



Human Rights Law Clinic Papers 2020

The Links Between Tax Policies and Human Rights

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i. Table of Legal Instruments

Convention on the Elimination of All Form of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106 (CRPD)

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

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

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (adopted 29th January 2018)

ii. Table of Abbreviations

| | |
|--------|---|
| CEDAW | Convention on the Elimination of all Forms of Discrimination Against Women |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| ECHR | European Convention on Human Rights and Fundamental Freedoms |
| ECSR | European Committee of Social Rights |
| ESCR | Economic, Social and Cultural Rights |
| GDP | Gross Domestic Product |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| NGO | Non-Governmental Organisation |
| OECD | The Organisation for Economic Co-operation and Development |
| VAT | Value-added Tax |
| UN | United Nations |

1. Introduction and Background

This memorandum will respond to a brief set by Amnesty International to investigate the link between tax and human rights. It will consider what the regional and international human rights mechanisms and experts have said about tax and human rights and where good and bad practices have been identified. In this memorandum, good tax practice is seen as practice that facilitates the realisation of human rights, while bad tax practice impedes the realisation of human rights. The project will attempt to draw conclusions about whether human rights is an appropriate framework for determining the types and levels of taxation.

There are two intersecting research aims. Initially, the project will consider how a State can increase its revenue through its tax system to ensure the realisation of socioeconomic rights. This is important due to the prevalence of recommendations made to States by human rights mechanisms and Non-governmental Organisations (NGOs) without guidance as to how States should fund them. The second aim is to ensure that revenue raising is carried out in a way that complies with international human rights standards.

The memorandum is driven by the fact that many States cannot afford their human rights obligations and will make reservations to human rights treaties because of this. An example is the Zambian reservation to the International Covenant on Economic, Social and Cultural Rights (ICESCR) article 13 (the right to education): while the State commits to taking all the 'necessary steps' to ensure the right to education is realised, it cannot be guaranteed due to 'financial constraints'.¹

In this memorandum, an assumption is made that an increase in available revenue will lead to higher standards of human rights implementation. This is a common assumption. For example, the Committee on the Rights of the Child (CRC) General Comment No. 19, which focuses on 'budgeting for the realisation of children's rights', stated that 'combating tax evasion can facilitate the realisation of children's rights'.² Additionally, the former Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, has criticised

¹ United Nations Treaty Collection, 'Status of Treaties' <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 27 March 2020.

² Committee on the Rights of the Child, General Comment No. 19: public budgeting for the realization of children's rights (20 July 2016) UN Doc CRC/C/GC/19.

corporate tax incentives due to the fact they reduce State revenue that could have otherwise been spent on human rights realisation.³

1.1. Applicable law and standards

Under article 2(1) of the ICESCR, a State has an obligation to allocate ‘maximum available resources’ to progressively realise economic, social and cultural rights,⁴ and ‘the immediate obligation to meet minimum core standards’.⁵ States should also cooperate in realising the rights in the Covenant.⁶ The Committee on Economic, Social and Cultural Rights (CESCR) found that States should avoid ‘deliberately retrogressive measures’ in the fulfilment of the human rights protected by the Covenant.⁷ This was supported by the Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights, a statement by experts on the evolution of international law relating to economic, social and cultural rights (ESCR).⁸ The ICESCR prohibits discrimination in connection with rights protected by the Covenant under article 2(2),⁹ and this has been found to apply to revenue raising policies.¹⁰ The memorandum will also consider how tax policies might disproportionately affect women, contrary to a State’s obligations under the Convention on the Elimination of Discrimination Against Women (CEDAW) to promote substantive equality.¹¹

1.2. Case studies

Five States have been chosen as case studies: Malawi, the Netherlands, South Africa, Spain and Zambia. These States are selected from both the Global North and the Global South and have wide differences in Gross Domestic Product (GDP), in levels of inequality and in their fulfilment of economic, social and cultural rights. This data is shown in Table 1. They also differ in how their tax systems have been assessed by human rights monitoring mechanisms. The case studies demonstrate both the domestic and transnational effects of tax policies.

Table 1: GDP, inequality, tax rates and ESCR fulfilment in the case studies

³ UNHRC, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (2014), UN Doc A/HRC/26/28 para 64.

⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) article 2(1).

⁵ Committee on Economic Social and Cultural Rights, General Comment No. 3: the nature of states parties’ obligations (14 December 1990) UN Doc E/1991/23 para 10.

⁶ ICESCR (n 4) article 2(1).

⁷ CESCR (n 5) para 9.

⁸ International Commission of Jurists, ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1997) <www.refworld.org/docid/48abd5730.html> accessed 3 March 2020 para 14 (e).

⁹ ICESCR (n 4) article 2(2).

¹⁰ Sepúlveda (n 3) para 13.

¹¹ Convention on the Elimination of All Form of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

| | GDP per Capita \$ ¹² | Gini Index ¹³ | Highest Income Tax Rate ¹⁴ | VAT rate ¹⁵ | Corporation tax rate ¹⁶ | ESRF-Index ¹⁷ |
|--------------|--|---------------------------------|--|-------------------------------|---|---------------------------------|
| Netherlands | 53024.10 | 28.2 | 49.5 | 21 | 25 | 93.05 |
| Spain | 30370.90 | 36.2 | 45 | 21 | 25 | 85.29 |
| South Africa | 6374 | 63 | 45 | 15 | 28 | 68.85 |
| Zambia | 1539.90 | 57.1 | 37.5 | 16 | 35 | 51.72 |
| Malawi | 389.40 | 44.7 | 30 | 16.5 | 30 | 62.15 |

All five States have ratified the ICESCR, CEDAW, CRC, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and Convention on the Rights of Persons with Disabilities (CRPD).¹⁸ Only Zambia and South Africa have reservations to the ICESCR, which limit their obligations relating to the right to education.¹⁹ Malawi, South Africa and Zambia have ratified the African Charter on Human and Peoples' Rights (ACHPR); and the Netherlands and Spain have both ratified the European Convention on Human Rights (ECHR) and its 12th Protocol, and the European Social Charter.

1.3. Limitations

There are several potential limitations to this research. Firstly, there are many reports from human rights monitoring mechanisms that discuss taxation and human rights in general terms,

¹² World Bank, 'Open Data' (2020) <data.worldbank.org> accessed 01 March 2020.

¹³ *ibid.*

A high GINI index is an indication of inequality. A value of 0 represents maximum equality, 100 maximum inequality.

¹⁴ PWC, 'Worldwide Tax Summaries' (2019) <taxsummaries.pwc.com> accessed 7 March 2020.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ Susan Randolf, Sakiko Fukuda-Parr, Terra Lawson-Remer, 'Economic and Social Rights Fulfillment Index: Country Scores and Rankings' (2007) <serfindex.uconn.edu/wp-content/uploads/sites/1843/2016/08/Research-SERF-Country-Rankings-2010.pdf> accessed 6 March 2020.

Economic and Social Rights Fulfillment Index. 100 meets all the measured rights obligations. This includes the rights to health, food, education, work and housing. Spain and Netherlands measured on different index that did not include right to housing. South Africa measurements did not include the right to food (100 meets all socioeconomic rights obligations).

¹⁸ ICESCR (n 4); CEDAW (n 11); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106 (CRPD).

¹⁹ UN (n 1).

but often do not discuss in detail what would be good and bad practice.²⁰ Secondly, it is also not possible within this memorandum to consider all aspects of taxation. Instead, it will focus on specific areas of corporate and individual taxation. Thirdly, each State has its own circumstances and challenges, which make it difficult to draw wider conclusions from its tax policies and human rights record. Within the case studies there are States with similar levels of taxation, but other factors that might affect a State's ability to meet its human rights obligations, such as natural resources or levels of debt, are not considered. In order to draw conclusions that are generalisable to other States, it would be necessary to examine how representative the selected States are,²¹ which cannot be done in this memorandum. However, as Flyvbjerg argues, extreme or unusual cases can provide more information about the causes of a problem than any typical case.²² This memorandum will, therefore, use the case studies to illustrate examples of good and bad practice that might be applicable more generally.

²⁰ CESCR, 'Concluding observations on the Sixth Periodic Report of Spain' (25 April 2018) UN Doc E/C.12/ESP/CO/6 para 16 (b) and (d). And CESCR, 'Concluding Observations on the combined fifth and sixth periodic reports of Mexico' (17 April 2018) UN Doc E/C.12/MEX/CO/5-6 para 14.

²¹ Allison Christians, 'Case Study Research and International Tax Theory. (Critical Issues in International & Comparative Taxation)' (2010) 55 St Louis ULJ 33, 338.

²² Bent Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2006) 12 Qualitative Inquiry 219, 228.

2. Taxes on Corporations

The aim of this section is predominantly to highlight bad practice in taxation. It will be shown that secrecy jurisdictions and profit shifting are types of bad practice due to their negative effect on the amount of revenue that a State can raise. The second aim is to discuss the impact of tax incentives on human rights. While secrecy jurisdictions and profit shifting are examples of bad practice, tax incentives have the potential to be both bad and good for human rights. This section will demonstrate that human rights can act as an appropriate framework for assessing the impact of corporate taxation on human rights.

