

RECONSTRUCTING STATE OBLIGATIONS TO PROTECT AND FULFIL SOCIO-ECONOMIC RIGHTS IN AN ERA OF MARKETISATION

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Abstract States hold international human rights obligations to protect rights-holders from infringements by third parties and to fulfil access to rights. States also increasingly rely on businesses to provide essential human rights resources, including for housing, food, and healthcare. How these obligations apply where States rely on businesses has not been adequately conceptualised, particularly regarding the scope of business infringements in this context, and how the obligation to fulfil relates to market regulation. The Committee on Economic, Social and Cultural Rights has not directly addressed these questions, but recent General Comments develop ambitious regulatory obligations in this area. However, their methodology is questionable, often collapsing the distinction between obligations to protect and to fulfil. This article reconstructs the obligations to provide distinct content under each. It delineates State duties to protect from profiteering and to fulfil human rights through market regulation. It concludes by arguing that this reconstruction may challenge central aspects of globalised capitalism based on the human rights harm inherent therein.

Keywords: international human rights law, business and human rights, globalisation, International Covenant on Economic, Social and Cultural Rights, marketisation, neoliberalism.

I. INTRODUCTION

States increasingly rely on private actors to supply essential human rights resources. This takes many forms, from the privatisation of natural monopolies, such as water, to State regulated markets for housing and food, as well as realising workers' rights through labour markets.¹ Private actors

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¹ See generally: K De Feyter and F Gómez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation* (Intersentia 2005); see on some specific human rights: P O'Connell, 'The Human Right to Health in an Age of Market Hegemony' in J Harrington and M Stuttaford, *Global Health and Human Rights* (Routledge 2010); G MacNaughton and DF Frey, 'Decent Work for All: A Holistic Human Rights Approach' (2010) 26 *American University International Law Review* 441; J Akers *et al.*, 'Liquid Tenancy: "Post-Crisis" Economies of Displacement, Community Organizing, and New Forms of Resistance' (2019) 1(1) *Radical Housing Journal* 1.

are increasingly involved in provision of education, healthcare, nursing homes, and detention facilities.² Marketisation, defined as the State facilitation of market conditions through regulation, and used here as an umbrella term to capture all forms of for-profit involvement in supplying and organising human rights resources,³ has transformed the nature of rights provision. Corporations, imagined under the tripartite delineation of State obligations to ‘respect, protect, and fulfil’ human rights as being third parties with the potential capacity to violate rights, are now parties intimately involved in realising rights.⁴

This article analyses State obligations to protect and to fulfil rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) where States rely on businesses to supply essential goods and services.⁵ Where businesses supply essential resources their potential capacity to infringe rights increases. Profit-motivated restrictions on rights may occur directly or indirectly, for example, through tactics designed to create artificial scarcity or to reduce the accessibility of services.⁶ The obligation to fulfil rights transcends the State choice to supply essential resources through markets, but it is unclear how this obligation applies to the regulation of businesses and markets.

The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 24 laid out significant obligations in relation to business activities, including that markets must realise universal access to rights, and obligations to implement progressive taxation and rent control.⁷ It is argued that the CESCR’s ambitious approach nonetheless contained two methodological weaknesses. First, the CESCR did not adequately address the range of ways in which businesses with authoritative positions in rights-relevant markets can profit from tactics that restrict access to rights, including their ability to shape markets themselves. Second, the CESCR did not make

² C Lubienski, ‘Privatising Form or Function? Equity, Outcomes and Influence in American Charter Schools’ (2013) 39 *Oxford Review of Education* 498, 502–4.

³ H Callaghan, ‘Who Cares about Financialization? Self-Reinforcing Feedback, Issue Salience, and Increasing Acquiescence to Market-Enabling Takeover Rules’ (2015) 13 *Socio-Economic Review* 331, 333–4.

⁴ IE Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’ (2005) 5 *HRLRev* 81.

⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁶ See, for example, on housing: Human Rights Council, ‘Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context: The Financialization of housing and the right to adequate housing’ (18 January 2017) UN Doc A/HRC/34/51, paras 34–7 (hereinafter UNSR, Financialization).

⁷ CESCR, ‘General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ (10 August 2017) UN Doc E/C.12/GC/24, para 17 (hereinafter General Comment 24, Business).

adequate use of the obligation to fulfil, particularly failing to establish that it is the State choice to outsource to the market that obligates that market regulation must work to fulfil access to rights.⁸

This article reconstructs duties to protect and to fulfil to better apply them under marketisation following an *act/outcome distinction*. It defines a ‘duty to protect from profiteering’ that obligates an interrogative approach to monitor the *business acts* that may reduce access to rights, including those that structure retrogressions of access without directly violating individuals’ rights. Examples cited include the range of practices constituting ‘wage theft’ by employers and tactics that housing developers employ to increase profit by restricting access to housing. It defines also a ‘duty to fulfil through market regulation’ that requires *outcome-oriented policies* based on rights-holders’ needs, such as rent control to increase affordable housing, that must be implemented through business because of the State choice to outsource.

Under this distinction, the obligation to protect focuses on how companies are actively seeking profit from harmful actions, while the obligation to fulfil focuses on policies to realise rights. These positive obligations to realise rights are relevant to business only because of the State decision to marketise essential resources. This decision entails that businesses in relevant markets must be regulated so as to fulfil rights, becoming necessary conduits of the State obligation to fulfil. This would mark a significant shift to the CESCR’s approach and builds a distinct purpose for each limb. It applies human rights principles to the two major sources of risk under marketisation: that specific business tactics may reduce access to rights, and that the market as a whole may fail to realise rights. It notes that both limbs may require clarification from the CESCR as to any limits of these.

