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## CHALLENGING THE COMMODIFICATION OF HUMAN RIGHTS: THE CASE OF THE RIGHT TO HOUSING

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# Challenging the Commodification of Human Rights:

## The Case of the Right to Housing

By David Birchall\*

*The profitability of commodified housing is driving extreme levels of corporate investment. To boost profits investors are exploiting “undervalued” low-income housing, evicting vulnerable individuals, hoarding land and charging exploitative fees. This is causing severe harm to individuals’ right to housing across the globe, including, inter alia, rapidly increasing prices and debt, increasing evictions, homelessness, and increased recourse to substandard accommodation. The harm is endemic, but the human rights response has been tepid.*

*This paper argues that both state obligations and the content of the right to housing under the International Covenant on Economic, Social and Cultural Rights (ICESCR) can usefully address the problem. However, in communications with State Parties the Committee on Economic, Social and Cultural Rights (CESCR) addresses issues of commodification and affordability in vague terms that fail to generate meaningful obligations. The paper grounds the CESCR’s approach in theories of enforceability which argue that enforcement is more practicable when “clear violations” can be established. The CESCR offers clear statements of breach only when identifying explicitly wrongful practices, such as discriminatory laws. This approach, however, almost entirely occludes harm caused by the marketization of human rights. It skeletonizes the “protect” limb of state obligations, permits the long-term retrogression of affordability and enables the serious subsequent effects. The paper proposes that “clear violations” can be constructed from the results of, and laws constituting, harmful marketization. A three-stage process of identification of breach, standard-setting, and policy suggestions is recommended that can turn the long-term retrogression of access to housing into specific, measurable statements of violations and recommendations. This same approach is advocated for business responsibilities under the UN*

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*Guiding Principles on Business and Human Rights, with the content of these responsibilities also evaluated.*

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## INTRODUCTION

This paper studies the right to housing in light of its entrenched and evolving commodification. Recent discussions have highlighted increasing respect for socio-economic rights, their increasing justiciability and their increasingly prominent role in rights discourse.<sup>1</sup> Yet concurrently, the materialities of socio-economic rights are increasingly commodified and treated as assets.<sup>2</sup> This applies particularly to housing.<sup>3</sup> Estimates of the value of global real estate range from 21% to 60% of total global assets.<sup>4</sup> House prices have risen by more than 50% in many places including Hong Kong, London, Sydney since 2011.<sup>5</sup> One major investor, the Blackstone Group L.P. (Blackstone), which owns hundreds of thousands of rental properties in the US alone,<sup>6</sup> made profits of \$3.5 billion in 2018,<sup>7</sup> and is accused of targeting low-income tenants through, *inter alia*, significantly increased rental prices, fee-charging and evictions.<sup>8</sup> This contributes to serious and accelerating problems of homelessness, precarious tenancy, housing-related debt, substandard habitability, evictions, and the exclusion of the poor in many of the world's wealthiest cities.<sup>9</sup> To take one example, investors in Dublin, Ireland, are accused of a range of policies detrimental to the right to housing including "land hoarding"<sup>10</sup>,

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<sup>1</sup> Malcolm Langford, *The Justiciability of Social Rights*, CAMBRIDGE UNIV. PRESS 3, 4 (2008); Philip Alston, (Special Rapporteur on Extreme Poverty and Human Rights), *Second Rep. on Extreme Poverty and Human Rights*, ¶¶4-5, U.N. Doc. A/HRC/32/31, (Apr. 28, 2016) [hereinafter UNSR, *Economic and Social Rights*]; Michael Ramsden, *Judging Socio-economic Rights in Hong Kong*, 16.2 INT. J. CONST. LAW 447, 447 (2018).

<sup>2</sup> Karen Bakker, *The "Commons" Versus the "Commodity": Alter-globalization, Anti-privatization and the Human Right to Water in the Global South*, 39.3 ANTIPODE 430 (2007); Aoife Nolan, *Privatization and Economic and Social Rights*, 40.4 HUM. RTS. Q. 815 (2018) [hereinafter Nolan, *Privatization*].

<sup>3</sup> See MANUEL AALBERS, *THE FINANCIALIZATION OF HOUSING: A POLITICAL ECONOMY APPROACH* (2016).

<sup>4</sup> U.N. Environment Programme, *The Value of Everything*, 4, 9 (2015); Leilani Farha (Special Rapporteur on Adequate Housing), *Report on the Financialization of Housing and the Right to Adequate Housing*, ¶ 3, U.N. Doc. A/HRC/34/51, (Jan. 18, 2017) [hereinafter UNSR, *Financialization*].

<sup>5</sup> *Id.* ¶ 26.

<sup>6</sup> 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*, 2, 2-3 OL OTH 17/2019 (Mar. 22, 2019) [hereinafter *Blackstone Letter*].

<sup>7</sup> *Blackstone Reports First Quarter 2019 Results and Announces Conversion to Corporation*, BLACKSTONE (Apr. 18, 2019), [https://s1.q4cdn.com/641657634/files/doc\\_financials/2019/q1/Blackstone1Q19EarningsPressRelease.pdf](https://s1.q4cdn.com/641657634/files/doc_financials/2019/q1/Blackstone1Q19EarningsPressRelease.pdf).

<sup>8</sup> *Blackstone Letter*, *supra* note 6, at 3-4.

<sup>9</sup> UNSR, *Financialization*, *supra* note 4, ¶¶ 34-38 nn.36-44.

<sup>10</sup> 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

the restriction of supply to increase value. “Dublin rents have increased by 42% in the past six years.”<sup>11</sup> On average individuals must “allocate 86.3% of their earnings [to] rent.”<sup>12</sup> Adult homelessness rose “by nearly 95.9% between 2015 and 2018... child homelessness grew by 227.7% over the same period.”<sup>13</sup> Core elements of the right to housing are retrogressing in the name of private profit, not just in Ireland but across the developed world.<sup>14</sup>

This paper studies the empirical situation within housing markets, the Committee on Economic, Social and Cultural Rights’ (CESCR) treatment of the problem, and the applicability of both the doctrinal tenants of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UN Guiding Principles on Business and Human Rights (UNGPs) to the problem.<sup>15</sup> Sixteen sets of Concluding Observations to State Parties by the CESCR are used to map the CESCR’s approach to rights enforcement, covering 2015-2019.<sup>16</sup> It draws also from work by UN Special Rapporteur on the Right to Housing, Leilani Farha.<sup>17</sup> The UK and Hong Kong are used as more detailed case studies. The USA – which has not ratified the ICESCR - is the case study related to business responsibilities under the UNGPs. The UNGPs apply “to all business enterprises... wherever they operate.”<sup>18</sup> Therefore despite the non-ratification of the ICESCR by the US,

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Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, *Letter to Ireland*, 1, 2 OL IRL 2/2019 (Mar. 22, 2019) [hereinafter *Ireland Letter*].

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3.

<sup>14</sup> See UNSR, *Financialization*, *supra* note 4.

<sup>15</sup> U.N. Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter *Guiding Principles*]; Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) [hereinafter *General Comment 24, Business*].

<sup>16</sup> Concluding Observations follow “the review of a state party report [and contain the treaty body’s] collective assessment of the State’s record and recommendations for enhanced implementation”. See UNHCR, *Concluding Observations*, <https://www.refworld.org/type/CONCOBSERVATIONS.html> (last visited July 26, 2019).

<sup>17</sup> See UNSR, *Financialization*, *supra* note 4; see also *Ireland Letter*, *supra* note 10; 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 (Mar. 22, 2019) [*Czech Republic Letter*]; *Letter to Denmark*, OL DNK 2/2019 (Mar. 22, 2019) [*Denmark Letter*]; *Letter to Spain*, OL ESO 3/2019 (Mar. 22, 2019) [*Spain Letter*]; *Letter to Sweden*, OL SWE 1/2019 (Mar. 22, 2019) [*Sweden Letter*]; *Letter to the United State of America*, OL USA 2/2019 (Mar. 22, 2019) [*US Letter*]; *Blackstone Letter*, *supra* note 6.

<sup>18</sup> *Guiding Principles*, *supra* note 15, §§ 1, 11.

companies hold a “responsibility to respect”<sup>19</sup> the ICESCR, which includes the right to housing,<sup>20</sup> in the US.

The content of the right to housing and of state obligations under article 2(1) of the ICESCR provide tools to address the harm caused by marketization. Yet the principles are not applied clearly or forcefully in Concluding Observations. In numerous recent Concluding Observations, the CESCR discusses severe affordability problems and links them to failures of market regulation but does not establish concrete obligations upon states to alter policy. For example, it recommends that Hong Kong takes a “human rights approach” to its housing policies, with no detail as to what this entails.<sup>21</sup> This neither assists state parties in meeting their obligations, nor sets standards against which future performance can be evaluated.<sup>22</sup> The result is recommendations that are easy to ignore, and that allow systemic problems in housing markets to fester.

The CESCR’s rationale appears to derive from Chapman’s “violations approach”, and Roth’s similar notion of “clear violations”.<sup>23</sup> Where “violation, victim, and remedy” are easily visible,<sup>24</sup> the CESCR sets clear recommendations against which state parties can be evaluated. Examples given below include overtly discriminatory laws, which the CESCR regularly labels as direct breaches of treaty obligations. The problem regarding marketization is that profit-seeking companies, and the laws that enable them, rarely produce such clear violations. Rather, affordability retrogresses, causing subsequent effects such as rising evictions and homelessness, but without creating a moment of clear violation. This paper proposes that clear violations can be constructed from commodified housing. A three-stage process of problem identification, standard setting, and policy recommendations through which the state could meet this standard is advocated. As noted, Dublin has an 86.3% income-housing costs ratio, meaning that the average Dubliner spends 86.3% of their income on housing. This is far beyond any national standard. Both the US and Canada use a 30 per cent ratio as the limit of

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<sup>19</sup> *Guiding Principles*, *supra* note 15, § 11.

<sup>20</sup> *Guiding Principles*, *supra* note 15, § 12.

<sup>21</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Second Periodic Rep. of China, including H.K., China, and Mac., China*, ¶ 49, U.N. Doc. E/C.12/CHN/CO/2 (June 13, 2014) [hereinafter CESCR, *CO Hong Kong*].

<sup>22</sup> *Id.* These are reviewed systemically below.

<sup>23</sup> Audrey Chapman, *A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23 (1996) [hereinafter Chapman, *Violations*]; Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63 (2004) [hereinafter Roth, *Defending*].

<sup>24</sup> Roth, *Defending*, *supra* note 23, at 69.

affordable housing,<sup>25</sup> and an OECD paper used a 40 per cent ratio.<sup>26</sup> The Dublin figure should therefore be identified as a breach of the state obligation to ensure affordable housing for all, which is one of the seven core criteria of the right to housing.<sup>27</sup> Next, a reasonable but ambitious quantitative reduction in this costs ratio should be established as an obligation to progressively realize the right to housing within the next reporting window. Finally, policies should be suggested as *pro tanto* obligations to meet this objective, such as rent control laws. This would create concrete statements of breach and objectives against which future state performance could be judged, including specific policy recommendations with which the state would have to comply or at least explain its reasons for non-compliance. This would turn affordability into an obligation capable of clear violation or compliance. Business responsibilities under the UNGPs are analysed similarly.

The paper begins by discussing the commodification of housing, its history and precursors, statistics, methods and effects on specific countries. It then discusses obligations relating to the right to housing and regarding the duty to protect in relation to business activities. It then analyses Concluding Observations, noting that market regulation is almost universally addressed but only in vague terms. To understand this problem the notion of “clear violations” is used. The paper then discusses how “clear violations” can be constructed from commodified housing. Finally, the same analysis is undertaken regarding business responsibilities under the UNGPs.

## I. THE COMMODIFICATION OF HOUSING

### A. A Brief History

Since the Second World War, housing in many developed states has been defined by three broad eras. First, the era of social housing, predating the binding human right to housing but in which the state took universal housing as a core obligation of decent societies. Second, the era of “housing finance”, starting in the late 1970s, of governments turning away from direct provision and toward assistance to individuals to buy homes from private developers. Third, the

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<sup>25</sup> *About Affordable Housing in Canada*, CAN. MORTG. AND HOUS. CORP. (Mar. 31, 2018), <https://www.cmhc-schl.gc.ca/en/developing-and-renovating/develop-new-affordable-housing/programs-and-information/about-affordable-housing-in-canada> [hereinafter Canada, *Affordable*]; *Defining Affordable Housing*, THE U.S. DEP’T OF HOUS. AND URBAN DEV., <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-081417.html> (last visited July 26, 2019) [hereinafter HUD, *Affordable*].

<sup>26</sup> ORG. FOR ECON. COOP. AND DEV., HOUSING COSTS OVER INCOME 1 (2019), <https://www.oecd.org/els/family/HC1-2-Housing-costs-over-income.pdf>.

<sup>27</sup> Comm. on Econ., Soc. and Cultural Rts., *Gen. Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, ¶ 8(c), E/1992/23 (Dec. 13, 1991) [hereinafter CESCR, *General Comment 4, Housing*].

contemporary and still accelerating era of “financialization”, in which investment companies enter markets and trade properties at significant scale as securitized assets, and some, like Blackstone, become landlords at a global scale.<sup>28</sup>

In the UK, 5.5 million homes were constructed by the state between 1946 and 1980.<sup>29</sup> The same trend was even more powerful in planned socialist economies, which rapidly constructed housing to meet growing populations.<sup>30</sup> This trend began with Lloyd George’s call in 1919 for “Homes for Heroes” and increased after World War Two. The Board of Trade in a 1946 letter to Aneurin Bevan, then Minister of Health, urged the prioritization of housing.<sup>31</sup> Problems with Keynesian policy in the west and socialist policy in the east led, from the late-1970s onward, to a monetarist approach to economic policy, and a greater role for the private sector in housing.<sup>32</sup> The state was to be seen primarily as a facilitator of private capital, particularly in the US under Reagan, and the UK under Thatcher. The principle of politics became to facilitate the economy.<sup>33</sup>

This led to the era of “housing finance,”<sup>34</sup> which refers to the state meeting its obligations toward the right to housing through “financial policies and programmes that aim to finance the cost of housing for individuals and families by providing loans (mortgages or micro-loans) or grants (subsidies or tax exemptions) for the purchase, rental construction or improvement of housing units.”<sup>35</sup> This era in retrospect appears as an interregnum between the eras of social housing and today’s financialized housing. The state switched from supply-side to demand-side policies, opening up markets but actively supporting entry into those markets. The theory stated that it was more efficient to allow the private sector to develop homes,

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<sup>28</sup> *Blackstone Letter*, *supra* note 6, at 4.

<sup>29</sup> MICHAEL HARLOE, *THE PEOPLE'S HOME?: SOCIAL RENTED HOUSING IN EUROPE AND AMERICA* (John Wiley & Sons eds., Blackwell Publishers, 1995).

<sup>30</sup> Raquel Rolnik & Lidia Rabinovich, *Late-Neoliberalism: the Financialization of Homeownership and the Housing Rights of the Poor*, *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* 57, 59 (Aoife Nolan ed., Cambridge University Press, 2014) [hereinafter Rolnik & Rabinovich, *Housing*].

<sup>31</sup> Letter to Aneurin Bevan, Minister of Health, from G.A. Issacs, Bd. of Trade (Mar. 19, 1946), <http://www.nationalarchives.gov.uk/education/resources/attlees-britain/houses-needed/>.

<sup>32</sup> See John Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 *INT’L ORG.* 379 (1982).

<sup>33</sup> FLORIAN WETTSTEIN, *MULTINATIONAL CORPORATIONS AND GLOBAL JUSTICE: HUMAN RIGHTS OBLIGATIONS OF A QUASI-GOVERNMENTAL INSTITUTION* 174-75 (2009).

<sup>34</sup> Raquel Rolnik (Special Rapporteur on Adequate Housing), *Rep. 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*, U.N. Doc. A/67/286 (Aug. 10, 2012) [hereinafter UNSR, *Finance*].

<sup>35</sup> Rolnik & Rabinovich, *Housing*, *supra* note 30, at 60.

and the state budget was best devoted to assisting individuals to enter the market.<sup>36</sup> The right to housing was to be actively realized through the market.

However, within the first-generation housing bubbles developed and housing in major urban areas became commodified nest eggs.<sup>37</sup> Now, in the era of the Washington Consensus, the idea that socio-economic justice was removed from the state's core functions was developing.<sup>38</sup> Home ownership was promoted further and housing rapidly became a competitive economic sector.<sup>39</sup> In London, average prices rose by 544 percent between January 1995 and April 2019.<sup>40</sup> The Economist found that the total value of residential property in 20 developed economies increased from \$40 trillion to \$60 trillion between 2000 and 2003.<sup>41</sup> This was partly caused by, and greatly encouraged further, private investors into these markets. Whereas previously the aim of marketization was to create "a property-owning democracy" in which each individual and family owned their own home,<sup>42</sup> now prices in major cities skyrocketed as some made fortunes.<sup>43</sup> It became accepted that many key workers and young people would be unable to afford homes in such locations.<sup>44</sup> Various interventions have been proposed, ranging from, in some parts of Ireland, rent control laws,<sup>45</sup> to the more targeted efforts of the UK government, such as key worker mortgages.<sup>46</sup> Nonetheless these interventions at best have dampened the acceleration of affordability problems. The most recent trend derives investor actions following the sub-prime crisis, and particularly corporations

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<sup>36</sup> MARTIN J. DAUNTON, *A PROPERTY-OWNING DEMOCRACY?: HOUSING IN BRITAIN* (1987).

