

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

Human Rights on the Altar of the Market: The Blackstone Letters and the Financialization of Housing

David Birchall

Abstract

This article analyses the recent exchange of letters between two UN human rights mandate-holders and the Blackstone Group L.P., a private equity firm with significant investments in the rental housing market in multiple jurisdictions. The mandate-holders argue that Blackstone's investments are causing serious harm to the right to housing, including retrogressing affordability, and increasing evictions, homelessness and housing-related poverty. The scale of investment displaces communities and reshapes the housing landscape for the next generation. Blackstone's rebuttal was, in part, predicated on their subservience to market forces and their obeying the law in all jurisdictions. This is largely accurate, indicating that markets and their constitutive rules permit and incentivize retrogressive housing outcomes. The paper therefore argues that promoting socio-economic rights under financialized globalization requires challenging the engrained norms of marketization. International human rights law provides an entry point for this project.

Acknowledgments

I am extremely grateful to Dr Surya Deva for his helpful comments on an earlier version of this article.

Keywords: International Covenant on Economic, Social and Cultural Rights; UN Guiding Principles on Business and Human Rights; Right to Housing; Commodification; Financialization

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

1. Introduction

In March 2019 Leilani Farha, the UN Special Rapporteur (UNSR) on the Right to Housing and Surya Deva, Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises (hereinafter, ‘the UN mandate-holders’) wrote to Blackstone Group L.P. (Blackstone) regarding their investments in housing,¹ noting allegations of harmful practices in multiple countries.² Blackstone responded to the letter, stating that it ‘contains numerous false claims, significant factual errors and inaccurate conclusions’.³ The UN mandate-holders also wrote letters to the governments of the Czech Republic, Denmark, Ireland, Spain, Sweden and the USA discussing their policies in relation to Blackstone and similar companies.⁴ This article will describe these letters, focusing on the exchange with Blackstone, in so doing contextualizing the right to housing in relation to the developing ‘financialization of housing’.⁵

Blackstone is described as ‘one of the largest real estate private equity firms in the world’,⁶ with \$512 billion in assets under management.⁷ One common Blackstone practice is to seek out ‘undervalued’ assets – often apartment buildings housing low-income tenants in gentrifying areas with weak tenant protection – purchase them, and significantly increase rental prices.⁸ Such acts reduce the affordability of housing,⁹ and cause a range of subsequent issues including

¹ Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Letter to the Blackstone Group, OL OTH 17/2019, 22 March 2019 [Blackstone Letter].

² *id.* 4.

³ Blackstone Group, Reply to the Mandate Holders, OL OTH 17/2019, 25 March 2019 [Blackstone Reply].

⁴ Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Letter to the Czech Republic, OL CZE 2/2019, 22 March 2019 [Czech Republic Letter]; Letter to Denmark, OL DNK 2/2019, 22 March 2019 [Denmark Letter]; Letter to Ireland, OL IRE 2/2019, 22 March 2019 [Ireland Letter]; Letter to Spain, OL ESO 3/2019, 22 March 2019 [Spain Letter]; Letter to Sweden, OL SWE 1/2019, 22 March 2019 [Sweden Letter]; Letter to the United State of America, OL USA 2/2019, 22 March 2019 [US Letter].

⁵ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context: The Financialization of housing and the right to adequate housing, A/HRC/34/51, 18 January 2017, [UNSR, Financialization].

⁶ Blackstone Letter, n 1, 1-2.

⁷ Blackstone, ‘Blackstone Reports First Quarter 2019 Results and Announces Conversion to Corporation’, 2019, 1 [Blackstone Report] at: https://s1.q4cdn.com/641657634/files/doc_financials/2019/q1/Blackstone1Q19EarningsPressRelease.pdf, (last visited 31 July 2019).

⁸ Blackstone Letter, n 1, 4-5.

⁹ *id.* 3.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

increased evictions and homelessness.¹⁰ Blackstone frequently defend their practices through reference to market forces and to their legal compliance.¹¹ This is accurate in that Blackstone is neither breaching domestic law and nor does it hold monopoly power over the market.¹² Rather, the market and its constitutive rules appear to allow and encourage harmful practices in breach of state duties and business responsibilities toward the right to housing and related rights.¹³ It is submitted therefore that direct engagement with markets, market actors and their constitutive rules must be the next frontier of socio-economic rights promotion.¹⁴

The background to the Blackstone letters is the UNSR’s 2017 report into the financialization of housing.¹⁵ The UNSR argues that ‘[h]ousing and real estate markets have been transformed by corporate finance’.¹⁶ She defines the financialization of housing as ‘structural changes in housing and financial markets and global investment whereby housing is treated as a commodity, a means of accumulating wealth and often as security for financial instruments that are traded and sold on global markets.’¹⁷ Real estate is a \$217 trillion market.¹⁸ Various specific forms of investment constitute or are linked to ‘financialization’. These include the large-scale purchase of ‘multi-family rentals’ (MFRs – this term usually refers to apartment buildings) by corporate investors; the purchasing of properties as financial assets; state policies such as ‘golden visas’ in exchange for property investment, and lower taxes and investment-friendly policies that are used to attract capital.¹⁹ Financialization is spurred by new credit and financial tools such as mortgage-backed securities that allow mortgages to be bundled and sold, the increasing mobility of capital, algorithmic price setting, and was accelerated significantly by the global financial crisis, which caused foreclosures and therefore a glut of cheap property

¹⁰ id. 3-4; Ireland Letter, n 4, 3.

¹¹ Blackstone Reply, n 3, 2-3.

¹² id. 2-3.

¹³ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, entry into force 3 January 1976 [hereinafter ICESCR]; U.N. Office of the High Commissioner of Human Rights, Guiding Principles on Business and Human Rights HR/PUB/11/04 (2011), [hereinafter Guiding Principles].

¹⁴ Such an argument can be seen as a way past critiques of human rights as inegalitarian and neoliberal, see below, and for some examples: Stephen Hopgood, *The endtimes of human rights*. Cornell University Press, 2013; Samuel Moyn, *Not enough: Human rights in an unequal world*. Harvard University Press, 2018. For more positive engagement in this direction see: Radhika Balakrishnan, James Heintz, and Diane Elson. *Rethinking Economic Policy for Social Justice: The radical potential of human rights*, Routledge, 2016; Paul O’Connell, ‘On the human rights question’ *Human Rights Quarterly* 40.4 (2018) 962.

¹⁵ UNSR, Financialization, n. 5, para. 26.

¹⁶ id. para. 2.

¹⁷ id. para. 1.

¹⁸ id. para. 3.

¹⁹ id. para. 23.

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

in the US and Europe, much of which was bought by corporate investors.²⁰ In 2017, \$435bn of newly raised capital entered the global real estate market.²¹

Financialization transforms the logic of housing, displacing communities for the sake of profit,²² and ‘disconnect[ing] housing from its social function of providing a place to live in security and dignity.’²³ It accelerates the already rapid retrogression of affordability in ‘prime locations’ that are ‘safe havens’ for capital and pushes lower-income households into peri-urban areas.²⁴ House prices in ‘so-called “hedge cities” like Hong Kong, London, Munich, Stockholm, Sydney and Vancouver have increased by over 50 per cent since 2011’.²⁵ Investor-owned homes often lie empty [stat].²⁶ It increases the risks of both dangerous levels of debt and of evictions, creating ‘unprecedented housing precarity’.²⁷ The increased concentration in ownership leads to money flowing from communities to ‘remote investors’, increasing inequality.²⁸ This creates a vicious cycle in which corporate investment pushes up prices, making home ownership less feasible and so expanding the rental market, encouraging more investors into the market, increasing prices again.²⁹

Although ‘financialization’ has garnered significant attention,³⁰ its impacts on human rights, and even more so on the right to housing, has been largely neglected. The letters, and the UNSR’s report into financialization, present an opportunity to elaborate on how global investments and the laws constitutive of them are impacting individuals’ human rights, and, perhaps more importantly, how they are reshaping human rights possibilities for future generations. The trend is toward the rapid expansion of corporate landlords and investor-owned properties, and concomitantly more expensive, more precarious housing, affecting particularly the young. Housing precarity creates what Marcuse terms ‘residential alienation’, transient

²⁰ *id.* para. 19.

²¹ Cushman and Wakefield, ‘The Great Wall of Money’ (2017), at: <http://www.cushmanwakefield.com/en/research-and-insight/2017/great-wall-of-money-2017> (last visited 30 October 2019).

²² UNSR, *Financialization*, n. 5, para. 35-37.

²³ *id.* para. 1.

²⁴ *id.* para. 4.

²⁵ *id.* para 26.

²⁶ *id.* para 30.

²⁷ *id.* para. 5.

²⁸ *id.* paras. 28; 34-38.

²⁹ See generally Manuel Aalbers, *The financialization of housing: A political economy approach*. Routledge, 2016.