The article is limited to direct forms of private provision of essential resources. It does not cover other business-related issues, such as tax avoidance and tax rates.⁹ To retain precision it also does not address extraterritorial obligations, thereby not covering global food markets, for example.¹⁰ The analysis is relevant to these topics, but further research would be needed to map such obligations.¹¹ The article focuses on the ICESCR and so does not discuss civil and political rights, though similar arguments may apply

⁸ *ibid* paras 21 and 24; A Nolan, ‘Privatization and Economic and Social Rights’ (2018) 40 *HumRtsQ* 815, 818 (Nolan, Privatization). Nolan highlights the limited use of the obligation to fulfil in General Comment 24 and makes the important point that a State decision to privatise an essential service necessitates that fulfil obligations become relevant to that private actor and the regulation thereof. The argument herein builds on this perspective.

⁹ *ibid* para 37; S Darcy, ‘The Elephant in the Room’: Corporate Tax Avoidance & Business and Human Rights’ (2017) 2 *Business and Human Rights Journal* 1.

¹⁰ O De Schutter *et al.*, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (2012) 34 *HumRtsQ* 1084.

¹¹ SL Seck, ‘Moving beyond the E-word in the Anthropocene’ in DS Margolies *et al.* (eds), *The Extraterritoriality of Law* (Routledge 2019) 49.

in situations such as private prisons.¹² Finally, the focus is on State obligations, leaving direct business responsibilities aside.¹³

The article proceeds next with a discussion of marketisation. Section III introduces the obligations to protect and to fulfil rights, including the CESCR's treatment of the obligations. Section IV analyses the obligation to protect as applied to marketised rights, and Section V does the same for the obligation to fulfil. Section VI concludes by defining the reconstructed obligations and discussing their implications for global capitalism.

II. THE MARKETISATION OF SOCIO-ECONOMIC RIGHTS

This section discusses why marketisation presents both practical and jurisprudential problems for human rights. The marketisation of socio-economic rights is a result of the regulatory State model of governance, in which the State replaces direct provision of goods and services with incentives to encourage market actors to provide the same.¹⁴ In most rights-relevant cases, legal changes either encourage marketisation or create new markets.¹⁵ One example is tax incentives that encourage businesses to work on essential projects, such as the law of Real Estate Investment Trusts (REITs), common in many jurisdictions, including the UK, which typically permit housing developers to avoid paying corporation tax.¹⁶ New markets are regularly created, particularly through the gradual outsourcing of public operations, for example of catering, medical, IT, and other services in public bodies.¹⁷ The regulatory State model is therefore not hands-off laissez-faire economics, but entails the State actively shaping markets.¹⁸ The oft-made supposition that neoliberal governance entails deregulation remains partially true, in that interventions that run counter to promoting markets, are

¹² A Davis, 'Masked Racism: Reflections on the Prison Industrial Complex' (2000) 4.27 *Indigenous Law Bulletin* 4, 6–7.

¹³ OHCHR, *Guiding Principles on Business and Human Rights* (United Nations 2011) (hereinafter *Guiding Principles*). The author has published on the direct business responsibilities in relation to marketised rights. See D Birchall, 'Any Act, Any Harm, to Anyone: The Transformative Potential of "Human Rights Impacts" under the UN Guiding Principles on Business and Human Rights' (2019) 1 *University of Oxford Human Rights Hub Journal* 120; D Birchall, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (2019) 25 *AJHR* 428.

¹⁴ L Enns-Jedenastik, 'Credibility Versus Control: Agency Independence and Partisan Influence in the Regulatory State' (2015) 48 *Comparative Political Studies* 823.

¹⁵ And see on the evolving nature of marketisation: I McGimpsey, 'Late Neoliberalism: Delineating a Policy Regime' (2017) 37 *Critical Social Policy* 64, 75–7.

¹⁶ R Waldron, 'Capitalizing on the State: The Political Economy of Real Estate Investment Trusts and the "Resolution" of the Crisis' (2018) 90 *Geoforum* 206.

¹⁷ P Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge University Press 2007); C Hood and R Dixon, *A Government That Worked Better and Cost Less? Evaluating Three Decades of Reform and Change in UK Central Government* (Oxford University Press 2015).

¹⁸ Discussed in F Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford University Press, CA 2009) 174–9.

removed.¹⁹ Financial regulation,²⁰ trade union rights,²¹ and (particularly business-related) tax rates,²² decline.

Three delineable forms of marketisation exist that directly impact rights provision. First, commodification, referring to human rights resources being traded as commodities on open markets.²³ This is particularly relevant for housing and food, which are supplied by multiple private actors through regulated markets in most States. The rights to work and to decent work are commodified through labour markets.²⁴ While not a true commodity, labour is bought on markets and companies are incentivised to purchase it as cheaply as possible and to maximise the value from it, incurring risks to labour rights. Second, privatisation, defined as ‘a shift towards provision by nongovernmental or nonstate actors of certain classes of goods and services ... for the provision or performance of which, individuals have been accustomed to relying exclusively or mainly on state offices and agencies’.²⁵ Typically, the State sells an infrastructure or service to a private company, which will then run it for profit.²⁶ Third is the more recent and overarching trend of ‘financialisation’, where an increasing range of goods, services, and intangibles are traded as assets on global markets.²⁷ Housing, for example, is no longer simply a tradable commodity between two individuals, but is a financial product sold *en masse* on asset markets,²⁸ and likewise food commodity derivatives.²⁹ A fourth form of marketisation that is not covered here is the imposition of a market rationality into a wider range of services, such as higher education.³⁰

Where the resources necessary for the enjoyment of human rights are provided by business actors, two major risks are evident, which can be defined along the act/outcome distinction. First, as direct business

¹⁹ S Tombs and D Whyte, ‘Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK’ (2013) 7 *Regulation & Governance* 61, 74–5.

