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Re-righting the international tax rules: operationalising human rights in the struggle to tax multinational companies

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ABSTRACT
Who finances government, and *how*, is foundational to realising human rights for all, without discrimination. This is especially pertinent during the COVID-19 pandemic, which is only exacerbating health and economic disparities. This article reviews what a national human rights-aligned tax policy would look like, and then dissects how the international tax rules currently impede individual States, and particularly low- and middle- income countries, to bring their national tax policies in line with human rights. The authors then discuss how international human rights law, including the *UN Guiding Principles on Human Rights Impact Assessments of Economic Reforms*, can provide a stronger normative foundation to curb harmful tax competition and help resolve disputes over the right to tax multinational companies. Given the paucity of practical tools to embed human rights norms into the process and substance of reforming international tax policies, the authors then develop a set of assessment questions to help operationalise human rights norms into current efforts to re-write the international tax rules.

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I. Introduction

The COVID-19 shock has brought our global economy to its knees, with millions left without decent work. Governments have tried to respond with massive economic recovery plans, including subsidies to companies, temporary unemployment benefits and cash transfer schemes to cushion the shock. Considerable resources have been mobilised to this effect, leading to a sharp increase in the sovereign debts of States. Yet at the same time, COVID-19 has placed severe stress on many of the traditional ways in which governments raise the revenue sufficient to finance needed public services. In this context, it is more imperative than ever that national fiscal reforms be guided by a human rights framework – that they are progressive rather than regressive, and that they have as an express guiding mission to reduce deepening poverty and the entrenchment of inequalities.

Yet, achieving such a national human rights-aligned tax policy requires an international policy environment that enables individual States, and particularly low- and middle-income countries, to opt for and implement a human rights-aligned tax environment internationally.[1] Such an enabling international environment is one in which polities

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would regain the capacity to make their own collective fiscal choices about the size of the budget and the level of domestic redistribution – two key components of global tax justice. In this article, we explore how international human rights law, including the UN *Guiding Principles on Human Rights Impact Assessments of Economic Reforms* ('*GPs*'),[2] can contribute to build a more solid conception of global tax justice that might serve as a normative foundation to curb harmful tax competition and help resolve disputes over the right to tax cross-border economic activity. This is especially relevant as tax avoidance by multinational companies continues to deprive countries from the revenues they need even more now with the tremendous financing needs to rebuild better after COVID-19.

To that end, we first consider the parameters of a human rights-aligned approach to domestic tax policy (Part II). This framework takes its departure point in the International Covenant on Economic, Social and Cultural Rights, the main international human rights treaty in the area of economic and social rights, in its interpretation by the Committee on Economic, Social and Cultural Rights, as well as the *GPs*. In Part III, we note that economic globalisation, as it has proceeded over the past forty years, has significantly reduced the ability of States to make collective fiscal choices about the size of its budget and the level of domestic redistribution. This is not just a singular problem of poorer countries, but ultimately reduces the ability of all countries to mobilise domestic resources through taxation. To break this vicious cycle, new forms of international cooperation are required. Part IV therefore examines whether general international law, and human rights law in particular, imposes such a duty of international cooperation. Part V presents the current normative approaches to justify the use of the State power to tax multinational companies in an inter-connected, global economy. We introduce some of the pitfalls of these different approaches, and then discuss how invoking the norms and principles embedded in human rights law, including those reflected in the UN *Guiding Principles on Human Rights Impact Assessments of Economic Reforms*, could help resolve some of these normative gaps. Part VI wraps a framework of questions that policy makers and advocates can use for assessing current efforts to rewrite the international tax rules.

II. A national human rights-based tax policy

COVID-19 has put immense pressure on government budgets worldwide. The realisation of human rights – civil, political, economic, social or cultural – depends on various factors, but especially the material means available to fund the policies and programmes to give human rights life. The International Covenant on Economic, Social and Cultural Rights requires that States parties should move 'as expeditiously and effectively as possible towards [the] goal [of the full realization of economic, social and cultural rights]'.[3] This has a number of consequences for the budgetary policies of the States parties. First, the introduction of retrogressive measures is *prima facie* suspect: the Committee considers that such measures, 'would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[4] Any budgetary measure that would lower the level of provision of certain public services, such as in the areas of education, or of water or electricity provision, or that would diminish the right to social security, including the right to an old age pension, are also suspect, since such budgetary choices may have especially severe impacts on women who – in the current division of gender roles that is still dominant in most regions of the world – have traditionally been assuming the burden of caring for infants, children and older persons, as well as stepping in for non-existent or crumbling energy, water or health infrastructure by, for example, fetching firewood or caring for ill family members to meet the household needs.[5] Secondly, when facing resource constraints, the State should demonstrate that it has given priority to the 'satisfaction of, at the very least, minimum essential levels of each of the rights' of the Covenant, which correspond to the core obligations of States under this instrument: the Committee expresses the view that:

> a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[6]

Thirdly, in accordance with the principle of non-discrimination in the enjoyment of Covenant rights[7], priority should be given to improving the situation of groups who have traditionally been disadvantaged.[8] Fourth and finally, although the Covenant on Economic, Social and Cultural Rights itself is silent about such a requirement, the principle of participation is relevant to assessing whether the budgetary choices made by States comply with its prescriptions. For instance, where retrogressive measures are adopted in the area of social security, the Committee considers it relevant to ask whether such measures were taken with the 'genuine participation of affected groups in examining the proposed measures and alternatives',[9] and where a State cannot ensure a minimum level of protection against all risks and contingencies of life, it is recommended that it 'select a core group of social risks and contingencies', based on 'a wide process of consultation'.[10]

These broad principles have immediate and precise consequences for the design and implementation of taxation policies. First, and especially in the COVID-19 recovery, most countries need to expand the tax base in order to ensure that taxation, combined with other sources of public revenue, can fund public policies that support the realisation of economic, social and cultural rights – including access to healthcare, to education and to housing, and to social security. Even low-income countries now have the capacity to mobilise domestic resources to support at least the minimum essential level of all social rights.[11] It has been calculated in 2014 that, if developing countries were to raise even 15 percent of their national income in tax (a rather modest figure, compared to the average of 37 percent in OECD countries), the additional revenue collected ($198 billion per year) would represent more than all foreign development assistance combined.[12] Yet in many developing countries, the tax base remains very low, and does not allow the States concerned to effectively fulfil the rights of the Covenant.[13] Favourable fiscal treatment granted to foreign investors in order to attract capital (despite the weak evidence that such a strategy actually works[14]) further reduces the ability of States to mobilise enough domestic resources to finance economic and social rights.

Secondly, in order to support substantive equality, there is a need to ensure that the tax structure is sufficiently progressive, in order to accelerate the progress towards the eradication of poverty.[15] Whenever tax policy is either insufficient or discriminatory in nature, the CESCR is increasingly presuming non-compliance with the 'maximum available resources' (MAR) clause,.[16] Redistributive fiscal policies and social spending, particularly on social security, have had a major role to play to reduce the levels of inequality that would result from market incomes for different groups of the population. In OECD countries, public cash transfers, together with income taxes and social security contributions, were estimated to reduce inequality among the working-age population (measured by the Gini coefficient) by an average of about one-quarter across OECD countries during the period from the mid-1980s to the late 2000s.[17] A progressive tax system has a key role to play in this regard, since it can both reduce the weight of pre-tax income inequalities and increase the capacity of the State to provide public services to the population. This explains why the Committee on Economic, Social and Cultural Rights has regularly expressed its concern at reforms of the taxation system that would make it less progressive – for instance, by shifting the burden from corporations to the families, or by increasing VAT rates on essential items.[18]

Assessing whether a fiscal system is progressive enough requires looking beyond simply how taxes are raised. It should also examine how the money raised is to be spent. A progressive tax system's impact on the reduction of inequalities is heightened if the revenue from the taxes collected is redistributed through social and economic policies that benefit the poor, rather than being spent on investments that shall only allow the rich to become richer. Unfortunately, many of the initial COVID-19 economic relief packages have done just that.[19] For the effective realisation of economic, social and cultural rights, it is the *combination* of revenue mobilisation and of spending choices that matters,[20] 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,[21] 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.

Moreover, the ability for even a progressive tax system to reduce inequalities depends not only on the contribution of the richest part of the population to public revenue in *percentage* terms, but also on the *absolute* levels of such contributions: if, for example, the richest decile of the population pays 90 per cent of the total income taxes collected in the country, the taxation system may be said to be progressive according to the most common measure of tax progressivity known as the Kakwani index. But if those richest 10 per cent are taxed at very low rates, the redistributive capacity of the taxation remains very limited: such a redistributive capacity is captured by another index, known as the Reynolds-Smolensky index, which measures the difference in income distribution before and after the tax is imposed.[22] One important consequence of this distinction is that a tax reform that may at first appear as regressive because the proportion of the total tax revenue paid by the richest part of the population will decrease (leading, in other terms, to the effort being spread across a larger part of the population), nevertheless may have progressive consequences if the overall tax rates and thus the revenue the State may mobilise are increased and social spending is progressive enough to offset the effect of the higher tax burden across the population, providing domestic resources to invest in human rights.

