poverty, specifically considering women in Kenya.²²⁵ HRW frames this case as an issue of discrimination since customary law often evoked concerning women's right to property, particularly when inheritance is a concern, places women in a dependent and subservient position in comparison to men.²²⁶ The international treaties invoked include CEDAW and the ICCPR, with brief mention of a violation of the right to housing as present in the ICESCR. HRW, though focusing on women, seeks to engage its audience by emphasizing the harm to everyone if women are left destitute, homeless, and poor, noting the effects on development and economic growth and connecting violation of the right to property for women to the violation of other rights, including children's rights to an education and basic needs, including food. Presenting a partnership of sorts between rights and development, HRW cites the UNDP and states, "If Kenya is to meet its development aims, it must address the property inequalities that hold women back."²²⁷ HRW assigns blame explicitly to the state for its failure to protect women and its maintenance of unjust laws. As a remedy, it calls on the government to alter these laws

²²⁵ Human Rights Watch, *Women Stripped of Property in Kenya: AIDS, Evictions, and Poverty Linked to Property Rights Violations*, News, Nairobi: Human Rights Watch, 2003.

²²⁶Ibid. In a similar vein, noting the impediment of legal participation, a report by COHRE illustrates how threats and intimidation by the police prevented many potential plaintiffs from filing a case against the state for evictions, highlighting discrimination against the homeless and slum dwellers.

²²⁷Ibid.

and to include provisions defending women's rights in the Constitution and prioritization of women's specific vulnerability in the government, with gender specific programs in the Department of Housing. HRW includes recommendations for others that might shame the state into altering its practices, including the World Bank, other international donors, and the United Nations.²²⁸

Other than shaming by INGOs, UN human rights bodies, including the Special Rapporteur on adequate housing at the time, Miloon Kothari, addressed the issue. After visiting the country at the invitation of the state (illustrating in part the new democratic state's formal commitment to the right to housing), Kothari submitted an oft-cited report to the Commission on Human Rights on the general status of the right in Kenya, framing violations of ESR in light of discrimination, echoing HRW's report.²²⁹ Likewise, the

²²⁸ Even as other INGOs moved away from only inspecting the right to housing through the lens of discrimination, HRW continued to focus on discrimination. In early 2013, HRW more distanced from shaming the right to housing in Kenya took on the issue of evictions as they concern refugees. Emphasizing a violation of thousands of refugees' right to freedom of movement and of basic economic and social rights, HRW issued a press release against the proposed eviction and relocation of Somali refugees in Kenya. By November 2016, as the issue gained media recognition, AI shamed the Kenyan government for its forced displacement of Somali refugees, living in the state. The emphasis was on violations of civil and political rights, though, with the word eviction not used by AI.

Human Rights Watch, *Kenya: Don't Force 55,000 Refugees Into Camps*, Human Rights Watch, 2013.

Amnesty International, *KENYA: NOWHERE ELSE TO GO: FORCED RETURNS OF SOMALI REFUGEES FROM DADAAB REFUGEE CAMP, KENYA*, November 14, 2016,

<https://www.amnesty.org/en/documents/afr32/5118/2016/en/> (accessed February 14, 2017).

²²⁹ Echoing HRW's report, the Rapporteur concerning discrimination against women describes how customary law negatively affects women who are denied de facto property ownership, noting an example of how widows are often forced to marry their dead husband's brother or relative "to ensure her economic and social protection." Female headed households often struggle the most, with women forced often into prostitution, risking HIV/AIDs and other problems. The Rapporteur indicates some cases of evictions that were not highly popularized by INGOs and the media and others that were in the spotlight for years. This includes displacement in the Kieni forest of survivors of politically instigated clashes from 1992-3, of around 3,000 people. The state justified evictions by expressing concerns about the natural resource, the forest, and its environment. The state promised those evicted land until a proper reallocation could occur, but the land promised was small and, as of the Rapporteur's visit a decade following the evictions, the relocation program had not begun. Another case the Rapporteur mentions is of land cartels in Nairobi's urban slum areas, involving the illegal allocation of land. Yet another is a case of evictions, conducted in 2004, this one by the at-the-time current regime by the Kenya Railways Corporation and Kenya Power and Lighting Corporation, targeting poor slum residents. This led to the demolition of 2,000 structures, leaving thousands homeless. "According to information received from non-governmental sources, over 150,000 people would have been made homeless by the evictions and 17,600 structures destroyed. An estimated

Special Rapporteur emphasizes putting in place a rights-based approach to development, ensuring that efforts to ‘upgrade’ slums follow the basic tenets of international law.

Responses by the State to these Attempts

The state responded to these early shaming attempts in much the same way it would shaming attempts later. It failed to address questions of the specific instances of evictions conducted and instead underscored its main policies in relation to the right to housing broadly, regardless of whether such policies and promises in rhetoric led to actual changes in conditions.

In the report, it submitted to the CESCR in the early 1990s, rather than focusing on or even addressing evictions and other negative rights, Kenya emphasizes its commitment to progressive realization and implementing the positive right aspects of the broad right. To address the problem of affordability, Kenya mentions its enactment of the Housing Act, which “provides for loans and grants of public money for the construction of dwellings and establishes a Housing Fund and a Housing Board.” The state also stresses its other initiatives to encourage “cooperative housing schemes, mortgage lending and institutional housing programs” as well as mentioning its provision of housing to civil servants in urban areas.²³⁰ Kenya’s commitment to the right to housing,

330,000 people living in Kibera would be affected, including by displacement.” This case, in turn, became very popular among INGOs shaming.

Miloon Kothari, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: Adequate housing as a component of the right to an adequate standard of living. Report by the Special Rapporteur, Miloon Kothari Addendum: Mission to Kenya (9-22 February 2004)*, (New York: United Nations Economic and Social Council, 2004).

²³⁰ Kenya, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights*, Report, New York: UN Committee on Economic, Social and Cultural Rights, 1993.

though, more often than not, involves an adherence to market economics, such as promoting economic growth and development, ignoring ESR.

In January 2003, in partnership with UN-Habitat, the Ministry for Roads, Public Works, and Housing committed to the Slum Upgrading Program. The aim of this program is to improve housing, infrastructure, and livelihoods in slum areas with the project set to start in Nairobi and Kisumu with implementation to begin between 2005-2020.²³¹ It seeks to contribute to decentralization, negotiation, participation, and empowerment of local communities. However, invoking rights, multiple stakeholders, shack owners, rent collectors and slum dwellers are afraid of forcible eviction as a result of the project, noting that although it strives to ensure participation, it does not seem to maintain this as a priority of the project.²³² In 2004, the Ndungu Commission issued a lengthy report, citing the illegality of evictions, and drawing heavily on international guidelines to do so.²³³ Concerning the actual specific issue of evictions, following a case filed in the High Court, the government ordered a temporary ban on the evictions.

Nevertheless, with the problem of enforcement and implementation continuing to this

²³¹Raakel Syrjänen, Tom Osanjo, and UN-HABITAT KENSUP Team, *UN-HABITAT and the Kenya Slum Upgrading Programme: Strategy Document*, Nairobi: United Nations, 2008.

²³² One example the Rapporteur gives is of a slum upgrading project in the Mathare slums, funded by Germany, which since it did not consult the slum dwellers raised rent prices to levels prior tenants could not afford, causing them to have to move as other families who could afford the prices moved in. Miloon Kothari, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: Adequate housing as a component of the right to an adequate standard of living. Report by the Special Rapporteur, Miloon Kothari Addendum: Mission to Kenya (9-22 February 2004)*, (New York: United Nations Economic and Social Council, 2004).

²³³ The Ndungu Commission itself, though, rose more out of a local push for land rights than an international one, established in 2003 in response to local pressure on land rights. The new (post-Moi) regime also sought to assure its place in the international community and created the National Human Rights Commission. It recommended the implementation of two general rules. One rule prompts the government to take back illegally allocated public land from private actors only if the public interest outweighs private interest. Implementation of these rulings though is complex as there exists no way to value public against private interests and because there is a general lack of political will on the part of government officials to enforce this ruling.

Casty G. Mbae-Njoroge and Joseph Kieyah, *Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis*, Nairobi: Kenya Institute for Public Policy Research and Analysis (KIPPRA), 2010.

day, there has been no actual change in outcome as the number of women who own property stays at 5% from the early twentieth century.

States, then, fail to alter their practices or halt evictions in response to shaming, although they do institute general policies.

Specific Attempts at Shaming: Case of the Forest Peoples

The forest peoples in Kenya suffered and continue to suffer greatly under forced evictions. Still, because of a confluence of interest in the area between human rights and environmental groups and the prominence of the issue as a question of indigenous peoples' rights, shaming efforts are more intense and consistent for the two main cases of the forest peoples suffering in Kenya, the Ogiek and the Sengwer. In this subsection, I begin with an account of shaming efforts targeting the Ogiek, then delve into the state's responses to these efforts. Next, I illustrate shaming efforts concerning the Sengwer and the state's responses to these. I follow with a brief account of other specific shaming attempts, prominently for evictions occurring in slums. In the next subsection, I develop an analysis of my results.

As early as the 2004 report by the Special Rapporteur, the eviction and related marginalization of the Ogiek people was in the spotlight.²³⁴ Although eviction attempts against this group date back to British resettlement efforts, shaming pressure intensified with recent eviction attempts by the Kenyan government. These cite a law dedicated to protecting the environment that argues for the defense of the forest's natural flora and

²³⁴ Miloon Kothari, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: Adequate housing as a component of the right to an adequate standard of living. Report by the Special Rapporteur, Miloon Kothari Addendum: Mission to Kenya (9-22 February 2004)*, (New York: United Nations Economic and Social Council, 2004).

fauna, proscribing any groups from residing in or using forest land without permission, where permission is set to be given only when the person requesting it works to conserve the land. Using this law, the state has argued that the Ogiek threaten natural forestry and conservation and since 2001 demanded evictions of the group, while permitting private logging companies to settle on and use the land. Responding to the call for help, HROs began shaming efforts alongside an existing network of environmental organizations shaming to stop the logging. Both these groups noted that logging harms the land while the Ogiek's natural practices conserve and better it so that the latter should stay and the former be banned. In 2004, COHRE, an INGO working specifically on the issue of housing rights, first shamed the state for the continuation of eviction, the number rising to more than 50,000 in 2005 with 7 schools demolished.²³⁵ COHRE called for intensified shaming at the international level from other INGOs and third parties to bolster its efforts.²³⁶ In 2006, "an interim fact-finding mission report from the Kenya National Commission on Human Rights states that the settlements were burned, property and food stocks destroyed, children (half of the affected population) can no longer attend school, all residents, particularly children, lack food, proper clothing and shelter, no relief food has been sent by the government or any other agency and there are no medical services to deal with the likely increase in disease."²³⁷ In 2007, AI, COHRE and news sources in

²³⁵du Plessis, Jean, and Malcolm Langford, *Dignity in the Rubble? Forced Evictions and Human Rights Law*, (Oslo: University of Oslo, 2004).

²³⁶ Ibid.

²³⁷ Other evictions include 120 families in Nakuru, 30 houses demolished in Kibagare, leaving 140 homeless and destitute, the homes of 850 families in the Deep Sea settlement, 20 families from the Tudor Estate, 4000 residents of the Eburu Forest (reported by Relief Web), and 3000 residents of the Mt. Elgon Forest. In 2006, fires in Mukuru, leaving 20,000 homeless, were allegedly too a government land grabbing ploy.

Human Rights Education Associates and Niels J. Harbitz, *Forced evictions reach crisis levels*, Press Release, Human Rights House, 2006.

partnership primarily with Hakijamii, KNHCR and the Kenya Land Alliance continued shaming the repeated forced evictions of the Ogiek in the Mau Forests.²³⁸ They indicated that laws in Kenya continually fail to match international guidelines despite the state's promises. Increasingly shifting from stressing evictions as violations of ICCPR, these reports note the fundamental role the ICESCR plays. Following an extensive investigation, INGOs explicitly assign blame to the state, tracing orders for the evictions to the District Commissioner's office, which, in turn, gets its orders directly from the Office of the President with a 2004 cabinet decision purportedly giving the original orders. As remedies, they stress an immediate ban on evictions, the necessity of guidelines and a resettlement plan that includes compensations and investigation into illegal land allocation.²³⁹

As of 2008, a second major, environmental-based HRO, the Forest Peoples Program created in 1990 to support "the rights of people who live in forests and depend on them for their livelihoods," also issued press releases and reports concerning the evictions of the Ogiek.²⁴⁰ As evictions continued, in 2010, with the help of multiple INGOs, the Ogiek brought their case before the African Commission. In 2012, the African Commission referred the case to the African Court and called for a halt to the evictions. At the same time, an INGO report, backed by the ILO Committee of Experts, brought the forced evictions of the Endorois and the Ogiek to the notice of the UN

²³⁸ Amnesty International, *KENYA: NOWHERE TO GO: FORCED EVICTIONS IN MAU FOREST - BRIEFING PAPER, MAY 2007*, Amnesty International, 2007.

²³⁹Ibid.

²⁴⁰ Forest Peoples Programme, "Appeal to protect the rights of all the indigenous Sengwer / Cherangany people who are threatened with eviction from Embobut Forest, Kenya," *Forest Peoples Programme*. 2014, (accessed March 27, 2017).

Committee on the Elimination of Racial Discrimination.²⁴¹ The Committee “noted with concern that Kenya had not acted on the decisions of the African Commission on Human and Peoples’ Rights regarding the forced evictions of the Ogiek and Endorois from their lands, and urged it to provide them with redress.”²⁴² A collective meeting of the KFS, World Bank and multiple INGOs established that rather than harming the land and adversely affecting conservation efforts, the Ogiek benefited and preserved the land.²⁴³ In 2013, then, the African Court issued an order in favor of the Ogiek, halting both evictions and the proliferation of logging companies in the region.²⁴⁴ The decision placed particular emphasis on the right to housing. In February 2014, Survival International, an organization working for the rights of tribal people all over the world, reported further eviction attempts of the Ogiek as well in violation of this ruling, a domestic court order, and its own Constitution.²⁴⁵ More recently, Conservation Watch, reported in August 2016 that KFS had again burned Ogiek homes.²⁴⁶

The state has not responded as expected (by halting evictions) in response to these shaming attempts. Even as the state consents to listen to INGOs under pressure and agrees to help in rhetoric, it fails to implement its rulings and evictions continue to the

²⁴¹ Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review Kenya*, Geneva: United Nations, 2015.

