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Corporate Tax Abuse on the Business and Human Rights Agenda

LAGM01 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Radu Mares

Semester of graduation: Period 1 Spring semester 2022

Contents

Summary

Corporate tax evasion, tax avoidance, and aggressive tax planning undermine states' ability to protect, respect and fulfill human rights since states are deprived of necessary resources to realize economic, social and cultural rights as well as civil and political rights. Corporate tax has previously been called the elephant in the room within the United Nations' ('UN') framework of Business and Human Rights; however, now it is recognized as a key issue for the next decade.

The thesis' overarching aim is to examine the potential of integrating corporate tax abuse into the UN's soft law framework of Business and Human Rights that is being hardened into law by the European Union ('EU'). The United Nations Guiding Principles on Business and Human Rights ('UNGPs') are built upon three pillars: (1) the state duty to protect human rights; (2) the corporate responsibility to respect human rights; and (3) access to remedy for victims of business-related human rights abuses. The research is guided by a mixed methodological approach including a doctrinal research method and a critical analysis of the law with references to IHRL, EU law, and International Tax Law.

In the first study, the thesis clarifies states' international human rights obligations under the first pillar of the UNGPs concerning corporate tax abuse by examining states' obligations under IHRL in relation to resource mobilization. The thesis concludes that states must not only generate resources; they must also prevent and take strong measures against corporate tax abuse to demonstrate that every effort has been made to devote the maximum of all available resources for the realization of human rights.

In the second study, the thesis analyzes if the EU's regulatory modalities on Business and Human Rights include corporate tax. The thesis concludes that the EU's existing framework only contains two references to tax. Furthermore, the proposed Directive on Corporate Sustainability Due Diligence excludes tax. Yet, the thesis demonstrates that the EU's legal framework on anti-tax avoidance may further Business and Human Rights objectives.

In the thesis' third and final study, the thesis analyzes potential advantages and obstacles to integrating tax into the Business and Human Rights framework. It

demonstrates that the integration of tax would favor a coherent framework of Business and Human rights while incorporating all adverse human rights impacts from businesses. Moreover, the thesis argues that integration may foster a different approach to tax compliance if corporations recognize the relationship between tax and human rights since corporations' responsibility to respect human rights extends to tax strategies and tax behaviors.

The thesis concludes that despite the advantages and the expectation on corporations in the next decade to apply Human Rights Due Diligence on tax – which could help corporations identify and prevent adverse impacts – remediation in the third pillar of the UNGPs constitutes an inherent challenge. Corporate tax abuse has a systemic, cumulative, and harmful impact on human rights equally to climate change. Individual remediation is therefore not appropriate since corporate tax abuse lacks a direct causal link between the tax behavior of a single corporation and the specific human rights impact of an individual or community.

Sammanfattning

Skatteflykt, skatteundandragande och aggressiv skatteplanering av företag underminerar staters förmåga att respektera, skydda och uppfylla mänskliga rättigheter eftersom stater berövas nödvändiga resurser för att förverkliga ekonomiska, sociala och kulturella såväl som medborgerliga och politiska rättigheter. Företags skattebeteenden har tidigare betraktats som en elefant i rummet inom Förenta nationernas ('FN') ramverk för företagande och mänskliga rättigheter men anses idag utgöra en nyckelfråga för det kommande decenniet.

Förevarande examensuppsats har ett övergripande mål att undersöka möjligheten att integrera skatt inom FN:s soft law-ramverk för företagande och mänskliga rättigheter som förrättsligas av Europeiska unionen ('EU'). FN:s vägledande principer för företag och mänskliga rättigheter bygger på tre pelare: (1) statens skyldighet att skydda de mänskliga rättigheterna; (2) företags ansvar att respektera de mänskliga rättigheterna; och (3) möjlighet att få sin sak prövad om rättigheterna inte respekteras. Uppsatsen har ett blandat metodologiskt tillvägagångssätt där både en rättsdogmatisk och en rättsanalytisk metod tillämpas. Därtill innehåller uppsatsen hänvisningar till internationell lagstiftning om mänskliga rättigheter, EU-rätt och internationell skatterätt.

I uppsatsens första undersökning klargör uppsatsen staters skyldigheter enligt den första pelaren i FN:s vägledande principer i relation till skatt genom att undersöka staters förpliktelser enligt internationell lagstiftning om mänskliga rättigheter i relation till resursmobilisering. Uppsatsen drar slutsatsen att stater inte endast måste generera resurser – de måste även förebygga och vidta kraftfulla åtgärder mot företags skatteflykt och skatteundandragande. Stater måste visa att de har vidtagit alla åtgärder för att ägna alla sina tillgängliga resurser för förverkligandet av de mänskliga rättigheterna.

I den andra undersökningen analyserar uppsatsen huruvida skatt är inkluderat i EU:s rättsliga ram för företag och mänskliga rättigheter. I denna del drar uppsatsen slutsatsen att skatt endast omnämns två gånger och att förslaget till direktiv om tillbörlig aktsamhet för företag i fråga om hållbarhet inte omfattar till skatt. Uppsatsen visar dock att EU:s rättsliga ram rörande skatteflykt kan främja mål som är hänförliga till företagande och mänskliga rättigheter.

I uppsatsens tredje och avslutande undersökning analyseras möjliga fördelar och hinder för att inkludera skatt i ramverket för företag och mänskliga rättigheter. Uppsatsen påvisar att en inkludering av skatt skulle gynna ramverket genom att göra det sammanhängande och därmed omfatta företags samtliga negativa påverkan på de mänskliga rättigheterna. Därtill argumenterar uppsatsen att en inkludering kan främja företags skattemoral om företag erkänner relationen mellan skatt och mänskliga rättigheter eftersom företags ansvar att respektera de mänskliga rättigheterna omfattar skatteplanering och skattebeteenden.

Uppsatsen drar slutsatsen att tillgång till rättsmedel inom den tredje pelaren av FN:s vägledande principer utgör en inneboende utmaning för integrering. Detta trots att uppsatsen har påvisat flera fördelar med en inkludering samt att det finns en förväntan på att företag under det kommande decenniet ska utföra en konsekvensanalys med mänskliga rättigheter i fokus där skatt inkluderas; en konsekvensanalys som kan hjälpa företag att identifiera och förhindra negativ påverkan på de mänskliga rättigheterna. Detta beror på att skatteflykt, skatteundandragande och aggressiv skatteplanering har en systemisk, kumulativ och skadlig påverkan på de mänskliga rättigheterna i likhet med klimatförändringarna. Individuell prövning av rättigheter är därför inte lämpligt eftersom det saknas ett direkt orsakssamband mellan ett enskilt företags skattebeteende och dess påverkan på de mänskliga rättigheterna för en enskild individ eller ett samhälle.

Förord

Ett stort tack till Cristina, Johannes, Katja och Dennis för att ni har utmanat mig och gjort livet roligt under min studietid. Ett särskilt tack till Andréas för att du har lyssnat på mina uppsatsidéer och resonemang under vårens oräkneliga hundpromenader. Till sist vill även tacka min familj som alltid hejar på mig.

Lund, 25 maj 2022

Abbreviations

ATAD	Anti-Tax Avoidance Directive
BEFIT	Business in Europe: Framework for Income Taxation
BEPS	Base erosion and profit shifting
BHR	Business and Human Rights
CCCTB	Common Consolidated Corporate Tax Base
CESCR	Committee on Economic, Social and Cultural Rights
CSR	Corporate Social Responsibility
CSRD	Corporate Sustainability Reporting Directive
GRADE	Government Revenue and Development Estimations
GRI	Global Reporting Initiative
HRDD	Human Rights Due Diligence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IHRL	International Human Rights Law
IMF	International Monetary Fund
mHRDD	Mandatory Human Rights Due Diligence
MNE	Multinational enterprise
NGO	Non-governmental organization
NFRD	Non-Financial Reporting Directive

NPC	National Contact Point
OECD	Organisation for Economic Cooperation
OECD Guidelines	OECD Guidelines for Multinational Enterprises
OHCHR	Office of the United Nations High Commissioner for Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNGPs	United Nations Guiding Principles on Business and Human Rights
SDGs	Sustainable Development Goals
Working Group	United Nations Working Group on Business and Human rights

1 Introduction

1.1 Background

Each year, multinational enterprises ('MNEs') shift close to 40 percent of their profits to tax havens.[1] In a report published in 2021, using aggregate country-by-country data, the non-governmental organization ('NGO') Tax Justice Network could demonstrate how MNEs shift profits worth 1.19 trillion US dollars into tax havens every year thus depriving governments of direct tax revenue of 312 billion US dollars.[2] Corporate tax abuse is a human rights issue since it undermines states' ability to protect, fulfill and respect human rights as both developed and developing states are deprived of necessary resources to realize economic, social, and cultural rights as well as civil and political rights.[3]