³⁰ Gerald Epstein, ed. *Financialization and the world economy*. Edward Elgar Publishing, 2005; Natascha Van der Zwan, ‘Making sense of financialization’, *Socio-economic review* 12.1 (2014), 99.

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

individuals living in atomized societies.³¹ In combination with increased labour market flexibility, privatization, and reduced public services, the needs of profit are transforming society by gutting the substance, if not the letter, of socio-economic rights, and with it substantive community.³² As this article hopes to demonstrate, at least regarding financialized housing, the harm is both real and preventable. It requires political action, and the right to housing can provide a focal point around which pressure can develop.

The article first briefly describes the relevant human rights law and business responsibilities under the UN Guiding Principles on Business and Human Rights (UNGPs) in order to contextualize later arguments. Next, it focuses on the letters themselves, first describing those to states and then focusing on Blackstone. Finally, it concludes by discussing what the problems invoked by the letters mean for human rights law and argumentation around socio-economic rights and markets.

2. International Human Rights Law and Business Responsibilities in the Context of Housing

2.1. The Right to Housing under the International Covenant on Economic, Social and Cultural Rights

This section reviews the relevant international human rights law and business responsibilities toward human rights in relation to the right to housing. The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.’³³ It imposes a range of general obligations upon state parties. All material rights therein are subject to the principle of progressive realization, under which fulfilment of the rights should increase over time.³⁴ States are obliged to use the maximum of their available resources to progressively realise rights.³⁵ Deliberately retrogressive measures, defined as any law or policy that either reduces legal protection of a right or causes a quantitative ‘backsliding

³¹ Peter Marcuse, ‘Residential alienation, home ownership and the limits of shelter policy,’ *Journal of Society and Social Welfare* 3 (1975), 181.

³² See e.g. Paul O’Connell, ‘On reconciling irreconcilables: neo-liberal globalisation and human rights’, *Human Rights Law Review* 7.3 (2007), 483; Nicolas Bueno, ‘From the right to work to freedom from work: introduction to the human economy’, *International Journal of Comparative Labour Law and Industrial Relations* 33.4 (2017), 463.

³³ ICESCR, n 13, Article 11(1).

³⁴ CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) E/1991/23, para. 9 [hereinafter CESCR, Comment 3].

³⁵ *id.* para. 10.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

in the effective enjoyment of rights³⁶ are the negative side of progressive realization, and are assumed to be prohibited unless essential to protect ‘the totality of the rights provided for in the Covenant’.³⁷ States must ensure that at least a minimum core of each Covenant right is guaranteed.³⁸ States hold an obligation ‘of immediate effect’ to ensure that rights ‘will be exercised without discrimination’.³⁹ States hold international obligations toward assistance and cooperation.⁴⁰ Finally, states hold obligations to respect, protect and fulfil the right.⁴¹ Respect entails non-interference, protect entails preventing interference in rights by third parties, and fulfil entails the progressive realization of rights.⁴²

The Committee on Economic, Social and Cultural Rights (CESCR) General Comment 4 elaborates the specific content of the right to housing. The right to housing ‘should be seen as the right to live somewhere in security, peace and dignity’.⁴³ ‘Adequate housing’ must include ‘adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost’.⁴⁴ From this it defines seven core criteria along which the right to housing should be realised: Legal security of tenure; Availability of services, materials, facilities and infrastructure; Affordability; Habitability; Accessibility; Location; Cultural adequacy.⁴⁵ Forced evictions are ‘prima facie incompatible’ with the Covenant.⁴⁶ Therefore, if the state causes, or fails to protect third parties from causing, ‘interference’ in the right on any such metric it would appear to be in prima facie violation of the Covenant.⁴⁷ There is however, a potential lacuna based on what exactly constitutes ‘interference’ by third parties. Do, for

³⁶ Christian Courtis, Nicholas Lusiani and Aoife Nolan, ‘Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights’ in *Economic and social rights after the global financial crisis* (Aoife Nolan ed., 2014) 121, 123-4.

³⁷ CESCR, Comment 3, 34, para. 9.

³⁸ *id.* para. 10.

³⁹ *id.* para. 1.

⁴⁰ *id.* para. 13.

⁴¹ This does not appear in General Comment 3, but was formulated in its final version in 1987 by Asbjorn Eide in: Report on the right to adequate food as a human right submitted by Mr. Asbjorn Eide, Special Rapporteur E/CN.4/Sub.2/1987/23 7 July 1987, para. 66 and ff. It had become the standard delineation within the CESCR by the time of: General Comment 9 The right to adequate food (art. 11), E/C.12/1999/5 12 May 1999, para. 15

⁴² Discussed in: Manisuli Ssenyonjo, *Economic, social and cultural rights in international law*. Bloomsbury Publishing, 2009.

⁴³ CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) E/1992/23, 13 December 1991, para. 7 [General Comment 4, Housing]

⁴⁴ *id.*

⁴⁵ *id.* para. 8.

⁴⁶ *id.* para. 18.

⁴⁷ *id.* para. 9.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

example, investments that retrogress the affordability of housing constitute interference, and how is interference in this case to be defined and delimited?

General Comment 24 addresses this question, at least partially, elaborating ‘State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’.⁴⁸ ‘States would violate their duty to protect Covenant rights... by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all.’⁴⁹ This goes beyond ‘protect’ as preventing interference when this is defined as ‘actively violating rights’,⁵⁰ instead explicating a requirement that regulation ensures access to housing.⁵¹ A related policy example, also under ‘protect’, is that of ‘exercising rent control in the private housing market as required for the protection of everyone’s right to adequate housing.’⁵² States therefore hold duties, where material rights are provided privately, to regulate market actors to ensure that housing is accessible to all, including specifically on the metric of affordability. States are therefore obligated to prevent Blackstone profiting from reducing the affordability of housing insofar as it reduces access to housing.

Such an approach is necessary to retain the full scope of the obligation to fulfil where rights are provided privately.⁵³ The state is free to outsource provision of human rights materialities, but where it does the obligation to fulfil therefore entails strict regulation of these private providers.⁵⁴ The state could, in theory, choose minimalistic regulation of markets but provide public housing and subsidies to those in need, as is essentially Hong Kong’s approach to housing.⁵⁵ This however causes both serious problems in access to housing, such as low-income individuals without access to public housing paying high rates for ‘bed space only’

⁴⁸ CESCR General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24 [General Comment 24, Business].

⁴⁹ *id.* para. 18.

⁵⁰ UNSR, Financialization, n. 5, para. 14.

⁵¹ General Comment 24, Business, n 48, para. 18.

⁵² *id.* para. 19.

⁵³ In relation to privatization see: Aoife Nolan, ‘Privatization and economic and social rights’ *Human Rights Quarterly* 40.4 (2018) 815, 840-41 [Nolan, Privatization].

⁵⁴ *id.* 840.

⁵⁵ The Hong Kong Special Administrative Region (HKSAR) Government, ‘Response to the List of Issues raised by the United Nations Committee on Economic, Social and Cultural Rights in relation to the second periodic report of the People’s Republic of China’, para. 55.1-55.7, [hereinafter HKSAR, *Response*].

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

apartments with substandard security and habitability,⁵⁶ and/or greatly imperils the obligation to use ‘the maximum of its available resources’ to realise all Covenant rights,⁵⁷ as the government is forced to pay high subsidies to private landlords to meet demand,⁵⁸ restricting its ability to resource rights elsewhere.⁵⁹ Such a technique would appear at least to be inefficient, and most likely in breach of Covenant obligations. The UNSR report on Human Rights-Based National Housing Strategies reifies that states must ‘ensure that the actions of private actors and investors are consistent with the State’s obligation to fulfil the right to housing.’⁶⁰ Therefore, there appears to be at least a strong rationale, and most likely a clear obligation, that market regulation be designed so as to fulfil the right to housing.

2.2. Other Treaties and Business Responsibilities

The letter to Blackstone addresses its activity in the US, Sweden, Spain, and the Czech Republic, though it focuses primarily on the US. The ICESCR has been ratified in each except the US, and therefore the right to housing forms no part of US obligations. However, other human rights treaties that have been ratified by the US, such as the Convention on the Elimination of Racial Discrimination (CERD)⁶¹ and some that are near-universally ratified and therefore can in part constitute customary international law, such as the Convention on the Rights of the Child (CRC)⁶² can be invoked to target specific issues related to housing, as can

⁵⁶ Luke Marsh, ‘The Strategic Use of Human Rights Treaties in Hong Kong’s Cage-Home Crisis: No Way Out?’ 3.1 *Asian Journal of Law and Society* 159 (2016), 164-7 [hereinafter Marsh, *Cage-Home*]. In Hong Kong, the median price for a bed-space only apartment in 2017 was HKD4200 (USD537). The case study used in the article features an unsanitary combined kitchen/toilet. Naomi Ng, ‘Coffin cubicles, caged homes and subdivisions ... life inside Hong Kong’s grim low income housing’, *SCMP*, 26 September 2016, at: <https://www.scmp.com/news/hong-kong/education-community/article/2022430/theyre-just-us-exhibition-shines-light-hong-kongs> (last visited 31 July 2019).