Of course, the introduction of a progressive taxation scheme could have counter-productive impacts if it resulted in choking the economy and significantly slowing down economic activity, thus, in the medium- to long-term, destroying the very revenue base the State may be able to count on in order to finance human rights-aligned social and economic policies. This however is an argument in favour of, not against, progressive taxation schemes combined with strong redistributive policies. Based on the 'Kuznets curve' showing a positive correlation between the rise of inequality and GDP growth in countries going through a fast industrialisation process, it has sometimes been alleged that the growth of inequality is an inevitable price to pay for economic growth, so that the introduction of policies to combat inequalities, if it occurs too early, might damage the prospects for development.[23] However, quite apart from the fact that the original reasoning of Simon Kuznets, which applied to fast-growing nations going through rapid processes of industrialisation and urbanisation, could not be transposed to advanced industrial economies in which these processes are further along, the ideological uses made of his work does not correspond to the actual findings of Kuznets. Whereas there may have been, historically, a correlation between the structural transformation linked to industrialisation and the increase of inequality, it does not follow that such increase should be treated as a condition for industrialisation. Indeed, one may suspect that industrialisation would have been far less damaging to social cohesion, and thus far more sustainable, if it had included robust redistributive schemes compensating the losers by transferring resources from the gainers. In fact, there is now a consensus that high levels of taxation, allowing the State to adopt robust redistributive policies and provide high-quality public services, far from being an obstacle to economic growth, are an indispensable ingredient thereof: even researchers from the International Monetary Fund (IMF) now refer to the inverse relationship that exists between the income share accruing to the richest part of society and economic growth.[24] Indeed, inequality reduction plays a more important role than growth itself in poverty alleviation: the World Bank notes that a reduction of the Gini index by 1 percent per year would have a larger impact on global poverty than increasing annual growth one percentage point above current forecasts.[25] The importance of fiscal redistribution for the anti-poverty, as well as for the development agenda more broadly, motivated the adoption of the Redistributive Impact of Fiscal Policy indicator by the United Nations Statistical Commission to monitor progress on SDG 10.[26]

Empirically, therefore, there does not seem to be a trade-off between the understandable desire of low-income countries to grow their economy, and the reduction of inequality within these countries by progressive taxation and redistribution schemes: the two are in fact mutually supportive, and should be seen that way.[27] Bold reforms to invest in programmes that realise human rights and curb inequalities, therefore, should be seen as a boon to sustainable and dynamic economic progress.[28]

The adoption of strongly progressive tax and spending programmes should therefore be seen as a condition for the realisation of economic, social and cultural rights especially under COVID-19, and thus as a duty for the States parties to the Covenant on Economic, Social and Cultural Rights.[29] Yet, for many governments, progressive taxation with powerful inequality-reducing impacts may be difficult to achieve. Indirect taxes (such as VAT) are easier to collect, and therefore, despite their regressive impacts (since poor households spend a higher proportion of their incomes on buying consumer goods[30]), they may be the path of least resistance for governments with a weak administrative capacity to collect revenue. Moreover, because capital is more mobile than labour and households, it is tempting to reduce the levels of taxation of capital, particularly by lowering the corporate tax and the person income tax for the highest income earners,[31] and to compensate this by increasing the taxation of wage-earners and households. Finally, fiscal competition between countries is perpetuated by the myth according to which investors can be attracted by lowering the corporate tax base – as if the comparative advantage of countries should consist in restricting their chances to educate a highly-qualified workforce, to maintain well-functioning public services, and to improve the quality of life for those working under their jurisdiction.

Instead of shifting more of the tax burden on to the wealthiest corporations and the richest individuals as both economic common sense and human rights would require, the result of such pressures is that we have fiscal policies which end up taxing wage earners and consumers through VAT and imposing user fees in sectors such as health or education – adversely affecting the accessibility and affordability of key socio-economic rights According to the World Bank, the average total tax rate payable by businesses on their commercial profits decreased from 53.5% to 40.8% between 2005 and 2015.[32] Some countries moved in the opposite direction: Argentina and Chile are examples in Latin America; Malaysia and Niger provide illustrations in Asia and in Africa. In general, however, the trend downwards is massive: for many countries, the reduction of corporate taxes is measured in double digits, and the phenomenon is especially spectacular in the countries classified by the UN as least-developed, where the rate went down on average from 75.4% to 44.7%; if we consider heavily indebted poor countries alone, the decrease is from 81.2% to 52.7%.

In sum, the broad outlines of a human rights-aligned approach to domestic tax policy are apparent, with the task of more effectively taxing multinational companies a priority. Yet, challenges remain, in particular in light of the global constraints to taxing cross-border economic activity and putting an end to corporate tax abuse.

III. Economic globalisation and the policy space for progressive taxation

Whereas we can identify the broad outlines of a human rights-compliant approach to taxation domestically, whether countries are in fact realistically in a position individually to move in this direction remains questionable. The lowering of obstacles to trade and investment across borders, facilitated both by technological advances and by regulatory and policy changes, in addition to the diffusion of consumption styles modelled on those that have colonised the advanced Western economies, had led to the emergence of 'competitive States', whose chief concern is to maintain their competitive advantage in the global economy, in particular by shaping 'business friendly' environments.[33] Economic globalisation has thus narrowed down the policy space States have, a situation this has been further worsened by the failure of the international community to take decisive measures against tax avoidance strategies by transnational corporations – our particular focus in this chapter.[34] This Part examines these different obstacles, in order to identify what forms of international cooperation in the field of taxation would be required to overcome them.

A first obstacle to the adoption of human rights-aligned domestic taxation schemes relate to the provisions protecting foreign investors' rights in bilateral or multilateral trade or investment agreements.[35] Because such investment treaties (or provisions on investors' rights in trade agreements) protect investors from the adoption of regulations that amount to indirect expropriation, situations may arise in which the rights of investors are pitted against those of the individuals or communities whose rights are negatively affected by the investment. Most recently, law firms specialising in the use of investment treaties to sue governments have developed the groundwork to bring arbitration against governments for taking emergency measures to halt the spread of COVID-19 and save lives, with the argument being that these actions constitute indirect expropriation under relevant treaties by impinging on corporate earnings.[36] This is why the Guiding Principles on Business and Human Rights – a particularly authoritative text since they were unanimously welcomed by the Human Rights Council[37] – insist that 'States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts'.[38] In order to avoid the risk that investment treaties result in obstacles to human rights, for instance by chilling a State from adopting certain measures that an investor may seek to challenge as discriminatory or as imposing a disproportionate cost, investment treaties (or investment chapters in free trade agreements) may have to include specific references to the human rights obligations of the host State. Where investment agreements are insufficiently explicit about the right of the State to regulate foreign investors in order to ensure full compliance with the State's human rights obligations, as such obligations may evolve from time to time in the name of progressive realisation, there is a need to ensure that these human rights obligations are fully taken into account in investor-State dispute settlement proceedings.[39] The *GPs* further clarify that:

> host States should enact foreign investment laws in such a way that includes an obligation on investors to undertake human rights impact assessments [...] to enhance[e] the sustainability and development impact of investments in such a way that is beneficial to all stakeholders.[40]

Tax evasion and corporate tax avoidance presents a second layer of obstacles to the adoption of progressive taxation policies which mobilise sufficient resources for human rights. In Latin America for instance, on average 50 per cent of personal and corporate income taxes are either evaded or avoided, with Guatemala topping the league with an evasion rate of 70 per cent.[41] Such practices by corporations and high-net worth individuals represent a huge loss to countries, and they are of particular consequence (as a percentage of their public budgets) in low- and middle-income countries.[42] It has been noted, for instance, that the total financial flows for 1970–2008 represents a sum far in excess of the external debt of all African countries[43]: in other terms, taking into account the broader concept of illicit financial flows, Africa is a net creditor to the world.[44]

World leaders have come to some agreement – on paper at least – that tax abuse is a global priority. The Sustainable Development Goal 16, target 4 call for a significant reduction in illicit financial flows, arguably including corporate tax avoidance.[45] In the Addis Ababa Action Agenda – a major international agreement on financing sustainable development – the Heads of State and Government and High Representatives 'recognize [d] that significant additional domestic public resources, supplemented by international assistance as appropriate, will be critical to realising sustainable development and achieving the sustainable development goals'. They committed to 'enhancing revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax collection',[46] and to broaden the tax base.[47] Governments agreed further 'to assess the impact of their policies on sustainable development,' at least implicitly expressing support for investigating how their national tax systems spill over to undermine the ability of other countries to raise revenue.[48] While not legally binding, these political commitments make clear global concern with tax abuse and recognition of the need to remedy it [or something].

Although the main responsibility in tackling corporate tax avoidance lies with governments, the private sector – banks and other financial institutions – also have a role to play in this regard. The due diligence obligations of corporations in terms of the Guiding Principles on Business and Human Rights[49] – insisting that they put in place 'a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'[50] – compel companies that they take measures to ensure that their clients do not evade their duties to pay taxes in the jurisdictions in which they reside. This interpretation is confirmed by Principle 17 of the Guiding Principles on Business and Human Rights, which provides that human rights due diligence should cover 'adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'.[51] In sum, where and how much multinational companies pay in tax is intimately connected to governments' ability to protect and fulfil human rights, as well as companies' responsibilities to respect human rights.

