Articles

‘The Elephant in the Room’: Corporate Tax Avoidance & Business and Human Rights

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Abstract

This article addresses tax avoidance by companies in the context of the emerging field of business and human rights. It describes the mechanics of corporate tax avoidance and the human costs of such practices. It then considers the extent to which tax issues have been addressed by corporate social responsibility, before turning to business and human rights and assessing the potential value of the United Nations Guiding Principles on business and human rights in this context. The article draws on the experience of Ireland, given the country’s connection to abusive tax practices associated with large multinational corporations and its support for the United Nations Guiding Principles on business and human rights.

Keywords: corporate social responsibility, corporate tax avoidance, Ireland, tax abuse, tax justice

Tax abuse, and particularly tax avoidance by multinational corporations, has received considerable public, media, civil society and government attention in recent years.1 Coming against a backdrop of financial crisis and struggling economies, a series of leaks and investigations concerning tax and banking practices in countries such as Panama, Luxembourg and Switzerland has brought the issue of tax to the fore. This article focuses specifically on corporate tax avoidance, which has become ‘the number one issue that the public wants companies to address’, according to the Institute of Business Ethics.2 Governments and intergovernmental organizations have undertaken high profile initiatives to address certain aspects of the phenomenon of tax abuse, including corporate tax avoidance. The negative impact of tax abuse on the ability of states to deliver services, address poverty and meet their human rights obligations is becoming more apparent and is increasingly recognized. Alongside a greater attention to corporate tax avoidance and its human costs has been the advancement of the business and human rights agenda at the

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1 For present purposes, tax abuse is taken to cover both tax avoidance, which is considered as using lawful means for avoiding the paying of tax, and tax evasion, which is the unlawful avoidance of tax liabilities that are due, although it bears noting that it is often difficult to distinguish the two. See International Bar Association, Tax Abuses, Poverty and Human Rights (London: International Bar Association, 2013) 24–5.

international level. The unanimous endorsement by the United Nations Human Rights Council of a set of Guiding Principles on Business and Human Rights in 2011 can be seen as a key development. A growing number of states have committed to implementing these Guiding Principles nationally, while preliminary discussions are underway regarding a potential binding instrument on business and human rights. The once disputed notion that companies have human rights responsibilities is gaining greater acceptance, and a variety of legal and policy measures are being implemented with a view to ensuring business respect for human rights. Despite the relatively advanced state of developments in both contexts, and the seemingly obvious overlap between the two, corporate tax avoidance has not featured significantly on the business and human rights agenda. Tax avoidance by companies has thus been called ‘the elephant in the room’ for business and human rights. This article addresses this divorced approach and seeks to assess the utility of considering corporate tax avoidance through the lens of business and human rights.

The article begins by addressing the prevalence, scale and mechanics of tax avoidance, as well as touching upon current international efforts aimed at countering aggressive tax avoidance. Section II considers the impact of such tax practices on human rights, including in relation to poverty, development and inequality. In Section III, a brief overview is provided of the business and human rights agenda and how it is related to, but can be distinguished from, corporate social responsibility. The article will then turn to consider the extent to which issues of tax have featured in the context of business responsibility, beginning first with corporate social responsibility in Section IV, before turning to business and human rights and the United Nations Guiding Principles in Section V.

While issues related to tax have been relatively neglected in the literature and practice of both corporate social responsibility and business and human rights to date, there is an emerging focus on the tax practices of companies through the prism of their social and human rights responsibilities. This article will consider what a business and human rights approach may add to the discussion of tax avoidance. In particular, it explores the dual emphasis on the responsibilities of both states and companies in the United Nations Guiding Principles and the potential role of the concept of human rights due diligence. To illustrate the practice and impact of tax avoidance by large multinationals, the case of Ireland will be drawn upon, a country whose tax rules, incentives and low rates have attracted such companies, as well as accusations that it operates as a tax haven.


5 As described by an anonymous stakeholder consulted by the International Bar Association’s Human Rights Institute’s Task Force on Illicit Financial Flows, Poverty and Human Rights. See International Bar Association, note 1, 118.


In addition, the Irish example demonstrates the emergence of corporate tax avoidance as a business and human rights issue, with the matter having been frequently raised by civil society in the context of Ireland’s preparation of a national action plan for the implementation of the United Nations Guiding Principles on business and human rights. The article also identifies possible avenues for further research on the evolution of a business and human rights approach to corporate tax avoidance.

I. CORPORATE TAX AVOIDANCE

Tax abuse, including tax avoidance by multinational corporations is on the international political agenda like never before. Declining government revenues and public discontent at tax scandals involving major corporations like Apple, Google and Starbucks, and international banks such as HSBC and Barclays, have pressured states to address large-scale tax avoidance by companies. The Organisation for Economic Cooperation and Development (OECD) and the G20 group of states gave an undertaking in 2011 to address aggressive tax planning, as well as ‘offshore tax evasion’. Speaking in 2013, the British Prime Minister David Cameron said that tax avoidance and evasion are issues ‘whose time had come’. While tax evasion is clearly unlawful, Cameron put it that some forms of tax avoidance ‘have become so aggressive that I think it is right to say these raise ethical issues, and it is time to call for more responsibility and for governments to act accordingly’. Just over a year later, United States President Barack Obama spoke at the G20 of the steps taken towards ‘closing tax loopholes for multinational companies, and stopping tax evaders and criminals from hiding behind shell companies’. His President’s Framework for Business Tax Reform acknowledged that ‘empirical evidence suggests that income-shifting behaviour by multinational corporations is a significant concern that should be addressed through tax reform’. The growing size, wealth and mobility of multinational corporations have added a new dimension to the familiar problem of tax havens and other means that are used to avoid paying taxes. Corporate power can be seen to have generated some media reluctance to expose corporate tax avoidance.

8 See discussion below in Section V.
11 Ibid.
13 President’s Framework for Business Tax Reform, Department of the Treasury, (United States Department of the Treasury, 2012) 7.
Current international taxation rules are out of step with contemporary globalized business activities, in that they allow companies to avoid paying taxes where economic activity takes place and where value is created. Studies have shown an ‘increased segregation between the location where actual business activities and investment take place and the location where profits are reported for tax purposes’.16 According to the OECD:

Globalisation has in effect caused products and operational models to evolve, creating the conditions for the development of global strategies aimed at maximising profits and minimising expenses and costs, including tax expenses. At the same time, the rules on the taxation of profits from cross-border activities have remained fairly unchanged, with the principles developed in the past still finding application in domestic and international tax rules. [...] the changes in business practices brought about by globalisation and digitalisation of the economy have raised questions among governments about whether the domestic and international rules on the taxation of cross-border profits have kept pace with those changes.17

The organization notes that aggressive tax planning by multinational enterprises involves vast amounts, often ‘hundreds of millions of US $ in a single transaction or series of transactions’.18 The Tax Justice Network estimates that all forms of tax evasion annually amount to around US$3.1 trillion, a little over 5 per cent of the world’s GDP.19 It is difficult to find exact figures regarding the extent of profit shifting to avoid tax, with estimates ranging from US$60 to US$160 billion annually.20 Irrespective of the precise figures, aggressive tax planning by corporations, as the OECD has put it, ‘may undermine public trust in the system, creates inequalities, and reduces tax revenues’.21

The present international tax system has failed to prevent multinational enterprises from avoiding paying corporation taxes in jurisdictions where they operate. According to the United Kingdom House of Commons Committee on Public Accounts, ‘it is far too easy for companies to exploit the rules and set up structures in low-tax jurisdictions, rather than pay tax where they actually conduct their business and sell their goods and services’.22 An International Monetary Fund (IMF) staff report notes that multinational enterprises have ‘many devices—often highly complex, interlocking, and very effective—by which to reduce their total tax bills’.23 Transfer mispricing or trade mis-invoicing, the strategic use of intellectual property rights, management fees, and intra-company loans, as well as various other methods, are used to shift profits to countries where a greater tax advantage can be gained.24 With at least 30 per cent of global trade taking place within