⁵⁷ ICESCR, n 13, Art. 2.1.

⁵⁸ The UK, for example, spent £9.3 billion in 2016 on housing benefit that went to private landlords. Damien Gayle, ‘Private landlords get £9.3bn in housing benefit from taxpayer, says report’, *The Guardian* 20 August 2016, at: <https://www.theguardian.com/society/2016/aug/20/private-landlords-9bn-housing-benefit-taxpayers-national-housing-federation-report> (last visited 26 July 2019).

⁵⁹ As Philip Alston noted in his report on the UK, ‘There were 1.2 million people on the social housing waiting list in 2017, but less than 6,000 homes were built that year.’ See: Human Rights Council, ‘Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United Kingdom of Great Britain and Northern Ireland’, A/HRC/41/39/Add.1, 23 April 2019, para. 22.

⁶⁰ Human Rights Council, ‘Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context: Human rights-based national housing strategies’, 15 January 2018, A/HRC/37/53, para. 121 [UNSR, *Housing Strategies*].

⁶¹ CERD is mentioned in USA Letter, n 4, 3-4.

⁶² In Philip Alston’s, UNSR on extreme poverty and human rights, mission to the USA, he noted that ‘[p]oor children are also significantly affected by the country’s crises regarding affordable and adequate housing. On a given night in 2017, about 21 per cent (or 114,829) of homeless individuals were children. See Human Rights Council, ‘Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

the State Duty to Protect under the UNGPs.⁶³ In the US there are also powerful social movements around housing rights.⁶⁴ Senators Kamala Harris and Cory Booker have each introduced housing bills aimed specifically at helping the poor.⁶⁵ The discourse and content of rights can ground critique and promote improved housing policies,⁶⁶ or fail to do so,⁶⁷ regardless of the status of the ICESCR. The UN mandate-holders' letter to the US strongly implicated the right to housing, presumably both on this social grounding and the links to other treaty obligations.⁶⁸ A previous UNSR on the right to housing, Rachel Rolnik, conducted a mission to the USA, taking a similar approach.⁶⁹ Her report mentions the right to housing as defined in the General Comment⁷⁰ alongside other rights that are binding in the USA, such as non-discrimination.⁷¹

The UNGPs define the direct responsibilities of Blackstone. They cover the ICESCR,⁷² and apply 'to all business enterprises... wherever they operate'.⁷³ They therefore apply to Blackstone in the US despite the non-ratification of the ICESCR. Under the UNGPs, companies hold a responsibility to respect human rights that entails that they 'avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur'.⁷⁴ An adverse human rights impact is defined as any business 'action' that 'removes

States of America', A/HRC/38/33/Add.1, 4 May 2018, para. 39; see on the CRC as a potential source of customary international law: Arabella Lang, 'UN Convention on the Rights of the Child: a brief guide', *House of Commons Briefing Paper Number 7721* (2016), 4.

⁶³ USA Letter, n 4, 4-5.

⁶⁴ Joe Hoover, "The human right to housing and community empowerment: home occupation, eviction defence and community land trusts." *Third World Quarterly* 36.6 (2015), 1092-1109.

⁶⁵ Dylan Matthews, 'Cory Booker and Kamala Harris's affordable housing plans, explained', *Vox*, 2 February 2019, at:

<https://www.vox.com/future-perfect/2019/2/2/18205913/rent-kamala-harris-cory-booker-poverty> (last visited 31 July 2019).

⁶⁶ Gillian MacNaughton and Mariah McGill, 'Economic and social rights in the United States: implementation without ratification' *Northeastern University Law Journal* 4 (2012), 365.

⁶⁷ For example, in recent Concluding Observations on Hong Kong and the UK the CESCR provided critique of state policies related to financialization and evidence of serious retrogressions in affordability, but neither state has addressed the issues in significant ways. See e.g. Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China E/C.12/CHN/CO/2, 13 June 2014, para. 49; Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, 14 July 2016, para. 49.

⁶⁸ For example, 'The Government of the United States of America has... failed to take measures to ensure access to adequate housing for the most vulnerable populations.' USA Letter, n 4, 1.

⁶⁹ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, Mission to the United States of America', A/HRC/13/20/Add.4, 12 February 2012.

⁷⁰ *id.* para. 62.

⁷¹ *id.* para. 65.

⁷² Guiding Principles, n 13, Principle 12.

⁷³ *id.* Principle 1; 11.

⁷⁴ Guiding Principles, n 13, Principle 13 (a) and (b).

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

or reduces the ability of an individual to enjoy his or her human rights’.⁷⁵ Therefore Blackstone’s actions are to be evaluated on the basis of whether or not they have ‘removed or reduced’ any individuals’ enjoyment of their human rights. If Blackstone is reducing affordability or any other criterion of the right to housing, and this can be shown to be ‘removing or reducing’ rights enjoyment of affected individuals, it is causing an adverse impact on human rights and should cease this behaviour and provide remedy.⁷⁶

3. Letters to States and the Effects of Financialization on Local Markets

Before moving onto the Blackstone letters in section four, this section briefly reviews the letters that the UN mandate-holders sent governments of the Czech Republic, Denmark, Ireland, Spain, Sweden and the USA. These described three main areas: first, the laws and policies that permit and enable the financialization of housing, second, the lack of state intervention to protect and assist individuals, and third, the specific human rights issues generated.⁷⁷

The authors evidence a range of rules that encourage financialization to the detriment of the right to housing. For example, in the US ‘at least 176,760 delinquent mortgages [were auctioned] at prices that were heavily discounted’. As much as 95 percent of these mortgages were bought by private equity firms, and many were turned into private rental properties’.⁷⁸ The authors also criticize the ‘favourable tax treatment’ granted to ‘Real Estate Investment Trusts’ (REITs). REITs are popular with companies like Blackstone. Their benefits include ‘that REITs pay no corporate tax as long as 90 percent of a REIT’s profits are floated to the unit holder/shareholder; all expenses related to a REIT’s rental activities can be deducted...

⁷⁵ United Nations Office of the High Commissioner, ‘The Corporate Responsibility to Respect Human Rights - An Interpretative Guide’, HR/PUB/12/02 (2012), 5 [hereinafter Responsibility to Respect].

⁷⁶ The scope of ‘impacts’ is discussed fully in: David Birchall, ‘Any Act, Any Harm, To Anyone: The Transformative Potential of “Human Rights Impacts” Under the UN Guiding Principles of Business and Human Rights’, 1.2 *University of Oxford Human Rights Hub Journal* 120 (2019); see also: David Birchall, ‘Unaccountable Contributors and Irremediable Impacts: The Possibility of a Trust Fund for Victims of Large-Scale Human Rights Impacts Under the UN Guiding Principles of Business and Human Rights’ *Australian Journal of Human Rights* (forthcoming, 2019).

⁷⁷ The authors’ describe their rationale for the letters to states as follows: ‘We are writing to express our concern with respect to your Government’s practice of adopting laws and policies which treat housing as a commodity and undermine the enjoyment of housing as a human right... Our chief concern lies with those laws and policies which have allowed unprecedented amounts of global capital to be invested in housing as security for financial instruments that are traded on global markets, and as a means of accumulating wealth’, See e.g. Denmark Letter, n 4, 1. It should be noted that at the time of writing the Czech Republic, Ireland, Spain and Sweden have responded. These responses are collated on the UNSR homepage:

<https://www.ohchr.org/EN/Issues/Housing/Pages/FinancializationHousing.aspx> (last visited 31 July 2019).

⁷⁸ US Letter, n 4, 1-2.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

and [that] a portion of the dividends paid by REITs may constitute a non-taxable return of capital.’⁷⁹ Ireland encourages financialization in similar ways, including through tax favourable REITs and ‘the establishment of the National Asset Management Agency (NAMA) charged with selling assets to global investors.’⁸⁰ NAMA has sold 93% of assets to foreign investors, mostly to US private equity funds.⁸¹ ‘By 2016, one third of all properties sold in Ireland were being purchased by investors.’⁸² The authors also allege that investors in Ireland are driving up prices through ‘land hoarding’, wherein ‘investors sit on vacant land to restrict supply and thus increase demand and value.’⁸³

The authors critique most states for their inadequate policies to protect and assist individuals. Sweden is building 23,000 too few homes per annum.⁸⁴ In Denmark, developers, including a Blackstone subsidiary, North 360, are taking advantage of a law designed to encourage renovations in order to raise rents by more than 100%.⁸⁵ In Czech Republic, Blackstone subsidiary RESIDOMO is alleged to be attempting to evict families prior to redevelopment from a building housing many Roma and low-income families.⁸⁶ Ireland is accused of failing to provide sufficient social housing,⁸⁷ and the US is accused of, inter alia, permitting extremely high rental increases and pernicious fee charging, such as, again by Blackstone, a \$30 charge for paying rent by debit card.⁸⁸

Various human rights issues stem from the above. In Ireland, ‘the number of homeless adults [increased] by nearly 95.9% between 2015 and 2018, whilst levels of child homelessness grew by 227.7% over the same period. The central causes of homelessness are issues related to the private rental sector.’⁸⁹ In the US private investors have particularly targeted majority African-American communities, and therefore the increased rate of eviction notices and rental increases is disproportionately targeting this group, potentially in breach of CERD.⁹⁰ The increased risk

⁷⁹ id. 2.

