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Converging Tax Policy and Human Rights in the Face of Tax Abuse: A Developing Country Perspective

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ABSTRACT: The intersection between tax and human rights has largely been looked at from a social or economic, and not a rights-based perspective. Tax or fiscal policy has an indirect impact on a country's ability to discharge its social obligations to the citizenry and thereby ensure the provision of human rights that the citizenry is entitled to. This article explores the intersection between tax and human rights law to demonstrate that formalising tax policies in a manner that centres the focus on the fulfilment and protection of human rights would leave less room for tax abuses and ensure that more money is available to the state to improve the lives of its citizens. Effectively tackling inequitable tax policies and tax abuse is an avenue that states can use to ensure that the 'maximum available resources' are allocated to the progressive realisation of economic, social and cultural rights.

KEYWORDS: corporate tax abuse, developing countries, economic policy, fiscal policy, government expenditure, tax avoidance, tax evasion, tax planning, transfer pricing

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I INTRODUCTION

It is incontrovertible that taxation policy plays a vital role in a government's ability to raise the funds required to ensure realisation of various human rights. The amount of revenue that a state acquire through taxation impacts on the states' ability to meet its citizens' various social and economic needs effectively. These needs include food security, public health and education, most of which are deemed to be human rights. Taxation's role is so essential that the old maxim 'taxation is one of the few things that one can be certain about'[1] still rings true today. Without revenue collected from tax a government would be unable to meet its obligation to provide basic economic and social rights listed above. In addition, taxation policy has the potential to facilitate a greater and more stable flow of revenue to sustain the provision of investment in public services and infrastructure.[2]

In spite of these imperatives, certain governments continue to find themselves unable to mobilize sufficient resources to provide for the delivery of the quality of public services required or to meet their nation's cumbersome public debt obligations. The persistence of budget deficits in most developing countries[3] makes it clear that the tax policies of low-income countries (LICs) need to be reviewed to effectively tackle tax abuse[4] and increase tax revenues.

The effect of harmful tax practices on the delivery of human rights obligations has been insufficiently monitored and examined by human rights bodies even though 'human rights norms apply to all aspects of fiscal policy'[5] and tax abuse 'negate[s] an essential source of revenue which should be used to realise socio-economic rights'.[6] This is partly because international human rights standards grant governments a wide margin of discretion in matters of economic and social policy since they are often faced with strained budgets and difficult choices in prioritising competing social policies.[7] Furthermore, because:

> Taxation has traditionally been understood as a fundamentally 'economic' or 'development-related' undertaking by which policy makers generate revenue for socio-economic development, fiscal policy makers are more concerned with the 'economic' aspects of taxation (such as the maximization of tax revenue) rather than the non-economic aspects like human rights.[8]

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1 H Stein *Tax Policy in the Twenty-First Century* (1st Ed, 1988) 46.

2 M Sepulveda Carmona *Report of the Special Rapporteur on Extreme Poverty and Human Rights* UN Doc A/HRC/26/28 (2014). The report 'examines how a state's use of its revenue raising power has a direct impact on its ability to comply with international human rights obligations, in particular relating to the economic, social and cultural rights of people living in poverty'.

3 For the purposes of this article the terms 'developing countries' and 'LICs' are used interchangeably to refer to countries having a standard of living or level of industrial production well below that possible without financial or technical aid.

4 '[A]n abusive tax position includes criminal conduct, tax evasion, avoidance, and embarking on schemes that appear to be in compliance with the tax laws but do not result in the multi-national corporation (MNC) paying what is referred to as a fair share of taxes'. See K Datt 'Tax and Human Rights: Much Ado About Nothing' (2018) 16 *eJournal of Tax Research* 113, 114.

5 Sepulveda Carmona (note 2 above). See also International Bar Association Human Rights Institute *Tax Abuses, Poverty and Human Rights: A Report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights* (2013).

6 MR Maziwisa & P Lenaghan 'Rethinking the Right to Water in Rural Limpopo' (2020) 20 *African Human Rights Law Journal* 233, 234.

7 UN General Assembly *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008) GA Res A/RES/63/117, UN Doc A/63/435 (2008).

8 EE Bagenda 'A Human Rights Approach to Taxation: Some Brief Comments' (2011) 2 *Africa Tax Spotlight* 1, 3.

However, ignoring the fact that taxation and spending policies need to take human rights obligations into account results in 'extremely unjust effects'. For example, if a government has an inequitable tax policy or gives enormous subsidies to the wealthy with no social transfers to the poor, human rights are infringed.

According to Alston,[9] scholars have begun to realise that when tax policy is viewed as a human rights concern and not simply as an aspect of economic policy — ie, a policy concerning the management the money supply, inflation, interest rates and efforts to increase the country's productive capacity — it 'becomes a matter of what the objectives are and how they can be achieved.'[10] Recent works by various scholars and international organizations have penned that a human rights approach to inefficient or harmful financial and tax regulatory measures might serve as an alternative avenue to combat international tax abuses and the resulting impact on revenue.[11] Corporate tax abuse has also garnered the attention of politicians and policy-makers globally over the last few decades as the issue of tax avoidance has been exacerbated by globalisation.

Globalisation refers to the process by which businesses operate on an international level across borders. It has 'resulted in a shift from country-specific operating models to global models based on a matrix of management organisations and integrated supply chains that centralise several functions at a regional or global level'.[12] The internet has made it possible for businesses to locate many productive activities in geographic locations that are distant from the physical location of their customers. Sophisticated tax planners are then able to reduce or avoid tax liability for their companies by 'employing tax planning strategies that exploit gaps in the architecture of the international tax system to artificially shift profits to places where there is little or no activity or taxation.'[13] The practice is referred to as Base Erosion and Profit Shifting (BEPS).

According to Cobham and Jansky, '[u]sing firm-level Orbis data, OECD estimated a global loss of USD 100 billion to USD 240 billion in 2014, or 4 to 10 per cent of all CIT revenues (and up to USD 2.1 trillion over 2005–2014).[14] Ortiz, Chai and Cummins estimate that over USD 285 billion in annual revenue is lost by developing countries because of tax evasion[15]

[9] P Alston 'Tax as a Fundamental Human Rights Issue' *CESR International Strategy Meeting, LIMA* (2015), available at https://youtu.be/YdRGFp7D66A.

[10] Ibid.

[11] E Donald 'Revenue Mobilization Accountability: Combating Harmful Tax Regimes with the Law of Human Rights' (2019) 50 *Georgetown Journal of International Law* 517ff.

[12] Organisation for Economic Cooperation and Development *Action Plan on Base Erosion and Profit Shifting* (2013) 7, available at https://doi.org/10.1787/9789264202719-en

[13] Ibid. See also European Commission Recommendation on Aggressive Tax Planning (6 December 2012) which states that aggressive tax planning 'exploits difference in tax systems by taking advantage of the technicalities of a tax system by taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purposes of reducing tax liability'.

[14] A Cobham & P Jansky 'Global Distribution of Revenue Loss from Corporate Tax Avoidance: Re-Estimation and Country Results' (2018) 30 *Journal of International Development* 206, 209. Cobham and Jansky (at page 207) peg the estimated revenue loss from corporate tax avoidance at around USD 500 billion globally.

[15] I Ortiz, J Chai & M Cummins 'Identifying Fiscal Space: Options for Social and Economic Development for Children and Poor Households in 184 Countries' (2011) *SSRN*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1946006.

and that Africa loses twice as much in illicit financial flows[16] as it receives in aid. Such loss of revenue for developing countries[17] 'bleeds them of essential resources'

> For the schoolchild in Haiti, the new mother in Malawi, or the farmer in Bangladesh, these losses have a real impact: they result in classrooms that are overcrowded, health clinics that are never built, and water that is never delivered. People's opportunities are being stolen from them – because tax revenues are not collected.[18]

These tax abuses have proved so devastating that the G20 endorsed an Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan)[19] that calls for 'fundamental changes to the current mechanisms and the adoption of new consensus-based approaches, including anti-abuse provisions, designed to prevent and counter base erosion and profit shifting.'[20] The BEPS Action Plan is therefore 'aimed at reducing multinational tax avoidance and improving cross-border tax dispute resolution', because aggressive tax planning 'undermines the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level. Moreover, when taxpayers see multinational corporations legally avoiding income tax, it undermines voluntary compliance by all taxpayers'[21]

Ultimately, the loss and abuse of these essential resources reflect a link between derisory domestic and international resource mobilisation and poor human development. This understanding has resulted in stakeholders stressing the importance of —

> clarifying the human rights responsibilities of states, business enterprises and other actors to encourage improved domestic tax policies and strengthened international cooperation efforts to confront tax abuses (…), the current imbalances of information, income and power. Tax has the potential to be an instrument to confront these imbalances and inequalities. So do human rights.[22]

[16] Illicit financial flows are defined as 'money that is illegally obtained, transferred, or utilized. These funds typically originate from three sources: commercial tax evasion including trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, [...] bribery and theft by corrupt government officials.' See United Nations Economic Commission for Africa (UNECA) 'Illicit financial flows: report of the High Level Panel on illicit financial flows from Africa' (2014). See also D Kar and D Cartwright-Smith 'Illicit financial flows from Africa: A hidden resource for development' (2010), available at https://gfintegrity.org/report/briefing-paper-illicit-flows-from-africa/.

[17] Developing countries have a higher reliance on corporate income tax (CIT) at 10% of GDP, compared to 3% for developed countries. The impact of BEPS in developing countries is accordingly particularly damaging. See I Burgers & I Mosquera 'Corporate taxation and BEPS: a fair slice for developing countries' (2017) 10 *Erasmus Law Review* 29, 41. See also Cobham & Jansky (note14 above) at 216–217.

[18] SM Indrwati 'Speech by World Bank Managing Director and COO Sri Mulyani Indrawati at Event on Tax Evasion and Development Finance' (2015), available at https://www.worldbank.org/en/news/speech/2015/04/17/speech-wb-md-coo-sri-mulyani-event-tax-evasion-development-finance

[19] The OECD BEPS Plan addresses the use of strategies for the purpose of applying existing inadequate tax rules to shift profits to low or no tax jurisdictions, regardless of whether sufficient economic activity is present in those jurisdictions. See OECD 'BEPS frequently asked questions', available at https://www.oecd.org.

[20] Burgers & Mosquera (note 17 above) at 29. See also OECD *Tax Annex to the St Petersburg G20 Leaders' Declaration* (September 2013), available at https://www.oecd.org/g20/summits/saint-petersburg/Tax-Annex-St-Petersburg-G20-Leaders-Declaration.pdf.

[21] 'Bahamas and Zambia Join Inclusive Framework on BEPS' (17 December 2017) *MNE Tax*, available at https://mnetax.com/bahamas-zambia-joined-inclusive-framework-beps-25239.

[22] International Bar Association Human Rights Institute *Tax Abuses, Poverty and Human Rights: A Report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights* (2013) 1, 9.

This article explores the intersections between tax and human rights law to demonstrate that formalising tax policies in a manner that focuses on the fulfilment and protection of human rights leaves less room for tax abuses and ensure that more money is available to the state to improve the lives of its citizens.[23] This is because effectively tackling inequitable tax policies and tax abuses should have a positive effect on the levels of poverty and the progressive realisation of economic, social and cultural rights (ESCR).[24] This is on the assumption of good governance where the revenue raised 'would actually be used for public purposes and for the achievement of human rights through the provision of public goods and services'.[25]

To this end the article starts by analysing the intersections between taxation and human rights followed by an in-depth discussion into the reasons why taxation is a human rights issue. It then breaks down the concept of tax policy and the role that it plays in developing countries. Thereafter, it explores the issue of tax abuse and its effects on the achievement of human rights before a conclusion is reached.

