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

**Abstract**

States increasingly outsource the provision of resources essential for socio-economic rights realization to market actors. This generates uncertainties regarding the substantive content of state obligations toward these rights. What does it mean to protect a right from ‘infringements’ by third parties when businesses supply the content of the right? Are states obligated to regulate rights-relevant markets so that the actors therein operate to fulfil human rights? The Committee on Economic, Social and Cultural Rights has not directly addressed these questions, but recent General Comments develop some ambitious regulatory obligations in relation to marketized rights. However, their methodology is questionable, often collapsing the distinction between the ‘protect’ and ‘fulfil’ limbs. This paper reconstructs the limbs according to their historical and theoretical origins to provide distinct content to each. It delineates and defines state duties to protect from profiteering and state duties to fulfil human rights through market regulation. It concludes by arguing that this reconstruction may present a challenge to central aspects of globalized capitalism based on the human rights harm inherent therein.

**Keywords:** Business and Human Rights, Globalization, International Covenant on Economic, Social and Cultural Rights, International Human Rights Law, Marketization, Neoliberalism

1. Introduction

*Marketization has transformed the provision of essential socio-economic rights resources and theories of legal obligation have been slow to react.[[1]](#footnote-1)* This paper analyses state obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) where states have ceded the supply of essential goods and services to the market, termed herein ‘marketization’, with privatized services, housing, food, workers’ rights, and sometimes healthcare, major examples.[[2]](#footnote-2) Reliance on markets and businesses to provide essential human rights resources has transformed how socio-economic rights are realized and introduced new risks. The implications of this for state obligations have not been fully considered.

States hold obligations to respect, protect, and fulfil human rights. The obligation to protect entails preventing ‘infringements’ by third parties. The obligation to fulfil entails working to realize universal access to Covenant rights. The interpretation of these obligations must be reconsidered where states rely on market-based provision. What does it mean to protect human rights from ‘infringements’[[3]](#footnote-3) by business where businesses control the supply of the relevant materials? To what extent do state obligations to fulfil human rights necessitate regulation of these markets? Currently, some rights-relevant markets are constructed without significant human rights input, for example, housing markets frequently fail to realize the right to affordable housing.[[4]](#footnote-4) This paper theorizes how the ‘protect’ and ‘fulfil’ limbs of state obligations should be applied in such contexts.

The analysis starts from the CESCR’s approach to marketization. It notes that the CESCR in GC24 blurs obligations to protect and to fulfil. This paper builds distinct content for each limb, derived from what are argued to be the two main risks under marketization, based on an *act/outcome distinction*. It is argued that the obligation to protect should focus on regulating specific harmful *acts* by businesses,[[5]](#footnote-5) and the obligation to fulfil on market regulation to improve quantitative outcomes.[[6]](#footnote-6) This addresses the two major forms of risk under marketization. Businesses can ‘infringe’ rights through acts that reduce access to rights, and markets can as a whole work against fulfilment of rights. This leads to a reconceptualization of the obligations as state duties ‘to protect from profiteering acts’ and ‘to fulfil through market regulation’. This would mark a significant shift to the CESCR’s approach, which currently pays minimal attention to what business acts constitute ‘infringements’ of Covenant rights,[[7]](#footnote-7) and, in General Comment 24, included outcome-based policies primarily under ‘protect’,[[8]](#footnote-8) in so doing failing to fully address the risks and requirements of marketization.

Proceeds…

…

The Committee on Economic, Social and Cultural Rights (CESCR) has not elaborated clear answers to these questions. This facilitates a gap between state practice and the principles of the ICESCR within which legally permitted business acts cause ongoing harm to access to rights.[[9]](#footnote-9) CESCR analysis of state obligations with regard to business actors is hampered particularly by a blurring of the ‘protect’ and ‘fulfil’ limbs, with content overlapping between the two.[[10]](#footnote-10) This paper builds distinct content for each limb, derived from what are argued to be the two main risks under marketization, based on an *act/outcome distinction*. It is argued that ‘protect’ should focus on regulating specific harmful acts by businesses,[[11]](#footnote-11) and ‘fulfil’ on addressing quantitative non-fulfilment of marketized rights through outcome-oriented policies based on rights-holder needs.[[12]](#footnote-12)

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.[[13]](#footnote-13) To retain precision it also does not address extraterritorial obligations, thereby not covering global food markets, for example.[[14]](#footnote-14) The analysis is relevant to these topics, but further research would be needed to map such obligations.[[15]](#footnote-15) The article focuses on the ICESCR and so does not discuss civil and political rights, though similar arguments may apply in situations such as private prisons.[[16]](#footnote-16) Finally, the focus is on state obligations, leaving direct business responsibilities aside.[[17]](#footnote-17)

The paper proceeds in section two with a discussion of the causes of, forms of, and risks inherent in, marketization. Section three introduces the CESCR’s current approach to marketized rights through General Comments and Concluding Observations. Section four analyses the obligation to protect and to fulfil, respectively, under marketization. Section five then reconstructs the relevant obligations according to the preceding analysis. Section six discusses the implications for global capitalism, and section seven concludes.

1. The Marketization of Socio-Economic Rights

This section discusses contemporary marketization and clarifies why marketization presents both practical and jurisprudential problems for human rights. The marketization of socio-economic rights is a result of the regulatory state model of governance, in which the state constructs and regulates markets to ensure social provision, rather than providing directly.[[18]](#footnote-18)

Three delineable forms of marketization exist that directly impact rights provision. First, commodification, referring for the purposes herein to essential goods being traded as commodities on open markets.[[19]](#footnote-19) This is particularly relevant for housing and food. These rights are supplied by multiple private actors through ostensibly free markets in most states. The rights to work and to just work – to buy and sell labour - while not true commodities, are equally in the thrall of markets.[[20]](#footnote-20) Second, privatization, defined as ‘a shift towards provision by nongovernmental or nonstate actors of certain classes of goods and services… which individuals have been accustomed to relying exclusively or mainly on state offices and agencies’.[[21]](#footnote-21) Typically, the state sells an infrastructure or service to a private company, which will then run it for profit.[[22]](#footnote-22) Third is the more recent and over-arching trend of ‘financialization’, where an increasing range of goods, services, and intangibles are traded as assets on global markets.[[23]](#footnote-23) Housing, for example, is no longer simply a tradable commodity between two individuals, but is a financial product sold *en masse* on asset markets,[[24]](#footnote-24) and food commodity derivatives do likewise.[[25]](#footnote-25) A fourth form of marketization that is not covered here is the imposition of a market rationality into a wider range of services, such as higher education.[[26]](#footnote-26)

Where human rights resources are to be realized through markets, actors in these markets have significant abilities to affect, and to infringe, rights, including through boardroom decisions… The question is to what extent, and how, IHRL can address this?

Whether the resources necessary for the enjoyment of human rights are commodified, privatized, or financialized, two major risks to access to rights are evident, which can be defined along the act/outcome distinction. First, as direct business involvement increases, businesses increasingly attempt to work around rules and exploit legal gaps to increase profits. The state that seeks to protect against harm caused by business actors must constantly investigate and react to these new tactics. This we could term the ‘micro’ problem, wherein specific tactics by individual actors must be examined. The possible examples are numerous: developers hoarding land to increase the value of their current properties, practices to avoid paying full minimum wage or recognizing insurance claims, or regularly photographing remote workers in potential breach of privacy. These tactics have a powerful effect on rights realization under marketization. The extent to which ‘protect’ can and should address these tactics is explored below.