²⁴² Ibid.

²⁴³ Rachel Savage, *Kenya's Ogiek people forced from homes amid 'colonial approach to conservation'*, August 18, 2016, (accessed March 27, 2017).

²⁴⁴ This is an important case not just for Kenya but for the international human rights movement since it is the first case referred by NGOs to the Commission to make it to the Court and set legal precedent. It is also the first case to consider the rights of indigenous peoples.

Minority Rights Group International, *Kenya: Guaranteeing Ogiek rights*, November 14, 2016.

<http://minorityrights.org/law-and-legal-cases/the-ogiek-case/> (accessed March 10, 2017).

²⁴⁵ Survival International, *Ogiek are violently evicted from ancestral home in Kenya*, February 15, 2014, (accessed March 27, 2017).

²⁴⁶ Rachel Savage, *Kenya's Ogiek people forced from homes amid 'colonial approach to conservation'*, August 18, 2016, (accessed March 27, 2017).

present, more than a decade after the first shaming attempt. First, under sustained pressure from both the human rights and the environmental network, the state banned logging in 2001, but left the ban unenforced with the Rapporteur indicating its de facto continuation. At the same time, the state argued that the Ogiek were detrimental to the forest lands.²⁴⁷ Seeking to start a dialogue, though, INGOs recognized the strength of the state's counter. COHRE notes, "Whereas the official reason for the eviction – protection of water catchment areas – has some merit, none of the correct procedures were followed: there was no prior consultation with the affected residents on alternatives to eviction, no due process and no adequate resettlement."²⁴⁸ In May 2005, concerning the evictions of the Ogiek, the Kenyan government told the UN of its commitment to comply with international human rights standards. In 2006, though, the state continued evictions and said it would settle only 250 residents.²⁴⁹ In 2007, it briefly halted the practice for a year while at the same time attempting innovative ways to legitimize evictions, namely by cancelling title deeds of all the residents in the area. Likewise, the state established no resettlement plan. When a domestic High Court ruling in Kenya in 2014 affirmed the Ogiek's right to their land as put forth by the African Court, with the National Land

²⁴⁷ Miloon Kothari, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: Adequate housing as a component of the right to an adequate standard of living. Report by the Special Rapporteur, Miloon Kothari Addendum: Mission to Kenya (9-22 February 2004)*, (New York: United Nations Economic and Social Council, 2004).

²⁴⁸ These evictions were illegal under international law under these conditions: "The notice provided was inadequate and confusing and there was no consultation with residents or effort to find an alternative to evicting them from their homes. None of the evictions was carried out on the basis of a court order; on the contrary there a court injunction halting evictions was ignored. Evictions were executed with excessive force and the authorities responsible for ensuring respect for the law failed to take appropriate action to stop the abuses or to investigate allegations of human rights violations. Many people were left without shelter, livelihoods, and many lost their possessions."

COHRE Africa Programme Fact-Finding Mission, Malcolm Langford, Jean du Plessis and Rob Stuart, *Listening to the Poor? Housing Rights in Nairobi, Kenya*, Utrecht: The Centre on Housing Rights and Evictions (COHRE), 2006.

²⁴⁹ Ibid.

Commission set to protect their rights, evictions still continued.²⁵⁰ Moreover, in this case, international donors including the EU and the Finnish government overlooked the fact that the money they provide to KFS goes into threatening the Ogiek.

In January 2014, continuing on the trend of condemning evictions, the UN Special Rapporteur on the rights of indigenous peoples, James Anaya, expressed discontent over the forcible evictions of the Sengwer indigenous people in the Embobut forests of Western Kenya.²⁵¹ In February, an Intercontinental Cry, a publication of the Center for World Indigenous Studies, described the forcible eviction of the Sengwer from their ancestral forest home by the KFS despite a court order banning these evictions in 2013 and then in 2014.²⁵² The publication traces the project that led to the evictions, the Natural Resource Management Project, to funds from the World Bank, allocated with the goal of protecting the forest and urban water supplies. The publication notes instead that, the KFS sets fire to Sengwer homes and food for years to prompt evictions, using this strategy in 2007, 2009, 2010, 2011, and 2013 after the government signed the Indigenous Peoples Planning Framework. As multiple environmental organizations formed to oppose the evictions, as part of the No REDD network, the Sengwer case gained immense popularity, placing particularly the World Bank under immense pressure.²⁵³ Considering

²⁵⁰ NO REDD in Africa Network, *FORCED RELOCATION OF SENGWER PEOPLE PROVES URGENCY OF CANCELING REDD*, World Rainforest Movement, 2014.

²⁵¹ United Nations Human Rights Office of the High Commissioner, *Kenya / Embobut Forest: UN rights expert calls for the protection of indigenous people facing eviction*, January 13, 2014. (accessed March 27, 2017).

²⁵² Curtis Kline, *SENGWER OF KENYA FORCIBLY EVICTED FROM ANCESTRAL FOREST*, February 1, 2014. (accessed March 27, 2017).

²⁵³ REDD is a UN backed initiative to reduce emissions from deforestation and forest degradation. The No REDD campaign, though, describes the ways in which REDD affects indigenous peoples to bring about genocide. Their website indicates, "But really what REDD means is Reaping profits from Evictions, land grabs Deforestation and Destruction of biodiversity." Global Alliance Against REDD <http://no-redd.com/> (Accessed March 10, 2017)

this case, in an appeal to the state and third party actors, the campaign declared, “We, the No REDD in Africa Network (NRAN) together with the Sengwer Indigenous Peoples Programme and the undersigned 66 organizations and over 300 individuals, strongly condemn the massive evictions and forced relocation of the Sengwer Indigenous People, one of the few remaining hunter-gatherers of the world, from their ancestral home in Kenya’s Cherangany Hills.”²⁵⁴ This network emphasizes the Convention on Genocide. A review by the International Union for the Conservation of Nature (IUCN) “alluded to the role of the Kenyan government's relationship with RaiPly Ltd, a Kenyan company involved in manufacture of wood products” as a factor in the evictions.²⁵⁵ This private company is one of the few exempt from the general government ban on logging. In September 2014, an organization heavily involved with the Sengwer peoples’ case, the Forest Peoples Program issued an appeal for the Sengwer to relevant UN bodies and the government to protect the rights of all Indigenous people who are threatened with eviction from the Embobut Forest. Numerous human rights and environmental organizations signed this document and it centers on shaming the eviction of 6-7000 Sengwer people.²⁵⁶ The Forest Peoples Program begun shaming the state publicly on the

²⁵⁴ NO REDD in Africa Network, *FORCED RELOCATION OF SENGWER PEOPLE PROVES URGENCY OF CANCELING REDD*, World Rainforest Movement, 2014.

²⁵⁵ Chris Lang, *Enough is enough! Stop the evictions of the Sengwer indigenous peoples in Kenya*, May 27, 2016. (accessed March 27, 2017).

²⁵⁶ Signed by Forest Peoples Programme, Global Forest Coalition, Friends of the Earth International, World Rainforest Movement, Survival International, Greenpeace Africa, Center for International Environmental Law, Indigenous Peoples’ & Community Conserved Territories & Areas, Cherangany Multipurpose Development Programme, Sengwer Indigenous Peoples Programme, Timberwatch, National Association of Professional Environmentalists, JA! Justiça Ambiental, Mali Folkecenter, Sustainable Development Institute, Health of Mother Earth Foundation, Centre pour l’Environnement et le Développement, Abibimman Foundation, ADECRU, Maison de l’Enfant et de la Femme Pygmées, NRAN (No REDD In Africa Network), Save the Forest Movement Jarkhand, Wahana Bumi Hijau, Acción por la Biodiversidad, Mekong Energy and Ecology Network, South Asian Dialogues on Ecological Democracy – Nepal, Jikalahari, Econexus, Synchronicity Earth, Friends of the Earth US, FERN, Sengwer Aid, Transition Free Press, Indigenous Peoples Links (PIPLinks), Biofuelwatch, Amigos de la Tierra América Latina y El Caribe, REDD Monitor, The Corner House, Enlace Continental de Mujeres Indígenas de las Américas, The

issue since 2010 when they did their first report on the ‘Burning and Destruction of the Sengwer Peoples’ properties.’ Subsequently, in 2013, the organization issued an urgent appeal against the forced evictions, and in 2014, reported the continued threat in a press release and called for the signing of an AVAAZ petition by international supporters, ultimately collecting 950,000 signatures worldwide.²⁵⁷ The organization delivered another appeal in February 2014, and then in December 2015, in January 2016, March 2016 and finally to prevent the repetition of the problem in the future a letter to the EU on their €31 million Water Tower Protection and Climate Change Mitigation and Adaptation Project in December 2016, since this new project has replaced the World Bank project as a threat to the Sengwer and the Ogiek.²⁵⁸ For this final appeal to the EU, the organization partnered with FERN, a NGO dedicated specifically to ensuring that EU programs and measures achieve the environmental and social justice they set out to. In March 2015, another environmental justice group, Both ENDS, focused pressure on the World Bank, but also mentioned the state’s responsibility.²⁵⁹ AI emphasized the problematic burning of Sengwer houses and mentioned the case in multiple reports including its 2015 submission to the CESCR.²⁶⁰ The Coalition for Human Rights in Development including

Oakland Institute, Mangrove Action Project, Coorg Organisation for Rural Development, Centro de Culturas Indígenas del Perú, Budakattu Krishikara Sangha, Corporate Europe Observatory, Humane Trust / CAFAT, SONIA, Carbone Guinée, Youth's Network to Educate and Empower the Weak, World Family, S.Faizi, and New Wind.

Forest Peoples Programme, "Appeal to protect the rights of all the indigenous Sengwer / Cherangany people who are threatened with eviction from Embobut Forest, Kenya," *Forest Peoples Programme*. 2014, (accessed March 27, 2017).

²⁵⁷ Ibid.

²⁵⁸ Forest Peoples Programme, fern, Swedish Society for Nature Conservation et. al. *URGENT – Re: European Union, Water Tower Protection and Climate Change Mitigation and Adaptation Project (WaTER) in Kenya*. Forest Peoples Programme, 2016.

²⁵⁹ Both ENDS, *SENGWER PEOPLE EVICTED FOR CONTROVERSIAL - WORLD BANK FUNDED - PROJECT IN KENYA*, March 3, 2015, (accessed March 27, 2017).

²⁶⁰ Amnesty International, *KENYA: AUTHORITIES MUST INVESTIGATE VIOLENT ATTACK BY FOREST GUARDS ON SENGWER ACTIVIST*, New York: Amnesty International, 2017.

HRW stressed World Bank involvement in the evictions.²⁶¹ The issue gained so much prominence that alongside other issues, Kenya addressed the problem of the Sengwer in its second universal periodic review in 2015. This developed from observations made by CERD on the Sengwer people.²⁶² By March 2016, with the help of No REDD, the Sengwer wrote to President Uhuru Kenyatta to affirm their right to their ancestral land, describing how their identities remain inextricably tied to the land and indicating that evictions breached both the Kenyan Constitution and multiple international treaties, particularly the ICESCR. In May 2016, No REDD released an article assigning blame for the evictions not only to the state, but also the World Bank.²⁶³

Both the state and the World Bank responded to shaming differently. Where the state continues evictions to this day unapologetically, the World Bank pulled out of the project. Following the court injunction served in April 2013 to halt evictions, in November, the President of Kenya, the Deputy President, and a Senator for the area offered 400,000 Kenyan shillings to the 2,784 families living on the land as compensation, giving the Sengwer until January 2014 to leave willingly.²⁶⁴ The Bank, in turn, now, only threatened to withhold funding but let the project continue de facto. Following the January 2014 deadline set by the President, the government intensified violence against the Ogiek, causing degradation of the forest²⁶⁵. As of October 2014, the

²⁶¹ Coalition for Human Rights in Development, *World Bank Accuses itself of Failing to Protect Kenya Forest Dwellers*, September 29, 2014, <http://rightsindvelopment.org/news/world-bank-accuses-itself-of-failing-to-protect-kenya-forest-dwellers/?lang=world-bank-accuses-itself-of-failing-to-protect-kenya-forest-dwellers> (accessed December 10, 2016).

²⁶² Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review Kenya*, Geneva: United Nations, 2015.

²⁶³ Nafeez Ahmed, *World Bank and UN carbon offset scheme 'complicit' in genocidal land grabs – NGOs*, July 3, 2014, (accessed March 27, 2017).

²⁶⁴ Ibid.

²⁶⁵ Ibid.

World Bank finally took notice and its president Jim Yong Kim personally reached out to the state to help resolve the problem. This, though, was only after a World Bank panel's ignored report noting that they were effectively funding the evictions was leaked and publicized by the Guardian newspaper. By April of 2015, the World Bank stopped funding the forest conservation project, distancing itself from the evictions.²⁶⁶ The differing responses of the state and World Bank showcase how effective shaming is concerning these two different actors. It suggests that INGOs' tactic of influencing Western public opinion can heavily impact INGOs that rely on Western donors concerned about human rights, but do not affect the state to as great an extent. Almost as if to distance itself from potential shaming attempts by INGOs, in 2008, UN-HABITAT also released a report on KENSUP that enhances this theory. UN-HABITAT's report establishes its strict and restricted role in providing technical advice, capacity building, basic infrastructure and testing novel approaches through pilot projects for KENSUP so that actual authority rests in the hands of the state.²⁶⁷

Many other specific efforts to shame evictions occurred, particularly of slum areas where the state often evicted residents for development reasons, all of which government forces sanctioned, ordered, or carried out. In response, along with other INGOs, as part of its Global Dignity Campaign, AI released multiple Urgent Actions, demanding immediate assistance to those left homeless without resources. One such specific eviction AI emphasizes is that of the Deep Sea settlement. The state overlooked the settlers' residence for decades until from 2003-2005 when a private company sought ownership of

²⁶⁶ Jacob Kushner, Anthony Langat, Sasha Chavkin, and Michael Hudson, *Burned Out: World Bank Projects Leave Trail Of Misery Around Globe*, April 15, 2015, (accessed March 27, 2017).