Duly considering the current efforts being made by the international community to prevent tax abuse, this paper will also briefly examine the issue of corporate accountability by analysing the measures that are currently in place to deter further abuses and/or hold corporations accountable for engaging in activities that may potentially have dire effects on the ability of individuals to have their basic human rights met by their governments.[26]

II BACKGROUND

Non-governmental organisations (NGOs), through the donations they receive, have often championed the protection of human rights, and played a primary role in focusing the international community on human rights issues.[27] They tend to step in and fill the gaps that governments fail to cater for in the areas of food, health, and education, amongst other things. Governments, more specifically in developing countries, often claim to fail to meet various human rights obligations due to a lack of funds to adequately meet the needs of their subjects.[28]

The vast population of citizens in developing countries live in deplorable circumstances[29] and struggle to obtain food each day, let alone adequate housing and medical care. In Zambia, for example, it was found that 54.4 per cent of the country's 15.5 million citizens live below the poverty line, with 52.9 percent of households living in traditional huts and 77 per cent using

[23] A Christians 'Fair Taxation as a Basic Human Right' (2009) 9 *International Review of Constitutionalism* 211ff.

[24] Maziwisa & Lenaghan (note 6 above).

[25] N Mendis 'A Comment on the Interface of Harmful Tax Practices, Human Rights and WTO Law, in Light of the Panama Papers Scandal and Argentina-Financial Services Case' (2018) 9 *Indian Journal of International Economic Law* 19, 26.

[26] The issue of accountability poses challenges because corporate tax avoidance is not entirely illegal. Furthermore, the responsibility of the enforcement and protection of human rights lies first and foremost with states and not with corporations.

[27] FS Collins 'Non-Governmental Organisations (NGOs) and the Decline of State Intervention in Nigeria's Development' (2020) 3 *International Journal of Management, Social Sciences, Peace and Conflict Studies* 141, 142.

[28] S Okafor, OD Maduka, A Ike, B Uzoechina, C Ohachosim 'Tax-Budget Deficit Relationships: Fiscalists' Platform for Deficit Financing Policy' (2017) 3 *Business and Management Studies* 53, 53.

[29] See BC Arimah *The Face of Urban Poverty: Explaining the Prevalence of Slums in Developing Countries* (2010) at 1, which indicates that '[i]n the developing world, 43 per cent of the urban population live in slums (…). These settlements (…) are characterized by inadequate water supply, squalid conditions of environmental sanitation, overcrowded and dilapidated habitation (…)', available at https://doi.org/10.1093/acprof:oso/9780199590148.003.0008

pit latrines.[30] Governments are responsible for providing their citizens with adequate housing, food and health care, however, the governments' of developing countries often face dire budget deficits and rely heavily on financial aid from the more developed international communities who, ironically, 'are also home to companies taking wealth from those same poorer countries at a rate, and amount that far outstrips aid flows. They are also, in some cases, architects of the very structures – tax havens and offshore finance hubs – that enable them to do so'.[31] The issue of tax havens and other tax avoidance strategies is deal with in more detail in part VI.

Tax abuses result in taxable income that escapes the tax collector, resulting in reduced revenue. This erosion in the tax base has a significant effect on a state's ability to progressively realise the socio-economic rights of its citizens.[32] Accordingly, Mendis is of the view that:

> allowing the continuation of a financial and tax regulatory structure that negatively affects public revenue which could have been directed towards social services and which therefore impedes the achievement of human rights standards and goals *within your own territory or extraterritorially,* can be identified as a violation of State responsibility (emphasis added).[33]

This often results in the poorest and most needy members of society being impacted the most. For example, according to UNICEF and the WHO, more than one billion individuals in developing countries still do not have access to adequate sanitation such as a toilet or latrine.[34] This has ominous health implications for such individuals and has been said to cause death and disease, particularly among children. Furthermore, many children,[35] especially in the rural areas, lack access to education because adequate school systems are not established due to the lack of financial resources. Such statistics work to uphold and emphasise that '[i]neffective taxation systems, corruption and mismanagement of government revenues from, among others, state-owned businesses and corporate taxation, can limit the resources available for the fulfilment of children's rights'.[36]

NGOs should not be at the forefront of providing these needs; these underfunded areas are, firstly, the responsibility of governments whose subjects provide the taxes with which to meet human rights obligations. Governments should therefore take all the viable avenues available to them to optimise the collection and distribution of tax revenue to finance and support the provision of ESCR.[37] Accordingly, the Committee on the Rights of the Child has demanded accountability where tax evasion, alongside corruption, has negatively impacted on the level

[30] Republic of Zambia Central Statistical Office *2015 Living Conditions Monitoring Survey (LCMS) Report* (2016), available at https://prais.unccd.int/sites/default/files/2018-08/LCMS%202015%20Summary%20Report.pdf.

[31] A Gaughran 'Cracking Down on Tax Abuse Will Help Promote Economic and Social Rights' *Open Democracy* (18 February 2015), available at https://www.opendemocracy.net/en/openglobalrights-openpage/cracking-down-on-tax-abuse-will-help-promote-economic-and-social-ri/.

[32] Maziwisa & Lenaghan (note 6 above) at 239.

[33] Mendis (note 25 above) at 29.

[34] P Hathi, S Haque, L Pant, D Coffey & D Spears 'Place and Child Health: The Interaction of Population Density and Sanitation in Developing Countries' (2017) 54 *Demography* 337, 340, available at https://doi.org/10.1007/s13524-016-0538-y

[35] World Economic Forum 'Just How Big a Problem is Lack of Access to Education?' *YouTube* (22 July 2016), available at https://youtu.be/7hvdl-TS_80, highlights those 16.7 million girls in Sub-Saharan Africa alone, are not in school.

[36] UN Committee on the Rights of the Child *General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights* (2013) CRC/C/GC/16 on State obligations regarding the impact of the business sector on children's rights, available at https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf.

[37] International Bar Association Human Rights Institute (note 22 above) at 8.

of resources available for the implementation of the Convention on the Rights of the Child.[38] Moreover, the African Charter on Human and Peoples' Rights (African Charter) provides that '[s]tate parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'.[39]

Governments, particularly in developing countries, could have more money available to spend in areas where it is most needed, such as health and education, if they improved their tax policies and took measures against the tax loopholes that expose them to tax abuses.

III INTERSECTIONS BETWEEN TAXATION AND HUMAN RIGHTS

There are three policy documents that delineate the concept of human rights: the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[40] The existence of such instruments together with various other international efforts, such as the establishment of global and regional overseeing bodies, has had a pivotal role to play in the way that states exert the authority that they hold over their subjects, in relation to human rights.[41]

International treaties, such as the ICESCR, do not dictate specific fiscal policies that governments need to put in place. Accordingly, society has traditionally deemed tax codes incapable of violating human rights. Therefore, except for the right to freedom from arbitrary deprivation of property and the right to privacy, the conception of a right that has been infringed by the way in which taxes are levied would be difficult However, despite the lack of specificity in international treaties, there are limits to the amount of discretion available to states in the formulation of fiscal policies.

For instance, article 2(1) of the ICESCR requires parties to use the 'maximum' of their resources to achieve 'the full realization' of the Covenant's rights by, inter alia, the 'adoption of legislative measures':

> Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieve progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Thus, a human rights perspective shows that taxation is a critical part of complying with the principle of making use of the maximum available resources (MAR),[42] as set out in article 2(1) of the ICESCR. Member states to the ICESCR are obliged to demonstrate that every effort has been made to use all available resources at their disposal to satisfy as a matter of priority their

[38] UN Committee on the Rights of the Child (note 36 above).

[39] Article 21(5) African Charter on Human and Peoples' Rights adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

[40] A Waris *Tax and Development: Solving Kenya's Fiscal Crisis through Human Rights* (2013) 128.

[41] RA Falk *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (1st Ed, 2000) 1–2.

[42] UN General Assembly *International Covenant on Economic, Social and Cultural Rights* (1966) A/RES/2200A(XXI) '[E]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

minimum core human rights obligations, to take deliberate and targeted measures to safeguard the rights of vulnerable members of the population and to ensure the widest possible enjoyment of rights despite the circumstances.[43] Furthermore, the Committee on Economic, Social and Cultural Rights[44] has elaborated that even in times of resource constraints, states have a duty to move as expeditiously and effectively as possible towards the goal of fully realising all rights.[45] In addition, any deliberately retrogressive measures require strict justification and must be carefully considered with regard to the totality of rights set forth in the Covenant.[46] It was further determined that a lack of adequate resources cannot be invoked by any state as an excuse for inaction in the face of deprivations of economic and social rights (ESR).[47] The question of resources is particularly critical to the fulfilment of ESCR since this is dependent on the amount of resources a state has at its disposal to fund the requisite public services and policy interventions.[48] Furthermore, owing to the fact that 'a state is in violation of the Covenant if it fails to allocate the maximum available resources to realizing human rights'[49] it is important to understand how the concept of MAR is relevant to tax.

IV TAX AND FISCAL POLICY AS HUMAN RIGHTS ISSUES

Part 1 of this article highlighted how tax and fiscal policy play a role in enabling a state to generate the conditions required to guarantee its citizens human rights. This is because 'rights cannot be protected or enforced without public funding and support … all rights make claims on the public treasury.'[50] This is an argument made by various individuals, but as will be determined in the following paragraphs, it is insufficient as a complete argument. This part therefore seeks to delve more deeply into understanding why tax abuses and tax policy should be understood as human rights issues.

According to Alston, tax is a human rights issue because:

> It reflects better than all the ministerial statements and white papers the real priorities of a government. We can see clearly the activities it chooses to incentivise, those that it opts to dis-incentivise, the groups that it decides to privilege, and the groups that it chooses to ignore or penalise.[51]

Mendis[52] considers 'a good tax and financial regulation system [to be] the most dependable method towards raising revenue which could be used for public goods and services, […] which could be required under a state's international human rights law obligations, especially the […] (ICESCR)'. However, when a state is faced with decreased revenues from an eroded tax base,

[43] UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 3: The Nature of States Parties' Obligations* (Art. 2, Para. 1 of the Covenant) E/1991/23 (14 December 1990), available at https://www.refworld.org/docid/4538838e10.html

[44] CESCR is a UN expert body that monitors compliance by state parties with the provisions of the Covenant on Economic, Social and Cultural Rights.

[45] CESCR (note 43 above).

[46] Ibid.

[47] Ibid.

[48] R Balakrishnan, D Elson, J Heintz & N Lusiani *Maximum Available Resources and Human Rights: Analytical Report* (2011) 10.

[49] Ibid at 4.

[50] S Holmes & CR Sunstein *The Cost of Rights: Why Liberty Depends on Taxes* (1999) 18–20.

[51] Alston (note 9 above).

[52] Mendis (note 25 above) at 25.

alternative sources of revenue are sought out to urge the national treasury and support the national budget. The state often resorts to regressive avenues and 'tends to place the burden on the shoulders of its citizens' through increased personal taxes such as value added tax (VAT) and income tax, ultimately resulting in a disproportionate effect on the poorest households who lose more buying power relative to wealthy households.[53]

Developing nations tend to rely heavily on consumption taxes, even though a large part of their economies are informal.