²⁰ M Stephens, ‘Mortgage Market Deregulation and Its Consequences’ (2007) 22 *Housing Studies* 201.

²¹ D Harvey, ‘Neoliberalism as Creative Destruction’ (2007) 610 *The Annals of the American Academy of Political and Social Science* 21, 30–2.

²² S Loretz, ‘Corporate Taxation in the OECD in a Wider Context’ (2008) 24 *Oxford Review of Economic Policy* 639.

²³ See generally N Thrift, ‘Re-inventing Invention: New Tendencies in Capitalist Commodification’ (2006) 35 *Economy and Society* 279.

²⁴ I Greer, ‘Welfare Reform, Precarity and the Re-commodification of Labour’ (2016) 30 *Work, Employment and Society* 162.

²⁵ Nolan, *Privatization* (n 8) 818.

²⁶ G Hodge, *Privatization: An International Review of Performance* (Routledge 2018) 6 (Hodge, *Privatization*).

²⁷ R Rolnik, ‘Late Neoliberalism: The Financialization of Homeownership and Housing Rights’ (2013) 37 *International Journal of Urban and Regional Research* 1058, 1059–60.

²⁸ D Birchall, ‘Human Rights on the Altar of the Market: The Blackstone Letters and the Financialisation of Housing’ (2019) 10 *Transnational Legal Theory* 446.

²⁹ A Chadwick, ‘Regulating Excessive Speculation: Commodity Derivatives and the Global Food Crisis’ (2017) 66 *ICLQ* 625.

³⁰ B Jongbloed, ‘Marketisation in Higher Education, Clark’s Triangle and the Essential Ingredients of Markets’ (2003) 57 *Higher Education Quarterly* 110, 114–15.

involvement increases, businesses are increasingly able to work around rules, exploit legal gaps and use their powerful structural positions within markets to increase profits by reducing access to rights. This we could term the 'micro' problem, wherein the State must investigate specific business acts in rights-relevant markets. The possible examples are numerous: housing investors targeting low-income neighbourhoods for eviction;³¹ practices to avoid paying full minimum wage or to avoid recognising insurance claims;³² and strict monitoring of employees through wearable sensors in potential breach of the right to privacy.³³ The extent to which these tactics invoke the State obligation to protect is explored below.

The second problem is more macro-level and grounded in quantitative outcomes across the population. Here the market in totality is failing to realise or is retrogressing access to rights. A European report summarises that 'there has been significant growth in a wide range of non-standard forms of employment relationship with the result that significant numbers of Europe's workers are now excluded from welfare benefits and/or employment protections'.³⁴ The rate of in-work poverty in the UK rose by 35 per cent in the last 25 years.³⁵ Housing fares particularly badly: in Ireland, homelessness trebled from July 2014 to August 2019.³⁶ In the UK, rough sleeping more than doubled from 2010–15.³⁷ Housing-related poverty and debt is equally stark: in Europe in 2017, 26.3 per cent of renters were 'overburdened', spending more than 40 per cent of their income on housing costs,³⁸ and 'there was over €541 billion of distressed real estate debt in Europe in 2015'.³⁹ While these problems may be partly caused by specific business

³¹ I Leijten and K de Bel, 'Facing Financialization in the Housing Sector: A Human Right to Adequate Housing for All' (2020) 38 NQHR 94.

³² On wages, see below. On private health insurance: SL Dickman, DU Himmelstein and S Woolhandler, 'Inequality and the Health-Care System in the USA' (2017) 389(10077) *The Lancet* 1431.

³³ GM Dery III, 'Trading Privacy for Promotion? Fourth Amendment Implications of Employers Using Wearable Sensors to Assess Worker Performance' (2020) 16 *Northwestern Journal of Law & Social Policy* 17.

³⁴ S McKay et al, 'Study on precarious work and social rights' (Study VT/2010/084 carried out for the European Commission by the Working Lives Research Institute, April 2012) 5.

³⁵ P Bourquin et al., 'Why Has In-Work Poverty Risen in Britain?' (2019) Institute of Fiscal Studies Working Paper W19/12, 12 <<https://www.ifs.org.uk/publications/14154>>.

³⁶ 'Latest figures on Homelessness in Ireland' (*Focus Ireland*) <<https://www.focusireland.ie/resource-hub/latest-figures-homelessness-ireland/>>.

³⁷ S Fitzpatrick and H Pawson, 'Fifty years since Cathy Come Home: Critical Reflections on the UK Homelessness Safety Net' (2016) 16 *International Journal of Housing Policy* 543, 549.