⁸⁰ Ireland Letter, n 4, 2.

⁸¹ id. 2.

⁸² id. 2.

⁸³ id. 2.

⁸⁴ Sweden Letter, n 4, 1-2.

⁸⁵ Denmark Letter, n 4, 1-2.

⁸⁶ Czech Republic Letter, n 4, 1-2.

⁸⁷ Ireland Letter, n 4, 2.

⁸⁸ US Letter, n 4, 2.

⁸⁹ Ireland Letter, n 4, 3

⁹⁰ US Letter, n 4, 3-4

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

of evictions and other pressures to leave homes is noted in each letter.⁹¹ In Spain for example there were 100 evictions a day in 2017.⁹² The most common human rights issue is the retrogression in affordability,⁹³ which then increases the likelihood of the right to housing retrogressing along other criteria, such as individuals being forced into sub-habitable accommodation,⁹⁴ or accommodation in an inadequate location⁹⁵ or with poor services and infrastructure.⁹⁶ For example, ‘[i]n Dublin rents have increased by 42% in the past six years, and a person with an average salary renting the average property now has to allocate 86.3% of their earnings on rent.’⁹⁷ In Sweden average rental rates rose between 59 and 84 per cent from 2009-2017.⁹⁸ In Madrid, it is estimated that Blackstone have increased the average rent of social housing that was purchased in 2013 by 49%.⁹⁹

As indicated by the preceding summary, Blackstone is the business actor most frequently mentioned in the letters to states. The primary allegation against Blackstone is that they are the most efficient global exploiter of this emerging form of investment. Blackstone is described as ‘a leader in implementing the new residential real estate business model [but] by no means the only financial actor [to do so]’.¹⁰⁰ The authors identify that the private equity firm I-RES REIT is the largest private landlord in Ireland, for example.¹⁰¹ The next section discusses the exchange of letters between the UN mandate-holders and Blackstone.

4. The Blackstone Letters

The letter to Blackstone was sent under the communications procedure of the Special Procedures of the United Nations Human Rights Council. This allows UN mandate-holders to intervene where stakeholders have made allegations of human rights abuses that fall within the scope of their mandate. The aim is to clarify the facts of the allegation, inform the party of the relevant human rights standards, and to request follow-up action.¹⁰² The UN mandate-holders

⁹¹ Czech Republic Letter, n 4, 2; Denmark Letter, n 4, 2; Ireland Letter, n 4, 3; Sweden Letter, n 4, 2; US Letter, n 4, 3

⁹² Spain Letter, n 4, 3.

⁹³ General Comment 4, Housing, n 43, para. 8(c)

⁹⁴ *id.* para. 8(d).

⁹⁵ *id.* para. 8(f).

⁹⁶ *id.* para. 8(b).

⁹⁷ Ireland Letter, n 4, 2.

⁹⁸ Sweden Letter, n 4, 2.

⁹⁹ Spain Letter, n 4, 2.

¹⁰⁰ Blackstone Letter, n 4, 7.

¹⁰¹ Ireland Letter, n 4, 2.

¹⁰² Blackstone Letter, n 4, 1.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

highlight three main issues in their letter to Blackstone: Blackstone’s purchasing of single-family properties, particularly foreclosed homes in the US; Blackstone’s purchasing of multi-family properties globally; and that ‘Blackstone is using its significant resources and political leverage to undermine domestic laws and policies.’¹⁰³ I will address the allegations and Blackstone’s response together, framing the analysis around the two major forms of rebuttal by Blackstone, which can be grouped into two, slightly contradictory, categories. The first is that Blackstone claims to be providing benefits to communities through their investment in housing, their improvement of housing quality, and by behaving as a responsible landlord. The second is that, if harm is being caused, that harm can only be blamed on market forces and their legal construction, over which Blackstone has no influence.

4.1. The Benefits that Blackstone Provides to Local Communities

4.1.1. Investing in the Housing Market

Blackstone state that ‘there is no question that insufficient capital is flowing into the housing sector which has in turn caused a significant undersupply of housing.’¹⁰⁴ They describe how since the financial crisis ‘construction of new housing is down 50% in the United States and 90% in Spain’.¹⁰⁵ Blackstone is therefore ‘part of the solution in helping to address the undersupply of housing by bringing capital, [and] increasing rental housing supply.’¹⁰⁶ Blackstone has ‘provided relief to devastated communities, confidence to homeowners regarding the value of their homes, spurred local economic growth and created local jobs by bringing capital and expertise to the residential rental market.’¹⁰⁷ At the national, aggregate level in the US there are indicators of undersupply, but this is primarily a geographic issue caused by shifting employment opportunities.¹⁰⁸ In areas of high employment expansion, such as San Francisco and Seattle, land is at a premium and there is little space left to develop.¹⁰⁹ Blackstone have focused their investments in these undersupplied areas, but it is not clear that they are helping to address the housing shortage in so doing.

¹⁰³ id. 2

¹⁰⁴ Blackstone Reply, n 3, 1

¹⁰⁵ id. 1

¹⁰⁶ id. 1

¹⁰⁷ id. 1

¹⁰⁸ Freddie Mac, ‘The Major Challenge of Inadequate U.S. Housing Supply’ 5 December 2018, at: http://www.freddiemac.com/research/insight/20181205_major_challenge_to_u.s._housing_supply.page (last visited 31 July 2019).

¹⁰⁹ Freddie Mac, ‘Is Geography Destiny?’, 29 September 2017, at: http://www.freddiemac.com/research/insight/20170929_is_geography_destiny.page (last visited 31 July 2019).

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

Rather, the Blackstone model as described by the UN mandate-holders is to identify undervalued properties, often foreclosed or housing low-income individuals in areas experiencing gentrification, to purchase these homes and if necessary to renovate them, and to then offer them at much higher rental rates, thereby ‘pricing tenants out of their own homes and communities’.¹¹⁰ The UNSR states that, as of 2017, the Blackstone Group ‘spent \$10 billion to purchase repossessed properties in the United States of America at courthouses and in online auctions following the 2008 financial crisis, emerging as the largest rental landlord in the country.’¹¹¹ Similar companies in total ‘invested \$20 billion to purchase approximately 200,000 single-family homes in the United States between 2012 and mid-2013’.¹¹² Blackstone ‘has a portfolio of 82,260 single family rental homes across 17 markets in the United States of America, with a focus on the Western US (28,663 homes) and Florida (25,682 homes),’¹¹³ as well as many multi-family rental homes (generally apartment blocks) around the world.¹¹⁴ Blackstone buys these homes by selling bonds ‘backed by the rental payments of properties and using the mortgages on the properties as collateral.’¹¹⁵ This model drives a need to maximise profits by restricting the quantity of affordable housing. The mandate-holders state that ‘only 1 percent of [Blackstone subsidiary] Invitation Homes SFRs [single family rentals] are allocated to lowest income tenants.’¹¹⁶ Similar practices at a smaller scale occurred in Czech Republic, Spain, and Sweden.¹¹⁷

Blackstone state that ‘the answer to affordability is to increase the supply of housing.’¹¹⁸ But buying up foreclosed or otherwise undervalued properties is not necessarily achieving this aim, and certainly it would appear more conducive to the right to housing if community members had been able to purchase these homes. The human rights approach necessarily entails providing adequate housing for existing communities, particularly those on low-incomes, as

¹¹⁰ UNHRC, States and real estate private equity firms questioned for compliance with human rights, Press Release, 26 March 2019, [UNHRC, Press Release], at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24404&LangID=E> (last visited 31 July 2019).

¹¹¹ UNSR, Financialization, n. 5, para. 27.

¹¹² *id.* para. 27.

¹¹³ Blackstone Letter, n 1, 2.

¹¹⁴ *id.* 4-5.

¹¹⁵ *id.* 2.

¹¹⁶ *id.* 4.

¹¹⁷ *id.* 5.

¹¹⁸ Blackstone Reply, n 3, 2.

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

well as wealthier individuals.¹¹⁹ The allegation is that Blackstone is actively harming the former group through retrogressing affordability, and the response by Blackstone provides no counterevidence.