²⁶⁷Raakel yrjänen, Tom Osanjo, and UN-HABITAT KENSUP Team, *UN-HABITAT and the Kenya Slum Upgrading Programme: Strategy Document*, Nairobi: United Nations, 2008.

the land. Subsequently, a domestic court granted an order to demolish the homes of 850 families, only giving newspaper notice of the demolitions to the residents after it had occurred. In response, the church, local and international NGOs including AI began an instant backlash in the media until the High Court of Kenya outlawed the evictions. Yet, in 2007, AI released an urgent action, documenting a fire that destroyed a further 200 homes, with suggestions that the fire was illegally set to forcibly evict residents.²⁶⁸ In 2009, AI noted a further threat of the evictions of more than 100,000 people along the Nairobi River basin for a river clean-up project. AI and COHRE in partnership with two local organizations Hakijamii and Shelter Forum wrote to the Kenyan government in protest. In March 2011, AI reacts against evictions of the Deep Sea informal settlements burned down by fire, noting the occurrence of similar so-called ‘accidents’ in the Kibera slums. “According to the Kenya Red Cross, up to 10,000 people may have been affected by the fire – a majority of them having been made homeless.”²⁶⁹ In October 2012, AI preemptively released a report on the country, describing the fear around evictions in the Deep Sea settlement of 3,000 people for a road construction project funded by the EU.²⁷⁰ AI situated blame firmly on the state, indicating the problematic lack of security of tenure for residents since the land of the settlement is partially on private land and partially on land reserved for road construction, noting prior eviction attempts. In July 2015, AI released an urgent action after the threat of forced evictions of 3000 residents of the Deep Sea informal settlement due to the road construction project became imminent despite the

²⁶⁸ Amnesty International, *KENYA: THOUSANDS FORCIBLY EVICTED FROM KENYA'S FORESTS*, Amnesty International, 2007.

²⁶⁹ Amnesty International, *KENYA: FIRE SHOWS NEED FOR PROTECTION FOR SLUM-DWELLERS*, Amnesty International, 2011.

²⁷⁰ Amnesty International, *Slum dwellers across Africa urge governments to respect housing rights*, Amnesty International, 2012.

consistent shaming AI put the state through over the years.²⁷¹ The Kenya Urban Roads Authority (KURA) has offered some compensation, but it is not sufficient to adequately resettle with. In fact, according to AI, “on 8 July 2015, KURA told residents that unless they withdrew their court action challenging the eviction, KURA would not negotiate with them.”²⁷²

In response to the shaming of evictions in the Deep Sea settlements, as of 2012, although the state did attempt a community meeting and an enumeration of the people to be affected by potential eviction, they did not consult the residents and have not shared a plan for resettlement. While AI was able to halt evictions for a time, it was not the state that decided to this, but rather the EU, having heavily funded the road construction project.²⁷³

Other urgent actions AI issued and specific cases targeted include an urgent action after 3,000 people were evicted from their homes in Githogoro village near Nairobi, given only 72 hours to dismantle their homes and evicted as part of a plan to build a new road in Nairobi, left without shelter in winter.²⁷⁴ In October, on World Habitat Day, AI mentions the state’s refusal to act on these evictions and the lack of due process, consultation, adequate notice and compensation, calling readers to sign a petition.²⁷⁵ In April 2010, AI released another urgent action against the evictions of 50,000 people, mostly slum dwellers in Nairobi living around railway lines for the improvement of the

²⁷¹ Amnesty International, *KENYA: DEEP SEA RESIDENTS AT RISK OF FORCED EVICTION*, Amnesty International, 2015.

²⁷² Naomi Barasa, *Missing Link: The road to development with no human face*, Amnesty International, 2015.

²⁷³ Ibid.

²⁷⁴ Amnesty International, *Slum dwellers across Africa urge governments to respect housing rights*, Amnesty International, 2012.

²⁷⁵ Ibid.

railway who were given no resettlement options.²⁷⁶ In July 2010, AI issued press releases and an urgent action calling for the halting of forced evictions of hundreds and destruction of market stalls in Kabete NITD that were authorized by the Nairobi City Council.²⁷⁷

In 2010, after the African Commission on Human and People's Rights condemned the expulsion of the Endorois people for the purpose of tourism development, shaming rose. The Commission's ruling also legitimated INGO action in the state by including as evidence reports by prominent INGOs including a video by WITNESS²⁷⁸, testimony by HRW. A local NGO, the Center for Minority Rights Development (CEMIRIDE) and an international group, Minority Rights Group International brought the case. "The African Commission found that the Kenyan government has continued to rely on a colonial law that prevented certain communities from holding land outright, and allowed others, such as local authorities, effectively to own their traditional land on "trust" for these Communities."²⁷⁹ It also called on the state to immediately correct the problem.

In September 2011, AI issued a public statement on the explosion and fire (after a petrol pipeline exploded) in an informal settlement, Sinai, located in Nairobi. More than 100 people died, and AI argued that the incident showed the need to address inadequate

²⁷⁶ Amnesty International, *KENYA: MORE THAN 50,000 FACE FORCED EVICTION*, Amnesty International, 2010.

²⁷⁷ Amnesty International, *KENYA: HUNDREDS AT RISK AFTER FORCED EVICTIONS*, Amnesty International, 2010.

²⁷⁸ "WITNESS makes it possible for anyone, anywhere to use video and technology to protect and defend human rights."

WITNESS, *WITNESS: See it, Film it, Change it*, n.d. <https://witness.org/> (accessed April 1, 2017).

²⁷⁹ Human Rights Watch, *Kenya: Landmark Ruling on Indigenous Land Rights*, New York: Human Rights Watch, 2010.

living conditions in slums, a positive right.²⁸⁰ In November 2011, AI issued a public statement addressing evictions near the Jomo Kenyatta airport, carried out by police under orders from the Kenya Airports Authority.²⁸¹ During the African Commission's 50th ordinary session, AI made a statement on Kenya, shaming the eviction of 50,000 people living along railway lines, claiming, "the government should ensure full and effective implementation of the constitutional guarantee to the right to adequate housing, by prohibiting forced evictions, adopting national eviction guidelines and providing all persons with a minimum degree of security of tenure."²⁸² AI arranged for slum residents from Kenya to go to Gambia and address the African Commission itself. An opinion piece in Kenya's Daily Nation newspaper described the sentiment at the address: "Us ordinary Kenyans living in informal settlements face many challenges. The authorities fail to adequately provide us with essential services, such as water, sewers, roads, schools, health clinics and police posts. But the biggest violation of our human rights we face is the threat of forced evictions."²⁸³ Other evictions shamed occurred in the Mitumba informal settlement near the Wilson Airport and in settlements close to the Moi Airbase in Nairobi. In some places, evictions went ahead despite court issued injunctions against evictions.

²⁸⁰ Amnesty International, *KENYA: FIRE SHOWS NEED FOR PROTECTION FOR SLUM-DWELLERS*, Amnesty International, 2011.

²⁸¹ Amnesty International, *KENYA MUST END EVICTIONS AS FEARS INTENSIFY*, Amnesty International, 2011.

²⁸² Amnesty International, *AMNESTY INTERNATIONAL STATEMENT TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: STATE OF HOUSING RIGHTS AND FORCED EVICTIONS IN AFRICA*, Amnesty International, 2011.

²⁸³ Amnesty International, *Kenya slum fires demonstrate need to ensure housing rights*, Amnesty International, 2012.

In 2012, AI continued its international shaming efforts, with a press release on the fires that destroyed 700 homes in Kibera and Mathare. In April 2012, AI addressed the underlying causes of forced evictions, by supporting a local radio project seeking to challenge peoples' perceptions of slum dwellers and increase an emphasis on human rights.²⁸⁴ In 2013, AI partnered with WITNESS and the design firm Pentagram to create a video for the campaign against evictions. At the same time, it issued an urgent action on the violent, forced eviction of 400 families in City Carton and on the same day evictions in neighboring Opendo, home to at least 600 families, calling for immediate attention to the families without access to food, water, and shelter.²⁸⁵

Later in the year 2015, AI reported on another forced evictions case this time in Mombasa at night on the Jomvu informal settlement along the A109 highway in Mombasa with many more evictions threatened in the settlement and in a nearby settlement, Bangladesh.²⁸⁶ The project was part of Vision 2030, "financed by the African Development Bank, the German Development Bank, the European Investment Bank, the EU-Africa Infrastructure Trust Fund, and the Government of Kenya."²⁸⁷ Settlers, here, already faced evictions in 2002 without consultation of the community.

The state seemed to respond to all these urgent actions by promising rhetoric that failed to play out in practice as evictions continue unabated. In 2004, the Ministry of Lands said they would draft guidelines concerning the issue of forced evictions though

²⁸⁴ Amnesty International, *Speaking up from the slums*, Amnesty International, 2012.

²⁸⁵ Amnesty International, *KENYA: 400 FAMILIES FORCIBLY EVICTED*, Amnesty International, 2013.

²⁸⁶ Amnesty International, *DRIVEN OUT FOR DEVELOPMENT: FORCED EVICTIONS IN MOMBASA, KENYA*, Amnesty International, 2015.

²⁸⁷ *Ibid.*

none were forthcoming until shamed in different ways later.²⁸⁸ “In March 2005, Kenya’s Attorney General, Hon. Amos Wako, during his appearance before the United Nations Human Rights Committee in New York, stated: that the Government of Kenya had stopped evictions in Kibera and other informal settlements and that future eviction, if necessary, will be done according to the established international and United Nations standards on evictions.”²⁸⁹ On World Habitat Day, AI announced that Kenya’s highway authority (KEHNA) had agreed that it was wrong in forcibly evicting people from an informal settlement and promised to right the wrongs in a letter sent to AI.²⁹⁰ In its December press release, AI focuses on the case of evictions in Mombasa, presenting it as a victory for the organization’s shaming attempts, highlighting the importance of the local response in getting KENHA to recant.²⁹¹ Nevertheless, the government continued evictions of thousands of people living alongside the country’s railway lines in the next few years and up to the present.

Despite failing to produce actual change in the specific cases shamed, such shaming persists. A recent report by Cultural Survival,²⁹² submitted to the CESCR in 2015, looks at land rights as they relate to indigenous peoples. This organization shames a case of evictions other INGOs often overlook, namely the evictions of over 4,000 families of the Maasai people to build the ‘Olkaria geothermal plant,’ funded by the

²⁸⁸ Ibid.

²⁸⁹ Centre on Housing Rights and Evictions, *Civil and Political Rights in Kenyan Informal Settlements: Submission to the Human Rights Council*, The Global Initiative for Economic, Social and Cultural Rights, 2005.

²⁹⁰ Amnesty International, *Kenya: Authorities must keep promise to compensate victims of forced eviction*, Amnesty International, 2015.

²⁹¹ Renata de Souza, “Finally, justice will be on our side!” *Community fighting forced evictions in Kenya*, Amnesty International, 2016.

²⁹² An international indigenous rights organization in consultative status with ECOSOC

World Bank and supported by the UN Environmental Program. On March 12, 2017, Cultural Survival write a letter to the state addressing the escalation of this issue.²⁹³

Considering its responses in the past, though, the state may not respond as favorably as expected.

Analysis

The effectiveness of international NGOs can be inspected at every stage of the process of shaming. Examining Keck and Sikkink's model, one can note the effectiveness of NGOs, first in their framing of debates by noting whether the issue successfully rose to the agenda, then looking at the "discursive commitments from states and other policy actors," then at whether the INGOs' action of shaming prompted "procedural change at the international and domestic level," whether it affected policy and finally whether there was actual improvement and the behavior of actors involved significantly changed.²⁹⁴ To best understand the effects of these specific shaming attempts noted above, I apply Risse and Sikkink's prominent spiral model mentioned in the literature to the case and consider realist responses to it. This model is helpful, here, for responding to previous literature on shaming and helping to situate shaming of the right to housing in Kenya in this discourse. Risse and Sikkink's model involves a five-step process that I elucidate below, indicating where the case of specific shaming in Kenya stands in relation to each step.

²⁹³ Cultural Survival, "OPEN LETTER TO THE PRESIDENT OF THE REPUBLIC OF KENYA, H.E UHURU KENYATTA BROKEN LAND, BROKEN LIVES OF THE PASTORALIST PEOPLE IN LAIKIPIA AND SAMBURU," *Intercontinental Cry*, March 12, 2017, <https://intercontinentalcry.org/open-letter-president-republic-kenya-h-e-uhuru-kenyatta/> (accessed April 1, 2017).

²⁹⁴ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Ithaca: Cornell University Press, 1998).

The first stage of Risse and Sikkink's spiral model is 'repression' wherein a state violates certain norms. In response, international NGOs, hearing the pleas of domestic groups, pressure governments with a specific focus on alerting "Western public opinion and Western governments" to the violations to encourage these third parties to intervene. At the same time, domestic NGOs continue their efforts from the 'bottom-up,' collectively conducting what Risse and Sikkink term "a process of socialization" on the violator state (a shift from the terminology of the "boomerang effect").²⁹⁵

Following the model closely in this first step, international shaming efforts in Kenya remain tied closely to the local response which bolsters and is bolstered by the international. Local campaigns have been working in Kenya to hold the state accountable for its actions using rights language for much longer than international efforts existed even as the Moi regime was in power. For example, in 1996, a network of local NGOs, termed the Habitat Task Force, launched a major local campaign on the issue of the right to housing. The organizations termed the campaign "Operation Firimbi" (Operation Blow the Whistle) because it called on Kenyans to commit to a twofold strategy to respond to illegal land allocation, both to "'blow the whistle on someone" and "blow the whistle on something."²⁹⁶ According to Habitat for Humanity's note on the campaign, "The fact that Kenyans today are blowing the whistle everywhere in the country on land grabbing

²⁹⁵ Thomas Risse and Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction," In *The Power of Human Rights: International Norms and Domestic Change*, by Kathryn Sikkink, Thomas Risse, & Stephen C. Ropp, (New York: Cambridge University Press, 1999), 5.

