TAXING FOR THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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ABSTRACT

Taxation allows States to mobilize resources in order to invest in health, education, housing, social protection, electricity and water provision, or transport infrastructure, all of which are indispensable for the enjoyment of the rights of the Covenant. It also allows States to redistribute wealth from the richest parts of the population to the poorest. Finally, the shaping of taxation policies are central to democratic self-determination, and therefore may have to take into account the human rights principles of participation and accountability. For all these reasons, taxation policies are essential for the realization of economic, social and cultural rights, and they may be said to be human rights policies.

This paper seeks to define the normative framework that could guide the assessment by the Committee on Economic, Social and Cultural Rights of the tax policies of the States parties to the Covenant. It argues that four key norms could be taken into consideration in this regard. First, there is a 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 realization of economic, social and cultural rights -- including access to healthcare, to education and to housing, but also to social security. Second, in order to speed up the reduction of poverty, to ensure effective enjoyment of economic and social rights for each individual, tax policies should be sufficiently progressive -- but there are different ways of defining and assessing this requirement of progressivity. Third, there is a need to step up efforts to combat tax evasion. Fourth, finally, the requirements of participation and of democratic accountability should be strengthened in the area of taxation. These components of a human rights-compliant tax policy are reviewed in turn, and the implications of each are discussed.

1. Introduction

The International Covenant on Economic, Social and Cultural Rights commits the States parties to "take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means*, including particularly the adoption of legislative measures".[1] This "progressive realization" clause is typically seen as a weakness -- as an indication that economic, social and cultural rights are still undervalued in the international human rights regime in comparison to the more "classical" civil and political rights. But it can also be seen as a strength. With this provision, how States mobilize resources and how they define their spending priorities become human rights issues. Such decisions cannot be left to the arbitrary and capricious choices of States : they can and must be subject to a searching inquiry by courts and other bodies in charge of enforcing the Covenant on Economic, Social and Cultural Rights.

Taxation policies are human rights policies.[2] They are so for three reasons. First, taxation allows States to mobilize resources in order to invest in health, education, housing, social protection, electricity and water provision, or transport infrastructure, all of which are indispensable for the enjoyment of the rights of the Covenant, both because of the needs they respond to directly[3] and because these services alleviate the burden that women shoulder. If they did not have the ability to mobilize domestic revenues through taxation, States would have to cut down on the provision of these services, and women would be particularly affected since -- in the current division of gender roles that remains dominant in most regions of the world -- it is still they who take care of the infants, children and the elderly, and fetch the firewood or water to meet the household needs.[4] Second, taxation allows States to redistribute wealth from the richest parts of the population to the poorest. The impacts on the reduction of inequalities and, therefore, on the effective enjoyment of human rights, can therefore be significant. Third, finally, the shaping of taxation policies are central to democratic self-determination. From the perspective of human rights, to which the principles of participation and accountability are central, *how* the decisions were reached in order to mobilize resources and in making spending decisions shall matter as much as *what* decisions were made.

Taxation, of course, is not the only tool at the disposal of States to finance public policies in support of the realization of economic, social and cultural rights, and it is not the only tool through which inequality can be reduced. Indeed, other important sources of domestic revenues include trade tariffs (on imports and on exports), the royalty fees obtained from companies (both domestic and foreign) exploiting natural resources, as well as fees that may be imposed on the users of public services such as schools or hospitals. States may also borrow to finance their policies,[5] and they may obtain resources from the

[1] G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 (Art. 2 (1)) (emphasis added).
[2] 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.
[3] It may be worth recally that the "adequate house", in the view of the Committee on Economic, Social and Cultural Rights, is one that, in particular, ensures access to "safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities" and is "in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities [in particular since] the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households" (General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), para. 8, (b) and (f)).
[4] 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).
[5] Although this may come at the risk of increasing their annual public deficit and, ultimately, their public debt, it may be justified particularly in times of economic downturn and insofar as the debt finances policies that may be seen as investments rather than merely as a stop-gap to meet current expenditures. Rathin Roy and Antoine Heuty (eds), *Fiscal Space: Policy options for financing human development* (Earthscan and UNDP, New York, 2009).

international community in the form of development assistance. The position that taxation occupies in this typology is nevertheless unique: more than any other source of public revenue, it embodies the civic contract between the people and the government, and, since the public pays, it constitutes a strong incentive for greater accountability.

This chapter is an attempt to define the normative framework that could guide the assessment by the Committee on Economic, Social and Cultural Rights of the tax policies of the States parties to the Covenant. It argues that four key norms could be taken into consideration in this regard. First, there is a 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 realization of economic, social and cultural rights -- including access to healthcare, to education and to housing, but also to social security. Second, there is a need to speed up the reduction of poverty, and thus ensure effective enjoyment of economic and social rights for each individual, by ensuring that tax policies are sufficiently progressive. Third, there is a need to step up efforts to combat tax evasion: increasing tax levels without also addressing tax evasion would be like pouring water into a leaking bucket. Fourth, the requirements of participation and of democratic accountability could be strengthened in the area of taxation. These components of a human rights-compliant tax policy are reviewed in turn.

2. Widening the tax base

In 2009, basing himself on data from 2000-2005, Martin Ravallion famously arrived at the conclusion that only by imposing "prohibitive" tax rates (of 60% and above, and often beyond 100%) on the relatively rich (that is, on those whose incomes exceed 13USD per day in 2005 PPP, which corresponds to the level of consumption defining the poverty line in rich countries) would it be possible for low-income countries to effectively end poverty. In other terms: although various other measures might be relied on to reduce poverty in these countries, poverty was considered to be so widespread, and wealth creation so woefully insufficient, that taxation was not a promising way to achieve this objective.[6] The implication was that, for these poor countries, redistribution of wealth was not a substitute for economic growth and international support: before wealth could be redistributed, there needed to be wealth to share.