Globalization has increased the mobility of capital and subsequently created opportunities for MNEs to minimize their tax burden by profit shifting.[4] In addition, globalization created governance gaps providing a permissive environment for wrongful acts by companies, where societies lack the capacity to manage adverse human rights impacts caused by economic forces and actors. The issue of corporate responsibility for human rights violations gained attention in the 1990s.[5] Attempts at the United Nations ('UN') were made to regulate the responsibilities of MNEs for adverse human rights impacts. However, creating binding norms was a difficult task and triggered strong opposition from both states and businesses. Therefore, instead of supporting the draft Norms, the Commission of Human Rights asked the Secretary-General in 2005 to appoint a Special Representative to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights".[6] Following a lengthy period of research and

[1] Tørsløv, R. Thomas., Wier, S. Ludvig., & Zucman, Gabriel (2018) p. 2.
[2] Tax Justice Network (2021) The State of Tax Justice 2021 p. 6.
[3] HRC (2016) Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development, A/HRC/31/61, para 21.
[4] OECD (2013) Action Plan on Base Erosion and Profit Shifting, p. 8.
[5] HRC (2008) Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Doc A/HRC/8/5, paras 3, 104.
[6] UN Commission on Human Rights, Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises, 20 April 2005, E/CN.4/RES/2005/69, para 1(a)-(b).

consultations, the work of Professor John Ruggie as the appointed Special Representative resulted in the "Protect, Respect and Remedy" Framework ('Framework') that was adopted and endorsed by the United Nations General Assembly ('UNGA') in 2008 followed by the Guiding Principles on Business and Human Rights ('UNGPs') in 2011.[7] In short, the UN Framework addresses what should be done, while the UNGPs address how to do it.[8] The UNGPs are built upon three pillars: (1) the state duty to protect human rights; (2) the corporate responsibility to respect human rights; and (3) the need for greater access to remedy for victims of business-related human rights abuses.[9] The UNGPs are the global standard of practice relating to business and human rights ('BHR'). It is not a legally binding document, nonetheless, the UNGPs elaborates on existing standards and practices from international and domestic law and has a normative contribution. States are the only actors that have obligations under International Human Rights Law ('IHRL'). However, the UNGPs establish a dual responsibility in which states have an obligation to protect human rights and businesses have a responsibility to respect human rights.[10] The UNGPs proposes that states should adopt a smart mix of both mandatory and voluntary measures to foster business respect for human rights.[11] The soft law framework of BHR is currently being hardened in law in the EU. In 2022, the European Commission proposed a Directive on Corporate Sustainability Due Diligence to implement mandatory Human Rights Due Diligence ('mHRDD') for corporations.[12]

The issue of tax abuse arose on the global political agenda in 2014 after the International Consortium of Investigative Journalists revealed tax schemes exploiting mismatches in tax systems and secret tax deals in what is known as LuxLeaks.[13] A growing tax justice movement has subsequently developed with major anti-poverty and development organizations.[14] However, corporate tax abuse has been called the

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[7] HRC, Human rights and transnational corporations and other business enterprises*,* resolution, 6 July 2011, A/HRC/RES/17/4.
[8] Ruggie, John (2013) p. 81.
[9] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31.
[10] Ibid, para 14 and Annex para 4 commentary.
[11] Ibid, Annex para 3 commentary.
[12] European Commission (2022) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence.
[13] European Commission (2020) Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices p. 17.
[14] See for example Tax Justice Network (2021) Tax Justice & Human Rights; ActionAid, Christian Aid, and Oxfam (2015) Getting to Good.

"elephant in the room" within the field of BHR. One of the reasons for the exclusion of corporate tax abuse is the perceived weak link to human rights.[15] Nonetheless, the connection between tax and human rights is evolving in different fields of IHRL.[16] In addition, the United Nations Working Group on Business and Human rights ('Working Group') published its Roadmap for the next decade of Business and Human Rights ('Roadmap') in 2021 with several references to corporate tax abuse whereas "[t]ax practices that undermine the State's ability to fulfill economic and social rights" is considered as a key issue of corporate practices inconsistent with commitments to respect human rights.[17] Moreover, states should reinforce emerging mHRDD regulations through international dialogue on "complex corporate structures, the existence of shell companies and registrations of business entities in jurisdictions favoring secrecy to support oversight and accountability".[18]

1.2 Purpose and Research Questions

This thesis' overarching aim is to examine the potential of integrating tax into the soft law framework of BHR that is being hardened into law in the EU.[19] IHRL does not have the technical solutions to corporate tax abuse.[20] Nevertheless, this thesis will build on the assumption that regulatory efforts by individual states cannot effectively tackle tax abuse since corporations are often one step ahead of exploiting loopholes in tax laws regardless of states' regulatory efforts.[21] Therefore, BHR in which businesses have a responsibility to respect human rights might reinforce the existing obligations upon corporations to comply with national tax laws.

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[15] See Darcy, Shane (2017) p. 2; International Bar Association (2013) Tax Abuses, Poverty and Human Rights p. 118.
[16] Women's rights: CEDAW (2016) Concluding observations on the combined fourth and fifth periodic reports of Switzerland, CEDAW/C/CHE/CO/4-5. Economic, social, and cultural rights: HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28; CESCR (2016) Concluding observations on the 6th periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6. The right to development: OHCHR, The Right to Development and Taxation.
[17] Working Group on BHR (2021) UNGPs 10+ A Roadmap For the Next Decade of Business and Human Rights p. 28.
[18] Ibid p. 23.
[19] See for example European Commission (2022) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence.
[20] Darcy, Shane (2017) p. 29.
[21] International Bar Association (2013) Tax Abuses, Poverty and Human Rights p. 25.

The first purpose is to examine states' human rights obligations under the first pillar of the UNGPs in relation to resource mobilization and corporate tax abuse to identify and clarify the link between corporate tax behavior and its potential impacts on human rights. The second purpose is to examine and analyze the role of tax in the EU's existing and proposed modalities on BHR. The third purpose is to examine possible benefits or obstacles of the inclusion of corporate tax behavior within the framework of BHR. To fulfill the aim and the purposes of this thesis, the following research questions will be examined:

1. What are the human rights obligations upon states in relation to corporate tax abuse?
2. What is the existing role of corporate tax in the regulatory modalities in the EU relating to the smart mix of regulatory measures in Business and Human Rights?
3. What are the possible advantages and obstacles of including tax in the framework of Business and Human Rights?

1.3 Outline

The thesis is outlined in four main chapters. Chapter 2 will address the relationship between tax and human rights to clarify the link between human rights and corporate tax abuse. The chapter will demonstrate the human rights obligations upon states in relation to resource mobilization and tax abuse to clarify states' obligations to protect human rights under the first pillar of the UNGPs.

Chapter 3 provides a brief introduction to the principles in the international tax regime, rationales for tax competition between states, and profit shifting. The chapter also addressed the issue of legality, the compliance mindset, and the interpretation of tax laws. Moreover, the chapter addresses harmful corporate tax practices that may cause adverse impacts on human rights and a brief descriptive overview of the regulatory initiatives by the EU relating to anti-tax avoidance.

Chapter 4 examines the framework of UNGPs and the regulatory modalities by the EU relating to BHR. The chapter also analyzes how the issue of corporate tax abuse is addressed within the two frameworks and demonstrates some voluntary initiatives relating to the responsible tax behavior of corporations.

Chapter 5 is an analysis of the integration of corporate tax behavior within the framework of BHR and the EU's proposed Directive on Corporate Sustainability Due Diligence. Finally, the thesis' conclusion is elaborated in Chapter 6.

1.4 Delimitation and Previous Research

There are two main instruments within fiscal policy: revenue and expenditure. These two functions are both critical for states' ability to realize human rights.[22] Nevertheless, this thesis will not focus on expenditure, i.e., how governments allocate their budgets, which has previously been examined from a human rights perspective.[23] Instead, this thesis will focus on revenue and corporate tax. Corporate income tax is not the only source of governmental revenue, other important resources are for example royalty fees from natural resources, tariffs on imports and exports, and fees for public services such as schools and hospitals.[24] However, tax is the primary, most sustainable, and reliable source of revenue to finance public goods and services and constitutes one of few sources of public revenue in low-income states.[25]

The connection between tax and human rights is evolving in the literature.[26] However, research on the relationship between corporate tax behavior and BHR is limited and there has been little effort to integrate corporate tax conduct within BHR and especially in HRDD.[27] Nevertheless, there are scholars and reports from NGOs exploring the relationship.[28] The suggestion to include tax impact assessments within the UNGPs has previously been done in a joint discussion by NGOs in a paper called *Getting to Good: Responsible Corporate Tax Behavior* published in 2015 which this thesis will elaborate on.[29] Academics have expressed a need for deeper engagement by scholars, NGOs and policymakers to formulate the responsibilities of corporations

[22] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 2.
[23] Reisch, Nikki (2019) p. 37; See for example Nolan, Aoife., O'Connell, Rory & Harvey, Colin (2013).
[24] De Schutter, Olivier (2019a) p. 60.
[25] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 2; IMF (2014) Spillovers in International Corporate Taxation p. 7.
[26] See for example Alston, Philip G. & Reisch; Nolan, Aoife., O'Connell, Rory & Harvey, Colin (2013); Beckett, Paul (2018).
[27] Alston, G. Philip & Reisch, Nikki (2019) pp. 23–24.
[28] See for example International Bar Association (2013) Tax Abuses, Poverty and Human Rights; Darcy, Shane (2017); Tax Justice Network (2019b); Lima Declaration on Tax Justice and Human Rights (2015); Bogota Declaration on Tax Justice for Women's Rights (2017).
[29] ActionAid, Christian Aid, and Oxfam (2015), Getting to Good.

relating to tax conduct and to articulate the obligations under the first pillar of the UNGPs for states facilitating tax abuse and the obligations to regulate corporate tax abuse.[30] Therefore, this thesis aims to contribute to this debate.