²⁹⁶ "To blow the whistle on someone is to report their wrongdoing to someone (such as the police) who can stop their wrongdoing - as if one were blowing a police whistle. To blow the whistle on something is to bring something (such as land grabbing and corruption) to a quick end."

Operation Firimbi (Blow the Whistle) Campaign, n.d.

<http://mmc.habitat.org.ua/modul2/pract1/pppp0686.htm> (accessed April 1, 2017).

and grabbers, including the corrupt public officials and politicians involved, is an achievement, which to a large extent can be attributed to the Campaign.”²⁹⁷ In another example, many slum dwellers, facing eviction on public land now sold to private developers, organized under associations. One such is a group that represents 86 communities, mostly in Nairobi, termed the Community Action Against Forced Evictions and Land Grabbing (Muungano in Swahili). These organizations often look to the law and rights to advocate for a halt to forced evictions. One of the main slogans of Muungano, for example, is “Land and Shelter is a Right.”²⁹⁸

Efforts to bolster this pre-existing local effort with international support occurred, for example, in the solidarity campaign, termed ‘Viva Nairobi Viva,’ which got 6000 people and 100 institutions to support it in the first few weeks of its inception.²⁹⁹ This campaign was the product of a collaboration between an international NGO, the International Alliance of Inhabitants (IAI)³⁰⁰, and a local organization, the Kutoka

²⁹⁷ This Operation not only sought to halt forced evictions, but also to prompt local government officials to address the increasing problems people face living in inadequate housing conditions as squatters or in slums. By 1997, Operation Firimbi had garnered over 250 complaints.

Firimbi Bulletin, "Grappling with historical injustices around land: Focus on Kilifi county," *Habitat International Coalition*, December 2013, <http://www.hic-gs.org/content/Firimbi%20Bulletin%2036.pdf> (accessed April 1, 2017).

²⁹⁸ Klopp indicates, “The struggle on the part of these activists to draw irregular land allocations into the realm of public scrutiny and debate is a direct challenge to the secretive rules of the patrimonial game where patrons are not questioned on the sources of their wealth or on what the consequences of their appropriations and redistributions will be.”

Jacqueline M. Klopp, "Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya," *africaTODAY*, (2000): 7-26.

²⁹⁹ Centre on Housing Rights and Evictions, *Civil and Political Rights in Kenyan Informal Settlements: Submission to the Human Rights Council*, The Global Initiative for Economic, Social and Cultural Rights, 2005.

³⁰⁰ The IAI “is a global network of associations and social movements of inhabitants, cooperatives, communities, tenants, house owners, homeless, slum dwellers, indigenous populations and people from working class neighbourhoods. The objective is the construction of another possible world starting from the achievement of the housing and city rights.”

International Alliance of Inhabitants, *Who we are*, n.d. http://www.habitants.org/who_we_are (accessed April 1, 2017).

Network of Parishes in the informal settlements, to mobilize people globally in the conversation against evictions. Backed by international support, the local settlers approached the Government and the Mayor to halt evictions.³⁰¹ Another initiative of IAI, as part of the Zero Eviction Campaign, was its establishment of the W Nairobi W! Campaign to target evictions that occur for infrastructure projects. The Campaign worked locally, mobilizing organizations in the state, having judicial appeals and meetings, and internationally by creating a website that resulted in around 10,000 solidarity emails and helping to convert Kenya's debt to Italy into a fund to improve living conditions in two towns in Kenya. AI too works closely with local actors as in the 'eviction torch' initiative brought as part of a grass roots movement protest from the Kenya Rapid Response to Forced Evictions Team (who work in partnership with AI) while an international campaign for petitions was ongoing.³⁰² Local NGOs too may learn and adopt tactics used by international HROs. For example, after AI begun to use #endforcedevictions on Twitter to consistently shame problems of the right to housing in Kenya, following the trend, local NGO Hakijamii and local politicians and activists adopted the hashtag.

In prominent direct cooperation between the local and the international, in late 2011, Hakijamii too asked ESCR-Net to help craft an amicus curiae brief for their court case against the state about an attempt at forcible evictions. The case brought by Ibrahim Sangor Osman was on his own behalf and on behalf of 1,122 evictees of a location in the municipal council of Garissa.³⁰³ Each of the amici are HROs concerned with the issue of the right to adequate housing, having already provided assistance in other cases in many

³⁰¹ Advisory group on forced evictions, *Forced Evictions - Towards Solutions? First Report of the Advisory Group on Forced Evictions to the Executive Director of UN-HABITAT*, Nairobi: UN-HABITAT, 2005.

³⁰² Ibid.

³⁰³ Details of the case itself are present in the Section on Court Cases

domestic and international fora.³⁰⁴ The report describes the case as a violation of the ICESCR, the ICCPR, the African Charter on Human and Peoples' Rights [implied right to housing in the African Charter in Articles 14 (property), 16 (physical and mental health) and 18 (family)]. It calls on the Kenyan Court to emulate a decision by the Supreme Court of Appeal of the Republic of South Africa in the case of *Tswelopele Non-Profit Organisation and Others v. City of Tshwane Metropolitan Municipality*, where the court considered forced evictions part of a violation of the right to adequate housing as enshrined in the Constitution of the state.³⁰⁵ Considering the immense success of local international partnership, it is possible too that INGOs' emphasis on following international law and guidelines (in its invocation of hegemony) may limit the strength of their argument unless they also have sustained backing from local NGOs.

In the second stage of Risse and Sikkink's spiral model, the state denies the allegations against it, finding ways to delegitimize INGOs' claims and failing that, under ever-increasing international pressure, contesting international norms in 'outrage.'³⁰⁶ In the case of Kenya, the state rarely denies allegations, agreeing that it has evicted a group

³⁰⁴ The group of international organizations that helped with drafting the brief include the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), the Socio-Economic Rights Institute (SERI), the Community Law Centre (CLC), the Centre for Economic and Social Rights (CESR), the Centre for Equality Rights in Accommodation (CERA) and the Social Rights Advocacy Centre (SRAC), members of the International Economic, Social and Cultural Rights Network (ESCR-NET) Adjudication Working Group, as well as Malcolm Langford, Co-Coordinator of the ESCR-Net Adjudication Working Group and Director of the Socio-Economic Rights Programme (Norwegian Centre for Human Rights, University of Oslo).

"AMICUS CURIAE INTERVENTION," *socio-economic rights institute*, May 6, 2011, <http://www.seri-sa.org/index.php/19-litigation/case-entries/75-ibrahim-sangor-osman-and-the-1-122-evictees-of-medina-location-municipal-council-of-garissa-v-the-hon-minister-of-state-for-provincial-administration-a-internal-security-and-others> (accessed March 1, 2017).

³⁰⁵ Ibid.

³⁰⁶ Thomas Risse and Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction," In *The Power of Human Rights: International Norms and Domestic Change*, by Kathryn Sikkink, Thomas Risse, & Stephen C. Ropp, (New York: Cambridge University Press, 1999).

of people. Rather, the state attempts to counter INGO arguments by justifying its eviction attempts, often with logical arguments. So, for example, it defends evictions along railway lines by articulating the dangerousness of settlements near railways.³⁰⁷ It stresses an inability to resettle the evicted because of a lack of resources. It uses its pre-existing laws and other interests including preservation of the environment to justify eviction attempts as in the case of the Ogiek.

The next step in Risse and Sikkink's model is where the state softens to pressure and agrees to certain 'tactical concessions,' committing to human rights inadvertently. These concessions are small, "low cost," relatively inconsequential measures, but still commitments that provide human rights organizations a foothold to shame further. These include, but are not limited to "releasing a few political prisoners, showing greater tolerance for mass public demonstrations, and/or signing international treaties."³⁰⁸ The Kenya case matches these in that the state promises to halt evictions and takes some steps in that direction.

At the fourth stage, states start to approach compliance. Subject to continued shaming, they take on "prescriptive status," altering domestic practices to match the

³⁰⁷In the case of evictions conducted by the Kenyan Power and Railroad Ministries, the area was unsafe for residents. The state noted that power lines running through were hazardous, often causing fires and the evictions were not arbitrary or discriminatory but conducted to protect the settlers from threat. INGOs have responded by emphasizing the resulting problematic homelessness and the illegality of the act itself since "alternatives are available." For other evictions, similar to their earlier arguments of safety concerning railroad construction evictions, the government makes a logically coherent argument in this case, noting that "the settlements were in restricted flight paths and around restricted airport areas, and needed to be demolished to avert potential air disasters in the future."

Amnesty International, *KENYA MUST END EVICTIONS AS FEARS INTENSIFY*, Amnesty International, 2011.

³⁰⁸ Thomas Risse and Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction," In *The Power of Human Rights: International Norms and Domestic Change*, by Kathryn Sikkink, Thomas Risse, & Stephen C. Ropp, (New York: Cambridge University Press, 1999), 6.

international standard by “changing related domestic laws, setting up new domestic human rights institutions, and regularly referring to human rights norms in state administrative and bureaucratic discourse.”³⁰⁹ Over time, Kenya does alter domestic laws to match international ones, sets up committees to address the issue and even by 2010, changes its Constitution to include a provision on the right to housing.

The last step in Risse and Sikkink’s model, though, is where states, having adopted and accepted human rights, self-enforce ‘rule consistent behavior,’ fully complying with human rights norms. Kenya has yet to enter this stage. In their case studies, Risse, Ropp and Sikkink emphasize that eventually every state including those currently at the stage of tactical concessions or of compliance will eventually reach this stage.³¹⁰ The most compelling case for their theory is that of South Africa. For decades, labelled a pariah state for maintaining the apartheid well into the late 20th century, South Africa moved from denial to rule consistent behavior, eventually responding to pressure, and now not only has a stable democracy, but also increasingly serves as a leader/model of human rights. For countries that do not yet comply with human rights, then, like Kenya, Risse and Ropp claim, they are on the way to doing so as transnational networks strengthen and INGOs continually tarnish the country’s image and reputation to the point that other states systematically exclude them from the community’s “in-group.”³¹¹ They argue too that in many cases, states comply even without third party states having to exert additional pressure, citing this as proof that “talk is not cheap.” The primary example for this is Morocco. Although Morocco’s main ally, France, did not impose any pressures on

³⁰⁹Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp. *The Persistent Power of Human Rights: From Commitment to Compliance*. New York: Cambridge University Press, 2013.

³¹⁰Ibid.

³¹¹Ibid.

the country to comply with human rights, the monarch perceived the dissonance between his views of his actions and the international community's perceptions. Seeking to reconcile the two and improve the country's reputation, the monarch instituted a variety of human rights friendly measures, complying with international law. To explain other countries like Tunisia that fail to fit the model and even retrogressed under shaming from implementing tactical concessions back to denial, Risse and Ropp situate them as the outliers, not the norm.³¹²

Critiquing this assumption, though, Simmons, for example, takes particular issue with the shift from phase 2 to 3, where states move from denial to providing tactical concessions, arguing against the contention that governments would repeatedly adopt measures that only entrap them into eventual compliance, describing it as a 'naïve' assumption. The model, Simmon notes, then, fails to answer the legitimate realist question: "why can't repressive governments foresee the communicative quicksand they are about to wade into and steer clear of it in the first place?"³¹³ Retrogression and failure to achieve rule consistent behavior may be the norm. Concerning ESR in Kenya, I contend, the state potentially in simply reaching the tactical concession and compliance stage without moving into rule consistent behavior may be maximizing its cost-benefit ratio. Without having to spend on the actual enforcement of rights and approach rule-consistent behavior, by adopting improvements in rhetoric and policy, the state can gain

³¹² Ibid.

³¹³ Beth A. Simmons, "From ratification to compliance: quantitative evidence on the spiral model," In *The Persistent Power of Human Rights: From Commitment to Compliance*, by Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp, (New York: Cambridge University Press, 2013), 48.

the benefits of international approval without fully altering its institutions and internalizing norms.

Another interesting note on shaming is the significance of third party actors. INGOs help place pressure on non-state actors in the case of ESR to keep in check development by shaming the World Bank, EU and other prominent donors contributing to violations of human rights. These donor organizations, in turn, sometimes exert pressure on the state to uphold human rights and other times strive to distance themselves from the violators as rapidly as possible. The state proceeds to deny allegations of wrongdoing. However, courts do often respond to these specific shaming attempts since shaming often complements legal action by local actors to halt evictions and gain compensation for them. In the next subsection, I look at the responses of courts to these specific shaming attempts more closely.

Response by the Courts

Although the state does not alter its practices in response to specific shaming of evictions, courts do respond under this pressure and such specific attempts often involve a legal focus. However, as the state refuses to enforce or heed court rulings, evictions continue unabated. My findings are similar to those of Shankar and Metha in their study of the successes to litigating ESR in India. Here, although there exists an activist court dedicated to the cause, cases of success overshadow the manifold other instances where “the judges were reluctant to strongly penalize the government even when the state failed

to fulfill its statutory obligations.”³¹⁴ In fact, paradoxically, Shankar and Metha find that, while “in the last two decades, the higher judiciary in India transformed non-justiciable economic and social rights such as basic education, health, food, shelter, speedy trial, privacy, anti-child labor, and equal wages for equal work into legally enforceable rights,” courts, at the same time, hardly if ever influence actual public policy and fail to actuate change in society.³¹⁵ For activists, then, litigation proves costly, time-consuming, and ineffective as judges more often promote restraint as opposed to activism. In the case of Nigeria, Odinkalu, similarly, highlights the ways in which the courts fail to provide any change.³¹⁶ Just as the state refuses to provide rights, the judiciary responds with a refusal to intervene, problematically leaving the people with no possible recourse to enforce their rights. In this subsection, I list some of the major cases in Kenyan courts related with housing rights and their outcomes.