Ten years have passed, however, during which economic growth has been strong for most of the countries of this group: more recent research, using a methodology very similar to that of Ravallion, has come to the conclusion that "most developing countries [now] have the financial scope to dramatically speed up the end of poverty based on national capacities at the global poverty lines of $1.90 or the $2.50 line".[7] That means an untapped potential. In many countries, particularly developing countries, the tax base is very low, and does not allow the States concerned to mobilize sufficient resources for the fulfilment of the rights of the Covenant.[8] Inter-regional differences are huge in this area: in developed countries, revenue from personal income tax is 8.4 percent of GDP, whereas in Latin American countries for instance, this tax generates only 1.4 percent of GDP.[9] It has been noted that "if all developing countries were able to raise 15 per cent of their national income in tax, a commonly accepted minimum figure (the OECD average is 37 per cent), they could realize at least an additional $198 billion per year,

[6] Martin Ravallion, "Do Poorer Countries have less Capacity for Redistribution?", Policy Research Working Paper 5046 (Washington DC: World Bank, 2009).
[7] 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), at 19.
[8] 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.
[9] 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.

more than all foreign development assistance combined".[10]

A specific area in which action could be taken to widen the tax base in order to fund the realization of social rights is by reducing, or eliminating entirely, favourable fiscal treatment granted to foreign investors in order to attract capital. There is in fact ample evidence that such "tax holidays" or even, more generally, legal protections granted to investors, have little or no impact on the ability of the country to attract investment.[11] The major determinants of foreign direct investment (FDI) are economic factors such as market size and trade openness, as measured by exports and imports in relation to total GDP.[12] For other variables there is less consensus in the literature. In general, the studies find that the political and economic factors such as market size, skilled labor and trade policies are more important for the locational decision of foreign investment than the legal structure for protection of investors' rights and the ability to avoid double taxation by double-taxation treaties.[13] In other terms, if there is one means through which revenues from taxation could increase rather painlessly (and at a relatively low administrative cost), it is by raising the taxes owed by foreign corporations operating in the country, or by closing loopholes, such as price transfer mechanisms, allowing such corporations to escape local taxes, if not entirely, at least to a very large extent.

3. Implementing progressive tax policies

The former Special Rapporteur on extreme poverty and human rights argued that States should be encouraged to "set up a progressive tax system with real redistributive capacity that preserves, and progressively increases, the income of poorer households. [A]ffirmative action measures aimed at assisting the most disadvantaged individuals and groups that have suffered from historical or persistent discrimination, such as well-designed subsidies or tax exemptions, would not be discriminatory. In contrast, a flat tax whereby all people are required to pay an equal proportion of their income would not be conducive in achieving substantive equality, as it limits the redistributive function of taxation".[14] Her successor in the mandate, Philip Alston, emphasized this point further, regretting that we are still far from "recognizing the fact that tax policy is, in many respects, human rights policy", despite the obvious contribution taxation makes to the fulfilment of human rights: "The regressive or progressive nature of a State’s tax structure, and the groups and purposes for which it gives exemptions or deductions, shapes

[10] 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, p. 5).

[11] For a more systematic treatment, see Olivier De Schutter, Johan F. Swinnen and Jan Wouters, 'Introduction: Foreign Direct Investment and Human Development', in O. De Schutter et al. (eds), *Foreign Direct Investment and Human Development. The Law and Economics of International Investment Agreements*, Routledge, London and New York, 2012, pp. 1-24. See also 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* (OECD Publishing, Paris, 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").

[12] A greater emphasis has been placed in recent years on the latter determinant as a result of globalization and the development of global supply chains. Even in this regard, however, the relationship is by no means automatic, as illustrated by the situation of Sub-Saharan African countries that are very open to trade but that nevertheless are generally not able to attract FDI.

[13] The economic empirical literature confirms the suspicion expressed by some in the legal literature (M. Sornarajah, 'State responsibility and bilateral investment treaties', *Journal of World Trade Law*, vol. 20 (1986), pp. 79–98; Jason Webb Jackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence', *Virginia Journal of International Law*, vol. 51 (2011), p. 397): there is weak evidence that the conclusion of investment agreements guaranteeing extensive rights to investors has more than a marginal impact on FDI inflows, and where it does seem to have some effect, it is mostly as a substitute for poor institutional quality, particularly in Sub-Saharan African countries or in transition economies swiftly moving towards open market policies.

[14] 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.

the allocation of income and assets across the population, and thereby affects levels of inequality and human rights enjoyment".[15] It is time that these calls be heeded.

a) Progressivity of taxation as a human rights requirement

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.[16] Few graphs illustrate this contribution of redistributive public policies better than a graph presented by the OECD in 2011, which contrasts the levels of inequality resulting from market incomes alone with the levels of inequality resulting from net incomes, i.e., after taxation and redistribution are taken into account. Combining progressive taxation schemes with subsidies to various forms of social protection, it appears, reduced inequality within the working-age population by about one quarter, on average, in OECD countries, and the impacts are even larger in Nordic countries, in Belgium or in Germany. The following figure illustrates this impact:

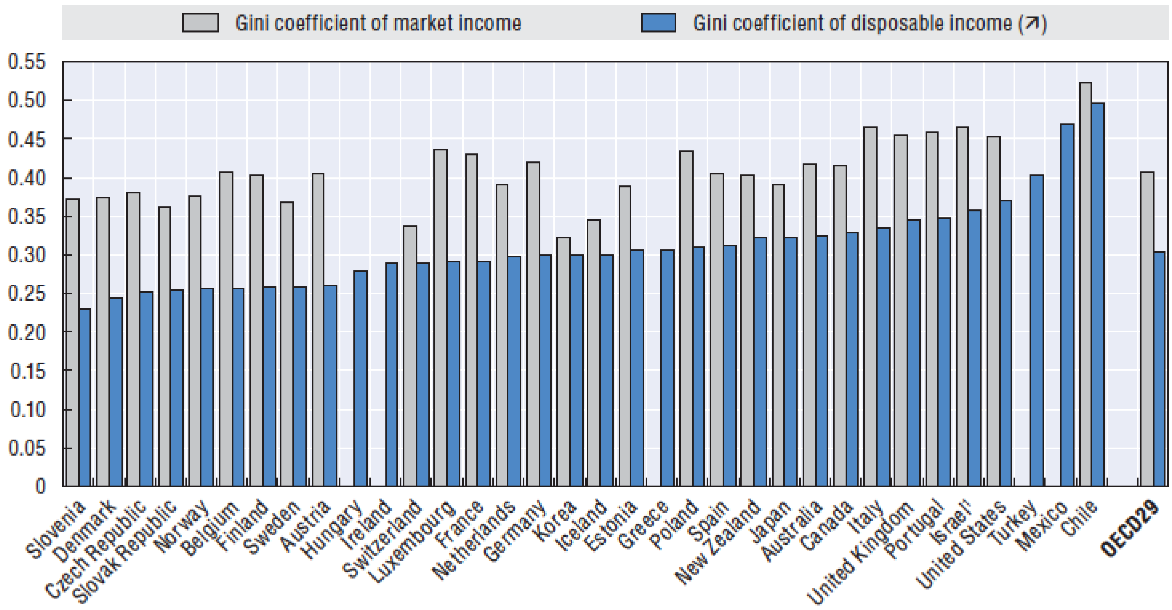

Fig. 1. *Impacts on inequality (measured as Gini-coefficient) of the difference between market incomes and net (disposable) incomes following taxation and social security transfers, OECD countries, late 2000s (data from 2006 to 2009, depending on the data available for each country).*
Source: OECD, Divided we Stand. Why Inequalities Keep Rising (2011), chap. 6, fig. 6.1.