Chapter 2 of the thesis will examine state obligations to mobilize resources for the fulfillment of human rights and primarily focus on the two big covenants in IHRL: the International Covenant on Economic, Social, and Cultural Rights ('ICESCR') and the International Covenant on Civil and Political Rights ('ICCPR'). Resource mobilization is acknowledged as a central part to achieve the UN 2030 Agenda and meet the Sustainable Development Goals ('SDGs') whereas taxation plays a fundamental role.[31] Due to space limitations, this thesis will not elaborate on resource mobilization in relation to the SDGs or the Addis Ababa Action Agenda of the Third International Conference on Financing for Development.[32]

The thesis will not examine domestic laws. Instead, the thesis will examine regulatory initiatives from the EU in chapters 3 and 4. This deliberate choice has been made since the EU is an active regulator in both BHR and tax. However, tackling corporate tax abuse will require the implementation of fundamental reforms of the corporate tax rules on a global scale.[33] The thesis will address tax competition between states and the fact that corporate tax abuse harms low-income states the most. However, the initiatives at the UN level to regulate states' behaviors will not be addressed due to space limitations. In addition, the thesis will not examine how the EU's initiatives impact low-income states.

Chapter 3 will provide a brief and not exhaustive overview of the EU's regulation of tax avoidance and aggressive tax planning. The focus will be on the Anti-Tax Avoidance Directive, Country-by-Country reporting mechanisms, and proposals for unitary taxation. This delimitation has been made since it corresponds with some of the obligations upon states derived from IHRL to tackle tax abuse.[34] Moreover, the thesis will only cover a selected range of potentially abusive tax practices identified by the

[30] Alston, G. Philip & Reisch, Nikki (2019); Darcy, Shane (2017) p. 30.
[31] See Target 17.1 of the SDGs.
[32] Addis Ababa Action Agenda is a global framework for financing the 2030 Agenda, 193 UN Member States have committed to enhancing tax systems' fairness, transparency, efficiency, and effectiveness.
[33] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 401.
[34] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 37: "[…] combat transfer pricing practices and deepen international tax cooperation and explore the possibility to tax multinational groups of companies as single firms […]."

International Monetary Fund ('IMF'): transfer pricing and treaty shopping.[35] The selection of abusive tax behaviors derives from the discussion paper *Getting to Good: Towards Responsible Tax Behaviors*.[36] The thesis has adopted these limitations since it is a thesis in IHRL and not in international tax law. In chapter 4, the BHR initiatives from the EU will not cover public procurement and this thesis will focus on a delimited range of voluntary initiatives directed against corporations - not investors.

Tax and corporate responsibility have been examined by scholars within the field of Corporate Social Responsibility ('CSR') where the responsibility to obey tax law derives from an ethical obligation.[37] This thesis will draw upon some findings from CSR scholars since the literature on BHR and tax is scarce. CSR and BHR may be perceived as the same thing using different languages. CSR is often interpreted as self-imposed norms where the responsibility is binding on a moral level. In contrast, BHR does not use the language of voluntarism since it refers to human rights obligations and the language of voluntarism would diminish human rights responsibility to corporate goodwill.[38]

1.5 Method and Material

This is a thesis based on IHRL and has an overarching human rights perspective. It covers different fields of law that are usually analyzed in isolation from each other: IHRL, BHR, EU law, and international tax law. Therefore, different research methods and materials have been used to answer the abovementioned research questions and to fulfill the thesis' purposes.

To answer the first and second research questions, which are descriptive questions that aim to establish *de lege lata*, the thesis has used a doctrinal research method where arguments are derived from authoritative sources.[39] The sources of IHRL listed in 38(1) Statute of the International Court of Justice are treaties, custom, general principles of law and subsidiary means for determining the law such as writings of jurists. In IHRL, resolutions from the UNGA and human rights experts' work in

[35] IMF (2014) Spillovers in International Corporate Taxation p. 11.
[36] ActionAid, Christian Aid, and Oxfam (2015), Getting to Good.
[37] See for example: Hilling, Axel & Ostas, Daniel T. (2017); Avi-Yonah, Reuven S., (2014); Hilling, Axel & Sorrentino, Lorena (2019).
[38] Wettstein, Florian (2016) pp. 79-80.
[39] Hutchinson, Terry (2018) p. 14.

different bodies may also be regarded as sources of IHRL.[40] Tax is not explicitly referred to in any IHRL treaties, therefore, the material used to answer the first question primarily builds upon general comments and recommendations from treaty bodies, writings of scholars, and the work of human rights expert bodies.

To answer the second question, the doctrinal research method has been used in subchapters 4.2.1 and 3.4 to examine the EU's regulatory modalities relating BHR and anti-tax avoidance. There are three sources of EU law: primary law (e.g. EU treaties), secondary law, and supplementary law. To determine the legal framework relating to the EU, the thesis will examine secondary law, i.e., regulations, directives, decisions, communications, white and green papers.[41] Directives requires transposition into the Member States' domestic laws whereas Regulations have binding legal force.[42] However, this thesis does not examine how the law functions nor how the Member States have implemented the Directives.

To answer the third research question, the thesis has used a method that can be described as a critical analysis of the law. This approach offers opportunities to criticize, discuss and analyze a legal problem more freely by using different sources outside of the traditional legal method while recognizing that there can be several solutions to solve a legal problem.[43] To establish the relationship between tax and human rights in subchapters 2.1 and 2.2, the thesis uses materials from CSR scholars, Tax Justice NGOs, sources from IHRL, and research based on the Government Revenue and Development Estimations ('GRADE') tool. The GRADE project was established in 2020 at the University of St. Andrews School of Medicine to demonstrate how increased government revenue could help the progress towards the SDGs.[44] The tool can be used to demonstrate the human cost of tax abuse.[45]

To fulfill the thesis' overarching aim to examine the existing and potential role of tax in BHR both at the UN and EU levels, the thesis first establishes the issue of tax abuse in chapter 3. The materials used to describe the legal problem, i.e., corporate tax abuse, are written by international tax law scholars, CSR scholars, international organizations, and NGOs. Chapter 4 explains the framework of BHR, regulatory

[40] Chinkin, Christine (2018) p. 63.
[41] EUR-Lex, Sources of European Union Law.
[42] EUR-Lex, European Union directives.
[43] Sandgren, Claes (2018) pp. 48–49.
[44] The GRADE Project (2021) User Guide p. 1.
[45] O'Hare, Bernadette., McNabb, Kyle., & Hall, Stephen. (2021).

modalities relating to BHR in the EU and its relationship to tax, and voluntary initiatives on responsible business conduct. The materials used derive from IHRL, EU law, CSR scholars, and NGOs.

Chapter 5 analyzes the possible integration of corporate tax behavior within two of the three pillars of UNGPs and the proposed Directive on Corporate Sustainability Due Diligence from the EU and its relationship to tax. The third research question does not aim to establish *de lege lata,* i.e., how the law is. Instead, the thesis aims to develop an argument for the integration of corporate tax behavior within BHR which is a *de lege ferenda*-argument, i.e., how the law should be.[46] As stated in the background, the instruments of BHR at the UN level are not traditional legal sources with binding force. The UNGPs are characterized as soft law elaborated upon existing standards and practices from international and domestic law and have a normative contribution.[47] Therefore, the arguments for imposing a responsibility for corporations to respect human rights will rely on soft law. The thesis is built upon the assumption that a BHR approach might be a piece in the solution to corporate tax abuse. However, the thesis does not adopt a theory besides the normative framework of BHR to develop the *de lege ferenda*-argument. The materials used to examine possible advantages and obstacles are primarily derived from scholars within CSR and BHR, NGOs, EU law, and sources relating to BHR.