The earliest major case for evictions received a verdict in 2000. The Ogiek had sued the government for evicting them in 1999, and the High Court of Kenya ruled in favor of the state, finding justification in the state’s argument in favor of the environment and conservation where the Ogiek were deemed detrimental to it. This regardless of the fact that from early on “human rights bodies accuse the government of being insensitive

³¹⁴Shylashri Shankar and Pratap Bhanu Metha, “Courts and Socioeconomic Rights in India,” In *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Varun Gauri and Daniel M. Brinks, (New York: Cambridge University Press, 2009),147.

³¹⁵Ibid: 146

³¹⁶ Chidi Anselm Odinkalu, “The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights,” In *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Varun Gauri and Daniel M. Brinks, (New York: Cambridge University Press, 2009).

to the community's basic needs, saying the Ogiek's right to land and natural habitat has been trampled upon for too long."³¹⁷

The next few cases concerned evictions of slum areas including Kibera by the Kenya Railways Corporation. Communities initiated two separate cases after the mass eviction in 2004. In the first case, *Nderu & Others v Kenya Railways Corporation*, the High Court granted an injunction, stopping the eviction, but only for an additional ten days upon the 30-day notice period.³¹⁸ In the second case, *Kirwa and Nine Ors v. Kenya Railways Corporation*, the court ruled differently. It noted that the notice was arbitrary and unjustified and indicated the necessity of compensation for the removal of the settlers. The court asked, "They have allowed the plaintiffs to occupy its land for a period of over 30 years without removing them. Why would it now give such citizens a 30 days notice to remove what they have invested for such a length of time?" Nevertheless, the Kenya Railways Corporation had no representation in this last case.³¹⁹

By 2010, a new progressive Kenyan constitution came into effect, and judges initially started to rule more in favor of sufferers of violations of the right to housing. The Constitution includes all the international provisions requested by INGOs in shaming attempts and incorporates ESR from the right to food and health to the right to housing and education. The right to housing and the attendant right to a reasonable standard of sanitation appears in Article 43 (1b). Article 21 (2) establishes positive rights, calling for

³¹⁷Tervil Okoko, "Judges Rule In Favour Of Environment," *Archive 2000*, March 27, 2000. <http://www.ogiek.org/news/news-post-00-03-4.htm> (accessed March 20, 2017).

³¹⁸ Centre on Housing Rights and Evictions, *Civil and Political Rights in Kenyan Informal Settlements: Submission to the Human Rights Council*, The Global Initiative for Economic, Social and Cultural Rights, 2005.

³¹⁹ *Ibid.*

the progressive realization of the right to housing while Article 2 (6) ensures that ratified international law will be part of the state's laws. Article 23 solidifies a commitment to negative rights, making the right enforceable through courts in cases of their violation.³²⁰ In the same year, then, in the case of *Satrose Ayuma and Ors. vs. The Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme and Ors*, after demolitions by the Kenya Railways Authority, the Petitioners claimed, "various violations of fundamental rights and freedoms including the right to accessible and adequate housing...right of every child to be protected from inhuman treatment." The High Court was receptive to the claims, calling the state to put in place security of tenure and a "legal framework for evictions based on internationally acceptable guidelines."³²¹

In 2011, though, the Court ruled against a group claiming the right to housing in the case of *Charo wa Yaa v Jama Abdi Noor & 4 others*, indicating that "the right to housing (is) only aspirational, subject to progressive realization."³²² Nevertheless, by November 2011, in an oft-cited court case of *Ibrahim Sangor Osman & 1222 Others v the Minister of State for Provincial Administration and Internal Security and 10 Others*, the High Court of Kenya showed an element of judicial activism.³²³ Receptive to the plaintiffs, "the Court issued a permanent injunction compelling the State to return petitioners to their land and to reconstruct their homes and/or provide alternative housing

³²⁰Amnesty International, *DRIVEN OUT FOR DEVELOPMENT: FORCED EVICTIONS IN MOMBASA, KENYA*, Amnesty International, 2015.

³²¹"Petition 65 of 2010: Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others," *Kenya Law*, 2010, <http://kenyalaw.org/caselaw/cases/view/90359/> (accessed March 1, 2017).

³²²Dennis Onsongo, *Four landmark court rulings in Kenya's battle over forced eviction*, October 10, 2016, <http://www.nation.co.ke/news/Key-court-rulings-in-battles-over-forced-evictions/1056-3410964-14n5614z/> (accessed March 10, 2017).

³²³ *Ibid.*

and other facilities including schools and awarded each of the petitioners Kshs 200,000.00 (approx. \$2,000.00) in damages,” a total of \$2.2 million.³²⁴ This set an important precedent in national courts as it was the first ruling to order a remedy and compensation for the evicted, ensuring government accountability. However, in practice, the state paid little to no compensation. Another case in 2011, *Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others* faced a similar ruling with the High Court judge referring to the case of South Africa and international law.³²⁵

Continuing this positive trend, in 2013, in *Satrose Ayuma and Others versus The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others*, the High Court ruled that the railway pension board had violated the right to adequate housing and sanitation and children’s rights after it bulldozed hundreds of homes. Since the country lacks domestic laws on the issue, the ruling called on the state instead to look to international law and standards on forced evictions. One of the judges at the case, Isaac Lenaola stated, ““I must lament the widespread forced evictions that are occurring in the county...which are justified mainly by public demands for infrastructural developments...The right to adequate housing cannot be aspirational and merely speculative.”³²⁶

Another case in 2013, *Mitu-Bell Welfare Society v Attorney General and 2 others*, concerning 15,000 residents, living near Nairobi’s Wilson Airport who the state evicted because they were in flight path received a favorable ruling with a court order to both halt

³²⁴ESCR-Net, *Constitutional Petition No. 2 of 2011 (Garissa)*, ESCR-Net, 2011.

³²⁵ "Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others," *Kenya Law Reports*, 2011, http://kenyalaw.org/Downloads_FreeCases/80847.pdf (accessed March 1, 2017).

³²⁶ Ibid.

the evictions and resettle the residents.³²⁷ The court cited the constitutional right to housing, respect for human dignity, equality, and non-discrimination. Combining CPR and ESR, Justice Ngugi looked to international guidelines on evictions, including General Comment 7, noting, “Any forceful eviction or demolition without a relocation option is illegal...It robs them (settlers) of their dignity, jeopardises their right to health, and threatens their right to life.”³²⁸ Once again, though, implementation was lacking as authorities ignored the court order, continuing demolitions in 2011. The Kenya Airports Authority argued too that they did not have sufficient funds to resettle the settlers and that said people were simply violating the right to property.³²⁹

In March 2014, a high court judgement ruled on the Ogiek case again, noting that evictions violated their right to life and involved discrimination against the indigenous group.³³⁰ In 2015, the High Court of Eldoret, although ruling on a separate issue at the time, noted that evictions of the Sengwer were unlawful.³³¹

Despite these strides forward, in 2016, the Court of Appeals took the state a step backward when it overruled the 2013 Wilson airport decision, asking that Courts be more restrictive and less activists. The judgement stated, “Courts have no role to play in policy formulation.” Further considering the consistent invocation of international law in these cases the ruling averred that, “Neither the U.N. nor any international organisation

³²⁷ Ibid

³²⁸Victoria Miyandazi, "Forced Evictions and Demolition of Informal Settlements in Kenya," *Oxford Human Rights Hub*, November 19, 2015, <http://ohrh.law.ox.ac.uk/forced-evictions-and-demolition-of-informal-settlements-in-kenya/> (accessed January 5, 2017).

³²⁹ Ibid.

³³⁰Julius Okoth, *Kenya a land of forceful evictions without dignity*, August 14, 2014, (accessed March 27, 2016).

³³¹ Amnesty International, *DRIVEN OUT FOR DEVELOPMENT: FORCED EVICTIONS IN MOMBASA, KENYA*, Amnesty International, 2015.

legislates for Kenya.”³³² Moreover, implementation and enforcement of all court rulings mentioned before is lacking.

Nevertheless, as a final note, although it appears, here, in their retrogression, that courts are not an effective means to prompt response, the scholar Pieterse notes in his study of the South African judicial system that enforcement of ESR may not be “by nature ill-suited for domestic application.”³³³ Rather, Pieterse states, “the development of a dynamic and coherent domestic jurisprudence on social rights that resonates with international standards and translates into tangible rights enjoyment, depends on judicial willingness to depart from outmoded approach to rights-adjudication.” In other words, Pieterse claims that if willing to refer to and acknowledge positive rights as well as negative rights as attached to ESR without taking over budgetary concerns left to the Parliament, courts will be able to prompt change.³³⁴ Without adequate lack of enforcement even when the court is activist in Kenya, though, this argument may not apply.

Specific shaming attempts, then, may instigate rhetoric in compliance with international law particularly in domestic courts, but they do not assure implementation. States can also regress as Kenya’s recent resistance to passing legislation and guidelines for forced evictions and the court’s refusal to legislate on the issue indicate. Kenya, then, does not appear to be moving towards rule consistent behavior, but may perpetually

³³² Nevertheless, since INGOs have made legal action prominent, other groups continue to rely on the courts to assert their rights.

Katy Migiro, "Four landmark court rulings in Kenya's battle over forced eviction," *Daily Mail*, October 10, 2016, <http://www.dailymail.co.uk/wires/reuters/article-3830260/Four-landmark-court-rulings-Kenyas-battle-forced-eviction.html> (accessed March 10, 2017).

³³³ Marius Pieterse, "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited," *Human Rights Quarterly*, (2007): 796-822.

³³⁴ *Ibid.*

remain trapped between tactical concessions, approaching compliance. In the next subsection, I look at the ways in which INGOs shame Kenya for violations of the right to housing in general and how the state responds to these allegations, presenting an analysis of my results at the end.

Shaming the Right to Housing in General

In addition to shaming specific eviction attempts as they occur, major HROs shame evictions in general in Kenya, particularly focusing on the multiple forcible evictions that occur in Kenya's slums. In this subsection, I go through the changing attempts at shaming in general, over the years, before indicating the state's responses to these shaming attempts in the next subsection.

Moving towards recognizing evictions and other inadequate housing conditions as violations of ESR, in beginning the general shaming effort, COHRE framed future understandings of housing rights in Kenya. In 2004, the INGO began shaming forced evictions from settlements in the Kibera, Mukuru, Korogocho, and Kiambiu slums, affecting an estimated 1-2,000 people. Other than looking at the eviction itself, in its general inspection, COHRE looked to other closely related issues as well, including "access to water and sanitation, rights of women to housing and land, rights of Nubian community to land in Kibera, harassment of tenants and participation rights within housing programmes," shaming all these violations together.³³⁵ The report also discusses the limited scope of the National Slum Upgrading Policy and calls for the implementation

³³⁵ Centre on Housing Rights and Evictions, *Civil and Political Rights in Kenyan Informal Settlements: Submission to the Human Rights Council*, The Global Initiative for Economic, Social and Cultural Rights, 2005.

of the Ndungu Land Commission's report. In 2004, COHRE too sent letters to the President of Kenya and other Ministers, underscoring that forced evictions in general were violations of the right to adequate housing. In 2005 again, COHRE collectively shamed the 2003 evictions of inhabitants in multiple communities rather than focusing on one or two specific cases to make a more general claim to the government of Kenya to address the right to housing.³³⁶

Later, in 2006, multiple INGOs, including COHRE, AI, the Kenyan National Commission on Human Rights and Hakijamii Trust as well as a number of other foreign organizations, most focused in a number of foreign countries including Egypt, Pakistan, Philippines, India, South Africa and Brazil gathered together to form a joint appeal on the right to housing in Kenya and other African states at the African Ministerial Conference on Housing and Urban Development in Nairobi relating to slums and the MDGs.³³⁷ The organizations specific to foreign countries having dealt with urban housing crises in their states and having evidence that forced evictions only exacerbate pre-existing difficulties, called for their cessation. Another report by the Human Rights House (originally by COHRE) in 2006 emphasized the repeated need to enforce the Ndungu Report on

³³⁶Ibid. Including "Kibera, Korogocho, Kahawa Soweto, Kamae, Kware, Kamwanya, Kanguku, Kandutu, City Cotton, Mutumba, Kareru, Kirigu, Muria-Mbogo, Mutego, Njiku and others of the most populated among the 199 Nairobi slums," affecting 300,000, on the grounds that these people were living "illegally on road and rail servitudes, electricity wayleaves and other reserved land." COHRE also notes another eviction of the 'Raila Village' in 2004 that demolished 400 structures, leaving around 2,000 people homeless. Another eviction of over 2000 families and 4000 people in the Sururu Forest of the Rift Valley occurred despite the government's guarantee that the land they occupied belonged to the residents.

³³⁷ Amnesty International, *KENYA: A JOINT APPEAL TO AFRICAN MINISTERS ON URBAN HOUSING: 3 APRIL 2006*, New York: Amnesty International, 2006.

Irregular allocation of Public land and to use international guidelines to create national laws outlawing evictions.³³⁸

Other than the immediate meeting of basic needs and halting the continuation of evictions as in specific shaming attempts, in these general attempts, COHRE and other HROs more often advocated for positive rights, such as adequate sanitation or security of tenure to ensure future protection from evictions. COHRE notes, “Merely preventing an eviction and allowing people to stay where they are is not sufficient. Under current circumstances, they are still vulnerable and living in highly inadequate housing conditions.”³³⁹ In September 2006, multiple community organizations and groups, over 1000 community members, including international organizations such as AI and prominent local NGOs such as Hakijamii and KNHCR as well as coalitions and faith based organizations such as the Coalition on Violence Against Women – Kenya and Kenya Basic Rights Catholic Diocese of Kitale, Kenya gathered for a National Symposium on Eviction Guidelines.³⁴⁰

These general shaming attempts most often called for compliance, demanding the state translate international law into domestic law. In 2007, UN-HABITAT’s Advisory Group on Forced Evictions released a report on solutions to the issue, demanding the state establish guidelines on forced evictions and adhere to internationally established

³³⁸ Human Rights Education Associates, Niels J. Harbitz, *Forced evictions reach crisis levels*, Press Release, Human Rights House, 2006.