IV. The role of international cooperation in combating corporate tax avoidance

Domestic efforts to address tax avoidance will only be fully effective if supported by international cooperation. States' extraterritorial human rights obligations, also reflected in the *GPs*, provide a useful framework to better delineate respective duties between countries over cross-border economic activity.[52] Though classic forms of international cooperation have a role to play in this regard, such as 'aid for tax' strategies in which donor governments support tax administrations to strengthen tax collection,[53] these will remain insufficient unless complemented by reforms in the countries which facilitate corporate tax avoidance. This concerns in particular the countries under whose jurisdiction tax havens are currently left unaddressed, or whose financial secrecy or lax corporate tax regulations facilitate tax avoidance. The Committee on Economic, Social and Cultural Rights encouraged in this regard States parties to 'combat abusive tax practices by transnational corporations', in particular by 'combat[ing] transfer pricing practices and deepen[ing] international tax cooperation, and explor[ing] 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'.[54]

The duty of international cooperation, as part of the human rights duties of States, may also play a role. Under international human rights law, State Parties have the obligation to cooperate internationally to realise human rights.[55] This means they must not cause harm beyond their borders, or prevent other States from meeting their human rights obligations.[56] The duty of international cooperation and the extraterritorial obligations have implications on tax issues.[57] This is evident from the work of various UN treaty bodies. For instance, the Committee on Economic, Social and Cultural Rights noted in concluding observations related to the United Kingdom that:

> financial secrecy legislation [allowing its Overseas Territories and Crown Dependencies to prosper as tax havens] and permissive rules on corporate tax are affecting the ability of the State party, as well other States, to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights,

and it recommended that it 'intensify its efforts, in coordination with its Overseas Territories and Crown Dependencies, to address global tax abuse'.[58] The Committee on the Elimination of Discrimination against Women also recommended that Switzerland:

> undertake independent, participatory and periodic impact assessments of the extraterritorial effects of its financial secrecy and corporate tax policies on women's rights and substantive equality, and ensure that such assessments are conducted in an impartial manner with public disclosure of the methodology and finding.[59]

There are signs that governments are finally taking these issues more seriously. As mentioned above, the Addis Ababa Action Agenda explicitly acknowledges the need for enhanced international tax cooperation on these issues.[60]

Yet in the absence of meaningful international cooperation, transnational corporations shall continue to rely on various techniques to reduce their tax liability, depriving States from the revenues they need to finance public services. One favoured technique is profit-shifting, when corporations declare profits in low-tax jurisdictions where they may have no staff or productive activities or only minimal activities, rather than declaring such profits (and paying the corresponding taxes) where their activities take place.[61] Transfer-pricing between different companies of a multinational group allows to achieve such profit-shifting, in ways which are difficult for a judge at domestic level to find illegal. And it plays an increasingly important role in the global economy: intra-group trade is currently estimated to represent 30 per cent of global trade.[62] This is why instruments such as the United Nations Model Double Taxation Convention between Developed and Developing Countries[63] or the OECD Model Tax Convention on Income and on Capital (most recently revised in 2017)[64] encourage countries to adopt the 'arm's length standard', according to which they should prohibit mispricing between different parts of the multinational group, which is deemed to occur where such relations between related enterprises 'differ from those which would be made between independent enterprises'.[65] The Convention on Mutual Administrative Assistance in Tax Matters[66] also provides for various forms of administrative cooperation between States in the assessment and collection of taxes, facilitating the exchange of information and the recovery of foreign tax claims with a view to supporting States' efforts to combat tax avoidance and evasion. Furthermore, on 1 July 2018, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) entered into force, with various anti-abuse provisions and amending a large number of bilateral tax treaties concluded to eliminate double taxation between the parties. These efforts are ongoing: the G20 has identified base erosion and profit shifting (BEPS) as a major concern for tax justice worldwide, and the OECD adopted a 15-point action plan in 2013 in order to address this, to be progressively implemented in the next few years ('OECD/G20 BEPS package').[67] We turn now to these efforts to improve how States can tax multinational corporate activity.

V. What are the current normative justifications grounding States' rights to tax cross-border business activity – and what is missing?[68]

We have argued above how the adoption of strongly progressive taxation schemes is a pre-condition for the realisation of human rights, especially economic, social and cultural rights. Yet, at the same time the current international tax system denies the capacity of countries to implement these sorts of human rights-consistent tax policies, especially when it comes to raising sufficient revenue from the activity of multinational enterprises. This raises a number of key questions. Namely, how can the international community make progress towards enabling individual countries to implement such polices? Article 23 of the International Covenant on Economic, Social and Cultural Rights refers to 'the conclusion of conventions' among the measures that States should take in order to comply with the duties of international assistance and cooperation under the Covenant. And general international law recognises a duty to negotiate in good faith where it is only through negotiation that States can discharge their international obligations and solve situations of conflict.[69] It may therefore be argued that in order to strengthen international cooperation in this area, States have a duty, minimally, to enter into negotiations and to pursue them in good faith – an obligation of means, to be distinguished from the obligation of result to achieve agreement. According to the CESCR, for example,

> the extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant. This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties, as well as to judicial cooperation.[70]

What human rights considerations should individual countries take into account, however, in order to comply with their duty to negotiate in good faith for building such an environment in the ongoing multilateral negotiation processes on international tax matters?

This section attempts to answer these questions by focusing on the problem of how to allocate the right to tax multinational companies between States where multinational companies operate. We focus here on the negotiation process within the OECD's Inclusive Framework on BEPS for reaching a solution on this issue (as well as on other challenges in the field of corporate international taxation arising from the digitalisation of the economy). These deliberations would arguably have more democratic legitimacy if carried out between member states within the UN, where the principle of sovereign equality and one-member, one-vote can be more adequately protected.[71] Yet, we focus on this OECD-led process because it is currently the main locus of negotiation between States to re-shape what is a thoroughly outdated and broken set of international tax rules. We first present the current normative approaches to justify the use of the State power to tax multinational companies in an inter-connected, global economy. We then discuss some of the pitfalls of these different approaches. Finally, we explore how invoking the norms embedded in human rights law, including those captured in the *GPs*, could help resolve some of these normative gaps.

A. Economic nexus and its discontents

Taxation is the act of preserving a portion of economic resources for the use of a polity instead of an individual person or business. Scholars, philosophers and governments justify taxation as necessary to pay for public goods and services, correct market failures, or to distribute economic gains more fairly. Cross-border economic activity – especially carried out by multi-national companies – creates a set of competitive claims between States on the right to tax. While each State is understood to enjoy sovereignty over its power to tax, an individual State's sovereignty is inevitably wrapped up in the sovereignty other States when each attempts to tax the profits and/or value generated by the same company. This is especially so when States seek to avoid double-taxation. So, who has the right to tax a company operating in a variety of countries?

According to Christians,[72] States generally lay their claim for a jurisdiction to tax multinational taxpayers on three different rationales. The first is *national sovereignty*. Under this rationale, States – either as the representative of the 'will of the people' or the ultimate provider of the people – are entitled to absolute authority to rule in tax matters, with the only constraint being other States' sovereignty.[73] Competing claims between sovereign States over the right to tax certain individuals or entities are generally resolved with reference to the 'nationality' of that taxpayer, who is seen as an object of the State rather than an active agent. That is, the nexus between the State and the taxpayer is defined by a *political*, not necessarily the economic, connection.[74] This principle of national sovereignty lends itself to the primary goal of producing public revenue and economic growth for the national government and/or its people, even if that comes at the expense of other governments and other people.

The second justification for taxing cross-border activity relies on *economic nexus*, according to Christians.[75] This rationale for the jurisdiction to tax multinational activity rests not on the basis of a taxpayer's nationality, especially difficult to define in the era of globalisation in which multinational companies operate to great scale and great depth across jurisdictions. Instead of national allegiance, jurisdiction is defined here by the early work of the League of Nations as the taxpayer's 'economic allegiance' with, and within, the state.[76] In making the case for basing tax jurisdictional claims on economic ties instead of political adherence, this rationale argues that economic nexus should be assessed primarily with respect to two factors: the jurisdiction of physical residence by the subject of the tax ('residence'), and the 'origin' of the activity to be taxed ('source').[77] This remains the principal way governments today justify their right to tax international economic flows. This rationale is at the heart of much of current international tax law (e.g. permanent establishment rules) guiding the allocation of taxing rights over multinational companies. While the traditional focus on revenue potential is surely an important consideration, the principle of economic nexus lends itself more seamlessly than the national sovereignty view toward a vision that the primary goal of international taxation to advance worldwide economic efficiency.

A third normative explanation for the jurisdiction to tax multinational companies, according to Christians, is the *membership*, or benefit principle.[78] Tax subjects, according to this justification, are identified neither by their nationality nor by their specific economic relationships, but instead by the degree to which they benefit from the tax and public spending decisions of all country in question. Certain tax-derived benefits – be they infrastructure, an educated and healthy workforce, protection of private property, a stable climate, etc. – are essential economic foundations without which a particular company would not succeed. By implicitly choosing to benefit from these public services, according to this principle, businesses voluntary express their membership in the political community, and accordingly accept their reciprocal tax obligations. While taxing in reference to benefits received might contribute to increased economic equity between States, this approach is not principally guided by a concern for distributive justice: it aims, rather, to ensure better reciprocity between taxpayers and the governments which provide the good and services they need to operate.[79]

Most of modern international tax law (expressed for example in over 3,000 bilateral tax treaties, a multilateral instrument, and some elements of customary international tax law[80]) is normatively based on the economic nexus rationale as a normative foundation for allocating taxing rights between countries. This very much flows from the post-war global political agreement on the superiority of free trade and the belief that commercial barriers between countries should be abolished. More recently, the OECD Base Erosion and Profit Shifting (BEPS) project – which now brings together over 130 countries to adapt the international tax rules to more effectively tax today's multinational companies – rests on the fundamental principle of economic nexus. Much of the heat in these debates rests on how to define economic nexus (for instance, in order to adapt the concept of a permanent establishment to a digital economy), how to allocate between States the taxable economic value companies produce (Pillar I of the BEPS 2.0 debate), and how to ensure companies pay at least a minimum level of tax wherever they operate (Pillar II of the BEPS 2.0 debate).[81] In theory, all States and even most civil society organisations involved in this seminal process agree that companies should be taxed where they produce economic value.[82] Parties engage in intense debates on *how* to define and allocate that value (i.e. arms-length pricing vs. formulary apportionment methods); however, in our reading, next to no one argues for taxing multinationals based on their nationality alone, or in reference to the tax-derived benefits they receive from different governments alone.

From a human rights perspective however, there are at least two factors that urge caution when taking the economic nexus principle as the sole normative foundation undergirding international tax law in the twenty-first century. First, there are serious practical considerations which limit the ability to implement this principle in the real world. In practice, national sovereignty very often prevails,[83] especially where transactions are more complex and subjective. That is, the *de facto* and disproportionate power of some nations to better administer, regulate and enforce their tax prerogatives leads in practice to a disconnect between the *de jure* jurisdiction to tax defined in economic terms on the one hand, and – on the other hand – the actual behaviour adopted by States as a result of their effective power as manifest in superior administrative capacity, economic positioning or geo-political weight. The US role in the OECD negotiations is paramount, for example, even if on the surface they have the same voting rights in the process as other states.