<sup>37</sup> Rolnik & Rabinovich, *Housing*, *supra* note 30, at 63.

<sup>38</sup> DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 93, 183 (2007).

<sup>39</sup> Stuart Hodgkinson & Glyn Robbins, *The Return of Class War Conservatism? Housing Under the UK Coalition Government*, 33 CRIT. SOC. POL'Y. 57, 62 (2013).

<sup>40</sup> *House Prices Report for London: January 1995 to July 2020*, HOME.CO.UK, [https://www.home.co.uk/guides/house\\_prices\\_report.htm?location=london&all=1](https://www.home.co.uk/guides/house_prices_report.htm?location=london&all=1) (last visited July 26, 2019) [hereinafter *Home Prices*].

<sup>41</sup> *The Global Housing Boom: In Come the Waves*, THE ECONOMIST (June 16, 2005), <http://www.economist.com/node/4079027>.

<sup>42</sup> Martin O'Neill, *Liberty, Equality and Property-Owning Democracy*, 40.3 J. SOC. PHIL. 379, 379 (2009).

<sup>43</sup> For example, most of the Hong Kong's ten richest individuals made their money on full or in large part through real estate. *Hong Kong's 50 Richest People*, FORBES, <https://www.forbes.com/hong-kong-billionaires/list/#tab:overall> (last visited July 26, 2019). Foreign investment is also booming in some markets due to high levels of profit and security. The inflow of foreign capital into the UK real estate market rose from £1.5 billion (\$1.85 billion) to £7 billion (\$8.64 billion) from 2009-11. See Manuel Aalbers, et al., *London and New York as a Safe Deposit Box for the Transnational Wealth Elite*, 48.12 ENV. AND PLAN. 2443, 2452 (2016) [hereinafter Aalbers, *Elite*].

<sup>44</sup> See generally Michael Edwards, *The Housing Crisis and London*, 20.2 CITY 222 (2016).

<sup>45</sup> *Ireland Letter*, *supra* note 10, at 3.

<sup>46</sup> Colin Jones, *The Credit Crunch: Short-term UK Housing Market Correction or Long-term Tipping Point?*, 16.1 INT'L J. HOUS. POL'Y 70 (2016).

purchasing huge numbers of rental properties. This was covered in a 2017 UNSR report, explained next.

## B. The Financialization of Housing

The first serious treatment of an issue related to the housing market by a human rights authority came with Rachel Rolnik's 2012 report as UNSR on the right to housing into housing finance.<sup>47</sup> This report almost entirely targeted government plans around the privatization of publicly-owned homes, such as, in the US, the Housing and Community and Development Act of 1974 which initiated privatization through the Housing Choice Voucher Program, also known as Section 8.<sup>48</sup> This was also noted in 2010 country visit to the USA by the same UNSR.<sup>49</sup> The UNSR quotes the World Bank's 1993 advice on the issue: "[g]overnments should be encouraged to adopt policies that enable housing markets to work ... and avoid distorting housing markets."<sup>50</sup> The focus of the report is three major forms of governmental strategies to encourage private ownership: mortgage markets;<sup>51</sup> demand subsidies from the government such as a "down-payment subsidy or a subsidized loan";<sup>52</sup> and, for the developing world, housing microfinance.<sup>53</sup> The UNSR also noted in a passage not dissimilar to the 2017 report that:

[T]he conceptual transformation of adequate housing from a social good into a commodity and a strategy for household wealth accumulation and welfare security. Housing has become a financial asset ("real estate"), and housing markets are increasingly regulated so as to promote the financial aspects rather than the social aspects of housing.<sup>54</sup>

Leilani Farha's report as UNSR in 2017 into the financialization of housing marked an evolution in this approach. The UNSR defines financialization in relation to human rights as "the way capital investment in housing increasingly disconnects housing from its social function of providing a place to live in security and dignity and hence undermines the realization of housing as a human right."<sup>55</sup> It thus refers to a macro-situation in which "[h]ousing and real estate markets have been transformed by corporate finance, including banks, insurance and pension funds, hedge funds, private equity firms and other kinds of financial intermediaries".<sup>56</sup>

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<sup>47</sup> UNSR, Finance, *supra* note 34.

<sup>48</sup> UNSR, Finance, *supra* note 34, ¶ 5.

<sup>49</sup> Raquel Rolnik (Special Rapporteur on Adequate Housing), *Rep. on Mission to the United States of America*, ¶10, U.N. Doc. A/HRC/13/20/Add.4 (Feb. 12, 2010).

<sup>50</sup> UNSR, Finance, *supra* note 34, ¶ 3; Stephen K. Mayo & Shlomo Angel, *Housing: Enabling Markets to Work*, WORLD BANK 6 (1993).

<sup>51</sup> UNSR, Finance, *supra* note 34, ¶¶ 20-32.

<sup>52</sup> UNSR, Finance, *supra* note 34, ¶ 33.

<sup>53</sup> UNSR, Finance, *supra* note 34, ¶¶ 49-61.

<sup>54</sup> UNSR, Finance, *supra* note 34, ¶ 11.

<sup>55</sup> UNSR, *Financialization*, *supra* note 4, ¶ 1.

<sup>56</sup> UNSR, *Financialization*, *supra* note 4, ¶ 2.

The term captures a range of specific business-related acts, with many variations between states based on distinct legal and historical treatments of property.<sup>57</sup> Two general forms are worth highlighting. First, investors are increasingly buying large quantities of rental properties defined as “undervalued”.<sup>58</sup> Often these are foreclosed homes or homes rented by low-income tenants in areas experiencing gentrification.<sup>59</sup> These homes are then renovated and offered at a higher rental rate, “pricing tenants out of their own homes and communities”.<sup>60</sup> In 2017, Blackstone alone 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.<sup>61</sup> Other “major institutional players invested \$20 billion to purchase approximately 200,000 single-family homes in the United States between 2012 and mid-2013,” and there was over €541 billion of distressed real estate debt in Europe in 2015 much of it held by public asset management companies.<sup>62</sup> This business model creates specific pressure on lower-income households. In the US, Blackstone subsidiary Invitation Homes increased rental rates by 7 per cent on average in the Western US in the third quarter of 2017.<sup>63</sup> In 2013, in Charlotte, North Carolina, the same company “filed eviction proceedings against 10 percent of its renters.”<sup>64</sup> Invitation Homes has also significantly increased fee charging, such as \$95 for late payment of rent, increasing revenue by \$2 million in so doing.<sup>65</sup> Despite these issues, private investors are increasingly encouraged into new markets by governments. One such means adopted in Ireland is that of “Real Estate Investment Trusts” (REITs) that allow for the complete avoidance of corporation tax so long as most profits are reinvested.<sup>66</sup> A related point is the lack of accountability tenants have as the

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<sup>57</sup> There are numerous forms that financialization can take often dependent on the legal regime in which it operates. A variety are discussed in the US context in Joshua Akers et al., *Liquid Tenancy: "Post-crisis" Economies of Displacement, Community Organizing, and New Forms of Resistance*, 1.1 RADICAL HOUS. J. 10 (2019) [hereinafter Akers et al., *Tenancy*].

<sup>58</sup> UNSR, *Financialization*, *supra* note 4, ¶ 27; *Blackstone Letter*, *supra* note 6, at 4-5.

<sup>59</sup> UNSR, *Financialization*, *supra* note 4, ¶ 37.

<sup>60</sup> Press Release, Human Rights Council, States and Real Estate Private Equity Firms Questioned for Compliance with Human Rights, U.N. Press Release HRC (Mar. 26, 2019) [hereinafter HRC, *Press Release*].

<sup>61</sup> UNSR, *Financialization*, *supra* note 4, ¶ 27.

<sup>62</sup> UNSR, *Financialization*, *supra* note 4, ¶ 27; *see also* Joe Beswick et al., *Speculating on London's Housing Future: The Rise of Global Corporate Landlords in 'Post-Crisis' Urban Landscapes*, 20.2 CITY 323 (2016); RIGHT TO THE CITY ALLIANCE, *RENTING FROM WALL STREET: BLACKSTONE'S INVITATION HOMES IN LOS ANGELES AND RIVERSIDE* 9 (2014).

<sup>63</sup> *Blackstone Letter*, *supra* note 6, at 3.

<sup>64</sup> *Blackstone Letter*, *supra* note 6, at 3.

<sup>65</sup> *Blackstone Letter*, *supra* note 6, at 3.

<sup>66</sup> *Ireland Letter*, *supra* note 10, at 2.

commodity-form of housing creates “nameless” owners<sup>67</sup> and “absentee corporate landlords.”<sup>68</sup>

Second, housing in inflating markets is used as a safe haven investment. “Housing and urban real estate have become the commodity of choice for corporate finance, a “safety deposit box” for the wealthy, a repository of capital and excess liquidity from emerging markets and a convenient place for shell companies to stash their money with very little transparency.”<sup>69</sup> Investments in housing in major cities such as London and New York are seen as near-guaranteed investment opportunities, based on long-term trends.<sup>70</sup> This contributes significantly to rising prices in the least affordable markets that inevitably affect lower-income households more severely. A related component of commodification is the significant rise in luxury properties often sold to global elites who may visit the home only occasionally.<sup>71</sup> In Melbourne one-fifth of investor-owned homes were empty in 2015.<sup>72</sup> Investment visas schemes encourage this form of commodification, demonstrating one of many examples of the legal construction of financialization.<sup>73</sup>

The UNSR states that policy responses have prioritized “support for financial institutions” over access to housing.<sup>74</sup> She also notes some positive developments, such as the autonomous regions of Spain facilitating the temporary expropriation of vacant housing and prohibiting foreclosures and evictions that would result in homelessness.<sup>75</sup> Various states have implemented taxes on foreign owners, and Vancouver a new tax on vacant homes.<sup>76</sup> Others have introduced taxes on luxury property or on property speculation.<sup>77</sup> Some governments assist in the financing of affordable housing, require developers to provide a proportion of affordable housing,<sup>78</sup> or provide microfinance options.<sup>79</sup> This confirms that options are available to states, but the UNSR notes that states often implement them

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<sup>67</sup> UNSR, *Financialization*, supra note 4, ¶ 32.

<sup>68</sup> UNSR, *Financialization*, supra note 4, ¶ 33.

<sup>69</sup> UNSR, *Financialization*, supra note 4, ¶ 25.

<sup>70</sup> Aalbers, *Elite*, supra note 43.

<sup>71</sup> UNSR, *Financialization*, supra note 4, ¶ 30.

<sup>72</sup> UNSR, *Financialization*, supra note 4, ¶ 30; CATHERINE CASHMORE, SPECULATIVE VACANCIES 8: THE EMPTY PROPERTIES IGNORED BY STATISTICS 5 (2015), [https://www.prosper.org.au/wp-content/uploads/2015/12/11Final\\_Speculative-Vacancies-2015-1.pdf](https://www.prosper.org.au/wp-content/uploads/2015/12/11Final_Speculative-Vacancies-2015-1.pdf).

<sup>73</sup> UNSR, *Financialization*, supra note 4, ¶ 23; see generally Andrew Lang, *The Legal Construction of Economic Rationalities?*, 40 J. LAW SOC. 155 (2013).

<sup>74</sup> UNSR, *Financialization*, supra note 4, ¶ 67.

<sup>75</sup> UNSR, *Financialization*, supra note 4, ¶ 69.

<sup>76</sup> UNSR, *Financialization*, supra note 4, ¶ 70.

<sup>77</sup> UNSR, *Financialization*, supra note 4, ¶ 71.

<sup>78</sup> UNSR, *Financialization*, supra note 4, ¶ 73.

<sup>79</sup> UNSR, *Financialization*, supra note 4, ¶ 75.

inadequately, such as defining “affordable” housing in unrealistic ways.<sup>80</sup> The UNSR concludes with a series of critiques and recommendations, describing that states should “ensure that all investment in housing recognizes its social function”<sup>81</sup> and “human rights implementation [should become] the overriding goal, not a subsidiary or neglected obligation.”<sup>82</sup>

### C. Country Situations

In understanding the effects of marketization, it is necessary to understand the broader empirical situation in states in which financialization has taken hold. To this end I will briefly review the situation in the UK, focusing on London, and in Hong Kong.

As noted, London, average house prices in London rose by 544 percent between January 1995 and April 2019.<sup>83</sup> UK wide, the number of people made homeless after failing to pay rent trebled from 2010-2016.<sup>84</sup> 86,000 properties in the UK are owned by anonymous offshore investment companies.<sup>85</sup> Londoner’s spend on average 70% of their income on rent and bills.<sup>86</sup> Around 15% of all new-build homes in London between 2014 and 2016 were sold to foreign investors, 70% of whom planned to rent them out.<sup>87</sup> The number of landlords in the UK is a record-high of 2.5 million, a rise of 26% in five years,<sup>88</sup> although the government has increased taxes to attempt to reduce this number.<sup>89</sup> Housing benefit recipients can be forced to relocate to a cheaper region, and essential workers such as nurses

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<sup>80</sup> UNSR, *Financialization*, *supra* note 4, ¶ 72.

<sup>81</sup> UNSR, *Financialization*, *supra* note 4, ¶ 77.

<sup>82</sup> UNSR, *Financialization*, *supra* note 4, ¶ 77.

<sup>83</sup> *Home Prices*, *supra* note 40.

<sup>84</sup> Ben Kentish, *Number of Private Renters Made Homeless Has Trebled Since 2010, Figures Reveal*, THE INDEP. (Dec. 30, 2016), <http://www.independent.co.uk/news/uk/home-news/private-renters-homeless-trebled-2010-rent-conservative-government-david-cameron-theresa-may-london-a7502511.html>.

<sup>85</sup> Sam Leon, *Two Years on, We're Still in the Dark About the UK's 86,000 Anonymously Owned Homes*, GLOBAL WITNESS (Dec. 17, 2017), <https://www.globalwitness.org/en-gb/blog/two-years-still-dark-about-86000-anonymously-owned-uk-homes/>.

<sup>86</sup> *Londoners Now Spending 70% of Average Income on Rent and Essential Bills*, PORTICO (June 8, 2016), <https://www.portico.com/blog/our-news/londoners-now-spending-70-of-their-income-on-rent-essential-bills>.

<sup>87</sup> Robert Booth, *Foreign Investors Snapping Up London Homes Suitable for First-Time Buyers*, THE GUARDIAN (June 13, 2017), <https://www.theguardian.com/society/2017/jun/13/foreign-investors-snapping-up-london-homes-suitable-for-first-time-buyers>.

<sup>88</sup> Marc Da Silva, *Number of UK Landlords Rises to 2.5 million*, LANDLORD TODAY (Apr. 9 2018), <https://www.landlordtoday.co.uk/breaking-news/2018/4/number-of-uk-landlords-rises-to-1-75-million>.

<sup>89</sup> Emma Agyemang, *UK Capital Gains Tax Take Soars as Buy-to-Let Landlords Sell Up*, FINANCIAL TIMES (Apr. 24, 2019), <https://www.ft.com/content/6945d210-6681-11e9-9adc-98bfl1d35a056>.

cannot afford to live in London.<sup>90</sup> Public-private partnerships price local residents out. London's Haringey Council is completing multiple regenerations deals and states of its housing strategy: "The ability of local people to afford the new homes being built, is dependent on them... increasing their incomes to a sufficient level to afford the new homes."<sup>91</sup> The fire at Grenfell tower, which killed 80 people, brought wider safety issues to light that were intrinsically rooted in cost-saving measures.<sup>92</sup> In 2019, a swathe of low-income people, including both drug addicts and single parents, were moved into an out-of-town renovated office block, lacking security, privacy, and adequate kitchen facilities and that suffered from high crime rates.<sup>93</sup> According to 2018 report, 86 per cent of low-income renters experience harmful living conditions (i.e. habitability problems) and/or housing-related poverty.<sup>94</sup> Philip Alston's report into the UK described that "[i]n England, homelessness rose 60 per cent between 2011 and 2017 and rough sleeping rose 165 per cent from 2010 to 2018. The charity Shelter estimates that 320,000 people in Britain are now homeless."<sup>95</sup>

Hong Kong, which suffers more significant practical problems linked to space and immigration than does London,<sup>96</sup> has been ranked as the world's least affordable housing market for the last nine years by the metric of how long it would

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<sup>90</sup> Peter Byrne, *Housing Costs 'to Drive 40% of Nurses Out of London*, BBC (Apr. 24, 2019), <http://www.bbc.com/news/uk-england-london-36151927>.