³⁸ A Pittini et al., 'The State of Housing in the EU 2019' (Housing Europe, September 2019) 11. This adopts the OECD's 40 per cent income-housing costs ratio. Many jurisdictions set affordable housing at 30 per cent of income costs, including both the US and Canada. See 'About Affordable Housing in Canada' (*Canada Mortgage and Housing Corporation*, 31 March 2018) <<https://www.cmhc-schl.gc.ca/en/developing-and-renovating/develop-new-affordable-housing/programs-and-information/about-affordable-housing-in-canada>>; 'Defining Affordable Housing' (*HUD USER*) <<https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-081417.html>>.

³⁹ UNSR, Financialization (n 6) para 27.

tactics, they also implicate market-level issues. Addressing the issues may require outcome-based policies such as instituting rent control, limits on precarious work, or higher minimum wages. These are therefore two distinct problems requiring distinct approaches and which the obligations to protect and to fulfil can address. The next section introduces these obligations.

III. DEFINING OBLIGATIONS TO PROTECT AND TO FULFIL

The tripartite typology ‘respect, protect, fulfil’ was formulated in 1980 by Henry Shue, in terms of obligations ‘to avoid depriving’, ‘to protect from deprivation’ and ‘to aid the deprived’.⁴⁰ Protection included both ‘enforcing rules’ and ‘designing institutions that avoid the creation of strong incentives to violate duty’.⁴¹ Asbjørn Eide formulated the legal terms in 1987 as ‘[t]he obligation to respect, the obligation to protect, and the obligation to fulfil human rights.’⁴² Eide’s original formulation of ‘protect’ stated that:

The obligation to protect requires from the State and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual – including the prevention of infringement of the enjoyment of his material resources.⁴³

‘Protect’ is a positive obligation to proactively prevent harm by third parties of a similar scope to the State obligation to ‘respect’.⁴⁴ The duty to protect is commonly summarised as a duty to protect against ‘infringements’, ‘violations’, or ‘abuse’ by third parties.⁴⁵ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines), published in 1997, state that ‘[t]he obligation to protect requires States to prevent violations of such rights by third parties’.⁴⁶ General Comment 24 defines the obligation to protect in relation to business activities: ‘States parties must prevent effectively infringements of economic, social and cultural rights

⁴⁰ H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press, NJ 1996) 52 (Shue, Basic Rights); This was applied directly to business, with the argument being that businesses have direct responsibilities only to ‘avoid depriving’, in T Donaldson, *The Ethics of International Business* (Oxford University Press 1989).

⁴¹ Shue, Basic Rights (n 40) 52.

⁴² UN Economic and Social Council, ‘The New International Economic Order and the Promotion of Human Rights—Report on the Right to Adequate Food as a Human Right Submitted by Mr. Asbjørn Eide, Special Rapporteur’ (7 July 1987) UN Doc E.CN.4/Sub.2/1987/23, para 66 (Eide, Report on Food).⁴³ *ibid* para 68.

⁴⁴ ‘The obligation to respect requires the State, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds best to satisfy the basic needs.’ *ibid* para 67.

⁴⁵ Discussed in A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 49.

⁴⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht 22–26 January 1997) para 6 (Maastricht Guidelines) <http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html>.

in the context of business activities.⁴⁷ These definitions clarify that ‘protect’ applies to third parties and is restricted to a duty to prevent harm, thereby not entailing that States ensure that third parties contribute to realising human rights.

Eide formulated the obligation to fulfil as follows:

The obligation to fulfil requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts.⁴⁸

This is a broadly framed, with ‘measures necessary’ being deliberately open-ended. It permits, and presumably obligates insofar as it is ‘necessary’, regulation of markets with a view to fulfilling rights. Eide later added an obligation to ‘facilitate opportunities by which the rights listed can be enjoyed’.⁴⁹ In Article 2(1) of the ICESCR, State obligations towards ‘achieving progressively the full realization of [Covenant] rights’ include both the devotion of ‘the maximum of its available resources’ and ‘the adoption of legislative measures’.⁵⁰ The Maastricht Guidelines state that ‘[t]he obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights’.⁵¹ In General Comment 24, ‘[t]he obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights’.⁵²

As such, there appears ample evidence that States Parties must both directly fulfil, and facilitate the fulfilment of rights, through law and policy as required, including through market regulation where relevant.⁵³

General Comment 24 focused on business activities, confirming that States retain their obligation to progressively realise rights regardless of private provision.⁵⁴ General Comment 24 is admirably ambitious, clarifying not just that States Parties must regulate business actors so as to fulfil human rights,⁵⁵ but also obligations in regard to overseeing subsidiaries and business partners,⁵⁶ regarding taxation rates,⁵⁷ and tax avoidance.⁵⁸ However, General Comment 24 tends to collapse the distinction between the protect and fulfil limbs by placing similar obligations under both limbs and by using ‘protect’ for policies with a clear link to fulfilment.⁵⁹ For example, under the obligation to protect, it states

⁴⁷ General Comment 24, Business (n 7) para 14.

⁴⁸ Eide, Report on Food (n 42) para 68.

⁴⁹ A Eide, ‘Human Rights and the Elimination of Poverty’ in A Kjønstad and JH Veit-Wilson (eds), *Law, Power and Poverty* (CROP Publishers 1997).

⁵⁰ ICESCR (n 5).

⁵¹ Maastricht Guidelines (n 46) para 6.

⁵² General Comment 24, Business (n 7).

⁵³ Duties to facilitate are usually cited in General Comments, see eg CESCR, ‘General comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)’ (7 April 2016) UN Doc E/C.12/GC/23, para 61.