1.6 Definitions

The thesis will use the term “tax abuse” as including both tax evasion and tax avoidance. This term is used within the Tax Justice movement and by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.[48] Moreover, the thesis will also include aggressive tax planning within the scope of “tax abuse” since aggressive tax planning has the same effects as tax avoidance by challenging the fundamental functions of tax systems which have led

[46] Kestmont, Lina (2018) pp. 17–18.
[47] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (2011), A/HRC/17/31, para 14 and Annex para 4 commentary.
[48] Tax Justice Network (2021) The State of Tax Justice 2021, p. 30; HRC (2016) Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development, A/HRC/31/61, paras 7-8.

some authors to label aggressive tax planning as tax avoidance.[49] The definitions of tax evasion, tax avoidance, and aggressive tax planning will be elaborated in subchapter 3.3.1. Tax abuse in referenced material can be defined in other ways, for example, tax abuse according to the former UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, includes tax evasion, fraud, and other illegal practices but also bribery and money laundering.[50] The concept of "tax behavior" will refer to corporations' tax-motivated actions.

There is no universal definition of "tax havens", however, for the purpose of this thesis tax havens are understood as low-tax jurisdictions, offshore financial centers or secrecy jurisdictions specialized in enabling profit shifting from MNEs.[51] Therefore, the thesis' definition is wider than the EU's list of non-cooperative jurisdictions for tax purposes where jurisdictions are screened on a number of criteria whereas zero or near zero-tax regimes are just a risk indicator.[52] The EU's list does not include EU's Member States such as Ireland or jurisdictions ranking on the Corporate Tax Haven Index from 2021 such as the British Virgin Islands, Cayman Islands, and Bermuda.[53]

[49] Hilling, Axel & Ostas, Daniel T. (2017) p. 45.
[50] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28/Corr.1, para 10.
[51] Tax Justice Network, What is a tax haven?
[52] European Council (2022) EU list of non-cooperative jurisdictions for tax purposes.
[53] The EU's list of non-cooperative jurisdictions for tax purposes from 14 February 2022: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands, and Vanuatu. See Tax Justice Network (2021) Corporate Tax Haven Index.

2 Tax and Human Rights

This chapter will demonstrate the relationship between the functions of tax and human rights to clarify the link between human rights and tax. Moreover, the chapter will demonstrate states' human rights obligations in relation to resource mobilization and tax. Subchapter 2.4.4 will present the first pillar of the UNGPs under which states have an obligation to protect human rights from human rights abuses by third parties.

2.1 The Relationship Between Tax and Human Rights

In general, there are three reasons to tax: to raise revenues to finance public expenditures, to regulate social and economic behavior, and redistribute income and wealth within a society.[54] In relation to human rights, an additional reason is often considered - representation.[55] Hence it is also possible to regard taxation as providing critical functions in society. According to the former UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona ('Special Rapporteur'), taxation combines three critical functions, namely: (1) generating revenue for the realization of rights, (2) tackling discrimination and achieving equality, and (3) strengthening governance and accountability.[56]

The first reason to tax and the first function of taxation in relation to human rights is to raise revenues to finance public expenditures and thereby realize human rights. Tax revenues can enhance states' available resources which can be allocated for the progressive realization of human rights.[57] The resources a state is able to collect will determine the quality, accessibility, and availability of goods and services required for the realization of the rights in the ICESCR, including the rights to an adequate standard of living (Article 11), health (Article 12), and social security (Article 9). The strengthening of tax systems is also vital to guarantee the right to education (Article 13

[54] Hilling, Axel & Ostas, Daniel T., (2017) p. 27.
[55] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) pp. 385–386.
[56] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 36.
[57] Ibid para 36.

ICESCR).[58] The rights in the ICCPR also require resources. For example, the right to a fair trial in Article 14 of the ICCPR requires an independent and impartial judicial system. To finance police departments, prosecutors, judges, legal aid, and the electricity in the courtroom - the state needs to raise revenues. Therefore, corporate tax abuse undermines states' ability to protect, fulfill and respect human rights as states are deprived of necessary resources to realize economic, social, and cultural rights as well as civil and political rights.[59] Moreover, according to the right to development,[60] states shall formulate appropriate policies for development to improve the well-being of the entire population.[61] The collection of adequate tax revenues is essential to ensure that states under Article 8(1) "undertake […] all necessary measures for the realization of the right to development and […] ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income".[62]

Secondly, taxes can regulate social and economic behavior by repricing social costs and collateral "bads" of private interests.[63] Taxation on harmful goods such as tobacco can relate to the right to health in Article 12 of the ICESCR, since the imposed tax may reduce individuals' consumption and thereby improve the health of persons. For example, the Committee on Economic, Social and Cultural Rights ('CESCR') has recommended states to develop tax policies to reduce tobacco consumption.[64] Another example where taxes can regulate behavior is in relation to climate change which poses a threat to human rights including the right to life (Article 6 ICCPR) and the right to food and water (Article 11 ICESCR).[65] Governments can impose taxes on carbon emissions with the ambition to reduce emissions, meanwhile, the imposed tax can finance subsidies for green alternatives that can foster a green transition.[66]

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[58] Ibid para 43.
[59] HRC (2015) Illicit financial flows, human rights and the post-2015 development agenda, A/HRC/28/60, para 32; HRC (2016) Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development, A/HRC/31/61, para 21.
[60] UNGA, 1986 Declaration on the Right to Development.
[61] Article 2(3) Declaration on the Right to Development.
[62] OHCHR, The Right to Development and Taxation, p. 1.
[63] Tax Justice Network (2021) Tax Justice & Human Rights p. 19.
[64] CESCR (2011) Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, E/C.12/ARG/CO/3, para 23.
[65] OHCHR (2021) Frequently Asked Questions on Human Rights and Climate Change pp. 4, 10–12.
[66] Tax Justice Network (2021) Tax Justice & Human Rights pp. 19–20.

Third, taxes can redistribute income and wealth within a society. Growing economic inequalities are perceived not only as a threat to human rights but also to the economy.[67] By adopting progressive income taxation by which high-income individuals pay more, states can create tax equality among taxpayers based on the concept of vertical equity or substantive equality. Progressive taxation can redress systemic discrimination such as gender inequalities by constructing tax systems that incentivize women's participation in the labor force.[68] Moreover, taxation as a tool can stimulate poverty reduction and finance development by investments in education, health, and food security. Such investments do not only ensure the realization of rights in the present, but they also hinder intergenerational poverty affecting future generations.[69]

Finally, the fourth reason to tax is to strengthen governance and provide political representation. During the American War of Independence, the slogan "no taxation without representation" illustrated that effective representation was a prerequisite for taxation.[70] In IHRL, the principles of participation and accountability are central and participation in how tax policies are designed is important for democratic self-determination.[71] In addition, tax can strengthen the social contract between the state and a taxpayer, an aspect often overlooked. The need for accountability mechanisms relating to effective expenditure increases when a state involves in revenue-raising. Another aspect is the growing trust from citizens which emanates from the state's ability to fulfill its human rights obligations.[72]

2.2 Government Revenue and Determinants of Health

In 2020, the Government Revenue and Development Estimations ('GRADE') project was established to demonstrate how increased government revenue could help the progress toward the SDGs by using data over several decades from almost all countries

[67] Hilling, Axel & Ostas, Daniel T., (2017) p. 33.
[68] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, paras 16-17, 40.
[69] Ibid, para 37.
[70] Cobham, Alex., Mohiuddin, Fariya & Nelson, Liz (2021) p. 177.
[71] De Schutter, Olivier (2019a) p. 60.
[72] Tax Justice Network (2021) Tax Justice & Human Rights pp. 21–22; See also Reisch, Nikki (2019) p. 36.

in the world.[73] The GRADE project provides models of the relationship between government revenue and access to health determinants including access to clean water, sanitation, education, and healthcare which are critical determinants of health according to the World Health Organization.[74] There is no explicit right to water or sanitation in the right to an adequate standard of living in Article 11, nor the right to health in Article 12 of the ICESCR. However, the UNGA explicitly recognized the human right to water and sanitation in 2010 by adopting Resolution 64/292.[75] Moreover, water is an integral part of the right to health since water is necessary for sanitation and for consumption of food.[76]

The GRADE project may provide models to assess how MNEs contribute to public finances since the model can predict the impact of the loss of revenues on the access to health determinants in individual states. The GRADE project uses government revenue per capita instead of measuring how governments spend their revenues since multinational organizations, including MNEs, are more likely to influence government revenue than government spending. Another reason is that government revenue per capita reflects the available resources in a state, resources that a state can spend on different sectors. Spending on other sectors outside of the health sector as education may have positive effects on health since raised maternal literacy can increase child survival.[77]

By using the GRADE tool in conjunction with available data on tax abuse available from country-by-country reporting from MNEs, it is possible to quantify the human cost of tax abuse on health determinants. However, data is unavailable for many states which underestimates the true impact on human rights.[78] An aspect to consider is the fact that additional revenue does not guarantee that the revenue will be allocated to fulfill human rights. Hence it is policies, events, and decisions that are factors that can deny people their human rights.[79] It may not be realistic to assume that additional tax revenue would have been allocated to finance the realization of human rights.