<sup>91</sup> Aditya Chakraborty, *How Power Operates in Modern Britain: With Absolute Contempt*, THE GUARDIAN (July 3, 2017), <https://www.theguardian.com/commentisfree/2017/jul/03/britain-power-contempt-grenfell-labour-haringey-social-housing>.

<sup>92</sup> Vikram Dodd, *Grenfell Tower Death Toll Will Remain at About 80, Police Believe*, THE GUARDIAN (July 10, 2017), <https://www.theguardian.com/uk-news/2017/jul/10/grenfell-tower-fire-death-toll-will-remain-at-about-80-police-believe>.

<sup>93</sup> Matt Precey et al., *Inside Harlow's Office Block 'Human Warehouse' Housing*, BBC (Apr. 2, 2019), <https://www.bbc.com/news/uk-england-essex-47720887>.

<sup>94</sup> David Rhodes & Julie Rugg, *Vulnerability Amongst Low-Income Households in the Private Rented Sector in England*, UNIV. OF YORK CENTRE FOR HOUS. POL'Y 45 (2018), <https://www.york.ac.uk/media/news-and-events/pressreleases/2018/vulnerability-report.pdf>.

<sup>95</sup> Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. on the Mission to the United Kingdom of Great Britain and Northern Ireland*, ¶ 22, U.N. Doc. A/HRC/41/39/Add.1 (Apr. 23, 2019).

<sup>96</sup> Naomi Ng & Ng Kang-chung, *Number of Mainland Chinese Migrants Coming to Hong Kong Drops by Almost 15,000 From Last Year, Government Data Shows*, SOUTH CHINA MORNING POST (Aug. 15, 2018), <https://www.scmp.com/news/hong-kong/community/article/2159723/number-mainland-chinese-migrants-coming-hong-kong-drops> (mainland immigration from 1997-2016 amounted to 950,000 individuals and 12.8% of Hong Kong's total population); H.K. Population (Apr. 2015), [https://www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf?utm\\_source=weibolife.apps.pot.com](https://www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf?utm_source=weibolife.apps.pot.com).

take someone earning the median average wage to afford a house.<sup>97</sup> The researchers, Demographia, categorise Hong Kong as “severely unaffordable.”<sup>98</sup> The 2016 census revealed that 209,700 people live in bed-space only sub-divided apartments or roof-top slums.<sup>99</sup> These frequently lack basic amenities, safety, hygiene and security features.<sup>100</sup> As these are private sector, rents vary, but there is no control and they are often far above public housing rates despite habitability issues. The median price for a bed-space only apartment in 2017 was HK\$4200 (US\$537).<sup>101</sup> These feature shared facilities, and as in the case study described in this article, an unsanitary combined kitchen/toilet.<sup>102</sup> Public rental housing costs around HK\$2,500 and would be much larger.<sup>103</sup> Hong Kong is the 17<sup>th</sup> richest region in the world by GDP per capita, and in top ten on a purchasing power parity basis.<sup>104</sup> Hong Kong’s approach to housing, explained further below, is characterized by an extremely liberal approach to the private sector buttressed by significant investment in public housing and subsidies. Lee et al. state that “the financialization of Hong Kong depends mainly on real estate.”<sup>105</sup> A major revenue source for the government is selling land to private developers, averaging around 100 billion HKD per year.<sup>106</sup> This is sold with minimal caveats, in part because the land prices are so high that developers need to extract maximum value to make a profit.<sup>107</sup> Hong Kong is seeing

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<sup>97</sup> Pearl Liu, *Hong Kong Tops the Table as World’s Most Expensive Housing Market for 9th Straight Year*, SOUTH CHINA MORNING POST (Jan. 21, 2019), <https://www.scmp.com/business/article/2182980/nothing-be-proud-hong-kong-tops-table-worlds-most-expensive-housing-market>.

<sup>98</sup> *Id.*

<sup>99</sup> Kris Cheng, *209,700 People Live in Subdivided Flats in Hong Kong, 2016 Gov’t By-Census Reveals*, HONG KONG FREE PRESS (Jan. 19, 2018), <https://www.hongkongfp.com/2018/01/19/209700-people-live-subdivided-flats-hong-kong-2016-govt-census-reveals/>.

<sup>100</sup> Luke Marsh, *The Strategic Use of Human Rights Treaties in Hong Kong’s Cage-Home Crisis: No Way Out?*, 3.1 ASN. J. LAW SOC. 159 (2016), 164-7 [hereinafter Marsh, *Cage-Home*].

<sup>101</sup> Naomi Ng, *Coffin Cubicles, Caged Homes and Subdivisions ... Life Inside Hong Kong’s Grim Low Income Housing*, SCMP, (Sept. 26, 2016) <https://www.scmp.com/news/hong-kong/education-community/article/2022430/theyre-just-us-exhibition-shines-light-hong-kongs>.

<sup>102</sup> *Id.*

<sup>103</sup> David Vetter, *How Hong Kong’s Public Housing System Works: Costs, Waiting Times and Sales*, SCMP (Jan. 19, 2019), <https://www.scmp.com/news/hong-kong/society/article/2182106/why-public-housing-shortfall-will-remain-thorn-hong-kongs>.

<sup>104</sup> STATISTICS TIMES, *Projected GDP per capita Ranking (2019-2023)* (Apr. 8, 2019), <http://statisticstimes.com/economy/projected-world-gdp-capita-ranking.php>.

<sup>105</sup> Kim Ming Lee et al., *Financialization and Economic Inequality in Hong Kong: The Cost of the Finance-led Growth Regime in Hong Kong 20 Years after the Handover. Studies in the Political Economy of Public Policy*, 127, 136 (Brian Fong & Tai-Lok Lui eds., Palgrave Macmillian) (2018).

<sup>106</sup> Peggy Sito & Sandy Li, *How Hong Kong Land Policies Help Fuel City’s Ever-rising Property Prices*, SCMP (Sept. 23, 2017), <https://www.scmp.com/property/hong-kong-china/article/2125469/hong-kongs-politics-deter-options-alter-land-sales-policy>.

<sup>107</sup> *Id.*

an increase in charitable housing, where rents are set at no more than 25 per cent of tenants' household income.<sup>108</sup> This is a positive development but the cost pressures are too severe to be considered a solution to the problem.

## II. OBLIGATIONS AND OBSERVATIONS UNDER THE ICESCR

Two truths appear evident: first, affordability of housing is retrogressing in many, particularly wealthy, states, with consequences for many other elements of the right to housing and two, private investors are contributing to this retrogression. The core question therefore is that of whether profit-motivated retrogressions of rights by corporate actors are coherent with human rights standards, and if not, how they should be addressed by states and human rights bodies. In this section I provide a review of the relevant obligations under the ICESCR as interpreted by the CESCR, and a review of recent Concluding Observations in developed states with well-developed private housing markets to understand how the CESCR is addressing the topic.

### A. Basic Obligations

The ICESCR imposes a range of obligations upon State Parties. First, rights with a material basis are to be progressively realized over time taking into account differing development levels.<sup>109</sup> Such a principle incorporates that material rights may not always have a clearly-defined point at which fulfilment is achieved.<sup>110</sup> Second, states are obliged to use the maximum of their available resources to progressively realise rights.<sup>111</sup> Third, deliberately retrogressive measures are assumed to be prohibited unless necessary to protect “the totality of the rights provided for in the Covenant.”<sup>112</sup> A deliberately retrogressive measure is one which either reduces legal protection or causes a quantitative “backsliding in the effective enjoyment of rights.”<sup>113</sup> Fourth, states have an obligation to ensure that at least a minimum core of each Covenant right is guaranteed.<sup>114</sup> Fifth, states hold an obligation “of immediate effect” to ensure that rights “will be exercised without

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<sup>108</sup> Mandy Lau, *Community-based Housing Solutions in Hong Kong: How and Why Have They Emerged?* 20 INT’L J. HOUS. POL’Y. 290, 296 (2020).

<sup>109</sup> Various aspects confer immediate obligations to fulfil, including non-discrimination and articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3); see Comm. on Econ., Soc. and Cultural Rts., *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, ¶ 5, U.N. Doc. E/1991/23, (Dec. 14, 1990) [hereinafter CESCR, *General Comment 3, Obligations*].

<sup>110</sup> The right to health, for example, requires new forms of fulfilment as technology improves.

<sup>111</sup> CESCR, *General Comment 3, Obligations*, *supra* note 109, ¶ 10.

<sup>112</sup> CESCR, *General Comment 3, Obligations*, *supra* note 109, ¶ 9.

<sup>113</sup> Aoife Nolan et al., *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* 121, 123 (Aoife Nolan ed., 2014) [hereinafter Nolan et al., *Retrogression*].

<sup>114</sup> CESCR, *General Comment 3, Obligations*, *supra* note 109, ¶ 10.

discrimination.”<sup>115</sup> Sixth, states hold international obligations toward assistance and cooperation.<sup>116</sup> Seventh, states hold obligations to respect, protect and fulfil the right.<sup>117</sup> Respect entails non-interference by the state, protect entails preventing interference in rights by third parties, and fulfil entails the progressive realization of rights.

Another important source of obligations comes from the General Comment on the Right to Housing. General Comments are considered authoritative interpretations of the right itself and are not legally binding, but most elements at least are generally accepted. The right to housing “should be seen as the right to live somewhere in security, peace and dignity.”<sup>118</sup> The report considers the nature of “adequate housing” to 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.”<sup>119</sup> From this it defines specific content for the right in seven areas: Legal security of tenure; Availability of services, materials, facilities and infrastructure; Affordability; Habitability; Accessibility; Location; Cultural adequacy.<sup>120</sup> These provide specific standards to which the principles governing state obligations can be applied. Therefore, if the state causes, or fails to protect from third parties causing, retrogression on any such standard it would be in violation of the Covenant, unless it could be “fully justified by reference to the totality of the rights provided for in the Covenant.”<sup>121</sup>

## B. General Comment 24

The CESCR’s General Comment 24 elaborates on “State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities.”<sup>122</sup> This covers many aspects specifically related to marketized human rights. Two main points are relevant. First, it reifies the core of the state duty to protect: “a State party would be in breach of its obligations under the Covenant where the violation [by a business enterprise] reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event.”<sup>123</sup> Rather more expansively, and with links to economic policy, it notes that

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<sup>115</sup> CESCR, *General Comment 3, Obligations*, *supra* note 109, ¶ 1.

<sup>116</sup> CESCR, *General Comment 3, Obligations*, *supra* note 109, ¶ 13.

<sup>117</sup> This does not appear in *General Comment 3* but was formulated in its final version in Asbjorn Eide (Special Rapporteur on Right to Adequate Food as a Human Right), ¶ 66, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987). It has been used by the CESCR since *General Comment No. 12, The Right to Adequate Food (Art. 11)*, ¶ 15, E/C.12/1999/5 (May 12, 1999).

<sup>118</sup> CESCR, *General Comment 4, Housing*, *supra* note 27, ¶ 7.

<sup>119</sup> CESCR, *General Comment 4, Housing*, *supra* note 27, ¶ 7.

<sup>120</sup> CESCR, *General Comment 4, Housing*, *supra* note 27, ¶ 8.

<sup>121</sup> CESCR, *General Comment 3, Obligations*, *supra* note 109, ¶ 9.

<sup>122</sup> CESCR, *General Comment 24, Business*, *supra* note 15.

<sup>123</sup> CESCR, *General Comment 24, Business*, *supra* note 15, ¶ 32.

“[t]he obligation to respect... is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification.”<sup>124</sup> These comments indicate that one fundamental principle underlying the provision by business of human rights materialities, such as housing, is that these businesses at least do no harm to the right. This fully aligns with the fundamental basis of the state duty to protect, defined as a duty to prevent interference in rights by third parties.

Second, it goes beyond the state duty to protect (in the non-interference sense predicated on “actively violating right”)<sup>125</sup> by linking the regulation of business actors to the duty to progressively realize rights. Regarding privatization, “[t]he provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay.”<sup>126</sup> Regarding housing, “[s]tates 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.”<sup>127</sup> It goes further in stating that the obligation to protect includes “exercising rent control in the private housing market as required for the protection of everyone’s right to adequate housing.”<sup>128</sup> The UNSR on the right to housing, in the financialization report, notes similarly that commodified housing generates obligations that “extend well beyond a traditional understanding of the duty to simply prevent private actors from actively violating rights.”<sup>129</sup> Rather, states must “ensure that the rules under which [companies] operate are consistent with the realization of the right to adequate housing.”<sup>130</sup>

It must be noted that the above quotations from General Comment 24 are incorporated under the subheading “obligation to protect.” But both, and particularly the housing comment, go beyond preventing interference in the right by third parties. Rather, because “the housing market” - including regulation of the private sector, state subsidies and other modifications of the free market - is the method by which the state has chosen to meet its obligations, market regulation must “ensure access to affordable and adequate housing for all.”<sup>131</sup> This overtly links market regulation with the state duty to fulfil rights. Where rights have been successfully marketized, therefore, there is not always a significant distinction between the “protect” and “fulfil” limbs. A law such as rent control could be seen as protection against business interference in the right to housing, or as part of

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<sup>124</sup> CESCR, *General Comment 24, Business*, *supra* note 15, ¶ 12.

<sup>125</sup> UNSR, *Financialization*, *supra* note 4, ¶ 14.

<sup>126</sup> CESCR, *General Comment 24, Business*, *supra* note 15, ¶ 22.

<sup>127</sup> CESCR, *General Comment 24, Business*, *supra* note 15, ¶ 18.

<sup>128</sup> CESCR, *General Comment 24, Business*, *supra* note 15, ¶ 19.

<sup>129</sup> UNSR, *Financialization*, *supra* note 4, ¶ 14.

<sup>130</sup> UNSR, *Financialization*, *supra* note 4, ¶ 15.

<sup>131</sup> CESCR, *General Comment 24, Business*, *supra* note 15, ¶ 18.

realization of the right. This blurring of the distinction is also evident when we consider how the CESCR defines the obligation to protect in General Comment 24: “[t]he obligation to protect means that States parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities.” Exactly what constitutes an “infringement” in terms of corporations attempting to profit from the right to housing is not perfectly defined but it does not appear synonymous with the duty, also positioned under the “protect” limb, “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.”<sup>132</sup>

Therefore, the *prima facie* reading of General Comment 24 is that it breaks down any imagined barrier between state and business provision of essential human rights. What matters is the human right, and if states cede provision of that right to private enterprises the substantive duties of the state do not change. The state is still required to progressively realise the right. The scope of duties does not change, but the form of the specific duties may do. This is a coherent ethical position, because anything less would mean that the level of substantive respect, protection and fulfilment owed to an individual would vary based on whether the state supplied it directly or outsourced it to other actors. Once a right is comprehensively marketized, the obligation to regulate necessarily encompasses all elements of tripartite state duties. Nolan makes a similar case regarding privatization of human rights, arguing that “while the state may delegate its responsibilities... its obligation to fulfill... remains as extensive as before.”<sup>133</sup>

As such, states have a duty to regulate the housing market to ensure universal access to housing, or at least to ensure that access is progressively realized and does not regress. However, this duty does not appear to be being met or even taken seriously. The specific problems facing the marketized right to housing are the retrogression of affordability, the targeting of low-income, “undervalued” homes, rising evictions and often homelessness, and a range of further retrogressive consequences for other elements of the right such as materials, facilities and infrastructure; habitability; and location. Quantitative retrogressions in access to the right, including on each specific metric, constitute state breaches unless they are necessary to protect the totality of Covenant rights.<sup>134</sup> The state is therefore in breach along each metric that is regressing insofar as these specific problems are occurring and the caveats cannot be invoked. The next section turns to how the CESCR applies these principles to contemporary housing markets in state reports.

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<sup>132</sup> CESCR, *General Comment 24, Business*, *supra* note 15, ¶ 18.

<sup>133</sup> Nolan, *Privatization*, *supra* note 2, at 840.

<sup>134</sup> Nolan et al., *Retrogression*, *supra* note 113, at 123-24.

### C. The Application of Obligations by the CESCR in Concluding Observations

To understand how the CESCR addresses the right to housing in those states within well-developed housing markets, I review 16 Concluding Observations ranging from 2015-2019, focusing on states that are both high GDP per capita and free market-oriented, on the assumption that such states will be most prone to significant commodification and financialization of housing that impacts affordability, and can be assumed generally to be in a position to address the affordability problems due to their level of development. These states are: Australia;<sup>135</sup> Canada;<sup>136</sup> Finland;<sup>137</sup> France;<sup>138</sup> Germany;<sup>139</sup> Hong Kong;<sup>140</sup> Ireland;<sup>141</sup> Italy;<sup>142</sup> Liechtenstein;<sup>143</sup> the Netherlands;<sup>144</sup> New Zealand;<sup>145</sup> Portugal;<sup>146</sup> South Korea;<sup>147</sup> Spain;<sup>148</sup> Sweden;<sup>149</sup> and the United Kingdom.<sup>150</sup> In the observations on Finland and Liechtenstein the right to housing is not addressed, leaving 14 states under review. The 14 cases display remarkably similar descriptions of the problems and face similar recommendations. Every state is recommended to improve the supply of affordable housing, and, bar the Netherlands, every state is recommended to better regulate the market to ensure affordable housing.