Both by reducing the weight of pre-tax income inequalities and by increasing the fiscal capacity of the State, a progressive tax system has an important role to play in the fulfilment of social rights. The Committee on Economic, Social and Cultural Rights has therefore 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 essentiel items): in Concluding Observations addressed to the United Kingdom, it deplored "the adverse impact that recent changes to

[15] 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] Organisation for Economic Co-operation and Development, *Divided we Stand: Why Inequality Keeps Rising* (OECD, Paris, 2011).

the fiscal policy in the State party, such as the increase in the threshold for the payment of inheritance tax and the increase of the value added tax, as well as the gradual reduction of the tax on corporate incomes, are having on the ability of the State party to address persistent social inequality and to collect sufficient resources to achieve the full realization of economic, social and cultural rights for the benefit of disadvantaged and marginalized individuals and groups".[17]

b) Progressivity properly understood

Three remarks are in order, however. First, it is important to relate progressivity in taxation schemes with the scope and content of the redistributive policies adopted within each country. A progressive tax system only can have an impact on the reduction of inequalities if the revenue from the taxes collected is redistributed through social policies that benefit the poor, rather than being spent on investments that shall only allow the rich to become richer. For the effective realization of economic, social and cultural rights, it is the combination of revenue mobilization and of spending choices that matters, 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,[18] 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.

Secondly, 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.[19] 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, the effort to be 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 mobilize are increased.

Thirdly, 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 its

[17] 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.
[18] 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".
[19] 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*, vol. 87 (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, D.C.: 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*, n° 102 (Dec. 2010), pp. 85-99.

social policies. This however is an area in which the persistence of certain myths often has made a disservice to public debate. One assumption in particular, popularized as the "Kuznets curve", is 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.[20] However, quite apart from the fact that the original reasoning of Simon Kuznets, which applied to fast-growing nations going through rapid processes of industrialization and urbanization, could not be transposed to advanced industrial economies in which these processes are completed, 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 industrialization and the increase of inequality, it does not follow that such increase should be treated as a condition for industrialization -- indeed, one may suspect that industrialization would have been far less damaging to social cohesion, and thus far more sustainable, with robust redistributive schemes compensating the losers by transferring resources from the gainers. Nor indeed, do such ideological uses have any (other) solid data to rely on. Quite to the contrary 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: the International Monetary Fund (IMF) found that "the combined direct and indirect effects of redistribution, including the growth effects of the resulting lower inequality, are on average pro-growth".[21] Indeed, more recent research has generalized findings initially focused on OECD countries, which concluded that the concentration of incomes at the top impeded growth, whereas growth in contrast was stimulated by increasing the portion of total wealth going to the lowest quintile of the population or to the middle class: researchers from the IMF thus found "an inverse relationship between the income share accruing to the rich (top 20 percent) and economic growth":

> If the income share of the top 20 percent increases by 1 percentage point, GDP growth is actually 0.08 percentage point *lower* in the following five years, suggesting that the benefits do not trickle down. Instead, a similar increase in the income share of the bottom 20 percent (the poor) is associated with 0.38 percentage point *higher* growth. This positive relationship between disposable income shares and higher growth continues to hold for the second and third quintiles (the middle class).[22]

There is no tradeoff, therefore, 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.

There are therefore strong reasons to define the adoption of strongly progressive taxation schemes as a condition for the realization of economic, social and cultural rights, and thus as a duty for the States parties to the Covenant on Economic, Social and Cultural Rights. 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[23]), they may be the

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[20] See Simon Kuznets, "Economic Growth and Income Inequality", *American Economic Review* 45 (March 1955): 1–28.

[21] 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. 40, citing Jonathan D. Ostry, Andrew Berg and Charalambos G. Tsangarides, "Redistribution, Inequality and Growth", IMF Staff Discussion Note, February 2014 (International Monetary Fund, Washington, D.C., 2014). See also Andrew Berg and Jonathan D. Ostry, "Inequality and Unsustainable Growth: Two Sides of the Same Coin?", IMF Staff Discussion Note 11/08 (International Monetary Fund, Washington, D.C., 2011).

[22] 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, p. 7.

[23] Diane Elson, Radhika Balakrishnan and James Heintz, "Public Finance, Maximum Available Resources and Human Rights", in Aiofe Nolan, R. O'Connell & Colin Harvey, *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (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

preferred way 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,[24] and to compensate this by increasing the taxation of wage-earners and households.

It has been demonstrated time and again that the levels of taxes paid by corporations plays only a minor role in the decisions of investors concerning the location of their investment.[25] Yet, the myth persists that attracting investors by lowering the corporate tax base is a sustainable strategy, as if the comparative advantage of countries could consist in maintaining them unable 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. Fiscal competition persists. It is stimulated by indicators such as the *Doing Business* ranking of the World Bank, which -- contrary to findings of organisations such as the OECD or IMF -- still suggests that the lowering of corporate taxes is a valid means to attract investment, since countries that reduce tax rates, or raise the threshold for taxable income, or provide for a larger set of exemptions, get approval.

Thus for instance, *Paying Taxes 2017: The Global Picture*, a background study to the Doing Business ranking jointly authored by the World Bank and by PwC, concludes following a review of 190 countries' tax regimes that the Total Tax Rate (the cost of all taxes borne, as a % of commercial profit) decreased by 0.1 % in 2015, to reach 40.6 % -- a result of 38 jurisdictions decreasing taxes, while 44 raised taxes (but doing so to a lesser extent).[26] The World Bank's commentary included in the study acknowledges that "Taxes are important to the proper functioning of an economy. They are the main source of federal, state and local government revenues used to fund health care, education, public transport, unemployment benefits and pensions, among others".[27] Yet, the ranking at least implicitly sends the exact opposite message, as the better ranked countries are those where the costs of doing business go down: among the eleven factors according to which countries are ranked in the most recent edition (the fourteenth of its kind) *Doing Business* report are "payments, time and total tax rate for a firm to comply with all tax regulations as well as post-filing processes".[28] Moreover, the report suggests that the shift from direct taxes (such as those, in particular, on corporate incomes) to indirect taxes are a rather positive trend: "Consumption taxes, primarily in the form of value-added tax, goods and services tax (GST) as well as sales and use tax (SUT), have grown to be a major source of tax revenues for governments across the globe as they begin to appreciate that taxing consumption provides a more certain tax revenue stream

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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 9), at 167-168.