The second problem is more macro-level and grounded in quantitative outcomes across the population. Here there is may be no single cause but rather the data shows an ongoing retrogression in access, often cost-based, even in wealthy states. A European report summarizes 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’.[[27]](#footnote-27) The rate of in-work poverty in the UK rose by 35 per cent in the last 25 years.[[28]](#footnote-28) Housing fares particularly badly: In Ireland, homelessness trebled from July 2014 to August 2019.[[29]](#footnote-29) In the UK rough sleeping more than doubled from 2010-2015.[[30]](#footnote-30) 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,[[31]](#footnote-31) and ‘there was over €541 billion of distressed real estate debt in Europe in 2015’.[[32]](#footnote-32) While these will in part be caused by specific business tactics, it is unlikely that addressing these alone can address the problem. Rather, it is grounded in a quantitative lack of fulfilment of rights-holders needs that requires addressing directly. This may require market-wide policies such as instituting rent control, limits on precarious work, or higher minimum wages.

These are therefore two distinct problem requiring distinct approaches which can be defined according to the act/outcome distinction. One requires investigating business practices, seeking out what is harmful and adopting changes to address these practices. The other requires macro-scale intervention to address a market-wide problem.

The issue for socio-economic rights jurisprudence is that the nature of rights provision, and rights authority, has shifted. Corporations, imagined under the ‘respect, protect, fulfil’ delineation as being third parties with the potential capacity to violate rights, are now parties intimately involved in the provision of rights.[[33]](#footnote-33) With provision comprehensively outsourced, whether to individual firms as in privatization, or to multiple firms through commodification, every business act may retrogress or realize the correlated human right. It makes minimal sense when two companies control over three-quarters of the world’s grain supply to address their obligations toward the right to food only in terms of legal breaches, when through boardroom production choices they could cause a serious famine without breaching any domestic law.[[34]](#footnote-34) The new reality of embedded marketization may entail the expanding, or shifting, of state obligations.[[35]](#footnote-35) The next section discusses the CESCR’s current approach to marketization.

1. The Collapsing Distinction Between Protect and Fulfil Under Marketization

General Comment 24 focused on business activities,[[36]](#footnote-36) confirming that states retain their obligations to progressively realize the right at all times, regardless of private provision.[[37]](#footnote-37) General Comment 24 is admirably ambitious, clarifying not just that State parties must regulate business actors so as to realize human rights,[[38]](#footnote-38) but also obligations in regard to overseeing subsidiaries and business partners,[[39]](#footnote-39) and regarding taxation rates,[[40]](#footnote-40) and tax avoidance.[[41]](#footnote-41) However, General Comment 24 tends to collapse the distinction between protect and fulfil in relation to marketization by placing similar obligations under both limbs and by using ‘protect’ for policies relevant to fulfilment.[[42]](#footnote-42) For example, under ‘protect’ it states that ‘private health-care providers should be prohibited from denying access to affordable and adequate services, treatments or information’.[[43]](#footnote-43) Under fulfil: ‘States parties should ensure that intellectual property rights do not lead to denial or restriction of everyone’s access to essential medicines necessary for the enjoyment of the right to health.’[[44]](#footnote-44) It includes minimum wage, rent control, and eliminating precarious work only under ‘protect’,[[45]](#footnote-45) while previous General Comments, examples of which are cited below,[[46]](#footnote-46) include such issues under fulfil, or sometimes both protect and fulfil.

This approach can be rationalized on the basis that many policies targeting marketized rights will both protect from business harm and fulfil the right. This is a reality when discussing the private provision of essential resources: any policy that, for example, mandates lower cost private healthcare both protects from third party harm and moves to fulfil the criteria of universal affordability. Nonetheless, it creates risks that a return to the core principles of each limb may avoid. These include potentially building a minimalistic version of ‘fulfil’, as implied by the intellectual property example above, and obfuscating the importance of using ‘protect’ to cast a human rights lens on specific infringements by businesses.

*This lack of grounding is particularly overt in Concluding Observations. For brevity, the paper includes just two recent examples at the time of writing.[[47]](#footnote-47) Observations on Belgium in 2020 noted the lack of decent quality affordable housing and recommended ‘expanding the supply of social housing, addressing the problem of unoccupied private and public buildings and regulating rents on the private rental market.’[[48]](#footnote-48) On Norway in 2020 similar concerns were noted including ‘(a) The chronic shortage of social housing in many municipalities… (c) Expensive private rental housing, which is often of poor quality.’[[49]](#footnote-49) Recommendations included ‘increas[ing] the provision of… social housing [and] regulat[ing] the private rental housing market, including by controlling rent increases.’[[50]](#footnote-50) Two points are worth noting. First, despite critique of the private housing market, no specific business issues are mentioned. There is no lens on whether business practices within the housing market are causing problems, beyond high market rates. Second, a broad list of positive recommendations is included that are not firmly grounded in obligations, or any clear practical or legal rationale. Recommendations such as rent control are frequently invoked yet have made minimal inroads as a human rights obligation. Better defining the legal rationale of rent control, explored below, would assist in concretizing and promoting the obligation.*

In the following section, the paper lays out a theoretical grounding for a delineation of protect and fulfil that allows for distinct content under each limb, and encourages focus on the two major problems under marketization cited above through the act/outcome distinction, those of harmful business practices and a lack of quantitative fulfilment.

[keep, merge s1, 2, 3, make s2 ‘my argument?’]

1. Constructing Theories of Protect and Fulfil Under Marketization
	1. The Duty to Protect

cut many words from here, keep it simple….

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’.[[51]](#footnote-51) Protection included both ‘enforcing rules’ and ‘designing institutions that avoid the creation of strong incentives to violate duty’.[[52]](#footnote-52) Ashbj**ø**rn Eide formulated the legal terms in 1987 as ‘[t]he obligation to respect, the obligation to protect, and the obligation to fulfil human rights.’[[53]](#footnote-53) 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.[[54]](#footnote-54)

‘Protect’ is a positive obligation to proactively prevent harm by third parties of a similar scope to the state obligation to ‘respect’. [[55]](#footnote-55) The duty to protect is commonly summarized as a duty to protect against ‘infringements’, ‘violations’, or ‘abuse’ by third parties.[[56]](#footnote-56) 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.’[[57]](#footnote-57)

Three concerns must be raised regarding this definition considering the preceding analysis. First, what distinguishes ‘protect’ and ‘fulfil’ under marketization? Second, how should ‘business activities’ be defined and limited? Third, what is the scope of ‘infringements’ by third parties – does this cover all potentially harmful or risk-inducing acts by business, or are some acts too indirect to be covered within human rights analysis? The following sections address each question in turn.

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Protect on three criteria: it is a duty to prevent harmful actions rather than to promote realization, it covers all ‘business activities’, ‘infringements’ broad too… How apply to markets?

* + 1. What Distinguishes Protect and Fulfil Obligations?

This section looks at the distinction between protect and fulfil. It argues 1) that under marketization there is significant overlap between protect and fulfil, with many state regulations performing both functions; but 2) that many of the examples of ‘protect’ policies used in General Comment 24 are better constructed under ‘fulfil’.

‘Protect’ obligates 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.’[[58]](#footnote-58) 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’.[[59]](#footnote-59) As noted, General Comment 24 defines the obligation to protect as to ‘prevent effectively infringements of [Covenant rights] in the context of business activities’.[[60]](#footnote-60) Measures should be taken to ‘ensure effective protection against Covenant rights violations linked to business activities’.[[61]](#footnote-61) The framing ‘in the context of’ and ‘linked to’ suggests a deliberately broad scope.[[62]](#footnote-62) This broad scope can be understood to encompass two distinct forms of oversight. The first is the obligation to sanction and remedy ‘where business activities result in abuses of Covenant rights’.[[63]](#footnote-63) 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.’[[64]](#footnote-64) General Comment 24 also includes three policies that directly address profit and exploitation:

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.[[65]](#footnote-65)

While some forms of regulation neatly fit a harm prevention-oriented ‘protect’, such as limits on tobacco advertising,[[66]](#footnote-66) 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 are obligations to fulfil. 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. 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.[[67]](#footnote-67) 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…’.[[68]](#footnote-68)

This approach hints at a key distinction, although 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 their historic remit, this paper suggests 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 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. ‘Protect’ 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,[[69]](#footnote-69) and requires detailed regulatory oversight. ‘Fulfil’ can then be reserved for concrete obligations regarding the exact quantitative requirements in each jurisdiction, including regional variations.