Further widening the gap between law and practice, the largest multinational companies have achieved such effective power that they are able to effectively chose where, when and sometimes whether to pay tax at all.[84] These companies, and their tax advisors, actively seek to take advantage of national differences in tax law, administrative/ enforcement capacity, political will and information in order to boost their own short-term returns.[85] While the nationality principle may have little cogence in international tax law, global companies based in the US or Europe, for example, respond very differently to their home states' strong tax administrations than to those of less powerful countries.[86]

In sum, practical coherence over the implementation of the three principles discussed above is tempered strongly by asymmetries of effective power between States, which have resulted in a set of global tax arrangements biased against the weakest countries. The current international tax regime could be said to be un-governed in many practical respects, embodying in practice the principle of 'might is right'.

Advocates have advanced various proposals to remedy these power imbalances in ways which would ensure multinational companies pay more in tax, and to the right countries.[87] These include efforts to reduce information asymmetries (e.g. public country-by-country reporting requirements),[88] to strengthen the administrative and enforcement capacities of LMICs (e.g. Tax Inspectors Beyond Borders),[89] and to more fairly allocate the right to tax (e.g. by replacing the subjective arms-length principle with a formulary apportionment model).[90] Unfortunately, even if these were all implemented equitably across countries, we would still be faced with a fundamental dilemma at the heart of the basing the right to tax on economic value creation: it inevitably locks low-*income* countries into being low-*tax* countries. How is that?

Today's global economy rests on a stark division of labour between richer on the one hand, and poorer countries on the other. High-income countries on the whole capture the highest value-added portions of a company's value chain (such as research, intellectual property, design, branding, marketing, sales and service) while poorer countries contribute lower value-added parts of the value chain (including the provision of raw materials and low-wage manufacturing).[91] Without enhancing the value of the economic activities these countries are involved in, simply assigning these countries' taxation rights as a function of how much value they add to the economic chain will put them in a consistently inferior position with regard to the revenue they can mobilise. Investigating one particular case study of the UK-based global telecom giant Vodafone, researchers have found that using a more objective formula to apportion taxable profits between countries ('formulary apportionment') based on sales, assets and payroll – all oft-used indicators of economic value – are valuable, but not necessarily transformative in providing more material benefit to lower-income countries.[92]

B. Elaborating on the membership principle, and remaining gaps in the normative justifications governing States' rights to tax

If economic nexus then is a flawed normative principle, what can come in its place? Though increasingly hinted at by nationalist politicians, reverting back to a company's supposed nationality to justify the right to tax fundamentally global companies arguably poses more problems than solutions—especially when most of the most profitable global companies are based in already-wealthy places like the US and the European Union. So, how might the membership principle work in practice to define which countries can tax multinational companies?

The membership principle – complemented by efforts to constrain harmful real tax competition – provides an useful alternative which could harmonise relevant national tax policies, and without having to transfer core tax decisions from national States to the global level. According to Dietsch and Rixen, along with the generalisation of the membership principle, a constraint on fiscal policy – enforced by a possible International Tax Organization – that rules out fiscal arrangements which can be shown to be based on strategic intent, can help to restore States' capacity to tax multinationals according to polities' will without fears that their tax base will be eroded by other States' policies.[93] This would require assessing whether the country would have pursued the same corporate tax policy in the absence of the resulting capital inflows.[94] This would go a long way towards avoiding the collectively sub-optimal outcomes that might otherwise result from undermining effective control that other States have over their main fiscal decisions – thus reducing the aggregate extent of fiscal self-determination.

However, establishing a social and international order in which States can enjoy *de facto* sovereignty to achieve the aims of their people is not sufficient to establish the needed enabling environment for the realisation of human rights. The jurisdictional proposals outlined above must be complemented by more substantive principles if this is to be achieved. As Dietsch and Rixen recognised:

> A world in which the two principles are respected is not yet a just world. It is merely a world that guarantees international background justice in one important way: national polities would regain the capacity to make collective fiscal choices about the size of the budget and the level of domestic redistribution. In other words, the principles ensure that the costs of fiscal choices fall on those who make them, at least to the extent that this can be achieved under conditions of fiscal interdependence. However, the two principles will have to be complemented by substantive principles of global tax justice.[95]

So, what are these more substantive principles of global tax justice? To the extent that countries respect both their own constitutional principles and their international human rights obligations analysed in part II, there are multiple valid conceptions on what an ideal tax system should be. In each country, different actors advance their visions of tax justice within an institutional framework to settle a collective agreement on the issue. There are places, such as Sweden, that provide more social services to citizens, but in turn also 'charge' more in terms of taxes. There are others, like the United Kingdom, where voters seem to prefer a leaner set of services and hence pay less. As long as democratic choice is constrained at the national level, different fiscal settlements, with different levels of required tax revenue, will differ by country. Democracies have this right to decide, as long as these decisions are in line with the obligation to international cooperation, including the duty to respect other countries' right to take different approaches.

Thus, a normative proposal on the right to tax based on substantive grounds cannot simply assume – or worse impose – a universal recipe for a just form of public finance. International rules must respect the plurality of national collective fiscal settlements as they emerge over time. How can international regimes define legitimate limits to state tax prerogatives based on substantive principles, while at the same time respecting both self-determination and pluralism?

We argue that justifying a State's right to tax can benefit from broadly accepted and universal meta-agreements on particular political values. International human rights law is the closest version of such a meta-agreement for building a sort of conditionality on justice grounds to self-determination and pluralism. These rules of justice do not prescribe a specific new rationale for a State's right to tax. Yet, as shown in the next section, these substantive and procedural principles provide complementary criteria to assess how better to empower States and their people to make global companies pay their 'fair share'.

VI. Human rights norms and questions to assess the adequacy and impact of international tax rules

As argued elsewhere,[96] relevant international human rights norms – as usefully distilled in the UN *Guiding Principles on Human Rights Impact Assessments of Economic Reforms*[97] and the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights – are a potentially powerful foundation upon which to ground international taxation. As shown above with regard to the United Kingdom and Switzerland, various human rights treaty bodies, including the UN Committee on Economic, Social and Cultural Rights, are currently using these principles to hold States parties accountable for the overseas impact of their tax policies, including in how these affect human rights outside their own borders. Human rights norms compel States to conduct assessments to evaluate and address any foreseeable effects of their tax policies.[98] Injecting human rights principles into the analysis will not address all the existing gaps in terms of normative failures of the current international tax architecture. Yet, using widely-accepted human rights norms can help arrive at the right questions to ask when developing proposals to allocate tax rights between jurisdictions or tackle tax avoidance,questions that might form the basis of a human rights impact assessment of proposals to re-write the international tax rules.[99]

For our purposes, international human rights law can be defined as socio-political claims founded on the inherent dignity of people, and the resulting foundational obligations of government to uphold human dignity. These claims have increasingly been codified in national, regional and international law through an extensive process of negotiation and interpretation within and between countries. Over time, a significant body of law and jurisprudence as emerged which provides a coherent set of principles. In this sense, a first added value of embedding human rights into the normative debates on the right to tax cross-border economic activity is that it provides a strong set of binding norms protecting important human freedoms as substantive values. This collective set of global agreements can thus help to define the legitimate limits to State's tax prerogatives based on substantive principles, while also respecting States' self-determination and pluralism. International human rights law is a sort of meta-agreement between States that can provide a basis for important substantive and procedural principles of global tax justice, described below.

Second, international human rights law disrupts the traditional understanding that international law and international relations be based on inter-state relationships, in which the primary tension is between States, and that any resulting duties and obligations be owed from one State to another. Under this 'billiard-ball' conception of international relations, it was unthinkable that international law should concern itself with protecting the interests of an individual or a community against its own government.[100] Yet, what was once inconceivable has started to change as human rights treaties – which expressly protect inherent dignity of people as their primary objective – have gained widespread adoption.[101] Human rights law, in other words, has arguably re-framed the concept of legitimate State sovereignty to strengthen the self-determination of 'peoples' as enjoying equal moral, if not yet equal legal, value.[102] A State's legitimacy to enact public policies, including tax policies, depends upon its realisation of the human rights of individuals and communities.[103] In this sense, human rights norms are valuable to the global tax debate in that they are flexible enough to both include global requirements of justice that take seriously the moral value of each person as a rights-holder regardless of the polity he/she pertains, while also respecting the internationalist approach concerned with protecting the right to self-determination of particular polities to define their own fiscal future within the boundaries of respecting human dignity.

The non-exhaustive table below sketches out some of the implications of substantive and procedural principles of human rights for assessing efforts to rewrite the rules around international corporate taxation. For each, a human rights framework poses questions which might be fruitfully used to assess the impacts of the current debate on creating fairer rules to tax cross-border economic activity.

Relevant human rights norm/ obligation	Implications on international matters on corporate taxation	Questions to assess adequacy and impacts of international tax rules
Obligation to *respect* human rights beyond borders	Requires countries to avoid conduct that has foreseeable risks of impairing the enjoyment of human rights by persons beyond their borders.[104]	Are reforms to current rules effective for making real progress in the fight against tax avoidance?
	Governments must collaborate with – and not undermine – other governments' efforts to mobilise the maximum of available resources for human rights and sustainable development.[105] By corollary, government laws and policies which have the effect of enabling corporate tax avoidance clearly work against the achievement of human rights goals.	Are reforms effective to curb harmful tax competition?
	Consideration of the spill-over effects[106] of such laws and policies must therefore be central to determining whether states, international institutions and large business actors are meeting their human rights and sustainable development responsibilities	Do reforms effectively prevent the negative spillover effects of some countries upon others, especially lower income countries?
Obligation to *protect* against third-party abuses of human rights overseas	'States Parties should 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 realise the Covenant rights, for instance by resorting to tax evasion or tax avoidance strategies in the countries concerned.'[107]	Are reforms to current rules effective in preventing revenue losses stemming from corporate tax avoidance, particularly in low- and middle-income countries?
	'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'.[108]	Are reforms effective for making real progress on combatting base erosion and profit-shifting and eliminating loopholes that allow multi-national not paying their fair share?
	'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	

(*Continued*)

Continued.