4.1.2. Improving the Quality of Homes

Blackstone's second claim is that their investments are improving the habitability of homes, itself a criterion of the right to housing.¹²⁰ In the US, through their subsidiary Invitation Homes, Blackstone has invested \$2 billion in restorations, \$22, 000 per property on average.¹²¹ Blackstone has '[p]rovided opportunities for people that can't afford to buy homes with safe, high quality rental housing.' In Sweden, '100% of all income from the company has been reinvested into its properties to provide a better living environment for its tenants.'¹²² Moreover, 'Invitation Homes has a 96% occupancy rate, high levels of customer satisfaction (4.4 out of 5 average resident rating), and residents renew their leases and stay on average 50% longer compared to the multifamily industry.'¹²³ The methodology used for the customer satisfaction figures is not cited and the statistic could be problematic.¹²⁴ A Blackstone report published in September 2019 that uses similar data states that '[a]ll figures are Blackstone proprietary data.'¹²⁵ This lack of transparency makes the data unverifiable. We do not know how it was collected, response rates, or whether low-income residents have been replaced.

The focus on habitability and satisfaction is a rebuttal to UN mandate-holder claims that Blackstone is pushing rental rates to unaffordable levels and combining this with exploitative fee charging systems. If customers are satisfied, they are presumably not unhappy with this system, and any rent increases correlate with improved habitability. The allegations in this area by the UN mandate-holders include that they have heard 'countless stories of tenants' whose buildings had been bought by private equity firms and whose rents had skyrocketed almost

¹¹⁹ UNSR, *Housing Strategies*, n. 60, Principle 2, paras. 29-40, especially 34-35.

¹²⁰ Blackstone Reply, n 3, 1.

¹²¹ *id.* 1.

¹²² *id.* 3.

¹²³ *id.* 2.

¹²⁴ Customer satisfaction surveys are notoriously unreliable and can be drafted in ways that ensure the company gets the responses it desires, see: Nigel Hill and John Brierley, *How to measure customer satisfaction* Routledge, 2017.

¹²⁵ Blackstone, 'Blackstone's Approach to Rental Housing' September 2019, at: <https://www.blackstone.com/docs/default-source/default-document-library/approach-to-rental-housing.pdf> (last visited 30 October 2019).

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

immediately afterward, sometimes by 30 or even 50 percent, making it impossible for them to remain.¹²⁶ This includes Spain, the Czech Republic, Sweden, Denmark and multiple regions of the USA.¹²⁷ In Madrid, for example, ‘Blackstone purchased over 1,800 units of social housing from the local government. Once tenants’ housing contracts expired, Blackstone raised rents to levels that were unaffordable for those who lived there, forcing many of them to leave their homes.’¹²⁸ The UN mandate-holders state that Invitation Homes increased rent on average by 7% in Western (US) States in the third quarter of 2017, and contrast this with average increases of 3.9% in Los Angeles in the first quarter of 2017.¹²⁹ Blackstone describes this as ‘an apples and oranges comparison’ because the regions are different.¹³⁰ Even so, an average rent increase of 7% for lower-income homes in a single quarter is not conducive to respecting the right to housing regardless of any comparative figures. The allegations against Blackstone in this area relate to affordability. Blackstone’s response does not adequately address the concerns, offering only tangential benefits of improved habitability that appears to exclude lower-income residents, in so doing fitting the gentrification model previously identified.

The evidence on fee-charging is focused on Blackstone’s US subsidiary. ‘Invitation Homes has initiated a “national lease” policy which “standardizes rental fees across the portfolio,” and has designed a system to “track resident delinquency on a daily basis” in order to continually assess late fees.’¹³¹ Tenants must ‘pay fees for a number of infractions or services.’¹³² The ‘national lease and automated tenant-charge system [has driven] a 22% increase in ancillary income, resulting in \$2 million of additional revenue.’¹³³ ‘Invitation Homes – through an automated system – is quick to threaten eviction or file eviction notices due to late payment of rent or late of payment of fees (95 USD per incident), no matter the circumstances.’¹³⁴ In Charlotte, North Carolina, ‘in 2013 Invitation Homes filed eviction proceedings against 10 percent of its renters.’¹³⁵ Blackstone rebut this by writing that ‘the vast majority of individuals who receive such [eviction] notices stay in their home after working with the company to get back on

¹²⁶ id. 3.

¹²⁷ Blackstone Letter, n 1, 4-5, also covered in some letters to states. It should be noted that Blackstone dispute the facts of the Czech Republic case, see Blackstone Reply, n 3, 3.

¹²⁸ id. 5.

¹²⁹ id. 3.

¹³⁰ Blackstone Reply, n 3, 3.

¹³¹ Blackstone Letter, n 1, 3.

¹³² id. 3.

¹³³ id. 3.

¹³⁴ id. 3.

¹³⁵ id. 3.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

track.’¹³⁶ However, individuals must still pay the fine and face the stress of eviction proceedings. Blackstone claim also to follow the law ‘to the letter’ in this regard.¹³⁷ There is no suggestion that they do not, but there is a strong implication that Blackstone is exploiting the legal systems – its gaps and the rights it grants landlords – to maximize profits at the expense of individuals.

4.1.3. Blackstone is a Responsible Landlord

Third, Blackstone provide ‘responsible, proactive and professional ownership’.¹³⁸ Blackstone describe how they promised to retain 5000 affordable homes from over 11000 in total when they purchased Stuyvesant Town in New York City – the largest apartment complex in Manhattan.¹³⁹ However, of these 5000, 4500 should be classified as middle-income homes, with only 500 preserved for low-income families.¹⁴⁰ One reason the complex is so profitable is that rent-controlled tenancies are in place at Stuyvesant Town, but are no longer being created, leading to a gradual quantitative decline.¹⁴¹ The proportion of such tenancies in the building has fallen from 99% in 2000 to 50% in 2015.¹⁴² Blackstone agreed to preserve 5000 existing ‘rent stabilized tenancies’ for the next twenty years. They did this in exchange for \$221 million in city funds through the waiving of mortgage recording taxes worth \$77 million and a \$144 million loan that ‘will have a term of 20 years at 0% interest, with the principal amount... being forgiven annually at a rate of \$7,185,937.50 per annum.’¹⁴³ This means that Blackstone will not have to repay this loan.¹⁴⁴ Blackstone is therefore merely ‘preserving the status quo in exchange for \$221 million in taxpayer money and hundreds of millions more in development rights.’¹⁴⁵ These development rights, also called ‘air rights’, are granted to developers that

¹³⁶ Blackstone Reply, n 3, 3.

¹³⁷ id. 3.

¹³⁸ id. 2.

¹³⁹ id. 2.

¹⁴⁰ The middle-income bracket is targeted at families ‘earning up to \$128,210 a year [who] would pay a rent of \$3,205 a month for a two-bedroom apartment. An additional 500 apartments would be set aside for families making less. For example, a family of three earning up to \$62,150 a year would pay about \$1,553 in rent for a two-bedroom.’ Jen Chung, ‘Stuyvesant Town Sold Yet Again, With 5,000 Apartments Set Aside For Middle Class Families’ *Gothamist*, 20 October 2015, at: https://gothamist.com/2015/10/20/stuyvesant_town_sold_yet_again_with.php (last visited 31 July 2019).

¹⁴¹ Hui-yong Yu, Oshrat Carmiel, and Sarah Mulholland, ‘Blackstone to Buy Manhattan’s Stuyvesant Town for \$5.3 Billion’ *Bloomberg*, 20 October 2015, at: <https://www.bloomberg.com/news/articles/2015-10-20/blackstone-to-buy-manhattan-s-stuyvesant-town-for-5-3-billion-ifzjecx2> (last visited 31 July 2019).

¹⁴² Kevin Sweeting, ‘How Stuy Town Got A Tourniquet While Blackstone Gets Billions’ *Gothamist*, 21 March 2016, https://gothamist.com/2016/03/31/stuy_town_affordable_housing.php (last visited 31 July 2019).

¹⁴³ id.

¹⁴⁴ id.

¹⁴⁵ id.

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

have not used the maximum height allocation of a building, allowing them to transfer this capacity to another building. Stuyvesant Town comes with about 1 million square feet of air rights that Blackstone can either use elsewhere or sell-on. The exact value will depend on the specific deals struck, but one article estimates it could be worth around \$625 million.¹⁴⁶

One reason the city was in a weak bargaining position was that the previous ownership, a partnership between investors Tishman Speyer and BlackRock, had used a heavily debt-leveraged model and eventually defaulted on \$4.4 billion in loans, abandoning the venture to CWCapital Asset Management which was tasked with managing the interim period and finding a new buyer.¹⁴⁷ The Tishman deal, which took place in 2006, was described as ‘one of the biggest real-estate disasters of the financial downturn.’¹⁴⁸ To recoup their losses, Tishman adopted the same practices now widely-alleged of Blackstone. They ‘infuriated tenants as they showered hundreds of residents with eviction notices. They renovated vacant apartments and rapidly raised rents.’¹⁴⁹ This ownership situation granted Blackstone leverage, particularly as it was prepared to put significant liquidity into the deal rather than rely on debt, demonstrating the interconnectedness of market actors and market problems. One concern in the financialization of housing report is the increased precarity of housing as it becomes an investment commodity.¹⁵⁰ A poor financial decision by one group just before the global financial crisis opened the door to a lucrative opportunity for another group nine years later.