[73] The GRADE Project, Impact.
[74] The GRADE Project (2021) User Guide p. 1; See also WHO (2017) Human Rights and Health.
[75] UNGA, Resolution 64/292 adopted by the General Assembly on 28 July 2010, The human right to water and sanitation, A/RES/64/292.
[76] CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, para 6.
[77] The GRADE Project (2021) User Guide pp. 1–2.
[78] O'Hare, Bernadette., McNabb, Kyle., & Hall, Stephen (2021).
[79] Tax Justice Network (2021) Tax Justice & Human Rights pp. 11–12.

Therefore, the GRADE tool assumes that government spending would be the same as in recent years, providing a more realistic picture of the impact of the increased governmental revenue on determinants of health. In addition, the GRADE tool does not estimate the benefits during the first five years of increased revenues since the impact on increased revenues takes time to manifest.[80]

Tax abuse often takes place over decades. For that reason, a study using the GRADE tool projected data from 2020 on global tax abuse over ten years in countries where data is available. [81] The study found that the deprived revenues – if they would have been recovered – equal access to sanitation for 36 million people and access to drinking water for 18 million people. Moreover, the increase in revenue would be associated with over 600,000 children and almost 80,000 mothers surviving.[82] The GRADE tool can also be used for individual countries. In 2020, Nigeria lost 11 billion in tax revenue. Projected over a ten-year period, the revenue lost could have prevented 150,000 child deaths.[83] In Zambia, the GRADE tool demonstrates that 98,311 people would have access to drinking water over a ten-year period if the lost revenues would have been curtailed.[84]

In 2020, several NGOs jointly submitted a report to the Committee on the Rights of the Child in relation to Ireland's responsibility for the impacts of cross-border tax abuse on the realization of children's economic, social and cultural rights. Using the GRADE tool, the NGOs could demonstrate that the corporate tax abuse in Ghana, which amounted to 340 million US dollars in 2013, could have prevented 170 child deaths if it was curtailed.[85]

Tax abuse threatens low-income states for at least two reasons: first, low-income states have a general deficit in resources and the consequences of lost revenues are greater on the ability of low-income states to combat poverty and fulfill their human rights. Second, low-income states do not have a broad tax base in general and corporate income taxes constitute one of the few sources of public revenue. In addition, tax

[80] The GRADE Project (2021) User Guide pp. 4–5.
[81] O'Hare, Bernadette et. al (2022) p. 1.
[82] Ibid.
[83] O'Hare, Bernadette., McNabb, Kyle., & Hall, Stephen. (2021).
[84] The GRADE project, Policy Brief - #2.5 Case study - Zambia p. 2.
[85] ActionAid Ireland et al. (2020) Ireland's Responsibility for the Impacts of Crossborder Tax Abuse on the Realisation of Children's Economic, Social and Cultural Rights p. 7.

administrations are generally weak.[86] High-income states are responsible for 99.4 percent of all tax revenue lost to corporate tax abuse, meanwhile, tax abuse deprives high-income states of more direct tax revenue than low-income states. Nevertheless, in proportion to states' collection of tax revenues in a year, low-income states lose 4.2 percent of their collected tax revenue, while high-income states lose 2.8 percent.[87] Nonetheless, the GRADE tool demonstrates that additional revenues do not lead to equal benefits in all states. In 2016, high-income states spent a hundred times more government revenue per person than low-income states. Therefore, additional revenue is relatively more significant in low-income states. For example, a low-income state with a population of 10 million receiving an additional 200 million in revenue will have an increase of 25 percent of government revenue per capita. Meanwhile, the same revenue increase for a high-income state will only equal 0.16 percent. In addition, the benefits of increased revenue are smaller at higher levels of development. Measures to reduce high child mortality rates require access to clean water, sanitation, and primary healthcare. They constitute measures that are easier to implement in comparison to measures aiming to reduce less preventable deaths which require more advanced healthcare services.[88]

2.3 State Obligations to Mobilize Resources

This subchapter will relate to the first reason to tax, namely: to raise revenue to finance public expenditures and thereby realize human rights. The main legal basis for resource mobilization for the realization of human rights lies in the obligation to take steps for human rights implementation; the obligation to devote maximum available resources for the realization of economic, social and cultural rights; and international assistance and cooperation.[89] This subchapter will cover both economic, social and cultural rights and civil and political rights even if provisions regarding resource mobilization are not

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[86] Alston, G. Philip & Reisch, Nikki (2019) pp. 5–6; IMF (2014) Spillovers in International Corporate Taxation p. 7.
[87] Tax Justice Network (2021) *The State of Tax Justice 2021*, p. 31
[88] The GRADE Project (2021) User Guide p. 4.
[89] International Bar Association's Human Rights Institute (2017) The Obligation to Mobilize Resources p. 16.

included in the ICCPR. Nonetheless, there is a consensus that all human rights, including civil and political rights, require resources.[90]

The obligation to take steps for human rights implementation is enshrined in several international human rights treaties. For example, Article 2(1) in the ICESCR imposes an obligation upon states to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of the state's available resources to progressively realize human rights, including legislative measures. Similar steps are required by the state parties to the Convention on the Rights of the Child (Article 4) and the Convention on the Rights of Persons with Disabilities (Article 4(2)). These steps should be deliberate, concrete, and targeted toward the full realization of rights.[91] This obligation is often referred to as the "progressive realization" of human rights and is found in various human rights treaties.[92] Nonetheless, states still have a core obligation to ensure the minimum essential levels of all rights in the ICESCR.[93]

According to General Comment No. 24, the obligation to take necessary steps may require resource mobilization by states, including by enforcing progressive taxation schemes.[94] Furthermore, the obligation to take steps requires states to design and implement fiscal and tax policies so that they are deliberately directed towards the realization of rights. States also demonstrate that every effort has been made to mobilize all available resources and they must generate, allocate, and make use of the maximum of their available resources towards the achievement of the full realization of rights.[95] The obligation upon states to mobilize the maximum available resources for the implementation of economic, social and cultural rights has been articulated by the CESCR in recommendations to State Parties. In addition, the committee has expressed

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[90] See HRC (2016) Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development, A/HRC/31/61, para 21; OHCHR, The Right to Development and Taxation, p. 1.
[91] CESCR (1990) General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para.1 of the Covenant), E/1991/23, paras 2, 10.
[92] OHCHR (2008) Frequently Asked Questions on Economic, Social and Cultural Rights p. 13.
[93] CESCR (1990) General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para.1 of the Covenant), E/1991/23, paras 2, 10.
[94] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 23.
[95] HRC (2018) Guiding principles on human rights impact assessments of economic reforms A/HRC/40/57, principle 9, commentary 9.3.

that the obligation to mobilize the maximum available resources can be undermined by tax abuse.[96]

Similarly, according to Article 2(2) in ICCPR, each state party undertakes to take the necessary steps to adopt laws or other measures to give effect to the rights enshrined in the ICCPR. According to the Human Rights Committee, the requirement to take steps to implement civil and political rights is unqualified and of immediate effect.[97] Even if there are no provisions related to resource mobilization in the ICCPR, the obligation to take steps and measures implies a requirement for resource mobilization since the realization of civil and political rights also requires resources.[98] Revenues such as taxes are vital to finance institutions to protect civil and political rights such as access to justice, personal security, and free and fair elections.[99]

Treaty bodies within the UN governing civil and political rights have explicitly in their recommendations called for resource allocation to implement civil and political rights. For example, the Human Rights Committee has recommended allocating necessary resources to provide training for the judiciary including police officers to prevent, suppress and punish trafficking in persons and finance International Human Rights Institutions.[100] The Committee against Torture governing the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, has in its concluding observations urged individual state parties to allocate sufficient financial resources to ensure the effective functioning of police units for domestic violence and victim support[101] and to make resources available for National Human Rights Institutions and for prevention and protection program regarding violence and sexual abuse against children.[102] In addition, the Special Rapporteur on extrajudicial, summary or arbitrary execution attributed Guatemala's crisis to the government's failure to

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[96] See for example: CESCR (2017) General comment No. 24, E/C.12/GC/24, para 37; CESCR (2016) Concluding observations on the 6th periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, paras 16-17; CESCR (2019) Concluding observations on the third periodic report of Senegal*,* E/C.12/SEN/CO/3, paras 10-11.

[97] Human Rights Committee (2004) General comment no. 31, CCPR/C/21/Rev.1/Add.13, para 14.

[98] International Bar Association's Human Rights Institute (2017) The Obligation to Mobilize Resources p. 30

[99] HRC (2016) Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development, A/HRC/31/61 para 21.