18 OECD, Tackling Aggressive Tax Planning, note 9, 6.
21 OECD, Tackling Aggressive Tax Planning, note 9, 6.
23 IMF, Spillovers in International Corporate Taxation, note 20, 8.
transnational companies, it has become easier to pursue practices which allow for the avoidance of corporation tax.\textsuperscript{25} The IMF staff report notes that over 42 per cent of the net income of United States majority-owned affiliates is earned in tax havens, although ‘less than 15 percent of their value added is created there’.\textsuperscript{26} These types of tax avoidance measures, it bears noting, may be in line with applicable domestic tax laws and regulations. According to the OECD, the current system provides opportunities to ‘associate more profits with legal constructs and intangible rights and obligations, and to legally shift risk intra-group, with the result of reducing the share of profits associated with substantive operations’.\textsuperscript{27} Corporations are obviously keen to avoid double taxation in different countries, but they have also been able to exploit differences between jurisdictions leading to double non-taxation.\textsuperscript{28}

Ireland has played a significant role in tax avoidance by large multinational corporations. The country has one of the most open economies in the world and its tax system is considered amongst the most efficient in Europe for doing business.\textsuperscript{29} That being said, a 2008 report by the United States Congressional Research Service described Ireland as ‘a well known tax haven’.\textsuperscript{30} The Irish Government and business organizations have strongly denied the claim,\textsuperscript{31} although the tax haven label has also been used by a United States Senate Subcommittee and various commentators.\textsuperscript{32} While there is no internationally agreed definition of a tax haven, Ireland has been described as such partly because of its low headline corporation tax rate of 12.5 per cent (as compared with 35 per cent in the United States), and because of various tax incentives which companies have been able to avail themselves of, most notable the so-called ‘double Irish’.\textsuperscript{33} That business enterprises would move profits to a country like Ireland to avail themselves of more favourable tax rates is nothing new, according to Brian Keegan, Director of Taxation at Chartered Accountants Ireland:

\begin{quote}
The notion that companies are not just taxed where they operate, but where they are managed and controlled has been in the tax systems of the Western world for over 100 years.
\end{quote}

\textsuperscript{26} IMF, \textit{Spillovers in International Corporate Taxation}, note 20, 17.
\textsuperscript{27} OECD, \textit{Addressing Base Erosion and Profit Shifting}, note 16, 33.
\textsuperscript{28} Ibid.
It’s an idea, conceived in the age of empires, that taxes should be paid in the capital rather than in the colonies. You could call it fiscal imperialism.34

Under Irish tax law, most companies are considered tax resident if they are either incorporated in Ireland or managed and controlled in Ireland.35 However, certain foreign owned companies incorporated in Ireland were able to avoid Irish tax residence so long as they were managed and controlled elsewhere, a position that lead Jim Stewart to note that some companies have been ‘tax resident in Ireland for some tax purposes, but are not tax resident for corporate tax payments’.36 The tax practices of Apple, one of the world’s largest and most profitable companies, have come under intense scrutiny because of its use of tax structures and incentives available under Ireland’s tax rules.

In hearings before the United States Senate, Senator Carl Levin, Chair of the Permanent Subcommittee on Investigations explained that Apple had created offshore companies which received ‘tens of billions of dollars in income, but which have no tax residence—not in Ireland, where they are incorporated, and not in the United States, where the Apple executives who run them are located’.37 According to Senator Levin:

Apple has arranged matters so that it can claim that these ghost companies, for tax purposes, exist nowhere. One has paid no corporate income tax to any nation for the last 5 years; another pays tax to Ireland equivalent to a tiny fraction of 1 percent of its total income.38

One Irish-incorporated Apple subsidiary, Apple Sales International, had profits of around US$74 billion over a four-year period but paid less than 1 per cent corporation tax, while another, Apple Operations International, made US$30 billion but paid no corporation tax in Ireland or seemingly anywhere else.39 The European Commission has alleged that tax rulings made by Ireland for Apple amounted to unlawful state aid under European Law.40

Other multinational corporations with their European headquarters in Ireland have also been criticized for their avoidance of corporation tax. The United Kingdom’s Committee of Public Accounts concluded, in relation to internet giant Google, that ‘the processing of sales through Google Ireland has no purpose other than to avoid UK corporation tax’.41 Despite having generated US$18 billion of revenue over a five-year period, the company only paid US$16 million in corporate tax in the United Kingdom in that time. The Committee of Public Accounts found it ‘extraordinary’ that the UK Revenue and Customs had not been ‘more challenging of Google’s corporate arrangements given the overwhelming disparity between where profit is generated and where tax is paid’.42 The Committee expressed its concern that larger companies

34 Cliff Taylor, ‘How might clampdown on tax avoidance hit Ireland?’, Irish Times (14 November 2014) 2.
36 Stewart, note 7, 5–6.
38 Ibid.
42 Ibid, 5.
received ‘preferential treatment’ compared to small businesses and individual taxpayers, and considered as ‘disproportionately small’ the tax settlement of GB£130 million made by Google in 2016. The company’s profit-shifting activities to Ireland have given rise to a French criminal investigation into potential tax fraud and a police raid on Google’s Paris offices in May 2016. Ireland, for its part, has committed to closing certain tax loopholes and phasing out the ‘double Irish’, although a proposed ‘knowledge development box’ will offer an effective tax rate related to research and development and intellectual property that is lower than the current standard rate of 12.5 per cent. In addition to deliberate profit-shifting, the globalized nature of the digital economy and the mobility of intellectual property presents particular challenges for ensuring tax is not avoided by information technology and social media companies.

Such tax scandals involving multinational corporations have led to high-profile international efforts aimed at tackling tax abuse. The OECD has focused on addressing the erosion of tax bases by profit shifting (BEPS). The organization has noted the need for international action, given that it may be ‘very difficult for any single country, acting alone, to effectively combat BEPS behaviours’. Sri Mulyani Indrawati, the Managing Director of the World Bank has also emphasized the need for international cooperation ‘to address the demand for and the supply of tax havens as well as the cover-up of illicit financial transfers’. Other proposed measures which might address corporate tax avoidance include automatic exchange of information between tax jurisdictions, greater transparency, including disclosure of company ownership, and country-by-country reporting regarding revenues, profits, sales and taxes. In addition to strengthening relevant national legislation and institutions, it has been suggested that a World Tax Authority be established in order to provide a multilateral approach to addressing international tax issues, including corporate tax avoidance. Within the United Nations,

a Committee of Experts on International Cooperation in Tax Matters has produced an updated Model Double Taxation Convention between Developed and Developing Countries which can assist in curbing tax abuse.\textsuperscript{52} The response of civil society to the recent OECD undertakings regarding base erosion and profit shifting has been mixed.\textsuperscript{53} The orientation of the organization is such that the current initiatives regarding corporate tax avoidance are motivated primarily by sovereign interests and not the human costs of abusive tax practices, to which the article now turns.