Profit shifting is the act of moving profits from a high tax jurisdiction where the company is based or operates in some form, to a low or zero tax jurisdiction where the company has 'no real economic presence'.²³ Often such profits are shifted to tax havens.²⁴ A tax haven, also known as a secrecy jurisdiction, has been defined as 'a country which imposes a low or no tax, and is used by corporations to avoid tax which otherwise would be payable in a high tax country'.²⁵ The two are linked and will be considered together. Tax incentives have been defined as 'policy measures that allow deductions, exclusions and exceptions that reduce the tax liability of selected economic entities, such as corporations, with the intention of influencing cross border investment behaviours, decisions, or activities'.²⁶

This memorandum is unable to provide a specific corporate tax rate that would be best suited to human rights implementation. However, it can recommend against rates that are too low. Low corporate tax rates have been criticised on human rights grounds,²⁷ and a universal corporate tax rate, or a universal minimum, has been advocated by the Organisation for Economic Cooperation and Development (OECD) and others. The OECD Global Anti-Base Erosion (GloBE) proposal, calls for a universal minimum corporate tax rate.²⁸ While the proposal makes no suggestion as to what this rate should be, it uses 15% as an example.²⁹ The OECD has noted that this is a change from its previous stance that argued that 'no or low

²³ Sepúlveda (n 3) para 76.

²⁴ *ibid.*

²⁵ OECD, 'Glossary of Tax Terms' <www.oecd.org/ctp/glossaryoftaxterms.htm> Accessed 10 March 2020.

²⁶ Financial Transparency Coalition 'The Use and Abuse of Tax Breaks, How Tax Incentives Become Harmful' (2020) <financialtransparency.org/reports/31710/> Accessed 4 March 2020, 2.

²⁷ CESCR 'Concluding observations on the fifth periodic report of Mauritius' (5 April 2019) UN Doc E/C.12/MUS/CO/5, para 13.

²⁸ OECD, 'Global Anti-Base Erosion Proposal ("GloBE") - Pillar Two' (2019) <www.oecd.org/tax/beps/public-consultation-meeting-global-anti-base-erosion-proposal-pillar-two-9-december-2019.htm> accessed 3 April 2020, 6.

²⁹ Mark Martin & Thomas Bettge, 'OECD GloBE consultation focuses on details but overall design remains hazy' (*International Tax Review*, Jan 6 2020) <www.internationaltaxreview.com/article/b1js9n7j7x8hx3/oecd-globe-consultation-focuses-on-details-but-overall-design-remains-hazy> accessed 29 January 2020.

taxation is not per se a cause for concern'.³⁰ The overall goal of this proposal is to overcome 'unhealthy regulatory competition'³¹ as well as to 'combat profit shifting'.³² For these goals to be achieved, it must be adopted by all, or 'certainly most' countries.³³ Additionally, Tørsløv has argued that 'perfect international tax harmonization, i.e., [agreement] to apply the same effective corporate tax rate' would increase revenue in many high tax places and decrease the revenue of secrecy jurisdictions.³⁴ A universal minimum has also been supported by the Independent Expert on the Promotion of a Democratic and Equitable Order, Alfred-Maurice de Zayas.³⁵

2.1. Secrecy Jurisdictions and Profit Shifting

The aim of this section is to demonstrate that both secrecy jurisdictions and profit shifting can be seen as bad practice. There is a prevailing view held by human rights practitioners that these practices have a negative impact on human rights.³⁶ It is commonly stated that secrecy jurisdictions serve no purpose other than facilitating tax avoidance from large corporations.³⁷ This point has been reiterated by de Zaya, who has argued that secrecy jurisdictions should be phased out.³⁸ This memorandum intends to support and emphasise these perspectives. Alternative perspectives on secrecy jurisdictions do exist, but these can be seen as minority views and are not supported by human rights monitoring mechanisms. For example, it has been argued that secrecy jurisdictions allow for those who are being persecuted to save their money where the government cannot steal it.³⁹ Secrecy jurisdictions are also supported by libertarians, who do not believe in the legitimacy of the State.⁴⁰ However, there is no support for these arguments from human rights treaty bodies. Additionally, while the notion of State sovereignty has been used to legitimise the creation of secrecy jurisdictions,⁴¹ this is not

³⁰ Michael Devereux, 'The OECD Global Anti-Base Erosion (GloBE) proposal', Oxford University Centre for Business Taxation, (January 2020) <www.sbs.ox.ac.uk/sites/default/files/2020-02/OECD_GloBE_proposal_report.pdf> accessed 2 February 2020, 1.

³¹ CESCR (n 27).

³² OECD (n 28) 3.

³³ Devereux (n 30) 2.

³⁴ Thomos Tørsløv, Ludvig Wier & Gabriel Zucman, 'The Missing Profit of Nations' (2020) <gabriel-zucman.eu/files/TWZ2020.pdf> accessed 1 April 2020, 1.

³⁵ UNHRC 'Report of the Independent Expert on the Promotion of a Democratic and Equitable Order' (2016) UN Doc A/71/286, para 77 (l).

³⁶ *Ibid*, para 72.

³⁷ Oxfam Australia, 'The Hidden Billions: How Tax Havens Impact the Lives At Home and Abroad' (June 2016) <www.oxfam.org.au/wp-content/uploads/2016/06/OXF003-Tax-Havens-Report-FA-WEB.pdf> Accessed 1 February 2020, 4.

³⁸ UNHRC (n 35) 'summary'.

³⁹ Dan Mitchell, 'The Moral Case For Tax Havens' (*International Man*) <internationalman.com/articles/the-moral-case-for-tax-havens/> Accessed 14 March 2020.

⁴⁰ Doug Casey, 'Doug Casey on Anarchy and Libertarianism' (*Doug Casey's International Man*) <internationalman.com/about-im/> accessed 5 April 2020.

⁴¹ Anthony B. Van Fossen & Kristy Chambers, *Tax Havens and Sovereignty in the Pacific Islands* (2012, University of Queensland Press) 2.

considered to be a valid viewpoint because States must ‘abide by internationally accepted standards’ while exercising such sovereignty.⁴² As will be shown, profit shifting and secrecy jurisdictions are considered to be a violation of a State’s extraterritorial obligations⁴³ and, therefore, contrary to international human rights standards.

In order to demonstrate such extraterritorial impacts, this section predominantly focuses on the Netherlands. The Netherlands is currently ranked the eighth biggest enabler of financial secrecy in the world,⁴⁴ yet there are no human rights treaty body reports that focus on its financial secrecy policies. However, financial secrecy is certainly frowned upon. For example, CEDAW has criticised both Barbados and Switzerland due to the ‘negative impact’ the States’ financial secrecy policies have on the ability of other States to implement women’s rights, ‘in particular those [States] already short on revenue’.⁴⁵ Additionally, CESCR has criticised the UK for its ‘financial secrecy legislation’, highlighting concern that such policies ‘fully respect economic, social and cultural rights’.⁴⁶

The Netherlands’ ranking on the Gini Index of 28.2 (see Table 1 above), suggests that the State’s financial secrecy policies do not undermine the implementation of human rights domestically. Yet, the extraterritorial impacts must be discussed. An ActionAid report has identified that Malawi has suffered a large loss of revenue as a result of Dutch secrecy policies.⁴⁷ The report analysed how a large corporation shifted profits out of Malawi, through the Netherlands, and back to its home country of Australia.⁴⁸ An Oxfam report estimated that such actions facilitated by the Netherlands led to the loss of \$27 million of Malawi’s revenue,⁴⁹ or, as ActionAid has emphasised, money that could have been spent on ‘17,000 annual nurses’ salaries, or 39,000 annual teachers’ salaries’.⁵⁰ Such a large loss in revenue would impact Malawi’s ability to implement socioeconomic rights. This is shown by a CRC Committee report that highlights public services that have not received adequate funding such as child

⁴² OECD, ‘Harmful Tax Competition: An Emerging Global Issue’ (1998) <doi.org/10.1787/9789264162945-en> accessed 1 March 2020, 15.

⁴³ Alex Cobham, ‘Procuring Profit Shifting’ in Philip G Alston & Nikki R Reisch (eds), *Tax, Inequality, and Human Rights* (OUP, 2019) 138.

⁴⁴ Tax Justice Network, ‘Financial Secrecy Index’ (2020) <www.taxjustice.net/2020/02/18/financial-secrecy-index-2020-reports-progress-on-global-transparency-but-backsliding-from-us-cayman-and-uk-prompts-call-for-sanctions/> accessed 01 February 2020.

⁴⁵ CEDAW ‘Concluding observations on the combined fifth to eighth periodic reports of Barbados’ (24 July 2017) UN Doc CEDAW/C/BRB/CO/5-8, para 37 and ‘Concluding observations on the combined fourth and fifth periodic reports of Switzerland’ (15 July 2019) UN Doc CEDAW/C/CHE/CO/4-5, para 40.

⁴⁶ CESCR ‘Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’ (14 July 2016) UN Doc E/C.12/GBR/CO/6 para 16.

⁴⁷ ActionAid, ‘An Extractive Affair: How one Australian mining company’s tax dealings are costing the world’s poorest country millions’ (2015) <actionaid.org/publications/2015/extractive-affair> accessed 8 March 2020.

⁴⁸ *ibid.*

⁴⁹ Oxfam, ‘The Netherlands: a tax haven’ (2016) <www.oxfam.org/en/research/netherlands-tax-haven> accessed 1 April 2020.

⁵⁰ ActionAid, (n 47), 2.

protection and the Department of Disability.⁵¹ According to international human rights law, States are obliged to ensure that their actions do not impair another States human rights implementation.⁵² Evidently, the Netherlands' financial secrecy policies impact Malawi's revenue and thus the implementation of socioeconomic rights within the country.