⁵⁴ General Comment 24, Business (n 7) 21–2.

⁵⁵ *ibid* para 26.

⁵⁶ *ibid* para 33.

⁵⁷ *ibid* para 23.

⁵⁸ *ibid* para 37.

⁵⁹ See below for examples and see also Nolan, Privatization (n 8) 852–3.

that ‘private health-care providers should be prohibited from denying access to affordable and adequate services, treatments or information’.⁶⁰ Under fulfil: ‘States parties should ensure that intellectual property rights do not lead to denial or restriction of everyone’s access to essential medicines.’⁶¹ It includes minimum wage, rent control, and eliminating precarious work only under ‘protect’,⁶² while previous General Comments include such issues under fulfil, or sometimes both protect and fulfil.⁶³ The following sections explore how obligations to protect and to fulfil may be better applied under marketisation.

IV. THE OBLIGATION TO PROTECT UNDER MARKETISATION

This section looks at the distinction between the obligations to protect and to fulfil and applies the obligation to protect to marketised rights resources. It argues 1), that under marketisation there is significant overlap between protect and fulfil, with many State regulations performing both functions; but 2), in General Comment 24, there is minimal attention paid to the ways in which businesses may profit from reducing access to rights and that under marketisation these practices play a central role in deprivation; and 3), that many of the examples of ‘protect’ policies used in General Comment 24 are better constructed as obligations to ‘fulfil’, on the grounds that they work to guarantee outcomes rather than to prevent specific infringements.

Duties to ‘protect’ obligate the prevention of harm by third parties. General Comment 12 on the right to food states that ‘[t]he obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food’.⁶⁴ General Comment 22 on the right to sexual and reproductive health offers that ‘states must prohibit and prevent private actors from imposing practical or procedural barriers to health services’.⁶⁵ As noted, General Comment 24 defines the obligation to protect as to ‘prevent effectively infringements of [Covenant rights] in the context of business activities’.⁶⁶ Measures should be taken to ‘ensure effective protection against Covenant rights violations linked to business activities’.⁶⁷ The framing ‘in the context of’ and ‘linked to’ suggests a deliberately broad scope.⁶⁸ This broad scope encompasses two distinct forms of oversight. The first is the obligation to sanction and remedy ‘where business activities result

⁶⁰ General Comment 24, Business (n 7) para 21. ⁶¹ *ibid* para 24. ⁶² *ibid* para 19.

⁶³ See, for similar blurred distinction, CESCR, ‘General Comment No. 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)’ (6 February 2006) UN Doc E/C.12/GC/18, para 25 (protect) and para 36 (fulfil).

⁶⁴ CESCR, ‘General Comment No. 12: The Right to Adequate Food (Art. 11)’ (12 May 1999) UN Doc E/C.12/1999/5, para 15 (CESCR, Food).

⁶⁵ CESCR, ‘General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2 May 2016) UN Doc E/C.12/GC/22, para 43. ⁶⁶ *ibid* para 14. ⁶⁷ *ibid* para. 17.

⁶⁸ This framing is borrowed from the UNGPs (n 13) Principle 13.

in abuses of Covenant rights'.⁶⁹ The second is the need to regulate markets and market actors, such as 'regulat[ing] the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all'.⁷⁰ General Comment 24 also includes under the obligation to protect three specific market-regulation policies:

exercising rent control in the private housing market as required for the protection of everyone's right to adequate housing; establishing a minimum wage consistent with a living wage and a fair remuneration ... and gradually eliminating informal or "non-standard" (i.e. precarious) forms of employment.⁷¹

Some forms of regulation neatly fit a harm prevention-oriented 'protect', such as limits on tobacco advertising,⁷² which will not realise the right to health but should help to prevent harm, but the examples above appear to encroach on the obligation to fulfil. At least, that housing market regulation must 'ensure access to affordable and adequate housing for all' and establishing a living wage work to fulfil the relevant rights. The CESCR's logic appears to be that high rental prices and low wages (can) constitute an infringement of the relevant rights, thus invoking the duty to protect.

This is true but does a disservice to the holistic rationale of the respect, protect, fulfil delineation. Many policies targeting marketised rights resources will both protect from business harm and fulfil the right. A national minimum wage consistent with a living wage simultaneously protects and fulfils the quantitative element of the right to fair remuneration. While General Comment 24 includes minimum wage only under protect, General Comment 23, on the right to just and favourable conditions of work, places minimum wage in both the protect and fulfil limbs: 'The obligation to protect requires that ... legislation on minimum wage and minimum standards for working conditions, are adequate and effectively enforced.'⁷³ The General Comment also recalls the obligation to 'facilitate' as part of 'fulfil'. This includes that 'States parties should adopt positive measures to assist workers [including] a non-derogable minimum wage ...'.⁷⁴

This approach hints at a key distinction but lacks clarity. The obligation to protect requires that minimum wage laws be 'effectively enforced'. The obligation to fulfil covers 'positive measures to assist workers' such as minimum wage laws. To provide distinct content within each limb and keep each limb within its historic remit, it is suggested that the role of 'protect', based on preventing 'infringements', regarding minimum wage should cover the framework of supportive laws and remedies for breach of minimum wage rules. This is an obligation to effectively prevent any breaches of minimum wage rules by employers. This aligns well with the key historic rationale of the obligation as 'preventing infringements' by third parties. The obligation

⁶⁹ General Comment 24, Business (n 7) para 15.