\section{The Human Costs of Tax Avoidance}

Taxation plays an important role in the resourcing of state institutions, public services and essential infrastructure.\textsuperscript{54} Tax policy can serve as a vehicle for pursuing important social objectives, such as reducing poverty and inequality.\textsuperscript{55} On the other hand, tax measures can also be used to privilege the wealthier sections of society; regressive taxation has been a prominent feature of so-called ‘austerity’ programmes, which have been hardest felt by those on lower incomes.\textsuperscript{56} These measures have led to the denial or infringement of economic and social rights.\textsuperscript{57} Regressive taxes have been a feature of austerity, even though the Committee on Economic, Social and Cultural Rights suggested that during an economic downturn, taxation could serve to ‘support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalised groups are not disproportionately affected’.\textsuperscript{58} Resources, as the International Covenant on Economic, Social and Cultural Rights explicitly acknowledges, play a significant role in ensuring the realization of the Covenant rights,\textsuperscript{59} although resources are not without relevance for the full range of human rights. The Committee on the Rights of the Child has observed that ‘[i]neffective taxation systems, corruption and mismanagement of government revenues from, among others, State-owned businesses and corporate taxation, can limit
the resources available for the fulfilment of children’s rights.60 The Committee has taken individuals countries to task where tax evasion, alongside corruption, have negatively impacted on the level of resources available for the implementation of the Convention.61

The OECD recognizes that corporate income tax receipts are ‘an important component of government revenues’, comprising around 10 per cent of the total tax take in OECD countries,62 and typically 15 per cent in developing countries.63 The trend over recent decades has been a steady decline in national corporation tax rates, with this fall in revenues compounded by tax avoidance and evasion.64 According to the Tax Justice Network, the loss of corporate tax income is ‘increasingly replaced with other taxes that tend to hit the poor hardest’,65 with Oxfam highlighting that:

In many countries, economic inequality has reached extreme levels and continues to grow. If left unchecked, it will weaken global efforts to eradicate poverty. Fair tax regimes are vital to finance well-functioning states and enable governments to fulfil their obligations to uphold citizens’ rights to basic services, such as healthcare and education.66

When British Prime Minister David Cameron spoke of the need to address aggressive tax avoidance at the World Economic Forum in 2013, he also argued for cutting business taxes, and spoke proudly of Britain’s low corporation tax rate.67 Tackling tax avoidance was an issue of ‘fairness’ for both developed and developing countries, although he did not specifically acknowledge how tax practices in the former may have a human cost in the latter.

As with illicit financial flows arising from money laundering or corruption, tax avoidance and evasion deprive poorer countries of resources.68 Billions of dollars are lost to the developing world annually by such outflows, and while precise figures are not available, it is clear that trade mis-invoicing accounts for the majority of illicit financial flows, the total of which exceeds both inward aid and investment.69 A High Level Panel on illicit financial flows, chaired by former South African President, Thabo Mbeki, concluded that ‘large commercial firms are by far the biggest culprits of illicit outflows’, estimated to cost the continent US$50 billion annually.70 Large corporations are in a position to obtain legal, accounting and banking advice which enables them to

60 Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, CRC/C/GC/16, para 55.
62 OECD, Tackling Aggressive Tax Planning, note 9, 15.
64 Ibid.
65 Ibid. See also Saiz, ‘Resourcing Rights’, note 54, 84–6.
66 Oxfam, note 51, 2.
67 ‘Prime Minister David Cameron’s Speech to the World Economic Forum in Davos’, note 10.
69 Ibid, paras 8–22.
‘perpetuate their aggressive and illegal activities’. Given that such illicit financial outflows end up in other countries, the High Level Panel asserted a responsibility on the part of receiving countries, both to prevent illicit flows and to assist with repatriation and prosecution.72

Developed countries are often the destination for illicit financial flows, including those arising from corporate tax avoidance. Philip Alston, the Special Rapporteur on Extreme Poverty and Human Rights, has outlined that tax policies which allow multinationals to avoid tax are ‘especially harmful’ to developing countries that rely on investment from multinational companies:

… often the resulting profits provide the best chance for tax to actually be collected in those countries. When developed countries tolerate internal pricing mechanisms and other arrangements that enable those corporations to effectively avoid such taxes that would otherwise be due to the developing country, they do an immense disservice.73

Low-income countries typically raise around 10 per cent of gross domestic product in tax revenue as it is, as compared with an average of 30 per cent in high-income countries.74 Tax avoidance, along with other illicit financial flows, can further entrench the reliance on aid from donor countries, which can be unpredictable and indeed insufficient.75 Richer countries:

are also home to companies taking wealth from those same poorer countries at a rate, and amount that far outstrips aid flows. They are also, in some cases, architects of the very structures – tax havens and offshore finance hubs – that enable them to do so.76

Tax has featured prominently in the debates regarding the financing of the post-2015 development agenda and the sustainable development goals. Magdalena Sepúlveda Carmona, Alston’s predecessor as Special Rapporteur on extreme poverty and human rights, described viewed tax as ‘critical to finance development’ and ‘a powerful tool for stimulating poverty reduction’.77 Taxation allows for more stable and higher revenues, and thus greater potential for investment in public services and infrastructure.78 While not the only source of revenue for governments, the Special Rapporteur attached particular importance to tax, given the potential for generating revenue for the realization of rights and equality, tackling discrimination and strengthening governance and accountability.79 Sri Mulyani Idrwati, the Managing Director of the World Bank has noted that while around US$100 billion in tax revenue is lost annually to developing countries because of ‘transactions directly linked to offshore hubs’, the total

71 Ibid.
72 Ibid.
73 Alston, note 55.
78 Ibid.
79 Ibid.
‘development finance’ loss is estimated to be between of US$250 to US$300 billion.\textsuperscript{80} Such loss of revenue for developing countries ‘bleeds them of essential resources’:

For the schoolchild in Haiti, the new mother in Malawi, or the farmer in Bangladesh, these losses have a real impact: they result in classrooms that are overcrowded, health clinics that are never built, and water that is never delivered. People’s opportunities are being stolen from them – because tax revenues are not collected.\textsuperscript{81}

The former UN Secretary General, Kofi Annan, put it more bluntly, when he said that tax avoidance by companies is, in some cases, ‘like taking food off the table for the poor’.\textsuperscript{82}

The role of taxation is firmly recognized in the outcome document of the Third International Conference on Financing for Development, held in Addis Ababa in July 2015. In the context of strengthening domestic resources, states agreed to commit themselves to ‘enhancing revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax collection’.\textsuperscript{83} In working towards improving fairness, transparency, efficiency and effectiveness in tax systems, the signatories agreed to support international efforts aimed at capacity-building in developing countries, including through the provision of development assistance. The outcome document makes reference to the need for technical assistance and relevant initiatives such as the OECD’s ‘Tax Inspectors without Borders’.\textsuperscript{84} It has been estimated that the countries of sub-Saharan Africa would require 650,000 more tax officials in order to bring them into line with the average per capita ratio in the OECD.\textsuperscript{85}

Regarding illicit financial flows, the outcome document includes a renewed commitment to their substantial reduction by combating tax evasion and corruption, as well as reducing ‘opportunities for tax avoidance’.\textsuperscript{86} A commitment is made to ‘\textit{consider} inserting anti-abuse clauses in all tax treaties’.\textsuperscript{87} Furthermore:

\begin{quote}
We will enhance disclosure practices and transparency in both source and destination countries, including by seeking to ensure transparency in all financial transactions between Governments and companies to relevant tax authorities. We will make sure that all companies, including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created, in accordance with national and international laws and policies.\textsuperscript{88}
\end{quote}

The Addis outcome document also refers to enhancing international tax cooperation, encouraging country-by-country reporting by multinational companies, access to beneficial ownership information and ‘progressively advancing towards’ automatic exchange of information between tax authorities.\textsuperscript{89} Reference was also made to the

\begin{itemize}
\item \textsuperscript{80} ‘Speech by World Bank Managing Director and COO Sri Mulyani Indrawati’, note 49.
\item \textsuperscript{81} Ibid.
\item \textsuperscript{82} Oxfam, note 51, 6.
\item \textsuperscript{83} United Nations, ‘Addis Ababa Action Agenda of the Third International Conference on Financing for Development’ (July 2015), para 22.
\item \textsuperscript{84} Ibid, para 28.
\item \textsuperscript{85} Oxfam, note 51, 4, 6.
\item \textsuperscript{86} Addis Ababa Action Agenda, note 83, para 23.
\item \textsuperscript{87} Ibid (emphasis added).
\item \textsuperscript{88} Ibid.
\item \textsuperscript{89} Ibid, para 27.
\end{itemize}
efforts of the G20 and the OECD on base erosion and profit shifting, which have been criticized for leaving developing countries on the periphery and for the excessive influence of corporate lobbyists in the process. At Addis Ababa, it was agreed to marginally strengthen the capacity of the UN Committee of Experts on International Cooperation in Tax Matters. Developing countries and civil society have expressed disappointment with the results of the conference, in particular that developed countries defeated the attempt by the G77 countries to have a more representative world tax authority established.