This review performs two functions. First, it maps the problems facing the right to housing in the most developed private markets and the CESCR's recommendations in this regard. Second, it categorizes how the CESCR addresses problems, to understand why human rights obligations have so far failed to generate

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<sup>135</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Fifth Periodic Report of Australia*, U.N. Doc. E/C.12/AUS/CO/5, (July 11, 2017) [hereinafter CESCR, *CO Australia*].

<sup>136</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Sixth Periodic Report of Canada*, U.N. Doc. E/C.12/CAN/CO/6, (Mar. 23, 2016) [hereinafter CESCR, *CO Canada*].

<sup>137</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Sixth Periodic Report of Finland*, U.N. Doc. E/C.12/FIN/CO/6, (Dec. 17, 2014) [hereinafter CESCR, *CO Finland*].

<sup>138</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Fourth Periodic Report of France*, U.N. Doc. E/C.12/FRA/CO/4, (July 13, 2016) [hereinafter CESCR, *CO France*].

<sup>139</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Sixth Periodic Report of Germany*, U.N. Doc. E/C.12/DEU/CO/6, (Nov. 27, 2018) [hereinafter CESCR, *CO Germany*].

<sup>140</sup> CESCR, *CO Hong Kong*, *supra* note 25.

<sup>141</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Third Periodic Report of Ireland*, U.N. Doc. E/C.12/IRL/CO/3, (July 8, 2015) [hereinafter CESCR, *CO Ireland*].

<sup>142</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Fifth Periodic Report of Italy*, U.N. Doc. E/C.12/ITA/CO/5, (Oct. 28 2015) [hereinafter CESCR, *CO Italy*].

<sup>143</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Combined Second and Third Periodic Reports of Liechtenstein*, U.N. Doc. E/C.12/LIE/CO/2-3 (July 3, 2017) [hereinafter CESCR, *CO Liechtenstein*].

normatively powerful counter-movements against commodified housing. These reports reveal that recommendations can be grouped into three categories based on their specificity. First, and by far the most specific is the recommendation that a state repeal, reinstate, or promulgate a law or policy. These are primarily based on discriminatory rules or rules that are otherwise overtly harmful to specific groups. This creates a standard against which the state will be judged, and where the state will at least have to explain its non-performance of the recommendation. Second, states are advised to spend more, for example on social housing. This is specific in its form but never quantifies the amount that is needed, in terms of homes or money. This is therefore a standard that can only partially be used to evaluate performance. Third is what I will term recommendations for “blue sky regulation.” Market regulation is frequently mentioned, but not in ways that are remotely actionable, such as Hong Kong being asked to adopt “a human rights approach to housing,” with no clue given as to what that would entail.<sup>151</sup> This therefore creates no meaningful standard and states are demonstrably failing to address such issues. It is noteworthy that most of the developed states under review feature few or zero recommendations in the first category, suggesting that the normative prohibition on such breaches is taken seriously. That every state is recommended to spend more and/or regulate the market more effectively suggests that these demands are not taken so seriously. I first briefly turn to how the problems facing the right to housing are described by the CESCR.

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<sup>144</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Sixth Periodic Report of the Netherlands*, U.N. Doc. E/C.12/NLD/CO/6 (July 6, 2017) [hereinafter CESCR, *CO Netherlands*].

<sup>145</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Fourth Periodic Report of New Zealand*, U.N. Doc. E/C.12/NZL/CO/4 (May 1, 2018) [hereinafter CESCR, *CO New Zealand*].

<sup>146</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Fourth Periodic Report of Portugal*, U.N. Doc. E/C.12/PRT/CO/4 (Dec. 8, 2014) [hereinafter CESCR, *CO Portugal*].

<sup>147</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Fourth Periodic Report of the Report of Korea*, U.N. Doc. E/C.12/KOR/CO/4 (Oct. 19, 2017) [hereinafter CESCR, *CO Korea*].

<sup>148</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Sixth Periodic Report of Spain*, U.N. Doc. E/C.12/ESP/CO/6 (Apr. 25, 2018) [hereinafter CESCR, *CO Spain*].

<sup>149</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Sixth Periodic Report of Sweden*, U.N. Doc. E/C.12/SWE/CO/6 (July 14, 2016) [hereinafter CESCR, *CO Sweden*].

<sup>150</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Sixth Periodic Report of the U. K. of Gr. Brit. and N. Ir.*, U.N. Doc. E/C.12/GBR/CO/6 (July 14, 2016) [hereinafter CESCR, *CO UK*].

<sup>151</sup> CESCR, *CO Hong Kong*, *supra* note 21, ¶ 49.

#### D. Defining the Problem

Before moving onto recommendations, the CESCR first describes the problems facing the right to housing within the jurisdiction. While there the specifics vary, affordability problems are cited in every case and connected both to rising market prices and insufficient government assistance. Most comments also mention inadequate responses to homelessness and often issues of discrimination that relate in some way to affordability.<sup>152</sup> In relation to Germany the CESCR describes “the very high level of rents and rent increases; the acute shortage of affordable housing... the decreased number of apartments available as social housing; and the decreasing and low level of public spending on housing.”<sup>153</sup> In Australia there is a “[p]ersistent shortage of affordable housing, including rental housing and social housing; [an] [i]ncreased number of homeless persons; [and] forced evictions disproportionately affecting indigenous peoples in Western Australia.”<sup>154</sup> In Sweden, the CESCR note recent increases in spending but “remains concerned about the shortage of housing in the State party, especially in main cities, the limited access to affordable tenancies and the lack of social housing, which generate homelessness.”<sup>155</sup> Ireland suffers from a lack of social housing, rising prices, “[i]neffective social support programmes,” increasing mortgage arrears, and rising homelessness “as a result of the lack of social housing and the inadequate levels of rent supplement.”<sup>156</sup> In Spain the CESCR “is concerned at the shortage of social housing stock; the worsening shortage of affordable housing, particularly in the private market, as a result of excessively high prices; and the lack of adequate protection of security of tenure”, also noting the “large number of homeless persons.”<sup>157</sup> In Korea the CESCR cites “inadequate dwellings... high housing costs... housing shortages; and the lack of adequate protection of tenants against forced evictions.”<sup>158</sup> Canada is described as in a persistent “housing crisis.” Concerns include “insufficient funding for housing... inadequate housing subsidy... the shortage of social housing units; and increased evictions related to

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<sup>152</sup> Discrimination is prevalent against the Roma in Europe, indigenous groups in Australia and Canada, undocumented migrants in the Netherlands and against other ethnic minorities in multiple states. Frequently discrimination intersects with the affordability crisis, whether because undocumented migrants cannot access social housing (CESCR, *CO Netherlands*, *supra* note 144, ¶ 39), indigenous Australians are facing forced evictions (CESCR, *CO Australia*, *supra* note 135, ¶¶ 41(e); 42(d)-(e)), or because the general crisis more significantly affects those already suffering discrimination, such as the Roma in Portugal (CESCR, *CO Portugal*, *supra* note 146, ¶ 20).

<sup>153</sup> CESCR, *CO Germany*, *supra* note 139, ¶ 54. It should be noted that in Germany’s case the Committee notes a forthcoming increase in spending on social housing.

<sup>154</sup> CESCR, *CO Australia*, *supra* note 135, ¶¶ 41(a), (b), (e).

<sup>155</sup> CESCR, *CO Sweden*, *supra* note 149, ¶ 37.

<sup>156</sup> CESCR, *CO Ireland*, *supra* note 141, ¶ 26(a)-(e).

<sup>157</sup> CESCR, *CO Spain*, *supra* note 148, ¶ 35.

<sup>158</sup> CESCR, *CO Korea*, *supra* note 147, ¶ 52.

rental arrears.”<sup>159</sup> France face “housing shortages, including shortages of social housing, affordable housing and emergency shelters.”<sup>160</sup> Very similar comments are made in relation to Italy, New Zealand, Hong Kong and the United Kingdom. The Netherlands is the exception because the only concern in relation to general housing is “the significant rise in homelessness.”<sup>161</sup> However as one recommendation in this regard is “securing affordable social housing” it does not suggest that the Netherlands has escaped the affordability crisis.<sup>162</sup>

### E. Direct Violations

With affordability issues universally cited and linked to a range of serious externalities, the CESCR then turns to its recommendations regarding the right to housing. The first categorization is defined here as “direct violations” and features strongly worded condemnation by the CESCR of a specific law or practice. These are direct and clear statements of breach by the state party which strongly imply the existence of a rights-violative government action. In being direct, stating that the state should “repeal” laws or “halt the policy,” the CESCR creates a clear standard against which to measure future performance, forces a direct response from the state if it fails to adhere to the recommendation, and lays out clearly that this policy is antithetical to human rights standards, therefore providing guidance to the state. Aside from some issues grounded in discrimination, the right to housing generates few clear direct violations.

Although the CESCR tends to be clearest over egregious breaches, it is also willing to make ambitious recommendations that are unlikely to be accepted if they can be defined in terms of direct violations requiring a simple legal change. One example of this is the demand that Hong Kong allow migrant domestic workers to live outside the home in which they work. Hong Kong should “[t]ake immediate action to repeal the two-week rule and the live-in requirement and eliminate conditions that render migrant domestic workers vulnerable to compulsory labour and sexual assault.”<sup>163</sup> The recommendation is clear that the rules be repealed on the basis that the live-in requirement subjects such workers to the risk of abuse and exploitation and the CESCR is therefore comfortable making a direct recommendation. It does however represent a form of utopianism from the CESCR. It would mean 200,000 extra homes, or bed spaces at least, were needed instantly in a region with under 2.5 million total housing units and already under great strain

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<sup>159</sup> CESCR, *CO Canada*, *supra* note 136, ¶ 39.

<sup>160</sup> CESCR, *CO France*, *supra* note 138, ¶ 35.

<sup>161</sup> CESCR, *CO Netherlands*, *supra* note 144, ¶ 42.

<sup>162</sup> CESCR, *CO Netherlands*, *supra* note 144, ¶ 43.

<sup>163</sup> CESCR, *CO Hong Kong*, *supra* note 25, ¶ 43(b) (two-week rule mandates that upon leaving their employer migrant domestic workers must leave Hong Kong within two weeks unless they find new employment. Migrant domestic workers must also ‘live-in’ their employer’s home).

to provide more housing.<sup>164</sup> The Hong Kong government responded with this argument and rejected the recommendation.<sup>165</sup> The CESCR presumably knew that there was minimal chance of being accepted and yet they were willing to make the demand. Therefore significant, expensive and unlikely-to-be-accepted changes are recommended if the demand can be framed as altering a rights-violative law. This is important because it demonstrates that it is not merely minimalism that underlies the CESCR's failure to address the retrogression of access to housing, but rather that the form of breach is the most important element in generating clear recommendations.

There are a smattering of other, housing-related, clearly-defined recommendations that states can provably be found to be in compliance with, or not. France should “[d]efer the implementation of eviction orders regarding households whose members include schoolchildren.”<sup>166</sup> In Italy, the CESCR was bolstered by court rulings and therefore stated that Italy should “[d]etermine without delay the minimum essential levels as core elements of housing required to meet the needs of disadvantaged and marginalized individuals and groups, in line with the Constitutional Court’s rulings of 2007 and 2008.”<sup>167</sup> Even these are not ideal examples. In reality housing demonstrably fails to generate clear recommendations. It is worth contrasting housing with some examples from other areas. Australia’s offshore migrant detention centres feature the following recommendations:

The Committee urges the State party to:

- (a) Halt its policy of offshore processing of asylum claims;
- (b) Complete the closure of the regional processing centres, repatriate all concerned persons to Australia and process their asylum claims with all procedural safeguards, while respecting their right to family reunification.<sup>168</sup>

This is a clear recommendation alleging a clear violation against which Australia’s future conduct can be judged. Regarding discrimination, Korea is recommended to “[a]brogate the provision of the military criminal act, which

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<sup>164</sup> Maren Boersma, *Filipina Domestic Workers in Hong Kong: Between Permanence and Temporariness in Everyday Life*, 67.2 CURR. SOCIO. 273, 273 (2019).

<sup>165</sup> 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, ¶¶ 40.1-.3 [hereinafter HKSAR, *Response*],

[https://www.cmab.gov.hk/doc/en/documents/policy\\_responsibilities/Response\\_to\\_LOI-ICESCR\(Eng\)\(3\\_3\\_14\).pdf](https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Response_to_LOI-ICESCR(Eng)(3_3_14).pdf) (last visited July 26, 2019).

<sup>166</sup> CESCR, *CO France*, *supra* note 142, ¶ 39(c).

<sup>167</sup> CESCR, *CO Italy*, *supra* note 146, ¶ 45(c).

<sup>168</sup> CESCR, *CO Australia*, *supra* note 139, ¶18(a)-(b).

criminalizes same-sex acts.”<sup>169</sup> Hong Kong is urged to “take all necessary measures to amend the Employment Ordinance to allow the reinstatement of trade unionists arbitrarily dismissed for participating in trade-union activities.”<sup>170</sup> In states where legal gaps and discriminatory or otherwise overtly violative laws are in place the recommendations are often clearer. Taking the two recent (2019) Concluding Observations as examples, Mauritius was urged “to make the necessary legislative changes with a view to repealing section 250 of the Criminal Code, fully protecting lesbian, gay, bisexual, transgender and intersex persons from discrimination.”<sup>171</sup> Kazakhstan is recommended to amend “article 402 of the Criminal Code and section 177 of the Labour Code, to ensure that workers can exercise their right to strike, without undue restrictions.”<sup>172</sup>

If we contrast this to how the law around tenancy legislation is addressed, we see a clear distinction. The Spanish case is typical. It was recommended to “[r]eview its tenancy legislation and make the necessary amendments to ensure adequate protection for security of tenure and to provide for effective judicial mechanisms that guarantee protection of the right to adequate housing.”<sup>173</sup> The problem with this recommendation is that it provides no real guidance and no specific change against which the Spanish government can be measured. The Hong Kong government was forced to reject the CESCR’s proposal regarding the “live-in” requirement and explain why. The Spanish government can claim this review is ongoing and some amendments have been made regardless of whether substantive review or change is occurring. The failure to create clear standards mean that there is no meaningful judgement criteria established, and breach is likely to continue.

## F. State Provision and Subsidy

The second form of recommendation is that of increasing state provision and/or subsidy. Here the demand is reasonably clear – the state should spend more – but it is never defined exactly how much or when the problem will be considered to be adequately addressed. It therefore should motivate action, or at least inaction will require clear explanation, but the action undertaken may be unsatisfactory. Every state in this review is recommended to increase spending, either through increased provision of public housing or through increasing subsidies and other means of assisting individuals in the private market, and often both are required. For example, Portugal should “[p]rovide for resources that are proportionate to the

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<sup>169</sup> CESCR, *CO Korea*, *supra* note 151, ¶ 25(a).

<sup>170</sup> CESCR, *CO Hong Kong*, *supra* note 25, ¶ 44

<sup>171</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Fifth Periodic Rep. of Mauritius*, ¶ 18, U.N. Doc. E/C.12/MUS/CO/5 (Apr. 5, 2019).

<sup>172</sup> Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations on the Second Periodic Rep. of Kazakhstan*, ¶ 28, U.N. Doc. E/C.12/KAZ/CO/2 (Mar. 29, 2019).

<sup>173</sup> CESCR, *CO Spain*, *supra* note 148, ¶ 36(c).

unmet need for social housing, and for appropriate forms of financial housing support, such as rental subsidies.”<sup>174</sup> Sweden should “[i]ncrease the availability of affordable tenancies and consider allocating resources to social housing so as to meet the demand.”<sup>175</sup> Ireland should “increase the number of social housing units so as to satisfy the high demand and to reduce the long waiting list.”<sup>176</sup> Very similar recommendations are provided to every other state in the review.