³³⁹ COHRE Global Forced Evictions Programme (GFEP), *Forced Evictions: Violations of Human Rights*, Housing and Land Rights Network: Habitat International Coalition, 2006.

³⁴⁰ “Speakers from the United Nations, South Africa, the Kenya National Commission on Human Rights and COHRE provided a human rights legal perspective, while community groups presented their experiences and demands.”

Advisory Group on Forced Evictions, *Forced Evictions – Towards Solutions? Second Report of the Advisory Group on Forced Evictions to the Executive Director of UN-HABITAT*, Nairobi: UN-HABITAT, 2007.

standards.³⁴¹ Multiple AI press releases and submissions by INGOs, particularly COHRE, to the CESCR address this issue of the evictions and mention multiple particular examples, but only generally, including concerns about KENSUP's implementation as well as problems with associated rights, including the right to safe water in informal settlements so that they shame violations of the right to housing in general. In 2008, with CESCR's review of Kenya upcoming, several civil society organizations submitted reports to the committee to address the issue of housing rights and evictions. A partnership of INGOs including the Economic and Social Rights Center (Hakijamii, which is also a founding member of the International Network on Economic and Social Rights), Dignity International, COHRE, and others³⁴² submitted such a report. Their report depicts a subtle shift in the shaming stance, arguing that the state must comply with both an obligation of conduct and one of result.³⁴³ Indicating the structural nature of the problem, the report notes, "The forced evictions...reflect the unjust socio-economic history and circumstances of systemic housing rights violations and unequal land access that most communities in Kenya experience."³⁴⁴ The report also expresses concerns about long-term implications.

³⁴¹Ibid.

³⁴² Including African Women's Development and Communications Network (FEMNET, a regional NGO focused on women's development, equality, and human rights), Building Eastern Africa Community Network, International Commission of Jurist – Kenya Section, the Kenya Human Rights Commission, the Centre for Minority Rights and Development (Local/Regional Organization that works for indigenous people in Kenya and East Africa), COHRE, International Students Association for Legal Aid and Research (affiliated with the University of Nairobi), Children's Legal Action Network, Kenya Land Alliance, Federation of Women Lawyers in Kenya

³⁴³not simply Article 11 but also Article 1(2) that maintains that, "In no case may a people be deprived of its own means of subsistence." As examples of instances of evictions, the report cites the heavily publicized evictions of the Ogiek among others. Including evictions of the Mukuru kaw Reuben including 4,000 houses and approximately 12,000 people, expected evictions in Kwale for the establishment of a mining company, the ignorance of local community's wishes in prompting mining in Ortum and evictions of the Endorois community for the purposes of tourism.

³⁴⁴ Economic and Social Rights Centre-Hakijamii, Amnesty International-Kenya, et. al, *JOINT CIVIL SOCIETY ORGANIZATIONS' ALTERNATIVE REPORT TO THE UN COMMITTEE ON ECONOMIC,*

Launching the Global Dignity Campaign, in 2009, AI intensified its shaming efforts. In June of the year, the Secretary General at the time Irene Khan herself led a march of members of informal settlements in Nairobi to the city center to promote basic human rights for residents of slums, with a general emphasis on the right to housing and on ending forced evictions all over the state. Many participants in the march had lost their own homes and possessions. At this time, AI facilitated the first “SMS action” for an ESR centered project.³⁴⁵ In the same month, AI released an influential report on human rights in Kenyan slums, drawing on interviews and focus group discussions and describing the two million slum dwellers in the country as an “unseen majority.” The report focuses on what it sees as the primary obstacle to the right to adequate housing, namely the lack of legal security of tenure.³⁴⁶ The report also addresses KENSUP while citing evictions, expressing concerns about affordability, accessibility, addressing immediate needs, and lack of security of tenure. AI notes, ““The recent commitment to slum upgrading is a positive step. However, this commitment falls short of the comprehensive plan that is needed to recognize informal settlements and slums.”³⁴⁷

AI too often emphasizes the influence violations of the right to housing have on women. In late 2010, AI, calling for the implementation of a positive right based on the failure to respect a negative right in discussing how a lack of sanitation in slums

SOCIAL AND CULTURAL RIGHTS ON THE OCCASION OF THE REVIEW OF THE REPUBLIC OF KENYA, New York: United Nations, 2008.

³⁴⁵A “SMS action” is a free text message that, in this case, many slum dwellers sent to the Kenyan government to protest its discriminatory actions. Amnesty International, *Nairobi slum-dwellers march for better conditions and basic human rights*, Amnesty International, 2009.

³⁴⁶ Security of tenure is a key issue because most of the land on which informal settlements rest is government owned so that landlords and structure owners demand rent on land they don’t own. Amnesty International, *KENYA: THE UNSEEN MAJORITY: NAIROBI’S TWO MILLION SLUM-DWELLERS*, Amnesty International, 2009.

³⁴⁷ Ibid.

exacerbates the problem of violence against women in its briefing to the UN Committee on the Elimination of Discrimination against Women.³⁴⁸ In January 2011, AI delivers an oral statement along with settlers to the African Commission on Human and Peoples' Rights emphasizing how a lack of adequate sanitation and housing leads to gender based violence.³⁴⁹ 2013, then, marked a high point of the #endforcedevictions campaign led by AI as AI's newsletter the WIRE featured Kenya and the country was also prominent on AI's press release for World Habitat Day, which sought to highlight the particular challenges evictions pose for women.³⁵⁰ The Center for Women's Land Rights, Landesa submitted a prominent report to the CESCR in 2016, stressing that evictions disproportionately affect women, who lack equal rights to property or inheritance.³⁵¹ The organization emphasizes that the government has many laws in the books that are progressive, but fails to put in place measures to implement these laws, including the Marriage Act and the Matrimonial Property Act.

Working with AI, others like UN-Habitat also began to recognize the severity of the issue, forming the Kenyan Housing Coalition. UNHABITAT recounts the many evictions made by the state including those from early 2003 and discusses KENSUP. It finds problems not in political will as much as in the state's lack of coordination.³⁵² In the

³⁴⁸Amnesty International, *KENYA: EXAMINATION OF KENYA'S STATE REPORT UNDER THE CONVENTION: ORAL STATEMENT BY AMNESTY INTERNATIONAL TO THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN*, Amnesty International, 2011.

³⁴⁹Daily Nation, *Forced evictions are callous; end them now*, November 8, 2011, (accessed March 27, 2017).

³⁵⁰Amnesty International, *'We don't eat, we don't sleep': A message from Kenya on World Habitat Day*, Amnesty International, 2013.

³⁵¹Landesa Rural Development Institute, Center for Women's Land Rights, *Supplementary Information Concerning Women's Land Rights in Kenya Submitted to the 57 Session (22 Feb 2016 - 04 Mar 2016) of the Committee on Economic, Social, and Cultural Rights*, New York: United Nations, 2016.

³⁵²Raakel Syrjänen, Tom Osanjo, and UN-HABITAT KENSUP Team, *UN-HABITAT and the Kenya Slum Upgrading Programme: Strategy Document*, Nairobi: United Nations, 2008.

increasing push for participation by slum dwellers, in March 2012, AI and other INGOs organized a week of action against evictions and to ensure as well positive rights for those living in slums including the right to adequate water and sanitation.³⁵³ One major event part of the week was the African Ministerial Conference on Housing and Urban Development, attended by representatives from Nairobi's slum communities. Another was a roadshow entertainment truck, travelling through the Nairobi slums, including Kenyan rapper Juliani.

In Kenya's Universal Periodic Review in 2015, multiple INGOs brought up different issues. Some joint reports stressed outcome indicators, others process and yet others both. One indicated that despite inclusion of the right to housing in the Constitution, "more than 34% of Kenya's total population lived in urban areas and of this, more than 71% were confined in informal settlements" where the conditions in these settlements where the most vulnerable and marginalized lived were substandard and dangerous.³⁵⁴ A report by AI indicated that forced evictions in slums and informal settlements continued in Nairobi despite the government's statements prohibiting it and the Constitution. AI emphasized passing the Evictions and Resettlement Bill as a potential solution. In response, the Human Rights Committee "recommended the development of transparent laws and policies for conducting evictions."³⁵⁵ A country to comment on the right to housing in Kenya was Brunei Darussalam, commending Kenya on the inclusiveness of its housing policy. Another, Switzerland, though, was more

³⁵³ Amnesty International, *Slum dwellers across Africa urge governments to respect housing rights*, Amnesty International, 2012.

³⁵⁴ Kenya, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Kenya*. Geneva: United Nations, 2015.

³⁵⁵ Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review Kenya*, Geneva: United Nations, 2015.

critical, urging the state to follow its international obligations and protect its citizens from forced evictions.³⁵⁶

As time passed and Kenya adopted progressive measures, INGOs emphasized the problem of implementation and enforcement. In 2016, AI submitted a report to the CESCR in advance of Kenya's periodic reporting.³⁵⁷ As before, AI illuminates both the state's failure to commit to a negative right in its continued ignorance of international law in reference to forced evictions and a failure of the state to enforce positive rights by not ensuring adequate housing in informal settlements where residents often do not have equal access to water and sanitation which has a particularly powerful impact on violence against women and girls, forcing many to use the unsanitary method of waste disposal, termed "flying toilets."³⁵⁸ It stresses how the state does not adhere to its laws. Other civil society organizations submitted to the CESCR to shame the state too. This includes a report by the Kenya National Commission on Human Rights. Their report describes laws that are liberal, but that the state has yet to implement, particularly the Land Act and the Land Registration Act passed in 2010, the Housing Bill of 2012, guidelines and report by the National Land Commission in 2013 and multiple court decisions.³⁵⁹ This report assigns blame to the state not for a lack of political will as much as for incoherence. Some reports are joint including one by HakiJammii (as part of the Economic Social

³⁵⁶ Ibid.

³⁵⁷ Amnesty International, *KENYA: UN EXPERT BODY CONCERNED ABOUT CONTINUED FORCED EVICTIONS IN KENYA*, Amnesty International, 2016.

³⁵⁸ "Flying toilets:" polythene bags used to defecate which are then thrown out. The report cites multiple evictions AI has shamed including those in City Carton, in Mombasa, of the Sengwer and others. To document the violations of the positive rights, AI describes that the state discriminates in failing to include informal settlements in city planning projects so that policing and sanitation is lacking in those areas. Amnesty International, *KENYA: SUBMISSION TO THE UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, London: Amnesty International, 2016.

³⁵⁹ Ibid.

Rights Center), the Federation of Women Lawyers (FIDA) Kenya (premier women's rights organization), and the Global Initiative for Economic, Social and Cultural Rights (non-profit NGO in US, special interest in women's property rights).³⁶⁰ This report stresses the detrimental effect evictions have on women. Again, it emphasizes that although multiple domestic laws address this issue, implementation is lacking due in some part to a lack of political will in the Parliament and contradictory customary laws in place. A second joint report includes multiple more INGOs and LNGOs including Hakijamii, AI-Kenya, and others.³⁶¹ They look at the state's repeated promises to stop forced evictions and its consistent failure to do so in practice, particularly concerning the plight of women. A third joint civil society report was published by the Kenya Section of the International Commission of Jurists, Human Dignity, the Elizabeth Glaser Pediatric Aids Foundation, KELIN, and Save the Children Kenya, underscoring the problem of evictions and a failure to implement court orders.³⁶² A fourth civil society report by the Pamoja Trust, the Centre for Economic and Social Rights (Hakijamii) and EACOR,

³⁶⁰ Hakijamii, Federation of Women Lawyers Kenya, Global Initiative for Economic, Social and Cultural Rights, *JOINT SHADOW REPORT TO THE UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, New York: United Nations, 2016.

³⁶¹ Kituo Cha Sheria, Umande Trust, Copa-Kenya, COT, African Platform for Social Protection, Muungano wa Wanavijiji, Article 19, Grassroots Trust, Kutoka Network, Health Rights Africa, UPR info, Minda Trust, Haki-Yetu Trust, Kisora, Wewasafu, EACH Rights, Kenya Land Alliance, The Youth Congress, Kamukunji Paralegal Trust, Nairobi Peoples Settlement Network (NPSN), Institute of Environment and Water Resources Management, Water Livelihood Network (Walinet), Migori Clan, Homabay Community, Youth Alive Kenya, Pamoja Trust, Edmund Rice advocacy Network, Kenya Human Rights Commission, Kelin Kenya, Kenya Hospice and Palliative Care Association (KEHPCA), HIVOS Kenya, and Keeping Alive Society's Hope Economic and Social Rights Centre-Hakijamii, Amnesty International-Kenya, et. al., *JOINT CIVIL SOCIETY ORGANIZATIONS' ALTERNATIVE REPORT TO THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON THE OCCASION OF THE REVIEW OF THE REPUBLIC OF KENYA*, New York: United Nations, n.d.

³⁶² International Commission of Jurists (Kenya section), Human Dignity, Save the Children, KELIN, Elizabeth Glaser Pediatric AIDS Foundation, *TOWARDS THE REALIZATION OF ECONOMIC SOCIAL AND CULTURAL RIGHTS IN KENYA: JOINT CIVIL SOCIETY ALTERNATIVE REPORT TO THE 2ND-5TH STATE REPORT OF THE REPUBLIC OF KENYA ON THE IMPLEMENTATION OF THE COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS*, New York: United Nations, 2016.

supported by the UNDP Amkeni Wa Kenya, Bread for the World-Protestant Development Services, and ICCO Cooperation echoed the arguments made above.³⁶³

Shaming in general in this way involves referring to both positive and negative rights all over the state at once.³⁶⁴ In the next subsection, I indicate how the state responds to these attempts.