The G20 and OECD efforts on base erosion and profit shifting have also been criticized for not addressing tax incentives. The Financing for Development Conference considered that tax incentives ‘can be an appropriate policy tool’, while seemingly recognizing their potential downsides by suggesting that in order to ‘end harmful tax practices, countries can engage in voluntary discussions on tax incentives in regional and international forums’. Developing countries are often engaged in a race to the bottom in regards to tax offerings in order to attract foreign direct investment. Oxfam contends that this strategy ‘brings greater benefits to multinationals and their shareholders, than to the citizens and governments of developing countries’. A 2014 report by staff of the IMF has emphasized that tax incentives are ‘significantly undermining revenue in developing countries’, where corporate income tax is a more important source of revenue than in advanced economies. Developing countries face particular challenges in collecting taxes due, especially when offshore transactions are involved and given the practical difficulties associated with applying the arm’s length principle. The IMF staff report concluded that the institutional framework for addressing international tax spillovers, that is, the impact of one country’s international tax practices have on another, is ‘weak’.

Ireland was amongst the OECD states at the 2015 ‘ Financing for Development’ conference that strongly opposed calls to create a more representative intergovernmental tax authority. The potential negative impact on developing countries of the tax practices of companies located in Ireland has been highlighted, as well as concerns

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90 Oxfam, note 51, 2.
91 Addis Ababa Action Agenda, note 83, para 29.
93 Oxfam, note 51, 2.
94 Addis Ababa Action Agenda, note 83, para 27.
95 Oxfam, note 51, 7.
96 IMF, Spillovers in International Corporate Taxation, note 20, 7.
98 IMF, Spillovers in International Corporate Taxation, note 20, 1, 5–6.
regarding the domestic effect of low effective corporation tax rates. Certain tax schemes in Ireland, according to Philip Alston, ‘look to all the world to be designed to facilitate tax avoidance by huge multinationals in return for a pittance of a reward to Ireland. But more importantly, the costs to other countries, including developing countries, have been immense.’ Given Ireland’s commitment to overseas aid and development, such as initiatives aimed at enhancing tax collection in certain developing countries, an inherent contradiction in Irish public policy is evident:

despite Ireland’s track record of solidarity with the Global South, the domestic system of corporate taxation is structured in a manner that supports a practice which impoverishes hundreds of millions of the world’s poorest citizens by facilitating multinational firms in reducing their international tax bill.

It has been claimed that a tax treaty between Ireland and Zambia may have deprived the latter of €1 in every €14 of Irish development aid, given that the treaty permitted certain tax write-offs, and that profits were shifted to companies in Ireland, leading to lower tax bills and government revenue for Zambia. The Irish Department of Finance and the Revenue Commissioners do not encourage transfer mispricing, but have been criticized for leaving the onus of proof on the country claiming lost revenue, despite the ‘lack of capacity in the global south to track tax avoidance and evasion’. While allowing for exchange of information is now routinely included in Ireland’s tax treaties, it is not yet done on an automatic basis. In its recent review of foreign policy, Ireland acknowledges its human rights obligations, its development commitments, and its support for OECD efforts to address ‘harmful tax competition’, but fails to consider the potential human rights impact of Irish tax practices. The ‘spillover analysis’ of the Department of Finance only considered the economic impact on developing countries of Ireland’s tax rules. It did not fully exonerate Ireland’s tax laws and practice, finding that ‘the Irish tax system on its own can hardly lead to significant loss of tax revenue in developing countries’.

### III. BUSINESS AND HUMAN RIGHTS

There have been several attempts over recent decades to devise international standards and mechanisms aimed at holding companies, especially multinational corporations,
to account for activities that violate human rights.\textsuperscript{110} High profile instances of sweatshop labour and environmental damage by oil companies in the 1990s generated increased attention to the issue of corporate responsibility for human rights violations and prompted action at the United Nations level, including the preparation of the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.\textsuperscript{111} This attempt to create binding standards applicable to business entities was not well-received by states or business,\textsuperscript{112} with the result that the Commission on Human Rights instead opted to ask the Secretary General to appoint a Special Representative on human rights and transnational corporations and other business enterprises.\textsuperscript{113} The Special Representative was asked to ‘identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights’, as well as considering the role of states in regulating companies in relation to human rights, including ‘through international cooperation’.\textsuperscript{114}

The Secretary General appointed Professor John Ruggie of Harvard University as Special Representative in 2005 and the Human Rights Council endorsed the Guiding Principles and Framework on business and human rights, as put forward by Ruggie in 2011, following a lengthy period of research and consultation.\textsuperscript{115} The UN Guiding Principles are based on three pillars: the state duty to protect human rights, a corporate responsibility to respect human rights, and the need to ensure adequate remedies.\textsuperscript{116} The Guiding Principles are not an international treaty and do not create any new legal obligations, although they do affirm that states have a legal obligation to protect individuals from human rights violations by others.\textsuperscript{117} For companies, the responsibility to respect human rights comprises ‘a global standard of expected conduct for all business enterprises wherever they operate’, which is seen to exist ‘over and above’ national laws relating to human rights.\textsuperscript{118} To meet this responsibility, companies should undertake due diligence to avoid potential negative human rights impacts and to address those with which they are involved.\textsuperscript{119} The third pillar, access to remedy, is critical, for without it, the state duty to protect human rights ‘can be rendered weak or even meaningless’:\textsuperscript{120}

\begin{thebibliography}{99}
\bibitem{113} Commission on Human Rights, Resolution 2005/69, 20 April 2005.
\bibitem{114} Ibid, para 1(a)–(b).
\bibitem{116} ‘Guiding Principles on Business and Human Rights’, note 3.
\bibitem{117} Ibid, 5–6.
\bibitem{118} Ibid, 13.
\bibitem{119} Ibid, 14–21.
\bibitem{120} Ibid, 22.
\end{thebibliography}
The UN Guiding Principles on business and human rights have been favourably received by states, as evidenced by their unanimous endorsement by the Human Rights Council. The Guiding Principles provide an authoritative statement of how states and companies can address corporate activities that might violate human rights, and have led to a considerable upsurge in advocacy and policy initiatives on business and human rights. Both the UN Human Rights Council and the European Commission have called on states to develop national implementation plans for the Guiding Principles, while the Council-established Working Group on business and human rights has the mandate to ‘promote the effective and comprehensive dissemination and implementation of the Guiding Principles’. The OECD revised its Guidelines for Multinational Enterprises to include a human rights chapter which draws heavily on the UN Guiding Principles. Civil society has offered support for the UN Guiding Principles, while also pushing for binding standards on business and human rights. Within the UN human rights system, an Intergovernmental Working Group has been established with a view towards elaborating a potential international treaty on business and human rights. Most Western states, including the United States and EU member states, however, have decided to remain outside the discussions on a binding treaty, and favour pursuing the implementation of the UN Guiding Principles.