Next I discuss a case study of the UK to provide context. The CESCR recommended that the UK “[a]dopt all necessary measures to address the housing deficit by ensuring a sufficient supply of housing, in particular social housing units, especially for the most disadvantaged and marginalized individuals and groups.”<sup>177</sup> Here there is clarity about the problem, but the remedy suggested is vague and therefore creates no meaningful obligation. It is highly unlikely the UK will ensure “a sufficient supply of housing” before the next reporting period, but a reasonable figure could have been given based on research in different regions. A 2018 government report said the UK may need up to 340,000 new homes per year,<sup>178</sup> also citing research that 145,000 “must be affordable homes.”<sup>179</sup> Currently, the rate of new demand for affordable homes is comfortably outstripping the rate of new supply.<sup>180</sup> The CESCR could have selected a minimum figure, including for affordable housing, thereby turning housing supply into a metric on which the UK could be evaluated. The link to regulation is also important. So long as the UK retains its market-oriented approach to housing, social housing costs will continue to rise. Since the mid-1980s around 90% of all housing has been built privately. Research from 2016 showed that £9.3 billion in housing benefit went to private landlords, 37% of the total spend.<sup>181</sup> Private tenants paid on average £110.34 a week, whereas those in local authority homes paid £82.76 a week.<sup>182</sup> The rising costs of both ownership and rent perpetually force more individuals into claiming housing benefit, and this also has a knock-on effect on habitability and other factors. This significant outgoing by the state to private landlords is not conducive to the

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<sup>174</sup> CESCR, CO *Portugal*, *supra* note 146, ¶ 15(b).

<sup>175</sup> CESCR, CO *Sweden*, *supra* note 149, ¶ 38(a).

<sup>176</sup> CESCR, CO *Ireland*, *supra* note 141, ¶ 27(b).

<sup>177</sup> CESCR, CO *UK*, *supra* note 150, ¶ 50(a).

<sup>178</sup> CASSIE BARTON & WENDY WILSON, TACKLING THE UNDER-SUPPLY OF HOUSING IN ENG., HOUSE OF COMMONS BRIEFING PAPER NUMBER 07671, 7 (2018).

<sup>179</sup> *Id.* at 11.

<sup>180</sup> *Id.* at 10.

<sup>181</sup> Damien Gayle, *Private Landlords Get £9.3bn in Housing Benefit from Taxpayer, Says Report*, THE GUARDIAN (Aug. 20, 2016), <https://www.theguardian.com/society/2016/aug/20/private-landlords-9bn-housing-benefit-taxpayers-national-housing-federation-report>.

<sup>182</sup> *Id.*

state devoting the maximum available resources to all Covenant rights.<sup>183</sup> Therefore market regulation is the essential partner to subsidy.

### G. Market Regulation

Regulatory requirements are by far the vaguest. Here, neither victim, violation nor remedy are adequately defined in relation to the under-regulated market. There are numerous examples of vague suggestions that states should improve regulation, without offering any specifics. New Zealand is asked to “[r]edouble its efforts to regulate the private housing market, including by controlling rent increases.”<sup>184</sup> Korea should “[p]ut into place mechanisms to regulate rising housing costs in the private sector, including unreasonable housing costs.”<sup>185</sup> Italy should “[a]dopt comprehensive national housing legislation, including legislation on rent control that promotes affordable rental housing.”<sup>186</sup> Likewise Canada should “[r]egulate rental arrangements with a view to ensuring that tenants enjoy the right to affordable and decent housing and are not vulnerable to forced evictions or homelessness.”<sup>187</sup> Ireland should “[c]onsider introducing legislation on private rent and increasing rent supplement levels [and] consider introducing banking regulations in order to strengthen protection for mortgage borrowers in arrears.”<sup>188</sup> Germany is asked to “take appropriate measures to counteract the impact of speculation in urban residential accommodation on access to affordable housing.”<sup>189</sup> Spain should “take necessary measures to regulate the private housing market in order to improve the accessibility, availability and affordability of adequate housing for persons with low incomes.”<sup>190</sup> In Sweden, “[i]ncrease the availability of affordable tenancies and consider allocating resources to social housing.”<sup>191</sup> Portugal should “[p]rovide for resources that are proportionate to the unmet need for social housing, and for appropriate forms of financial housing support, such as rental subsidies.”<sup>192</sup> Finally, the advice to France is slightly more specific because France already has rent control laws in certain parts of the country. These laws should “[e]xtend... to other towns where it is deemed to be necessary.”<sup>193</sup>

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<sup>183</sup> CESCR, *General Comment 3, Obligations*, *supra* note 109, ¶ 9.

<sup>184</sup> CESCR, *CO New Zealand*, *supra* note 145, ¶ 40.

<sup>185</sup> CESCR, *CO Korea*, *supra* note 147, ¶ 52(c).

<sup>186</sup> CESCR, *CO Italy*, *supra* note 142, ¶ 41(a).

<sup>187</sup> CESCR, *CO Canada*, *supra* note 136, ¶ 40(c).

<sup>188</sup> CESCR, *CO Ireland*, *supra* note 141, ¶ 27(c)-(d).

<sup>189</sup> CESCR, *CO Germany*, *supra* note 139, ¶ 55(f).

<sup>190</sup> CESCR, *CO Spain*, *supra* note 148, ¶ 36(b).

<sup>191</sup> CESCR, *CO Sweden*, *supra* note 149, ¶ 38(a).

<sup>192</sup> CESCR, *CO Portugal*, *supra* note 146, ¶ 15(b).

<sup>193</sup> CESCR, *CO France*, *supra* note 138, ¶ 37(f).

The comments on Hong Kong provide a good case study of the CESCR's vague approach to regulation. While Hong Kong does face practical obstacles in realizing the right to housing, the extreme marketization allied with affordability and habitability issues outlined above suggest obvious inroads for the CESCR. The CESCR was:

[C]oncerned about the inadequate investment of Hong Kong, China, in providing affordable and adequate housing, resulting in a high percentage of the population living in informal settlements, industrial buildings, cage-homes and bed-space apartments, which do not have adequate services and utilities (art. 11). . .The Committee recommends that Hong Kong, China, adopt a human rights approach to reconstruction efforts, thereby ensuring appropriate consideration to the availability, affordability and adequacy of housing, including temporary housing for new immigrants and single applicants.<sup>194</sup>

The recommendation that Hong Kong “adopt a human rights approach to reconstruction efforts” has no clear meaning, provides no specific guidance and creates no standards against which the Hong Kong government can be judged. In response, the government recalls that 30% of households live in public rental housing (PRH), state-owned homes with rent of \$1,540 per month (as of 2013), significantly below market rates.<sup>195</sup> However, they also admit that these homes are over-subscribed. They aim for a three-year waiting time, but recent figures suggest the average is over four years.<sup>196</sup> The government plans to build 79,000 new PRH flats for the five-year period from 2012/13 to 2016/17; and for the next five-year period from 2017/18 to 2021/22.<sup>197</sup>

Taken in isolation, the government's response to a difficult housing problem seems reasonable. But the volte-face is an almost complete withdrawal from market regulation leading to soaring prices for substandard and sometimes unsafe accommodation.<sup>198</sup> The government states that it “had no plan to introduce rent control” due to fears it will “discourage landlords from renting out their premises” and cause upfront price increases, disadvantaging those most in need.<sup>199</sup> It “considers that the best way is to tackle the problem at source by increasing housing supply, in particular the supply of PRH flats; as well as cooling down the overheated property market.”<sup>200</sup> The HKSAR Government did announce an enhancement to the Special Stamp Duty and the introduction of Buyer's Stamp Duty in October 2012 targeting individuals buying second properties and corporations,<sup>201</sup> however a series of loopholes allow large investors to bypass the

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<sup>194</sup> CESCR, *CO Hong Kong*, *supra* note 21, ¶ 49.

<sup>195</sup> HKSAR, *Response*, *supra* note 165, ¶¶ 55.1-2.

<sup>196</sup> HKSAR, *Response*, *supra* note 165, ¶ 55.3.

<sup>197</sup> HKSAR, *Response*, *supra* note 165, ¶ 55.4.

<sup>198</sup> Marsh, *Cage-Homes*, *supra* note 100, at 164.

<sup>199</sup> HKSAR, *Response*, *supra* note 165, ¶ 55.6.

<sup>200</sup> HKSAR, *Response*, *supra* note 165, ¶ 55.7.

<sup>201</sup> HKSAR, *Response*, *supra* note 165, ¶ 55.5.

tax.<sup>202</sup> There is minimal evidence that this has impacted the property market. The property market dipped in 2018, but this was attributed to the fall in the value of the Chinese Yuan.<sup>203</sup> Prices are predicted to rise up to 15% in 2019.<sup>204</sup> Rental prices have continued to increase to ever higher record levels.<sup>205</sup>

These minimalistic interventions will do nothing to assist those currently living in cage homes, nor those forced to devote the majority of their salary to rent. These two examples could easily have standards created around them, such as that the median rent-income ratio for individuals in private accommodation should fall by a percentage in the next reporting window. The failure to specify such standards means that the Hong Kong government can ignore these issues and continue with its business-centric approach to housing. The government's response exemplifies the withdrawal from market regulation and coterminous partial alleviation of the subsequent harm. The right to housing is retrogressing and unrealized on key indices (particularly affordability, habitability and services) but the CESCR fails to insist on improvements in normatively powerful ways.

### III. THE "CLEAR VIOLATIONS" PARADIGM

Critiques of socio-economic rights often stress their minimalism, reliance on sufficiency, and aspirational form, to name a few.<sup>206</sup> The review above suggests that none of these accurately describe the problem facing the right to housing. As identified regarding Hong Kong and live-out housing for migrant domestic workers the CESCR is at least not uniformly minimalistic. Moreover, it does not neatly correlate to sufficiency, or protection of the minimum core, since even large quantitative increases in homelessness are not adequately addressed. As such it does not perfectly fit contemporary critiques of inegalitarian human rights. Rather, a different prioritization strategy, one rooted in the form of the harmful act, appears to underlie the CESCR's technique. This has connections to the legalism critique of human rights,<sup>207</sup> the idea of rights as (only) rules to be enforced, but may be

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<sup>202</sup> Shirley Zhao, *Stamp Duty Loophole Cost Hong Kong Purse HK\$9.4 Billion in 8 Years, Study Finds*, SOUTH CHINA MORNING POST, (July 10, 2018), <https://www.scmp.com/news/hong-kong/hong-kong-economy/article/2154664/stamp-duty-loophole-cost-hong-kong-purse-hk94>.

<sup>203</sup> Lam Ka-sing, *Analysts Change Their Tune, Forecast an Up to 15 per cent Increase in Hong Kong Home Prices This Year*, SOUTH CHINA MORNING POST, (Jan. 25, 2019), <https://www.scmp.com/property/hong-kong-china/article/2183539/analysts-change-their-tune-forecast-15-cent-increase-hong>.

<sup>204</sup> *Id.*

<sup>205</sup> Midland Property Price Chart, MIDLAND REALTY, <https://en.midland.com.hk/property-price-chart/> (last visited July 26, 2019).

<sup>206</sup> Makau Mutua, *Human Rights and Powerlessness: Pathologies of Choice and Substance*, 15 BUFF. L. REV. 1027 (2008); 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).

<sup>207</sup> TOM CAMPBELL, *RIGHTS: A CRITICAL INTRODUCTION* 16-18 (Routledge, 2011).

better defined by looking at Kenneth Roth's stated approach as director of Human Rights Watch (HRW). Activist organizations like HRW "should look for ESC [economic, social and cultural rights] situations in which there is relative clarity about violation, violator, and remedy."<sup>208</sup> He continues:

[HRW] must be able to show persuasively that a particular state of affairs amounts to a violation of human rights standards, that a particular violator is principally or significantly responsible, and that a widely accepted remedy for the violation exists.<sup>209</sup>

These Roth terms situations of "clear violation."<sup>210</sup> These are the correct focal point for HRW because "the principal power of groups like Human Rights Watch is our ability to hold official conduct up to scrutiny and to generate public outrage."<sup>211</sup> Roth adopts a similar method and rationale to Audrey Chapman's "violations approach" to monitoring state compliance with the ICESCR.<sup>212</sup> Chapman described progressive realization as "inexact" and "lack[ing] concrete standards."<sup>213</sup> She advocates a "more limited and focused emphasis on violations."<sup>214</sup> Such a focus is more "tangible" than the "optimistic" requirements of progressive realization, and "the stigma of being labeled a human rights violator is one of the few 'weapons' available to human rights monitors."<sup>215</sup> Chapman defines three types of violation that the CESCRC should focus upon:

(1) violations resulting from actions and policies on the part of governments; (2) violations related to patterns of discrimination; and (3) violations related to a state's failure to fulfill the minimum core obligations of enumerated rights.<sup>216</sup>

Chapman's approach is more expansive than Roth's, and both note that the Covenant rights themselves should not be restricted merely to these violations.<sup>217</sup> It is understandable that such an approach leads to greater normative legitimacy when making claims or judgements. If one can clearly show that actor A has violated rule B causing harm to individual C, liberal conceptions of justice would agree that C deserves remedy, and often that A deserves punishment.<sup>218</sup> Where a

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<sup>208</sup> Roth, *Defending*, *supra* note 23, at 69.

<sup>209</sup> Roth, *Defending*, *supra* note 23, at 68.

<sup>210</sup> Roth, *Defending*, *supra* note 23, at 73.

<sup>211</sup> Roth, *Defending*, *supra* note 23, at 67.

<sup>212</sup> See Chapman, *Violations*, *supra* note 23.

<sup>213</sup> Chapman, *Violations*, *supra* note 23, at 23.

<sup>214</sup> Chapman, *Violations*, *supra* note 23, at 38.

<sup>215</sup> Chapman, *Violations*, *supra* note 23, at 38.

<sup>216</sup> Chapman, *Violations*, *supra* note 23, at 24, 43.

<sup>217</sup> See Chapman, *Violations*, *supra* note 23, at 65; Roth, *Defending*, *supra* note 23, at 64.

<sup>218</sup> JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (Harvard University Press, 1986); DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (Oxford University Press, USA, 2015).

problem, such as retrogressing affordability, is occurring but multiple actors are contributing, and the impact is not a direct and uniform breach of individuals' human rights (for example, some individuals can still afford homes), it is more difficult to make a clear allegation of violation.

There is a definite overlap between the CESCR's framing of recommendations and these "violations approaches." Where there is "clarity about violation, violator, and remedy,"<sup>219</sup> the CESCR can recommend a direct policy change, as occurred with Australia's migrant detention centres and Korea's partial criminalization of same-sex relationships.<sup>220</sup> Roth notes this form of violation in stating that violations are "clearest when it is possible to identify arbitrary or discriminatory governmental conduct that causes or substantially contributes to an ESC rights violation."<sup>221</sup> Roth continues, "[t]hese three dimensions are less clear when the ESC shortcoming is largely a problem of distributive justice."<sup>222</sup> Just as Roth perceives HRW to lack normative validity over distributive questions and so he shies away from them, so the CESCR is tentative in this area, refusing to set clear standards around how much should be spent, which redistributive laws are needed, and how the housing market should be regulated. Although the CESCR does address these questions, as its mandate requires, it does so in vague ways that obfuscate the requirements and fails to construct "clear violations" or any compliance standards.

The history and empirics of the marketized right to housing, discussed above, demonstrates that the obligation to regulate to ensure affordable housing for all is not taken as a priority by many governments. Roth is correct that it may invoke complex issues of domestic spending and regulatory priorities. But the consequence of this failure to address the systemic problem is that it festers and evolves until, for example, in Spain in 2017, there were 100 evictions a day,<sup>223</sup> in Madrid Blackstone purchased social housing and increased the average rent 49%,<sup>224</sup> in Sweden average rental rates rose between 59 and 84 per cent from 2009-2017,<sup>225</sup> and as Philip Alston found on his mission to the USA, in 2017 there were an average of 114,829 homeless children per night.<sup>226</sup>

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<sup>219</sup> Roth, *Defending*, *supra* note 23, at 69.

<sup>220</sup> CESCR, *CO Australia*, *supra* note 135, ¶ 18(a), (b); CESCR, *CO Korea*, *supra* note 147, ¶ 25(a).

<sup>221</sup> Roth, *Defending*, *supra* note 23, at 69.

<sup>222</sup> Roth, *Defending*, *supra* note 23, at 69.

<sup>223</sup> *Spain Letter*, *supra* note 17, at 3.

<sup>224</sup> *Spain Letter*, *supra* note 17, at 2.

<sup>225</sup> *Sweden Letter*, *supra* note 17, at 2.

<sup>226</sup> Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, ¶ 39, U.N. Doc. A/HRC/38/33/Add.1, (May 4, 2018).

Any one of these situations could be seen as a “clear violation,” but they are part of a larger structural crisis rather the result of singular arbitrary policies.<sup>227</sup> The failure to address these issues at their source – the failure to focus on macro-level affordability and the root causes of its retrogression – constructs the framework rendering such issues inevitable.<sup>228</sup> The “clear violations” approach occludes the two major breaches of the ICESCR of relevance: first, it occludes meaningful critique of quantitative retrogressions, such as around affordability, because it is gradual and because neither the state nor individual companies overtly, deliberately, cause the whole crisis. Second, it occludes the lack of appropriate corporate regulation and business acts within this deregulated environment that are a major source of the affordability crisis. It could be the case that singular business acts such as “poor doors,” special entrances to buildings for those in affordable units, and the related exclusion from the full use of facilities, could be considered “clear violations.”<sup>229</sup> Such cases at least feature the tripartite victim, violator, remedy structure. But such punctual interventions are the antithesis of systemic change. In limiting themselves to these types of interventions, the human rights activist ignores the systemic crisis, allowing it to proliferate.