[24] International Monetary Fund Policy Paper, *Fiscal Policy and Income Inequality*, Jan. 2014, p. 37 (estimating that top personal income taxes were lowered by about 30 % on average since 1980).

[25] See the references cited above, note 11.

[26] World Bank and PwC, *Paying Taxes 2017: The Global Picture* (World Bank Group, Washington, D.C., 2017). Rather awkwardly, this total is obtained by including in the calculation of the total tax rate "the sum of all the different taxes and contributions payable after accounting for allowable deductions and exemptions, which fall five categories: "profit or corporate income tax, social contributions and labour taxes paid by the employer (in respect of which all mandatory contributions are included, even if paid to a private entity such as a requited pension fund), property taxes, turnover taxes and other taxes (such as municipal fees and vehicle and fuel taxes)" (id., 91 (in Appendix 1 concerning the methodology). This deviates from standard practice, for instance, from the recommendation so the IMF's Government Financial Statistics Manual, which treat levies for the collection of waste or environmental of contributions to employees' health or pension funds as distinct from general taxes: the methodology followed results in a misleadingly high estimate of the tax burden, which increases the pressure on governments to reduce the costs for businesses in all the areas covered. See Jomo Kwame Sundaram and Anis Chowdhury, *World Bank Must Stop Encouraging Harmful Tax Competition*, IPS (Inter Press Service) News Agency, April 2017, available at: http://www.ipsnews.net/2017/04/world-bank-must-stop-encouraging-harmful-tax-competition/ (last accessed on 30 April 2017).

[27] World Bank and PwC, *Paying Taxes 2017: The Global Picture*, cited above, at 20.

[28] World Bank, *Doing Business 2017. Equal Opportunity for All* (World Bank Group, Washington, D.C., 2017), at 14 (table 2.1.).

than taxing income or profit. Governments worldwide are looking to raise more of their taxes from indirect taxes, which from a business perspective should be more neutral than direct taxes."[29]

The result of such pressures is that we have fiscal policies that, 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, end up taxing wage earners and consumers through VAT and the imposition of users' fees in sectors such as health or education. According to calculations of 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.[30] Although 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), the trend downwards is massive: for many countries, the reduction of corporate taxes is measured in double digits. On average, the total tax rates in the Euro Area countries went from 51.0 % to 43.6 %, a trend corresponding roughly to the tendency in the European Union as a whole. But 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 %.

4. Effectively combating tax evasion and illicit financial flows

The fight against tax evasion is the third channel through which tax policies can be made to contribute better to the realization of economic, social and cultural rights. Tax evasion represents a huge loss to countries, and it is of particular consequence (as a percentage of their public budgets) in low- and middle-income countries.[31] In 2008, Global Financial Integrity estimated that, during the 2002-2006 period, illicit financial flows represented an average of between 859 billion and 1.06 trillion USD on a yearly basis.[32] For Africa alone, a conservative estimate is that illicit financial flows have amounted to a total of 854 billion USD for the period 1970-2008.[33] These outflows have been steadily growing throughout the period at an average rate of 12.1 percent per year (with peaks reached in oil-producing countries such as Nigeria and Soudan linked to increases in the price of oil). The impacts are considerable: by the end of 2008, the same study notes, the cumulative impact of these outflows meant that each African woman, man or child lost 989 USD to illicit financial outflows.[34] In fact, the total financial flows for 1970-2008 represents a sum far in excess of the external debt of all African countries (279 billion USD in 2008): in other terms, taking into account illicit financial flows, Africa is a net creditor to the world, and by tackling such illicit financial flows, about 600 billion USD could have been mobilized for the fight against poverty on the continent.[35] 60 to 65 percent of the total illicit financial flows come from commercial tax evasion, which results from overpricing imports and underpricing exports on customs documents, and thereby illegally transferring money abroad. Alhough the situation in Africa is particularly troubling, the continent is not alone in this regard. For instance, according to the

[29] World Bank and PwC, *Paying Taxes 2017: The Global Picture*, cited above, at 82.

[30] 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 %.

[31] For a useful assessment, see OECD, *Development Co-Operation Report 2014. Mobilising Resources for Sustainable Development*, cited above note 11, chapter II.13.

[32] Dev Kar and Devon Cartwright-Smith, *Illicit Financial Flows from Developing Countries: 2002-2006* (Global Financial Integrity, Washington DC, Dec. 2008).

[33] Dev Kar and Devon Cartwright-Smith, *Illicit Financial Flows from Africa: Hidden Resource for Development* (Global Financial Integrity, Washington DC, 2010).

[34] Dev Kar and Devon Cartwright-Smith, *Illicit Financial Flows from Africa: Hidden Resource for Development*, cited above, at 12.

[35] 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).

Inter-American Development Bank, evasion rates of personal and corporate income taxes average 50 per cent in 10 representative Latin American countries, with Guatemala topping the league with an evasion rate of 70 per cent.[36]

This is now described to be a priority in various international outcome documents. In the Addis Ababa Action Agenda, adopted at the Third International Conference on Financing for Development in July 2015, 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 realizing sustainable development and achieving the sustainable development goals", and they committed to "enhancing revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax collection".[37] They pledged to "work to improve the fairness, transparency, efficiency and effectiveness of our tax systems, including by broadening the tax base and continuing efforts to integrate the informal sector into the formal economy in line with country circumstances".[38] Though not explicitly defined as a human rights requirement, these commitments should be seen as a component of the duty of progressive realization.

a) Strenthening the ability to collect taxes

To effectively combat tax evasion, a strengthening of tax administration (by dedicating sufficient personnel and resources to combating tax evasion) would be required.[39] The High-Level Panel on Illicit Financial Flows from Africa established under the auspices of the African Union and the United Nations Economic Commission for Africa recommended in this regard, in particular, "developing the required capacities, establishing or strengthening necessary institutions including transfer pricing units, and providing resources for the effective functioning of these institutions", and "holding multinationals accountable for fraudulent practices by setting up requirements for their transfer of funds and business practices".[40] This should also be treated as a priority since the failure to effectively address tax evasion has regressive impacts, disproportionately affecting the poor:

> High net-worth individuals and large corporations [...] have a far greater ability to evade taxes as they are able to pay tax advisers, lawyers and accountants (who may sometimes provide inappropriate advice and assistance) and to open undeclared foreign bank accounts in low-tax jurisdictions. Tax abuse by corporations and high net-worth individuals forces Governments to raise revenue from other sources: often regressive taxes, the burden of which falls hardest on the poor. Therefore, if States do not tackle tax abuse, they are likely to be disproportionately benefiting wealthy individuals to the detriment of the most disadvantaged. Monitoring, preventing and punishing abuse is therefore essential in order to comply with human rights principles and improve the distributive effects of tax systems.[41]

Combating illicit financial flows are therefore a human rights issue. Indeed, recognizing that “illicit capital flight undermines the capacity of State Parties to implement the African Charter on Human and Peoples’ Rights and to attain the Millennium Development Goals”, the African Commission on Human

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[36] Ana Corbacho, et al. (eds), *More than Revenue: Taxation as a development tool*, cited above, 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.
[37] Outcome document adopted at the Third Internatinal 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.
[38] Id.
[39] 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. 57.
[40] High-Level Panel on Illicit Financial Flows from Africa, *Illicit Financial Flows* (2014), at 66.
[41] 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. 60.

and Peoples' Rights has called upon States parties to the African Charter on Human and Peoples' Rights "to examine their national tax laws and policies towards preventing illicit capital flight in Africa".[42]

b) The role of extraterritorial human rights obligations

Strengthening domestic institutions tasked with combating tax evasion will not suffice, however. This is one area in which such efforts shall only be fully effective if supported by international cooperation, requiring that all countries comply with their extraterritorial human rights obligations.[43] Though classic forms of international cooperation have a role to play in this regard, "aid for tax" strategies -- by supporting local institutions in charge of tax collection[44] -- will remain insufficient unless complemented by reforms in the countries which receive illicit financial flows from tax evasion or other forms of economic crime such as corruption. This concerns in particular the countries under whose jurisdiction tax havens are currently left unaddressed, or whose bank secrecy laws facilitate tax evasion. As noted by the Special Rapporteur on Extreme Poverty and Human Rights : "Individual countries, in particular low-income countries, are severely constrained in the measures that they alone can take against tax abuse. Illicit financial flows are international in nature and therefore beyond the capacity of one State alone to tackle. The availability of offshore financial centres (tax havens) that offer low or no taxes and secrecy is a major factor."[45]

There are signs that governments are finally taking these issues more seriously. In 2010, the Convention on Mutual Administrative Assistance in Tax Matters, intially the result of a joint effort of the OECD and the Council of Europe in 1988, was amended in order to allow for the participation of developing countries. The new text was opened for signature on 1 June 2011. It now covers 109 jurisdictions, including 15 jurisdictions covered by extension.[46] It 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. At the same time, the G20 has identified base erosion and profit shifting (BEPS) as a major concern for tax justice worlwide: the ability for States to raise public revenue is undermined as multinational companies are taking advantage of differences between tax rates by artificially shifting profits across borders, rather than declaring such profits (and paying the corresponding taxes) where their productive activities take place. The OECD adopted a 15-point action plan in 2013 in order to address this, to be progressively implemented in the next few years.[47]

That these efforts are essential for the fulfilment of human rights is made increasingly explicit by United Nations human rights treaty bodies. 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

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[42] Resolution adopted by the Commission at its 53rd ordinary session, 23 April 2013.
[43] 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. 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*, vol. 34 (2012), pp. 1084-1171.
[44] See in this regard OECD, *Tax and Development: Aid Modalities for Strengthening Tax Systems* (OECD Publishing, Paris, 2013).
[45] 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. 61.
[46] Thus, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Guernsey, the Isle of Man, Jersey, Montserrat and the Turk and Caicos Islands are covered by extension from the United Kingdom; Aruba, Curaçao and Sint Maarten, the latter two formerly part of the Netherlands Antilles, are covered by extension from the Netherlands; the Faroe Islands are covered by extension of Denmark.
[47] OECD, *Development Co-Operation Report 2014. Mobilising Resources for Sustainable Development*, cited above (note 11), at 167-176.

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".[48]

Nor is the Committee on Economic, Social and Cultural Rights isolated in this regard. A few months after the cited recommendation was addressed to the United Kingdom, the Committee on the Elimination of Discrimination against Women 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".[49] The recommendation was prompted by a report[50] presented by a coalition of non-governmental organisations and a human rights clinic, showing how cross-border tax abuse by corporations and individuals (in various forms including "controversial profit-shifting, fraudulent under-reporting of the value of taxable transactions, and the use of off-shore accounts to hide taxable income"[51]) have an impact on the ability for developing countries to protect and fulfil women's rights. As the report explained:

> The loss of revenues to cross-border tax abuse contributes to the underfunding of essential services, institutions, and infrastructure on which women depend, from health care and education to public courts and transportation systems, as well as programs designed specifically to protect and promote women's rights. Inadequate spending on social services often takes a heavy toll on women in particular, as they typically bear the burden of care-giving and performing unpaid work when public institutions fall short.[52]

In addition, development cooperation may support efforts at domestic level to combat illicit financial flows. In 2011, development aid contributing to such efforts (by programs strengthening the judiciary or anti-corruption authorities, for instance) represented 11% of total official development assistance (ODA) from OECD countries.[53] Such interventions can be highly effective: in Kenya, a 20,000 USD support program led to an increase of 33 million USD in increased tax revenue during a one-year period (2012-2013), which represents a rate of return of 1,650 USD for each dollar spent.[54] Here again, however, such efforts could go further. Staff within the relevant public sector authorities could be trained to facilitate investigations in economic crimes and asset recovery. Developing countries could be encouraged to make this a top political priority. Support to local civil society organisations acting as watchdogs to denounce corruption or tax evasion could be increased.[55]

c) The role of the private sector: financial institutions

Although the main responsibility in tacking illicit financial flows lies with governments, the private sector -- banks and other financial institutions -- also have a role to play in this regard. Indeed, it could be argued that a failure to discharge their responsibilities in this regard is a violation, by these entities,