This is not to say that an inadequate minimum wage is not also a failure to protect, as noted, its quantitative value is relevant to both limbs. A business can breach its responsibility to respect under the UNGPs by paying national minimum wage where the value is set below basic needs.[[70]](#footnote-70) It is not doctrinally incorrect to include the value under ‘protect’, and if the CESCR believes that a particular context warrants this, the option remains. Nonetheless, as a general principle, the delineation above provides unique content to each limb as per their historic scope, keeping ‘protect’ focused on enforcing rules adequately, and ‘fulfil’ focused on ensuring outcomes. As noted, one benefit of this approach is to provide more focused attention on those ‘business activities’ which infringe rights. This is the topic is further elaborated in the next section.

* + 1. What Constitutes ‘Business Activities’?

General Comment 24 phrases the obligation to ‘protect’ as to prevent infringements ‘in the context of business activities’. This is deliberately broad, sensibly, to be non-exclusionary, but in analysing the scope it is worth discussing priorities and focal points. This section uses the example of two practices that affect access to housing, land hoarding and rent control, to show that 1) the former practice is definitively a harmful business practice that requires human rights critique and can only fall under ‘protect’, and 2) that the latter practice is better suited to ‘fulfil’. This delineates the pillars and builds distinct content into each.

Land hoarding is a common business practice designed to increase the value of current developments by not developing other areas of land under the developer’s ownership.[[71]](#footnote-71) ‘Protect’ covers infringements related to business activities, but land hoarding is never mentioned in Concluding Observations, nor in relevant General Comments,[[72]](#footnote-72) despite being frequently criticized and despite most housing markets being dominated by business actors.[[73]](#footnote-73) It appears that actual ‘business activities’ are marginalized in favour of state policies that operate ‘in the context of business activities’, such as rent control. This lack of attention to business acts causes a significant gap in oversight. The ex-UNSR on the right to housing, Leilani Farha, has explored numerous harmful business activities around the world.[[74]](#footnote-74) Land hoarding provides an example of an issue that should be highlighted by the CESCR on the grounds that it is common and creates a severe, and purposeful, risk to affordability. To protect the right to housing, the CESCR and State parties need to pay much more attention to such business practices. Highlighting their regulation and prohibition as the core element of the obligation to protect would help to achieve this.

The CESCR frequently cite homelessness and housing-related poverty in Concluding Observations, and frequently suggest rent control as a possible solution.[[75]](#footnote-75) Rent control to address rising homelessness and housing-related poverty would fulfil, or limit the retrogression of, the right to housing on the criterion of affordability. While rent control does operate ‘in the context of business activities’, it has a logical home under ‘fulfil’ since it involves regulation designed to improve quantitative outcomes based on rights-holder need. In that it potentially covers all landlords it is not addressing any specific business activity, but rather unaffordable market rates. Placing it under ‘fulfil’ may also expand the normative scope of the obligation, beyond preventing the continued retrogression of access to housing through unaffordability and toward creating universal affordable housing. This paper therefore argues that, while noting the protective element of rent control, such policies have a more natural home under fulfil, leaving ‘protect’ open to address business acts such as land hoarding.

This approach is also coherent with the rapidly developing norm of human rights due diligence, legal enforcement of which the CESCR include as part of the state obligation to protect.[[76]](#footnote-76) While it is coherent under the UNGPs to argue that unaffordable market rents can constitute a breach of the corporate responsibility to respect, under a legislated human rights due diligence framework it is unlikely that high market rents charged by private actors would constitute a breach.[[77]](#footnote-77) To determine fair rent levels would be onerous requirement on individual landlords, and such questions should be determined by the state and passed on as rules that businesses should follow. More overt business acts such as purchasing land for the sole purpose of ensuring its non-development is much more easily constructed as a breach of the responsibility to respect, and an act that a company seeking to avoid causing or contributing to adverse human rights impacts should not undertake.[[78]](#footnote-78) The next section addresses the scope and limits of a ‘protect’ limb geared around specific business acts, i.e. what business acts are within or beyond the scope of ‘protect’?

* + 1. What Constitutes an ‘Infringement’ by Business Actors?

So far, the case has been made that there is an inadequate distinction between protect and fulfil when discussing marketized rights, that this lead to overtly harmful business practices being ignored by the CESCR, and that separating protect and fulfil according to an act/outcome distinction can be useful. Because marketization leads to business actors’ holding powerful structural positions in rights relevant markets, they may adversely impact rights through numerous means, including some indirect activities. This leads to a question over the scope and limits of ‘infringements’ by business.

There is ample evidence that ‘protect’ entails protecting the right in a comprehensive sense, but the limits are not well explored. General Comment 24 gives some examples, including that the obligation to protect entails ‘direct regulation and intervention’.[[79]](#footnote-79) This includes limits on marketing of tobacco and breast-milk substitutes and active interventions to prevent gender discrimination.[[80]](#footnote-80) Further examples include ‘lowering the criteria for approving new medicines… granting exploration and exploitation permits for natural resources without giving due consideration to the potential adverse impacts of such activities on the individual and on communities’ enjoyment of Covenant rights.’[[81]](#footnote-81) The CESCR makes similar comments in relation to the right to water, to sexual health, and elsewhere cited herein. General Comment 14 on the right to health cites extensive protect obligations, including ‘to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services’.[[82]](#footnote-82) This demonstrates the comprehensive nature of ‘protect’: privatization 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. This obligation entails that states pay close attention to specific business tactics designed to profit from exploitation, which may well operate in legal gaps and grey areas. The vision of ‘protect’ entailing the prevention of all harmful business practices extends beyond privatized services. General Comment 24 states that:

The Committee is particularly concerned that goods and services that are necessary for the enjoyment of basic economic, social and cultural rights may become less affordable as a result of such goods and services being provided by the private sector, or that quality may be sacrificed for the sake of increasing profits. The 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, which would create new forms of socioeconomic segregation.[[83]](#footnote-83)

This covers all Covenant rights, and any related aspects that are ‘necessary’, such as, perhaps, banks through mortgage lending insofar as certain practices may create an ‘[in]ability to pay’. While states could meet this obligation by increasing the social safety net,[[84]](#footnote-84) it shows that, where marketization is adopted, private providers of Covenant rights must be subject to restrictions designed to prevent them retrogressing affordability or quality for profit. Therefore ‘protect’ under marketization entails that states proactively manage private suppliers of human rights essentials to ensure, so far as possible,[[85]](#footnote-85) that no right is harmed on any metric.

This is the element that the CESCR has failed to adequately explore. The principle appears comprehensive, however, there are countless examples of private companies increasing profits through reducing access that states do not protect against and the CESCR ignores. The article has mentioned land hoarding, and the CESCR also fails to mention practices of corporate landlords such as extreme fines for late payment and exploiting legal loopholes.[[86]](#footnote-86) Regarding wage-related issues, this may include unpaid time to pass through security checks at work,[[87]](#footnote-87) or for salaried individuals it may include working time breaches through expecting email replies in the evening.[[88]](#footnote-88) During COVID-19, British Airways fired thousands of workers and rehired them on significantly lower pay.[[89]](#footnote-89) The full range of specific, harmful practices is context-dependent and limitless. Yet such tactics barely register under ‘protect’.

More attention to this area is necessary to improve rights protection, but also to better define the scope and limits of ‘protect’. For example, legally permitted lobbying by businesses is one commonly cited social problem, often with implications for human rights.[[90]](#footnote-90) Are states obligated to address their lobbying rules as part of ‘protect’? Should human rights legal obligations be part of any decision on lobbyist requests, given that sometimes the relevant government department may be deciding without adequate knowledge of these obligations? Do federal governments have an obligation to regulate lobbying to ensure regional human rights compliance? Or, does the CESCR believe that such issues have too indirect an effect on human rights, and are therefore beyond the scope of their remit? Given that the CESCR included both national taxation plans and the prevention of the facilitation of tax avoidance in General Comment 24, neither of which directly violate human rights, the directness of harm does not seem to be a key criterion. This is agreeable from a rights-holder perspective, and comprehensive rights oversight is necessary where businesses shape rights outcomes. Nonetheless, the CESCR’s failure to properly analyse and consider the range of these tactics has allowed them to proliferate without institutional human rights critique. The CESCR must address this type of question with more clarity in future.