The Netherlands' extraterritorial obligations are particularly pertinent for both forms of tax avoidance discussed because they disproportionately impact the ability of developing countries to implement key socioeconomic rights. Shaxson has argued that tax avoidance more commonly impacts poorer countries,⁵³ and a study by Cobham and Jansky supported these findings.⁵⁴ Furthermore, *Mauritius Leaks*, an investigation carried out by the International Consortium of Investigative Journalists, highlighted how Mauritius encouraged tax avoidance from States in Africa, Asia, the Middle East and the Americas.⁵⁵ Such perspectives have been reaffirmed by Sepúlveda, who noted that profit shifting has caused African States to lose \$38 billion of revenue on an annual basis.⁵⁶ This is especially problematic for developing countries because they rely more on corporate income tax than tax paid by individuals, a fact highlighted by multiple sources.⁵⁷

Tax havens and profit shifting do not only affect developing countries. Spain has been criticised for its 'high unemployment, chronic youth unemployment, a housing crisis of stunning proportion and deep widespread poverty'.⁵⁸ Philip Alston, the former Special Rapporteur on Extreme Poverty and Human Rights, has highlighted that companies on the IBEX 35, Spain's principal stock exchange, had '805 subsidiaries in tax havens, suggesting that significant amounts of revenue may be lost to tax avoidance'.⁵⁹ An Oxfam report emphasised that common secrecy jurisdictions used by the IBEX35 companies to avoid paying corporation tax

⁵¹ CRC, 'Concluding observations on the combined third to fifth periodic reports of Malawi' (6 March 2017) UN Doc CRC/C/MWI/CO/3-5, para 7.

⁵² Sepúlveda (n 3) para 31.

⁵³ Nicholas Shaxson, 'Tackling Tax Havens, Finance and Development' (2019) 56, Finance & Development, 7.

⁵⁴ Alex Cobham & Petr Jansky, 'Global distribution of revenue loss from tax avoidance' United Nations University Working Paper (2017) <www.wider.unu.edu/publication/global-distribution-revenue-loss-tax-avoidance> accessed 1 April 2020.

⁵⁵ Will Fitzgibbon 'Mauritius Leaks: Leak Reveals How Mauritius Siphons Tax From Poor Nations To Benefit Elites' (*International Consortium of Investigative Journalists*, July 2019), <www.icij.org/investigations/mauritius-leaks/treasure-island-leak-reveals-how-mauritius-siphons-tax-from-poor-nations-to-benefit-elites/> accessed 7 March 2020.

⁵⁶ Sepúlveda (n 3) para 77.

⁵⁷ Philip G Alston & Nikki R Reisch (eds), *Tax, Inequality, and Human Rights* (OUP, 2019) 5; OECD, 'Action Plan on Base Erosion and Profit Shifting' (2013) <doi.org/10.1787/9789264202719-en> accessed 1 March 2020; Alternative Information & Development Centre (AIDC) 'The State of Tax and Wage Evasion: A South African Guide 2019' <aidc.org.za/download/taxation/Tax-Evasion-and-South-Africa-Final-version-24.04.2019-00000003.pdf> accessed 28 March 2020, 17.

⁵⁸ Statement by Professor Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights (February 2020) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25524> accessed 10 February 2020.

⁵⁹ *ibid.*

in Spain are first and foremost Delaware in the US, followed by the Netherlands.⁶⁰ The report found that the Netherlands' financial secrecy policies are contributing to a total of \$60 billion annual loss of revenue to Spain.⁶¹ This is a large proportion of revenue that could otherwise be spent on minimising the 'growing social inequality'.⁶²

As noted by the African Commission, 'human rights cannot be fully achieved without the availability of resources',⁶³ resources which both profit shifting and secrecy jurisdictions take from States that would benefit from such revenue, such as Spain and Malawi. This section has shown that both profit shifting and secrecy jurisdictions can be seen as bad practice in taxation policy.

2.2. Corporate Tax Incentives and Corporate Tax Rates

Unlike secrecy jurisdictions and profit shifting, there is less agreement among human rights practitioners as to whether tax incentives are good or bad for human rights. Tax incentives are both promoted and cautioned against. Taking such recommendations in mind, this memorandum will predominantly criticise tax incentives. Not only do tax incentives reduce State revenue and thus inhibit human rights realisation domestically, they also undermine human rights implementation in other States due to the 'global ramifications' of such incentives.⁶⁴ However, carefully curated tax incentives can have beneficial effects but must be used with caution.

The case studies of Spain, South Africa and Zambia will be used to support this argument. Spain has been criticised by Alston for the 'appalling' poverty rates within the State,⁶⁵ and the CESCR has stated that South Africa is one of the 'most unequal countries in the world'.⁶⁶ Additionally, the World Bank has said that Zambia 'ranks among the countries with the highest level of inequality globally'.⁶⁷ The States' use of tax incentives is analysed against this backdrop.

⁶⁰ Oxfam Intermon, 'La Ilusión Fiscal' (March 2015) <oxfamintermon.s3.amazonaws.com/sites/default/files/documentos/files/InformeLailusionFiscal2015.pdf> accessed 10 March 2020.

⁶¹ *ibid.*

⁶² CESCR, 'Concluding observations on the sixth periodic report of Spain' (25 April 2018) UN Doc E/C.12/ESP/CO/6 para 15.

⁶³ African Commission on Human and Peoples Rights, '236 Resolution on Illicit Capital Flight from Africa' (April 2013) ACHPR/Res.236(LIII) <www.achpr.org/sessions/resolutions?id=262> accessed 5 February 2020.

⁶⁴ Sepúlveda (n 3) para 62.

⁶⁵ Alston (n 58).

⁶⁶ CESCR, 'Concluding observations on the initial report of South Africa' (29 November 2018) UN Doc E/C.12/ZAF/CO/1 para 16.

⁶⁷ The World Bank, 'The World Bank in Zambia Overview' <www.worldbank.org/en/country/zambia/overview#1> accessed 01 April 2020.

It has been argued that Zambia is ‘very generous’ with its tax incentives.⁶⁸ The State offers manufacturing enterprises located in a rural area a five year tax free period, followed by an additional five years of ‘staggered’ tax payments to ensure a company is given enough time to stabilise itself within the territory.⁶⁹ The standard tax rate for those not granted a concessionary rate is 35 percent. The ‘generous’ tax incentives offered by Zambia work directly against the State’s obligations to ensure that the ‘maximum available resources’ are devoted to socioeconomic rights,⁷⁰ and to ‘demonstrate that every effort has been made to use all resources that are at its disposition.’⁷¹ Indeed, Sepúlveda has argued that States must ‘refrain from granting fixed-term holidays and tax stability agreements that may undermine accountability for evolving impact on human rights’.⁷² Zambia’s high inequality, with a 57.1 ranking on the Gini index (see Table 1 above), suggests that such long-term tax incentives do not facilitate the realisation of human rights and therefore must be avoided.

South Africa also has multiple tax incentive systems in place. For example, six Special Economic Zones (SEZ) were created in July 2018 and taxpayers operating within these zones get a reduced corporate tax concession at 15 percent, from the standard 28 percent.⁷³ Taking into account the high levels of inequality and poverty within the State, such incentives would appear to reduce State revenue and inhibit human rights implementation.⁷⁴ This has been emphasised by CESCR, which has found that South Africa’s corporate income tax does not afford the State ‘enough resources required to reduce such inequalities; and is not sufficiently progressive in that regard’.⁷⁵

Tax incentives do have some support on the basis that they attract foreign investment, but human rights monitoring mechanisms have questioned their effectiveness. The Financial Transparency Coalition has argued that such incentives are granted because they succeed in bringing about positive benefits in society.⁷⁶ These benefits come in the form of increased job opportunities, increased ‘investment behaviours, decisions or activities’, and increases to the

⁶⁸ Dr. Rose Fuma-Makano, ‘Tax Exemptions and Tax Expenditures, Corporate Taxation in Zambia’, (2019) Dag Hammarskjöld Institute for Peace and Conflict Studies <www.taxjustice-and-poverty.org/fileadmin/Dateien/Taxjustice_and_Poverty/AwarenessJoint/NairobiConference/MakanoBackground.pdf> accessed 1 March 2020, 1.

⁶⁹ *ibid.*

⁷⁰ ICESCR Article 2 (1).

⁷¹ CESCR (n 5) para 9.

⁷² Sepúlveda (n 3) para 79 (j).

⁷³ PWC, ‘South Africa, Corporate – Tax Credits and Incentives’ (December 2019)

<taxsummaries.pwc.com/ID/South-Africa-Corporate-Tax-credits-and-incentives> accessed 15 March 2020.

⁷⁴ Sepúlveda (n 3) para 66.

⁷⁵ CESCR (n 67) para 16.

⁷⁶ Financial Transparency Coalition (n 26) 3.