Blackstone agreed to some relatively affordable homes at Stuyvesant Town only as a contractual stipulation and in exchange for other benefits. This suggests that Blackstone will respect the right to housing only insofar as that respect will help maximize profits, and this caveat is the locus of harm to affordability, security of tenure and other issues. This is perhaps obvious, but needs reifying where corporations are taking such a crucial position within human rights protection and claiming to be protecting the right of their own accord. This cannot be the

¹⁴⁶ Lois Weiss, ‘Blackstone captures \$625M worth of air rights’ *New York Post*, 6 January 2016, at: <https://nypost.com/2016/01/06/blackstone-captures-625m-worth-of-air-rights/> (last visited 31 July 2019).

¹⁴⁷ Charles Bagli and Christine Haughney, ‘How Stuy Town Got A Tourniquet While Blackstone Gets Billions’, *New York Times*, 26 January 2016, at: <https://www.nytimes.com/2016/01/26/nyregion/26stuy.html> (last visited 31 July 2019).

¹⁴⁸ Peter Grant, ‘Stuytown Is Going on the Market’, *Wall Street Journal*, 18 October 2015, at: <https://www.wsj.com/articles/stuytown-is-going-on-the-market-1445214626> (last visited 31 July 2019).

¹⁴⁹ Charles Bagli, ‘Stuyvesant Town Said to Be Near Sale That Will Preserve Middle-Class Housing’, *New York Times*, 20 October 2015, at: <https://www.nytimes.com/2015/10/20/nyregion/stuyvesant-town-said-to-be-near-sale-that-will-preserve-middle-class-housing.html?partner=rss&emc=rss&r=0> (last visited 31 July 2019).

¹⁵⁰ UNSR, *Financialization*, n. 5, para. 5.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

case regarding affordable housing in a booming market like New York City. Affordability will detract from profits, and so Blackstone will have to make a choice between profits and rights. That they required incentives to maintain the status quo at Stuyvesant Town shows where their priorities lie.

4.2. Following Market Signals and the Law

The second interesting part of the letter is that, without ever admitting to causing harm, their actions are set against the backdrop of an inalienable housing market guided by an invisible hand that forms a barrier against criticism. If Blackstone is causing harm, it is only because that is what the market demands, allows, or incentivizes. The foundation of this argument is that Blackstone has no monopoly power over the market. ‘Invitation Homes ‘has no ability to impact rents – it must follow market price or no one would rent from Invitation Homes.’¹⁵¹ Blackstone make the same argument regarding their investment in Sweden.¹⁵² They add that in both cases, as well as in the Czech Republic, they follow the law stringently.¹⁵³ ‘Invitation Homes represents... just 0.5% of the nearly 16 million single family homes in the US.’¹⁵⁴ Quite apart from this being a large fraction for a single company to own in such a vast jurisdiction, the concentration of their properties in specific, ‘undervalued’¹⁵⁵ markets means they could be having a direct effect on prices regionally. Nonetheless, Blackstone is keen to portray itself as just one small operator following market forces and obeying the law, and this is largely accurate.

Blackstone state that ‘in the vast majority of markets where Invitation Homes operates, it is actually cheaper to rent rather than own a home. In Southern California and Seattle for example, it is \$818 and \$759 less expensive respectively per month to do so.’¹⁵⁶ As such, Blackstone claim that their business plan provides benefits through making more, statistically cheaper, rental properties available. Even the raw statistic requires explanation because averaging flattens regional and quality disparities. But one reason renting is less expensive than buying must be that Blackstone and similar firms own so many homes in these regions that they are

¹⁵¹ Blackstone Reply, n 3, 2

¹⁵² *id.* 3

¹⁵³ *id.* 3

¹⁵⁴ *id.* 2

¹⁵⁵ UNHRC, Press Release, n 110.

¹⁵⁶ Blackstone Reply, n 3, 3.

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

choosing to let, rather than sell.¹⁵⁷ When Blackstone increases rental prices by 7 per cent in one quarter, this will also impact purchase costs in the local area. It is reasonable to assume that most individuals would prefer to be investing in home ownership rather than losing money to a landlord every month. They cannot get on the housing ladder, as Blackstone state, because prices are too high. This market reality is contingent and is affected by the acts of investor-landlords. Any number of state interventions into the market could improve this situation, from help-to-buy policies for individuals, to restrictions on investors. Blackstone prefers to see the market as inalienable – that purchase prices are innately this high, rather than contingent - because that renders invisible Blackstone’s relationship to the problem.

As to the legal question, Blackstone is not breaching any laws, but it is exploiting laws that are not conducive to the right to housing anyway. Laws incentivize large-scale investments, such as through REITS, even where they may have deleterious effects on the right to housing. The law is permissive of harm as explained in each letter to states. Regarding evictions in the US, Blackstone write that ‘[t]here are fulsome consumer protections and often lengthy legal processes that Invitation Homes follows to the letter in the rare instances when an eviction becomes unfortunately necessary.’¹⁵⁸ This does not adequately address the UN mandate-holders concerns. They write that ‘in neighbourhoods heavily invested by private equity firms including Invitation Homes, more than 7,400 families and individuals are evicted every day.’¹⁵⁹ Such evictions and threats to evict are permitted in domestic law and guided by market forces, but may still breach both state duties and business responsibilities toward the right to housing. Relatedly, matters of government policy, such as the decision to sell Stuyvesant Town to another private company after the collapse of the previous ownership, are equally committed to an ideological, and indeed unspoken, vision of marketization that may not be conducive to the right.

The market and the law thereby become the site of Blackstone’s personal exculpation. Where Blackstone is causing harm, it refers back to market forces and legal compliance. Issues such as seven per cent rent increases in a single quarter, ten per cent of residents facing eviction and

¹⁵⁷ Mortgages have also been more difficult to arrange, see: Costas Lapavitsas and Ivan Mendieta-Muñoz, ‘Financialization at a watershed in the USA’, *Competition & Change* 22.5 (2018), 488-508.

¹⁵⁸ *id.* 3

¹⁵⁹ Blackstone Letter, n 1, 3. The exploitative ingenuity of new tenancy forms is explored in: Joshua Akers, Eric Seymour, Diné Butler, and Wade Rathke, Liquid Tenancy: "Post-crisis" economies of displacement, community organizing, and new forms of resistance, *Radical Housing Journal* 1.1, 1.

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

more generally, a for-profit company owning hundreds of thousands of homes around the world are neither illegal nor rooted in monopolistic corruptions of the market, but equally are not conducive to rights’ realization. Indeed, Blackstone’s tactics represent a market failure in human rights terms. The housing market, which could provide for universal housing is instead providing profits for the few and homelessness, evictions, indebtedness, and poverty for many. The market is failing to allocate resources ‘so as to ensure access’ to housing,¹⁶⁰ even in the wealthiest states. For example, Los Angeles suffers from a poverty rate of 24.9 per cent when housing costs are factored in,¹⁶¹ and an income of \$87,880 is needed to afford the median average rent.¹⁶²

It is worth clarifying that Blackstone is profiting handsomely from these tactics. Blackstone made \$3.5 billion profit in 2018,¹⁶³ and dividends rose 7.2%.¹⁶⁴ Blackstone ‘capture[d] \$43 billion of capital inflows in the [first] quarter [of 2019] and a record \$126 billion over the last twelve months.’¹⁶⁵ ‘Blackstone’s Total Assets Under Management now exceed half a trillion dollars, at \$512 billion, up 14% year over year.’¹⁶⁶ These profits provide strong evidence that the state could be intervening far more, without disincentivizing private investment in homes. Instead, Blackstone spent \$6.3 million to help defeat Proposition 10 in California, which would have allowed implementation of rent control laws.¹⁶⁷ These profit levels encourage increased exploitation. Today, global housing investments may no longer be yielding adequate profits – there is too much investment – and riskier forms of investment are growing, putting market stability at risk.¹⁶⁸

5. The Financialization of Human Rights

¹⁶⁰ General Comment 24, Business, n 48, para. 19.

¹⁶¹ California Housing Partnership Corporation, ‘Los Angeles County’s Housing Emergency and Proposed Solutions’ May 2018, 2, at: <https://1p08d91kd0c03rlxhmhtydpr-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/Los-Angeles-2018-HNR.pdf> (last visited 31 July 2019).

¹⁶² LA Family Housing, ‘The Causes and Solutions to Homelessness’, at: <https://lafh.org/causes-solutions> (last visited 31 July 2019).