#### IV. CONSTRUCTING CLEAR VIOLATIONS

The problem therefore is that profiteering private companies together constitute a retrogressive market that in totality causes egregious harm to the right without ever constituting a single moment we could call a “clear violation.” Two contradictory truths thereby exist simultaneously: One, housing is legally guaranteed human right subject to the protection and realization of the seven core elements in the General Comment. Two, the laws enabling, and actions by, private companies which retrogress or otherwise deny elements of the right to individuals – even where the effect is severe - are not meaningful breaches. With affordability neutered, a domino effect plays over habitability, services, location, and other elements. It is submitted that, at least, Roth and Chapman have accurately described an extant norm within contemporary human rights practice. It is a problematic norm and one that may be malleable under the right conditions, but it does appear to exist, as the priorities of the CESCR demonstrate. Therefore, one route out of the problem

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<sup>227</sup> Roth, *Defending*, *supra* note 27, at 73.

<sup>228</sup> Susan Marks, *Human Rights and Root Causes*, 74.1 THE MOD. L. REV. 57 (2011). It is worth noting that the true root cause could reasonably be argued to be the globalized housing market itself, free movement of capital, and other global structural realities, rather than specific acts by individual companies. As per the nature of Concluding Observations, I limit my analysis to specific human rights effects in single jurisdictions. Marks discusses this issue at 68-70 in relation to the global food crisis of 2007.

<sup>229</sup> Glyn Robbins, *Engels and the Perennial Housing Crisis*, 6.2 CRITICAL & RADICAL SOC. WORK 231 (2018).

could be to attempt to construct clear violations from retrogressive acts. The paper next proposes a method by which this could be achieved.

It is recommended that the CESCR in Concluding Observations adopt a three-stage process of identification of breach, compliance standard-setting, and policy recommendations. First, the type of breach should be clarified. If rent in a certain city has risen far beyond inflation, this should be noted as a retrogression of affordability that is in breach of Covenant obligations. Externalities of this, such as rising evictions or homelessness, should be noted as independent breaches as well as linked to the root cause. State breaches should also be constructed from the failure to regulate the acts of private companies, such as their high levels of evictions, fee-charging, or rent increases. The quantitative situation should be analysed covering the seven criteria plus homelessness and evictions. If there is a lack of fulfilment or retrogressions by any quantitative measure, that should be noted as a *prima facie* breach unless necessary to protect the totality of Covenant rights. The state is under an obligation to explain why such a *prima facie* breach occurred and why the breach was necessary or unpreventable.

For example, the income-housing costs ratio in Dublin of 86.3% should be considered a breach of the duty to “ensure access to affordable and adequate housing for all.”<sup>230</sup> House price increases of over 50 per cent in Hong Kong since 2011 should be defined as a quantitative retrogression of affordable housing that violates state duties. The continuing blight of substandard accommodation in Hong Kong should be linked to the affordability crisis, and noted as a separate breach. Increasing homelessness was mentioned in many Concluding Observations, including the UK. This should be clarified as a *prima facie* breach of state obligations. Specific acts by private companies and the laws that permit them should also be listed as breaches. Blackstone’s actions such raising rents by 49% in a year in Madrid, “land-hoarding” by investors in Ireland, vacant homes in Melbourne,<sup>231</sup> and high eviction rates constitute *prima facie* breaches of the duty to protect as defined in General Comment 24. In latter case it invokes a failure to adequately guarantee legal security of tenure. Although not necessarily a breach of duties, states could be asked why such favourable tax conditionalities, such as REITs, are necessary, and whether they are the most conducive means by which to fulfil the right to housing.

Second, with these breaches noted, clear standards should be set by which the state can be judged. Unaffordable housing could be addressed by setting a target income-housing costs ratio. As noted above, the US and Canada each use a 30 per cent ratio.<sup>232</sup> It may vary in different states, but at least states must develop such a

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<sup>230</sup> CESCR, *General Comment 24, Business*, *supra* note 15, ¶ 18.

<sup>231</sup> UNSR, *Financialization*, *supra* note 5, ¶ 30.

<sup>232</sup> Canada, *Affordable*, *supra* note 29; HUD, *Affordable*, *supra* note 29.

standard, and perhaps, if they want to set it above 30 per cent, explain why a higher standard is needed. In areas where the ratio is far above 30 per cent, a realistic but ambitious reduction target should be set based on the duty to progressively realise the right to housing, and drawing on local expertise to establish a value. Relatedly, standards should be set for the levels of rent increases allowed by private companies in unaffordable markets. Ireland, in “rental pressure zones,” allows rent increases of 4 percent per year, although there are problematic loopholes.<sup>233</sup> Proposition 10 in California would have allowed a maximum 15 percent increase over three years.<sup>234</sup> In both cases, where regulation exists it appears to coalesce around similar figures around the world, and these therefore constitute reasonable norms to apply as compliance standards. Regarding legal security of tenure, the specific reasons for insecurity in each jurisdiction should be noted, rather than the generalized statement that the state should “[r]eview its tenancy legislation and make the necessary amendments.”<sup>235</sup> While this would increase the research burden on treaty bodies, they should be able to consult experts to get an understanding of the problems.

One example of problematic tenancy legislation from the US is that of “land instalment contracts” (LICs). These combine a rental and sale contract, where the buyer is part buying and part-renting the home. The buyer makes a large down-payment for part of the value of the home, takes out a loan from the seller for this part of the contract, and pays rent for the rest. This allows those who could not afford a traditional mortgage to more gradually take ownership of a home. Similar models are used effectively in the UK.<sup>236</sup> However, LICs in the US are “lightly regulated” and “are designed to fail.”<sup>237</sup> They “often carry high interest rates and significant penalties for late payment.”<sup>238</sup> If payments are late “these contracts revert to rental agreements.”<sup>239</sup> The process is described as follows:

These contracts often include language that voids the purchase agreement for late payment. The contract then becomes a month-to-month agreement, and the buyer can be evicted. Once an eviction is complete, the seller seeks a new buyer.<sup>240</sup>

LICs would appear to constitute one variety of a failure to enforce adequate legal security of tenure. This example is from the US, which is not party to the ICESCR. Nonetheless, other treaty bodies, such as the Committee on the Elimination of

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<sup>233</sup> *Ireland Letter*, *supra* note 10, at 3.

<sup>234</sup> Ballotpedia, *California Rent Control Initiative*, [https://ballotpedia.org/California\\_Rent\\_Control\\_Initiative\\_\(2020\)](https://ballotpedia.org/California_Rent_Control_Initiative_(2020)) (last visited July 26, 2019).

<sup>235</sup> CESCR, *CO Spain*, *supra* note 152, ¶ 36(c).

<sup>236</sup> Eleanor Wilkinson & Iliana Ortega-Alcazar, *A Home of One’s Own? Housing Welfare for ‘Young Adults’ in Times of Austerity*, 37.3 CRITICAL SOC. POL’Y 329 (2017).

<sup>237</sup> *Tenancy*, *supra* note 57, at 10.

<sup>238</sup> *Tenancy*, *supra* note 57, at 10.

<sup>239</sup> *Tenancy*, *supra* note 57, at 10.

<sup>240</sup> *Tenancy*, *supra* note 57, at 11.

Racial Discrimination (CERD), monitoring the Convention on the Elimination of All Forms of Racial Discrimination, which the US has ratified, may be interested in the “discriminatory impact” of business practices and the laws which permit them,<sup>241</sup> such as LICs.<sup>242</sup>

Third, means by which the state could meet this standard should be noted. Regarding affordability, these may include rent control laws or increased state subsidization. It may involve disincentivizing the mass purchase of rental properties through taxation or other means. Legal security of tenure will require the enactment or repeal of specific laws based on their facticity in each state party. States should be wary of only using subsidies to improve affordability as that could lead to significantly higher spending that may contravene the obligation to devote the maximum available resources to all Covenant rights.<sup>243</sup> Detailed explanations should be sought where states both fail to take up these suggestions and continue to breach the obligation. The CESCR should also note that housing entails business responsibilities. The CESCR in General Comment 24 noted that states should implement human rights due diligence laws “in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations... on the enjoyment of Covenant rights.”<sup>244</sup> The CESCR should note that human rights due diligence must apply to investments in housing and should clarify its necessary scope and content.

This three-stage process of identification of breach, standard-setting, and policy suggestions would take the problem identified above of the long-term retrogression of affordability, and its relationship to profit-seeking actors, and create clear objectives against which states could be judged. It would therefore transform the current vague demands into meaningful evaluative criteria. This also would assist activists in using international law to pressure states, and, as Guzman notes, increased clarity of violation increases the likelihood of meaningful

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<sup>241</sup> *Blackstone Letter*, *supra* note 6, at 4.

<sup>242</sup> *Tenancy*, *supra* note 57, at 12.

<sup>243</sup> CESCR, *General Comment 3, Obligations*, *supra* note 109, ¶ 10.

<sup>244</sup> CESCR, *General Comment 24, Business*, *supra* note 15, ¶ 16. For accuracies sake, it must be noted that the CESCR write that “[t]he obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence.” It is questionable whether this is truly a requirement under human rights law, since human rights due diligence was conceptualized under the UNGPs which explicitly do not create “new international law obligations.” Nonetheless, many states are discussing such laws, and France has already enacted a version of the law. *See Guiding Principles*, *supra* note 15, at 1; *see also* Justine Nolan, *Hardening Soft Law: Are the Emerging Corporate Social Disclosure and Due Diligence Laws Capable of Generating Substantive Compliance with Human Rights Norms?* 15 *REVISTA DE DIREITO INTERNACIONAL L.* 64, 73 (2018) (Braz.) (referring to the emergent laws).

“reputational sanctions” – states losing status in the international community due to breaches of international law - occurring through the right to housing.<sup>245</sup>

There is a relationship between this strategy and elements of a further report by Farha, as UNSR on the right to housing, into “human rights-based [housing] strategies.”<sup>246</sup> She advocates ten principles, some of which directly connect to the three-stage process of constructing clear violations described above. Principle two, to “prioritize those most in need and ensure equality,”<sup>247</sup> focuses on problem-identification, including that of the “unaffordability of housing for those in the lowest income brackets.”<sup>248</sup> Principle six describes standard-setting based on “human rights-based goals and timelines,”<sup>249</sup> and entails the use of “process,” “outcome” and “structural” indicators<sup>250</sup> to create “reasonable” goals.<sup>251</sup> The UNSR further notes, in concordance with “clear violations,” that once states have established their goals, “[f]ailures to meet [them], unless justified by unforeseen events or circumstances, constitute violations of human rights for which States should be held accountable.”<sup>252</sup> Principle seven, accountability and monitoring, is closely connected in that goals must be based on accurate quantitative data.<sup>253</sup> Principle nine focuses on policy recommendations as related to “the obligations of private actors and regulate financial, housing and real estate markets.”<sup>254</sup> As per the link established above between private actors and fulfilment in situations of commodified human rights, states must “ensure that the actions of private actors and investors are consistent with the State’s obligation to fulfil the right to housing.”<sup>255</sup> As such “housing strategies may, for example, require investors to produce affordable rather than luxury housing.”<sup>256</sup>

This report focused specifically on national housing strategies. It therefore did not speak directly to the CESCR. Nonetheless, these principles could be applied by the CESCR in Concluding Observations where relevant. Reflexively, the three-stage method described above is useful in linking the different principles together.

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<sup>245</sup> Andrew T. Guzman, *A Compliance-based Theory of International Law*, 90 CALIF. L. REV. 1823, 1861 (2002).

<sup>246</sup> Leilani Farha (Special Rapporteur on the Right to Adequate Housing), *Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*, ¶¶ 4, 9, U.N. Doc. A/HRC/37/53 (Jan. 15, 2018) [hereinafter UNSR, *Housing Strategies*].

<sup>247</sup> *See id.* ¶¶ 29-40.

<sup>248</sup> *Id.* ¶ 33.

<sup>249</sup> *See id.* ¶¶ 89-92.

<sup>250</sup> *Id.* ¶¶ 92(a)-(c).

<sup>251</sup> UNSR, *Housing Strategies*, *supra* note 246, ¶ 90.

<sup>252</sup> UNSR, *Housing Strategies*, *supra* note 246, ¶ 91.

<sup>253</sup> UNSR, *Housing Strategies*, *supra* note 246, ¶ 105.

<sup>254</sup> UNSR, *Housing Strategies*, *supra* note 246, ¶¶ 118-26.

<sup>255</sup> UNSR, *Housing Strategies*, *supra* note 246, ¶ 121.

<sup>256</sup> UNSR, *Housing Strategies*, *supra* note 246, ¶ 121.

For example, if a lack of affordable housing is a problem under principle two within a jurisdiction, the state should set a reasonable target by which to reduce the income-housing costs ratio (principle six), and the one policy by which this should be achieved will be stronger business regulation (principle nine), such as a mandatory quantity of affordable housing within each development. Clarifying this specific form of linkage between the principles may assist state parties in developing coherent strategies, as well as assisting others in holding states to account.

There is always the overarching problem that states need private companies to invest in housing, and the current system may be argued to be the least bad option, particularly by those leaders with ideological predilections towards the free market. Even so, the current system is causing clear and ongoing breaches of the right and as such states are still required to address these issues. When looking at the freedom and indeed benefits that companies like Blackstone have been granted to buy individuals homes, and the high profit margins they earn, it is implausible that there is not some additional regulation that could be implemented. Even if states refuse to take the more extreme measures, there are targeted interventions that could be made, and there is value in reifying that accelerating prices, rising evictions and homelessness are serious breaches of state obligations. Even if states may argue that the CESCR, in listing these breaches and recommendations, is failing to understand the modern market, there is value in challenging states to think differently about these markets. To strengthen the case in relation specifically to market actors, it is worth now turning to business responsibilities towards human rights, an area of human rights practice that has experienced significant growth in the last twenty years,<sup>257</sup> but that has not significantly addressed the marketization of human rights materialities.

#### V. THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS UNDER THE UNGPs

In this vein, the UNSR on the right to housing stated in 2017 that:

Despite the growing attention to the importance of business and human rights and despite the fact that housing represents the largest global business sector, very little attention has been paid to the obligations of business enterprises and financial corporations operating in the real estate and housing sector with respect to the right to adequate housing.<sup>258</sup>

The UN mandate-holders address this topic in their letter to Blackstone. Blackstone is accused of a range of harmful practices, particularly in the USA. First,

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<sup>257</sup> See generally SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS (2012).

<sup>258</sup> UNSR, *Financialization*, *supra* note 4, ¶ 64.

it is worth recalling that business responsibilities under the UNGPs can represent a useful inroad into housing rights in the USA. The UNGPs define a “corporate responsibility to respect human rights” described as “a global standard of expected conduct for all business enterprises wherever they operate.”<sup>259</sup> Despite the non-ratification of the ICESCR in the USA, therefore, businesses are expected to respect the right to housing therein, and Blackstone, as a private landlord, must be cognisant of public opinion. Business responsibilities towards human rights can also empower more traditional forms of activism and media critique.<sup>260</sup>

The Blackstone model is based on purchasing “undervalued” homes.<sup>261</sup> Such homes are often undervalued because they are rented by low-income tenants in areas experiencing population inflows, particularly of wealthier individuals.<sup>262</sup> Blackstone renovates the properties and significantly increases rents.<sup>263</sup> As noted above, Blackstone subsidiary Invitation Homes in the US is accused of raising rents on low-income housing far beyond market rates and regularly filing for evictions. The UN mandate-holders “heard countless stories of tenants’ whose buildings had been bought by private equity firms and whose rents had skyrocketed almost immediately afterward, sometimes by 30 or even 50 percent.”<sup>264</sup> It is also accused of excessive fee-charging, such as a \$95 fee for late payment of rent and many others, all through automated processes.<sup>265</sup> This drove “a 22% increase in ancillary income, resulting in \$2 million of additional revenue.”<sup>266</sup> Moreover, just “1 percent of Invitation Homes SFRs [single family rentals] are allocated to lowest income tenants.”<sup>267</sup> This contributes to rising prices and therefore to severe problems including homelessness. Blackstone has significant holdings in Los Angeles.<sup>268</sup> In

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<sup>259</sup> *Guiding Principles*, *supra* note 15, § 11.