> The informal sector is economic activity that is not reported to the state, and that is not regulated or protected by the State. Because this informal part of the economy is outside the formal system, it has been difficult to raise significant revenues from consumption taxes.[54]

Moreover, developing nations face problems in collecting personal income taxes because it is largely dependent on individuals who are formally employed within the formal economy, where employers deduct income tax from their wages and pay it over to the state on their behalf. Also taxing the elite poses challenges in that they are well equipped to hide their money overseas or employ tax consultants to find loopholes in the income tax rules so as to hide their earnings from scrutiny of tax officials. This means that the collection of corporate tax, which is a lucrative source of revenue, is not maximized.[55]

Furthermore, the pressures of globalisation have had developing countries engaged in as a 'race to the bottom' in which developing nations compete against each other to attract foreign direct investment (FDI).[56] They offer ever more generous tax incentives[57] to multinational corporations to lock in the potential benefits associated with FDI, such as industrial development and job growth. However, evidence indicates that 'the cost of these incentives often outweigh their intended benefits. For example, 'the Tax Justice Network has provided recent estimates suggesting that Kenya, Tanzania, Rwanda and Uganda are losing between USD 1.5 billion and USD 2 billion a year in revenues foregone as a result of tax incentives.[58]

The ICESCR[59] accordingly urges states to 'take rigorous measures to combat illicit financial flows, tax evasion and fraud "with a view to raising national revenues and increasing reliance on domestic resources"', because 'in order to fully devote the maximum available resources to

[53] Maziwisa & Lenaghan (note 6 above) at 242.

[54] RS Avi-Yonah 'Lecture in Human Rights: Tax, Policy, Global Economics, Labor. And Justice in Light of COVID-19' (2021) *Rutgers International Law and Human Rights Journal* 1, 5.

[55] Avi-Yonah ibid at 7.

[56] FDI is defined by the Organization for Economic Co-Operation and Development (OECD) as a 'category of investment that reflects the objective of establishing lasting interest by a resident enterprise in one economy [...] in an enterprise [...] that is resident in an economy other than that of the direct investor'. See A Titus & T Gutuza 'The Relationship Between Tax Incentives and Human Rights Obligations in the Drive to Attract Foreign Direct Investment: Are Developing Countries in Africa Getting it Right' (2018) *Acta Juridica* 149, 149.

[57] Tax incentives can take the form of reduced corporate income tax rates, tax holidays, investment allowances, and special economic zones (SEZs). See Titus & Gutuza (note 56 above) at 150.

[58] Ibid at 150–151.

[59] The CESCR increasingly presumes non-compliance with the MAR clause whenever tax policy is either insufficient of discriminatory in nature. See O De Schutter, NJ Lusiani & S Chaparro 'Re-Righting The International Tax Rules: Operationalizing Human Rights in the Struggle to Tax Multinational Companies' (2020) 24 *The International Journal of Human Rights* 1370, 1372.

human rights, states have a duty not only to generate resources, but also prevent the diversions of resources'.[60]

According to De Schutter et al:

> It has been calculated in 2014 that, if developing countries were to raise even 15 percent of their national income tax […], the additional revenue collected ($198 billion per year) would represent more than all foreign development assistance combined. Yet many developing countries, the tax base remains very low, and does not allow the States concerned to effectively fulfil the rights of the Covenant.[61]

Accordingly, national tax systems must not only be judged on how effectively they generate revenue but must also be judged on how fairly they redistribute wealth and uphold the human rights of their citizens.[62] According to De Schutter et al, it is important to examine not only how taxes are raised, but also how the money raised is to be spent. The combination of revenue mobilisation and spending choices matters in respect of the realisation of ESCR and —

> neither of these two elements alone shall in itself suffice to assess whether the efforts of the State are sufficient: just like one can easily imagine a State with generous social policies addressed at tackling poverty, but in which such policies are essentially financed by the poor themselves, it is possible to have a State tax the rich but not use the revenues collected in ways that have a significant impact on the reduction of inequalities.[63]

According to the Committee on ESCR, taxation serves to ensure that the rights of the disadvantaged and marginalised groups are not disproportionately affected.[64] This approach would force governments to be more accountable to their citizens through the sort of policies that they implement. If states would prioritise their human rights obligations to their citizens and make decisions with these obligations in mind, the policy decisions put in place would be more successful in ensuring that they do not adversely impact on the most vulnerable members of the nation.

The tax abuses engaged by MNCs greatly impact a state's ability to combat poverty and development issues. Studies have shown that more money flows out of developing countries through corporate tax avoidance than flows in through development aid.[65] Such MNCs fail to be a foundation for sustainable development when they continue to aggressively lobby for tax holidays and structure their affairs through secrecy jurisdictions and tax havens. Zambia Sugar, for example, admitted to paying 'virtually no tax' in Zambia between 2007 and 2013 despite generating profits of USD 123 million of which an average of USD 83.7 million was taken out of Zambia into and via tax havens including Ireland, Mauritius, and the Netherlands.

[60] International Bar Association's Human Rights Institute *The Obligation to Mobilise Resources: Bridging Human Rights, Sustainable Development Goals and Economic and Fiscal Policies* (2017) 69, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/IBA_Obligation_to_Mobilise_Resources_SDG_2017_En.pdf

[61] De Schutter et al (note 59 above).

[62] M Greggi 'Human Rights, Fundamental Rights and International Tax Law' (2014) *European Tax Studies* 1, 4.

[63] De Schutter et al (note 59 above) at 1373.

[64] M Sepúlveda 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery' in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (2014) 23, 38–39.

[65] J Hickel 'Aid in Reverse: How Poor Countries Develop Rich Countries' *The Guardian* (14 January 2017), available at https://www.theguardian.com/global-development-professionals-network/2017/jan/14/aid-in-reverse-how-poor-countries-develop-rich-countries

Furthermore, an estimated USD 27 million was lost to public services because of various tax avoidance schemes and special tax breaks.[66]

Corporate tax abuse can be deemed to be a human rights issue because when MNCs take part in transfer mis-pricing, non-taxation of natural resources, negotiation of tax holidays, and the use of offshore investment accounts; they engage in depriving governments of the resources needed to address poverty and to finance programmes seeking to protect and fulfil internationally recognized human rights.[67] The IBHARI Report's task force argues that states' obligations to protect ESCR should be understood to include the obligation to assess and address the domestic and international impact of corporate, fiscal and tax policies on human rights.[68] It can further be argued that when governments opt to grant further tax incentives to international investors over generating revenue that could be used to better meet the needs of the many, they work to further the gap between the wealthy and the very poor.

An analysis of the various acts that lead to the disparities in income, which can block development and increase demand for government social spending, between the wealthy and the poor has led to the realisation that it is important to redistribute societal resources if inequality is to be tackled and human rights realised. This is based on the growing consensus that 'rising inequality seems to be the main reason for the disappointing overall record on reducing poverty'.[69]

Possibly, the most important reason for dealing with taxation through a human rights lens is accountability. Ross's[70] research has shown that states that are more dependent on foreign aid[71] and natural resource exploitation, as opposed to domestic resource mobilisation through taxation, 'tend to be more corrupt,[72] conflict-ridden, authoritarian, poorer, more unequal, and have lower long term economic growth, whereas governments which are dependant to a greater extent on domestic taxes for their revenue have incentives to be more answerable to taxpayers.'[73] This is because taxation makes people feel the need to engage with how their taxes are utilised as well as the sort of policies that are put in place. People are willing to obey their elected government 'only if its actions provide security, improve …] lives and enhance …] welfare.'[74]

[66] ActionAid *Sweet Nothings: The Human Cost of a British Sugar Giant Avoiding Taxes in Southern Africa* (2013), available at https://actionaid.org/publications/2013/sweet-nothings.

[67] Holmes & Sunstein (note 50 above).

[68] International Bar Association's Human Rights Institute (note 22 above).

[69] Africa Progress Panel *Equity in Extractives: Stewarding Africa's Natural Resources for All* (2013), available at https://reliefweb.int/sites/reliefweb.int/files/resources/relatorio-africa-progress-report-2013-pdf-20130511-125153.pdf. The Africa Progress Panel is a group of ten high-level individuals from the public and private sector, chaired by former UN Secretary General Kofi Annan, which advocates for equitable and sustainable development in Africa. The Panel issues an annual report that seeks to highlight important issues for development policy.

[70] ML Ross 'Does taxation lead to representation?' (2004) 34 *British Journal of Political Science* 229.

[71] 'Up to 2001, donors in toto provided more than USD 12 billion of financial assistance to Zambia which was equivalent to almost 20% of GDP'. Refer to C Von Soest *How Does Neopatrimonialism Affect the African State? The Case of Tax Collection in Zambia* (German Institute of Global and Areas Studies Working Paper No 32, 2006), available at https://www.files.ethz.ch/isn/47051/wp32.pdf.

[72] According to Transparency International 'Zambia Country Data', several ministers were involved in corruption scandals without being dismissed. Furthermore, Zambia's corruption ranking in 2017 was at 96 out of 180, with a score of 37/100, which made it part of the worst performing regions in Sub-Saharan Africa, available at https://www.transparency.org/country/ZMB.

[73] A Nolan; R O'Connell & C Harvey *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) 82.

[74] Y Edrey 'Taxation and Human Rights' (2014) 2 *European Tax Studies* 6.

This part of the article has shown that taxation is one of the critical areas of policy to interrogate when assessing whether states are drawing on the 'maximum of available resources' and an indispensable policy instrument for mobilising additional public resources to finance human rights related expenditure. Furthermore, it plays a major, potential role in redistributing resources to mitigate and redress social inequalities and tackling discrimination. Additionally, it has an important role in cementing the bonds of accountability between states and citizen.

V TAX POLICY

Tax policy refers to 'the choice by a government as to what taxes to levy, in what amounts, and on whom.'[75] Tax policy seeks to provide guidelines, rules and *modus operandi* that would regulate a nation's tax system and provide a basis for tax legislation and administration.[76] It has however been argued that traditional tax policy is only minimally concerned with the effect that 'taxation can have on existing social, political, and economic disparities in terms of participation or access and does not acknowledge the various ways that tax policy can reinforce existing inequalities or biases'.[77] This can, in part, be attributed to the fact that tax policy and human rights law have historically not been assessed under the same framework.

The problem with traditional tax policy is that because it lacks a human rights perspective, even though undesirable consequences may result from the policies that are put in place, traditional tax policy deems these consequences as irrelevant to its goals and beyond its power to correct. For example, Sierra Leone, like most developing countries, regards attracting FDI to be one of its primary goals. As a result, foreign investors enjoy very generous concessions on mining exports, of which only one of the five major mining companies operating in the country paid corporate taxes for the 2013 financial year.[78] Furthermore, an Extractive Industries Report, on Zambia, found that between 2005 and 2009, over 500 000 Zambians employed in the mining sector were carrying a higher tax burden than the mining companies.[79] Most developing country governments tend to disregard such undesirable consequences, despite the fact that harnessing the wealth of their mineral resources provides them with the greatest opportunity for growth, poverty reduction and development.[80] Developing countries instead opt to argue that they do not have the administrative capacity to regulate such occurrences, and find solace in the fact that the companies help provide jobs for the populace while the companies' retained profits allow them to continue to invest in the countries.[81] This will be discussed in further detail, using Zambia as an example, below.