State revenue as corporations are attracted to invest in that specific State.⁷⁷ If such benefits existed, these would improve human rights standards because the State would have more revenue to spend on fulfilling socioeconomic rights and there would be more employment opportunities. However, such presumed benefits have been refuted.⁷⁸ Fumpa-Makano has argued that corporations look at other factors when deciding whether a country is suitable to invest in, such as ‘political stability, security of their investment, and infrastructure’.⁷⁹ Sepúlveda has stated that there is little evidence to suggest that tax incentives succeed in bringing about investment and that the investment would have come regardless.⁸⁰ This has been emphasised by the CESCR in multiple State reports. The Committee has urged Cabo Verde to ensure its tax incentives are effective⁸¹ and suggests that Spain ‘periodically assess the suitability of tax exemptions’.⁸² Additionally, the Committee states that Argentina should avoid ‘unwarranted tax exemptions’.⁸³

Furthermore, tax incentives have extraterritorial effects. This has been described as the ‘race to the bottom’, which occurs when different States compete against each other to offer more competitive corporate tax rates and incentives in order to attract investment that would have otherwise gone elsewhere.⁸⁴ The CESCR raised this as an issue of concern in relation to Mauritius in 2019. It criticised the State for its low corporate income tax (15 percent) because it ‘encourages unhealthy regulatory competition in the subregion’.⁸⁵ Sepúlveda has argued that this competition threatens State sovereignty because States are forced to compete by offering more generous tax incentives than their neighbour, even when such losses to revenue are problematic for their human rights implementation.⁸⁶ This can be seen in South Africa’s Headquarter Company Regime tax incentive, which offers generous tax deductions as a means of encouraging corporations to use South Africa as a base.⁸⁷ The Alternative Information and Development Centre (AIDC) has argued that this results in a ‘tax war’, where African countries compete against each other to attract investment.⁸⁸ Under the UN Guiding

⁷⁷ *ibid.*

⁷⁸ OECD, ‘Global Anti-Base Erosion Proposal (“GloBE”) - Pillar Two’ (2019) <www.oecd.org/tax/beps/public-consultation-meeting-global-anti-base-erosion-proposal-pillar-two-9-december-2019.htm> accessed 1 April 2020, 28.

⁷⁹ Fuma-Makano (n 68) 2.

⁸⁰ Sepúlveda (n 3) para 65.

⁸¹ CESCR, ‘Concluding observations on the initial report of Cabo Verde’ (27 November 2018) UN Doc E/C.12/CPV/CO/ para 25.

⁸² CESCR, ‘Concluding observations on the sixth periodic report of Spain’ (25 April 2018) UN Doc E/C.12/ESP/CO/6 para 16.

⁸³ CESCR, ‘Concluding observations on the fourth periodic report of Argentina’ (1 November 2018) UN Doc E/C.12/ARG/CO/4 para 22.

⁸⁴ Sepúlveda (n 3) para 65.

⁸⁵ CESCR (n 27).

⁸⁶ Sepúlveda (n 3) para 34.

⁸⁷ AIDC (n 57) 17.

⁸⁸ *ibid.*

Principles on Extreme Poverty and Human Rights, States must take ‘deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction’.⁸⁹ AIDC have stated that ‘between 1985 and 2018, the global average statutory corporate tax rate has fallen by more than half, from 49 percent to 24 percent’.⁹⁰ Tax competition forces corporation rates to be reduced and can be seen as contributing to poverty rather than reducing it.

Although tax incentives are generally considered to be bad practice, they can also have benefits. Sepúlveda has stated that tax incentives can be used when they are ‘justified by a clear description of deliberate, concrete and targeted advances towards fulfilment of human rights that can be expected from their implementation’.⁹¹ Additionally, while the CESCR has been critical of the effectiveness of tax incentives, it also promotes them in certain cases,⁹² as they can be used to achieve certain goals. In South Africa, two tax incentives have been implemented to tackle high unemployment rates in both the young and the unskilled workforce. South Africa’s Learnership Tax Incentive ensures that employers are incentivised to provide a ‘work-based approach to learning and gaining qualifications’.⁹³ Additionally, employers who give learnership positions (formal employment accompanied by classroom learning) to people with disabilities are given a higher tax deduction than when learnership roles are given to those without disabilities.⁹⁴ This is particularly positive due to the high rate of unemployment amongst people with disabilities, as noted by the Committee on the Right of Persons with Disabilities.⁹⁵ Furthermore, such schemes are encouraged by the Protocol to the African Charter on the Rights of Persons with Disabilities in Africa. Under article 19(2), a State should promote the ‘employment of persons within the private sector through appropriate policies and measures, including through the use of specific measures such as tax incentives’.⁹⁶

⁸⁹ Human Rights Council, ‘Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona’ (18 July 2012) A/HRC/21/39, para 96.

⁹⁰ AIDC (n 57) 18.

⁹¹ Sepúlveda (n 3) para 67.

⁹² CESCR, ‘Concluding observations on the combined second and third periodic reports of Albania’ (18th December 2013) UN Doc E/C.12/ALB/CO/2-3, para 17; CESCR, ‘Consideration of reports submitted by states parties under Articles 16 and 17 of the Covenant, concluding observations’ (4th January 2008) UN Doc E/C.12/BEL/CO/3 para 30; CESCR, ‘Concluding observations on the initial report of Cabo Verde’ (27 November 2018) UN Doc E/C.12/CPV/CO/1, para 25; CESCR, ‘Concluding observations on the second periodic report of Serbia’ (10th July 2014) UN Doc E/C.12/SRB/CO/2, para 17; CESCR, ‘Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant, concluding observations’ (9 June 2008), UN Doc E/C.12/FRA/CO/3, para 35.

⁹³ South African Revenue Service, ‘Guide on the Tax Incentive For Learnership Agreements’ (2008) <www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G09%20-%20Guide%20on%20the%20Tax%20Incentive%20for%20Learnership%20Agreements.pdf> accessed 5 March 2020, 2.

⁹⁴ *ibid.*

⁹⁵ CRPD, ‘Concluding observations on the initial report of South Africa’ (23rd October 2018) UN Doc CRPD/C/ZAF/CO/1, para 44.

⁹⁶ Protocol to the African Charter on Human and Peoples Rights on the Rights on Persons with Disabilities in Africa, Article 19 (2) e.

A further example from South Africa demonstrates the advantages and disadvantages of tax incentives. The Employment Tax Incentive (ETI) aims to overcome the low levels of skill and unemployment. If an employer hires someone between the ages of 18 and 29 years old, they are permitted to pay a reduced employer's tax.⁹⁷ Under the scheme, employers who employ a person who earns R2,000 for a full month, will get R1,000 (approximately \$50) reduction in their tax liability.⁹⁸ However, the incentive has been criticised for subsidising employees who would have been hired even in the absence of such a subsidy.⁹⁹

Overall, States must ensure that any incentives that reduce State revenue, whether to bring about investment or to reduce unemployment, are systematically checked to ensure they are achieving their stated goal. While tax incentives can ensure certain issues, such as unemployment, are being tackled, they should be used with caution. While not inherently bad practice, they should not be used without clear beneficial reasons, such as increasing the employment rates for people with disabilities. Additionally, if there are high levels of inequality within a State, they should be avoided so that the lost revenue can be spent on advancing socioeconomic rights.

⁹⁷ SARS, 'Employment Tax Incentive (ETI)' (2019) <www.sars.gov.za/taxtypes/payee/ETI/Pages/default.aspx> accessed 10 March 2020.

⁹⁸ *ibid.*

⁹⁹ Amina Ebrahim, Murray Leibbrandt & Vimal Ranchhod, 'The Effects of Employment Tax Incentive on South African Employment' (2017) United Nations University, Wider Working Paper <www.wider.unu.edu/sites/default/files/wp2017-5.pdf> accessed 1 March 2020, 18.

3. Individual Taxation

The aim of this section is to consider whether it is possible to identify good and bad practices in the taxation of individuals, and how the choices between the different types of tax affect human rights. This section will consider how the burden of taxation is shared amongst individuals and how this can be compatible with human rights. It will focus particularly on the balance between different types of income tax and consumption tax.

Not all the human rights implications of taxation will be considered in this section. For example, the former Special Rapporteur on Extreme Poverty and Human Rights, Magalena Sepúlveda Carmona noted that resource-rich States that do not have to rely on taxes to raise revenue tend to have lower levels of accountability and participation in public affairs.¹⁰⁰ This suggests that the level of individual taxation can affect civil and political rights. However, this section will focus on socioeconomic rights in States that do directly tax individuals, and how the different types of taxation are applied, in practice.

This section will recognise that there might be a conflict between the goals of maximising resources and the goals of ensuring equality, non-discrimination and minimum essential levels of human rights. The obligation to allocate maximum available resources involves many factors beyond individual taxation such as the corporation tax issues discussed in Section 2. It is also a progressive obligation, which can make it more difficult to identify State compliance.¹⁰¹ This section will therefore focus on the immediate obligations relating to equality, non-discrimination and minimum core requirements. However, it will also show where there might be a potential conflict.

When assessing the effect of taxation it is necessary to consider whether the tax impacts individuals' ability to meet their basic needs. CESCR has found that within the ICESCR there is 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.¹⁰² In addition, tax policies will affect groups differently. Where taxes are disproportionately applied to the lowest earners, this might reduce their ability to spend money on essential goods to meet their human rights. For example, the CRC Committee has noted that some tax regimes can place disproportionate burden on those with 'scarce financial resources'.¹⁰³ Article 2(2) ICESCR requires States to ensure that rights

¹⁰⁰ Sepúlveda (n 3) para 51.

¹⁰¹ ICESCR (n 4) article 2(1).

¹⁰² CESCR (n 5) para 10.