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[48] Committee on Economic, Social and Cultural Rights, Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (UN doc. E/C.12/GBR/CO/6, 14 July 2016), paras. 16-17.
[49] CEDAW Concluding Observations on the combined fourth and fifth reports of Switzerland (UN doc. CEDAW/C/CHE/CO/4-5) (18 November 2016), para. 41.
[50] Alliance Sud, Centre for Economic and Social Rights, Global Justice Clinic of New York University School of Law, Public Eye and Tax Justice Network, *Swiss Responsibility for the Extraterritorial Impacts of Tax Abuse on Women's Rights*, 2 November 2016, available at: http://chrgj.org/wp-content/uploads/2016/12/switzerland_cedaw_submission_2nov201628.pdf (last consulted on 20 Dec. 2016).
[51] Id., at 1.
[52] Id., at 2.
[53] OECD, *Illicit Financial Flows from Developing Countries: Measuring OECD Responses* (OECD Publishing, Paris, 2014).
[54] OECD, *Development Co-Operation Report 2014. Mobilising Resources for Sustainable Development*, cited above (note 11), at 170.
[55] OECD, *Development Co-Operation Report 2014. Mobilising Resources for Sustainable Development*, cited above (note 11), at 162-163.

of their commitments in the area of human rights. The Guiding Principles on Business and Human Rights[56] set out a requirement that business enterprises respect human rights, which includes an expectation that companies act with due diligence: corporations, the Guiding Principles state, should "act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved".[57] This means that they should put in place "a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights".[58] The OECD Guidelines for Multinational Enterprises, following their revision in 2011 to insert a human rights chapter (chapter IV), also include due diligence in the definition of the responsibility of business enterprises to respect human rights.

Such due diligence obligations require from 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". Similarly, the OECD Guidelines for Multinational Enterprises provide that business enterprises domiciled in OECD should "seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts." As explained in the Commentary to these Guidelines (in para. 43), this implies an expectation that

> an enterprise, acting alone or in co-operation with other entities, as appropriate, ... use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact. ‘Business relationships’ include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts.

The OECD Guidelines on Multinational Enterprises also provide that companies "encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines."[59]

The responsibilities of banks and other financial institutions to ensure that they support, rather than undermine, the efforts of governments to combat tax evasion, follows from the simple fact that without a mechanism to launder the money, economic actors will be less tempted to violate their tax obligations. Yet, Global Witness and others have warned that many regulations aimed at combating laundering were ignored or circumvented by financial actors.[60] This comes at a considerable price for developing countries: in 2015, the United Nations Office on Drugs and Crime estimated that the amount of the

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[56] A/HRC/17/4 (and, for the text of the Guiding Principles on Business and Human Rights, A/HRC/17/31). The Guiding Principles on Business and Human Rights were approved by the Human Rights Council at its seventeenth session on 16 June 2011. They clarify the content of the "Protect, Respect, Remedy" framework defining the respective obligations of States and corporations. On the Guiding Principles on Business and Human Rights, see, inter alia, Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business. Beyond the Corporate Responsibility to Respect?* (Cambridge Univ. Press, 2013); 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).

[57] A/HRC/17/31, para. 6.

[58] See, for a more detailed description of what this entails, Principle 17 of the Guiding Principles on Business and Human Rights.

[59] OECD Guidelines on Multinational Enterprises (as revised on 25 May 2011), II. General Policies, para. 13.

[60] Global Witness, *Undue Diligence. How banks do business with corrupt regimes* (2009), available at: http://www.u4.no/recommended-reading/undue-diligence-how-banks-do-business-with-corrupt-regimes/ (last consulted on 28 Feb. 2016).

money laundered each year was the equivalent of 2-5% of total GDP, or 800 billion to 2 trillion USD.[61]

Some attempts have been made to make private financial actors aware of their responsibilities. The Financial Action Task Force (FATF), an independent intergovernmental body established in 1989 to support the fight against money laundering, adopted a set of recommendations addressed to its Member States. Known as the *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (AML/CFT standards) the recommendations were initially drawn up in 1990; they were most recently updated in 2012, and have been endorsed by 180 countries.[62] While it is not possible here to describe in detail the full set of recommendations, it may be relevant to note that they include imposing on financial institutions that they undertake customer due diligence (CDD) upon establishing business relationships with new clients or for occasional transactions, whether because they reach a certain level or because there is a suspicion of money laundering or terrorist financing. CDD means identifying the customer and verifying that customer's identity ; identifying the "beneficial owner", and "taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is": where the client is a corporation, this means understanding the corporate structure to see who is "behind" the corporate structure; "understanding and, ..., obtaining information on the purpose and intended nature of the business relationship"; "conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds".[63]

The FATF recommendations on the need to seek information about beneficial owners are of particular importance. Indeed, a major obstacle to the effective enforcement of money laundering regulations is that the identity of the real owners of corporate structures may remain hidden, or can only be known to the authorities in country A (where the company is domiciled and regulated) by seeking information from country B (from where the company is administered). Noting that in many cases financial institutions did not seek to identify the beneficial owner when establishing a business relationship, the authors of a World Bank 2011 study on the laundering of the products of economic crime highlight the importance of imposing due diligence obligations on banks and other financial intermediaries such as trust and company service providers.[64] This, the study noted, would oblige service providers to "collect information and conduct due diligence on matters about which they might prefer to remain ignorant": "If a service provider is obligated to gather full due diligence information, it becomes impossible for the intermediary to legitimately plead ignorance regarding the background of a client or the source of his or her funds".[65] Moreover, the collection of such information by the financial intermediaries facilitates inquiries, providing investigators with an adequate source of information.

Even apart from the fact that they are not, by any means, fully implementated in the participating countries, the AML/CFT standards remain insufficient to effectively combat the widespread practice of tax evasion. Gaps remain, for instance, in enforcing the duty of financial institutions to ensure that they identify the beneficial owner. First, where investigators seek to have access to information detained by an attorney, the attorney-client privilege is invoked to oppose this and shield information from scrutiny. Such a barrier should be lifted where circumstances allow for this: the 2011 World Bank study already referred to above notes that many jurisdictions have introduced exceptions to the legal professional

[61] See https://www.unodc.org/unodc/en/money-laundering/globalization.html (last consulted on 28 Feb. 2016).
[62] See for the text of the recommendations:
http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (last consulted on 28 Feb. 2016).
[63] Recommendation 10.
[64] E. van der Does de Willebois, E. M. Halter, R.A. Harrison, Ji Won Park and J.C. Sharman, *The Puppet Masters. How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (Stolen Asset Recovery Initiative, The World Bank / UNODC, 2011), available at: https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf (last consulted on 28 Nov. 2016).
[65] E. van der Does de Willebois, et al., *The Puppet Masters*, cited above note 64, at 5.