This section has made three arguments: first, ‘protect’ is grounded in preventing harm by third parties, yet many policies that the CESCR includes under protect are at least as relevant to the obligation to fulfil. Second, the CESCR does not focus on specific business practices that harm access to rights, such as land hoarding and evasions of minimum wage and working hours rules. Such acts are a major way in which businesses profit from harm and should be a focal point of ‘protect’. Third, the CESCR has not adequately determined the scope and limits of ‘infringements’ by business, with many definitions appearing comprehensive but with no attention drawn to the breadth of business impacts on rights, leading to a lack of clarity around a range of more indirect forms of harm, such as lobbying. The CESCR needs to pay more attention to the raft of overtly harmful business acts under marketization, and ‘protect’ is the correct limb under which to do it. The next section addresses the duty to fulfil.

* 1. The Duty to Fulfil

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.[[91]](#footnote-91)

This is a broadly framed, with ‘measures necessary’ being deliberately open-ended. It permits, and presumably obligates insofar as it is ‘necessary’, regulation of private actors to fulfil rights. Eide later added an obligation to ‘facilitate opportunities by which the rights listed can be enjoyed’.[[92]](#footnote-92) As examples he cites CESCR Article 6(2), encompassing ‘technical and vocational guidance and training programmes’ and ‘Article 11(2)(a), take steps to 'improve measures of production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems.’[[93]](#footnote-93) ‘[D]eveloping or reforming agrarian systems’ should include regulating market actors therein insofar as they contribute to the constitution of the system within a jurisdiction. Where the market is the entry point for rights-holders to access the right, to what extent it fulfils access will be, in large part, determined by its legal constitution. 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 realization of such rights.[[94]](#footnote-94) 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,’ Again, a broad scope of activity is invoked that would appear to entail market regulation where necessary.

Following this introduction, this section is divided into four parts, discussing the outsourcing of rights provision, the role of facilitation through market regulation, the role of businesses in fulfilling rights, and the type of policies that fulfil rights.

* + 1. Does the Duty to Fulfil Hold When Provision is Outsourced?

The first point is an overarching principle that is confirmed in CESCR Comments and elsewhere. States cannot renege on their human rights obligations by outsourcing provision to business. Rather, outsourcing, whether direct in the sense of privatization, or more gradual in the case of commodification, is a policy choice by the state that may change the form of state obligations, but not the extent. Nolan addresses this point regarding privatization under General Comment 24. Privatization is covered under ‘protect’ where it is described as ‘not per se prohibited… Private providers should, however, be subject to strict regulations that impose on them so-called “public service obligations”. [[95]](#footnote-95) Nolan critiques the positioning of privatization under ‘protect’ because it implies that businesses are acting ‘on their own initiative’, and the only duty of the state is to prevent harmful acts.[[96]](#footnote-96) This obfuscates that ‘privatization… cannot occur without states making that possible’.[[97]](#footnote-97) Privatization ‘can—and, in the author’s view, should—be primarily viewed as one means by which the state chooses or acts to fulfil ESR [economic and social rights].’[[98]](#footnote-98) Further, ‘an “obligation to fulfil” approach will… entail an engagement with the implications of privatization for the overall realization of ESR.’[[99]](#footnote-99)

Because states are choosing the method of privatization as their primary or sole means by which to address the right, that state action and by extension the actions of the private service provider must be analysed in light of the obligation to fulfil. This is valid, as the analysis above suggests, and applies to other marketized rights, such as housing and food, insofar as the state has ceded access to the right to private companies. The inverse would mean that states could trade away the obligation to fulfil, exposing a significant loophole in international human rights law. Rather, state obligations to fulfil transcend any such policy choice, but it may mean, although does not solely necessitate, that specific policies to fulfil shift from direct provision to regulation. Both as an ethical principle and from the CESCR’s interpretations, states retain their obligation to fulfil regardless of the chosen method of fulfilment.

* + 1. Does Fulfil Include Facilitation through Market Regulation?

Second, the obligation to fulfil includes the obligation to facilitate rights through regulation. This is evident concerning minimum wage and affordable housing, above. In General Comment 24 it ‘requires directing the efforts of business entities towards the fulfilment of Covenant rights’.[[100]](#footnote-100) It is also stated in General Comment 15 on the right to water, where again the distinction between protect and fulfil is not clear. ‘Violations of the obligation to protect [include the] failure to effectively regulate and control water services providers.’[[101]](#footnote-101) Many fulfil obligations imply regulation: ‘failure to take measures to reduce the inequitable distribution of water facilities and services… failure to ensure that the minimum essential level of the right is enjoyed by everyone.[[102]](#footnote-102) In privatized cases these fulfil obligations would constitute obligations to regulate the private actor to fulfil the right. No restriction on fulfil obligations based on the service provider is elaborated. The General Comment on Social Security indicates a similar line, again under ‘protect’: ‘[w]here social security schemes… are operated or controlled by third parties, States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security.[[103]](#footnote-103) Elsewhere, ‘[i]n order to facilitate the right to just and favourable conditions of work, States parties should adopt positive measures… for example, on… minimum standards for rest, leisure, limitations on working hours, paid annual and other leave and public holidays.[[104]](#footnote-104) Concluding Observations carry similar statements. The United Kingdom of Great Britain and Northern Ireland is advised to increase the level of national minimum wage and expand its coverage to under-25s.[[105]](#footnote-105) 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’. [[106]](#footnote-106)

In each case, ‘fulfil’ obligations can require facilitation through market regulation. To guarantee the right to a fair wage, a national minimum wage should be implemented that applies to all employers. This is evident but underdeveloped, particularly regarding certain rights, such as housing. It means that if marketization is adopted, any business in a rights relevant market may be compelled by national law to reduce prices or improve supply based on the state’s international legal obligations. The scope and form of this principle is discussed next.

* + 1. Does Fulfil Necessitate Regulating Businesses so as to Fulfil Rights?

This leads to the third element of ‘fulfil’ under marketization. Businesses have voluntarily chosen to take key structural positions in markets for human rights essentials in the hope of increasing profits. As such, the state obligation to fulfil entails obligations to regulate businesses so as to fulfil rights. Just 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. These obligations already exist but are not well-defined, particularly when placed under ‘protect’. Implementing a living wage or affordable rent control fulfils the element of the right in question for the relevant individual, and does so through market facilitation, by compelling a private actor to fulfil the right so long as the private actor remains in the relevant field.

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.’[[107]](#footnote-107) 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 principle of equality to ensure that individuals and families are not disproportionately burdened with health expenses.’[[108]](#footnote-108) Along with the statements cited above from General Comment 24 related to housing, just work, and other rights, it is clear that, to the CESCR, 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.

These positive obligations will be enforced by state regulation, and will be specifically limited to those necessitated by the business’s structural position.[[109]](#footnote-109) Therefore, the water company holds obligations to ensure universal access to water at an affordable price;[[110]](#footnote-110) the healthcare insurance company holds obligations to ensure universal access for its members, including an array of regulations regarding when funding for health services can be legitimately denied; the employer may obligated to ensure fair pay through minimum wage law; and the landlord may be obligated to contribute to universal access to housing through rent control.