¹⁰³ Committee on the Rights of the Child, General Comment No. 19: public budgeting for the realization of children's rights (20 July 2016) UN Doc CRC/C/GC/19 para 76.

protected by the Covenant are exercised without discrimination of any kind.¹⁰⁴ Any protection against discrimination must be linked to a right within the Covenant, and the ICESCR does not mention taxation, which could suggest that there is no requirement within the ICESCR to ensure that taxation is applied in an equitable way. However, Sepúlveda has argued that States should respect equality and non-discrimination in revenue raising policies,¹⁰⁵ and noted that CESCR had found that discrimination in this respect could be direct or indirect.¹⁰⁶ In other treaties that protect specific groups there are requirements to take affirmative action to prevent discrimination.¹⁰⁷ The tax system is seen as a powerful tool to address inequality in the enjoyment of rights,¹⁰⁸ and Sepúlveda has concluded that to comply with human rights obligations, States may be required to set up a progressive tax system that increases the income of poorer households.¹⁰⁹ Therefore, as we consider the different types of individual taxation, one way of assessing their compliance with human rights is whether and to what extent the income of the lowest earners is protected or increased and whether the minimum core requirements relating to their socioeconomic rights are being met.

3.1. Income Tax

Taxes on income are considered to be a fair way of taxing the individual, but the impact can vary depending on how the income tax is implemented. Sepúlveda noted that personal income tax is one of the most important taxes to address income inequality.¹¹⁰ In most States, personal income tax is progressively applied: lower earners pay a smaller percentage of their income than higher earners.¹¹¹ This can be contrasted with a flat-rate tax (flat tax) system under which everyone pays the same percentage of their income.

The case-study States all have income tax policies that are progressive to varying degrees. In the Netherlands, when national insurance tax is included, there are four tax bands with rates in 2019 that ranged from 27.65 percent on incomes less than €20,711 to 49.5 percent on incomes over €68,507. In Spain there are five bands ranging from 19 percent for incomes less than €12,450 to 45 percent on incomes above €60,000.¹¹² Progressive income tax systems are broadly welcomed by human rights monitoring mechanisms but both the Netherlands and

¹⁰⁴ ICESCR (n 4) article 2(2).

¹⁰⁵ Sepúlveda (n 3) para 13.

¹⁰⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 19: the right to social security (4 February 2008) UN Doc E/C.12/GC/12 para 10.

¹⁰⁷ e.g. CEDAW (n 11) article 3 and 5; ICERD (n 18) article 2(1).

¹⁰⁸ Sepúlveda (n 3) 36.

¹⁰⁹ *ibid* para 16.

¹¹⁰ *ibid* para 46.

¹¹¹ PWC (n 14).

¹¹² *ibid*.

Spain have been criticised in relation to how income tax allowances, rather than cash transfers, have been used to deliver welfare benefits.¹¹³ Allowances might be used by a State to reduce income tax for individuals in certain circumstances, which can be problematic if the mechanism disproportionately benefits those on higher incomes. The former Special Rapporteur for Extreme Poverty and Human Rights, Philip Alston, found that a child allowance for Spain's higher earners was more generous than the means-tested child benefit available to low earners.¹¹⁴ Whilst there might be administrative reasons to use income tax deductions for this purpose, care must be taken to avoid reducing the redistributive effects of income tax.

Although income tax is an important element, the extent to which a tax system is progressive and has redistributive effects relies on other taxes and spending, which makes it difficult to identify specific comments on income tax from human rights monitoring mechanisms. Of the case studies, South Africa appears to have the most progressive income tax system with eight gradually increasing tax bands ranging from zero to 45 percent. However, its policies have been seen by CESCR as insufficiently progressive because the tax system as a whole, including income tax, does not raise enough revenue to reduce inequalities.¹¹⁵ On the other hand, a statement to the African Commission by the International Institute for Child Protection (ICP) singled out the progressive tax system of South Africa as a good example for other African States to follow.¹¹⁶ In these reports, CESCR is using human rights standards to assess South Africa's tax system, whereas ICP is comparing with it with other States, which could explain the different conclusions. Without these reports specifying which element of the tax system is being considered, it can be difficult to draw wider conclusions.

The income tax in Malawi could be described as progressive in that there are four tax bands ranging from zero for the lowest earners, to 35 percent for the highest earners. However, this hides the fact that first two bands are only applied to very low incomes. An annual income over 360,000 Malawian Kwacha (MWK) (approximately \$490) is taxed at 15 percent and income over 420,000 MWK (approximately \$570) is taxed at 30 percent.¹¹⁷ A report by Tax Justice Network and Christian Aid showed that the lowest earners in Malawi are required to pay tax even when they cannot meet their minimum food requirements.¹¹⁸ While there are no general recommendations from human rights monitoring mechanisms that States should have

¹¹³ Council of Europe, 'European Social Charter: Conclusions XVIII-1, Volume 2' (2006) 576.

¹¹⁴ Alston (n 58).

¹¹⁵ CESCR (n 66) para 16.

¹¹⁶ Oral Statement: 51st Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul 18 April to 2 May 2012 <www.achpr.org/sessions/ngostatment?id=8> accessed 26 March 2020.

¹¹⁷ PWC (n 14).

¹¹⁸ Tax Justice Network & Christian Aid 'Africa Rising? Inequalities and the essential role of taxation' (2014) <www.christianaid.org.uk/sites/default/files/2017-08/africa-rising-inequalities-essential-role-fair-taxation-february-2014.pdf> accessed 25 March 2020, 7.

a zero rate of tax for low earners (the Netherlands and Spain do not), Sepúlveda has stated that appropriate tax thresholds are vital to ensure that the tax demands on the low paid do not affect their minimum essential levels of socioeconomic rights.¹¹⁹

The 30 percent tax rate in Malawi is paid on income between 420,000 MWK (approximately \$570) and 360,000,000 MWK (approximately \$48,700), with an additional 5 percent applied to incomes above this level. This covers such a wide range of incomes that it appears very similar to a flat tax, which applies the same rate to all levels of incomes. With a flat tax, high earners will still pay more tax than low earners as the fixed percentage is paid on a higher income, but as Sepúlveda has noted, flat taxes limit the redistributive effect of taxation and 'would not be conducive to achieving substantive equality'.¹²⁰ Flat tax systems have been both implicitly and explicitly criticised in CESCR States parties reports. CESCR explicitly found that the flat tax rate of 20 percent in Estonia is not sufficiently progressive to achieve the redistribution required to meet obligations under article 11 of ICESCR (the right to an adequate standard of living), and that the flat tax might have an adverse effect on those in poverty.¹²¹ Similarly, the Committee noted that a flat income tax rate of 13 percent in Russia contributed to an increase in economic and social inequalities, as it might fail to raise enough revenue to meet the State's human rights obligations.¹²² In contrast, without specifically referring to Bulgaria's 10 percent flat tax rate, the Committee recommended that more progressive fiscal policy be implemented to reduce inequalities.¹²³

It has been suggested that flat tax systems contribute to economic growth,¹²⁴ and some economists argue that lower rates of taxation can generate more revenue because of increased growth, although this is disputed.¹²⁵ Even if flat taxes can contribute to growth and increased revenue, it has been argued that economic growth does not necessarily lead to an improvement in human rights.¹²⁶ CESCR has not criticised other States with flat tax systems in State party reports, which suggests that compliance with human rights is context dependent.

¹¹⁹ Sepúlveda (n 3) para 48.

¹²⁰ *ibid* para 16.

¹²¹ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the third periodic report of Estonia' (27 March 2019) UN Doc E/C.12/EST/CO/3 para 36.

¹²² Committee on Economic, Social and Cultural Rights, 'Concluding observations on the sixth periodic report of the Russian Federation' (16 October 2017) UN Doc E/C.12/RUS/CO/6 para 16.

¹²³ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the sixth periodic report of Bulgaria' UN Doc E/C.12/BGR/CO/6 para 7.

¹²⁴ The Economist, 'Flat Taxes' (2007) < www.economist.com/news/2007/01/18/flat-taxes > accessed 1 March 2020.

¹²⁵ Philip Mirowski, 'What's Wrong with the Laffer Curve?' (1982) 16 *Journal of Economic Issues* 815, 816.

¹²⁶ Stephen Marks, 'Poverty' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2018) 604.

3.2. Consumption Tax / Value-added Tax

Following the example of States such as the UK and the United States in the latter half of the twentieth century, the OECD's 'taxation for growth' formula encouraged a shift from taxation on personal and corporate income to taxation on consumption.¹²⁷ The approach had an apparent aim of increasing efficiency and economic growth, and has been widely adopted by other States and international organisations.¹²⁸ It could again be argued that such a policy that encourages growth could maximise available revenue, although it has also been suggested that this type of policy is 'really a response to popular demands for tax cuts'.¹²⁹ Whether the 'taxing for growth' formula is successful in its stated economic aims is beyond the scope of this memorandum, but the approach does have human rights implications that will be discussed.

Sepúlveda noted that consumption taxes, of which Value-added Tax (VAT) is the most significant, are regressive because they make up a larger proportion of the income of those in poverty, and that the negative impact of these taxes can outweigh any positive impact of cash transfers.¹³⁰ It can be seen from the case studies that human rights monitoring mechanisms do not recommend a particular VAT rate but have been critical when the VAT rate increases. In South Africa, the case study with the highest measures of inequality, the VAT rate has been increased from 14 percent to 15 percent.¹³¹ CESCR expressed concern about the impact that the increase in VAT, despite certain exemptions, would have on low income households, and that the increase was implemented without carrying out a human rights assessment.¹³² Similarly, the increase in the VAT rate in Spain from 16 percent to 21 percent has been criticised by Alston due to the regressive nature of VAT.¹³³ However, no reports from Human Rights mechanisms criticise the 21 percent VAT rate in Netherlands, which is close to the average in the European Union.¹³⁴ This suggests that the specific rate of VAT is not the critical factor in determining whether the tax is consistent with human rights.