75 *Wikipedia* 'Tax Policy', available at https://en.wikipedia.org/wiki/Tax_policy.

76 RM Bird & JS Wilkie *Designing Tax Policy: Constraints and Objectives in an Open Economy* (International Center for Public Policy Working Paper 78, 2012), available at https://scholarworks.gsu.edu/icepp/78.

77 NJ Knauer 'Critical Tax Policy: A Pathway to Reform?' (2014) 9 *Northwestern Journal of Law & Social Policy* 207, 208.

78 Righting Finance 'Maximum Available Resources, Non-Retrogression and Minimum Essential Levels in Tax Policy' (2016), available at https://resourcingrights.org/api/files/1527024824848mfh2v4m4xl6fl9gwgi78k6gvi.pdf

79 Africa Progress Panel (note 69 above).

80 A Mwila, D Manley, P Chileshe, E Phiri & K Mpembamoto *The Taxation System in Zambia: A Report for the Jesuit Centre for Theological Reflection* (2011) available at https://www.taxjustice-and-poverty.org/fileadmin/Dateien/Taxjustice_and_Poverty/Zambia/JCTR/JCTR_2011_Tax_System_Zambia.pdf.

81 RW Bahl & RM Bird 'Tax Policy in Developing Countries: Looking Back and Forward' (2008) 61 *National Tax Journal* 279, 281.

This article, however, seeks to argue that government tolerance of these consequences as a part of the *status quo* needs to stop. Governments, of developing countries especially, need to take more substantive steps to ensure that their citizens benefit the most from the various policies and agreements they and their nationals enter into. Bird has stated that 'a good internal tax system provides not only revenue but is an essential element in developing a capable state.'[82] States need to adopt tax policies that are transparent and responsive to the needs of their citizens. Furthermore, the drafters of such policies need to understand that such policies play a major role in achieving the aims and ambitions of the state and its citizens.[83]

A Tax policy and developing countries

A country's ability to develop an adequate internal tax system plays a vital role in its ability to make economic progress. This is because 'a good internal tax system provides not only revenue but an essential element in developing a capable state'.[84] Most developing countries continue to face various tax policy challenges in their attempts to establish efficient tax systems. It is important to note that their efforts have not been in vain in that most of their tax structures have experienced much improvement in terms of the taxes and the rates.[85] Nevertheless, growth in domestic revenue mobilization as a result of various reforms has not significantly improved, as illustrated by their average tax-GDP ratio of between 10 and 15 per cent.[86] This is especially clear since research has shown that tax revenues in most LICs, especially in Sub-Saharan Africa (SSA), have been stagnant for at least the past 30 years with no notable difference since the 1980s.[87] Morrissey stipulates that this can be attributed to the absence of growth in the fundamental tax base – the formal sector employment and earnings (the income tax base) – and increasing difficulties in taxing sectors that are growing, such as resource extraction, multinationals and very wealthy individuals.

Developing countries face daunting challenges in establishing effective and efficient tax systems. It would therefore be naïve to expect developing countries to increase their tax take through more vigorous collection efforts. This is because most LICs have economic structures that make imposing and collecting taxes difficult. Furthermore, LICs have tax administrations with limited resources and capacity. However, it can be argued that globalisation and trade liberalisation have played a major role in encouraging tax reforms in developing countries even though globalisation further complicates the challenges faced by revenue authorities. The complication arises because globalisation allows taxpayers who are actually resident in a country to arrange their affairs so that their taxes are completely hidden from the domestic revenue authorities.[88] This will be discussed in more detail later in the article.

[82] Ibid.

[83] A Mumford *Tax Policy, Women and the Law* (2010) 3.

[84] Bahl & Bird (note 81 above).

[85] L Kayanga *Tax Policy Challenges Facing Developing Countries: A Case Study of Uganda* (LLM thesis, Queen's University, Canada, 2007), available at https://www.collectionscanada.gc.ca/obj/s4/f2/dsk3/OKQ/TC-OKQ-850.pdf.

[86] T Besley & T Persson 'Why do Developing Countries Tax So Little?' (2014) 28 *Journal of Economic Perspectives* 99, 99.

[87] Economic and Private Sector Professional Evidence and Applied Knowledge Services (EPS PEAKS) 'Taxation and Developing Countries: Training Notes' (2013) at 13, available at https://docplayer.net/8230727-Taxation-and-developing-countries.html

[88] M Carnahan 'Taxation Challenges in Developing Countries' (2015) 2 *Asia & the Pacific Policy Studies* 169, 179.

Due to the fact that developing countries aim to become more integrated with the international economy, the tax arena has seen developing countries increasingly adopt more indirect taxes, such as VAT,[89] in their systems in an effort to increase revenue.[90] However, more modern taxes, such as personal income taxes (PIT),[91] have continued to play a limited role with revenues that account for around one and two per cent of GDP.[92] Additionally, owing to the structure of most developing countries, it has been estimated that less than five per cent of the population pay PITs that are collected from wage-withholding, such as pay-as-you-earn (PAYE), by the public sector and corporations.[93] This is owing to the majority of the population working in the informal sector whose operations make enforcement practically impossible.[94]

Furthermore, research has shown that there has been a decline in corporate income taxes (CIT)[95] in most developing countries due to rate reductions, incentive policies that narrow the tax base, and various corporations failing to report profitability. This decline in CIT is 'especially harmful' because the profits that MNCs generate 'provide the best chance for tax to actually be collected in those countries'.[96]

Bahl and Bird contend that income taxes, together with property taxes, are some of the most difficult taxes for most developing country tax administrations to administer.[97] This is because their tax administrations are limited in capacity due to low human capital, limited resources and their staff are not trained for such advanced capabilities.[98] Furthermore, the majority of developing countries are mainly characterized by a large agricultural industry which makes up the majority of the countries' total output and employment. As explained above, the employment opportunities of developing countries often lie in the informal sector which is, as stated above, almost impossible to tax.[99] All these challenges culminate in a reduction in the possibility that developing countries are unlikely to achieve high tax levels.[100]

Faced with these challenges, developing countries tend to rely heavily on domestic and foreign borrowing, but this is not an adequate alternative to increasing tax revenues. Most of the people in developing countries have very low incomes therefore limited if any savings from which their governments cannot borrow. As an alternative, the reliance that governments place on foreign aid can have many deleterious consequences flowing from their dependency

[89] A VAT imposes a tax at each stage of the production process which is then passed through to the final consumer. It is regarded as one of the most economically efficient forms of consumption tax.

[90] Carnahan (note 88 above) at 173.

[91] PITs are generally administered through a wage withholding tax system where employers withhold part of the employees' wages and remit that amount to the tax administration.

[92] Carnahan (note 88 above) at 176.

[93] Carnahan (note 88 above) at 173.

[94] This is because the informal sector is largely cash based and is comprised of individuals who poorly keep record of their financial transactions.

[95] CITs are levied on the profit earned by companies, which is the revenue they generate less the deduction of allowable expenses.

[96] Gaughran (note 31 above).

[97] Bahl & Bird (note 81 above) at 283.

[98] V Tanzi & HH Zee *Tax Policy for Emerging Markets: Developing Countries* (IMF Working Paper, 2000), available at https://www.imf.org/external/pubs/ft/wp/2000/wp0035.pdf.

[99] IMF *Regional Economic Outlook: Restarting the Growth Engine* (2017), available at available at https://www.imf.org/en/Publications/REO/SSA/Issues/2017/05/03/sreo0517.

[100] Tanzi & Zee (note 98 above).

on aid.[101] For example, Romero and Sharpe report that governments in a large number of developing countries have had to give considerable weight to policy advice which has been provided by international financial institutions such as the World Bank and International Monetary Fund (IMF) because the advice has traditionally been 'directly or indirectly linked to disbursement loans.'[102] Dependency on these loans results in governments losing a level of control as they are compelled to apply the provided advice despite any possible number of undesired consequences.

In spite of these complications, taxation emerges as one of the most effective domestic tools that governments have direct control over with which to develop the resources needed to meet their social, economic, and political goals. If developing countries continue failing to control their domestic tax policies and take effective measures against domestic and international tax abuse, the constant struggle to meet the basic needs of the most vulnerable members of their individual states will continue.[103]

B Tax policy structures in Zambia: The case of Zambia Sugar

Earlier on, it was stated that Zambia Sugar reported that it paid virtually no tax in Zambia between 2007 and 2013 despite the fact that it had made an immense amount in profits. This paragraph will therefore analyse the Zambian tax system as well as some of the gaps that it contains. We use Zambia Sugar as an example.

1 *The Zambian tax structure*

Zambia taxes income on a source basis.[104] This means that income that is sourced, or deemed to be sourced, in Zambia is subject to tax within the country. In this regard, the corporate income tax rate is pegged at a rate of 35 per cent compared to 28 per cent in South Africa. In addition, Zambia also taxes the dividend and interest payments to resident companies. In a situation where disbursements (e.g. management and consultancy fees) are paid to a non-resident company, Zambia then levies a 20 per cent withholding tax,[105] which is similar to that of South Africa,[106] on such disbursement amounts. Moreover, Zambia provides extensive tax incentives, especially for mining operations whose tax rate is lowered to 30 per cent, and lowered even further for farming and agro-processing operations whose tax rate is set at 10 per cent.[107]

[101] R Gillanders *The Effects of Foreign Aid in Sub-Saharan Africa* (2010), available at http://www.edge-page.net/jamb2010/papers/The%20Effects%20of%20Foreign%20Aid.pdf.

[102] M Ruiz, R Sharpe & MJ Romero *Approaches and Impacts: IFI Tax Policy in Developing Countries* Eurodad and Action Aid (22 June 2011) 18, available at https://silo.tips/download/approaches-and-impacts-ifi-tax-policy-in-developing-countries.

[103] It is submitted that this is a result that the IMF has contemplated and therefore it added the strengthening of internal revenue collection to its conditions for the provision of new loans. Refer to CB Hill; MF Mcpherson (eds) *Promoting and Sustaining Economic Reform in Zambia* (2004) 141.

[104] PWC Worldwide Tax Summaries *Zambia: Individual – Taxes on Personal Income*, available at https://taxsummaries.pwc.com/zambia/individual/taxes-on-personal-income.

[105] Zambia Revenue Authority *Witholding Taxes* (2020), available at https://www.zra.org.zm/wp-content/uploads/2020/01/Withholding-Taxes.pdf.

[106] SARS *Dividends Tax* (2021), available at https://www.sars.gov.za/types-of-tax/dividends-tax/.

[107] K Munyandi 'Zambia – corporate taxation' *Country Surveys IBFD*, available at http://www.ibfd.org.

2 *Addressing how Zambia Sugar used Zambia's tax policies to its advantage*

It is common cause that companies often resort to aggressive tax planning to arrange their financial affairs in a manner that allows them to retain as much profit as possible. One of the ways that this is done is through treaty shopping,[108] which is also one of Zambia Sugar's most enriching forms of tax planning, as will be seen below.