¹⁶³ Blackstone, ‘Blackstone Reports First Quarter 2019 Results and Announces Conversion to Corporation’, 2019, 1 [Blackstone Report] at: https://s1.q4cdn.com/641657634/files/doc_financials/2019/q1/Blackstone1Q19EarningsPressRelease.pdf, (last visited 31 July 2019).

¹⁶⁴ Heather Perlberg, ‘Blackstone’s Assets Soar Above \$500 Billion in Topping Peers’, *Bloomberg*, 18 April 2019, at: <https://www.bloombergquint.com/business/blackstone-s-assets-soar-above-500-billion-in-outpacing-rivals> (last visited 31 July 2019).

¹⁶⁵ *id.*

¹⁶⁶ Blackstone Report, n 7, 1.

¹⁶⁷ Blackstone Letter, n 1, 5.

¹⁶⁸ ‘Real estate: post-crisis boom draws to a close’, *Financial Times*, 18 June 2019, at: <https://www.ft.com/content/64c381c8-8798-11e9-a028-86cea8523dc2> (last visited 31 July 2019).

5.1. Human Rights Breaches by States and Business

The letter to Blackstone is descriptive and only occasionally grounded in human rights law and argumentation. It is worth therefore spelling out the specific allegations against Blackstone and the states permissive of such practices, in legal terms. The seven criteria of the right to housing, the state duty to protect, and business responsibility to respect human rights are all relevant. Regarding the seven criteria, the overriding claim regards the retrogression of affordability. Affordability includes that ‘States parties [should] ensure that the percentage of housing-related costs is, in general, commensurate with income levels’ and that ‘tenants should be protected by appropriate means against unreasonable rent levels or rent increases.’¹⁶⁹ This underlies other human rights issues including discrimination and unwarranted evictions.¹⁷⁰ Other criteria that are likely to be affected include ‘availability of services, materials, facilities and infrastructure’, ‘habitability’ and ‘location’.¹⁷¹ In each case lower-income residents may be pushed into sub-standard conditions by the increased prices. ‘Legal security of tenure’ while specifically defining the legal standard, rather than business practices, is retrogressing insofar as Blackstone is exploiting the law for loopholes.¹⁷² Where applicable, the state is in breach of its duty to protect the right along these specific metrics¹⁷³ and of ‘failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all.’¹⁷⁴ The laws that permit these harmful actions should rightfully be defined as prohibited ‘deliberately retrogressive measures’ insofar as they enable the retrogression of the right.¹⁷⁵

Under the UNGPs, companies should avoid causing or contributing to adverse human rights impacts, defined as any business ‘action’ that ‘removes or reduces the ability of an individual to enjoy his or her human rights’.¹⁷⁶ The ‘removal or reduction’ of individuals’ enjoyment of the right to housing along each of the criteria cited above is a verifiable consequence for at least some individuals whose homes are targeted by Blackstone. Where this occurs, Blackstone is causing an adverse human rights impact in breach in the corporate responsibility to respect

¹⁶⁹ General Comment 4, Housing, n 43, para. 8(c).

¹⁷⁰ Blackstone Letter, n 1, 4.

¹⁷¹ General Comment 4, Housing, n 43, para. 8(b); (d); (f).

¹⁷² *id.* para. 8(a)

¹⁷³ For example, by failing to introduce rent control or similar policies to protect affordability. General Comment 24, General Comment 24, Business, n 48, para. 19.

¹⁷⁴ *id.* para. 18.

¹⁷⁵ Courtis, Lusiani and Nolan, *Retrogression*, n 36, 123-4.

¹⁷⁶ *Responsibility to Respect*, n XXXXXX 5.

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

the right to housing. Principle 23 addressed the problem of state malevolence or inertia – i.e. rules that require or permit harmful practices. This states that:

all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances.¹⁷⁷

This clarifies that business responsibilities exist even where the domestic context makes it difficult to comply with human rights standards. For Blackstone the situation is clear. It is operating in concordance with domestic legal standards, but it is far from ‘impossible’ to comply with human rights standards. Despite the permissive laws, therefore, Blackstone has a responsibility to respect the right to housing, meaning in this context to reduce costs, evictions, and other exploitations of the market. While the responsibility to respect is a social expectation, it can buttress already existing activist arguments against Blackstone’s practices,¹⁷⁸ and could assist in generating negative public attention that forces a shift in behaviour.

Both the ICESCR and the UNGPs set clear limits on how investors may impact individuals’ housing. The ICESCR prohibits acts that quantitatively retrogress low-income individuals’ access to housing. Rising homelessness, failure to guarantee secure tenure, and increased use of sub-standard housing also constitute state breaches. The UNGPs essentially transplant the same standards to corporations, through the umbrella prohibition on acts that remove or reduce individuals’ enjoyment of human rights, and the direct link to human rights treaty standards. A human rights approach to housing therefore requires that states and businesses act immediately to prevent any such retrogression or exploitation. Despite these standards, it is unclear whether any of the states mentioned above take the duty to avoid such retrogressions seriously. One problem in constructing a normatively powerful duty is that Blackstone’s method does not create a singular, obvious moment of violation,¹⁷⁹ and other factors, such as immigration, may

¹⁷⁷ Guiding Principles, n 1, Principle 23.

¹⁷⁸ See e.g. in the US: Occupy Our Homes Atlanta, *Blackstone: Atlanta’s Newest Landlord*, April 2014, at: <https://homesforall.org/wp-content/uploads/2014/04/BlackstoneReportFinal0407141.pdf> (last visited 26 July 2019); Cory Doctorow, *Wall Street Landlords are Slumlords*, *BoingBoing*, July 30 2018, at: <https://boingboing.net/2018/07/30/single-family-rental-secure.html> (last visited 26 July 2019); Alana Semuels, *When Wall Street Is Your Landlord*, *The Atlantic*, February 13 2019, at: <https://www.theatlantic.com/technology/archive/2019/02/single-family-landlords-wall-street/582394/> (last visited 26 July 2019).

¹⁷⁹ Kenneth Roth, ‘Defending economic social and cultural rights: Practical issues faced by an international human rights organization’, 26 *Human Rights Quarterly* (2004), 63.

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

interact with quantitative problems around affordability. It is useful to map the private actors involved and the laws constitutive of the problem, but it is difficult to define firm standards by which to hold states and corporations.¹⁸⁰ Nonetheless, the financialized model does not appear to be conducive to the right to housing and at times produces specific victims. As rights are becoming increasingly marketized,¹⁸¹ and the harm of that marketization spreads and deepens, human rights argumentation needs to develop so that demands to reshape markets and challenge market actors become as normatively forceful as those challenging torture and illegitimate killing.

5.2. Challenging the Financialization of Human Rights

Homelessness, evictions and severely unaffordable housing are increasing rapidly in wealthy jurisdictions that claim to respect human rights. Corporate profit from this housing is increasing just as fast. The first step must be to challenge Blackstone and the jurisdictions permissive of them as to whether these practices are coherent with human rights standards. Specifically, is it conducive to the right to housing for Blackstone to own close to 100,000 single-family rentals, and far more multi-family rentals, in the US? Is the mass purchasing of ‘undervalued’ homes by Blackstone conducive to the right to housing? Is the maximization of profit organized through automated processes and leading to soaring increases in rent and late payment fees conducive to the right? If these acts are not conducive to the right should they be permitted? Are European countries wise to be welcoming actors such as Blackstone?

Currently, Blackstone is breaching no domestic law and human rights argumentation appears neutered in the face of marketized housing. This suggests a larger role for political scrutiny: rather than the question resting on the reactive legality of the action it should rest on the proactive political question of whether this action is the most beneficial option for the right to housing. States must reify the right to housing as a core obligation of human rights and of human decency. States must take back control of their housing, including reviewing and

¹⁸⁰ Although the General Comment on Housing specifies that ‘the percentage of housing-related costs [should be] commensurate with income levels, it does not quantify this, see: General Comment 4, Housing, n 43, para. 8(c). In the US the ‘definition of affordable housing is that a household spend no more than 30 per cent of its income on housing.’ See UNSR, USA Mission, n 69, para. 17.

¹⁸¹ On food see: Anna Chadwick, ‘Regulating excessive speculation: commodity derivatives and the global food crisis’ *International & Comparative Law Quarterly* 66.3 (2017), 625; on healthcare see: Paul O’Connell, ‘The human right to health in an age of market hegemony.’ *Global Health and Human Rights* (John Harrington and Maria Stuttaford eds.) Routledge, 2010, 200.