The focus on Spain and South Africa's change in VAT rate rather than on the specific rate in the Netherlands can be partially explained by the doctrine of non-retrogression, first identified

¹²⁷ Kathleen A. Lahey, "'Taxing for Growth' vs. 'Taxing for Equality' - Using Human Rights to Combat Gender Inequalities, Poverty and income Inequalities in Fiscal Laws' in Philip G Alston & Nikki R Reisch (eds), *Tax, Inequality, and Human Rights* (OUP, 2019) 430.

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ Sepúlveda (n 3) para 46, 47.

¹³¹ PWC (n 14).

¹³² CESCR (n 66) para 16.

¹³³ Alston (n 58).

¹³⁴ PWC (n 14).

by CESCR in General Comment 3. A State must avoid ‘deliberately retrogressive measures’ in the fulfilment of the human rights protected by the Covenant, unless they can be ‘fully justified by reference to the totality of rights provided for in the Covenant and in the context of the full use of the maximum available resources’.¹³⁵ There is a strong presumption that such measures are a violation of human rights, and CESCR will consider a number of factors in deciding whether a justification is reasonable, including whether the measures are indirectly or directly discriminatory and whether groups or individuals are deprived of access to a minimum essential level of a protected right.¹³⁶ Other factors include whether there was an independent review of the policy and whether alternatives were considered.¹³⁷ This can explain the criticism by CESCR that South Africa had introduced its change to the VAT rate without a human rights assessment.

Choices around which items are exempt from VAT can make the tax more regressive. For South Africa, it was noted that even with its exemptions to VAT on 19 basic goods, VAT was still applied to other essential items, which would affect low-income households.¹³⁸ In Spain, it was noted that some VAT deductions, including on hotel rooms, only benefit the wealthy.¹³⁹ Similarly, in Malawi, items such as bicycles and motorbikes are exempt from VAT despite being unaffordable by most of the population.¹⁴⁰ Arguments have been made that the zero rating of basic goods in South Africa has also unfairly benefited those on higher incomes as they consume higher proportions of even basic goods.¹⁴¹ However, it can be seen that such reductions can be vital to mitigating the effects of a regressive tax. Again, the exact measures that need to be taken will vary from State to State. In the Netherlands, the case study that scores lowest on the scale of inequality, reductions in VAT are applied more widely to all food, but only to the extent of reducing VAT to nine percent rather than zero percent.¹⁴² This has gone without comment from CESCR.

Sepúlveda has also highlighted how VAT can disproportionately affect women. Women on average spend a higher proportion of their income on basic goods ‘because of gender norms

¹³⁵ CESCR (n 5) para 9.

¹³⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Article. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, para 42.

¹³⁷ *ibid.*

¹³⁸ CESCR (n 66).

¹³⁹ Alston (n 58).

¹⁴⁰ Tax Justice Network & Christian Aid (n 118), 46.

¹⁴¹ Davis Tax Committee, ‘Final Report on VAT for the Minister of Finance’ (2018) <www.taxcom.org.za/docs/20180329%20Final%20DTC%20VAT%20Report%20to%20the%20Minister.pdf> accessed 20 March 2020 para 4.2.

¹⁴² The Netherlands Government, ‘VAT Rates and Exemptions’ (2020) <business.gov.nl/regulation/vat-rates-exemptions/> accessed 30 March 2020.

that assign them responsibility for the care of dependents'.¹⁴³ States have obligations under the CEDAW Convention to eliminate substantive discrimination against women, including through legislation and the actions of public authorities.¹⁴⁴ The Beijing Plan for Action calls on States to analyse tax policies from a gender perspective and adjust them to promote greater equality.¹⁴⁵ The CEDAW committee has referred to both the Beijing Plan of Action and the use of VAT in its periodic State reviews.¹⁴⁶ For example, in relation to Barbados, it was found that the 'regressive Value Added Tax... [has] disproportionately affected women'.¹⁴⁷ Again, certain exemptions to VAT can limit its gender inequality. A study in South Africa has shown that the zero rate on 19 basic goods disproportionately benefits 'female-type' households: those headed by women, or where women are in the majority, or only women work.¹⁴⁸ It found that indirect taxes can promote gender equality because of the higher taxes on goods, such as alcohol, most consumed by the other household types, but there is no suggestion that this is more effective at promoting equality than other types of taxes such as income tax.

It has been shown that income tax and VAT policies can affect human rights. There are no specific economic policies that can be recommended to all States, as each economy is different, but when there is a shift towards using VAT and away from a progressive income tax this has been criticised. Good practice would therefore include maintaining a progressive income tax system and avoiding, where possible, increases in VAT. Any increases in VAT should be shown to be necessary, and a human rights assessment should be carried out. Conversely, an over-reliance on VAT for revenue raising can be regarded as bad practice, as can income tax systems that tend towards a flat tax or do not have sufficient thresholds to protect the lowest earners.

¹⁴³ Sepúlveda (n 3) para 46.

¹⁴⁴ CEDAW (n 11) article 2.

¹⁴⁵ UN Women Watch, 'Report of the Fourth World Conference on Women' (1995) <www.un.org/womenwatch/confer/beijing/reports/plateng.htm> accessed 25 March 2020.

¹⁴⁶ Lahey (n 127) 443.

¹⁴⁷ CESCR, 'Concluding observations on the combined fifth to eighth periodic reports of Barbados' (24 July 2017) UN Doc CEDAW/C/BRB/CO/5-8 para 37.

¹⁴⁸ Daniella Casale, 'Indirect Taxation and Gender Equity: Evidence from SA' 18 (2012) *Feminist Economics* 25.

4. Conclusion

Human rights can be an appropriate framework for assessing tax policies. The framework cannot be used to set economic policy or identify specific tax rates, but it is possible to identify good and bad practices. This memorandum has shown that international human rights law contains key principles that can provide useful guidance on tax policy.

Firstly, there is an obligation on States to not undermine the ability of other States to meet their human rights obligations, and therefore the extraterritorial effects of tax policies should be considered. Secrecy jurisdictions and corporation tax competition would be considered bad practice as both impact on the ability of other States to raise revenue. Tax incentives can also contribute to tax competition but if these incentives are carefully targeted, they can be beneficial to the fulfilment of human rights obligations. Secondly, the principles of equality and non-discrimination found in human rights law can guide policy, with tax systems seen as an important tool to address inequality. A progressive income tax with suitable thresholds would therefore be considered good practice, whereas a less progressive income tax system or an over-reliance on indirect taxation such as VAT would be bad practice. Thirdly, the doctrine of non-retrogression of socioeconomic rights can also be used to assess changes in tax policy. Any changes must not reduce socioeconomic rights below the level that is currently enjoyed. This provides a mechanism to consider each State's particular circumstances by assessing any change to taxation against its own human rights record. Increasing the rate of VAT can be seen as bad practice even if the new rate is below that applied in other States. Finally, there is a requirement to carry out human rights assessments before implementing changes to taxation. This can ensure that human rights considerations are an important part of tax policy.

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Annex

Table of Comments from Human Rights Mechanisms

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| Committee on Economic Social and Cultural Rights | Tax incentives / exemptions <ul style="list-style-type: none">- 'The Committee encourages the State party to strengthen its efforts to promote employment opportunities for young persons, especially those without professional qualification and those living in ZUS areas, through specifically targeted measures, including vocational training, career guidance and tax incentives for companies hiring young persons'. (2008, E/C.12/FRA/CO/3, para 35)- 'The Committee encourages the State party to intensify its efforts to reduce unemployment rates of young persons, persons over 55 years of age and foreign residents by specifically targeted measures, including vocational and reorientation training opportunities, career guidance and tax incentives for companies hiring persons belonging to these target groups'. (2008, E/C.12/BEL/CO/3, para 30)- 'The Committee urges the State party to reduce unemployment through effective measures of active employment such as requalification, local employment initiatives, incentives and tax benefits to employers, including also programmes aimed at reducing unemployment of disadvantaged and marginalized groups, particularly in rural areas'. (2013, E/C.12/ALB/CO/2-3, para 17)- 'The Committee urges the State party to intensify its efforts to reduce the unemployment rate through effective measures of active employment policy, including requalification, local employment initiatives, placement incentives and tax benefits for employers, in order to promote the employment of persons from marginalized groups, in particular in rural areas'. (2014, E/C.12/SRB/CO/2, para 17)- 'The Committee recommends that the State party ensure the effective implementation of existing measures, such as the initiatives introduced in the Budget Bill 2016 aimed at assisting persons with disabilities in obtaining work, and the appointment of a national coordinator to address the situation of young people who are not in education, employment or training. It also calls on the State party to consider adopting other targeted measures to reduce the vulnerability of members of all the above-mentioned groups to unemployment, including the introduction of temporary special measures, and the strengthening of financial incentives for employers, such as tax incentives'. (2016, E/C.12/SWE/CO/6, para 24)- 'The Committee is concerned that tax revenue and social spending are very low in relation to the State party's level of development and that the tax system cannot be used to reduce the high level of inequality because it essentially relies on indirect taxes and provides for many unjustified exemptions'. (2016, E/C.12/DOM/CO/4, para 17) |
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- 'The Committee is concerned about the adverse impact that recent changes to the fiscal policy in the State party, such as the increase in the threshold for the payment of inheritance tax and the increase of the value added tax, as well as the gradual reduction of the tax on corporate incomes, are having on the ability of the State party to address persistent social inequality and to collect sufficient resources to achieve the full realization of economic, social and cultural rights for the benefit of disadvantaged and marginalized individuals and groups'. **(2016, E/C.12/GBR/CO/6, para 16)**
- 'The Committee is concerned about the high degree of social inequality in the State party, which hampers the enjoyment of Covenant rights. It is also concerned to note that certain tax measures, including the reduction of the tax burden for high-income social groups and the maintenance of unwarranted tax exemptions, have reduced the redistributive capacity of the tax system and limited the capacity to collect sufficient resources to guarantee economic, social and cultural rights'. **(2018, E/C.12/ARG/CO/4, para 22)**
- 'The Committee is concerned that the application of tax exemptions and the inadequate prevention of tax fraud are reducing the State party's capacity to meet its obligation to mobilize the maximum of available resources to give full effect to the economic, social and cultural rights of disadvantaged and marginalized groups and individuals'. **(2018, E/C.12/ESP/CO/6, para 15)**
- 'The committee recommends the State - Assessing the effectiveness of tax incentives in place for hiring young people'. **(2018, E/C.12/CPV/CO/1, para 25)**