Relevant human rights norm/ obligation	Implications on international matters on corporate taxation	Questions to assess adequacy and impacts of international tax rules
	domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States Parties to the Covenant.'[109] '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'[110]	
Obligation to support the universal *fulfilment* of economic and social rights	States are also obligated under the Covenant to cooperate internationally to mobilise the maximum available resources to fulfil economic, social, and cultural rights[111]—including in matters of taxation so critical to the creation of an enabling environment for the realisation of these rights.[112]	Are States complying with their duty to negotiate in good faith in the relevant multilateral fora on tax matters for creating an international environment that enables the universal fulfilment of human rights?
Substantive human rights obligations: - Minimum core - Non-discrimination - Progressive realisation using the maximum available resources (MAR)	Duty of each State acting, commensurate with its capacities, resources and influence, in accordance with the principle of common but differentiated responsibilities and respective capabilities, to improve the system of international taxation, according priority to countries which are struggling to meet the minimum essential levels of economic and social rights.[113]	Do the economic and revenue impacts of international tax rules exacerbate economic, gender, or other inequalities within a given country?
	'States must not only use existing resources to fulfil this obligation [of mobilising the maximum available resources for the progressive enjoyment of rights] but also generate potential resources in a sustainable way when the former are not sufficient to ensure the realisation of rights. This requires, for example, seeking international assistance and cooperation, mobilising domestic resources in ways compatible with environmental sustainability and with the rights of people affected by extractive industries, as well as regulating the financial sector.'[114]	Do international tax rules exacerbate inequalities between countries, for example in their respective abilities to raise corporate tax revenue? Do proposals foster substantive equality between countries in their rights and capacity to tax multinationals?
	'States' obligation to mobilise resources includes: tackling tax evasion and avoidance; ensuring a progressive tax system, including by widening the tax base with regard to multinational corporations and the richest; avoiding international tax competition; improving the efficiency of tax collection; and reprioritizing expenditures to ensure, among other things, adequate funding of public services.'[115]	Do reforms to international tax rules empower countries to strengthen equitable tax collection for progressive realisation of human rights and to prevent austerity measures? Is tax administration capacity a priority?
Procedural principles: transparency, participation, accountability (TAP Principles), and self-determination	States 'must observe international human rights standards, including the right to self-determination and the right to participate in decision-making, as well	Are LMICs empowered to using their voice and collective leverage in international tax forums to be able to capture more of their right to tax?

(*Continued*)

Continued.

Relevant human rights norm/ obligation	Implications on international matters on corporate taxation	Questions to assess adequacy and impacts of international tax rules
	as the principles of non-discrimination and equality, including gender equality, transparency, and accountability'.[116] Human rights law protects the right to self-determination of peoples as a core element of most treaties and instruments. Therefore, the interest to protect and circumscribe the fiscal prerogatives of the state in order to allow national polities regain the capacity to make collective fiscal choices about the size of the budget and the level of domestic redistribution is perfectly compatible, and even required, by the right to self-determination. 'Genuine participation can only be possible if Governments provide timely, comprehensive and accessible information on all aspects of public finance, including budgets and macroeconomic performance. Governments should also provide adequate justifications of policy choices to the population in general, and specifically to those most likely to be affected by the reform'.[117]	Do LMICs have the ability and capacity to participate on equal footing in the spaces where negotiations on international tax matters are taking place? Are all issues on the agenda for discussion, especially topics particularly critical for LMICs (e.g. revising the nexus rules to capture digital companies with very little sales but huge numbers of users in certain, unitary taxation vs arm-length principle, or the duty of HICs to assist developing countries in improving tax administration). Is participation of all countries involved must genuine and meaningful as members with the same rights of voice and vote? Do all stakeholders have all the information they need to make informed decisions?

This table shows that the *GPs*, and the international human rights framework more broadly, offers important content to a background conception of global tax justice. A just global tax system is not only one in which polities regain the capacity to make collective fiscal choices about the size of the budget and the level of domestic redistribution, whatever they may be. It is also one that enables individual States to fulfil their human rights obligations. To that end, it is critical that any global tax cooperation effort must be transparent, participatory and accountable, especially to those most affected. Importantly, one must consider both the position of LMICs, as well as those people most affected by lower tax revenues, to participate in the elaboration and implementation of the rules.

These requirements of a human-rights based conception of global tax justice are particularly important in the context the COVID-19 pandemic. A massive investment of resources are needed to tackle the impacts of the crisis, particularly within the LMICs that are already under-resourced and may well suffer the worst consequences.[118] Tax policy is an essential tool for aiding governments in dealing with the COVID-19 crisis. Yet this requires adapting tax rules to ensure sufficient policy space.[119] Some have begun to talk about the need for a 'new deal' on international taxation.[120] What should this 'new deal' look like if it took human rights obligations seriously?

A new deal for tax would need to focus on issues relevant to LMICs such as bringing back to the table the G24 proposal to tax on a formulary basis according to 'Significant Economic Presence',[121] expansion and protection of source taxation, adoption of anti-abuse provisions that effectively prevent the shifting of profits from these countries,[122] improving tax collection from resource extraction,[123] enhancing capacities of revenue authorities, strengthening tax and financial transparency to effectively respond to the challenges raised by illicit financial flows, internalising costs associated with social and environmental risks within profit allocation rules,[124] among others.[125] In order to respond to the pandemic in a way which ensures shared sacrifices and prevents certain companies from expanding their market power during a pandemic, the proposal of a COVID-19 Excess Profits Tax is also a promising option to not only raise revenue but also to level the playing field, curb corporate consolidation and restore a sense of public trust in institutions.[126]

Finally, the determination of whether a State complies or not with normative criteria of tax justice when adopting policies that can harm others States' fiscal prerogatives, eroding their capacities to fulfil human rights, requires a dual plank. First, empirical assessments are indeed essential, since it has to be based on technical tools that allow to demonstrate that the State are causing a restriction on fiscal sovereignty. Yet, a normative assessment is also necessary to help weigh trade-offs based upon a common set of standards and principles. A process of public reasoning should then develop between State parties and a monitoring body on tax issues. The experience of the implementation of the *GPs*, as well as the work of the Committee on Economic, Social and Cultural Rights and other monitoring bodies combining normative standards about the content of the duties of States in the area of economic, social and cultural rights and technical information and methodologies that help evaluate the compliance those standards could work as a model.

VII. Concluding remarks

This article demonstrated the need to rewrite the currently outdated and broken rules on how countries tax multinational companies as a condition for creating an enabling environment for implementing human rights-based tax policies at domestic level, particularly in LMICs. In order to understand on what grounds those reforms can be considered just, we argued for expanding the understanding of global tax justice as a situation in which polities regain the capacity to make collective fiscal choices about the size of the budget and the level of domestic redistribution to one in which States also operate in an enabling environment to fulfil their human rights obligations.

T.S. Adams, the key figure in fashioning U.S. international tax law and the League of Nations Model Treaty in the period from 1918 to 1928, once said:

> [M]odern taxation or tax making in its most characteristic aspect is a group contest in which powerful interests vigorously endeavor to rid themselves of present or proposed tax burdens. It is, first of all, a hard game in which he who trusts wholly to economics, reason and justice will in the end retire beaten and disillusioned. Class politics is the essence of taxation.[127]

While it is essential to get the normative foundations right, politics and influence of elite tax professionals trump normative considerations in most interactions.[128] Ultimately there is a need for champions in governments and key international institutions on tax governance – where the influence of human rights norms remains very limited. This article has suggested that if human rights are to have a say in the shaping of global tax rules, then there is an urgent need to bring the value-added of human rights norms, and the types of impact assessments the *GPs* push for, into the spaces where global tax governance is played out and to embed a defence of a rights-based order into the hard game of international political economy.

Notes

1. In the past few years, the Committee on Economic, Social and Cultural Rights (CESCR) has consistently recommended State Parties to take the measures needed to ensure that its tax policy is socially just. See CESCR, Concluding observations: Paraguay, 20 March 2015, E/C.12/PRY/CO/4, para. 10; CESCR, Concluding observations: Spain, 25 April 2018, E/C.12/ESP/CO/6, para. 16.b; CESCR, Concluding observations: Burundi, 15 Oct 2015, E/C.12/BDI/CO/1, para. 1(4).
2. Juan Pablo Bohoslavsky, *Guiding Principles on Human Rights Impact Assessments of Economic Reforms: Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations on the Full Enjoyment of Human Rights, Particularly Economic, Social and Cultural Rights*, Report to the Human Rights Council. UN. Doc. A/HRC/40/57 (19 December 2018).
3. General Comment No. 3 (1990): The nature of States parties' obligations (E/1991/3), Annex III, UN ESCOR, Supp. (No. 3) (1991), at 83, para. 9.
4. Id. See also General Comment No. 19 (2007): The right to social security (art. 9) (E/C.12/GC/19), para. 42; and the Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights (noting that, in order to comply with the Covenant, austerity measures or adjustment programmes, as have been adopted by a number of States to face the financial and economic crisis after 2009, must be 'necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights').
5. See Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the sixty-eighth session of the General Assembly, A/68/293 (9 August 2013).
6. General Comment No. 3 (1990): The nature of States parties' obligations (E/1991/3), para. 10.
7. See art. 2(2) of the International Covenant on Economic, Social and Cultural Rights and Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) (E/C.12/GC/20) (2009).
8. General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), cited above note 7, para. 8. In his Letter of 16 May 2012 to the States parties to the Covenant on austerity measures, the Chairperson of the Committee emphasized that fiscal consolidation policies 'must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected'.
9. General Comment No. 19 (2007): The right to social security (E/C.12/GC/19), para. 42.
10. Id., para. 59.
11. This results from the significant growth that almost all developing countries, including low-income countries, have witnessed during the past decade. Comp. Martin Ravallion, 'Do Poorer Countries have less Capacity for Redistribution?', Policy Research Working Paper 5046 (Washington DC: World Bank, 2009) with Chris Hoy and Andy Sumner, 'Gasoline, Guns and Giveaways: Is there New Capacity for Redistribution to End Three Quarters of Global Poverty?', CGD Working Paper 433 (Washington, DC: Center for Global Development, 2016).
12. Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (A/HRC/26/28) (22 May 2014), para. 56 (citing ActionAid, *Accounting for Poverty: How international tax rules keep people poor*, 2009), 5).