<sup>260</sup> There has been a great deal of activist and media attention paid towards Blackstone in the US. *See, e.g.*, Robert Call et. al., *Blackstone: Atlanta’s Newest Landlord*, OCCUPY OUR HOMES ATLANTA (Apr. 2014), <https://homesforall.org/wp-content/uploads/2014/04/BlackstoneReportFinal0407141.pdf>; Cory Doctorow, *Wall Street Landlords are Shumlords*, BOINGBOING (July 30, 2018), <https://boingboing.net/2018/07/30/single-family-rental-securitie.html>; Alana Semuels, *When Wall Street Is Your Landlord*, THE ATLANTIC (Feb. 13, 2019), <https://www.theatlantic.com/technology/archive/2019/02/single-family-landlords-wall-street/582394/>; Kevin Sweeting, *How Stuy Town Got A Tourniquet While Blackstone Gets Billions*, GOTHAMIST (Mar. 21, 2016), [https://gothamist.com/2016/03/31/stuy\\_town\\_affordable\\_housing.php](https://gothamist.com/2016/03/31/stuy_town_affordable_housing.php) (on Blackstone’s ownership of Stuyvesant Town in New York).

<sup>261</sup> *Blackstone Letter*, *supra* note 6, at 4-5.

<sup>262</sup> *Blackstone Letter*, *supra* note 6, at 5.

<sup>263</sup> *Blackstone Letter*, *supra* note 6, at 5.

<sup>264</sup> HRC, *Press Release*, *supra* note 64.

<sup>265</sup> *Blackstone Letter*, *supra* note 6, at 3.

<sup>266</sup> *Blackstone Letter*, *supra* note 6, at 3.

<sup>267</sup> *Blackstone Letter*, *supra* note 6, at 4.

<sup>268</sup> *Blackstone Letter*, *supra* note 6, at 4.

June 2019 figures showed a 16 percent rise in homelessness to 36,300 individuals in the city of Los Angeles, 58,936 in the wider county.<sup>269</sup> The Mayor of Los Angeles told a reporter that “housing affordability was the biggest factor driving homelessness.”<sup>270</sup> Government figures show that one “would need to earn \$47.52 an hour just to afford the median monthly rent” in Los Angeles.<sup>271</sup> While Blackstone are not accused of breaching any domestic laws, their actions are also not respectful of the right to housing. The UN mandate-holders list specific responsibilities in the UNGPs, including the responsibility to have in place:

(a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.<sup>272</sup>

They also list the Blackstone policies that are “inconsistent”<sup>273</sup> with human rights law:

The threat of eviction creates fear, anxiety and housing insecurity, inconsistent with requirements of the right to housing. Evictions which result in homelessness are a violation of the right to housing under international human rights law. Furthermore, access to affordable housing – with affordability defined by level of household income, not what the market can bear – is a cornerstone obligation of the right to adequate housing under international human rights law.<sup>274</sup>

This provides a useful starting point, but, like the CESCR, it fails to create concrete standards around which companies like Blackstone can be evaluated. When, for example, will Blackstone’s effects on the affordability of housing constitute a breach of the responsibility to respect under the UNGPs? This is the kind of question to which, as the UNSR notes, “very little attention has been paid.”<sup>275</sup> It is however a fundamental question regarding the right to housing that should be explored.<sup>276</sup>

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<sup>269</sup> Jill Cowan, *Homeless Populations Are Surging in Los Angeles. Here’s Why*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/us/los-angeles-homeless-population.html>.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Blackstone Letter*, *supra* note 6, at 6-7; *Guiding Principles*, *supra* note 15, § 15.

<sup>273</sup> *Blackstone Letter*, *supra* note 6, at 6.

<sup>274</sup> *Blackstone Letter*, *supra* note 6, at 6.

<sup>275</sup> UNSR, *Financialization*, *supra* note 4, ¶ 65.

<sup>276</sup> Some cases have been made around the UNGPs role in tackling what we could broadly term ‘human rights-related social harm.’ See, John Knox (Special Rapporteur on the Issue of Human Rights), *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change*, ¶ 66, U.N.

The UNGPs are the most important framework within business and human rights and were endorsed by the Human Rights Council in 2011. They cover, as noted, all business enterprises in all situations regardless of whether relevant states have ratified human rights treaties. They cover at least the International Bill of Rights, covering the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the ICESCR and “the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”<sup>277</sup> “Depending on circumstances, business enterprises may need to consider additional standards.”<sup>278</sup> This means that the right to housing as defined in the ICESCR is covered by the UNGPs. The UNGPs operate under three pillars: the state duty to protect, the corporate responsibility to respect, and access to remedy.<sup>279</sup> Pillar two is a set of principles grounded in “social norms” that defines the extent of corporate responsibility and introduces implementation tools and best practices.<sup>280</sup> Principle 13 under pillar two states that:

The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.<sup>281</sup>

An adverse human rights impact is defined as occurring “when an action removes or reduces the ability of an individual to enjoy his or her human rights.”<sup>282</sup> This includes both acts and omissions.<sup>283</sup> Corporations therefore have a responsibility to avoid acts or omissions that remove or reduce rights enjoyment. This is a broad depiction of “respect” responsibilities, beyond the most basic

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Doc. A/HRC/31/52 (2016); Sara Seck, *Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty*, 26 *TRANS. LAW & CONT. PROBS.* 383 (2016); Shane Darcy, *The Elephant in the Room: Corporate Tax Avoidance & Business and Human Rights*, 2.1 *BUS. HUM. RTS. J.* 1, 23 (2016).

<sup>277</sup> *Guiding Principles*, *supra* note 15, § 12.

<sup>278</sup> *Guiding Principles*, *supra* note 15, § 12.

<sup>279</sup> *Guiding Principles*, *supra* note 15, § 12.

<sup>280</sup> John Ruggie, *The Social Construction of the UN Guiding Principles on Business & Human Rights*, HKS WORKING PAPER NO. RWP17-030, 1, 12 (2017), <https://ssrn.com/abstract=2984901>.

<sup>281</sup> *Guiding Principles*, *supra* note 15, § 13.

<sup>282</sup> U.N. Office of the High Comm’r on Human Rights, *The Corporate Responsibility to Respect Human Rights - An Interpretive Guide*, 5, U.N. Doc. HR/PUB/12/02 (2012) [hereinafter, *Responsibility to Respect*].

<sup>283</sup> *Guiding Principles*, *supra* note 15, § 13(a).

understanding of respect as non-interference.<sup>284</sup> It limits corporate responsibility to “do no harm,” rather than also including fulfil responsibilities,<sup>285</sup> but it defines harm as any act that “removes or reduces” rights enjoyment. This explicitly covers indirect and difficult to fully quantify forms of impact, for example “targeting high sugar food and drinks to children, with an impact on child obesity,”<sup>286</sup> and “human rights issues that result from environmental impacts—for example, related to water and health.”<sup>287</sup> It is not limited to legal breaches, and any particular act could covered, to be adjudicated based on whether it removed or reduced the ability of an individual to enjoy his or her human rights.<sup>288</sup> The use of the term “removes or reduces” rights enjoyment is key. While “remove” suggests the complete annulment of the right, “reduce” is very similar to the conception of “retrogression” under the ICESCR, defined as the quantitative backsliding in fulfilment or protection of a right.<sup>289</sup> Acts by companies that “reduce” access to housing for low-income individuals are therefore by definition included as adverse impacts. This is a vital element of the UNGPs that fosters a broad scope.<sup>290</sup> Where multiple individuals are adversely impacted, it may meet the criteria of a “severe” impact on the grounds of scope,<sup>291</sup> and if the impacts cause homelessness or other serious problems, it may be severe on the grounds of “scale.”<sup>292</sup>

Attribution for impacts is disaggregated into “caused, contributed, linked to.”<sup>293</sup> To cause is to be the sole or primary cause of the impact. To contribute is to be one of many actors involved in an impact, or to provide assistance to the commission of an impact, such as complicity in state crimes.<sup>294</sup> To be linked to requires that the business has no causal or contributory connection, but is linked to the impact via its business relationships. If a firm causes or contributes to an impact, it has the responsibility prevent, mitigate and/or remedy its own contribution to that impact.<sup>295</sup> If the firm is linked to an impact caused by another firm through its

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<sup>284</sup> SURYA DEVA, TREATING HUMAN RIGHTS LIGHTLY: A CRITIQUE OF THE CONSENSUS RHETORIC AND THE LANGUAGE EMPLOYED BY THE GUIDING PRINCIPLES IN HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 78, 98 (2013).

<sup>285</sup> Florian Wettstein, *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment*, 14.2 J. OF HUM. RTS. 162 (2015).

<sup>286</sup> *Responsibility to Respect*, *supra* note 283, at 17.

<sup>287</sup> *Responsibility to Respect*, *supra* note 283, at 53.

<sup>288</sup> 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 U. OX. HUM. RTS. HUB. J. 120 (2019) [hereinafter Birchall, *Impacts*].

<sup>289</sup> *Id.* at 138.

<sup>290</sup> *Id.* at 144-46.

<sup>291</sup> *Responsibility to Respect*, *supra* note 283, at 83.

<sup>292</sup> *Responsibility to Respect*, *supra* note 283, at 83.

<sup>293</sup> *Guiding Principles*, *supra* note 15, § 13.

<sup>294</sup> *Responsibility to Respect*, *supra* note 283, at 17.

<sup>295</sup> *Guiding Principles*, *supra* note 15, § 19.

operations, products or services, the firm has no responsibility to remediate, but should use its leverage over the other firm to encourage prevention, mitigation and/or remedy.<sup>296</sup> Because “linked to” impacts do not generate direct responsibilities to prevent, mitigate and remedy, it is important to question whether impacts by companies operating in housing markets represent contributions, or merely linkages, to the impact.

Contribution to an impact comes in two forms, which I will define here as “cumulative” and “assistive.” Cumulative impacts exist where an individual firm may not cause a sizeable amount of harm in and of itself, but where it is part of a network of firms that in totality is causing significant harm. Contributions toward climate change provide an obvious case-in-point here.<sup>297</sup> This is the key form related to the business and the right to housing and will be explained further below. The second form of contribution occurs when a company assists in a harmful act. This was explained by John Ruggie in a reply to the Thun group of banks, where he noted that there is “a continuum between contribution and linkage.”<sup>298</sup>

A variety of factors can determine where on that continuum a particular instance may sit. They include the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it. Asserting that only a bank’s own activities can constitute “contributing to” harm, as the paper does, bypasses these critical questions entirely.<sup>299</sup>

Ruggie establishes a set of three guidelines: “knowledge”; “enable, encourage, or motivate” and “a failure to mitigate.” Where each of these are met, the company is firmly at the “contributory” end of the spectrum. It would appear to be the case that such situations amount to a contribution unless a strong counter-argument could be made. Therefore, assistive contributions *prima facie* occur when a firm “knowingly enables” and “fails to adequately mitigate” a human rights impact.<sup>300</sup> This therefore potentially makes banks and other service providers contributors to the human rights impacts of the marketization of housing.<sup>301</sup> Where a project is very likely to retrogress affordability and is funded by a bank loan, for

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<sup>296</sup> *Guiding Principles*, *supra* note 15, § 19(b); *see also*, Stepan Wood, *The Case for Leverage-based Corporate Human Rights Responsibility*, 22.1 BUS. ETH. Q. 63 (2012).

<sup>297</sup> David Birchall, *Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts*, AUS. J. OF HUM. RTS. 428 (Dec. 11, 2019) [hereinafter Birchall, *Large-Scale Impacts*].

<sup>298</sup> John Ruggie, *Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS 2 (Feb. 21, 2017),

[https://www.ihrb.org/uploads/submissions/John\\_Ruggie\\_Comments\\_Thun\\_Banks\\_Feb\\_2017.pdf](https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2017.pdf)  
<sup>299</sup> *Id.* at 2.

<sup>300</sup> Birchall, *Large-Scale Impacts*, *supra* note 298.

<sup>301</sup> Birchall, *Large-Scale Impacts*, *supra* note 298.

example, that bank is “enabling” the impact, has not taken steps to mitigate the impact, and should be able to, with some research, have knowledge at least in broad terms, that the impact would occur.

Because the “impacts” framework is fairly expansive, including acts which “reduce” rights enjoyment and contribute to adverse impacts, it would appear that impacts on the right to housing should be comprehensively captured. It is, however, necessary to look more specifically at corporate contributions to test the scope and limits of responsibility. I will focus on two examples, that of evictions, and that of retrogressing the affordability of housing. In the General Comment on the right to housing it states that: “instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”<sup>302</sup> It is further added by the UNSR that “[p]rinciples of international human rights law [require] that no eviction take place if it will lead to homelessness.”<sup>303</sup> These, the UNSR continues “have not generally been properly applied by domestic courts to evictions linked to defaults on mortgages or rent... eviction from homes is routinely applied in the case of unpaid debts.”<sup>304</sup> In the letter to Blackstone it is clarified that “[e]victions which result in homelessness are a violation of the right to housing under international human rights law.”<sup>305</sup>

Evictions therefore should, ideally, be regulated by the state with the right to housing foregrounded. As is the near-universal case with business human rights arguments, the direct business responsibility becomes most relevant where the state is unable or unwilling to meet its obligations in this area.<sup>306</sup> The eviction of tenants in the name of private profit must be considered an adverse impact in areas where the individual will be put at risk of homelessness. Further, if that individual would be likely to need to relocate far away, or move into substandard accommodation, it must be the case that the individual’s “ability to enjoy his or her rights” is at risk of being “reduced,”<sup>307</sup> along elements of the seven core criteria of the right to housing.<sup>308</sup> Therefore, applying the language of the UNGPs suggests that such acts are prohibited under the UNGPs insofar as they cause such adverse impacts.

Evictions caused by private landlords increasing prices unreasonably constitute a relatively easy question from the contemporary human rights perspective because, in Roth’s terms, there is normative clarity around “violation,

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<sup>302</sup> CESCR, *General Comment 4, Housing*, *supra* note 27, ¶ 18.

<sup>303</sup> UNSR, *Financialization*, *supra* note 4, ¶ 58.

<sup>304</sup> UNSR, *Financialization*, *supra* note 4, ¶ 58.

<sup>305</sup> *Blackstone Letter*, *supra* note 6, at 6.

<sup>306</sup> Peter Muchlinski, *Human Rights and Multinationals: Is There a Problem?* 77.1 INT. AFFS. 31, 32 (2001).

<sup>307</sup> *Responsibility to Respect*, *supra* note 283, at 5.

<sup>308</sup> CESCR, *General Comment No. 4, Housing*, *supra* note 27, ¶ 8.

violator and remedy,”<sup>309</sup> albeit there is not an obvious remedial avenue. We can demonstrate that X number of low-income individuals have been evicted, identify a risk of homelessness or other serious issues, and clearly identify that the corporate landlord caused the impact. These individuals have had their enjoyment of human rights “removed or reduced” by the actions of a single company. It therefore fits the Roth model and can be addressed in a normatively forceful way. It may also be the case that other companies that have loaned money to the investor or have other links may be contributing to the impact via assistance, following Ruggie’s arguments above.

The harder question is the macro-level retrogressions in affordability, and the subsequent retrogressions in habitability and location that are caused by the sum total of market actors, rather than by single acts. This question is crucial, however, because it represents the root cause of other problems. Building an expensive set of homes cannot be considered a human rights violation or even an adverse impact on its own, but when market actors build only expensive homes, replace affordable homes, and force low-income tenants out due to these policies, it has retrogressive impacts on the macro-level. To understand the scope of business responsibility for contributions to retrogressing affordability we can turn to the Danish Institute of Human Rights (DIHR) guide to Human Rights Impact Assessment. This report tested the scope of “impacts” as defined under the UNGPs<sup>310</sup> and discussed “cumulative impacts” in detail. Cumulative impacts are defined as: “the successive, incremental and combined impacts from multiple projects or multiple activities located in the same region or affecting the same resource.” One example given is the “widespread nature of the impact (e.g., cumulative water use due to tourism development reduces water tables, resulting in drought with widespread effect on food security in the local community).”<sup>311</sup> It states further that:

Because project developers and regulators tend to focus on assessing impacts of individual projects, they often do not consider the incremental impacts on areas or resources used or directly impacted by a project from other existing, planned or reasonably defined developments.<sup>312</sup>

A report into tourism in Myanmar considers various cumulative impacts including “[i]ncreased prices of food and goods due to the presence of tourism businesses, which makes these goods unaffordable for local populations,”<sup>313</sup> and increasing

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<sup>309</sup> Roth, *Defending*, *supra* note 23, at 69.

<sup>310</sup> Danish Institute of Human Rights, *Human Rights Impact Assessment Guidance and Toolbox* 63 (2016) [hereinafter DIHR, HRIA], [https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria\\_toolbox/hria\\_guidance\\_and\\_toolbox\\_final\\_may22016.pdf\\_223795\\_1\\_1.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/hria_guidance_and_toolbox_final_may22016.pdf_223795_1_1.pdf).

<sup>311</sup> *Id.* at 66.