State Responses

Under increasing pressure, the government expressed willingness to engage with civil society groups to find solutions to the problems and moved towards more human rights friendly laws and policies. In this subsection, I introduce some of these responses.

Under continued pressure, the state expressed a desire to address the issue. In January 2006, the Ministry of Lands committed to developing guidelines on evictions and prepared a draft. The Ministry of Housing worked on a Housing Act that commits to progressively realize the positive right to housing. The state developed a relocation plan, the Relocation Action Plan for Improving the Safety along Kenya Railway Line, supported by the World Bank.³⁶⁵ At the time, the Kenya Slum Upgrading Programme

³⁶³ Eastern Africa Collaboration for Economic, Social and Cultural Rights, *Kenya Civil Society Shadow Report on Economic, Social and Cultural Rights*, New York: United Nations, 2014.

³⁶⁴ To briefly address shaming by the news media: While some (mostly local) newspapers often stress evictions INGOs have not shamed or called attention to, other local and international NGOs explicitly follow cues from these organizations when determining which news to reveal. For example, one report by the Standard Digital, describes eviction of hundreds from the Mau Forest, an eviction shamed very little by NGOs, while The Star quotes Amnesty International activist in discussing evictions in Kibera caused by a lack of security of tenure. To attract greater sympathy, many newspapers too emphasize the effects evictions have on children, lacking now a right to education alongside a right to housing. Concerning the cases of the Ogiek and Sengwer, moreover, the international newspaper, The Guardian, prominently cites INGO shaming attempts, particularly by Forest Peoples Programme. The Huffington Post and Women News Network also occasionally shames the state for evictions, particularly focusing on the two key issues of the Ogiek and the Sengwer.

³⁶⁵ Kenya, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Kenya*, Geneva: United Nations, 2015.

after its pilot project in Kibera-Soweto mapped out structures and been allocated \$US8.4 million. The National Housing Policy adopted in 2004 put in place slum upgrading as an objective.³⁶⁶

For review by the CESCR, the state too submitted a report, elaborating on its policies to aid the poor and ways it sought to realize the rights enshrined in the ICESCR. Emphasizing economic growth as the main way of reducing poverty, programs initiated include “the Land Resettlement Reform Programme; the Special Rural development Programme; the Rural Works Programme; the District Focus for Rural Development Strategy.”³⁶⁷ Concerning the issue of poverty more broadly, the state adopted the National Poverty Eradication Plan to reduce poverty by 50% by 2015, the Poverty Reduction Strategies Paper (promote participation of poor), the Medium-Term Expenditure Framework, the Economic Recovery Strategy for Wealth and Employment Creation and the Millennium Development Goals to halve poverty to reduce this rate. It boasts a decline in the poverty rate from 52.3% in 1997 to 49.2% in 2006.³⁶⁸ Other helpful policies include the Water Act of 2002 to ensure sanitation, a National Water Services strategy paper to ensure every citizen has access to water supply. Kenyan Constitution debate and particularly inclusion of the right to housing begun in 2005 and

³⁶⁶ The Centre on Housing Rights and Evictions and Hakijamii Trust, *Submission to the United Nations Committee on Economic, Social and Cultural Rights On the Occasion of Pre-Sessional Working Group Discussion Kenya Right to Housing and Water (Article 11(1))*, New York: United Nations, 2007.

³⁶⁷ Although interestingly the state insisted on its commitment to ESR from even before the state’s adoption of the treaty, describing the signing of Sessional paper number 10 of 1965, titled “African socialism and its application to planning/Development.” However, the state has significantly moved away from this socialism approach towards privatization, attesting to reduce “role of the Government from direct involvement in economic activities to that of a facilitator; promoting public-private partnerships in the delivery of public goods and services; and reforming public enterprises and the civil service.” Kenya, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Kenya*, Geneva: United Nations, 2015.

³⁶⁸ Ibid.

continued into 2008 and the right to housing was present in the new 2010 Constitution. Kenya acknowledges that due to increasing demand for housing and reduced supply, the quality of housing tends to be poor especially for the most vulnerable groups. To correct this problem, the government created a Ministry of Housing to implement policies including the National Housing Bill to facilitate housing provision by third party actors, the Civil Servants Scheme to grant housing for civil servants, and started to upgrade a greater number of slums in collaboration with UN-HABITAT. Concerning eviction particularly of women, the Ministry established special gender desks since the Constitution prohibits sex based discrimination. According to the government, here, the shift from customary land system to individual tenure systems benefit women. Specifically, on the issue of the Kenyan Slum Upgrading Programme, a registration system of residents of areas to be upgraded kept by the Ministry of Housing, which collaborates with the Settlement Committee to ensure residents take part in decisions and benefit from the relocation project. Throughout the report, the state appears to directly respond to criticisms by INGOs on its policies.³⁶⁹ In October 2009, the Ministry of Lands published the promised Kenya Eviction and Resettlement Guidelines, emphasizing the prevalence of “development-based evictions.” These guidelines are comprehensive and recognize “that forced evictions affect the livelihoods of individuals and households and always have a devastating impact and sometimes loss of livelihood on individuals and households.” In the summer of 2010, Kenya had its first Universal Periodic Review where it emphasized its achievements under KENSUP.³⁷⁰

³⁶⁹ Ibid.

³⁷⁰ “To ensure the right to housing, the Government has: Created a specific Ministry for Housing to ensure better implementation of programmes; has developed a National Housing Policy for Kenya and passed a Sessional paper for the same leading to the development of a National Housing Bill; and has been

In July 2013, Kenya submitted a second report to the CESCR, emphasizing that the quality of life of individuals is a priority for the state along with economic development.³⁷¹ The state notes its political will to prompt change in the Kenya Vision 2030, which attests to promoting a high quality of life, including social, economic, and political aspects. A draft Eviction and Resettlement Bill exists as of 2012 that provides guidelines on what to do in the event of an eviction. The state also indicates its commitment with the Kenya Informal Settlement Improvement Program (2011-2016), a partnership between the Kenyan Government and the World Bank to undertake tenure regularization and install social and physical infrastructure in informal settlements in 15 municipalities. The Ministry of Housing reviewed the Housing Policy to include social housing and many other bills in progress address the right, including “the Housing Bill, the Built Environment Bill, the Evictions and Resettlement Procedures Bill, the Landlord and Tenant Bill, the Metropolitan Areas Bill, the Spatial Planning Bill to repeal the Physical Planning Act, the Community Land Bill and the Public Private Partnerships Bill 2012. The National Slum Upgrading and Prevention Policy is also being developed to guide the slum upgrading and prevention work.”³⁷² As part of KENSUP, the state notes that it had constructed 600 housing units, relocated 1800 households, opened 200 acres of

upgrading informal settlements under the Kenya slum Upgrading Programme (KENSUP).” Other states were mostly receptive, praising Kenya for its accomplishments on the right including Cuba that highlighted Kenya’s programs to combat poverty and its many socio-economic development achievements. Spain recognized Kenya’s progress and its review of the Constitution, but did call for increased consultation with affected community and civil society organizations in its development projects “aimed at ensuring adequate housing for all.”

Kenya, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1*, Geneva: United Nations, 2010.

³⁷¹ Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Combined second to fifth periodic reports of State Parties due in 2013*, New York: United Nations Economic and Social Council, 2014.

³⁷² *Ibid.*

land for development, completed a road in Kibera, begun the construction of 915 houses to benefit 1500 people, constructed 2,592 housing units in a county for EDPs scheduled to complete in 2013, begun ongoing construction of 450 housing units in Mavoko under the Sustainable Neighborhood Program, and the formation of 25 housing cooperatives in informal settlements to increase the affordability of housing.³⁷³ Recognizing these advances by the state in a statement on economic, social and cultural rights to the African Commission on Human and Peoples' Rights at the 55th Ordinary Session of the Commission, AI praised the state for drawing attention to forced evictions and proposing laws to address it in Parliament.³⁷⁴

Even with general shaming, though, there are limits to what the state is willing to do. Customary laws and practices sustain an exclusionary and discriminatory housing distribution, particularly disadvantaging women. In its failure to pass the Eviction and Resettlement Bill, the state failed to implement concrete guidelines on the issue of evictions, instead drafting an alternate Land Laws Amendment Bill that dilutes some of provisions of the original bill. Similarly, the Community Land Bill although a step in the right direction fails to include consultation and participation of informal settlers.³⁷⁵ Likewise, most slum upgrading projects do not include slum dwellers in decision-making. Moreover, for the positive aspect of the right, allocation of resources is essential, established in the budget. In their study of the “nexus between adequate resource allocation and land reforms,” a local NGO, affiliated with many international bodies,

³⁷³ Ibid.

³⁷⁴ Amnesty International, *AMNESTY INTERNATIONAL STATEMENT TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: STATE OF HOUSING RIGHTS AND FORCED EVICTIONS IN AFRICA*, Amnesty International, 2011.

³⁷⁵ Amnesty International, *KENYA: SUBMISSION TO THE UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, London: Amnesty International, 2016.

Hakijamii found that “the government was not matching its policy commitment to lands sector by adequate financial budget.”³⁷⁶ To that effect, Hakijamii suggested the government make the budget process more participatory and allocate more funding to realizing land rights.

State responses, though, are largely favorably despite their limitations. In the next section, I present an analysis of these findings.

Analysis

In the case of Kenya, the state seems to deflect its failure to stop specific instances of evictions and discrimination by noting the resources it spends on housing in general, citing progressive policies and slum upgrading programs. Lending credence to my theory on the state’s calculation of a cost-benefit ratio in decision-making, the state often simply avoids INGOs’ statements on the problems of corruption and coordination and the lack of sustainability of such programs since its indication of political will helps lessen the impact of INGO shaming, making it harder to malign the violator. In these cases, the state does not deny allegations of wrongdoing, but moves straight to tactical concessions, encouraging minor improvements, and establishing a commitment to improve in rhetoric. However, the state never approaches rule consistent behavior.

Considering White and Perelman’s model, also, the case of Kenya is counterhegemonic, prompting redistribution, but only to a certain extent. Shaming does create “local generative spaces” and even change policies of institutions, but this does not necessarily lead to a shift in the legitimacy of an action or the actual behavior of states

³⁷⁶ Economic and Social Rights Centre (Hakijamii), *Report on Housing Sector Financing in Kenya*, Nairobi: Economic and Social Rights Centre (Hakijamii), 2013.

and actors to produce change.³⁷⁷ Institutions are static. In fact, once the gaze shifts a little or the issue loses its salience in the media, conditions regress and evictions continue.

Shaming, then, aids in some ways and has no effect in others. In the next subsection, I present the state of Kenya today, measuring its ‘quality of ESR’ using an indicator developed by the OHCHR to conclude my argument.

Measuring ESR

NGOs, academics, and others have sought to measure the effectiveness of ESR and housing so as best to evaluate the condition of the right in a particular state. For some indicators, outcome is key. Chong, for example, notes that “the most important question to ask of human rights is not “Are they valid legal instruments?” – a question that kept economic and social rights in the shadows for decades – but “Are they effective in changing widespread behavior?”³⁷⁸ Effectiveness, though, need not mean change in the quality of rights in the country shamed, but rather, can be evaluated at various stages. In outlining potential human rights indicators, the OHCHR attempts to operationalize the right to housing by explicating both an “obligation of conduct,” defined as the procedural protections in place for the right and government action bolstering it (an example in the case of the right to health is the state’s adoption and implementation of a policy to reduce maternal mortality) and the “obligation of result,” which evaluates whether the state has actually successfully realized the right (for example whether the state and its policies

³⁷⁷ Jeremy Perelman and Lucie E. White, *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, (Stanford: Stanford University Press, 2010).

³⁷⁸ Daniel P. L Chong, *Freedom from Poverty: NGOs and Human Rights Praxis* (Philadelphia: University of Pennsylvania Press, 2010), 141.

brought about an actual reduction in maternal mortality).³⁷⁹ The OHCHR finds fault with quantitative indicators because they predominantly focus on results, overlooking the state's conduct. Instead to evaluate both conduct and result, the OHCHR looks to structural, process and outcome indicators.³⁸⁰ In looking at the case of Kenya, I take inspiration from OHCHR's indicators on the right to housing. Using their criteria, the table below lists the current state of the right in Kenya.

³⁷⁹ United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation*, 2012, http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf (accessed January 1, 2017).

³⁸⁰ Ibid. For structural indicators, the OHCHR indicates the ratification of international human rights treaties relevant and related to the right by the state, the date of its entry into force, coverage of the right in the state's constitution and other forms of law, including domestic law, the number and nature of active NGOs involved in promotion and protection of the right, the time frame and coverage of any national policy or strategy for the progressive implementation of measures for the right, and the time frame and coverage on policies on rehabilitation and resettlement of individuals. Concerning process indicators, the organization outlines the proportion of received complaints related to the right that are investigated and adjudicated by national human rights bodies and responses to them by the government, the number and total public expenditure on housing reconstruction and rehabilitation for evicted persons in the time period, the official development assistance received, the proportion of residents reporting satisfaction with their involvement in decision-making related to the right, the "proportion of homes (cities, towns and villages) brought under the provisions of building codes and by-laws in the reporting period • Share of public expenditure on social or community housing • Habitable area (sq. m.) added through reclamation, including of hazardous sites and change in land-use pattern, in the reporting period • Habitable area (sq. m. per capita) earmarked for social or community housing during the reporting period; Share of public expenditure on provision and maintenance of sanitation, water supply, electricity and other services of homes • Proportion of targeted population that was extended sustainable access to an improved water source, improved sanitation, electricity and waste disposal in the reporting period; • Proportion of households that receive public housing assistance, including those living in subsidized rental and subsidized owner-occupied housing • Proportion of targeted households living in squatter settlements rehabilitated in the reporting period • Proportion of homeless population that used public or community-based shelters in the reporting period." Concerning outcome indicators, the OHCHR lists, "proportion of population with sufficient living space (persons per room or rooms per household) or average number of persons per room among target households • Proportion of households living in permanent structure in compliance with building codes and by-laws • Proportion of households living in or near hazardous conditions; Proportion of urban population living in slums* • Proportion of population using an improved drinking water (public / private) source, sanitation facility, electricity and waste disposal • Proportion of household budget of target population groups spent on water supply, sanitation, electricity and waste disposal; Proportion of households spending more than "X" per cent of their monthly income or expenditure on housing or average rent of bottom three income deciles as a proportion of the top three • Annual average of homeless persons per 100,000 population; • Reported cases of "forced evictions" (e.g., as reported to the special procedures), in the reporting period • Proportion of households with legally enforceable, contractual, statutory or other protection providing security of tenure or proportion of households with access to secure tenure • Proportion of women with title to land or property."