The restricted nature of these positive obligations bypasses commonly cited issues with placing positive obligations upon private actors.[[111]](#footnote-111) Business, generally, remains under ‘protect’; only when a business voluntarily moves into a specific rights-relevant area does the state obligation to fulfil become relevant to business actors. Businesses do not hold general obligations to fulfil for a variety of reasons, including that it is difficult to specify to whom, how, and to what extent they should be obligated to fulfil rights. States are geographically-bounded entities with the authority to implement legal and political changes within their jurisdiction with the aim of realizing, or denying, human rights. States are hold responsibilities to their citizens and are at least capable of attempting to move toward full realization. Corporations do not have this sweeping authority and therefore the conception that they should be obligated to fulfil rights begs the above questions.[[112]](#footnote-112) This problem is true at the general level. The approach described above restricts positive obligations to those business actors that have accepted authoritative positions (even if this is minimalistic, such a landlord with a single property) in sectors that engage international legal obligations. It further restricts positive obligations only to those areas where such obligations are necessary to realize the right. Rent control, for example, is not a universal necessity, but where it is necessary it is because market prices are too high, invoking a lack of fulfilment that requires targeting landlords under state obligations.

The well-known limitation on private actors holding obligations to fulfil rights may explain the passivity of the CESCR in formulating rent control and similar policies as a state obligation. By concretely defining that it stems from the outcome-oriented state obligation to fulfil rights, that marketization requires that fulfil obligates regulation of these markets, and that it is an essential policy insofar as private rents are too high, the CESCR can take a much more assertive, obligations-oriented approach to such policies. The business actor retains the right to exit the relevant sector, and the state retains the right shift away from marketization to realize rights. The obligation is that so long as the market provides, market actors are legitimate and sometimes necessary bearers of de facto positive obligations through the state obligation to fulfil.

* + 1. What Policies are Needed to Fulfil Marketized Rights?

Finally, the core of ‘fulfil’ as relevant to marketization are those market-wide policies designed to improve quantitative outcomes, such as minimum wage, rent control, and universal health coverage. The state has an obligation to fulfil the right to affordable housing, healthcare, and fair wages for all. This is the core of the obligation. It is tangential to the obligation whether the state directly fulfils the right or chooses to regulate markets to fulfil such obligations. Each is a legitimate policy choice in principle, to directly fulfil or to facilitate. Any such universal policy grounded in rights-holders needs constitutes a fulfil policy. Its means of enactment does not change this.

As per the minimum wage example, while it could be discussed under each of respect, protect, and fulfil, the aim of a minimum wage is to fulfil the right to a fair wage. It is irrelevant whether the right to a fair wage is being ‘violated’, or allowed to retrogress, because the value is set so low, or if it requires moderate improvement so as to fulfil the right, and this quantitative approach does not feature in ICESCR jurisprudence.[[113]](#footnote-113) Such market-wide policies designed to create universal access to marketized resources are the essence of fulfilment through facilitation. They pay no heed to what any specific business is doing, nor the public/private divide, but are instead grounded in rights-holder outcomes, evidence of unfulfilled rights and policies to fulfil these rights. Contra the CESCR in General Comment 24, therefore, this paper proposes that such policies by located under ‘fulfil’. The next section concretizes the reconstructed duties.

1. Reconstructed State 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 marketized rights resources, ‘protect’ should be primarily restricted to monitoring and preventing specific harmful acts of ‘infringement’ through business acts, while fulfil entails any policy aimed at progressively realizing the right, including through facilitation. This proposed 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 marketized rights resources that do not detract from other obligations, such as direct provision.

The duty to protect from profiteering requires that states protect from profit-motivated retrogressions or denial of access to rights by third parties. This is defined according to four elements. First, it addresses third parties. Second, it is an obligation to prevent harm only. Third, it should prioritize investigating specific business acts, rather than national problems that are relevant to business. Fourth, the element which becomes more vital under marketization, it includes duties to protect against acts that cause or are likely to cause harm to human rights without constituting direct, or justiciable, violations of individuals’ rights. This final component covers potentially a swathe of corporate practices related to pricing, supply, and quality. As part of this component the CESCR should explicate the limits of business activities which may infringe rights. ‘Fulfil’ also contains four elements. First, as a general principle, ‘fulfil’ holds as a state obligation to realize human rights irrespective of outsourcing or other policy choices. Second, ‘fulfil’ includes facilitation through market regulation where relevant. Third, states are sometimes obligated to regulate business actors based on their structural position so that these actors fulfil rights. Fourth, it covers market-wide outcome-oriented policies grounded in an evidentiary base of rights-holders’ needs, whether designed to slow a retrogression of access or to increase access.

This delineation is necessary because states are ignoring these elements of the duty and the CESCR has not consistently and coherently constructed these elements. The act/outcome distinction provides the key. ‘Protect’ should be used as lens on specific business practices, including those which attempt to evade state fulfilment policies, while fulfil should be used to address universal rights-holders needs. Between them, the two major risks of marketization can be adequately addressed within socio-economic rights jurisprudence. The delineation would transform CESCR practice by allowing much greater critique of extant business practices within international human rights law, and concretizes that certain business-related policies are within the functional scope of ‘fulfil’, even to the point of states’ regulating companies so that they contribute to rights realization.

Two final points are worth noting. First, many of these obligations are obligations of conduct, not of result.[[114]](#footnote-114) The state obligation is to implement regulation conducive to access to rights. These are not obligations to eliminate homelessness or hunger; rather they are obligations that can be implemented immediately and that should lead to a positive outcome. They do not therefore suffer to such a strong degree from the oft-elaborated problem that the demands are utopian and unfeasible.[[115]](#footnote-115) Indeed, while business involvement in rights is often seen as presenting risks, it could allow an ethically-minded politician to make rapid improvements to access at a minimal cost.[[116]](#footnote-116) Second, something not highlighted in General Comment 24 is the importance of the obligation to devote the maximum available resources to all rights.[[117]](#footnote-117) A state is prima facie 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.[[118]](#footnote-118) 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.

1. How Much Room Remains for Profit?

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 ‘protect’ entails preventing harm by business, and fulfil includes facilitation through market regulation which in practice requires that states regulate those companies that are involved in the provision of human rights relevant resources so as to fulfil the right in question. This is a coherent human rights-based argument that in actuality challenges central aspects of global capitalism. It sets rules of the game beyond formalistic proceduralism and legal accountability for human rights violations, and toward the acts and outcomes produced by global capitalism. It thereby recasts human rights obligations as a critical lens on global capitalism, clarifying that these obligations apply to the actors and constitutive rules therein. Where private profit harms access to a right, that harm must be protected against. However, the CESCR’s method fails to concretely define these obligations. This paper argues that the CESCR’s principles necessitate in practice the prohibition or regulation of a wide range of specific business acts under ‘protect’, and the implementation of equally wide-ranging social policies that under marketization will impact businesses to realize rights.

One potential objection is that such obligations are beyond the remit of human rights law. There is no space to address the wealth of theoretical divisions over the proper scope of human rights. Certainly, the approach herein moves beyond the liberal-legalist notion of individual rights held against the state and to be enforced by courts based on specific claims of violation.[[119]](#footnote-119) It moves rights into the realm of political economy, and therefore into ideologically contested questions.[[120]](#footnote-120) Quite apart from liberal claim rights also being ideologically contested, limited and balanced - free expression and hate speech, for example - the issues raised above must be the proper site of socio-economic rights because they greatly impact these rights. It is less a case of human rights impinging on political economy, as political economy impinging on human rights, and a belated human rights response to the problems caused. How can one support a right to food but deny that the right influence the production and distribution of food? If one does, one is supporting only a liberal-legal fiction of the right to food, rather than supporting living individuals and their need for food.[[121]](#footnote-121) If issues such as affordability are not the proper site of human rights, then no rights with a material base exist in practice. If one’s rebuttal is that affordability is a matter for state provision, one is again ignoring political-economic reality to cling to an increasingly outdated worldview. Finally, human rights obligations can help restore a semblance of democratic balance to marketized rights by reinjecting political debate into issues that are currently the realm of market fundamentalism.[[122]](#footnote-122)