13. See for instance Report of the Special Rapporteur on the right to food to the thirteenth session of the Human Rights Council, Addendum: Mission to Guatemala (3-5 September 2009), A/13/33/Add.4, para. 87. In Latin American countries for instance, the personal income tax generates only 1.4 percent of GDP, in comparison to 8.4 percent of GDP in developed countries (Ana Corbacho, Vicente Frebes Cibils and Eduardo Lora, eds, *More than Revenue: Taxation as a Development Tool* (Inter-American Development Bank and Palgrave Macmillan, 2013), at 115. This discrepancy, as a measure of the degree of progressivity of the tax system (i.e., of its ability to reduce inequalities) is hardly attenuated by taking into account the proportion the personal income tax represented in the total tax burden: in OECD countries, the total tax burden represents 34.8 per cent of the GDP, and it is 23.4 per cent in Latin America. Therefore, the personal income tax represents about one quarter of the tax burden in OECD countries, but only 5.98 per cent of the tax burden in Latin American countries.
14. For a more systematic treatment, see Olivier De Schutter, Johan F. Swinnen and Jan Wouters, 'Introduction: Foreign Direct Investment and Human Development', in *Foreign Direct Investment and Human Development. The Law and Economics of International Investment Agreements*, ed. O. De Schutter et al. (Routledge: London and New York, 2012), 1–24. See also Ana Teresa Tavares-Lehmann et al., eds., *Rethinking Investment Incentives: Trends and Policy Options* (New York: CUP, 2016); Maria R. Andersen, Benjamin R. Kett and Erik von Uexkull, 'Corporate tax incentives and FDI in developing countries' in World Bank, Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications (Washington DC: World Bank, 2018); Hania Kronfol and Victor Steenbergen, 'Evaluating the costs and benefits of corporate tax incentives: Methodological approaches and policy considerations', FCI In Focus, World Bank, 2020; World Bank, *Results of Investor Motivation Survey Conducted in the EAC (East African Community)*, presentation made to the Tax Compact in Lusaka, Zambia (Global Tax Simplification Team, 2013), cited in OECD, *Development Co-Operation Report 2014. Mobilising Resources for Sustainable Development* (Paris: OECD Publishing, 2014), at 151 (according to which 'A large majority of investors covered by investor motivation surveys of the World Bank's Investment Climate Advisory claim that in the majority of cases (for instance over 90% in Rwanda, Tanzania and Uganda) they would have invested even if incentives were not provided').
15. Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (A/HRC/26/28) (22 May 2014), para. 16; Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, to the 29th session of the Human Rights Council (A/HRC/29/31) (26 May 2015), para. 53.
16. For this and other unfavorable presumptions on States' actions regarding the MAR clause that are part of the 'emerging doctrine' of the CESCR, see Rodrigo Uprimny, Sergio Chaparro Hernández, and Andrés Castro Araújo, 'Bridging the Gap: The Evolving Doctrine on ESCR and "Maximum Available Resources"', in *The Future of Economic and Social Rights*, ed. K. Young (Cambridge Univ. Press, 2019), 624–53.
17. Organisation for Economic Co-operation and Development, *Divided we Stand: Why Inequality Keeps Rising* (Paris: OECD, 2011).
18. See, e.g., Committee on Economic, Social and Cultural Rights, Concluding Observations: The United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6 (14 July 2016), para. 16.
19. Jack Kelly, 'Loans Intended For Small Businesses To Retain Workers Were Hijacked By Large Corporations And The Rich', Forbes (July 7, 2020), https://www.forbes.com/sites/jackkelly/2020/07/07/loans-intended-for-small-businesses-to-retain-workers-were-hijacked-by-large-corporations-and-the-rich/#3f15d9dc316d
20. See, e.g., Committee on the Rights of the Child, General comment No. 19 (2016) on public budgeting for the realization of children's rights, CRC/C/GC/19, 20 July 2016; Olivier De Schutter, *The Rights-Based Welfare State: Public Budgets and Economic and Social Rights* (Geneva: Friedrich-Ebert-Stiftung Geneva Office, November 2018).

21. See, e.g., Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the thirteenth session of the Human Rights Council, Addendum: Mission to Brazil (12-18 October 2009) (A/HRC/13/33/Add.6), para. 36: 'The tax structure in Brazil remains highly regressive. Tax rates are high for goods and services and low for income and property, bringing about very inequitable outcomes. […] [W]hile the social programmes developed under the 'Zero Hunger' strategy are impressive in scope, they are essentially funded by the very persons whom they seek to benefit, as the regressive system of taxation seriously limits the redistributive impact of the programmes. Only by introducing a tax reform that would reverse the current situation could Brazil claim to be seeking to realize the right to adequate food by taking steps to the maximum of its available resources'.
22. The Kakwani and the Reynolds-Smolensky indexes appeared simultaneously in the economic literature : see Nanak C. Kakwani, 'Measurement of Tax Progressivity: An International Comparison', *The Economic Journal* 87, no. 345 (1977): 71–80; and Morgan O. Reynolds and Eugene Smolensky, *Public Expenditures, Taxes and the Distribution of Income: The United States, 1950, 1961, 1970* (New York: Academic Press, 1977). For a general presentation, see Jonathan Haughton and Shahidur Khandker, *Handbook on Inequality and Poverty* (Washington, DC: World Bank, 2009) (chap. 15: 'The Effects of Taxation and Spending on Inequality and Poverty'). The reliance on these measures has been criticized on the ground that they fail to take into account the changes in revenue that may result from the introduction of tax reforms: see Santiago Díaz de Sarralde, Carlos Garcimartín and Jesús Ruiz-Huerta, 'The paradox of progressivity in low-tax countries: income tax in Guatemala', *CEPAL Review* no. 102 (Dec. 2010): 85–99.
23. See Simon Kuznets, 'Economic Growth and Income Inequality', *American Economic Review* 45 (March 1955): 1–28.
24. See IMF Staff Discussion Note, *Causes and Consequences of Income Inequality: A Global Perspective* (Era Dabla-Norris, Kalpana Kochhar, Nujin Suphaphiphat, Frantisek Ricka, Evridiki Tsounta), June 2015, 7; and see also Jonathan D. Ostry, Andrew Berg and Charalambos G. Tsangarides, 'Redistribution, Inequality and Growth', IMF Staff Discussion Note, February 2014 (Washington, DC: International Monetary Fund, 2014).
25. Christoph Lakner, et al., 'How Much Does Reducing Inequality Matter for Global Poverty', World Bank Working Paper 8869 (2019), 14.
26. Nora Lustig, Chiara Mariotti, Carolina Sánchez-Páramo, 'The redistributive impact of fiscal policy indicator: A new global standard for assessing government effectiveness in tackling inequality within the SDG framework', World Bank Blogs (June 11, 2020), https://blogs.worldbank.org/opendata/redistributive-impact-fiscal-policy-indicator-new-global-standard-assessing-government
27. In today's economic debate, the value of economic growth in and of itself is being challenged by several approaches, including de-growth, steady-state and circular economy theories. However, it is worth noting that champions of this approach as Jason Hickel talk about de-growth as a planned downscaling of excess energy and resource use in high-income nations to bring the economy back into balance with the living world, in a way that delivers justice, equality, democracy and human flourishing (Jason Hickel, *Less is More: How Degrowth Will Save the World* (London: Penguin Random House, August 2020)). See also, on how poverty reduction and the fight against inequalities can gain from the transformation towards a low-carbon economy that sees redistribution rather than economic growth as its priority, 'The "just transition" in the economic recovery', Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, to the seventy-fifth session of the General Assembly (A/75/181) (20 July 2020).
28. On the normative, conceptual and empirical links between economic inequality and human rights, see Rodrigo Uprimny Yepes and Sergio Chaparro Hernández, 'Inequality, Human Rights, and Social Rights: Tensions and Complementarities', *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 10, no. 3 (2019): 376–94.