privilege "in cases in which the attorney is acting as a financial intermediary or in some other strictly fiduciary or transactional capacity, rather than as a legal advocate".[66] Secondly, international cooperation is essential to the success of the provisions concerning the need to identify the beneficial owner: in order to save the considerable costs involved in having to seek information concerning the "real owners" of companies from authorities of another country than the country where the company is registered, countries should be encouraged to adopt regulations to ensure that information concerning beneficial ownership of any entity incorporated under its laws is available with a person who is *resident* in that country.[67]

In order for the AML/CFT standards to be truly effective, the incentives of bankers should be aligned with the legal duties imposed on the financial institutions themselves. This is not currently the case. Global Witness rightly notes that, as long as prosecuting authorities will remain hesitant to impose sanctions on the bank executives themselves, as individuals, these executives will remain tempted to treat the risk of their institution being fined for lack of due diligence in dealing with funds of suspect origin as a mere "business risk", that may be worth taking as long as the benefits outweigh the potential costs to the institution. It is encouraging to note, however, that in recent years prosecuting authorities (particularly in the United States) have appeared more willing to impose sanctions not only on financial institutions, but also on individuals working within such institutions -- although more frequently on middle-level employees than on the "directing minds" such as CEOs and members of the board --.[68]

5. Participation and accountability in taxation policies

After the Committee on Economic, Social and Cultural Rights expressed its concern about fiscal reforms introduced by the United Kingdom, such as increases in the threshold for the payment of inheritance tax and increases of the value added tax or cuts to the tax rates of corporations, it recommended that the UK "conduct a human rights impact assessment, with broad public participation, of the recent changes introduced to its fiscal policy, including an analysis of the distributional consequences and the tax burden of different income sectors and marginalized and disadvantaged groups".[69] Similarly, the Special Procedures of the Human Rights Council that deplored the impacts on poor families of the Welfare Reform and Work Act enacted by the UK in 2016, criticized the lack of credibility of the impact assessments preceding the cuts to welfare benefits, noting that these cuts were based on often unproven assumptions and that the government had failed to explore the full range of alternative options to ensure the sustainability of the welfare system ; and they asked the government to indicate whether they had

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[66] Id., at 6. The 2015 EU Anti-Money Laundering and Terrorist Financing Directive provides in this regard that, whereas "obliged entities" "know, suspect or have reasonable grounds to suspect" that funds result from criminal activity or are related to terrorist financing should report their suspicion to the authorities, this may not apply to "notaries, other independent legal professionals, auditors, external accountants and tax advisors *only to the strict extent that* such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings" (emphasis added): see Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73–117.

[67] E. van der Does de Willebois, et al., *The Puppet Masters*, cited above note 64, at 7. This is why the 2015 EU Anti-Money Laundering and Terrorist Financing Directive provides that the EU Member States must ensure that "corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held": see Art. 20(1) of the EU Anti-Money Laundering and Terrorist Financing Directive, cited above, note 63.

[68] For details, see Global Witness, *Banks and Dirty Money. How the financial system enables state looting at a devastating human cost* (2015). The recent EU Anti-Money Laundering and Terrorist Financing Directive again represents a promising step in this direction: it provides that where legal persons are found to have breached their obligations under the national law implementing the directive, "sanctions and measures can be applied to the members of the management body and to other natural persons who under national law are responsible for the breach": see Art. 58(4) of the EU Anti-Money Laundering and Terrorist Financing Directive, cited above, note 66.

[69] Committee on Economic, Social and Cultural Rights, Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (UN doc. E/C.12/GBR/CO/6, 14 July 2016), para. 17.

"consulted the individuals, groups and families most likely to be affected by the Act".[70] Thus, emerges a fourth requirement in the design of tax policies : it is that they are subject to effective democratic control.

Strengthening participation, transparency and accountability in budgetary decision-making is a way to ensure that budgetary priorities shall take into account the interests of the most marginalized groups within society. The point barely requires elaboration : economic marginalization (the deprivation of social and economic rights) typically is paired with political disempowerment (in violation of civil and political rights, in particular the right to take part in the conduct of public affairs), leading to a vicious cycle in which because the poor are unable to influence political processes, the policies shall serve the elites rather than respond to their needs.[71]

Strengthening the participation of the poor in shaping policies can help to break this cycle, leading in turn to the adoption of policies that will be more attentive to their needs.[72] It shall also strengthen the negotiating position of departments dealing with health, education or social welfare, whose demands frequently compete with those from departments concerned with law and order -- the Interior, National Defence or Justice --, particularly in relatively weakly governed countries in which controlling the population and law enforcement are seen are major challenges on which the very stability of the government may depend : if civil society are involved in defining the budgetary priorities, it is likely

[70] See the Allegation Letter addressed to the United Kingdom by the Special Rapporteur on adequate housing, the Special Rapporteur on the rights of persons with disabilities, the Special Rapporteur on extreme poverty and human rights, and the Special Rapporteur on the right to food (ref. AL GBR 1/2016, 8 April 2016). See in particular questions 5 ("What evidence is available to demonstrate that the Employment Support Allowance for persons in the WRAG [Work Related Activity Group : people deemed unfit to work as result of health problems or a disability] has created a disincentive for them to take steps towards work? Further, what evidence is available to demonstrate that they would be incentivised to move towards work by reducing the Employment Support Allowance, in view of the fact that they have been assessed not fit for work?"), 7 ("What evidence is available to establish that your Excellency's Government has considered alternative options to the benefit cut, in the context of the full use of maximum available resources?"), 12 ("Please indicate whether there has been an independent reveiw and assessment of the Act and if so, provide details. Please also indicate whether the human rights of persons likley to be subject to the benefit cut have been considered in the review / assessment and what the findings were."), and 13 ("Could you please indicate what mechanism will be available to monitor negative effects of the Act?"). The response of the United Kingdom was sent on 14 July 2016 (Verbal Note of the UK Mission to the United Nations in Geneva, No. 231). On these procedural dimensions, it states simply : "As per the usual Parliamentary process, the Public Bill Committee took 6 oral evidence sessions with a range of stakeholders representing interest groups, which are recorded in the parliamentary record. Furthermore, an open call for evidence was held with 86 pieces of evidence submitted and considered over the course of 8 months of Parliamentary scrutiny and 26 Parliamentary sessions". The scantiness of the response on the procedural questions raised is perhaps a good measure of how subversive these questions are.