One of the biggest contributors to Zambia Sugar's ability to avoid taxes in Zambia is the tax treaty between Zambia and Ireland, which has been in force since 1973. One of the agreed terms of this treaty is that the state of residence of the service provider is exclusively entitled to the taxing rights on professional services.[109] In light of this, Zambia Sugar structured its business transactions such that it pays excessive management and consultancy fees to Illovo Sugar Ireland (ISI). As a result of the tax treaty between Zambia and Ireland, Zambia is no longer able to levy a withholding tax on the management and consultancy fees that Zambia Sugar pays to ISI. In addition to this, Zambia Sugar is entitled to further deduct the costs of the management and consultancy fees from its profits as operating costs.[110] In order to ensure optimal profit generation and not fall victim to high tax rates in Ireland, ISI goes on to make payments to Illovo Sugar Ltd, which is established in South Africa, and to another Illovo subsidiary in Jersey, as well as to the Illovo Group Marketing Services (IGMS) which is established in Mauritius whose tax rate is a low 3 per cent. As can be seen, these arrangements take advantage of the various loopholes in the tax treaties to ensure that Zambia Sugar pays as little as possible in tax and that the money sent to Ireland is also not subject to as much tax as it technically should be.[111]

The tax treaty between Zambia and Ireland has additionally been beneficial to Zambia Sugar in that at a time when it needed to expand as a business; it had ISI provide it with a loan of USD 70 million to ensure that the tax treaty would be applicable. The implications of this transaction were that Zambia could, again, not levy a withholding tax on the interest on the loan that Zambia Sugar paid to ISI. Furthermore, Zambia Sugar could deduct the interest payments as actual costs to the company, to reduce its declared profits. This is although ISI had to borrow the money from branches of the commercial banks in the United Kingdom and notwithstanding that Zambia Sugar received the funds through a Zambian bank account. This would also mean that ISI would have to pay interest on the loan it acquired from the United Kingdom commercial banks. In accordance with the treaty between Ireland and the United Kingdom, the taxing rights on interest payments are allocated to the state of residence of the beneficiary of the payment, being Ireland.[112]

[108] 'Treaty shopping indicates the attempt to access tax treaty benefits that do not pertain to the particular person or corporate entity attempting access to the benefits. See JL Flanagan 'Holding US Corporations Accountable: Toward a Convergence of US International Tax Policy And International Human Rights' (2018) 45(4) *Pepperdine Law Review* 685, 724.

[109] Article 12 Convention Between Ireland and The Republic of Zambia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains.

[110] ActionAid (note 66 above).

[111] C O'Brien 'Zambia Sugar's Sweet Irish Tax Deal' *The Irish Times* (14 February 2015), available at https://www.irishtimes.com/news/world/africa/zambia-sugar-s-sweet-irish-tax-deal-1.2103225.

[112] Article 12(1) of the Convention between the Government of Ireland and the Government of the United Kingdom for the Avoidance of Double taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains.

In contrast, had Zambia Sugar acquired the loan directly from the United Kingdom commercial banks, the treaty between the United Kingdom and Zambia would have applied and Zambia would therefore have been allowed to levy a withholding tax up to 10 per cent on the interest payable. In addition, if the loan was provided from the commercial banks' head offices, being the United States, Zambia would likely have been able to levy a 15 per cent withholding tax on the profits since Zambia does not have a treaty with the United States.[113] As can be seen from the example provided, treaty shopping is an aggressive form of tax planning and will be dealt with in greater detail at a later stage.

Zambia Sugar accordingly benefitted not only from its aggressive tax planning practices, but the immensely advantageous tax incentives it received in Zambia. There are two specific tax incentives granted to Zambia Sugar which further reduced their tax burden in Zambia.[114] Firstly, Zambia Sugar's operations were categorised as farming operations, as such, its profits were taxed at a special rate of 10 per cent for farming and agro-processing, instead of the general CIT rate of 35 per cent. This is notwithstanding that a large part of its profit was derived from producing sugar and not farming. Moreover, Zambia Sugar was granted a 0 per cent tax rate for the first five years of operation in Zambia because it was deemed, by the Zambia Development Agency (ZDA), to have made an investment in a priority area and created desperately needed jobs for the local population.[115]

There is no substantial evidence to support Zambia's need to have granted Zambia Sugar the 0 per cent tax rate. Furthermore, it is uncertain as to whether Zambia Sugar would have withdrawn its investment in Zambia had it not received the tax break through the 0 per cent tax rate incentive. However, considering the advantageous treaty implications and immensely reduced tax rate, it can be argued that Zambia Sugar probably did not need the extra persuasion.

It has been established that the realisation of ESCR is heavily dependent on a country's resources. Accordingly, it is vital that developing countries realise that the consequences of granting tax incentives are not only financial but ultimately have a human cost because if the tax incentives 'do not yield the envisaged benefits, the resultant reduction in tax revenue may result in budget cuts as governments are forced to make up the shortfall in revenues elsewhere.'[116] Accordingly, any policy that impacts on a country's resources, particularly its fiscal resources, must find a balance between the country's objectives of investment, growth and employment and the need to ensure that sufficient resources are made available to meet the basic human rights of citizens. It is accordingly essential that the 'country's budgetary efforts are aligned with its human rights obligations.'[117] This is further supported by the Committee on ESCR General Comment No 24[118] which held that:

> States parties should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States in which they operate to fully realize the Covenant rights - for instance by resorting to tax evasion or tax avoidance strategies

[113] LS Wu 'Bittersweet (Tax) Symphony' (2016) 1 *Taxation Perspectives* 139, 144.

[114] Wu ibid.

[115] Ibid.

[116] Titus & Gutuza (note 56) at 151.

[117] United Nations Human Rights Office of the High Commissioner *Human Rights Indicators: A guide to Measurement and Implementations* HR/PUB/12/5 (2012) ('UN Rights Indicators Guide').

[118] Committee on Economic, Social and Cultural Rights, *General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (2017) UN Doc E/C.12/GC/24 para 23 ('General Comment 24').

> in the countries concerned. To combat abusive tax practices by transnational corporations, States should combat transfer pricing practices and deepen international tax cooperation, and explore the possibility to tax multinational groups of companies as single firms, with developed countries imposing a minimum corporate income tax rate during a period of transition. Lowering the rates of corporate taxes with a sole view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States Parties to the Covenant. Providing excessive protection to bank secrecy and permissive rules on corporate tax may affect the ability of States where economic activities are taking place to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights.

In as much as governments have a role to play in their failure to effectively meet the vital human rights needs of their subjects, such responsibility also rests of the corporations and the actions they implement, as will be illustrated in the following part of this article.

VI TAX ABUSE AS A VIOLATION OF HUMAN RIGHTS

Governments rely on healthy state finances to fund social programmes, redistribute wealth, and support economic development. The failure of wealthy corporations and individuals to pay their share of tax shifts the burden to poorer citizens or results in programmes and services being terminated or underfunded. Abuse of the tax system harms the ability of states to act in the interest of the people. This part of the article therefore examines the implications of corporate tax abuse on a state's ability to effectively meet the human rights needs of its people.

A Tax abuse

Tax abuse is an issue that has received a considerable deal of attention from governments, the media and the public at large. The attention this issue has received has been exacerbated by a series of leaks and investigations concerning tax and banking practices in countries such as Panama, Luxembourg and Switzerland in addition to the tax scandals involving major corporations like Starbucks, Apple and Google that were widely reported in the media and resulted in global public outcries for MNCs to be held accountable for the implications of their actions that result in gross human rights violations.[119] This culmination of events has pressured states into addressing this issue of tax abuse. Tax abuse is a collective term used to refer to aggressive tax avoidance[120] and illegal tax evasion.[121] It has also been labelled as 'an activity with no social returns but high social costs.'[122] It is important to note that even though tax avoidance is generally regarded as being legal, over the years the line between the various tax avoidance

[119] Flanagan (note 108 above) at 688. See also International Bar Association's Human Rights Institute Task Force (note 22 above) at 2 which found that tax abuses have considerable negative impacts on the enjoyment of human rights.

[120] Tax avoidance refers to using lawful means for avoiding the paying of taxes. See N Bernards, R O'Brien, F Zhang 'Labour and Tax Justice' Rosa Luxemburg Stiftung Southern Africa (2015) 1, 2, available at http://www.falinzhang.com/uploads/5/5/1/1/55117209/obrien-futures-commission-01_2015.pdf.

[121] Ibid. Tax evasion is the unlawful avoidance of tax liabilities that are due.

[122] JE Stiglitz *Reforming Taxation to Promote Growth and Equity* (Roosevelt Institute White Paper 2014), available at https://doi.org/10.7916/d8-tc6c-jm25.

strategies has become blurred as it borders closely on tax evasion. This has been proven by the inconsistency in the various findings that have been made through national tax rulings.[123]

Globalisation has added a new dimension to the already complicated methods used by multinational corporations to avoid paying taxes. According to the OECD:

> Globalisation has in effect caused products and operational models to evolve, creating the conditions for the development of global strategies aimed at maximising profits and minimising expenses and costs, including tax expenses. At the same time, the rules on the taxation of profits from cross-border activities have remained fairly unchanged, with the principles developed in the past still finding application in domestic and international tax rules…[T]he changes in business practices brought about by globalisation and digitalisation of the economy have raised questions among governments about whether the domestic and international rules on the taxation of cross-border profits have kept pace with those changes.[124]

The OECD has noted that MNCs save on vast amounts, that often range from 'hundreds of millions of USD in a single transaction or series of transactions'.[125] Furthermore, in as much as it is difficult to determine the precise amounts in respect of tax avoidance figures, the Tax Justice Network estimates that all forms of tax evasion amount to approximately USD 3.1 trillion,[126] which is 'a little over 5 per cent of the world's GDP.'[127] In addition to this, profit shifting[128], to avoid paying taxes, ranges in amounts between USD 60 billion to USD 160 billion per year.[129] Such astounding amounts in profit shifting have serious implications in that they 'may undermine public trust in the system, create inequalities, and reduce tax revenues'[130] Furthermore, the former United Nations Secretary General, Kofi Annan, correctly compared tax abuse to 'taking food off the table for the poor'[131] in that its effects are mostly experienced by the most vulnerable groups of our population.

B Forms of tax abuse

Multinational corporations have 'many devices — often highly complex, interlocking, and very effective — by which to reduce their total tax bills'.[132] In practice the strategies used by corporations to shift profit vary and are dependent on the situation at hand. However, there are certain elements that facilitate profit shifting, such as tax havens, transfer pricing and treaty shopping as will be discussed in a little more detail below.

[123] Bernards et al (note 121 above).

[124] OECD *Addressing Base Erosion and Profit Shifting* (2013), available at https://doi.org/10.1787/9789264192744-en.

[125] OECD ibid.

[126] R Murphy *The Cost of Tax Abuse: A Briefing Paper on the Cost of Tax Evasion Worldwide* (2011), available at https://www.taxjustice.net/wp-content/uploads/2014/04/Cost-of-Tax-Abuse-TJN-2011.pdf.

[127] S Darcy 'The Elephant in the room: Corporate tax avoidance & business and human rights' (2017) 2 *Business and Human Rights Journal* 1, 4.

[128] Profit shifting refers to strategies used by corporation to reduce their overall tax liability by reporting profits in low-law or no-tax foreign jurisdictions by artificially reallocating income and expenses. See Bernards et al (note 121 above) at 3.

[129] IMF *Spillovers in International Corporate Taxation* (2014), available at https://www.imf.org/external/np/pp/eng/2014/050914.pdf.

[130] OECD (note 125 above).