As of 2017³⁸¹

Structural Indicators (for the sake of expediency Kenya's ratification of international and regional laws and treaties is summarized above)	Process Indicators (maintaining that corruption is a prominent issue and both transparency and accountability hard to maintain)	Outcome Indicators
Constitution that includes a provision for the right to adequate housing (signed as of 2010)	Complaints related to right and addressed by courts: multiple (key ones that set precedent addressed already) Complaints to the Kenyan Commission on Human Rights: 15 complaints, 1% of the total (as of 2010) ³⁸² Complaints to the African Court: African Commission of Human and Peoples' Rights v Kenya (the 'Ogiek case'). Ruled in favor of the commission for the Ogiek (March 2013) recommendations not implemented yet	Proportion of households living in squatter settlements: Varies from 60-80% depending on estimate used. African Population and Health Research Center recorded in 2014 from a survey conducted in 2012: "approximately 2.5 million slum dwellers in about 200 settlements in Nairobi representing 60% of the Nairobi population and occupying just 6% of the land. Kibera (largest slum in Africa) houses about 250,000 of these people" ³⁸³ According to the World Bank (data retrieved from the MDG database as of 2014, 56% of Kenya's urban population lived in slums. ³⁸⁴

³⁸¹ Data for the table from a variety of sources including government sources, the World Bank, and Hakijamii. Other sources mentioned in footnotes.

³⁸² KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, *ANNUAL REPORT FOR THE 2009 – 2010 FINANCIAL YEAR*, Nairobi: KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, 2010.

³⁸³ Kibera UK, *Kibera Facts & Information*, n.d. <http://www.kibera.org.uk/facts-info/> (accessed March 1, 2017).

³⁸⁴ World Bank, *Population living in slums, (% of urban population)*, 2017, <http://data.worldbank.org/indicator/EN.POP.SLUM.UR.ZS> (accessed February 1, 2017).

<p>Laws: Land injustice at the turn of the 21st century became a prominent issue in Kenyan politics with citizens demanding the state address problems left over from colonialism and early independence:</p> <p>Draft Evictions and Resettlement Bill (as of 2012, resurfaced in 2013, but never passed took the form of an amendment to sec. 152 of the Land Act included in the omnibus Land Laws Amendment Bill, 2015)</p> <p>Community Land Law (2016): guarantees a community’s rights to their land</p> <p>Lands Act (2012): particularly relevant to the vulnerable in urban areas, need to get a court order to evict, resettlement guaranteed, looks at informal settlements and calls on governments to institute mechanisms for the removal of squatters and to put in place a legal framework of evictions based on international guidelines</p> <p>Establishes a Land Settlement Fund for resettlement</p> <p>Land Registration Act (2012)</p> <p>National Land Commission Act (2012)</p> <p>IDP Act (2012): establishes compensation though less specific.</p> <p>National Land Policy (2009): assures security of tenure for land</p> <p>Physical planning Act (1996): ensure “proper execution” of development plans</p> <p>Land Acquisition Act (1968): provide notice to all stakeholders (potentially including informal settlers) on the issue of land</p> <p>Public Health Act (1921): maintain district in clean and</p>	<p>Total public expenditure on housing reconstruction and rehabilitation for evicted persons:</p> <p>Budget dedicated to Land and Housing Reform (projected for FY 2016/2017): approx. US\$ 844,112,874.</p> <p>Required amount: US\$ 1,049,682,592.44</p>	<p>Reported cases of “forced evictions:” thousands annually (specific major instances referenced in detail below)</p>
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<p>sanitary condition, remedy anything dangerous to health Kenya Airports Authority, Kenya Ports Authority Act, and Kenya Railways Corporation Act (1978): apply to High Court for demolition for occupied land. Landlord and Tenant Act (1965): protects corporations more Rent Restriction Act (1959): provides protection against forced evictions but mostly redundant in practice Trespass Act (1963): misused to carry out evictions Limitations of Action Act (1968): contradicts Trespass Act implicitly Environmental and Management Coordination Act (1999). National Housing Policy (2004): enables access to housing and basic services and prompts participation of slum dwellers in slum upgrading to combat poverty, though, does not directly prohibit forced evictions nor ensure security of tenure.</p>		
<p>Number of NGOs: hundreds both nationally and internationally, extremely active. A prominent local NGO with ties to the International Network for Economic, Social and Cultural Rights is Center for Economic, Social and Cultural Rights (Hakijamii Trust). Before it ended, the INGO Center on Housing Rights and Evictions was a prominent INGO working on the cause. Amnesty International has also addressed the issue.</p>	<p>Official Expenditure in US dollars for FY 2016/2017 for Slum Upgrading and Housing Development: approximately 20,630,613.66 (a minor reduction from the past fiscal year) Recurrent Expenditure: approx. 64,147.47 in US dollars Ministry of Land, Housing, and Urban Development:³⁸⁵ approx.</p>	<p>Proportion of households living in or near hazardous conditions: (study of one slum 2015 but representative of conditions in other slums in Kenya: “eighty-five households in Mathare share one toilet, only 15% of households have access to a private toilet, and the average distance to a</p>

³⁸⁵ “responsible for Lands Policy Management, Rural Settlement Planning, Land Transactions, Physical Planning, Survey and Mapping, Land Reclamation, Land Registration, Administration of Public Land as designated by the Constitution, Settlement Matters, National Spatial Data Infrastructure, Land and Property

	<p>US \$ 265,444,300 for FY 2015/2016 National Land Commission Budget: approx. \$14,870,338.43 Foreign funding for Housing Projects Total (estimated for 2016/2017 in US dollars): 59,391,955.56</p>	<p>public toilet is over 52 meters. Eighty-three percent of households without a private toilet report poor health. Mathare women report violence (68%), respiratory illness/cough (46%), diabetes (33%), and diarrhea (30%) as the most frequent physical burdens.”³⁸⁶</p>
<p>Commissions: Committee on Land Clashes (1999), Constitution of Kenya Review Commission (2000), Njonjo Commission of Inquiry into the Land Law System of Kenya (1999), Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2003), the Truth, Justice, and Reconciliation Commission (2008) National Land Commission (2010): “manage public land, monitor land-use planning (including exploitation of natural resources) and investigate into present and historical land injustice”</p>	<p>Plan to allocate 800,000 titles in FY 2016/2017 (but often miss target) Build more units as part of the slum upgrading project Proportion reporting satisfaction with decision-making involvement: no exact figure but intermittent surveys by HROs find dissatisfaction as populations are rarely informed of evictions, and have no power to participate in decision-making</p>	<p>Proportion of women with title to land or property: 5% by women jointly with men, 1% just by women (Women Lawyers of Kenya)</p>
<p>Foreign Funded Projects related to Housing:</p>	<p>Share of budget allocated to Environment Protection,</p>	

Valuation, Housing Policy Management, Public Works Policy and planning, management of Building and Construction Standards and codes, Management of Housing for Disciplined Forces and Civil Servants, Public Office Accommodation Lease Management, Management of Civil Servants Housing Scheme, Registration of Contractors and Materials Suppliers and Registration of Architects and Quantity Surveyors and other Public Works”

Ministry of Land, Housing and Urban Development, 2017, <https://www.kenyans.co.ke/government/ministry-land-housing-urban-development> (accessed January 9, 2017).

³⁸⁶Jason Corburn and Chantal Hildebrand, "Slum Sanitation and the Social Determinants of Women's Health in Nairobi, Kenya," *Journal of Environmental and Public Health*, 2015.

<p>Korogocho Slum Upgrading – Nairobi Korogocho Community Strategy Project Technical Assistance Slum Upgrading Project in Kilifi Primary and Secondary Phase II Kisumu Urban Project Kenya Informal Settlements Improvement Nairobi Metropolitan Service Improvement Project</p>	<p>Water and Natural Resources includes encouraging access to water sources, sanitation, electricity, and waste disposal: US\$ 720,077,992³⁸⁷</p>	
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³⁸⁷John Kinuthia and Jason Lakin, "Kenya: Analysis of the 2016/17 National Budget Estimates," *International Budget Partnership*, June 2016, <http://www.internationalbudget.org/wp-content/uploads/ibp-kenya-analysis-of-2016-17-national-budget-estimates-6-2016.pdf> (accessed March 3, 2017).

Chapter 5: Conclusion and Limitations

Literature seeking to explain the (in)effectiveness of naming and shaming remains divided into two opposing camps. The optimists, Risse and Sikkink, attest that eventually all states approach rule consistent behavior under pressure from shaming.³⁸⁸ Realists, like Hafner Burton, resist this simple articulation of the effects of shaming. They indicate that the state may improve certain human rights only to appease the international community while continuing and even intensifying other violations. When we narrow the debate on shaming to focus only on ESR, the divisions become even more complex. Some, like Roth, are pessimistic about the extent to which INGOs can shame ESR. Roth argues that only instances of negative rights, of arbitrariness and discrimination respond to shaming efforts, not questions of distributive justice and positive rights inherent to ESR.³⁸⁹ Others, like Khan, are more optimistic about shaming ESR. After noting these contradictory theories, I looked at a specific ESR, the right to housing, in one country, Kenya, to decipher whether and how effective shaming ESR is in this context. My paper builds on, contradicts, and reinforces some of the theoretical debates on shaming as a whole and on shaming ESR in particular. Hence, although, my specific focus has been on the case of housing in Kenya, this study presents lessons for ESR more broadly.

Dividing shaming into two types, the shaming of specific eviction attempts and general shaming of the right to housing in Kenya, I find that while states respond favorably to the latter to a certain extent, violations shamed in the former continue

³⁸⁸ Thomas Risse, Kathryn Sikkink, and Stephen C. Ropp, *The Persistent Power of Human Rights: From Commitment to Compliance*, (New York: Cambridge University Press, 2013).

³⁸⁹ Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly*, (2004): 69.

unabated. In response to shaming, Kenya adopted progressive laws and a Constitution and vowed, in rhetoric, to defend ESR. Courts upheld the right to housing in some cases, taking cues from international law brought to the country by INGOs. However, all these initiatives went unenforced and unimplemented so that evictions themselves, the violations most often shamed, continued for decades to the present. Even while Kenya moves towards compliance, then, it may never move towards rule-consistent behavior where costs outweigh the benefits of human rights compliance. Placing my findings in the context of my literature, then, the case of the right to housing in Kenya grants credence more to a realist than an optimist notion of shaming human rights. Kenya appears to respond to shaming attempts with only marginal change, appeasing the international community, while continuing violations *de facto*. Considering the naming and shaming literature specific to ESR, though, the case of the right to housing in Kenya counters Roth's assumptions by illustrating the ways in which simply shaming instances of negative rights, of arbitrariness and discrimination does not help. Instead, taking into account progressive realization and shaming the right to housing more broadly does lead to change even if such change is only marginal.

These findings have many implications for what HROs can and should do to improve economic and social inequalities in the future. Although I cannot provide concrete recommendations, I do raise a variety of questions for future consideration. For one, INGOs must debate whether to emphasize and spend more resources on shaming in general as opposed to shaming specific cases. More importantly, though, noting that at least in this case shaming does not seem to lead to a halt in violations, INGOs must

question the extent to which they should spend on shaming and whether it might be fruitful to invest in and explore alternatives to promote international law enforcement.

In looking at these findings, then, I believe that shaming should move away from attempting to use and change laws themselves. Rather, perhaps, as Schulz notes, the aim of shaming should not be enforcement but an attempt to change norms, institutions and raise awareness.³⁹⁰ Moreover, even if enforcement is the aim, HROs should address both positive and negative rights and look to the right to housing in a country as a whole instead of simply shaming specific instances of evictions. As shaming becomes an increasingly common tactic today, my study becomes especially pertinent. In a recent statement, the World Bank declared its intent to shame ESR violations, stating that it too would start to name and shame “countries that fail to tackle the malnourishment and poor growth of their children, as part of a mission to rid the world of stunting.”³⁹¹ HROs and other organizations, then, can expect their efforts if only marginally and ephemerally to contribute to change that may provide more sustained results in the long run. Still, shaming by itself has many limitations, suggesting the need for the development of an alternative method of enforcement to bolster shaming efforts.

Nevertheless, my paper has many limitations. For one, I only look at one country case in a qualitative analysis and cannot draw conclusions and causal inferences about ESR shaming broadly from it. My results, then, would benefit from a quantitative

³⁹⁰ William F. Schulz, "Caught at the Keyhole: The Power and Limits of Shame," In *The Politics of Leverage in International Relations: Name, Shame, and Sanction*, by H. Richard Friman, (Hampshire: Palgrave Macmillian, 2015)

³⁹¹ Sarah Boseley, *World Bank to name and shame countries that fail to prevent stunting in children*, September 30, 2016, https://www.theguardian.com/global-development/2016/sep/30/world-bank-name-and-shame-countries-fail-stunted-children?CMP=Share_AndroidApp_Gmail (accessed March 1, 2017).

analysis akin to one Hertel does in her study, looking at a greater number and variety of cases.³⁹² I also only take the case of housing. INGOs may respond differently to health, education, and other rights. Finally, shaming ESR is so new that long run changes and responses have yet to appear and it may be decades before we may know the actual effects of the shaming attempts. However, my study starts this research and preliminarily addresses critical issues HROs need to consider today.

³⁹²Shareen Hertel, "Why Bother? Measuring Economic Rights: The Research Agenda," *International Studies Perspectives*, (2006): 215-230.

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