The UN Guiding Principles and Framework do not focus on specific human rights issues or particular business practices, unlike the Draft Norms, but rather aim to provide an overarching template through which business respect for human rights might be ensured, with the hope of contributing to a ‘socially sustainable globalization’. All ‘internationally recognized human rights’ fall within the corporate responsibility to respect, although greater attention may need to be paid to individuals belonging to certain groups, such as indigenous peoples, women, minorities, children, persons with disabilities, migrant workers and their families. Accordingly, it is understandable that corporate tax avoidance, the ‘elephant in the room’ of business and human rights,

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121 See, however, Surya Deva, ‘Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principle’ in Deva and Bilchitz (eds.), note 11, 78, 90–91.
122 For a comprehensive view see the website of the Business and Human Rights Resource Centre: http://business-humanrights.org.
130 Ibid, 14.
131 International Bar Association, note 1, 118.
is not specifically mentioned in the UN Guiding Principles or Framework. It is surprising, however, that this issue was not addressed to any noticeable degree by the Special Representative during his six-year mandate, during which time numerous reports and studies on a broad range of topics were prepared and presented to the Human Rights Council. Corporate tax avoidance was similarly not referred to in the Draft Norms, nor has it been a prominent issue for the UN Working Group on business and human rights since it was established in 2011.

The absence of corporate tax avoidance from the UN Guiding Principles or their preparatory work does not prevent this practice from being addressed through the prism of business and human rights. It may not be a natural fit, as David Scheffer notes, but ‘it is entirely plausible that refraining from tax avoidance schemes could fit within the Ruggie framework’. Other scholars have treated as a gap that the Guiding Principles:

... say little about the political responsibilities of business to pay taxes to ensure that citizens have access to affordable healthcare, education, water, etc., which are basic human rights according to the International Bill of Human Rights. Hence, the corporate responsibility to pay taxes, which essentially are investments in public goods, is a key, albeit missing, element.

It may be that the indirect nature of the impact on human rights of corporate tax avoidance partly explains why it was neglected in the development of the business and human rights agenda. It may also explain, at least in part, why businesses have not tended to treat tax compliance as a matter of corporate responsibility: ‘Companies do not think of taxes as material to their human rights risks, at least not directly. They are more concerned about what happens with what is paid, i.e., corruption and complicity in violations human rights’. Before turning to a consideration of how corporate tax avoidance may and indeed is beginning to be addressed through the lens business and human rights, it is worth considering how it has been treated within corporate social responsibility.

IV. CORPORATE SOCIAL RESPONSIBILITY AND TAX AVOIDANCE

Corporate social responsibility has been the dominant model for addressing the social impact of business activities in recent decades. In response to public, consumer or government pressure, companies have often given commitments to act ethically with regard to specific issues of concern, such as the environment, child labour or human trafficking. Although there is a lack of agreement on the precise meaning of the concept, corporate social responsibility can be characterized broadly as voluntary

135 International Bar Association, note 1, 118.
137 Ibid, 4.
business-led attempts to address social and environmental issues arising in the context of corporate activities. Such initiatives have been criticized for being selective and for not being underpinned by a set of universal principles, with human rights being a relatively recent addition to discussions of the social responsibilities of business. Although corporate social responsibility and business and human rights can be considered as conceptually distinct, there are obvious overlaps and shared concerns with these approaches to business responsibility. The influence of the business and human rights agenda on contemporary understandings of corporate social responsibility is becoming apparent; the European Commission recently broadened its definition of corporate social responsibility to encompass ‘the responsibility of enterprises for their impacts on society’. Leaving to the side these broader conceptual issues regarding corporate social responsibility, it is readily apparent that tax compliance has rarely featured in the social and ethical commitments made by companies to date. Issues of tax payment and tax avoidance, according to Jenkins and Newell, ‘have largely been absent from the CSR agenda’. Several major tax scandals have involved multinationals who see themselves as leaders in the area of corporate social responsibility.

The corporate social responsibility statements of a number of major multinational companies ring hollow in the face of their reported tax avoidance practices, as the following examples illustrate. Apple places strong emphasis on its environmental and supplier responsibility, and the right of workers to a health and safe working environment, while at the same time having avoided significant amounts of corporation tax in several jurisdictions. Boston Scientific, a United States medical devices company, describes itself as ‘a good corporate citizen’, yet a holding firm of the company allegedly paid an effective corporation tax rate of just 4 per cent in Ireland on profits of US$1.6 billion. HSBC, the British bank, was said to have effectively provided ‘a tax avoidance and tax evasion service’ for certain customers, yet it claims that its ‘corporate citizenship’ entails a responsibility not just towards ‘customers, employees and shareholders but also to the countries and communities in which we

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142 Jenkins and Newell, note 6, 379. See also Dowling, note 6, 173–4.
143 Jenkins and Newell, note 6, 379.
145 See Section II above.
operate’. The United Kingdom House of Commons Public Accounts Committee accused accounting firm PricewaterhouseCoopers of helping hundreds of companies avoid tax ‘on an industrial scale’. The accounting firm claims that its corporate responsibility includes playing a ‘significant role … in building trust in society and solving important problems’. It is worth noting that two partners of the firm wrote in 2010 that tax could be considered as a corporate responsibility issue:

> We believe that paying tax has already started to develop as a corporate responsibility issue. We suggest that large companies, if they have not already done so, should start to think about where tax fits into their approach and strategy on corporate responsibility. Not all companies will want to be a leader in this area, but not to have a position could well be a risk.

Despite this suggestion, the company’s 2014 Code of Conduct does not specifically refer to tax when setting out how the company can behave ‘in a socially responsible way’.

Given the scale of corporate tax avoidance, the proliferation of corporate social responsibility statements and policies has been described as ‘organised hypocrisy’. Companies themselves have not tended to refer to tax directly in the context of corporate social responsibility, with the few references which do exist usually referring to the requirement of meeting national legal rules concerning tax. Mobile phone company Vodafone, following claims of serious tax avoidance, adopted a tax risk management strategy which treats tax as part of ‘corporate sustainability’. The strategy notes that it is not possible for the company to determine a fair amount of tax to be paid, that Vodafone companies must follow the tax rules as set by governments. In deference to the reality of business concerns, the document also mentions that the company’s ‘main objective is to enhance shareholder value’. Barclays, also embroiled in a high-profile tax avoidance scandal, has included several ‘tax principles’ as part of its ‘responsible citizenship’ policy, including that the company will act in accordance with ‘generally accepted custom and practice, in addition to the law and the UK Code of Practice on Taxation of Banks’.

149 Vanessa Houlder, ‘PwC sold “tax avoidance on industrial scale”’, Financial Times (8 December 2014), https://next.ft.com/content/d2a73216-7fd0-a1e4-828-00144feed08 (accessed 1 June 2016).
153 Sikka (2010), note 6, 154. See also Hasseldine and Morris, note 6; Prem Sikka, ‘Smoke and Mirrors: corporate social responsibility and tax avoidance: A reply to Hasseldine and Morris’ (2013) 37 Accounting Forum 15.
154 Jenkins and Newell, note 6, 389; Dowling, note 6, 174.
157 Ibid, 3. On the question of fairness in tax, see Dowling, note 6, 181.
158 Ibid.
Although these examples may be emblematic of a growing move towards the addressing of tax issues in terms of corporate responsibility, it has generally been the case that ‘most major companies do not currently regard tax as an aspect of CSR’. Jenkins and Newell assert that corporate social responsibility has tended to exclude activities that are central to profitability and competitiveness. A senior policy adviser at Oxfam has argued that short-term profit maximization through tax avoidance has actually become ‘an integral component of many companies’ growth and profit strategies’. Initiatives such as the ‘fair tax mark’ in the United Kingdom require companies to do more than merely claim to be have a socially responsible approach to taxation, requiring that criteria relating to transparency, disclosure and avoidance are met before accreditation. To date, only one FTSE 100 company has received the mark. It has been suggested that an eleventh principle on ‘fair taxation’ be added to the UN Global Compact, whereby business should ‘undertake measures to promote fair taxation of their revenues, including non-resort to tax avoidance schemes and prohibition of any tax evasion practices’.