[131] Oxfam *Business Among Friends: Why corporate tax dodgers are not yet losing sleep over global tax reform* (Oxfam Briefing Paper 185, 2014), available at https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/bp185-business-among-friends-corporate-tax-reform-120514-en_0_1.pdf.

[132] IMF (note 130 above).

1 *Tax havens*

The term 'tax haven' does not have an exact definition.[133]Tax havens are countries that levy taxes at a substantially favourable rate in relation to other jurisdictions. The existence of tax havens is often problematic because they enable tax avoidance and evasion by structuring their legal and tax systems in a manner that protects bank secrecy which favours the tax abusers whose funds are invested within their jurisdictions.[134] This makes it immensely difficult for various governments to acquire an accurate account of the profits made by MNCs in that the various governments receive little to no co-operation from either the tax haven jurisdiction or the MNCs.[135]

The favourable nature of these tax haven jurisdictions proves so beneficial to MNCs that they opt to set up headquarters or various additional subsidiaries in tax havens. They then instruct subsidiaries in jurisdictions with high tax rates to contract with their tax haven subsidiaries to enter into money-losing arrangements involving trade mis-invoicing, abusive transfer prices as well as inflated consulting and trademark fees. These arrangements allow them to manipulate the system in a manner that allows them to show profits as accruing in a tax haven and to declare losses or menial profits within the jurisdictions of nations with steeper tax rates.[136]

Such arrangements are so widely used that, in 2012, it was reported that between USD 22 and 33 trillion in private assets were held in tax havens to evade and avoid taxes.[137] Furthermore, estimates of the annual tax revenue lost to developing countries due to this kind of tax avoidance and evasion amounted to between USD 98 and 106 billion[138] annually between 2002 and 2006. This amount is comparable to the total amount of USD 83.5 billion that was budgeted for overseas development assistance from OECD countries in 2009.[139] Such statistics are 'barebones estimates'[140] into the amounts of money lost and it can be argued that far larger amounts continue to be lost annually. This is because it is almost impossible for precise and accurate figures to be established, owing to banking secrecy that prevails in most tax havens together with the lack of transparency in respect of the way funds are managed in those jurisdictions.[141] It is therefore a likely outcome that the various estimates that are provided through the various studies are significantly underestimated to err on the side of caution.

[133] T Legwaila 'International Institutional Attitude Towards Holding Company Regimes: Curbing International Tax Avoidance' (2016) 28 *Mercantile Law Journal* 159, 162.

[134] According to the OECD, a tax haven usually has the following features: no or only nominal taxes, lack of effective exchange of information, lack of transparency, and no substantial activities.

[135] RT Kudrle 'Tax havens and the transparency wave of international tax legalization' (2016) 37 *University of Pennsylvania Journal of International Law'* 1153, 1155.

[136] DJ Workman 'The use of offshore tax havens for the purposes of criminally evading income taxes' (1982) 73 *Journal of Criminal Law and Criminology* 675, 681.

[137] JS Henry *The Price of Offshore Revisited: New Estimates for 'Missing' Global Private Wealth, Income, Inequality, and Lost Taxes* (2012), available at https://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf.

[138] A Hollingshead *The Implied Tax Revenue Loss from Trade Mispricing* (2010), available at https://gfintegrity.org/report/the-implied-tax-revenue-loss-from-trade-mispricing/.

[139] Z Khan & N Burn *Financing for Gender Equality: Realising Women's Rights through Gender Responsive Budgeting* (2017) 35.

[140] A Deneault 'The High Cost of Tax Havens' (2016) 50 *Canadian Dimension* 1, 9.

[141] SB Cohen 'Does Bank Secrecy Violate Internationally Recognized Human Right?' (2014) 16 *European Tax Studies* 16, 17.

It is no surprise that Sepúlveda Carmona[142] would reiterate that tax havens are jeopardizing compliance with their human rights obligations when they enable and encourage tax abuse and other illicit financial flows through their tax secrecy laws. This is because, if the money that is lost through these tax diminishing measures was available to allocate according to current spending patterns, the amount going into health services could save the lives of 350 thousand children in less developed countries under the age of five every year.[143] Furthermore, poor countries are more vulnerable to the impact of tax havens than the wealthier states. This is because '46% of reported cross border investment into low income and lower middle-income countries in 2011 came from tax havens, compared to 37% into upper-middle and high-income countries'.[144] In addition to this, 'almost one in every two dollars of reported corporate investment in developing countries is now being routed from or via a tax haven'.[145]

One of the effects of tax havens is that they have enticed governments all over the world to be drawn into a 'race to the bottom'.[146] The Quebec Finance Minister, Michel Audet, for example, indicated that fear of 'capital flight' was a major reason for his decision to cut the corporate investment income tax rate 'from an already paltry 16.25% to 9.9% in 2007'.[147] The unfortunate fact is that the race to the bottom, in fear of capital flight, has been a devastating reality for most developing countries that already lose too much to abusive tax practices.[148] Sepúlveda recognised that if countries are to realise tax justice, they need to work together and adopt the coordinated measures against tax evasion that are taking place globally, as part of both domestic and extraterritorial human rights obligations and to fulfil their duty to protect people from human rights violations by third parties, including business enterprises.

Sepúlveda's insights above, not only introduce a human rights aspect to the issue of tax abuse, but emphasise that co-operation is essential between the states if cross-border tax avoidance strategies are to be effectively managed and dealt with. This is especially true for low-income countries that are at a far greater disadvantage if they are to tackle this issue alone.

The human rights approach that has been introduced is by no means the ultimate remedy to this issue. However, it does help to build the case for reforms that boost government revenues, especially from the well-off individuals and corporations, to ensure that governments are better able to meet the needs of the many. This is further supported by the Lima Declaration on

[142] M Sepúlveda Carmona (note 2 above).

[143] Christian Aid *False Profits: Robbing the Poor to Keep the Rich Tax-Free* (2009), available at https://www.christianaid.ie/sites/default/files/2017-08/false-profits-robbing-the-poor-to-keep-rich-tax-free-march-2009.pdf.

[144] ActionAid *How Tax Havens Plunder the Poor* (2013), available at actionaid.org/publications/2013/how-tax-havens-plunder-poor.

[145] Ibid.

[146] OV Sokolovska 'Race to the Bottom in International Tax Competition: Some Conceptual Issues' (2016) 2 *Journal of Tax Reform* 98–110. The race to the bottom is because of tax competition. It essentially refers to how various governments implement what they deem to be 'competitive policies' such as various tax breaks and lower tax rates to seem more attractive than their counterpart states. This essentially means that countries are re affected by other governments' policies through the distribution of the tax base among countries, which is affected by the fiscal policy of all countries. Governments strategically interact with each other and try to attract the mobile tax base through the policy decisions they make. See overview by JD Wilson 'Theories of Tax Competition' (1999) 52 *National Tax Journal* 269–304.

[147] Deneault (note 140 above).

[148] Sokolovska (note 146 above).

Tax Justice and Human Rights,[149] which 'called for the integration of human rights standards in efforts to reform the deeply splintered tax system … that unfairly privileges multinational corporations',[150] and was endorsed by advocates, practitioners, scholars, activists, jurists, litigators and many other individuals committed to advancing tax justice through human rights and to realizing human rights through tax policy.

2 *Transfer pricing*

Transfer pricing is a form of profit-shifting that enables MNCs to manipulate the income and expenditure of the company, across the various jurisdictions that it is based, to be able to declare higher profits in countries with lower taxes and vice versa. It refers to the process of setting internal prices for goods and services that are sold between its related enterprises or subsidiaries.[151] With this, it must be noted that transfer pricing, in essence, is not illegal or unethical when it falls within the arm's length principle.[152] This is because the price set should essentially be equivalent to that which the seller (i.e. the company) would charge an independent party or buyer. The price could also be similar to what an independent buyer could pay an independent seller.[153] From a financial perspective, transfer pricing is likely the most important cross-border tax issue internationally.[154] This is attributed to the fact that a large proportion of world trade is accounted for by cross-border trade that takes place within MNEs, where branches or subsidiaries of the same MNE exchange goods and services.

Transfer pricing becomes an issue of concern when companies deliberately set these prices at something other than the market rate in an effort to lower profits of the subsidiary in a country with high taxes and ultimately minimize the company's tax liability.[155] This is what is referred to as transfer (mis) pricing. There are various actions that lead to transfer mispricing

[149] United Nations Industrial Development Organization *15th UNIDO General Conference,* Lima, Peru (2–6 December 2013), available at https://www.unido.org/who-we-are/inclusive-and-sustainable-industrial-development/lima-declaration

[150] Flanagan (note 108 above) at 688.

[151] EJ Malesky 'Transfer pricing and global poverty' (2015) *International Studies Review* 669, 671.

[152] The arm's length principle refers to the methods used with the intention of evaluating pricing agreements between related parties from the perspective of unrelated parties. See Flanagan (note 108 above) at 712.

[153] United Nations *Practical Manual on Transfer Pricing for Developing Countries* (2017), available at https://www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf.

[154] J Cooper, R Fox, J Loeprick & K Mohindra *Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners* (2016) 6.

[155] M Iyer 'Transferring Away Human Rights: Using Human Rights to Address Corporate Transfer Mispricing' (2017) 15 *Northwestern Journal of Human Rights* 1, 1.

such as, 'export mispricing,[156] import mispricing,[157] IP rights,[158] and re-invoicing.'[159] A clear example of export mispricing is with Glencore, a Swiss-based global mining parent company with a subsidiary in Zambia trading as Mopani Mines. After investigation by the Zambian authorities, it was determined that copper from Mopani Mine was being sold to Glencore at far lower prices than the market rate.[160] In this situation, the authorities of Zambia, like many other countries, are placed in an uncomfortable and difficult position in that they would need to devise a solution that protects their tax base whilst also not burning the bridges for continued or further FDI.

Such conduct obviously has some onerous implications for the treasury and ultimately, the citizens of states that fall victim to such conduct. This is especially true for developing countries who, as we know, 'lack capacity of their tax authorities to establish and enforce transfer pricing rules.'[161] This is supported by the fact that the High Level Panel on Illicit Financial Flows from Africa found that 'only three African countries had transfer pricing units in their internal revenue services.'[162] Even with the OECDs Transfer Pricing guidelines, developing countries face dire straits in their effort to implement such guidelines in practice.[163] Therefore, 'when developed countries tolerate internal pricing mechanisms and other arrangements that enable those corporations to effectively avoid such taxes that would otherwise be due to the developing country, they do an immense disservice.'[164] Despite this, it must still be noted that developing countries are themselves also to blame to the extent that they allow transfer pricing to continue to take place by not developing regulations and failing to effectively staff their revenue authorities.

[156] This is where a 'subsidiary of a company avoids paying taxes in a relatively high-tax country by selling its products at a loss to a subsidiary in a low-tax country, which then sells the product to final customers at market price and yields the profit.' See United Nations Human Rights Office of the High Commissioner *Illicit Financial Flows, Human Rights and the Post-2015 Development Agenda* (2016) UN Doc. A/HRC/28/60.

[157] This refers to 'where locally run enterprises are able to shift profits to affiliates in countries offering lower levels of taxation through…artificially inflating the price paid for intermediate products purchased from overseas affiliates so as to lower stated local profits.' See I Saiz 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective' in A Nolan, R O'Connell and C Harvey *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) 77, 86. For example, ActionAid has chronicled how global beer company SABMiller's breweries in Ghana pay extremely high fees for 'management services' from a Swiss-based affiliate, thus lowering corporate profits within Ghana. See ActionAid *Calling Time: Why SABMiller Should Stop Dodging Taxes in Africa* (2010), available at https://iogt.org/wp-content/uploads/2019/05/calling_time_on_tax_avoidance.pdf.