⁷⁰ *ibid* para 18.

⁷¹ *ibid* para 19.

⁷² *ibid* para 19.

⁷³ General Comment 23 (n 53) para 59.

⁷⁴ *ibid* para 61.

to fulfil should then be reserved for more focused attention on the quantitative value of the minimum wage. This creates separate spaces to discuss the two key aspects of a minimum wage, its enforcement and its value, following the act/outcome distinction. To guarantee a positive universal outcome, minimum wages must be set at an adequate level. To guarantee that there are no loopholes that businesses can exploit, specific means of avoiding payment of the minimum wage must be investigated and protected against.

This reconstruction is of major practical significance. One fundamental risk of marketisation is that it grants businesses greater opportunities to profit from harmful tactics. These tactics evolve and must be investigated as an ongoing policy. Regarding wages, it requires monitoring the full range of possible wage breaches, the scope of which have mushroomed with growing outsourcing, insecure work, subcontracting, and off-site work.⁷⁵ This is a lens on specific business practices designed to be interrogative and critical, to, ideally, spot every business tactic that avoids fair payment. Given that one study found that ‘wage theft’, business tactics to avoid paying employees all wages owed, cost minimum wage employees in the ten most populous US states \$8 billion in one year, this is not of marginal concern.⁷⁶ The fundamental role of the State obligation to protect should be to proactively seek and prevent these infringements. The failure of General Comment 24 to directly address this problem is a significant gap in an otherwise ambitious document.

A more difficult question regards businesses that hold structural power within markets, to determine pricing and supply, for example. This tests the scope and limits of ‘infringements’ by business, and particularly the extent to which the obligation to protect requires regulating businesses beyond preventing direct violations of individuals’ human rights. In housing markets, numerous business tactics can reduce affordability and habitability, two core criteria of the right to housing.⁷⁷ These include tactics to artificially restrict supply, monopolise markets, charge hidden fees to tenants, and exploit loopholes in eviction laws and contract law to create seriously rights-unfriendly markets.⁷⁸ Rent control, the only policy advocated by the CESCR in regard to housing, will improve fulfilment of affordable housing, but will not address these infringements that both structuralise unaffordable housing, driving up values to make rent control less feasible, and target individuals in ways that rent control will not protect against.

One example of a business practice that structuralises reduced access to housing is land hoarding, the purchasing of land with the intention of not developing it to increase the value of current holdings.⁷⁹ It can be an

⁷⁵ J Lee and A Smith, ‘Regulating Wage Theft’ (2019) 94 *WashLRev* 759. ⁷⁶ *ibid* 767.

⁷⁷ CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (13 December 1991) UN Doc E/1992/23, para 8.

⁷⁸ D Birchall, ‘Challenging the Commodification of Human Rights: The Case of the Right to Housing’ (2021) 19 *Santa Clara Journal of International Law* 1. ⁷⁹ *ibid*.

important factor in making housing markets unaffordable, but no individual can claim that a specific act of land hoarding denied their right to housing. Rather, land hoarding structuralises a lack of access to housing. The question is whether permitting land hoarding can breach the State obligation to protect, or if it is too indirect to be covered by human rights obligations. It must be emphasised that this is one example of a profit-driven business tactic in a free-market economy that profits from restricting access to rights. There are numerous other examples, from strategic bankruptcies to reduce pension liabilities to private equity firms loading debt onto private hospitals, forcing cost-cutting that eventually costs lives.⁸⁰ These practices, that exist within the political economy of rights-relevant markets, are integral structuring forces that often work counter to realising rights without necessarily generating individual rights claims.

The CESCR does not directly address this question, but regularly defines the obligation to protect as a fully comprehensive duty to protect against harm. General Comment 14 on the right to health cites extensive obligations to protect, including ‘to ensure that privatisation of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services’.⁸¹ This demonstrates the comprehensive nature of ‘protect’: privatisation must not threaten the availability of healthcare on any metric. Any act by a private healthcare provider that reduces access to healthcare *prima facie* constitutes a failure of the State to protect and all such acts must be protected against. The principle in General Comment 24 that markets be regulated ‘so as to ensure access’, would also imply a comprehensive scope beyond only addressing direct violations of rights by third parties.

This generalised duty to protect against harm implies significant obligations upon States to understand the practices of companies in rights-relevant markets and ensure none are designed to profit from reducing access to rights. The CESCR does not attempt to justify these obligations, nor to fully explore their ambitious scope, which may appear overly intrusive upon business. Such obligations are, however, doctrinally correct and must be justified as a necessary outcome of the State decision to supply essential resources through markets. This decision means that human rights principles must apply throughout the political economy of rights-relevant markets.⁸² It is the marketisation of housing, not an expansion of human rights obligations, that necessitates that every act by a housing developer be analysed on its human

⁸⁰ See on some human rights impacts of private equity investments: E Appelbaum, R Batt and I Clark, ‘Implications of Financial Capitalism for Employment Relations Research: Evidence from Breach of Trust and Implicit Contracts in Private Equity Buyouts’ (2013) 51 *British Journal of Industrial Relations* 498; E Appelbaum and R Batt, ‘Private Equity Buyouts in Healthcare: Who Wins, Who Loses?’ (2020) Institute for New Economic Thinking Working Paper Series 118.

⁸¹ CESCR, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)’ (11 August 2000) UN Doc E/C.12/2000/4, para 35.