With corporate tax avoidance now described as the ‘true nemesis’ of corporate social responsibility, there is increasing attention being paid to issues of tax compliance within policy-making in this context. For example, the European Commission’s 2011–2014 corporate social responsibility strategy specifically refers to three principles of ‘good tax governance’: transparency, exchange of information and fair tax competition between states. There is little doubt that these principles if implemented could assist in countering tax avoidance, although tax competition in and of itself is problematic. Moreover, the strategy typifies the predominantly voluntary approach to corporate social responsibility, by merely ‘encouraging’ enterprises ‘to work towards’ implementing the principles. Ireland’s national plan on corporate social responsibility also addresses tax compliance:

The relationship between good tax governance and the ability of Government to fund programmes for the betterment of society is well recognised. Any business that operates on the basis of good CSR principles should be fully tax compliant, thereby playing its part in

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160 Jenkins and Newell, note 6, 380–81.
161 Ibid. See also Dowling, note 6, 183.
163 For details see http://www.fairtaxmark.net (accessed 1 June 2016).
164 Vanessa Houlder, ‘Companies debate merits of “fair tax” kitemark’, Financial Times (2 February 2015), https://next.ft.com/content/5960de76-a9f7-11e4-9fa7-00144feab7de (accessed 1 June 2016).
166 Scheffer, note 153, 367.
169 European Commission, note 167, 7, see also 11.
ensuring that essential funds are available to Government to meet economic and social objectives. 170

The making of the connection between paying taxes and social objectives is important, but the national plan ultimately treats tax as a legal compliance matter. The CEO of the American Chamber of Commerce Ireland, Joanne Richardson claimed that multinational firms from the United States based in Ireland ‘exemplified corporate responsibility’ because they paid €2.7 billion in Irish taxes in 2004. 171 Given that tax avoidance largely occurs within existing legal rules, the approach of Ireland’s national plan on corporate social responsibility does not press companies to address the social impact or the effect on human rights of avoiding tax.

Corporate social responsibility, at least as it has been manifested and practiced to date, does not seem to readily lend itself to the issue of tax. Addressing tax avoidance through the essentially voluntary vehicle of corporate social responsibility would seem to run up against the decidedly legal requirements which arise in relation to tax liabilities. This is evident in Vodafone’s 2014/2015 Sustainability Report, in which the company sought to provide a transparent analysis of its tax and total economic contribution on a country-by-country basis. The document highlighted the challenge of addressing tax through corporate social responsibility:

While individuals and companies have legal obligations to pay tax, those obligations do not, however, extend to paying more than the amount legally required. Companies also have a legal obligation to act in the interests of their shareholders. [...] At the same time, individuals and companies must meet their responsibilities to contribute to the funding of public services and infrastructure, without which societies cannot operate effectively. Achieving a transparent and effective balance between those obligations and responsibilities therefore remains integral to operating sustainably. 172

The claim that corporate social responsibility involves going ‘beyond compliance’ gives rise to a tension in the context of corporate tax avoidance. To the extent that corporate social responsibility policies or pronouncements have engaged with tax, it has been on the basis that companies are expected to comply with the law, rather than go beyond it and pay more than the tax liabilities that are legally due. Tax avoidance, as mentioned previously, does not necessarily run afoul of applicable laws. However, a more meaningful understanding of corporate social responsibility and of going ‘beyond compliance’, could embrace greater tax transparency and disclosure by companies that may not be required by law. Moreover, the emphasis on legal compliance suggests that companies are passive objects of tax laws, despite considerable evidence of corporate lobbying in this context. 173 Recent research has demonstrated that on average ‘socially responsible firms do not pay more corporate taxes than other firms’, and that there is a

positive relationship between tax lobbying efforts and a firm’s corporate social responsibility index rating. For public corporations in the United States at least, ‘the payment of taxes is not viewed as an important socially responsible activity by an influential subset of firms’ stakeholders’. The reduction of tax burdens remains an integral aspect of corporate activity.

Corporate social responsibility itself has been described as a ‘voluntary tax’, which can bring certain reputational and commercial benefits to companies. It’s practice to date can be criticized for being voluntary and selective in nature, for overemphasizing the extent to which citizens and consumers can provide oversight of business activities and, at worst, for being a public relations exercise which deflects from more meaningful regulation. Perhaps a more substantive and effective model of corporate social responsibility may emerge, particularly in light of the increasing emphasis on human rights and the expectations for rather than of companies. In 2010, Special Representative Ruggie stated that ‘the era of declaratory CSR is over’. The UN Guiding Principles seem to address corporate social responsibility implicitly when they state that ‘Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations’. The limitations of addressing corporate tax avoidance through corporate social responsibility have lead Jenkins and Newell to conclude that ‘a regulatory approach is required in order to ensure compliance across the board’. The next section turns to consider corporate tax avoidance in the context of the growing business and human rights agenda.

V. CORPORATE TAX AVOIDANCE AND THE GUIDING PRINCIPLES

The absence of any direct reference to corporate tax avoidance in the United Nations Guiding Principles on business and human rights has not prevented their being applied to the issue of tax practices of business enterprises which may negatively impact on human rights. Several United Nations bodies and individual experts, as well as civil society organizations, have already begun to draw on the Guiding Principles for this purpose. In its 2015 report to the Human Rights Council, the United Nations Working Group on business and human rights highlighted tax avoidance as an area where the Guiding Principles could be of future relevance. The Working Group considered that with...
regard to tax avoidance, there was a need ‘to better delineate roles, responsibilities and appropriate accountability systems for both States and business enterprises’.\(^\text{182}\) In its list of priority issues for 2015, the Institute of Human Rights and Business considered included ‘Developing Policy and Regulatory Architecture to Tackle Human rights abuses arising from tax avoidance and illicit financial flows’.\(^\text{183}\) This section offers a preliminary consideration of the potential for addressing corporate tax avoidance through the Guiding Principles on business and human rights.

The Guiding Principles have achieved considerable international recognition as a ‘common global platform for action’ that is aimed at addressing ‘business-related human rights harm’.\(^\text{184}\) While not comprising new international law, the Guiding Principles are seen to have made a normative contribution by their elaboration of ‘the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved’.\(^\text{185}\) A key characteristic of the Guiding Principles of relevance to corporate tax avoidance is their focus on both states and business enterprises; the phenomenon of tax abuse is a product of the perennial efforts by companies to maximize returns by means that are facilitated by the actions or omissions of states. The dual focus of the Guiding Principles on both state and corporate actors is thus especially relevant in the context of corporate tax avoidance.

The first pillar of the Guiding Principles, the state duty to protect human rights, requires states to take appropriate steps to prevent, investigate, punish and redress human rights abuse by third parties, including business enterprises.\(^\text{186}\) This is based on existing international human rights law. The International Bar Association has persuasively argued that an obligation for states to counter tax abuses derives in particular from the requirement of states parties to the Covenant on Economic Social and Cultural to maximize available resources for the fulfilment of those rights.\(^\text{187}\) The former Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona drew on the Guiding Principles’ first pillar when articulating the view that states have a duty to regulate business enterprises, including legal, accounting and other specialized firms, in order that they do not participate in or facilitate tax abuse.\(^\text{188}\) The state duty to protect human rights is also relevant when states act through international organizations, including those such as the OECD which address international tax rules. It is ‘countries, not companies’, as Oxfam has put it, ‘that need to do the job of re-writing the global tax rules’.\(^\text{189}\) The Guiding Principles require that when states act as members of multilateral institutions, they should ‘[s]eek to ensure that

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\(^{182}\) Ibid.


\(^{185}\) Ibid, 5.

\(^{186}\) Ibid, 6.

\(^{187}\) International Bar Association, note 1, 105.


those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights'.

While international organizations such as the OECD have recognized the societal implications of corporate tax avoidance, the approach adopted is not anchored in human rights. The Guiding Principles advocate that states ‘[e]ncourage those institutions, within their respective mandates and capacities, to promote business respect for human rights’. The OECD Guidelines on Multinational Enterprises have incorporated the Guiding Principles, but have adopted a bifurcated approach to human rights and taxation, as discussed further below.