[71] See 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. 21 (citing *Combating Poverty and Inequality: Structural Change, Social Policy and Politics* (United Nations publication, Sales No. E.10.III.Y.1), p. 6) ("Economic inequalities seem to encourage political capture and the unequal realization of civil and political rights. High levels of economic inequalities 'may create institutions that maintain the political, economic and social privileges of the elite and lock the poor into poverty traps from which it is difficult to escape'"). For instance, the governing elites may veto tax reforms that would lead to a more progressive system of taxation, and they may undermine efforts at combating the practices of tax evasion that they, more than the average citizen, may be able to rely on : see 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 3 ("One of the rent-seeking mechanisms that the most affluent have imposed on the rest of society is the regressive design of the tax structure. Opportunities to evade taxes that vary greatly across income groups compound this perverse structure, shrinking the effective tax bases and resulting in low levels of revenue").

[72] See, e.g., World Health Organization, *World Health Report 2010: Health Systems Financing: the path to universal coverage* (World Health Organization, Geneva, 2011), at 25 ("Dealing with universal health coverage also means dealing with the poor and the marginalized, people who are often politically disenfranchised and lack representation. This is why making health a key political issue is so important and why civil society, joined by eminent champions of universal coverage, can help persuade politicians to move health financing for universal coverage to the top of the political agenda"). For a powerful empirical study relating the diffusion of power in society (i.e., its degree of democratization) with the adoption of pro-poor policies, see Mwangi S. Kimenyi, "Economic Rights, Human Development Effort, and Institutions", in Hertel and Minkler (eds), *Economic Rights. Conceptual, Measurement, and Policy Issues* (Cambridge: Cambridge Univ. Press, 2007) 182-213, as well as the previous effort of this scholar finding a statistical correlation between indicators of power diffusion and progress along the Human Development Index : Mwangi S. Kimenyi, *Institutions of Governance, Power Diffusion and Pro-Poor Growth and Policies* (African Economic Research Consortium, 2005).

that they will support the "human development" sectors within the State. Finally, in the competition between macroeconomic policies that keep the public debt under control and thus reassure the external creditors of the State, and meeting the needs of the population, strengthening participation improves the bargaining position of the government in its negotiation with its creditors and with international financial institutions in particular. While this make it more difficult for the government to find an agreement with creditors in situations where it needs financial support, the creditors may take solace in the fact that transparency and accountability may improve the efficiency of public policies, and maximize the effectiveness of public investment in reducing poverty and placing the country on the track of sustainable human development.[73]

In the fulfilment by the Committee on Economic, Social and Cultural Rights of its monitoring role under the International Covenant on Economic, Social and Cultural Rights, the insistence on participation and accountability also presents a major advantage: it reduces the tension between supervision of compliance by and international body of independent experts and democratic self-determination. The Covenant, after all, relies on deliberately vague wording to evoke the duty to progressively realize the rights of the Covenant "to the maximum available resources", and any attempt to go beyond that wording to clarify the content of such duty shall be met with suspicion by the States parties. By emphasizing participation and accountability in the design and implementation of taxation policies, the Committee conveniently can retreat from substance to procedure -- or, to borrow from the phrase of John Hart Ely, from a "representation-restricting" theory of rights adjudication to a "representation-reinforcing" approach, in which judicial review concerns itself more with "questions of participation", than with "the substantive merits of the political choice under attack".[74] This is not to say that the Committee abdicates its duty to assess taxation policies from the substantive point of view, asking in particular whether enough is done to widen the tax base, to ensure adequate redistribution from the riches to the poorest parts of the population, and to combat tax evasion. These substantive requirements, however, should be read in the light of the procedural requirements of participation and accountability: such procedural requirements are both an additional requirement imposed on States, and a means to ensure that the margin of discretion left to States in the design of their taxation policies is used in ways that truly benefit the poor.

6. Conclusion

In theory, the Committee on Economic, Social and Cultural Rights has all the tools it requires to strengthen the role of the International Covenant on Economic, Social and Cultural Rights in the design and implementation of taxation policies. A consensus is emerging on the need to strengthen domestic resource mobilization, in order to make development less dependent on foreign support and to increase accountability of governments towards populations. The fight against inequalities, and thus the need for robust redistributive taxation schemes, is broadly recognized as a priority. There is wide agreement too on the importance of reinforcing the ability of local tax administrations to combat tax evasion, and on the indispensable role both of international cooperation in this regard (by the clamping down on tax havens and the lifting of bank secrecy legislation that favor money laundering), and on the need to regulate the private financial sector. Finally, the role of participation and accountability in the design of taxation policies is increasingly acknowledged: reforming decision-making so that such choices are not the result of backdoor negotiations between politicians and technocrats, but rather the outcome of public deliberation involving large segments of society, is one key ingredient to ensure that they serve the needs of the poor.

Enforcing these four key requirements remains a challenge, however. In many countries, the economic elites exercise a disproportionate influence on political decision-making, and they resist any significant

[73] World Health Organization, *World Health Report 2010: Health Systems Financing: the path to universal coverage*, cited above note 72, at 25 ("Improving efficiency and accountability may also convince ministries of finance, and increasingly donors, that more funding will be well used").

[74] John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Cambridge: Harvard Univ. Press, 1980), at 181.

fiscal reform that could threaten their privileges.[75] The myth according to which low rates of corporate taxation are a condition for attracting foreign capital persists, despite the wealth of studies that have demonstrated the opposite -- that investors care more about the quality of the workforce and of public service, the quality of governance, and economic factors such as market size and trade openness. Some governments still do not accept the idea that the efforts of poor countries in combating tax evasion should be supported by rich countries, not only by ODA going to improving governance, but also by more structural measures concerning the removal of any loophole facilitating the practice of tax evasion. While tax evasion is criticized, at least rhetorically, tax optimization techniques and the widespread use of price transfer mechanisms by transnational corporations have only recently been evoked as a problem at the highest political level, leading to the adoption within the OECD of the action plan against base erosion and profit shifting (BEPS). It shall be the responsibility of the Committee on Economic, Social and Cultural Rights to continue to insist on such obstacles being removed, on such myths being dissipated, and on such pledges being kept.

[75] See, e.g., Martin Gilens, *Affluence & Influence: Economic Inequality and Political Power in America* (Princeton University Press, 2012); Martin Gilens and Benjamin Page, 'Testing Theories of American Politics: Elites, Interest Groups and Average Citizens", *Perspectives on Politics, vol.* 12(3) (2014), pp. 564-581.