[100] Human Rights Committee (2013) Concluding observations on the initial report of Mozambique, CCPR/C/MOZ/CO/1, paras 7, 17.

[101] Committee Against Torture (2011) Consideration of reports submitted by States parties under article 19 of the Convention – Ghana, CAT/C/GHA/CO/1 para 22.

[102] Human Rights Committee (2013) Concluding observations on the initial report of Mozambique, CCPR/C/MOZ/CO/1, paras 10, 24.

behave in a fiscally responsible manner since the low tax collection did not provide enough money to spend on the criminal justice system.[103]

Another legal basis for resource mobilization is the obligation to devote the maximum of available resources for the progressive realization of economic, social, and cultural rights which is enshrined in Article 2 of the ICESCR. The obligation is two-fold: it means both mobilizing sufficient resources and using the resources effectively for the fulfillment of the rights enshrined in the ICESCR. Taxes are not the only important source of revenue in relation to domestic resource mobilization. However, tax is the primary, most sustainable, and reliable source of revenue to finance public goods and services.[104] States should ensure that their fiscal policy is adequate, progressive, and socially equitable and the Committee has recommended a state party to improve the tax collection in order to increase the resources available for implementing economic, social and cultural rights.[105] Moreover, the CESCR has expressed concerns when tax revenues represent a small part of public budgets.[106]

The progressive realization depends not only on the available resources within a state but also on resources available through international cooperation and development assistance.[107] International cooperation and assistance in accordance with states' capacities are established in several IHRL treaties, including Articles 55 and 56 in the UN Charter.[108] Resources may therefore be mobilized both domestically and internationally. States may benefit from development aid to fulfill their obligations under the ICESCR or take loans to finance their policies.[109] Even if most of the provisions in the ICESCR are subject to progressive realization, states have the burden of proof whether they are truly unable, rather than unwilling, to progressively realize human rights. States must show that efforts have been made to mobilize resources even

[103] HRC (2007) Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*,* A/HRC/4/20/Add.2, paras 61, 64.
[104] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 2.
[105] CESCR (2016) Concluding observations on the 6th periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, paras 16-17.
[106] See for example: CESCR (2011) Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, E/C.12/ARG/CO/3, para 10.
[107] CESCR (2007) Statement on an evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant, UN Doc E/C.12/2007/1, para 5.
[108] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 29; See art. 55 and 56 in the Charter of the United Nations; ICESCR, art. 1 and 2; CRC art. 4; Convention on the rights of persons with disabilities art. 32.
[109] De Schutter, Olivier (2019b) pp. 563–564.

in times of constraints which includes reaching out for international assistance and cooperation.[110]

2.4 State Obligations to Tackle Tax Abuse

There are no obligations upon states under IHRL to adopt specific tax policies; it is within the states' discretion to adopt and formulate appropriate tax policies.[111] Nevertheless, states have an obligation under IHRL to adopt economic policies to ensure that they respect, protect, and fulfill all human rights.[112] The following subchapters will present the obligation to tackle tax abuse in relation to states' obligations to mobilize resources; obligations in relation to impacts on human rights; extraterritorial obligations; and obligations relating to business activities.

2.4.1 Resource Mobilization

First, the obligation upon states to address tax abuse should be understood in relation to their obligation to mobilize resources.[113] States must not only generate resources to be maximumly devoted to fulfill human rights, but they must also prevent tax evasion, fraud, and other illegal practices, including losses resulting from bribery, corruption, and money laundering. According to the former Special Rapporteur, a state that does not take strong measures against tax abuse does not devote the maximum of available resources to the realization of the rights enshrined in the ICESCR.[114] Therefore, the obligation upon states to mobilize resources includes an obligation to tackle tax evasion and tax avoidance. It also requires states to avoid international tax competition, improve the efficiency of tax collection and widen the tax base with regard to multinational

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[110] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 26.
[111] Ibid, para 4.
[112] HRC (2018) Guiding principles on human rights impact assessments of economic reforms A/HRC/40/57, Principle 2.
[113] International Bar Association (2013) Tax Abuses, Poverty and Human Rights, p. 105.
[114] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, paras 58, 60.

corporations and the richest.[115] To combat tax abuse, it is required to strengthen tax administrations by allocating sufficient personnel and resources to tackle tax abuse.[116]

The CESCR has in its concluding observations of the United Kingdom of Great Britain and Northern Ireland expressed concerns regarding the financial secrecy legislation and the permissive corporate tax rules of the state party and its overseas territories and crown dependencies. According to the CESCR, the laws on financial secrecy and the corporate tax rules are affecting the state party's ability to meet their obligation to mobilize the maximum available resources for the implementation of economic, social, and cultural rights. The CESCR recommended the state party to take strict measures to tackle tax abuse by corporations and "[…] intensify its efforts, in coordination with its Overseas Territories and Crown Dependencies, to address global tax abuse". Furthermore, the CESCR recommended that the state party should improve its tax collection to increase resources available for implementing economic, social, and cultural rights.[117]

2.4.2 Impacts on Human Rights

An obligation to tackle tax abuse can also be dictated by its impacts on substantial human rights as states have an obligation to respect, protect and fulfill human rights.[118] The resources a state is able to collect will determine the quality, accessibility, and availability of goods and services required for the realization of the rights in the ICESCR including the rights to an adequate standard of living (Article 11), health (Article 12), and social security (Article 9).[119] Moreover, as described in subchapter 2.1, the tool provided by the GRADE project can further the understanding of the importance of revenues in relation to health determinants.

In times of resource constraint, states must demonstrate that every effort has been made to use all available resources to fulfill minimum essential levels of the rights in the ICESCR. This includes resources that could potentially be collected through

[115] HRC (2018) Guiding principles on human rights impact assessments of economic reforms A/HRC/40/57, principles 2 and 9, Comment 9.3.
[116] De Schutter, Olivier (2019b), p. 578.
[117] CESCR (2016) Concluding observations on the 6th periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, paras 16-17.
[118] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 10.
[119] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 43.

taxation or by tackling tax abuse.[120] If states implement austerity measures without considering other ways to raise revenue, the measures may be contrary to the ICESCR if they are regressive and result in discriminatory outcomes or deprive people of access to minimum essential levels of rights.[121]

The principle of non-discrimination is enshrined in numerous human rights treaties, including Articles 2, 3, and 26 of the ICCPR and Articles 2(2) and 3 of the ICESCR. The obligation for states to guarantee that human rights are exercised without any kind of discrimination is a fundamental pillar of IHRL.[122] Tax abuse has disproportionate impacts on people living in poverty and undermines the principles of equality and non-discrimination as states are likely to benefit wealthy individuals to the detriment of the most disadvantaged. High-income individuals and large businesses have the ability to avoid taxes, for example by paying tax advisers, and can pay less than other taxpayers with the same or less capacity to pay.[123] In addition, tax abuse impedes states' ability to use taxation as a mechanism of redistribution.[124]

Poverty as a form of inequality is not considered a discrimination ground under IHRL. Nevertheless, poverty can limit the access and the enjoyment of human rights such as access to health care and education, which are also perpetuating factors for poverty.[125] People living in poverty are more dependent on public services and social programs financed by the state since they lack the ability to pay for private alternatives. The loss of revenue, therefore, has a disproportionate impact on the poorest of the population. In particular on people experiencing multiple disadvantages or discrimination since they regularly interact with state-funded institutions. Tax abuse also has a disproportionate impact on women since women's sexual and reproductive health and maternity-related needs make it more likely for women, in some period of their lives, to be directly dependent on social protection and health systems. In addition, when public services are underfunded, women often serve as unpaid alternatives to care

[120] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 27.
[121] HRC (2016) Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development, A/HRC/31/61, para 39.
[122] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 12.
[123] Ibid, para 60.
[124] Tax Justice Network (2021) Tax Justice & Human Rights p. 18.
[125] UNGA (2021) The persistence of poverty: how real equality can break the vicious cycles, A/76/177, para 5.

providers which limits not only their participation in the labor market but also impairs their education and leisure.[126]

2.4.3 Extraterritorial Obligations

The obligation to combat tax abuse can also be understood in relation to states' extraterritorial obligations. According to the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, states have an extraterritorial obligation not to impede the enjoyment and realization of human rights outside of their borders and other states' ability to comply with human rights commitments.[127] The Maastricht Principles are not legally binding, however, these instruments are elaborated by legal experts and have an undeniable moral force and provide practical guidance to states.[128]

According to the former Special Rapporteur, states have as a part of international cooperation and assistance an obligation to respect and protect the enjoyment of human rights in other territories and avoid taking actions that would risk the extraterritorial enjoyment of human rights. Furthermore, states have an obligation to conduct assessments of the extraterritorial impact of laws, policies, and practices according to the Guiding Principles on extreme poverty and human rights.[129]

The extraterritorial obligation to refrain from interfering with individuals' enjoyment of rights or other states' ability to comply with the ICESCR is reinforced by General Comment no. 24 and is particularly relevant when states negotiate and conclude tax treaties.[130] Furthermore, states shall conduct assessments relating to the extraterritorial impacts of laws and policies.[131] This impact can be referred to as tax spillovers which are cross-border impacts of states' tax rules or practices on other states.