⁸² Discussed further in D Birchall, ‘Corporate Power over Human Rights: An Analytical Framework’ (2021) 6 *Business and Human Rights Journal* 42, 56–8.

rights outcomes. This requires, in practice, that States take on an active monitoring role to ensure that harmful practices are prevented, and the CESCR should highlight the need for such a role. These practices may operate in legal gaps and grey areas and particularly may operate in the background, away from direct interaction with rights-holders. If there are any limits to this duty to proactively investigate harmful business acts, the CESCR should clarify the rationale and extent thereof.

V. THE OBLIGATION TO FULFIL UNDER MARKETISATION

If the obligation to protect is used to focus on specific business practices, the outcome-oriented policies frequently cited under ‘protect’ in General Comment 24 would be located as obligations to fulfil. This is logical in that policies such as adequate minimum wage levels and rent control do work to fulfil the relevant rights, even as they also prevent harmful practices. The key question regards the scope of this obligation in relation to marketised resources, particularly to what extent markets and market actors must be regulated to guarantee access to rights.

First, to address two foundational points. The first is that the obligation to fulfil holds as a State obligation regardless of marketisation. States cannot renege on their human rights obligations by outsourcing provision to business. Under the ‘protect’ pillar, General Comment 24 states that private providers should ‘be subject to strict regulations that impose on them so-called “public service obligations”’.⁸³ Nolan challenges this on the grounds that privatisation is a choice by States and therefore obligations to fulfil are relevant to privatised services.⁸⁴ The inverse would mean that States could trade away the obligation to fulfil, exposing a significant loophole in international human rights law. State obligations to fulfil transcend any such policy choice. This leads to the second point, that the State decision to marketise an essential rights resource necessitates that market regulation be designed so as to fulfil universal access to the right, very possibly in tandem with other interventions such as continued direct provision of resources for some groups.

This then leads to the question of whether there exists an obligation that States regulate businesses so that those businesses work to fulfil human rights. General Comment 14 on the right to health offers that fulfil ‘obligations include the provision of a public, private or mixed health insurance system which is affordable for all’.⁸⁵ General Comment 22 on the right to sexual and reproductive health states that ‘[p]ublicly or privately provided sexual and reproductive health services must be affordable for all. Essential goods and services ... must be provided at no cost or based on the

⁸³ General Comment 24, Business (n 7) para 21.

⁸⁴ Nolan, Privatization (n 8) 835.

⁸⁵ General Comment, Health (n 81) para 36.

principle of equality.⁸⁶ Along with the statements cited above from General Comment 24 related to housing, work, and other rights, the CESCR is clear that private actors can, and sometimes must, be regulated so that they contribute to fulfilment based on their position as key suppliers of essential materialities and services. To be clear, these are legally State obligations which impose, in practice, obligations to fulfil upon private providers.

As States have transferred the supply of essential resources to the market, so the State obligation to fulfil must be transferred to this market via regulation. Positive obligations on private actors will be enforced by State regulation, and will be specifically limited to those necessitated by the business's structural position.⁸⁷ The water company holds obligations to ensure universal access to water at an affordable price;⁸⁸ the healthcare company holds obligations to ensure universal access for its members; the employer may be obligated to ensure fair pay through wage laws; and the landlord may be obligated to contribute to universal access to housing through rent control.

The restricted nature of these positive obligations bypasses common issues with placing positive obligations upon private actors.⁸⁹ Only when a business voluntarily moves into a specific rights-relevant area does the State obligation to fulfil become relevant to that business. States are geographically-bounded entities with the authority to implement legal and political changes within their jurisdiction with the aim of realising, or denying, human rights. Corporations do not have this sweeping authority and therefore it is difficult to specify to whom, how, and to what extent they should be obligated to fulfil rights.⁹⁰ The approach described above clarifies that obligations to fulfil are relevant to business because of the State's turn to marketisation.

The well-known limitation on private actors holding obligations to fulfil rights may explain the failure to establish many of these obligations in practice. Here another weakness in the CESCR's methodology may be noted. The CESCR grounded policies such as rent control under the obligation to protect, implying that rent control is needed to prevent 'infringements' by business. A more coherent case is that rent control is a universal

⁸⁶ General Comment, Sexual Health (n 65) para 17.

⁸⁷ This bears a similarity to the functional approach to human rights jurisdiction, see: Y Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 *Law and Ethics of Human Rights* 47, 56.

⁸⁸ In the UK, water suppliers are not permitted to shut off water for non-payment, suggesting an obligation to fulfil the right, Water Industry Act 1999, art 61, section 4.A.

⁸⁹ Discussed critically in N Hsieh, 'Should Business Have Human Rights Obligations?' (2015) 14 *Journal of Human Rights* 218. Positive obligations are supported in F Wettstein, 'From Causality to Capability: Towards a New Understanding of the Multinational Corporation's Enlarged Global Responsibilities' (2005) 19 *Journal of Corporate Citizenship* 105; F Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22 *Business Ethics Quarterly* 739, 757–60.

⁹⁰ See for the most ambitious attempt to do just this: Wettstein, *Global Justice* (n 18) 311–47, and particularly for the purposes herein: 322–3 on multinationals such as agribusiness; 325 on privatisation; 328–33 on 'global public goods'.

outcome-based policy designed to realise access to housing for all that must be implemented via businesses only because of the State decision to marketise the right to housing. Marketisation dictates that business regulation to ensure fulfilment of rights is necessary. The CESCR should clarify that these are positive obligations that stem from the State obligation to fulfil rights.