A second likely objection is that these rights-based socio-economic changes may cause negative externalities. Here three rebuttals are possible: first, the most visible negative externalities related to socio-economic rights today come in the form of precarious work, homelessness, unaffordable healthcare and so on. The CESCR has a duty to address this, and, as the problems intimately connect to business, the CESCR must cast a lens in that direction. Relatedly, the ICESCR is not so powerful as to necessitate sweeping and immediate economic shifts. Rather, CESCR recommendations in Concluding Observations are already treated by states as *pro tanto* ‘comply or explain’ obligations.[[123]](#footnote-123) Adding more specificity and directness to these recommendations will not compel radical change. Second, there are many specific examples of investments that serve no necessary purpose other private profit, such as land-hoarding. Other cases, such precarious work, may require more nuance, but it is difficult to argue that the current trends represent the ideal of a humane society. Third, there is a strong argument that greater regulation of business would improve national economies. One argument frequently cited is that US healthcare is both more expensive and provides less protection than any other developed country system.[[124]](#footnote-124) Lower healthcare costs, housing costs or higher/more stable pay would provide more funds to spent in the wider economy.[[125]](#footnote-125) Finally, the level of profit is often extremely high, suggesting states could act without disincentivizing investment. In the UK, housing developer Persimmon made a record £1 billion profit, and £66,000 profit per home it built, in 2018,[[126]](#footnote-126) assisted by indirect government aid through the government’s help-to-buy scheme. Housing investor Blackstone, much criticized by the ex-UNSR on the right to housing,[[127]](#footnote-127) made $3.5 billion profit,[[128]](#footnote-128) and their dividends rose 7.2 per cent, in 2018.[[129]](#footnote-129)

1. Conclusion

Socio-economic rights are today frequently provided through the market. This raises risks, which the CESCR has addressed, most directly in General Comment 24, creating an ambitious list of obligations. These obligations appear almost entirely under ‘protect’, expanding its scope such that ‘protect’ now requires that regulation works to ‘ensure access… for all.’[[130]](#footnote-130) This falls more naturally under the obligation to fulfil, or to facilitate, access to rights. The collapsing of this distinction creates risks, and this paper has therefore reconstructed the duties to recall their unique individual purposes and to apply those purposes to contemporary marketized human rights. It is submitted that these reconstructed duties are both within the scope of international human rights law and a potentially significant tool with which to push back against harmful profit-seeking acts. It is hoped that this reconstruction can help clarify state obligations under the ICESCR and can assist in challenging the marketization of human rights and creating socio-economic justice.