The Guiding Principle’s second pillar, the corporate responsibility to respect human rights, sets out that ‘Business enterprises should respect human rights’. Companies should effectively seek to do no harm. They should ‘avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’. The corporate responsibility to respect is not a matter of legal obligation, but is described as a ‘global standard of expected conduct for all business enterprises wherever they operate’. In this vein, it is evident that the majority of public opinion is quite clearly opposed to tax avoidance by multinational companies. The responsibility to respect human requires that companies:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

There is little doubt that negative human rights impacts can be linked to the abusive tax activities of accountancy, tax and law firms, banking and other financial services providers, as well as multinational and other companies that have knowingly engaged in tax avoidance. According to the Guiding Principles, the responsibility to respect is not just tied to the operations of a business enterprise itself, but extends to other companies with whom it has business relations.

The corporate responsibility to respect human rights has been engaged as a means of addressing corporate tax avoidance. Magdalena Sepúlveda Carmona considered that tax avoidance would amount to a breach of the responsibility of business enterprises to respect human rights, ‘insofar as they have a negative human rights impact’. Companies that ‘knowingly avoid paying tax are purposefully depriving countries of the resources they need to fulfill their human rights obligations’. Juan Pablo Bohoslavsky, the United Nations’ 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, has applied the corporate responsibility to respect to illicit financial flows. He has asserted that:

Multinational enterprises, as well as their advisers and financiers, need to understand that their tax planning strategies have potential negative impacts on human rights. [...] Business enterprises that contribute through transfer mispricing, tax evasion or corruption to significant illicit financial outflows cause adverse human rights impacts by undermining the abilities of States to progressively achieve the full realization of economic, social and cultural rights. This is particularly the case when they operate in States that have difficulties in meeting the minimum core human rights obligations.

Civil society has also drawn on the second pillar of the Guiding Principles in the context of tax avoidance. The Lima Declaration on Tax Justice and Human Rights, which has been signed by over 150 organizations, declares that ‘the tax behaviour of business can no longer be treated outside the purview of the corporate responsibility to respect human rights’.

To advance corporate respect for human rights, the Guiding Principles recommend that business enterprises make a policy commitment to meet their responsibility to respect human rights, undertake due diligence to ‘identify, prevent, mitigate and account for how they address their impacts on human rights’, and provide for or contribute to remedies for victims of adverse human rights impacts which they cause or contribute to. The Guiding Principles introduce an element of proportionality for the corporate responsibility to respect human rights which would clearly be of relevance in the context of tax avoidance. While the responsibility to respect applies to all companies, ‘the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts’. Certain companies are more directly involved in facilitating avoidance, while the scale of tax avoidance by larger multinational corporations would obviously be far greater in terms of impact than that of small and medium-sized enterprises.

Key elements of the second pillar of the Guiding Principles are reflected in the Lima Declaration on Tax Justice and Human Rights, which calls upon companies to assess and address tax abuse ‘in their policy statements, due diligence and grievance processes’. With regard to an appropriate policy commitment in the area of taxation, it has been suggested that this would comprise ‘[a] clear, publicly communicated tax policy, which aligns the company on a tax risk management scale; sets out the company’s approach to tax negotiations; and rules out specified aggressive tax practices’. In addition to a

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policy commitment, the Guiding Principles also recommend that companies report transparently on their efforts to address human rights impacts.\(^{204}\) In the context of tax avoidance, Juan Pablo Bohoslavsky, the UN Independent Expert, considers that companies could demonstrate responsibility and compliance by embracing ‘a greater degree of transparency, in particular by publishing on a country-by-country basis their sales, profits and taxes’.\(^{205}\) John Christensen, the Director of the Tax Justice Network has put it that ‘[b]eing transparent about tax planning needs to be a key component of corporate citizenship reporting under the Ruggie framework’.\(^{206}\) To meet their duty to protect human rights, states could go beyond recommending that companies divulge such information and insist that it be made available as means of tackling tax abuse. While some inroads have been made on country-by-country reporting in the OECD BEPS process, the outcome document envisages such a requirement only for companies with group revenue of greater than €750 million, who will then report to the relevant tax authorities.\(^{207}\) The European Commission’s proposals reflect this approach, albeit with more of an element of public reporting.\(^{208}\)

There are a number of other features of the corporate responsibility to respect human rights that are of relevance to corporate tax avoidance. The corporate responsibility to respect human rights, the Guiding Principles proclaim, ‘exists over and above compliance with national laws and regulations protecting human rights’.\(^{209}\) It is arguable that the corporate responsibility to respect exists over and above any national laws, and should not be confined to those that are explicitly addressed to the protection of human rights. The International Bar Association has asserted that ‘[m]erely complying with tax law is not enough when this results in the violation of human rights’.\(^{210}\) The Lima Declaration calls on companies to conduct their tax arrangements in a transparent and accountable manner, ‘even when such arrangements are technically lawful yet contravene human rights principles’. Moreover, as mentioned earlier, companies and business representative organizations exert considerable influence on the substance of domestic tax laws and international tax rules. The Guiding Principles state clearly that as part of the corporate responsibility to respect human rights, business enterprises ‘should not undermine States’ abilities to meet their own human rights obligations’.\(^{211}\) The denial of resources by tax avoidance seriously harms the capacity of states to fulfill their human rights obligations. The Lima Declaration calls on companies ‘to refrain from


\(^{205}\) ‘Interim report of the Independent Expert’, note 198, para 34. See also ActionAid, note 203, 3.


\(^{210}\) International Bar Association, note 1, 4.

interfering in the public interest of tax policy-making, be that directly though special-interest lobbying or indirectly through provoking tax competition.²¹²

Due diligence comprises a key element of the second pillar of the Guiding Principles. This has been incorporated in the 2011 revision of the OECD Guidelines for Multinational Enterprises, which now includes a human rights chapter based on the Guiding Principles, although they remain ‘voluntary and not legally enforçable’.²¹³ The OECD Guidelines include a separate chapter on taxation, which emphasizes the importance of enterprises contributing to public finances by ‘making timely payment of their tax liabilities’.²¹⁴ Multinational enterprises should comply with the ‘letter and spirit of tax laws’, but are not required to pay more than legally required. The Guidelines recommend that they provide sufficient information to tax authorities and comply with the arm’s length principle, while refraining from seeking or accepting any exemptions related to tax that are not contemplated in the existing regulatory framework.²¹⁵ There is no reference to tax fairness nor any attempt to link human rights to taxation. Furthermore, the recommendation that companies conduct risk-based due diligence regarding actual and potential adverse impacts of their activities or business relationships is explicitly excluded from applying to the chapter on taxation.²¹⁶ According to John Ruggie and Tamaryn Nelson, applying due diligence to taxation in the OECD Guidelines ‘was not considered appropriate’.²¹⁷ Prominent non-governmental organizations have acknowledged that human rights due diligence is in its ‘infancy’, but advocate for a concerted effort to apply it to companies’ tax practices, while conceding that the design and implementation of such systems will be ‘a challenging but important journey for a tax-responsible company, and will require a great deal of innovative work’.²¹⁸

The Guiding Principles’ third pillar is addressed to access to remedy. In the context of corporate tax avoidance, an individualized approach to remediation would seem unsuitable, given the likely absence of any clear causative link between a single company’s tax practices and the specific violation or negative impact on the human rights of an individual or community. Corporate tax avoidance has a broader, cumulative and harmful impact on human rights. The Guiding Principles reject an overly narrow view of remedies, setting out how these may include ‘apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition’.²¹⁹ The third pillar also envisages the aggregation of claims or representative proceedings, such as class actions for