29. Center for Economic and Social Rights (CESR),. 'Progressive Tax Measures to Realize Rights', Recovering Rights Series, No, 2 (2020), https://www.cesr.org/sites/default/files/Brief%203%20Progressive%20Tax_.pdf
30. Diane Elson, Radhika Balakrishnan and James Heintz, 'Public Finance, Maximum Available Resources and Human Rights', in *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, ed. Aoife Nolan, R. O'Connell and Colin Harvey (Oxford: Hart Publishing, 2013), 13–39, at 28; and in the same volume, Ignacio Saiz, 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective', 77–104, at 84. It is important to note, however, that although VAT taxes are regressive when calculations are made on income (the poorest households contribute more as a proportion of their income), this regressivity either disappears or is significantly attenuated when calculated on the basis of consumption (that is, the higher levels of consumption of the rich and the high VAT rates on luxury items that are only affordable to the rich, leads to a situation in which the rich contribute more to the revenues collected through VAT than the poor). See Corbacho et al., *More than Revenue: Taxation as a development tool*, cited above (note 13), at 167–168.
31. International Monetary Fund Policy Paper, *Fiscal Policy and Income Inequality*, Jan. 2014, 37 (estimating that top personal income taxes were lowered by about 30% on average since 1980).
32. This is a non-weighted average: small economies count as much as large ones in the calculation of the average. The total tax rate, for the purpose of this calculation, is the 'amount of taxes and mandatory contributions payable by businesses after accounting for allowable deductions and exemptions as a share of commercial profits'. For more details, see http://data.worldbank.org/indicator/IC.TAX.TOTL.CP.ZS?end=2015&start=2005&view=chart (last consulted on September 9th, 2016). Some countries have lowered corporate taxes faster than others: during this ten-year period, Albania lowered corporate taxes from 58.2% to 36.5%, Belarus from 137.3% to 51.8%, and Uzbekistan from 96.7% to 41.1%; Canada went from 47.5% to 21.1%, and Paraguay from 54.5% to 35.0%. Turkey moved from 52.8% to 40.9%.
33. On this notion, see Joachim Hirsch, *Der nationale Wettbewerbsstaat: Staat, Demokratie und Politik im globalen Kapitalismus (The Competitive National State: State, Democracy and Politics in Global Capitalism)* (Berlin and Amsterdam: Edition ID-Archiv, 1995).
34. On how failures in international tax cooperation exacerbate the challenges of Latin American States to build sufficient and more progressive tax systems to meet their needs, see Juan Pablo Jiménez, Jose Antonio Ocampo, Andrea Podestá y Maria Fernanda Valdés 'Explorando sinergias entre la cooperación tributaria internacional y los desafíos tributarios latinoamericanos', Friedrich Ebert Stiftung (February 2020), Bogotá, Colombia, http://library.fes.de/pdf-files/bueros/kolumbien/16021.pdf
35. See, for instance, Ryan Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization', in *Transnational Corporations and Human Rights*, ed. O. De Schutter (Oxford and Portland, Oregon: Hart Publ., 2006), 73–160. For an empirical review collecting evidence from 113 developing countries from 1981 to 2009, concluding that investors' rights routinely may impede measures related to the realization of human rights in the host country, see Cristina Bodea and Fangjin Ye, 'Investor Rights versus Human Rights: Do Bilateral Investment Treaties Tilt the Scale?', *British Journal of Political Science* 50, no. 3 (2020): 955–77.
36. See for example, Corporate Europe Observatory, 'Cashing in on the pandemic: how lawyers are preparing to sue states over COVID-19 response measures', May 2020, https://corporateeurope.org/en/2020/05/cashing-pandemic-how-lawyers-are-preparing-sue-states-over-covid-19-response-measures
37. HRC Res. 17/4 (16 June 2011). For an assessment of the influence of the Guiding Principles on Business and Human Rights, see Michael K. Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights', *Human Rights Law Review* 14, no. 1 (March 2014): 133–47.

38. A/HRC/17/31, Principle 9.
39. See Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 13 (encouraging States parties to 'insert a provision explicitly referring to their human rights obligations in future [trade or investment agreements], and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements').
40. Para. 14(4).
41. Ana Corbacho, et al., eds., *More than Revenue: Taxation as a development tool*, cited above (note 13), at 121 (fig. 7.4.). These estimates are based on data from the period 2003-2010, with different years for the different countries (for Guatemala for instance, the reference year in 2006). They should therefore be treated with caution as a source of cross-country comparisons. They do provide, however, an idea of the magnitude of the problem.
42. For a useful assessment, see OECD, *Development Co-Operation Report 2014. Mobilising Resources for Sustainable Development,* cited above (note 14), chapter II.13.
43. Dev Kar and Devon Cartwright-Smith, *Illicit Financial Flows from Africa: Hidden Resource for Development* (Washington DC: Global Financial Integrity, 2010).
44. This was also the conclusion reached by Ndikumana, Léonce and James K. Boyce, *New Estimates of Capital Flight from Sub-Saharan African Countries: Linkages with External Borrowing and Policy Options* (University of Massachusetts, Amherst, April 2008).
45. See e.g. Alex Cobham, 'The significance and subversion of SDG 16.4Multinational tax avoidance as IFF', Tax Justice Network, 2017, https://www.un.org/esa/ffd/ffdforum/wp-content/uploads/sites/3/2017/05/ED1-Cobham.pdf
46. Outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015, para. 22.
47. Id.
48. Id., para. 103. For more detail on these tax spillover assessments, see N. Lusiani and M. Cosgrove, 'A Strange Alchemy: Embedding human rights into tax policy spillover assessments', in *Tax, Inequality and Human Rights*, ed. P. Alston and N. Reisch (Oxford University Press, 2019).
49. A/HRC/17/4 (and, for the text of the Guiding Principles on Business and Human Rights, A/HRC/17/31). On the due diligence component of the responsibility to respect human rights, see Olivier De Schutter, Anita Ramasastry, Mark Taylor and Robert Thompson, *Human Rights Due Diligence: The Role of States* (International Corporate Accountability Roundtable, European Coalition for Corporate Justice and Canadian Network on Corporate Accountability, 2012). See also, Office of the High Commisioner for Human Rights, 'Corporate human rights due diligence – identifying and leveraging emerging practice', https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx
50. See, for a more detailed description of what this entails, Principle 17 of the Guiding Principles on Business and Human Rights.
51. See, for a more detailed description, Principle 13 of the Guiding Principles on Business and Human Rights. See also Inter-American Commission on Human Rights (IACHR), 'Business and Human Rights: Inter-American Standards' (Spanish version only). OEA/Ser.L/V/II. CIDH/REDESCA/INF.1/19, para. 254-267.
52. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights seek to bring together the rather disparate contributions from judicial and non-judicial bodies to this fast-developing area of human rights law, http://www.icj.org/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf. They were endorsed on 28 September 2011 by a range of non-governmental organisations and human rights experts, including mandate-holders within the Special Procedures established by the Human Rights Council. See Olivier De Schutter, et al., 'Commentary to

the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', *Human Rights Quarterly* 34 (2012): 1084–171.

53. See in this regard OECD, *Tax and Development: Aid Modalities for Strengthening Tax Systems* (Paris: OECD Publishing, 2013).
54. CESCR, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24, 10 August 2017), para. 37.
55. Universal Declaration of Human Rights (1948), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), arts, 22 and 28; Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945; International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966) (999 UNTS 171), article 2(1); International Covenant on Economic, Social and Cultural Rights, UN Doc. A/6316 (1966) (993 UNTS 3), article 2(1).
56. Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, cited above (note 51).
57. See CESR., 'Governments' Obligation to Cooperate Internationally to Realize Human Rights'. Recovering Rights Series, No, 3 (2020), https://www.cesr.org/sites/default/files/Issue%20Brief%202__.pdf
58. Committee on Economic, Social and Cultural Rights, Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (E/C.12/GBR/CO/6, 14 July 2016), paras 16-17.
59. Committee on the Elimination of Discrimination against Women, Concluding Observations on the combined fourth and fifth reports of Switzerland (CEDAW/C/CHE/CO/4-5) (18 November 2016), para. 41. See also recommendations in Juan Pablo Bohoslavsky, 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, on his visit to Switzerland, UN Doc. A/HRC/37/54/Add.3, para. 92 (March, 2018), https://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/37/54/Add.3
60. Outcome document, cited above (note 45), para. 27.
61. Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky (A/HRC/31/61) (15 January 2016), para. 18.
62. *United Nations Practical Manual on Transfer Pricing for Developing Countries*, UN Department of Economic and Social Affairs (ST/ESA/347) (New York: United Nations, 2013), para. 1.1.3. Estimates of the volume of intra-group trade (trade between different enterprises related to a same multinational group) are however notoriously difficult to arrive at: see Rainer Lanz and Sébastien Miroudot, 'Intra-Firm Trade: Patterns, Determinants and Policy Implications', *OECD Trade Policy Papers* No. 114 (Paris: OECD Publishing, 2011).
63. The United Nations Model Double Taxation Convention between Developed and Developing Countries was initially adopted in 1980, and revised subsequently in 1999 and in 2011.
64. See http://www.oecd.org/ctp/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm (last consuleted on 20 July 2020).
65. Id., article 7 ('Business profits').
66. Initially the result of a joint effort of the OECD and the Council of Europe in 1988, the convention was amended in order to allow for the participation of developing countries. The new text was opened for signature on 1 June 2011 and now covers 109 jurisdictions (including 15 jurisdictions covered by extension).
67. OECD, *Development Co-Operation Report 2014. Mobilising Resources for Sustainable Development*, cited above (note 14), at 167-176.
68. Section V is partially based, and further developed, in an article pending publication by the Center for Economic and Social Rights.