Forthcoming in *Transnational Legal Theory* – draft, please do not cite without permission.

prohibiting, where necessary, large-scale purchases. States must close loopholes in tenancy rules. States must implement a binding commitment to a maximum income-housing costs ratio and a time-limited process by which to achieve it. Both the US and Canada use a 30% ratio, albeit neither is close to achieving this universally.¹⁸² Policies such as rent control,¹⁸³ strict regulation on evictions and fee-charging,¹⁸⁴ and required private provision of affordable housing at new developments,¹⁸⁵ exist in many areas around the world, albeit often partially and inadequately. The scale of investment and the range of new tactics suggests the era of strategic, minimalistic intervention by governments to guide and reinforce housing markets needs to end, precisely because firms like Blackstone have discovered how to exploit the system so well.

Some argue that such policies cause negative externalities by distorting market provision.¹⁸⁶ How true this is ultimately rests on locally specific conditions. As noted, however, profits are vast, prices are skyrocketing, and there does therefore appear to be room in which governments can work to address their respective housing crises through regulation of profit-motivated private actors. It must be restated that housing markets are not simply ‘free’. REITs, support for buy-to-let mortgages, and poorly drafted laws that allow the letter but not the substance of the law to be followed are just three cases of market interventions by states that incentivize investors and that permit exploitation. Moreover, there is an ideological element to the debate wherein financialization must be challenged politically. Relevant questions here concern upon whom the externalities are visited, and whether mass ownership of homes by individual investment firms represents the ideal working of the free market.¹⁸⁷

¹⁸² Canada Mortgage and Housing Corporation, *About Affordable Housing in Canada*, March 31, 2018, [hereinafter Canada, *Affordable*] at: <https://www.cmhc-schl.gc.ca/en/developing-and-renovating/develop-new-affordable-housing/programs-and-information/about-affordable-housing-in-canada> (last visited 31 October 2019); The Department of Housing and Urban Development, *Defining Affordable Housing*, HUD USER (undated), [hereinafter HUD, *Affordable*] at: <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-081417.html> (last visited 31 October 2019).

¹⁸³ In place in certain areas of Ireland, see: Ireland Letter, n 4, 3.

¹⁸⁴ Per Norberg and Jakob Juul-Sandberg, ‘Rent control and other aspects of tenancy law in Sweden, Denmark and Finland: how can a balance be struck between protection of tenants’ rights and landlords’ ownership rights in welfare states?’ *Paper presented at The European Network for Housing Research Conference, Belfast, United Kingdom* (2016), 11-12.

¹⁸⁵ Kim McKee, Jenny Muir, and Tom Moore, ‘Housing policy in the UK: The importance of spatial nuance’ 32.1 *Housing Studies* (2017), 60, 64.

¹⁸⁶ Explored in Jim Kemeny, *From public housing to the social market*, Routledge, 2002, 7-20.

¹⁸⁷ The ideological debates and history are well addressed in: David Harvey, *A brief history of neoliberalism*. Oxford University Press, USA, 2007.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

Indeed, the technical and definitional problems mentioned above are meaningful only if one believes that the human rights community must compel each victory from recalcitrant governments, or if one is wedded to free market ideology. Both assumptions are rooted in contemporary norms, but these norms are contingent and malleable. It was only a few generations ago, and prior to human rights treaties and the normative ‘breakthrough’ of human rights in the 1970s,¹⁸⁸ that multiple governments set themselves an obligation derived from human decency to provide residents with habitable, affordable housing.¹⁸⁹ This was largely achieved in many places with less technology and under greater external pressures than are faced today.¹⁹⁰ Perhaps the language of decency, social cohesion and national development could provide a complementary basis for housing rights arguments alongside those rooted in the powerful, but also confrontational and sometimes difficult to prove terms of ‘violations’.¹⁹¹ Concurrently, private actors should be addressed more directly. If market actors are controlling human rights materialities then every policy choice of these market actors must be subject to human rights critique.¹⁹² That Blackstone felt the need to reply just three days after the initial letter was sent suggests the company does feel a normative pressure to be seen to be respecting human rights.¹⁹³ Serious and sustained critique of marketized rights is a necessary evolution in socio-economic rights discourse, and these letters provides a useful entry-point to begin such a project.

Finally, such engagement could usefully address contemporary critiques that human rights discourse is inegalitarian and even conducive to neoliberal norms. Moyn, for example, argues that human rights are a ‘powerless companion’ to neoliberalism, incapable of challenging ‘market fundamentalism’¹⁹⁴ because of, first, human rights law’s predilection towards universal, minimal sufficiency,¹⁹⁵ and second, because the moral(istic) discourse of human

¹⁸⁸ Jan Eckel and Samuel Moyn (eds.), *The Breakthrough: Human Rights in the 1970s*, UPenn Press, 2015; Samuel Moyn, *The Last Utopia: Human Rights in History*, Harvard University Press, 2010.

¹⁸⁹ Michael Harloe, *The people's home?: social rented housing in Europe and America*. John Wiley & Sons, 2008.

¹⁹⁰ Including for example both the UK, wherein the government built 5.5 million social homes between 1950 and 1980, and the Soviet Union, see: Raquel Rolnik and Lidia Rabinovich, ‘Late-neoliberalism: the financialization of homeownership and the housing rights of the poor’ in Aoife Nolon (ed.) *Economic and Social Rights after the Global Financial Crisis*, CUP, 2014, 57, 59.

¹⁹¹ This utility of a ‘violations approach’ is advocated for in: Audrey Chapman, *A violations approach for monitoring the International Covenant on Economic, Social and Cultural Rights* (1996) 18 *Human Rights Quarterly*, 23.

¹⁹² General Comment 24, Business, n 48, para. 18-19; see also: Nolan, Privatization, n XXXXXXXX, 840-2.

¹⁹³ Blackstone Reply, n 3, 1.

¹⁹⁴ Samuel Moyn, ‘A powerless companion: Human rights in the age of neoliberalism’ 77 *Law & Contemporary Problems* (2014), 147, 151 [Moyn, Powerless]; Moyn, Not Enough, n 14, 174ff.

¹⁹⁵ Moyn, Powerless, n 194, 161.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

rights occludes focus on structural economic questions.¹⁹⁶ While this is not the space for a full elaboration of the critique and responses to it, it is worth noting that while Moyn's problematization of historical practice is powerful, neither sufficiency nor moralism captures the full doctrinal or discursive framework of the ICESCR, as discussed above. Importantly, the CESCR is belatedly realising the extent to which markets are shaping socio-economic rights possibilities and is beginning to address the issue. As explicated above, states have duties to prevent third parties depriving individuals of access to rights,¹⁹⁷ and duties to manage markets 'so as to ensure access' to the rights in question.¹⁹⁸ That human rights bodies have largely ignored the profit-motivated deprivation of access by businesses is a grave misstep, but it can be overcome within the doctrinal limits of the ICESCR. As the dangers of marketization become more apparent and oppositional discourses become mainstream,¹⁹⁹ space will emerge for human rights-based critique of marketization, capable of using the discourse of fundamental rights to challenge predatory business norms.

6. Conclusion

This article has described and contextualized the letters exchanged between two UN human rights mandate-holders and the Blackstone Group L.P. discussing harm caused to the right to housing by the latter's investments in therein. Blackstone is operating within the law and following market forces. Despite this, Blackstone is profiting from harm to the right to housing, particularly on the criterion of affordability, and causing further repercussive impacts to individuals, such as through evictions. The rapid global proliferation of the Blackstone model suggests that states do not see it as problematic. Indeed, states are ceding housing to the market at the expense of their human rights obligations. This cessation causes more harm than just the

¹⁹⁶ *id.*, 159; Susan Marks, 'Human rights and root causes' 74.1 *The Modern Law Review* 74.1 (2011), 57, 68-69.

¹⁹⁷ This formulation was first developed in: Henry Shue, *Basic rights: Subsistence, affluence, and US foreign policy*. Princeton University Press, 1996, 52. This was applied directly to business, with the argument being that businesses have direct responsibilities only to 'avoid depriving', in Thomas Donaldson, *The ethics of international business*, Oxford University Press, 1989, 84. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights explicate that: 'The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights.' Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para. 18.

¹⁹⁸ General Comment 24, Business, n 48, para. 18.

¹⁹⁹ Demonstrated aptly by both of neoliberalism's greatest underwriters, the US and the UK, having, at the time of writing, explicitly socialist challengers to their respective premierships. See on Jeremy Corbyn: Richard Seymour, *Corbyn: The strange rebirth of radical politics*, Verso Books, 2017.

Forthcoming in Transnational Legal Theory – draft, please do not cite without permission.

direct human rights issues, the evictions, homelessness, and poverty. It transforms societies by turning communities into assets to be squeezed, displacing long-standing groups and denying the next generation the chance to lay the same roots, creating transiency and alienation. The future of housing, of many other socio-economic rights, and perhaps of communities themselves depends on forceful critique of markets, their constitutive rules and the private actors therein by human rights experts and activists. Both state obligations under the ICESCR and business responsibilities under the UNGPs are useful tools in this fight. Failure to make this case will allow the Blackstone model to spread to all jurisdictions and to all material rights, ultimately sacrificing human rights to the market.