Tax incentives and discrimination

- 'Moreover, the Committee is concerned that the new package of tax exemptions and other benefits for enterprises where persons with disabilities make up at least 30 per cent of the personnel favours the creation of segregated enterprises'. **(2014, E/C.12/VNM/CO/2-4, para 15)**

Low corporate tax rates

- 'While the Committee appreciates the need to attract foreign direct investment and commends the contribution of the National Corporate Social Responsibility Foundation to the work of non-governmental organizations (NGOs), it is concerned that the low rate of corporate income tax applied in the State party may reduce the public revenues available to finance public policies for the implementation of the Covenant rights. The low rate may also encourage unhealthy regulatory competition in the subregion, which would ultimately make it more difficult for all Governments to mobilize the resources necessary for the fulfilment of the rights in the Covenant'. **(2019, E/C.12/MUS/CO/5, para 13)**

Value added tax

- 'The Committee notes that the recent increase in the value added tax was not preceded by a human rights impact assessment, and although certain items, including 19 basic food items, farming inputs, educational services, and rents were exempted, the Committee remains concerned about the impact of this increase on low-income households'. **(2018, E/C/12/ZAF/CO/1, para 16)**
- 'While noting the progress made in poverty reduction, the Committee is concerned about growing income disparities in the State party and about certain aspects of the State party's tax system, including the very low ratio of tax revenue to gross domestic product, the effects of the value-added tax system on poor households and the low level of tax collection. (The Committee further adds that the State should ensure) that the revised value-added tax system is not applied to basic foodstuffs and social services'. **(2018, E/C.12/BGD/CO/1, para 19/20)**

Flat Tax

- 'The Committee is concerned that the flat-rate tax system, currently applied to both personal and corporate income, contributed to an increase in income and social inequalities in the State party, and may prove inadequate in maximizing the available resources for implementation of the obligations arising from the Covenant and ineffective in addressing tax evasion. The Committee notes that, despite the coercive economic sanctions, the State party was able to maintain the level of public spending to implement its obligations under the Covenant'. **(2017, E/C.12/RUS/CO/6, para 16)**

Tax avoidance

- 'The Committee recommends that the state party: Intensify its efforts to combat illicit financial flows and tax avoidance with a view to raising national revenues and increasing reliance on domestic resources, including by combating trade mispricing with multinational corporations, and seek international cooperation with relevant international organizations, as well as the countries of origin of multinational corporations'. **(2018, E/C/12/ZAF/CO/1, para 17)**

Transparency

- 'The Committee encourages the State party to continue developing a satisfactory, socially fair, tax policy that will boost revenue and make it possible to increase the resources available for the implementation of economic, social and cultural rights. The Committee also recommends that the tax reform and resource allocation planning should be carried out in a transparent and participatory fashion'. **(2014, E/C.12/SLV/CO/3-5 , para 8)**

Progressivity

- 'The Committee is concerned that the reduction in the proportion of budgetary resources allocated for health, education and housing has resulted in retrogression in the effective enjoyment of the rights enshrined in the Covenant,

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| | <p>disproportionately impacting disadvantaged and marginalized individuals and groups. The Committee is also concerned at the increasing recourse to regressive indirect taxes without prior assessment of their potentially severe human rights impacts and careful consideration of more equitable revenue collection alternatives'. (2013, E/C.12/EGY/CO/2-4, para 6)</p> <ul style="list-style-type: none"> - 'The Committee recommends that the State party strengthen its efforts to ensure that its tax policy is effective, progressive and socially just with a view to combating economic inequalities and increasing the availability of resources for the realization of economic, social and cultural rights. The Committee urges the State party to make a determined effort to combat tax evasion and tax fraud. It also recommends that both fiscal policy reforms and budget'. (2016, E/C.12/DOM/CO/4 CESCR, para 18) - 'The Committee is concerned that the fiscal revenues of the State have diminished as a percentage of the gross domestic product (GDP) and that the tax system remains regressive. (para 21) The Committee recommends that the State party make its fiscal system more equitable and significantly increase its fiscal revenues, to make possible a rise in public spending on social services, particularly in the areas of social protection, health and education, in line with its obligation under article 2 (1) of the Covenant to progressively realize the rights contained therein. Any retrogression measures are acceptable under exceptional circumstances of economic hardship, providing, however, that they are temporary, non-discriminatory, proportional and do not affect disadvantaged and marginalized persons and groups'. (2017, E/C.12/LKA/CO/5, para 22) - 'Furthermore, it is concerned that the tax-to-gross domestic product ratio of Pakistan is very low and that the tax regime of the State party, characterized by a limited tax base, a non-progressive tax system and a heavy reliance on indirect taxes, may not be effective in significantly increasing spending on Covenant rights'. (2017, E/C.12/PAK/CO/1, para 15) - 'The Committee notes that the State party has taken the innovative step of incorporating the Sustainable Development Goals into its budget and is making efforts to increase resources and make the tax system more equitable thanks to the 2013 reform of its fiscal policy. However, it is concerned that the impact of these measures has not been sufficiently progressive and that the tax arrears collection rate remains low, which reduces the State party's capacity to fulfil its obligation to mobilize the maximum of its available resources for the realization of economic, social and cultural rights'. (2018, E/C.12/MEX/CO/5-6, para 14) - 'The Committee recommends that the State party adopt a progressive tax policy in order to reduce inequality and ensure greater enjoyment of the Covenant rights, using the maximum available resources'. (2019, E/C.12/ECU/CO/4, para 22) |
| Committee on the Right of the Child | International Cooperation <ul style="list-style-type: none"> - 'States parties shall seek international cooperation if the available resources to realize the rights of children are insufficient. Such cooperation shall take the Convention and its Optional Protocols into account both on the part of the |

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| | <p>recipient and the donor States. The Committee underlines the fact that international and regional cooperation for the realization of children’s rights can include mobilization of resources to targeted programmes, as well as measures relating to taxation, combating tax evasion, debt management, transparency and other issues’. (2016, CRC/C/GC/19, para 75)</p> <p>Transparency</p> <ul style="list-style-type: none"> – ‘The mobilization of resources for public spending on child rights should itself be conducted in a manner that adheres to the budget principles set out in section IV. A lack of transparency in resource mobilization systems can lead to inefficiencies, mismanagement of public finances and corruption. This in turn can lead to insufficient resources being available to spend on the rights of the child. The different tax regimes that do not take into account the ability of families to pay can lead to an inequity in resource mobilization. This can place disproportionate revenue burdens on people with already scarce financial resources, some of whom will be caring for children’. (2016, CRC/C/CG/19, para 76) <p>Discrimination</p> <ul style="list-style-type: none"> – ‘The Committee is concerned at: Economic discrimination directly or indirectly resulting from social transfer schemes and other social/tax benefits, such as the authorization given to provinces and territories to deduct the amount of the child benefit under the National Child Benefit Scheme from the amount of social assistance received by parents on welfare. (2012, CRC/C/CAN/CO/3-4, para 32) – ‘The Committee recommends the State party: Undertake a detailed assessment of the direct or indirect impact of the reduction of social transfer schemes and other social/tax benefit schemes on the standard of living of people depending on social welfare, including the reduction of social welfare benefits linked to the National Child Benefit Scheme, with particular attention to women, children, older persons, persons with disabilities, Aboriginal people, African Canadians and members of other minorities’. (2012, CRC/C/CAN/CO/3-4, para 33. (e)) |
| <p>Committee on the Elimination of all forms of Discrimination Against Women</p> | <p>Tax and women's rights</p> <ul style="list-style-type: none"> - ‘The Committee is concerned about: The system of joint taxation of both members of a married couple or persons living in a civil union, which may discourage the employment of women and have unequal effects on couples depending on the level of their income and the distribution of paid work in the couple; and the variation in the treatment of couples depending on their civil status in tax and social law (para 38 (a)) The Committee recommends that the State party: Revise the tax system and introduce individual taxation of income, at least as an option, and abolish or modify the “family quotient” to make the income tax system gender-neutral rather than a disincentive for participation by women in the labour market; Simplify and harmonize the treatment of couples, whether they are married, in a civil partnership or in a de facto union, in tax law and social law.’ (2016, CEDAW/C/FRA/CO/7-8, para 39 (a) (b)) |