69. International Court of Justice, *Fisheries Jurisdiction Case*, 1974 I.C.J., p. 31 (negotiations are required between Iceland and Great Britain who both have legitimate fishing rights in certain maritime areas); International Court of Justice, *Case concerning the Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, judgment of 1 October 2018, paras 86-87. See also M.A. Rogoff, 'The Obligation to Negotiate in International Law: Rules and Realities', *Michigan Journal of International Law* 16 (1994): 141–85; and Olivier De Schutter, 'A Duty to Negotiate in Good Faith as Part of the Duty to Cooperate to Establish "An International Legal Order in which Human Rights can be Fully Realized": the New Frontier of the Right to Development', *Cridho Working papers series* 2018/5.
70. CESCR, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24, 10 August 2017), para. 29.
71. Independent Commission on the Reform of International Corporate Taxation (ICRICT), 'BEPS 2.0. What the OECD BEPS has achieved and what real reform should look like', 14–15 (Jan. 2019), https://www.icrict.com/press-release/2019/1/17/icrict-is-launching-a-new-paper-the-fight-against-tax-avoidance-beps-20-what-the-oecd-beps-has-achieved-and-what-real-reform-should-look-like
72. Allison Christians. 'Human rights at the borders of tax sovereignty.' Available at SSRN 2924925 (2017).
73. Allison Christians. 'Human rights at the borders of tax sovereignty.', p. 3-11.
74. Ibid., 3–11.
75. Ibid., 11–16.
76. See Gijsbert W. J. Bruins, Luigi Einaudi, Edwin R. A. Seligman, and Sir Josiah Stamp, 'Report on double taxation' (5 April 1923).
77. Id., at 22-26.
78. Allison Christians. 'Human rights at the borders of tax sovereignty.', pp.16-19.
79. Allison Christians. 'Human rights at the borders of tax sovereignty.', p. 16-19; See also P. Dietsch and T. Rixen, 'Tax competition and global background justice', *Journal of Political Philosophy* 22, no. 2 (2014): 150–77.
80. See R.S. Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime* (Cambridge Univ. Press, 2009).
81. See ICRICT, 'Submission to OECD's 'Unified Approach' under Pillar 1 proposal', (Nov. 2019), https://www.icrict.com/icrict-documents-submission-to-oecds-unified-approach-under-pillar-1-proposal; ICRICT, 'ICRICT response to the OECD Consultation on Global Anti-Base Erosion Proposal ('GloBE') - Pillar Two', (December 2019), https://www.icrict.com/icrict-documents-icrict-response-to-the-oecd-consultation-on-global-anti-base-erosion-proposal; Oxfam, 'Policy Note: In support of a comprehensive tax reform to stop corporate tax dodging and limit tax competition', https://www.oxfamnovib.nl/Redactie/Downloads/Rapporten/Oxfam%20Policy%20Note%20BEPS%202.0.pdf
82. See the full list of submissions to the first round of public consultations, at https://www.oecd.org/tax/beps/public-comments-received-on-the-possible-solutions-to-the-tax-challenges-of-digitalisation.htm
83. As just one example, the basic ability to merely identify those companies subject to tax in any given jurisdiction is very unevenly distributed between States given the practical obstacles many poorer governments face when seeking to understand the taxable presence of companies in their jurisdiction, leading many advocates to call for a public registry of country-by-country tax and financial information of large multinationals. For various other examples, see A. Christians, Human Rights at the Borders of Tax Sovereignty
84. Kimberly Clausing, Emmanuel Saez and Gabriel Zucman., 'Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals' (2020), http://gabriel-zucman.eu/files/CSZ2020.pdf.
85. See e.g. Rasmus Christensen, (2020) Elite Professionals in Transnational Tax Governance, *Global Networks*. DOI: 10.1111/glob.12269; (2019) The New Politics of Global Tax

Governance: Taking Stock a Decade After the Financial Crisis (with Martin Hearson), *Review of International Political Economy* 26, no. (5). DOI: 10.1080/09692290.2019.1625802
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88. Andres Knobel, 'ABCs of tax transparency', Tax Justice Network (Dec. 2018), https://www.taxjustice.net/tag/abc-of-tax-transparency/
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90. ICRICT, 'BEPS 2.0. What the OECD BEPS has achieved and what real reform should look like', 14–15 (Jan. 2019), https://www.icrict.com/press-release/2019/1/17/icrict-is-launching-a-new-paper-the-fight-against-tax-avoidance-beps-20-what-the-oecd-beps-has-achieved-and-what-real-reform-should-look-like
91. Christians, 'Taxing According to Value Creation', 90 *Tax Notes International* 1379–1383 (June 18, 2018), 6
92. Tommaso Fitzgerald & Valpy Faccio, 'Sharing the Corporate Tax Base: Equitable Taxing of Multinationals and the Choice of Formulary Apportionment', *Transnat. Corporations* 25, no. 2 (2018): 67–90.
93. P. Dietsch and T. Rixen, 'Tax competition and global background justice', *Journal of Political Philosophy* 22, no. 2 (2014): 150–77.
94. Id., 36.
95. Id.
96. CESR, ACIJ, Dejusticia, CELS, Fundar, INESC, RJFALC. 'Commentaries to the OECD call for public input on the tax challenges of digitalisation, and possible solutions', March 6, 2019, https://www.cesr.org/sites/default/files/OECD%20March%202019%20-%20EN.pdf, see also Int'l Bar Ass'n, *Tax Abuses, Poverty and Human Rights* (Oct. 2013), http://www.ibanet.org/Tax_Abuses_Poverty_and_Human_Rights_Report.aspx
97. Juan Pablo Bohoslavsky, *Guiding Principles*.
98. Juan Pablo Bohoslavsky, *Guiding Principles*, Principle 3.
99. For more on how human rights norms can be leveraged to carry out impact assessments of the international spillovers of domestic corporate tax reforms, see Lusiani, Nicholas and Cosgrove, Mary, 'A Strange Alchemy: Embedding Human Rights in Tax Policy Spillover Assessments' (July 23, 2017), https://doi.org/10.2139/ssrn.3218597
100. See Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (1962), 19-2, as discussed in Anne-Marie Slaughter, 'International Law in a World of Liberal States', *European Journal of International Law* 6 no. 3 (1995): 503–38, https://doi.org/10.1093/oxfordjournals.ejil.a035934
101. Damrosch, Henkin, Pugh, Schachter, Smit, eds., *International Law: Cases and Materials*, 4th edition, Chapt. 8.
102. Cosmopolitan human rights theories have explored the prospects of this idea. See for example, W. Moka-Mubelo, 'A Cosmopolitan Human Rights Regime', in: *Reconciling Law and Morality in Human Rights Discourse. Philosophy and Politics. Critical Explorations*, vol 3. Springer (2017). For an understanding of indigenous peoples' right to self-determination as opposed to State-centered visions of sovereignty, see José Martinez Cobo, Study of the Problem against Indigenous Populations, vol. v, Conclusions, Proposals and Recommendations, UN Doc E/CN 4/ Sub 2 1986/7, Add 4, para. 379–381.

103. The conception of human rights as one of the overarching aims around which other States' actions should be aligned with is stated in article 103 the UN Charter 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement [including human rights obligations], their obligations under the present Charter shall prevail'. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, https://www.refworld.org/docid/3ae6b3930.html (accessed July 23, 2020)
104. See *GPs*, Principles 13 and 14; see also Guiding Principles on Extreme Poverty and Human Rights, Human Rights Council resolution 21/11 (2012) para. 92.
105. See *GPs*, Principle 9; see also Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, cited above (note 51), Principle 29.
106. The IMF, OECD, UN and World Bank have already recommended that 'spillover analyses' of tax policies should be conducted by developed countries. See IMF, OECD, UN and World Bank, 'Supporting the development of more effective tax systems, Report to the G20 Development Working Group', 2011, http://www.imf.org/external/np/g20/pdf/110311.pdf. An IMF paper is forthcoming on the subject, but is limited to economic spillovers, not human rights impacts.
107. Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (E/C.12/GBR/CO/6, 14 July 2016), paras 16-17; CEDAW Concluding Observations on the combined fourth and fifth reports of Switzerland (CEDAW/C/CHE/CO/4-5) (18 November 2016), para. 41.
108. See Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017), cited above (note 69), para. 37.
109. Ibid.
110. Ibid.
111. *See* Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, cited above (note 51), Principle 29.
112. *See* Special Rapporteur on Extreme Poverty and Human Rights, *Report of the Special Rapporteur on extreme poverty and human rights,* U.N. Doc. A/HRC/26/28, ¶¶ 29–32 (May 22, 2014) (by Magdalena Sepúlveda Carmona) (discussing why 'providing an avenue for high-net-worth individuals and transnational corporations to evade tax liabilities (such as through the establishment of tax havens) could be contrary to obligations of international assistance and cooperation' under the ICESCR and other international human rights treaties); *see also* Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, *Advance Edited Version: Final Study on Illicit Financial Flows, Human Rights and the 2030 Agenda for Sustainable Development*, ¶ 43, U.N. Doc. No. A/HRC/31/61 (2016) (by Juan Pablo Bohoslavsky).
113. The principle of common but differentiated responsibilities first enshrined in the 1992 Rio Declaration helps to underscore both the universality of the tax cooperation agenda for achieving the SDGs, as well as the need for differentiation of responsibilities for its realization. Universality is not legitimate or effective without clear differentiation of responsibilities based on varying and diverse degrees of national capacity, resources, levels of development and effective influence. Based on this differentiation, developed countries have far greater responsibility on tax cooperation matters. Human rights legal obligations of an extraterritorial nature help to delineate common but differentiated obligations across sustainable development in all of its dimensions, including tax cooperation. See CESR and Third World Network. 'Universal Rights, differentiated responsibilities. Safeguarding human rights beyond borders to achieve the Sustainable Development Goals'. Human Rights Policy Briefing, 2015. For the importation of the principle of common but differentiated responsibilities and respective capabilities to international human rights law, see O. De Schutter, *The international dimensions of the right to development: a fresh start towards improving accountability. Report prepared at the request of the United Nations Working Group on the Right to Development* (UN doc. A/HRC/WG.2/19/CRP.1) (2018), paras 47–52.

114. Juan Pablo Bohoslavsky, *Guiding Principles*, para. 9(4).
115. Juan Pablo Bohoslavsky, *Guiding Principles*, para. 9(5).
116. Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, cited above (note 51), Principle 32.
117. Juan Pablo Bohoslavsky, *Guiding Principles*, para. 19.
118. See Initiative for Human Rights Principles and Guidelines in Fiscal Policy, 'A Comprehensive Response to COVID-19 Demands Redistributive Fiscal Policies', April 23th, 2020, https://derechosypoliticafiscal.org/en/news/13-a-comprehensive-response-to-covid-19-demands-redistributive-fiscal-policies
119. OECD 'Tax and Fiscal Policy in Response to the Coronavirus Crisis: Strengthening Confidence and Resilience', May 2020, https://read.oecd-ilibrary.org/view/?ref=128_128575-o6raktc0aa&title=Tax-and-Fiscal-Policy-in-Response-to-the-Coronavirus-Crisis. See also, IMF, 'Tax Issues: An Overview', Fiscal Affairs Department. Special Series on Fiscal Policies to Respond to COVID-19, May 2020, https://drive.google.com/file/d/1b2z_HSJXCX7bqsFQz8Av6e7ufYUaoTp5/view
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