1. See generally: K. De Feyter & F. Gómez Isa (eds.) Privatisation and Human Rights in the Age of Globalisation (Maastricht: Intersentia, 2005); K. Farnsworth and C. Holden, ‘The business-social policy nexus: corporate power and corporate inputs into social policy’ (2006) 35.3 *Journal of Social Policy* 473; L. Drutman, *The business of America is lobbying: How corporations became politicized and politics became more corporate*. (Oxford: Oxford University Press, 2015). See on specific marketization and some specific human rights: P. O’Connell, ‘The human right to health in an age of market hegemony’, *Global Health and Human Rights* (London: Routledge, 2010), 200-219; G. MacNaughton and D. F. Frey, ‘Decent work for all: a holistic human rights approach’, (2010) 26 *American University International Law Review* 26 (2010), 441; J. Akers, E. Seymour, D. Butler, and W. Rathke, ‘Liquid Tenancy: "Post-crisis" economies of displacement, community organizing, and new forms of resistance’, (2019) 1.1 *Radical Housing Journal*, 1. [↑](#footnote-ref-1)
2. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993 [ICESCR]. [↑](#footnote-ref-2)
3. CESCR, ‘General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’, 10 August 2017, E/C.12/GC/24, para. 17 [hereinafter General Comment 24, Business]. [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. See [REDACTED BHRJ] [↑](#footnote-ref-5)
6. [REDACTED SCJIL] [↑](#footnote-ref-6)
7. General Comment 24, Business, n 3, para. 16. [↑](#footnote-ref-7)
8. General Comment 24, Business, n 3, para. 19. [↑](#footnote-ref-8)
9. 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’, A/HRC/34/51, 18 January 2017, paras. 34-37 [hereinafter UNSR, Financialization]; 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 Ireland, OL IRE 2/2019, 22 March 2019 [Ireland Letter]. See similar letters to the governments of the Czech Republic, Denmark, Spain, Sweden, the USA and to housing investment company the Blackstone Group L.P here: <https://www.ohchr.org/EN/Issues/Housing/Pages/FinancializationHousing.aspx> (last accessed 26 September 2020). [↑](#footnote-ref-9)
10. General Comment 24, Business, n 3, para. 21 and para. 24. [↑](#footnote-ref-10)
11. See [REDACTED BHRJ] [↑](#footnote-ref-11)
12. [REDACTED SCJIL] [↑](#footnote-ref-12)
13. General Comment 24, Business, n 3, para. 37; S. Darcy, ‘The Elephant in the Room’: Corporate Tax Avoidance & Business and Human Rights,’ (2017) 2.1 *Business and Human Rights Journal*, 1. [↑](#footnote-ref-13)
14. 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 *Human Rights Quarterly* 1084. [↑](#footnote-ref-14)
15. S.L. Seck, Moving beyond the E-word in the Anthropocene’ in *The Extraterritoriality of Law*. (D.S. Margolies et al. eds. Routledge, 2019), 49. [↑](#footnote-ref-15)
16. A. Davis, ‘Masked racism: reflections on the prison industrial complex’ (2000) 4.27 *Indigenous Law Bulletin* 4.27, 4, 6-7. [↑](#footnote-ref-16)
17. U.N. Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights,* HR/PUB/11/04 (2011) [hereinafter Guiding Principles]; The author has published on the direct business responsibilities in relation to marketized rights [REDACTED OXLR]. [↑](#footnote-ref-17)
18. L. Ennser-Jedenastik, ‘Credibility versus control: Agency independence and partisan influence in the regulatory state’ (2015) 48.7 *Comparative Political Studies* 823. [↑](#footnote-ref-18)
19. See generally: N. Thrift, ‘Re-inventing invention: new tendencies in capitalist commodification’ (2006) 35.02 *Economy and society* 279. [↑](#footnote-ref-19)
20. I. Greer, ‘Welfare reform, precarity and the re-commodification of labour, (2016) 30.1 *Work, employment and society* 162. [↑](#footnote-ref-20)
21. A. Nolan, ‘Privatization and economic and social rights’ (2018) 40.4 *Human Rights Quarterly* 815, 818 [Nolan, Privatization]. [↑](#footnote-ref-21)
22. G. Hodge, *Privatization: An international review of performance*. Routledge, 2018, 6 [Hodge, Privatization]. [↑](#footnote-ref-22)
23. R. Rolnik, ‘Late neoliberalism: the financialization of homeownership and housing rights, (2013) 37.3 *International journal of urban and regional research* 1058, 1059-60. [↑](#footnote-ref-23)
24. [REDACTED TLT]. [↑](#footnote-ref-24)
25. A. Chadwick, ‘Regulating excessive speculation: commodity derivatives and the global food crisis’ (2017) 66.3 *International & Comparative Law Quarterly* 625. [↑](#footnote-ref-25)
26. B. Jongbloed, ‘Marketisation in higher education, Clark's triangle and the essential ingredients of markets’ (2003) 57.2 *Higher Education Quarterly* 110, 114-5. [↑](#footnote-ref-26)
27. European Commission, *Study on precarious work and social rights*, VT/2010/084 (April 2012), 5. [↑](#footnote-ref-27)
28. P. Bourquin et al., ‘Why has in-work poverty risen in Britain?’ *Institute of Fiscal Studies Working Paper W19/12*, 12, at: <https://www.ifs.org.uk/publications/14154> (last accessed 26 September 2020). [↑](#footnote-ref-28)
29. Focus Ireland, ‘Latest figures on Homelessness in Ireland’, at: <https://www.focusireland.ie/resource-hub/latest-figures-homelessness-ireland/> (last accessed 26 September 2020). [↑](#footnote-ref-29)
30. S. Fitzpatrick and H. Pawson, ‘Fifty years since Cathy Come Home: critical reflections on the UK homelessness safety net’ (2016) 16.4 *International Journal of Housing Policy,* 543, 549. [↑](#footnote-ref-30)
31. EuroStat, The State of Housing in the EU 2019: Decoding the new housing reality, (2019), 2 (linked chapter 1), at:<http://www.housingeurope.eu/resource-1323/the-state-of-housing-in-the-eu-2019> (last accessed 26 September 2020). 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 Canada Mortgage and Housing Corporation*, About Affordable Housing in Canada*, March 31, 2018, at: <https://www.cmhc-schl.gc.ca/en/developing-and-renovating/develop-new-affordable-housing/programs-and-information/about-affordable-housing-in-canada> (last accessed 26 September 2020); The Department of Housing and Urban Development, *Defining Affordable Housing,* HUD USER(undated) at: <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-081417.html> (last accessed 26 September 2020). [↑](#footnote-ref-31)
32. UNSR, Financialization, n 4 para. 27. [↑](#footnote-ref-32)
33. Wettstein, Global Justice, n 19, 236-9. [↑](#footnote-ref-33)
34. A. Chadwick, ‘Gambling on Hunger? The Right to Adequate Food and Commodity Derivatives Trading,’ *Human Rights Law Review* 18.2 (2018), 233, 238. [↑](#footnote-ref-34)
35. J. Raz, *The morality of freedom* (Oxford: Clarendon Press, 1986), 171. [↑](#footnote-ref-35)
36. General Comment 24, Business, n 5. [↑](#footnote-ref-36)
37. E.g. at id. para. 21-22. [↑](#footnote-ref-37)
38. id. para. 26. [↑](#footnote-ref-38)
39. id. para. 33. [↑](#footnote-ref-39)
40. id. para 23. [↑](#footnote-ref-40)
41. id. para 37. [↑](#footnote-ref-41)
42. See below for examples and see also Nolan, Privatization, n 26, 852-853. [↑](#footnote-ref-42)
43. General Comment 24, Business, n 5, para 21. [↑](#footnote-ref-43)
44. id. para 24. [↑](#footnote-ref-44)
45. para. 19. [↑](#footnote-ref-45)
46. e.g. CESCR, General comment No. 23 on the right to just and favourable conditions of work (Art. 7 of the Covenant*)*, 7 April 2016, E/C.12/GC/23, paras. 59 and 61 available at: <https://www.refworld.org/docid/5550a0b14.html> (last accessed 26 September 2020). See for similar blurred distinction CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18, para. 25 (protect) and para. 36 (fulfil) available at: <https://www.refworld.org/docid/4415453b4.html> (last accessed 26 September 2020). [↑](#footnote-ref-46)
47. The author has previously provided an in-depth account of Concluding Observations relevant to this context [REDACTED]. [↑](#footnote-ref-47)
48. para. 39 [↑](#footnote-ref-48)
49. para. 34. [↑](#footnote-ref-49)
50. para. 35 b and c. [↑](#footnote-ref-50)
51. H. Shue, *Basic rights: Subsistence, affluence, and US foreign policy*. (Princeton University Press, 1996, 2nd ed.), 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: Oxford University Press, 1989); I. E. Koch, ‘Dichotomies, trichotomies or waves of duties?’ (2005) 5.1 *Human Rights Law Review* 5.1 81. [↑](#footnote-ref-51)
52. Shue, Basic Rights, n 57, 52. [↑](#footnote-ref-52)
53. Asbjørn Eide, ‘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’, E.CN.4/Sub.2/1987/23 (Jul. 7, 1987), para 40 [Eide, Report on Food] para. 66. [↑](#footnote-ref-53)
54. id. para. 68. [↑](#footnote-ref-54)
55. ‘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.’, id. para. 67. [↑](#footnote-ref-55)
56. Discussed in: A. Clapham, *Human rights obligations of non-state actors*, (Oxford: Oxford University Press, 2006), 49. [↑](#footnote-ref-56)
57. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para. 6 [Maastricht Guidelines] at: <http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html> (last accessed 26 September 2020). [↑](#footnote-ref-57)
58. CESCR General Comment No. 12: The Right to Adequate Food (Art. 11), 12 May 1999, E/C.12/1999/5, para.15, at: <https://www.refworld.org/pdfid/4538838c11.pdf> (last accessed 26 September 2020) [CESCR, Food]. [↑](#footnote-ref-58)
59. General comment No. 22 (2016) on the right to sexual and reproductive health (Art. 12 of the Covenant, 2 May 2016, E/C.12/GC/22, para. 43, at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfQejF41Tob4CvIjeTiAP6sGFQktiae1vlbbOAekmaOwDOWsUe7N8TLm%2BP3HJPzxjHySkUoHMavD%2Fpyfcp3Ylzg> (last accessed 26 September 2020). [↑](#footnote-ref-59)
60. id. para 14. [↑](#footnote-ref-60)
61. id. para. 17. [↑](#footnote-ref-61)