[158] This is much more common and involves companies storing their intellectual property rights in a subsidiary in a low tax jurisdiction and then charging affiliates in high tax locations artificially high rates for the use of that intellectual property. See M Henn *Tax Havens and the Taxation of Transnational Corporations* (2013), available at https://library.fes.de/pdf-files/iez/global/10082.pdf. SABMiller, for example, holds the rights to brands of beer sold in Africa in a Dutch company, to which African brewers must pay significant royalties.

[159] Iyer (note 155 above) at 4. Re-Invoicing is an illegal act that 'occurs when goods leave a country of export under one invoice, then the invoice is redirected to another jurisdiction…where the price is altered, and then the revised invoice is sent to the importing country for clearing and payment purposes.' See Hollingshead (note 138 above).

[160] Africa Progress Panel (note 69 above) at 14.

[161] Iyer (note 155 above) at 5.

[162] UN Economic Commission for Africa *Report of the High-Level Panel on Illicit Financial Flows from Africa, Illicit Financial Flows* (2015), available at https://hdl.handle.net/10855/22695.

[163] This is mainly because most developing countries do not have the resources to spare to implement the suggested guidelines.

[164] Gaughran (note 32 above).

Transfer pricing is prone to misuse because, despite all the efforts and guidelines to better equip tax authorities the world over, the fact remains that determining an arm's length price can be complex and resource intensive. An example of this can be taken from the Australian case, between the Australian Taxation Office (ATO) and Chevron, which was brought before the federal court.[165] The case was so complex and resource intensive that the ATO needed to call nearly two dozen expert witnesses from the banking industry, oil, gas and transfer pricing experts together with academics in these fields, in an effort to make and prove its case.[166] These are the sort of resources that developed nations can afford to have at their disposal. On the other hand, the tax authorities in most developing countries have little or no expertise on transfer pricing, scarce public data for comparison and lack proper internal review mechanisms among other things. However, despite this negative outlook, the world realises that developing countries cannot lose hope because transfer pricing plays such a major role on the state of a country's tax base. It has therefore been suggested that tax authorities in developing countries ought to start by honing their skills in respect of the most common types of transactions and sectors in their economy.[167] For example, tax authorities should master the processes of the natural resources, manufacturing and service sectors in order to more effectively enforce taxes with objectives that realistically take into account their available capacity.[168]

All in all, it is vital that developing countries strengthen their tax governance to aid their efforts in domestic resource mobilization as this may help them rely less on foreign development assistance to eradicate poverty and meet their citizens basic human rights' needs.[169]

3 *Treaty shopping*

The bilateral tax treaties that countries often enter in an effort to diminish the possibilities of double taxation have proven quite beneficial over the years in that they have encouraged international trade and investment.[170] However they have also opened up avenues for companies which are residents of a non-treaty country to exploit the treaties in order to avoid taxes and gain access to treaty benefits which would technically not have been available to them. This is known as 'treaty shopping' and it can prove financially devastating for treaty member countries as could be seen from the example of Zambia Sugar above.

Companies ensure the acquisition of treaty benefits by setting up a company in one of the treaty member states, which is preferably a tax haven jurisdiction or a jurisdiction with low tax rates, to serve as an intermediary to shift profits and take advantage of the tax allowances that the treaty offers. Companies may go even further in their avoidance strategies by presenting the

[165] In this case, ATO alleged that Chevron had used intercompany loans and related party payments to cut its tax bill by USD 260 million.

[166] Deloitte *Tax Insights: Deconstructing the Chevron Transfer Pricing Case* (2015), available at https://www2.deloitte.com/content/dam/Deloitte/au/Documents/tax/deloitte-au-tax-insight-deconstructing-chevron-transfer-pricing-case-041115.pdf.

[167] C Silberztein *Transfer Pricing: A Challenge for Developing Countries* (2009), available at https://www.researchgate.net/publication/294797214_Transfer_pricing_A_challenge_for_developing_countries.

[168] Silberztein ibid.

[169] International Bar Association's Human Rights Institute (note 22 above) at 89–91.

[170] AW Oguttu 'Curbing 'treaty shopping': the 'beneficial ownership' provision analysed from a South African perspective' (2007) 40 *Comparative and International Law Journal of Southern Africa* 237, 238.

nature of the income as tax deductible. As one can assume, this undoubtedly has the potential to result in significant revenue losses for the states who are party to the treaty.[171]

An example of how treaty shopping works is when two countries, A and B, enter into a tax treaty agreement that creates such a favourable tax environment that the residents of either nation not only benefit from it but also creates an environment that is conducive to foreign investment. This means that a company which is resident in country C and has an intermediary company in country B – a country with which it has a favourable treaty – can also benefit from the advantages (such as reduced rates of withholding taxes) that result from the treaty between country B and country A despite country C not having a treaty with country A. This is because the intermediary company in country B is deemed to be a resident of country B and is therefore entitled to the various advantages that result from the treaty between country A and B, in spite of the parent company being based in country C.[172]

This form of treaty shopping is favoured because it not only allows for a company which is in a country with an unfavourable treaty or no treaty to benefit, but it also allows for companies to take advantage of the differences in the tax relief that is provided by the various treaties amongst the various countries. These differences encourage the investors to make the most use of the most beneficial treaty for their transactions. This is an undesirable consequence because it frustrates the purpose behind the treaty in that it results in the avoidance of taxation altogether and not simply double taxation.[173] This is referred to as double non-taxation.

Tax abuse has a significant human rights impact that needs to be more overtly discussed and dealt with by the various international human rights agreements and treaties which guarantee basic rights that are denied by most developing countries because of their governments being deprived of the resources needed to meet such basic rights.[174]

C Current measures against tax abuse

Tax abuse has been an issue that has been at the forefront of state issues for the last few years. In that time, the world has been working on putting measures in place to counteract aggressive tax planning.[175] In the past, states have typically relied on enhancing administrative co-operation through concluding agreements to exchange information and encouraging administrative assistance to tackle aggressive tax planning. Furthermore, most countries have had general anti-avoidance rules (such as substance over form) within their domestic legislation together with additional anti-abuse rules in tax treaties.[176] However these measures have proved ineffective against the various specific forms of aggressive tax avoidance practices.

As such, states recently agreed to commit themselves to 'enhancing revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax

[171] Oguttu ibid at 238.

[172] Ibid at 240.

[173] Ibid at 242.

[174] Cohen (note 141 above) at 18.

[175] OECD *Aggressive Tax Planning* (2021), available at http://www.oecd.org/tax/aggressive/.

[176] IJM Valderrama, F Akunobera, A Mazz, NQ Cruz, LE Schoueri, J Roeleveld, C West, P Pistone & F Zimmer *Tools Used by Developing Countries to Counteract Aggressive Tax Planning in the Light of Transparency* (2016), available at https://www.jus.uio.no/ior/english/research/projects/global-tax-tranparency/publications/atp-developing-countries-destat-wp-edited-final.pdf.

collection.'[177] In order to achieve this, the parties made a commitment to 'consider inserting anti-abuse clauses in all tax treaties' and pledged to 'make sure that all companies, including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created, in accordance with national and international laws and policies'.[178] In addition to this, the parties present at the conference referred to the need for technical assistance and initiatives such as the OECDs 'Tax Inspectors without Borders' and the efforts of the G20 and the OECD on base erosion and profit shifting (BEPS)'.[179]

The conference in Addis Ababa also resulted in an agreement for countries to engage in voluntary discussions in respect of tax incentives which are believed to offer 'greater benefits to multinationals and their shareholders, than the citizens and governments of developing countries'[180]

D Holding corporations accountable for their abusive actions

Over the years, businesses have acquired so much power that they can now be regarded as some of the most powerful actors on the world stage, even more powerful than the governments of today. This is considering the increase in globalisation and international commercial activity, in which tax plays a major role, which has created challenges — for the protection of human rights — that are as a result of this global business and the mechanisms it uses to ensure that it ultimately profits. This power that has been attained by these corporations poses a challenge in that it results in businesses having far greater influence on the enjoyment of human rights by the citizens of a state. This influence may even reach farther than that possessed by the state itself.[181]

This understanding of the power possessed by corporations has resulted in a surge of literature that is concerned with the social implications of commercial enterprise.[182] The literature available questions how best we can harness the benefits that result from having a cosmopolitan and bountiful economy whilst also effectively regulating the corporations that bring forth such bounty when their conduct dismisses the plight of human beings. The fear that however continues to hover around this issue is that of upsetting or chasing off the 'goose that lays the golden economic egg'.[183]

For years governments have provided corporations with major tax breaks and tax advantages to attract further and/or new foreign investment into their economies. This consistent flexibility towards multinational corporations has resulted in what the OECD and other international bodies have referred to as 'the race to the bottom'.[184] This is in light of the fact that studies have found that there is little convincing proof of the fact that such policies actually play a

[177] UN General Assembly *Resolution: Addis Ababa Action Agenda of the Third International Conference on Financing for Development* (27 July 2015) GA Res A/RES/69/313.
[178] Ibid.
[179] Ibid.
[180] Oxfam (note 131 above).
[181] In 2011 alone, oil and gas behemoth ExxonMobil generated revenue of USD 467 billion- the size of Norway's entire economy. See C Albin-Lackey *Without Rules: A Failed Approach to Corporate Accountability* (2014), available at https://www.hrw.org/sites/default/files/related_material/business.pdf.
[182] For example, MK Addo (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999).
[183] D Kinley *Human Rights and Corporations* (1st Ed, 2016) 4.
[184] Sokolovska (note 146 above). Furthermore, see Wilson (note 146 above).

substantial role in attracting or sustaining FDI.[185] Studies however do show that governments disadvantage their economies further with policies that result in a decrease as opposed to an increase in state coffers that fund the various needs of society.[186] This problem is further exacerbated by the fact that MNCs continue to partake in strategies that further reduce their tax obligations in the economies that already provide what can be deemed to be advantageous tax breaks.

Corporate Social Responsibility (CSR), which is largely based on voluntary initiatives,[187] is an avenue that has been devised for businesses to deal with their human rights responsibilities. This article however strays from supporting such non-binding initiatives. This is because even though such initiatives have some effect; they prove ineffective in situations that demand that the corporation be held accountable. An example of this can be found in relation to De Beers, a diamond company in South Africa, that was found to be benefitting excessively from royalty and export tax structures that are 'riddled with loopholes, short-changing citizens of [South Africa] of tens of millions of dollars a year in revenue.'[188] When held to account to this, De Beers opted to deflect and instead reflect on the economic contribution that the corporation makes.[189] As can be seen from the De Beers example, non-binding initiatives have little effect and are likely to be highly acceptable to corporations the world over. This is because the implementation of such non-binding initiatives would ultimately be dependent on the company and its values.

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[185] S van Parys 'The Effectiveness of Tax Incentives in Attracting Investment: Evidence from Developing Countries' (2012) 3 *Reflets et Perspectives De La Vie Economique* 120–141, whose study results show that firms reward higher transparency and security more than a lower tax burden. It also confirms that the basic investment climate conditions are key to investors before tax incentives.