²¹² Lima Declaration, note 200. See also Jenkins and Newell, note 6, 390–91.
²¹³ OECD Guidelines for Multinational Enterprises, note 125, 17.
²¹⁴ Ibid, 60.
²¹⁵ Ibid, 19.
business-related human rights abuses.220 The International Bar Association notes that several UN mechanisms ‘certainly have the mandate and potential to articulate the links between tax abuses, poverty and human rights on an authoritative basis’.221 Such mechanisms are increasingly engaging with business and human rights in general and could also be seen as an appropriate avenue for remedy in this context, were individuals or organizations to bring such matters before them. While there have been a handful of unsuccessful complaints concerning taxation under the National Contact Point system of the OECD Guidelines for Multinational Enterprises,222 recent climate change litigation may offer a model for pursuing remedies for harm to human rights that occurs on a more systemic basis.223

National action plans are considered the main vehicle for the implementation of the UN Guiding Principles on business and human rights.224 The limited number of national action plans that have been adopted do not address the issue of corporate tax avoidance in any great detail, although the Netherlands plan articulates the Dutch Government’s support for ‘the growing number of international initiatives to promote transparency by means of tax disclosure’.225 During the consultation on Ireland’s national action plan on business and human rights, several non-governmental organizations called for the plan to address corporate tax avoidance. The Irish Human Rights and Equality Commission recommended that Ireland’s plan should ‘acknowledge the negative human rights impact of tax avoidance both nationally and globally, and include a commitment by the Irish Government to adopting a human rights based approach to addressing tax avoidance’.226 The Irish Centre for Human Rights recommended that the national action plan include a commitment to conducting an assessment of the human rights impact of Ireland’s tax practices.227 Christian Aid Ireland asserted in its submission that in light of the Department of Finance spillover analysis, the Irish government would be in ‘a strong position to lead on developing the link between tax, business and human rights’.228

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220 Ibid.
221 International Bar Association, note 1, 146.
227 Irish Centre for Human Rights, Submission to the Department of Foreign Affairs on the Development of a National Plan on Business and Human Rights (1 March 2015), 8.
228 Christian Aid Ireland, Christian Aid Ireland submission, Government of Ireland consultation on a National Action Plan for Business and Human Rights (1 March 2015), 5.
It put forward that Ireland’s national action plan should ‘include government recommendations to businesses not to engage in aggressive tax avoidance as part of their CSR commitments and human rights responsibilities’. The organization urged transparency in tax dealings, in particular publicly accessible country-by-country reporting by companies and a register of owners of companies. Despite these various calls, which were echoed in a private members motion in the Irish parliament, the draft national action plan published by the Irish Department of Foreign Affairs and Trade has made no reference to the issue of taxation.

VI. CONCLUSION

Corporate tax avoidance has become a high-profile matter of international public policy. As with other illicit financial flows, such tax avoidance can have a negative impact on human rights. The concerted efforts of the G20 group of states and the OECD to address tax abuse have included some acknowledgment of the human costs of large-scale tax avoidance by multinational corporations, but their undertakings have not adopted a human rights-based approach, and an element of self-interest of states is apparent in the process. The Base Erosion and Profit Shifting project has been welcomed by civil society as an important step, but there have been calls for greater and more equal participation of developing countries in the process. Parallel to these initiatives, human rights has become a touchstone in the debates on tax avoidance and tax justice. According to Philip Alston, this constitutes a break with the traditional approach of human rights, where there has been a greater focus on civil and political rights, and because lawyers, who dominated the field, ‘tended to steer clear of matters of economic policy’. The nature of the phenomenon of corporate tax avoidance and the actors that are implicated therein presents a serious challenge for the existing human rights machinery, which has only turned its attention to the activities of business entities relatively recently. Nevertheless, human rights can serve as a lens through which to view the issue of corporate tax avoidance, one which provides a principled and universal basis to examine and challenge the fairness of tax laws, policies and practices. With the business and human rights agenda growing in prominence, it was inevitable that corporate tax avoidance would be on the agenda.

229 Ibid, 13.
231 Corporate Tax Policy: Motion (Private Members) 891(3) Dáil Éireann Debate 43.
236 Alston, note 55.
avoidance would come to be addressed through this prism, thus overcoming a reluctance which was similarly evident in the realm of corporate social responsibility.

The United Nations Guiding Principles have been the focal point of the efforts of many states, international governmental organizations and civil society in the area of business and human rights and are slowly becoming embedded in human rights practice and processes. There is little doubt that they have contributed to the considerable advancement of the business and human rights agenda over the past decade, although it is not yet apparent that the prominence of such undertakings has been matched by a positive impact on the prevention and remediation of corporate human rights harm. National implementation of the Guiding Principles has been poor, and advocates are increasingly turning their attention to a possible binding business and human rights treaty.238 With regard to corporate tax avoidance, a business and human rights approach can offer some potential for addressing the issue and the Guiding Principles provide a useful framework, given that they authoritatively articulate the obligations and responsibilities of states and corporations when it comes to activities that may harm human rights. While corporate social responsibility has tended to be a business-centred endeavour, with the role of the state being somewhat downplayed, the approach of business and human rights is to treat corporations and states as having differing though parallel responsibilities concerning human rights. Both states and corporations contribute in different yet interrelated ways to corporate tax avoidance. While tax is not explicitly mentioned in the Guiding Principles themselves, their potential is beginning to be harnessed by tax justice advocates and United Nations experts and bodies.

Placing corporate tax avoidance more firmly on the business and human rights agenda can help to stimulate further discussion, debate and analysis of the human rights implications of this global issue, maintain the attention of states, corporations, civil society and human rights bodies, and perhaps even foster human rights-oriented developments aimed at addressing this harmful practice. While it may be that human rights law as it stands does not offer technical solutions to tax abuse, a human rights based approach that emphasizes principles such as fairness, transparency and accountability, as well as paying attention to marginalized groups, has obvious merit in this context.240 To advance the potential of a business and human rights approach to addressing corporate tax avoidance, further research and analysis is required, including on the articulation of the negative human rights impact of tax avoidance by companies, the role of human rights in international organizations addressing issues of taxation,


239 International Bar Association, note 1, 146.

such as the OECD, and the application of the requirements under the three pillars of the United Nations Guiding Principles. With regard to the latter, it is necessary to elaborate the obligations under the first pillar for states whose tax structures facilitate corporate tax avoidance, as well as the scope of the duty to regulate particularly relevant companies, including accountancy and law firms, and banks, whether state-owned or private, that are implicated in corporate tax avoidance. Consideration must also be given to the extraterritorial human rights obligations of states in the context of corporate tax avoidance, given the globalized nature of economic activity and the presence of tax havens in the overseas territories of certain states, and to the role that might be played by the duty of international cooperation for states and the right to an international and social order set out in Article 28 the Universal Declaration of Human Rights.241 Under the corporate responsibility to respect, how might the concept of human rights due diligence be applied to a corporate tax practices in order that companies might ‘know and show that they do not infringe on others’ human rights’?242 With regard to the third pillar, concerning remedies, greater engagement by the international and regional human rights bodies with corporate tax avoidance is merited, as well as efforts at exploring the potential for creative litigation to tackle the structural harm caused by the phenomenon in domestic jurisdictions, whether directed at states, corporations, or both.243 While business and human rights clearly does not provide a silver bullet for addressing the complex challenges of corporate tax avoidance, it would seem to hold a degree of potential that may complement and inform existing initiatives and thus lends itself to further consideration in both human rights practice and scholarship.

242 Ruggie, note 115, 99 (emphasis in original).
243 See, for example, Nicholas J Lusiani, ‘“Only the Little People Pay Taxes”: Tax Evasion and Switzerland’s Extraterritorial Obligations to Zambia (Committee on Economic, Social and Cultural Rights)’ in Mark Gibney and Wouter Vandenhole (eds.), Litigating Transnational Human Rights Obligations; Alternative Judgments (London and New York: Routledge, 2014) 116.