62. This framing is borrowed from the UNGPs, n 14, Principle 13. [↑](#footnote-ref-62)
63. General Comment 24, Business, n 5, para 15. [↑](#footnote-ref-63)
64. id. para. 18. [↑](#footnote-ref-64)
65. id. para 19. [↑](#footnote-ref-65)
66. id. para. 19. [↑](#footnote-ref-66)
67. General Comment 23, n. 51, para. 59. [↑](#footnote-ref-67)
68. id. para. 61. [↑](#footnote-ref-68)
69. J. Lee and A. Smith, ‘Regulating Wage Theft’, *Washington Law Review* 94 (2019), 759. [↑](#footnote-ref-69)
70. D. Doorey, ‘Mapping the ascendance of the ‘living wage’ standard in non-state global labour codes’, 6.2 (2015) *Transnational Legal Theory*, 435. [↑](#footnote-ref-70)
71. Ireland Letter, n 4, 2; 86-89; L. H. Li, S. K. K.Wong, and K. S. Cheung, Land supply and housing prices in Hong Kong: The political economy of urban land policy, (2016) 34.5 *Environment and Planning C: Government and Policy*,  981, 988. [↑](#footnote-ref-71)
72. See also: CESCR, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23; General Comment 24, Business, n 3. [↑](#footnote-ref-72)
73. Rory Hearne, ‘A home or a wealth generator? Inequality, financialisation and the Irish housing crisis’, in *Cherishing All Equally - Economic Inequality in Ireland* (2017) 62. [↑](#footnote-ref-73)
74. UNSR, Financialization, n. 4, paras. 24-38. [↑](#footnote-ref-74)
75. [REDACTED]. [↑](#footnote-ref-75)
76. General Comment 24, Business, n 3, para. 16. [↑](#footnote-ref-76)
77. The French Duty of Vigilance law is restricted to ‘the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks’. French Corporate Duty of Vigilance Law (English Translation),European Coalition of Corporate Justice, 2016, at: <http://www.respect.international/french-corporate-duty-of-vigilance-law-english-translation/> [last accessed 23 September 2020]. [↑](#footnote-ref-77)
78. Guiding Principles, n 14, Principle 13. [↑](#footnote-ref-78)
79. id. para. 19 [↑](#footnote-ref-79)
80. id. para. 19. [↑](#footnote-ref-80)
81. id para 18. [↑](#footnote-ref-81)
82. CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, E/C.12/2000/4), para. 35, at: <https://www.refworld.org/pdfid/4538838d0.pdf> (last accessed 26 September 2020). [↑](#footnote-ref-82)
83. General Comment 24, Business, n 5, para 22. [↑](#footnote-ref-83)
84. Although this may breach the obligation to devote the maximum available resources to all Covenant rights, see below. [↑](#footnote-ref-84)
85. As with other state obligations, retrogressive acts are permitted when essential and when cohering to the standards laid out in: C. Courtis, N. Lusiani and A. Nolan, ‘Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights’ in *Economic and social rights after the global financial crisis* 121 (Aoife Nolan ed., 2014) [hereinafter Courtis, Lusiani and Nolan, Retrogression]. [↑](#footnote-ref-85)
86. I. Yrigoy, ‘The Political Economy of Rental Housing in Spain: The Dialectics of Exploitation (s) and Regulations’, *New Political Economy* (2020): 1, 6-7. [↑](#footnote-ref-86)
87. F. Macdonald, Fiona, E. Bentham, and J. Malone, ‘Wage theft, underpayment and unpaid work in marketised social care’, *The Economic and Labour Relations Review* 29.1 (2018), 80. [↑](#footnote-ref-87)
88. J. Opie, ‘The right to reasonably limited working hours in the smartphone ERA’, *New Zealand Journal of Employment Relations* 41.3 (2017), 24. [↑](#footnote-ref-88)
89. G. Topham, ‘BA begins to carry out its 'fire and rehire' threat to jobs’ *The Guardian* 17 July 2020, <https://www.theguardian.com/business/2020/jul/17/ba-begins-to-carry-out-its-fire-and-rehire-threat-to-jobs> [last accessed 16 September 2020]. [↑](#footnote-ref-89)
90. A. Spithoven, The influence of vested interests on healthcare legislation in the USA, 2009–2010’, *Journal of Economic Issues* 50.2 (2016), 630. [↑](#footnote-ref-90)
91. Eide, Report on Food, n 59, para. 68 [↑](#footnote-ref-91)
92. A. Eide, ‘Human rights and the elimination of poverty’ (1997) *Law, Power and Poverty*, 117. [↑](#footnote-ref-92)
93. id. [↑](#footnote-ref-93)
94. Maastricht Guidelines, n 63, para. 6. [↑](#footnote-ref-94)
95. General Comment 24, Business, n 5, para 21. [↑](#footnote-ref-95)
96. Nolan, Privatization, n 26, 833. [↑](#footnote-ref-96)
97. id. 833. [↑](#footnote-ref-97)
98. id. 834. [↑](#footnote-ref-98)
99. id. 835. [↑](#footnote-ref-99)
100. General Comment 24, Business, n 5, para. 24. [↑](#footnote-ref-100)
101. CESCR General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, para. 44(b) available at: <https://www.refworld.org/docid/4538838d11.html> (last accessed 26 September 2020). [↑](#footnote-ref-101)
102. id. para 44(c). [↑](#footnote-ref-102)
103. CESCR, General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, paras. 45-6, available at: <https://www.refworld.org/docid/47b17b5b39c.html> (last accessed 26 September 2020). [↑](#footnote-ref-103)
104. General Comment 23, n 51, para. 61. [↑](#footnote-ref-104)
105. CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, 14 July 2016, para. 37. [↑](#footnote-ref-105)
106. CESCR, Concluding observations on the sixth periodic report of Canada, E/C.12/CAN/CO/6, 23 March 2016 para. 40(c). [↑](#footnote-ref-106)
107. General Comment, Health, n 87, para 36. [↑](#footnote-ref-107)
108. Genera Comment, Sexual Health, n 66, para 17. [↑](#footnote-ref-108)
109. 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) 7.1 *Law and Ethics of Human Rights* 47, 56. [↑](#footnote-ref-109)
110. 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, Article 61, S.4.A. [↑](#footnote-ref-110)
111. Discussed critically in N. Hsieh, ‘Should business have human rights obligations?’ (2015) 14.2 *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) 22.4 *Business Ethics Quarterly* 739, 757-760. [↑](#footnote-ref-111)
112. See for the most ambitious attempt to do just this: Wettstein, Global Justice, n 19, 311-347, and particularly for the purposes herein: 322-3 on multinationals such as agribusiness; 325 on privatization; 328-333 on ‘global public goods’. [↑](#footnote-ref-112)
113. CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant),14 December 1990, E/1991/23, para. 9; Courtis, Lusiani and Nolan, Retrogression, n 90, 123-4. [↑](#footnote-ref-113)
114. Eide, Report on Food, n 59, para. 71-72. [↑](#footnote-ref-114)
115. Explored in distinctive ways in: A. Sen, ‘Human rights and the limits of law’ (2005) 27 *Cardozo Law Review* 2913; M. Makau ‘Human rights and powerlessness: pathologies of choice and substance’ (2008) 56 *Buffalo Law Review* 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’ *Histories of Global Inequality* (C. Christiansen ed. Palgrave Macmillan, 2019) 157. [↑](#footnote-ref-115)
116. See below for a response to critics in this regard. [↑](#footnote-ref-116)
117. General Comment 3, Obligations, n 118, para. 9. [↑](#footnote-ref-117)
118. D. Gayle, ‘Private landlords get £9.3bn in housing benefit from taxpayer, says report’, *The Guardian,* 20 August 2016, at: <https://www.theguardian.com/society/2016/aug/20/private-landlords-9bn-housing-benefit-taxpayers-national-housing-federation-report> (last accessed 26 September 2020). [↑](#footnote-ref-118)
119. T. Campbell, *Rights: A critical introduction* (Routledge, 2011), 16-18. [↑](#footnote-ref-119)
120. T. Evans, *Human rights in the global political economy: critical processes* (Lynne Rienner Publishers, 2011), 11-14. [↑](#footnote-ref-120)
121. P. McMichael, ‘The land grab and corporate food regime restructuring’ (2012) 39.3 *The Journal of Peasant Studies* 681. [↑](#footnote-ref-121)
122. I. Leijten and K. de Bel, ‘Facing financialization in the housing sector: A human right to adequate housing for all’ (2020) 38.2 *Netherlands Quarterly of Human Rights* 94. [↑](#footnote-ref-122)
123. See for various rejected recommendations: Fourth Report of the Hong Kong Special Administrative Region of the People’s Republic of China under the International Covenant on Economic, Social and Cultural Rights, *Government of the HKSAR,* Annex 11D, Appendix 2, 15, at: <https://www.cmab.gov.hk/doc/en/documents/references/papers_reports_others/human_rights/FourthReport_PRC/FullReport-e.pdf> [last accessed 12 September 2020]. [↑](#footnote-ref-123)
124. Committee for a Responsible Federal Budget, *American Health Care: Health Spending and the Federal Budget,* May 16, 2018, at: <https://www.crfb.org/papers/american-health-care-health-spending-and-federal-budget> (last accessed 26 September 2020). [↑](#footnote-ref-124)
125. J. E. Stiglitz, ‘Inequality and economic growth,’ *Rethinking Capitalism*, 2016, 134, 140-1. [↑](#footnote-ref-125)
126. R. Neate, ‘Outrage as help-to-buy boosts Persimmon profits to £1bn,’ *The Guardian,* 26 February 2019, at:

<https://www.theguardian.com/business/2019/feb/26/persimmon-profits-help-to-buy-scheme> (last accessed 26 September 2020). [↑](#footnote-ref-126)
127. Blackstone Letter, n. 4. [↑](#footnote-ref-127)
128. Blackstone, ‘Blackstone Reports First Quarter 2019 Results and Announces Conversion to Corporation’, 2019, 1 [Blackstone Report] at: <https://s1.q4cdn.com/641657634/files/doc_financials/2019/q1/Blackstone1Q19EarningsPressRelease.pdf>, (last accessed 26 September 2020). [↑](#footnote-ref-128)
129. Heather Perlberg, ‘Blackstone’s Assets Soar Above $500 Billion in Topping Peers’, *Bloomberg,* 18 April 2019, at:<https://www.bloombergquint.com/business/blackstone-s-assets-soar-above-500-billion-in-outpacing-rivals> (last accessed 26 September 2020). [↑](#footnote-ref-129)
130. General Comment 24, Business, n 3, para. 18. [↑](#footnote-ref-130)