<sup>312</sup> *Id.*

<sup>313</sup> MYANMAR CENTRE FOR RESPONSIBLE BUSINESS, DANISH INSTITUTE FOR HUMAN RIGHTS, AND INSTITUTE FOR HUMAN RIGHTS AND BUSINESS, MYANMAR TOURISM SECTOR WIDE

property values that “can lead to the displacement of poorer residents who are unable to pay the higher rents.”<sup>314</sup> Where cumulative impacts or potential impacts are identified the report notes that firms have a responsibility to prevent, mitigate and remedy.<sup>315</sup> These descriptions of adverse impacts are very relevant to housing on the macro-scale. Housing is a rights-relevant resource that is being adversely affected by the combined impacts of multiple projects. What is true for tourism industries in Myanmar is true for housing developers and speculators in Los Angeles, London, Hong Kong, and elsewhere. They are raising prices and pricing the poor out or into substandard homes and debt.

It is important also to clarify that even the macro-level retrogression of affordability does constitute an adverse impact just as it constitutes a breach of state obligations. Rent increases and the impact on market prices are to be considered a cumulative impact for which companies are responsible for their own contribution, insofar as they reduce access to the right to housing or other human rights. This means that, just as governments should be required to implement rent control laws or subsidies, so, in the absence of government action, companies have a responsibility to avoid contributing to the retrogression of affordability. The definition of impact as acts which remove or reduce an individual’s enjoyment of his or her human rights necessarily and overtly incorporates impacts on housing affordability. This is a core component of the right to housing as defined by the CESCR.<sup>316</sup> To exclude it would be to artificially limit the content of the right, an argument that appears nowhere in the UNGPs. This element of the right to housing is not easily justiciable, but, just as it remains a state obligation even short of constitutional justiciability in the jurisdiction,<sup>317</sup> it remains a business impact short of the availability of judicial remedy. It is perfectly feasible and the correct usage of the UNGPs to highlight the cumulative impacts of housing companies on the core elements of the right to housing. These companies could perform impact assessments taking account of the market, and could mitigate the harm caused by building more affordable housing within the project or limiting rent increases. For those looking for safe-haven investments they could target only those markets which are not suffering serious problems with affordability and so on. These companies could also not take every opportunity to increase their share price at the expense of individuals. All of these are feasible choices.

However, much like the CESCR, there is a failure within business and human rights more generally to properly apply the wording of the UNGPs and

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IMPACT ASSESSMENT 118 (2015), <https://www.myanmar-responsiblebusiness.org/pdf/SWIA/Tourism/00-Myanmar-Tourism-Sector-Wide-Assessment.pdf>.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 102-03.

<sup>316</sup> CESCR, *General Comment No. 4, Housing*, *supra* note 27, ¶ 8.

<sup>317</sup> Paul O’Connell, *The Death of Socio-Economic Rights* 74.4 THE MOD. LAW. REV. 532 (2011).

therefore to embrace its potential. The UNGPs are soft law and rely on “social norms” to provide a basis for action. Without normative pressure behind allegations of impact, the allegations have no power. Probably, in part, because of this, the focus area of business and human rights has been on more justiciable human rights violations and little attention has been paid to markets.<sup>318</sup> This focus excludes those acts which are legally-permitted and produce no “clear violation,” but which, as part of their cumulative effects, have egregious long-term impacts on the right. Despite the impacts framework appearing to fit them comfortably, the engrained predilection for clearly-defined violations among experts renders the UNGPs voiceless over financialized housing.

The solution to this problem is therefore identical to that proposed to the CESCR. The challenge is to create meaningful responsibilities that will have normative force. This requires the same strategy of creating clear violations (clear impacts) and clear responsibilities as applied to states. Again, the three-stage process of identification of breach, standard-setting, and policy advice is recommended. Naturally, as a corporation, Blackstone is only responsible for its own impacts on the right to housing, including those connected through business relationships, not those of its competitors.<sup>319</sup> Regarding evictions, it is clear that evictions without good cause represent a breach. The standard should be set at a quantitative reduction in eviction rates and a revised process for undertaking evictions. The policy recommendations should focus on this process, bringing in best practice guidelines.<sup>320</sup> This may include setting more relaxed limits on initiating evictions, such as only when rent payments have been late for three consecutive months, clearer processes by which evictions are organized and can be challenged, and a removal of fee-charging for minor breaches of the contract agreement. The specifics would depend naturally on the specific problems in each market. Each change would improve business respect for the right to housing where the state is failing to meet its duties in this regard. Evictions are however rooted in affordability – tenants are evicted because they cannot pay. Therefore, it is necessary to address profiteering from housing directly.

BHR experts must work to create clear impacts around retrogressing affordability. Again, breach should be noted in terms of price increases, such as Blackstone’s seven per cent increase in its Western States market in a single

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<sup>318</sup> See, e.g., NADIA BERNAZ, *BUSINESS AND HUMAN RIGHTS: HISTORY, LAW AND POLICY-BRIDGING THE ACCOUNTABILITY GAP* (2016); see Grietje Baars, “*It’s not me, it’s the Corporation*”: *The Value of Corporate Accountability in the Global Political Economy*, 4 LONDON REV. INT’L L. 127 (2016); the ethics of this approach are discussed in: David Birchall, *The Consequentialism of the UN Guiding Principles on Business and Human Rights: Towards the Fulfilment of ‘Do No Harm’*, 24.1 E. J. BUS. ETH. & ORG. STDS. 28 (2019).

<sup>319</sup> *Guiding Principles*, *supra* note 15, at 15.

<sup>320</sup> JINO DISTASIO & SCOTT MCCULLOUGH, INST. OF URB. STUD., THE U. OF WINNIPEG, *EVICTION PREVENTION: TOOLKIT OF PROMISING PRACTICES* (2016).

quarter. This verifiably contributes to the retrogression of affordability. Standards could borrow from figures such as the four per cent maximum rent increases permitted in some parts of Ireland could be cited as maximums that corporations should adopt in other jurisdictions controlled by authorities that are unwilling to meet their own human rights obligations. There could also be aims set around the income-housing costs ratio of tenants, although it would be simpler to focus on rent increases as this is the only element such companies control. Nonetheless, BHR experts and activists should, for example, note that the US government defines affordable housing as at most a 30% income-housing costs ratio, and that in Los Angeles one must earn \$47.52 an hour to meet median monthly rent.<sup>321</sup> This statistic can underlie powerful arguments that any retrogressive act by Blackstone in the area is contributing to an already harmful cumulative situation.

Other tools, such as human rights due diligence, should encompass the right to housing. Firms should “identify, prevent, mitigate and account for how they address their impacts on human rights.” This means that prior to initiating a project the level of planned rent increases should be with affordability in mind, “defined by level of household income, not what the market can bear.”<sup>322</sup> They should understand how evictions can be minimized and what other impacts, such as “discriminatory effects” they may be at risk of causing.<sup>323</sup> These values should be identified in consultation with experts and communities.<sup>324</sup> Remedial mechanisms should be also considered by housing rights organizations such as NCPs and NHRIs. NCPs, for example, apply the UNGPs through the OECD Guidelines for Multinational Enterprises.<sup>325</sup> These have various practical limitations, including adopting divergent standards, including requiring high burdens of proof; the cost of complaints; and a reluctance to determine that firms are in non-compliance with the Guidelines.<sup>326</sup> Nonetheless, they have sometimes proven powerful in generating publicity around cases,<sup>327</sup> and sometimes in reaching agreements between claimants and company based on a breach of the UNGPs even where no law has

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<sup>321</sup> *Causes and Solutions to Homelessness*, L.A. FAM. HOUSING, <https://lafh.org/causes-solutions> (last visited July 31, 2019).

<sup>322</sup> *Blackstone Letter*, *supra* note 6, at 6.

<sup>323</sup> *Blackstone Letter*, *supra* note 6, at 6.

<sup>324</sup> *Guiding Principles*, *supra* note 15, at 20.

<sup>325</sup> *OECD Guidelines for Multinational Enterprises 2011 Edition*, OECD (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

<sup>326</sup> Mariëtte van Huijstee & Joseph Wilde-Ramsing, *The Relationship Between Non-judicial Grievance Mechanisms and Access to Remedy for Business-related Human Rights Abuses*, RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS (David Birchall & Surya Deva eds. forthcoming, 2019).

<sup>327</sup> See Joseph Wilde-Ramsing et al., *OECD Watch, Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct*, 28 (2015).

been broken.<sup>328</sup> Housing rights organization could therefore advance their cause by bringing a case to such an institution. As residential landlords, companies like Blackstone should be responsive to popular opinion. If its reputation falls too far individuals may be unwilling to move into homes owned by them, particularly if highlighted by the media. Therefore, if powerful arguments are made against Blackstone it is likely that they will respond, as they did within three days to the letter sent by the UN mandate-holders.<sup>329</sup> Although the UNGPs pillar two is grounded in social norms, rather than hard law, it could facilitate real improvements if given sufficient attention within the academic and activist field.<sup>330</sup>

One area where extra-legal social harm is caused by corporations and that has attracted attention to business responsibilities under the UNGPs is climate change. The harm caused by climate change, and the specific links to this harm caused by polluting corporations, is of a similar form to that related to housing and is therefore a comparable case. In both cases corporations contribute to a large-scale problem with clear human rights impacts, but without it being feasible to perfectly define each corporation's specific impact. One ambitious attempt is being undertaken by Greenpeace in the Philippines. A petition to the Philippine Commission on Human Rights (CHR) notes the severe current and future impacts of climate change on the archipelagic nation, including the increase in extreme weather events such as super-typhoon Yolanda, which killed over 6000 people.<sup>331</sup> It evidences that human-induced climate change is an important aggravating factor in these extreme weather events, and that fossil fuel production is a key driver of human-induced climate change.<sup>332</sup> It notes further that a small group of "carbon majors" (large fossil fuel producing companies) are responsible for a great deal of this human-induced climate change.<sup>333</sup> Specifically, the petition identified that fifty investor-owned Carbon Majors contributed "equivalent to 21.6% of estimated

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<sup>328</sup> One case example is *Action Aid Denmark vs. Arla Foods* (OECD Watch, [https://complaints.oecdwatch.org/cases/Case\\_358](https://complaints.oecdwatch.org/cases/Case_358) (last visited Oct. 18, 2020), where the company agreed to improve their due diligence around exporting milk with regard to the harm it was causing local farmers, discussed in David Birchall, *Fulfilling the Responsibility to Respect: Lessons from the ICESCR*, CITY. U. HK. L. R (forthcoming).

<sup>329</sup> Blackstone Group, *Reply to the Mandate Holders*, OL OTH 17/2019, (Mar. 25, 2019), [https://www.ohchr.org/Documents/Issues/Housing/Financialization/Reply\\_OL\\_OTH\\_17\\_2019.pdf](https://www.ohchr.org/Documents/Issues/Housing/Financialization/Reply_OL_OTH_17_2019.pdf), (discussed fully in: David Birchall, *Human Rights on the Altar of the Market: The Blackstone Letters and the Financialization of Housing*, 10 TRANSNATIONAL LEGAL THEORY 446 (2019).

<sup>330</sup> See Birchall, *Impacts*, *supra* note 288 (pillar two provides 'an argumentative framework' for social issues).

<sup>331</sup> Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, *Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change 1* (Sept. 22, 2015), <https://essc.org.ph/content/wp-content/uploads/2018/09/Philippines-Climate-Change-and-Human-Rights-Petition.pdf>.

<sup>332</sup> *Id.* at 25-27.

<sup>333</sup> *Id.* at 21-23.

global industrial emissions through 2013.”<sup>334</sup> The petition seeks responsibility in line with each company’s emissions, also considering when the firm acquired knowledge of the harmful effects of its products. This petition is explicitly grounded in the UNGPs, stating that it seeks the CHR to determine whether “investor-owned Carbon Majors... have breached their responsibility to respect human rights [under the UNGPs].”<sup>335</sup> It states that the Carbon Majors are “directly or indirectly contributing to current or future adverse human rights impacts through the extraction and sale of fossil fuels and activities undermining climate action.”<sup>336</sup> It posits breaches of a number of rights: “(a) to life; (b) to the highest attainable standard of physical and mental health; (c) to food; (d) to water; (e) to sanitation; (f) to adequate housing; and (g) to self-determination resulting from the adverse impacts of climate change.”<sup>337</sup>

At the time of writing the petition is still under consideration at the CHR. While the chance of success is unknown, it demonstrates that the UNGPs appear to provide a useful framework for managing human rights impacts that do not easily lend themselves to criminal or tortious liability, and/or, that thinking of tortious wrongdoing through the UNGPs framework could provide a useful means of holding corporations to account for harm caused beyond the traditional scope of the law. This evolution in justiciability could be of great importance to all environmental and socio-economic rights in an increasingly transnationalized future.

Finally, specific attention should be given to the right to housing within discussions around the binding treaty on business and human rights.<sup>338</sup> This ongoing discussion is organized by the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights with a mandate to create a “Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.” A revised draft was released in July 2019.<sup>339</sup> The

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<sup>334</sup> *Id.* at 23.

<sup>335</sup> *Id.* at 12.

<sup>336</sup> *Id.* at 25-27.

<sup>337</sup> Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, *Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change* 23 (Sept. 22, 2015), <https://essc.org.ph/content/wp-content/uploads/2018/09/Philippines-Climate-Change-and-Human-Rights-Petition.pdf>.

<sup>338</sup> David Birchall, *Between Apology and Utopia: The Indeterminacies of the Zero Draft Treaty on Business and Human Rights*, 42 SUFFOLK TRANSNAT’L L. REV. (2019) [hereinafter Birchall, *Treaty*].

<sup>339</sup> OEIGWG, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, Revised Draft July 2019.

right to housing is not discussed specifically, but the scope covers “all human rights,”<sup>340</sup> establishes legal liability for and “human rights violation or abuse”<sup>341</sup> which is defined as “any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities.”<sup>342</sup> What constitutes “harm” in this context will be the key question.<sup>343</sup> There is major opposition to the treaty among influential states and it is not clear, at this stage, that the final version will be widely ratified.<sup>344</sup>

## CONCLUSION

This paper has been critical of the current human rights responses to the marketization of housing markets. However, it is ultimately hopeful that human rights law and argumentation can address the subject. It has identified that the content of the right to housing, the nature of state obligations under the ICESCR, and of business responsibilities under the UNGPs each apply to the subject. The CESCR has the basic tools, but it is submitted that it needs to clarify specific standards that can create clear violations, and clear compliance, around the right. Clear standards can be set around issues such as retrogressing affordability, and clear law and policy changes can be recommended to address the issue. Commodification breeds profit-motivated exploitation. Failure to address commodification leaves housing at the mercy global finance and causes demonstrable human rights impacts. This is a serious problem for human rights, and one that has been overlooked for too long. There is plenty of evidence of a nascent turn toward the subject among academics and others, and this paper can, it is hoped, contribute to the development of oppositional strategies within the human rights movement.

Regarding next steps, it would be useful for the UNSR on the right to housing to develop a report for use by the CESCR to clarify some global, regional and national standards around what constitutes “clear violation” in relation to affordability, eviction rates, homelessness, and in regard to permitted business practices. The report should also include reasonable standards for progressive realization within a single reporting period along these metrics, and possible policy options to achieve these improvements. It may be useful to initiate this strategy within a country report first, to allow sufficient attention to empirical detail. As noted, this could bring the CESCR’s practice more in-line with the UNSR’s approach to national housing strategies, particularly, the principles “to prioritize

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<sup>340</sup> *Id.* art. 3.3.

<sup>341</sup> *Id.* art. 6.1.

<sup>342</sup> *Id.* art. 1.2.

<sup>343</sup> Birchall, *Treaty*, *supra* note 339.

<sup>344</sup> Barnali Choudhury, *Balancing Soft and Hard Law for Business and Human Rights*, 67 INT. & COMP. L. Q. 961, 980 (2018).

those most in need and ensure equality,”<sup>345</sup> of “human rights-based goals and timelines,”<sup>346</sup> “accountability and monitoring,”<sup>347</sup> and concerning the “obligations of private actors and regulate financial, housing and real estate markets.”<sup>348</sup> It is also necessary for detailed empirical work to be undertaken to provide the CESCR and national governments with specific, reasonable and ambitious standards within their jurisdiction. As identified in relation to Hong Kong, the UK, and the US, many organizations and experts can contribute knowledge to these standards. In so doing, the long-term retrogression of affordability in housing and its numerous subsequent effects can be described in terms of clear violations of the right to housing, states can be held accountable to specific standards in this regard, and recommendations as to specific policies conducive to meeting these standards can be elaborated. It is submitted that such a method may help rethink international human rights law so as to challenge the now egregious crisis engendered through the commodification of the materialities of human rights.

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<sup>345</sup> UNSR, *Housing Strategies*, *supra* note 246, at 7.

<sup>346</sup> UNSR, *Housing Strategies*, *supra* note 246, at 13.

<sup>347</sup> UNSR, *Housing Strategies*, *supra* note 246, at 15.

<sup>348</sup> UNSR, *Housing Strategies*, *supra* note 246, at 17.