[126] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 44.
[127] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), principle 21.
[128] OHCHR (2012) Human Rights Indicators p. 14; Joseph, Sarah & Dipnall, Sam (2018) p. 128.
[129] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 30; HRC (2012) Final draft of the guiding principles on extreme poverty and human rights, A/HRC/21/39 para. 92.
[130] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 29.
[131] HRC, *Final draft of the guiding principles on extreme poverty and human rights* (2012), A/HRC/21/39, para. 92

Assessments relating to how the decrease of tax revenues in one state can be attributed to another have been carried out by the International Monetary Fund ('IMF').[132]

Secrecy jurisdictions are a threat to progressive taxation as they enable taxpayers to escape from progressive taxation.[133] According to General Comment No. 24, states providing excessive protection for bank secrecy and permissive rules on corporate tax may affect the ability of other states – states in which the economic activity takes place – to meet their obligations to mobilize the maximum of available resources for the implementation of economic, social and cultural rights.[134] According to the former Special Rapporteur, the facilitation and establishment of tax havens could be contrary to the obligations derived from international cooperation and assistance. Since tax havens provide an avenue to evade tax liabilities, the facilitation of such can directly undermine other states' ability to mobilize the maximum available resources for the progressive realization of economic, social, and cultural rights and residents in other states' enjoyment of the rights to health, education, or social security.[135]

Moreover, secret offshore companies, often used to shield and facilitate abusive tax behavior by corporations, may also enable corruption since corruption is dependent on financial secrecy and tax havens.[136] Moreover, the prevalence of tax havens, in which illicit capital can be secured by minimizing the chances of detection, is a direct stimulus to corruption and other activities such as transfer mispricing. In states where the political elite is either willing or able to accumulate wealth through tax havens, the incentives to strengthen tax agencies and the independence of the judiciary are low. This creates a problem when agencies, especially in developing states, are faced with scarce resources and are unable to address complex issues such as transfer mispricing.[137]

The CESCR has highlighted the issue of tax havens and tax laws in its concluding observations of the United Kingdom of Great Britain and Northern Ireland where the CESCR expressed concern that financial secrecy legislation and permissive

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132 Lusiani, Nicholas & Cosgrove, Mary (2019) p. 162; IMF (2014) Spillovers in International Corporate Taxation.
133 Tax Justice Network (2021) Tax Justice & Human Rights p. 18.
134 CESCR (2017) General comment No. 24, E/C.12/GC/24, para 37.
135 HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 32.
136 Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 397.
137 HRC (2015) Illicit financial flows, human rights and the post-2015 development agenda, A/HRC/28/60, para 32.

rules on corporate tax are not only affecting the ability of the state party but also other states, to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights. The CESCR recommended that the state party should "[…] intensify its efforts, in coordination with its Overseas Territories and Crown Dependencies, to address global tax abuse" and to take strict measures to tackle tax abuse in particular by corporations.[138] A similar conclusion was reached by the Committee on the Elimination of Discrimination against Women ('CEDAW') in 2016 after a joint submission by several NGOs on Switzerland's responsibility for the extraterritorial impacts of the facilitation of tax abuse on women's rights.[139] The CEDAW expressed concerns about Switzerland's financial secrecy policies and rules on corporate reporting and taxation which can have a potential negative impact on the ability of other states, especially those already short of revenue, to mobilize the maximum available resources for the fulfillment of women's rights. The CEDAW recommended Switzerland undertake assessments of the extraterritorial effects of its financial secrecy and corporate tax policies on women's rights and substantive equality.[140]

Tax abuse has global ramifications and regulatory efforts by individual states cannot tackle tax abuse alone. Therefore, it is necessary to implement fundamental reforms on the corporate tax rules on a global scale.[141] States are expected, according to Article 2(1) of the ICESCR, to take collective action to fulfill the economic, social, and cultural rights of persons outside of their territories. Moreover, states have an obligation to create an international environment that enables the fulfillment of economic, social, and cultural rights. To promote and create such an environment, states are encouraged to take necessary steps in their legislations and policies. Furthermore, states should deepen international cooperation on tax matters.[142] The duty to protect human rights is prevalent even when states are acting through international organizations such as the

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[138] CESCR (2016) Concluding observations on the 6th periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, paras 16, 17(d).
[139] Alliance Sud et al. (2016) Swiss Responsibility for the Extraterritorial Impacts of Tax Abuse on Women's Rights.
[140] CEDAW (2016) Concluding observations on the combined fourth and fifth periodic reports of Switzerland, CEDAW/C/CHE/CO/4-5, paras 40(c), 41(a).
[141] HRC (2015) Illicit financial flows, human rights and the post-2015 development agenda, A/HRC/28/60, para 32.
[142] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 37; See also Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) Principle 29.

Organization for Economic Cooperation ('OECD').[143] According to Principle 10 in the UNGPs, states should seek to ensure that multilateral institutions that deal with business-related issues do not restrain the ability of their member states to meet their duty to protect human rights or hinder business enterprises from respecting human rights.[144] Moreover, in Principles 8 and 9 of the UNGPs, states should ensure that their state-based institutions shaping business practice are aware of and observe the state's human rights obligations. States should maintain adequate domestic policy when pursuing other business-related objectives involving other states or businesses, e.g., through investment treaties or contracts.[145]

2.4.4 Business Actors

According to UNGPs first principle, states must take appropriate steps to prevent, investigate, punish, and redress human rights abuses within their territory and/or jurisdiction by third parties, through effective policies, legislation, regulations, and adjudication.[146] States should encourage business actors, which they are able to influence, not to undermine the efforts by states in which they operate to realize economic, social, and cultural rights. This includes abusive behaviors of corporations such as tax evasion and tax avoidance that harm the states in which the businesses operate.[147] Moreover, states should revise relevant tax codes, and impose criminal or administrative sanctions and penalties where business activities result in abuses of economic, social, and cultural rights.[148]

According to General Comment no. 24, states have an extraterritorial obligation to take necessary steps to prevent human rights violations committed abroad by corporations domiciled in their territory and/or jurisdiction without infringing upon the host state's sovereignty or obligations under the ICESCR. This obligation extends to corporations whether they are incorporated under the state's laws, or have their statutory

[143] Darcy, Shane (2017) p. 22.
[144] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, para 10(a).
[145] Ibid, paras 8 and 9.
[146] Ibid, para 1.
[147] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 37.
[148] Ibid, para 15.

seat, management, or principal place of business on the state's territory.[149] Therefore, a state shall not remain passive where a business actor domiciled in its territory and/or under its jurisdiction, control, or authority harms the human rights of others in other states.[150] Nevertheless, even if the obligations upon states to regulate MNEs extraterritorially are affirmed in General Comment no. 24, the issue has been central for a longstanding debate.[151]

To combat abusive tax behaviors deployed by MNEs, states should "[…] combat transfer pricing practices and deepen international tax cooperation and explore the possibility to tax multinational groups of companies as single firms, with developed countries imposing a minimum corporate income tax rate during a period of transition."[152] According to the former Special Rapporteur, insufficiently regulated financial sectors have enabled aggressive tax abuse for instance through transfer pricing or profit shifting.[153] Transfer pricing or profit shifting are complex issues developing states may be unable to address due to resource constraints.[154] Hence, the following chapter will explain the concepts of transfer pricing and profit shifting.

Furthermore, states should explore the possibility to tax MNEs as single firms.[155] MNEs are not today treated as a single entity in international tax law for tax purposes.[156] Civil society is advocating for the unitary tax approach where MNEs should be regarded as single entities by their financial links.[157] In addition, the policy brief from the UN Secretary-General in 2021 acknowledges that proposals for a unitary tax system are important initiatives to stop base erosion and profit shifting.[158] If a unitary approach to taxation would be applied, it could require MNEs to pay taxes where they have real activity. If MNEs were not treated as a single entity, the entity could be taxed on a consolidated basis where the parent company pays the entire tax,

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[149] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 26; See also CESCR (2011) Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1, paras. 5-6.
[150] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 27.
[151] See O'Brien Methven, Claire (2018); Augenstein, Daniel (2022) p. 51.
[152] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 37.
[153] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 67.
[154]HRC (2015) Illicit financial flows, human rights and the post-2015 development agenda, A/HRC/28/60, para 32.
[155] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 37.
[156] Avi-Yonah, Reuven. S. (2019a) p. 30.
[157] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 388.
[158] UN (2021) Secretary-General's Policy Brief Investing in Jobs and Social Protection for Poverty Eradication and a Sustainable Recovery p. 21.

but with credits for the subsidiaries' foreign taxes. Another possibility is to ignore the separate status and apportion the income of the MNE among different jurisdictions by a formula.[159] In chapter 3, proposals from the EU on unitary taxation will be addressed to exemplify how this could be implemented in the EU.[160]

[159] Avi-Yonah, Reuven S. (2019a) p. 30.
[160] See European Commission (2016) Proposal for a Council Directive on a Common Corporate Tax Base; European Commission (2021) Business Taxation for the 21st Century.