[186] For example, Zambia has a high malaria and HIV/AIDS rate. This is further impacted by the fact that it prevalently affects the vastly poor population. This therefore places a heavy financial burden on governments as well as places demands on the government to address the pressing health and other social issues. A lack in implementing policy strategies that increase state coffers and maximise the available financial resources is a failure by the state on its people. This is especially because financing such areas through foreign aid has become more challenging. This means that if states do not take all the necessary measures with the policies that they implement to ensure that they can mobilise the maximum funds from their own resources, they will continue to fail to meet the basic and essential needs of their people. See JC Anyanwu, YG Siliadin & EOkonkwo *Role of Fiscal Policy in Tackling the HIV/AIDS Epidemic in Southern Africa* (African Development Bank Working Paper 148, 2012), available at https://www.afdb.org/en/documents/document/working-paper-148-role-of-fiscal-policy-in-tackling-the-hiv-aids-epidemic-in-southern-africa-26868.

[187] UN General Assembly *Report of the UN Conference on Environment and Development* (1992) UN Doc. A/Conf.151/14 (1992).

[188] S Bracking & K Sharife *Rough and Polished: A Case Study of the Diamond Pricing and Valuation System in South Africa* (Leverhulme Centre for the Study of Value Working Paper 4, 2014), available at https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:226968&datastreamId=FULL-TEXT.PDF.

[189] In this regard, it is important to note that in as much as corporations such as De Beers make considerable contributions to our economies; the estimated scale of corporate tax abuses also undermines some of the claims that foreign investment and private enterprise are major drivers of sustainable development. While there is undeniable evidence that foreign investment and private enterprise is and can be a powerful force for development and positive human rights impacts, evidence about the extent of tax abuses by multinational enterprises serves to reinforce criticism and cynicism about the role of the private sector in development. Also see Business & Human Rights Resource Centre 'So. Africa: "Rough and Polished" Report Alleges Tax Avoidance by Diamond Mining Companies; De Beers Denies Claim', available at https://business-humanrights.org/en/so-africa-rough-and-polished-report-alleges-tax-avoidance-by-diamond-mining-companies-de-beers-denies-claim.

Attention to corporate responsibility for human rights violations was prevalent in the 1990s because high-profile instances of sweatshop labour and environmental damage by oil companies. Such attention resulted in the UN taking action by preparing draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[190] The draft Norm's wide range of obligations was in many respects 'equal to states' own obligations to respect, protect and fulfil human rights'.[191] These efforts that worked towards the implementation of binding standards on the activities of business enterprises were however not well received by states or businesses, and resulted in the UN Commission on Human rights electing to instead have a Special Representative 'identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights'.[192] This decision to elect a Special Representative resulted in the birth of the United Nations Guiding Principles on Business and Human Rights.

The United Nations Guiding Principles on Business and Human Rights (UN GP) which were endorsed by the UN Human Rights Council in 2011 and supported by businesses around the world, is currently one of the most prevalent documents in the field of business and human rights.[193] It sets out the global standard of expected conduct for all business enterprises and stipulates that:

> [Business] enterprises have a responsibility to respect human rights, also in their business relations, which require them to:
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[194]

This provision carries such authority for the argument, as expressed throughout this article, which holds that corporations act adversely to the enjoyment of human rights by citizens when they engage in activities that deprive treasuries of funds that would otherwise be owed. It explicitly highlights that business enterprises have a responsibility to avoid the negative impacts on human rights caused by tax abuses. However, in as much as the UN Guiding Principles (GP) recognize this fact, they too fail to elaborate on any legally binding obligation on businesses to respect human rights.[195] As such, it can be determined that in as much as this document received immense support and endorsement from businesses the world over, the principles themselves remain insufficient to deal with the issues relating to the adverse impact

[190] UN Economic and Social Council *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) E/CN.4/Sub.2/2003/12.

[191] P Thielbörger & T Ackermann 'A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?' (2017) 24 *Indiana Journal of Global Legal Studies* 43, 47.

[192] D Kinley & R Chambers 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 *Human Rights Law Review* 447, 447. See also UN Office of the High Commissioner for Human Rights *Human Rights and Transnational Corporations and Other Business Enterprises: Human Rights Resolution*(2005) E/CN.4/RES/2005/69.

[193] J Ruggie *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011) A/HRC/17/31.

[194] Ibid.

[195] D Bilchitz *Human Rights Obligations of Business* (2013) 38. Also see Thielbörger & Ackermann (note 191 above) at 46.

of business on human rights.[196] It is for this reason that scholars, activists and other members of the international community, despite offering support for the UN GPs, continue to call for alternative, more binding works to deal with the human rights obligations of businesses.[197] This is because corporations and states should both be held accountable to ensure that the implications on basic human rights standards are not taken lightly or ignored by these bodies during business activities or policy decision processes. Unfortunately, major powers such as the United States and the EU have shown favour to pursuing the implementation of the UN GPs over engaging in discussions on a binding treaty.[198] Therefore, with no binding obligation on business to respect human rights, they will likely continue to disregard the implications of their practices on the basic human rights standards.

Considering all this, it is important to highlight that neither the draft Norms nor the UN GPs specifically mention aggressive corporate tax avoidance nor did the Special Representative conspicuously address it. In addition to this, the UN Working Group on business and human rights has also not paid much attention to this issue since it was established in 2011.[199]

VII CORRUPTION

It would be remiss to simply place the burden of the failure to meet essential human rights on corporations and their tax practices. Responsibility to fulfil these human rights needs must more so fall on the states that create these tax policies and direct the funds acquired. This is because even though the lost revenues play a significant role, the levels of corruption in the various institutions of government, especially in developing countries, is a far more significant factor. This is because if corruption is not addressed, even if these states, in a perfect world, managed to close all the avoidance loopholes and managed to maximise the amounts collected in revenue, corruption would be like a leaking bucket that would ensure that the resources collected continue to fail to reach the poorest people, for whom this article advocates.

Article 2(1) of the ICESCR obliges states to prioritise their obligations to provide for the most basic human rights of their citizens. The responsibility lies with them for the article obliges states to demonstrate that 'every effort has been made to use all available resources at their disposal to satisfy as a matter of priority their minimum core human rights obligations, to take deliberate and targeted measures to safeguard the rights of vulnerable members of the population and to ensure the widest possible enjoyment of rights' despite the circumstances.

To more effectively illustrate the veracity of the statement above, Transparency International Malawi ranked Malawi at 122 out of 180 states, with a corruption perceptions index score of 31 out of 100.[200] It was reported that in 2013, the Republic of Malawi's government coffers lost millions of dollars in public funds as a result of the 'massive and rampant' corrupt

[196] UN Office of the High Commissioner for Human Rights *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (2014) A/HRC/26/L.22/Rev.1.

[197] D Bilchitz 'The Necessity for a Business and Human Rights Treaty' (2016) 1 *Business and Human Rights Journal* 203, available at https://doi.org/10.1017/bhj.2016.13.

[198] D Cassel 'Treaty Process Gets Underway; Whoever Said It Would Be Easy?' *Business & Human Rights Resource Centre Blog* (12 July 2015) available at https://www.business-humanrights.org/en/blog/treaty-process-gets-underway-whoever-said-it-would-be-easy/.

[199] Darcy (note 127 above) at 16.

[200] Transparency International 'Malawi Country Data: Corruption Perception Index' (2017), available at https://www.transparency.org/country/MWI.

practices 'perpetrated by the executive' and 'at the highest levels of government'[201] The levels of corruption, through looting in particular, became shockingly blatant when 'an accounts assistant for the Ministry of Environment and Climate Change was arrested for illegally being in possession of […] [about USD 310 000] in cash'.[202] In the same period, various other officials were further caught with millions of dollars hidden in their offices, cars and houses. Such atrocious levels of looting and pillaging of state coffers, amongst government officials at all levels, resulted in 'a surge in expenditure and a drop in total revenue' which resulted in the Malawian government accruing a budget deficit of approximately K40.4 billion.[203]

To make an already unsavoury situation worse, 'foreign development donors pulled the plug on USD 150 million for the 2013/14 fiscal year.' This proved to be an insurmountable blow as '40 per cent of Malawi's annual budget is donor-funded'.[204]

Despite the extremity of the example provided above, it must be noted that corruption is not an insurmountable hurdle that cannot be curbed with diligence and good governance. It is an issue that can be addressed in tandem with the redress of tax policies. In addition to this, it must be noted that the amounts lost because of lax tax policies, which allow corporations to avoid paying millions of dollars, much like the case of Zambia Sugar which paid virtually no taxes despite making profits of approximately USD 123 million, are far more significant in value. This is especially apparent when one realises that the lost taxes are about only one of the multiple multi-national corporations operating in Zambia, like many other nations in similar straits. The fact that countries may have a certain level of corruption does not negate the fact that lost revenues because of tax avoidance and lax tax policies are significant enough to leave a substantial dent in a state's ability to meet various human right's needs.

VIII CONCLUSION

This article has canvassed the idea that taxation policies need to take human rights obligations into account. It has further submitted the idea that developing economies can take steps to improve the state of their economic coffers in relation to their ability to provide the adequate and essential ESCR for their subjects, viz., food, health services and education. This can be facilitated through an analysis of the various taxation policies that are currently in place; and identifying and removing the loopholes that result in tax abuses by corporations which significantly erode the tax base. Effectively tackling such gaps will go a long way to significantly increase the funds available to these states to meet the ESCR of their citizens. Furthermore, the collection of taxation revenues will continue to prove difficult if measures are not put in place to improve tax administration and review tax exemptions and incentives.

Tax incentives may play a role in attracting foreign investors; however, governments need to continuously review such incentives to ensure that the ones that appear to disproportionately favour a sector of the economy and not add value in terms of employment creation, skills transfer, and economic growth are phased out. This would benefit citizens in the long run as it

[201] ZA Ntata *Licence to Loot: A Report on the Cashgate Corruption Scandal in Malawi* (2013), available at https://www.whatdotheyknow.com/request/202520/response/524932/attach/5/MALAWI%20CASHGATE%20SCANDAL%20REPORT.pdf.

[202] Ibid.

[203] Ibid.

[204] Transparency International 'News – Malawi: Time For Action on "Cashgate" Corruption Scandal' (12 March 2014), available at https://www.transparency.org/news/feature/malawi_time_for_action_on_cashgate_corruption_scandal.

allows an increase in the revenues collected and results in less reliance on regressive taxes, which tend to place on the shoulders of citizens and ultimately result in a disproportionate burden on the poorest households. Unfortunately, states often resort to the reliance on regressive taxes when faced with decreased revenues from an eroded tax base. Accordingly, it is vital that developing countries realise that the consequences of granting tax incentives are not only financial but ultimately have a human cost. Moreover, that tax incentives must balance the country's objectives of investment, growth and employment and the need to ensure that sufficient resources are made available to meet the basic human rights of citizens. This is made possible when the country's budgetary efforts are aligned with its human rights obligations.

Considering all this, it is still important to note that creating the political will and momentum to make meaningful change to the current tax systems will likely take a concerted and prolonged effort, especially from developing countries that need to work a little harder than their developed country counterparts to ensure that they can raise sufficient funds to meet the basic needs of their citizens and sustain their economies without reliance on financial aid. As hard and arduous a journey as it may seem, this article posits that it is achievable for developing economies to rise above budget deficits and scant realisation of citizen human rights.