This approach is also more accurate in that outcome-based policies apply to all businesses in the relevant market equally and address a problem grounded in rights-holder needs, rather than overt infringements such as wage theft or land hoarding. The only relevant factor is that rights-holders cannot afford housing. This evidentiary basis of rights-holder need makes the policy a paradigmatic example of an ‘appropriate ... measure toward the full realization of [Covenant] rights’.⁹¹ The State becomes obligated to realise rights through business regulation because the business has taken on a rights-related function. The business actor (generally) retains the right to exit the relevant sector, and the State retains the right to shift away from marketisation to directly supply rights resources. The obligation is that so long as the market provides, market actors are legitimate and sometimes necessary bearers of positive obligations through the State obligation to fulfil.

VI. CONCLUSION: DUTIES TO PROTECT FROM PROFITEERING AND TO FULFIL THROUGH MARKET REGULATION

General Comment 24 is ambitious but blurs the distinction between ‘protect’ and ‘fulfil’, in so doing occluding some major issues and failing to concretely establish the rationale for some policy suggestions. As regards marketised rights resources, the obligation to protect should focus on monitoring and preventing harmful acts of ‘infringement’ by businesses, while the obligation to fulfil entails any policy aimed at progressively realising the right, including through market facilitation. The following restatement better specifies the scope of each limb, in so doing reifying the practical utility of each by defining a ‘duty to protect from profiteering’ and a ‘duty to fulfil through market regulation’. These are forms of the duty relevant to marketised rights resources that do not detract from other obligations, such as direct provision.

The duty to protect from profiteering requires that States protect against the profit-motivated retrogression or denial of access to rights by businesses. This is defined according to four elements. First, it addresses third parties. Second, it is an obligation to prevent harm only. Third, it should prioritise investigating harmful business acts, rather than wider problems connected to business. Fourth, the element that becomes more vital under marketisation, it includes duties to protect against acts within the political economy of relevant markets, that may harm human rights without constituting direct, or justiciable, violations of individuals’ rights. This final component potentially

⁹¹ Maastricht Guidelines (n 46) para 6.

covers a swathe of corporate practices related to pricing, supply, and quality. As part of this component, the CESCR should explicate any limits to the scope of this obligation as regards more structural practices, such as land hoarding. The duty to fulfil through market regulation also contains four elements. First, as a general principle, the obligation to fulfil transcends outsourcing or other policy choices. Second, 'fulfil' includes facilitation through market regulation where relevant. Third, States are sometimes obligated to regulate business actors so that these actors work to fulfil rights. Fourth, fulfil requires market-wide outcome-oriented policies, and their implementation via business stems from the State choice to marketise essential resources.

Two final points are worth noting. First, many of these obligations are obligations of conduct, not of result.⁹² The State obligation is to implement regulation conducive to access to rights. These are not obligations to eliminate homelessness or poverty; rather they are obligations that can be implemented immediately and without direct cost to the State. They are not therefore utopian or unfeasible socio-economic rights demands.⁹³ Second, something not highlighted in General Comment 24 is the importance of the obligation to devote the maximum available resources to all rights. A State is technically permitted to avoid regulating businesses and to provide significant subsidies to rights-holders. However, that State is also obligated not to waste resources if any Covenant right remains unfulfilled. The UK, for example, paid £9.3 billion to private landlords in 2016 at a time when its healthcare system was underfunded.⁹⁴ This presents a prima facie case of a failure to devote the maximum available resources to all Covenant rights, due, in part, to ineffective regulation of the housing market.

Despite the above critique, the CESCR's strategy is sensible from the human rights perspective. It is not anti-business. It makes no statement as to whether in theory free markets are good or bad for human rights. Instead, it confirms that the obligation to protect entails preventing harm by business, and that fulfilment includes facilitation through market regulation. These principles, once elaborated, make a human rights-based argument that may challenge central aspects of global capitalism. The principles set rules of the game beyond formalistic proceduralism and legal accountability for human rights violations, and toward the acts and outcomes produced under global capitalism. They recast human rights obligations as a critical lens on markets,

⁹² Eide, Report on Food (n 42) paras 71–2.

⁹³ Explored in distinctive ways in A Sen, 'Human Rights and the Limits of Law' (2005) 27 *CardozoLRev* 2913; M Makau 'Human Rights and Powerlessness: Pathologies of Choice and Substance' (2008) 56 *BuffLRev* 1027, 1028; J Dehm, "'A Pragmatic Compromise between the Ideal and the Realistic': Debates over Human Rights, Global Distributive Justice and Minimum Core Obligations in the 1980s' in C Christiansen (ed), *Histories of Global Inequality* (Palgrave Macmillan 2019) 157.

⁹⁴ D Gayle, 'Private landlords get £9.3bn in housing benefit from taxpayer, says report' *The Guardian* (20 August 2016) <<https://www.theguardian.com/society/2016/aug/20/private-landlords-9bn-housing-benefit-taxpayers-national-housing-federation-report>>.

clarifying that these obligations apply to the practices and constitutive rules therein. Where businesses profit from acts that reduce access to rights, this must be prevented. Where markets are failing to realise rights, these markets must be reorganised. It is submitted that these reconstructed duties clarify the scope of international human rights law to make it a potentially significant tool with which to push back against harmful elements of global capitalism.