- 'The Committee notes with concern: The prevailing negative stereotypes that mothers active in the labour market are confronted with; an income tax system for couples, depending on the combination of the tax collection categories; and social benefit provisions that may adversely affect the full professional integration in the labour market and the financial autonomy and security of women; (para. 35 (e)), The Committee recommends the State party: Strengthen awareness-raising campaigns to address the prevailing negative stereotypes limiting mothers' integration in the labour market, and review the tax system and social benefit provisions that, depending on the applied combination of the tax collection categories, penalize the full participation of women in employment'. **(2017, CEDAW/CO/7-8 ,para 36 (f))**
- 'The Committee is concerned about: The income tax allowances for families, which lower the tax burden (depending on the chosen tax collection category), but widen the gap in the tax wedge between the first and the second earner, with little overall impact on the labour supply or poverty reduction, thus presenting little incentive for women in a family with children to enter the labour market; **(para 49 (c))**. The Committee recommends the State party: Eliminate income tax allowances for families that lower the tax burden but widen the gap in the tax wedge between the first and the second earner, and introduce incentives to encourage women who live in families to enter the labour market'. **(2017, CEDAW/CO/7-8, para 50 (c))**
- 'The Committee notes the State party's efforts to eliminate discrimination against women in areas of economic life, including the amendment of the Income Tax Act in 2010 to extend eligibility for tax relief to married women. Nevertheless, the Committee is concerned that the State party's financial policies and rules on corporate reporting and taxation may have a negative extraterritorial impact on the ability of other States, in particular those already short of revenue, to mobilize the maximum resources available for the advancement of women's rights in their respective countries'. **(2017, CEDAW/CO/5, para 32)**
- 'The Committee recommends that the State party: In line with the Committee's general recommendation No. 28, undertake independent, participatory and periodic assessments of the extraterritorial effects of its financial and corporate tax policies on women's rights and on substantive equality between women and men, ensuring that the assessments are conducted impartially and that the methodology and findings are communicated to the public'. **(2018, CEDAW/CO/8, para 30)**
- 'The Committee recommends that the State party, in keeping with its extraterritorial obligations, ensure that its financial and tax policies do not negatively affect women's rights and efforts towards substantive equality between women and men'. **(2018, CEDAW/CO/6, para 40)**
- 'It is concerned, however, that the State party's financial secrecy policies, its corporate reporting and taxation practices and its incentives for companies registered in Luxembourg and operating abroad have a severe impact on the ability of other States, in particular those already short of revenue, to mobilize the maximum available resources for the realization of women's rights'. **(2018, CEDAW/CO/6-7, para 15)**

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| | <p>Financial secrecy</p> <ul style="list-style-type: none"> - ‘The Committee... is concerned about: ‘The State party’s financial secrecy policies and rules on corporate reporting and taxation having a potentially negative impact on the ability of other States, in particular those already short of revenue, to mobilize the maximum available resources for the fulfilment of women’s rights’. (2016, CEDAW/C/CHE/CO/4-5, para 40 (c)) - ‘[The Committee is] particularly concerned with regard to the following: The States financial secrecy policies and rules on corporate reporting and taxation having a potentially negative impact on the ability of other States, in particular those already short on revenue, to mobilize the maximum available resources for the fulfilment of women's rights’. (2017, CEDAW/C/BRB/CO/5-8, para 37 (a)) <p>Value added tax</p> <ul style="list-style-type: none"> - ‘Regressive Value Added Tax and National Social Responsibility Tax have disproportionately affected women.’ (2017, CEDAW/C/BRB/CO/5-8 2017, para 37) |
| <p>Inter-American Commission on Human Rights</p> | <p>Tax incentives, tax evasion and avoidance</p> <ul style="list-style-type: none"> - ‘The IACHR considers that, in analyzing the relationship between fiscal policy and poverty, three factors need to be mentioned. First, low levels of revenue collection impair the capacity to reduce social and regional inequalities. Despite the fact that tax revenue is the principal component of the region’s total income, this revenue has been insufficient due to the low tax burden and the regressive profile of some of the most important taxes in these countries – together with numerous tax deductions, exemptions, and legal loopholes, as well as tax evasion, avoidance, and similar practices’. (2017, Report on Poverty and Human Rights in The Americas, para 495) <p>Women’s rights and tax</p> <ul style="list-style-type: none"> - ‘Fiscal policies in the region often suffer from gender biases, both explicit and implicit, that reinforce traditional roles of women in society, creating greater burdens on them, with no reasonable justification for doing so’. (October 2015, Thematic Hearing on tax policy and human rights, Executive Summary, 156th period of sessions of the Inter-American Commission on Human Rights, 2) <p>Transparency</p> <ul style="list-style-type: none"> - ‘Transparency in itself is not sufficient to improve the quality of public spending, however; it is also necessary to improve effective participation of the citizenry, along with other factors that determine adequate distribution of public resources’. |

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| | <p>(October 2015, Thematic Hearing on Tax Policy and Human Rights, Executive Summary, 156th period of sessions of the Inter-American Commission on Human Rights, 2)</p> <ul style="list-style-type: none"> - The IACHR wishes to emphasize that the above-mentioned rights to participation, accountability, transparency, and access to information are fundamental principles fully applicable to fiscal policies (2017, Report on Poverty and Human Rights in The Americas, para 501) <p>Progressivity</p> <ul style="list-style-type: none"> - ‘There have been indications that the existence of regressive tax regimes prevents fiscal policy from playing a greater part in poverty reduction. While tax systems in Latin America apply 9% of distributive improvements, in the OECD the figure is 17% and in the European Union 15%.⁶²³ It is important to note that “the impact of fiscal policy and of regressive tax systems can be seen in the inequalities between social groups, age groups, indigenous, Afro-descendent, and non-indigenous groups, and between inhabitants of rural and urban areas’. (2017, Report on Poverty and Human Rights in The Americas, para 497) |
| <p>African Commission on Human and Peoples Rights</p> | <p>Tax incentives</p> <ul style="list-style-type: none"> - ‘Adopt and implement policies that ensure that members of vulnerable and disadvantaged groups have access to medicines. Appropriate legislation and international trade regulation and cooperation should be utilised towards the establishment of scientifically sound pharmaceutical industries in Africa with particular emphasis on local African production for self-reliance in drug industries. This should include utilising parallel importation and compulsory licensing for medicines where available and applicable, to ensure the availability of drugs and technologies at affordable prices for treatment, care, and prevention of epidemic, endemic, occupational and other diseases including malaria, HIV/AIDS tuberculosis and other infectious diseases. States parties shall also take immediate action to use tax exemption and other incentives to reduce the prices of drugs and all other inputs in health care services for accelerated improvement of the health of individuals and peoples’. (2010, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples rights, para cc) - ‘Ensure that strategies taken to control malaria should include the reduction or waiving of taxes and tariffs for mosquito nets and materials, insecticides, antimalarial drugs and other recommended goods and services that are needed for control strategies; and the allocation of resources required for sustained implementation of planned roll back malaria actions’. (2010, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples rights, para qq) - ‘National plans, policies and systems; Implement housing programmes, including subsidies and tax incentives, to expand housing construction to meet the needs of all categories of the population, particularly low-income families’. |

(2010, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples rights, para e)

Illicit financial flows

- ‘Another specific challenge arising in this context is the possibility of economic exploitation as a result of loss of revenue through illicit financial flows (IFF), which may result from under-reporting of profits, illegal repatriation of earnings, and laws which are too lenient, amongst others. Corruption, money laundering and commercial activities are the three main trajectories through which funds leave Africa illicitly. Secrecy jurisdictions, tax havens and international financial centres further play a major facilitative role in the illicit flow of funds as it provides the means and place to hide funds. Proper banking laws, laws of taxation and company laws, rules on related party transactions and customs regulations are some of the ways in which States can curb IFF. In order to ensure that companies comply with these regulations, there should also be administrative, civil and criminal penalties in place for breach of the applicable fiscal and transparency obligations on companies. In addition, the State can tighten controls over exports’. **(Inter Session Activity Report, (November 2017 – April 2018) of Commissioner Solomon Ayele Dersso, <https://www.achpr.org/sessions/intersession?id=289>, para 48)**
- ‘Deeply concerned that Africa is embroiled in a vicious circle of poverty, malnutrition, diseases and death because its revenue potential is being drained by multinational companies and individuals through exploitation of the loopholes and weaknesses of laws and of the monitoring system’. **(2013, 236 Resolution on Illicit Capital Flight from Africa - ACHPR/Res.236(LIII))**

Transparency

- ‘Areas of concern; The lack of information on the existing legal framework which ensures that multinational corporations are taxed for the activities they have undertaken in the country’. **(2016, Concluding observations and recommendations on the 6th to 8th combined report of the Republic of Mauritius, para 85)**
- ‘The Working Group also noted the need to have a robust regulatory framework to govern the financial aspect of the sector in order to increase transparency and to address illicit financial flow. The need to publicise the revenue generated from industries, the taxes collected, and the royalties paid, was also identified’. **(2019, Communique on the Advocacy Visit of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to the Federal Democratic Republic of Ethiopia, www.achpr.org/pressrelease/detail?id=471)**

Transparency and tax incentives

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| | <ul style="list-style-type: none">- 'While States often adopt financial or tax incentives to increase foreign investment, States should regulate licence fees, national and local taxes, custom duties, royalties and shares so that they are not to the detriment of the people of the country. In addition, there is also a need for transparency in concessionary contracts terms and payments which extractive companies make to the State, so as to ensure that there is no corruption in the allocation of exploration and extraction concessions'. (Inter Session Activity Report, (November 2017 – April 2018) of Commissioner Solomon Ayele Dersso, www.achpr.org/sessions/intersession?id=289, para 46) |
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