3 The Issue of Tax Abuse

This chapter will address tax competition between states and MNEs shifting profits artificially to locations with no activities. To understand these phenomena, subchapter 3.1 will briefly address three principles of the international tax regime: the single-tax principle, the benefits principle, and the arm's length principle. National income tax systems are based on these principles established by the League of Nations dating back to the 1920s.[161] Moreover, the chapter will describe profit shifting and abusive corporate tax practices. Finally, the chapter will demonstrate the EU's regulatory initiatives relating to tax abuse.

3.1 Basic Principles of International Tax Law

In a globalized world, the use of many different tax systems can create situations in which states have overlapping jurisdictions to tax. The single-tax principle aims to ensure that income from cross-border transactions is only subject to tax once to avoid double taxation or double non-taxation. If cross-border transactions would be more heavily taxed than domestic income, it may stifle international investment. For this reason, states enact domestic laws and conclude bilateral tax treaties to mitigate double taxation and to coordinate states' rights to tax.[162] However, these mitigation measures may create unintended opportunities for corporations to reduce their tax liabilities, which will be addressed in the following.[163]

Another principle in the international tax regime is the benefits principle which describes how the taxable base among jurisdictions should be divided with reference to the jurisdiction in which the taxpayer benefits from public spending. According to the benefits principle, businesses shall pay taxes in the source state, i.e., the state in which the business has activities that generate income since businesses benefit from that state's infrastructure, skilled workers, and other public goods. However, according to the benefits principle, workers and capital investors shall be taxed for their active income -

[161] Hilling, Axel & Sorrentino, Lorena (2019) p. 62.
[162] Avi-Yonah, Reuven., Sartori, Nicola., & Marian, Omri. (2011) pp. 156–157.
[163] OECD (2013) Addressing Base Erosion and Profit Shifting, p. 39; See subchapter 3.3.2.

respective passive income - in the residence state of the individual since it is in the residence state where the individual benefits from public spending.[164]

The benefits principle is reinforced in multiple anti-tax abuse measures stating that corporations should align their tax payments where the value is created.[165] When the finance ministers of the G20 instructed the OECD to develop the Action Plan on Base Erosion Profit Shifting ('BEPS'), one of the explicit instructions was to develop instruments that will better align the right to tax with economic activity.[166] Moreover, NGOs also identify responsible corporations as those who align their economic activities and tax liabilities. Hence, business structures should be connected to the location where the MNE has substantial real economic activities and should be driven by commercial interests, not built upon structures mainly intended to lower taxes.[167]

In the field of international tax law, MNEs comprised of multiple subsidiaries and affiliates are not treated as a single entity. Tax law applies to each of the entities and taxable income must be divided among them. For this reason, transfer pricing rules exist which contain the arm's length principle.[168] This principle is critical since transfer pricing and other cross-border intra-group transactions within MNEs account for at least a third of the world trade, while other estimations claim 80 percent.[169] When independent actors transact with each other, the price is often determined by market forces. This is not the case in intra-group transactions. Therefore, the arm's length principle - included in the OECD's transfer pricing rules - seeks to address the mispricing of transactions within groups. According to this principle, the price of within-group transactions should be the same as the price between independent parties on the open market.[170] By exploiting, stretching, or violating the weaknesses in the arm's length principle, corporations can misprice assets in an intra-group transaction. If an intra-group transaction does not reflect the arm's length principle, the transaction can be termed "transfer mispricing" and challenged by tax authorities.[171]

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[164] Avi-Yonah, Reuven., Sartori, Nicola., & Marian, Omri. (2011) pp. 154–156; Hilling, Axel & Ostas, Daniel T., (2017) pp. 40-41.
[165] Hilling, Axel & Ostas, Daniel T., (2017) p. 46.
[166] OECD (2013) Action Plan on Base Erosion and Profit Shifting, p. 11.
[167] See CSR Europe (2019) A Blueprint for Responsible and Transparent Tax Behavior p. 11; ActionAid, Christian Aid, and Oxfam (2015), Getting to Good p. 15.
[168] Avi-Yonah, Reuven. S. (2019a) p. 30.
[169] Cadestin, Charles et al. (2018) p. 24.
[170] OECD (2022) OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022 p. 29.
[171] International Bar Association (2013) Tax Abuses, Poverty and Human Rights, p. 29.

Nonetheless, the Tax Justice movement has been critical of the arm's length principle. The aim to better align the right to tax with economic activity is undermined by this principle since it still facilitates profit shifting from the location where the corporations operate (from the source jurisdiction) to low or no-tax jurisdictions.[172] The OECD's BEPS Action Plan, which will be described in the following section, does not provide tools for shifting taxation to value chains nor change the established transfer pricing guidelines. Moreover, the arm's length principle is not considered to not work in emerging economies such as South Africa and Brazil.[173]

3.2 The Race to the Bottom

Before the 1980s, the international tax regime governed by these abovementioned principles functioned as protection against tax competition among states and thereby protected the social safety net.[174] Since the 1920s, governments' income tax bases have moved from states' real economy to an international financial economy. In addition, the production of physical goods has been complemented by digital goods and services. The way value is created within the society has therefore changed but the principles governing the international tax regime have not.[175]

The globalization in the 1980s and 1990s resulted in increased mobility of capital and MNEs which led to numerous alterations in states' regulations. For example, to attract investments, source jurisdictions began to offer tax breaks.[176] Tax incentives are designed to attract foreign investments in a state. However, this objective has been questioned in a report by the IMF, OECD, World Bank, and the UN since tax incentives may be redundant in developing states since investments may have taken place without them.[177] Tax incentives in the form of "tax stability" or "advance pricing" aim to protect foreign investors from future changes in domestic tax rates for an extended period. According to the former Special Rapporteur, these forms of incentives should be examined with caution under IHRL as they reduce states' revenues - regardless of the

[172] Tax Justice Network (2020) The State of Tax Justice 2020 p. 9.
[173] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) pp. 388–389.
[174] Avi-Yonah, Reuven S. (2019b) p. 2.
[175] Hilling, Axel & Sorrentino, Lorena (2019) p. 62.
[176]Avi-Yonah, Reuven S. (2019b) pp. 1, 3.
[177] IMF, World Bank, OECD & UN (2015) Options for Low Income Countries Effective and Efficient Use of Tax Incentives for Investment p. 11.

evolving impact on human rights.[178] Moreover, the right to self-determination establish states' sovereignty over all their natural resources and requires the populations' active, free, and meaningful participation and a fair distribution of the development's benefits.[179] Revenues gained from the exploitation of natural resources shall serve to fulfill the population's rights. According to De Schutter, granting tax incentives for exploiting natural resources is a bad practice since there is a tendency that the officials granting tax incentives does not have sufficient transparency and accountability mechanisms. Hence, there is a risk that the officials protect investors to the detriment of the population that has a right to the benefits of their resources.[180]

Meanwhile, residence jurisdictions of MNEs, i.e., the jurisdiction in which the MNE has its headquarters, started to relax controlled foreign corporation rules to prevent MNEs from moving to other jurisdictions.[181] This has led to tax competition between states, known as "the race to the bottom". According to General Comment No. 24, "[…] lowering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights."[182] The average statutory corporate tax rates have declined from 28 percent in 2000 to 20.6 percent in 2020.[183] Nevertheless, in December 2021, the European Commission proposed a Directive that will ensure a minimum effective tax rate of 15 percent for global activities of large multinational groups. This proposal follows the historic international agreement – agreed by 137 states – which stems from the OECD's work on a global consensus on the international corporate tax framework.[184]

From a human rights perspective, tax competition among states can result in regressive measures against people living in poverty. To compensate for the loss of revenues from both corporate tax abuse and tax competition between states, governments can shift the tax burden toward consumers by imposing value-added taxes and on employees by personal income taxes on wages. Indirect taxes on consumption, i.e., value-added taxes, are regressive in nature as they, in general, constitute a larger

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[178] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 66.
[179] See Articles 1(2), 2(3) Declaration of the Right to Development.
[180] De Schutter, Olivier (2019b) p. 565.
[181] Avi-Yonah, Reuven S. (2019b) pp. 1, 3.
[182] CESCR (2017) General comment No. 24, E/C.12/GC/24, para 37.
[183] OECD (2020) Corporate tax statistics p. 9.
[184] European Commission (2021) Fair Taxation.

proportion of the income of people living in poverty. This indicates that the lower-income population will bear a higher tax burden since they spend a greater proportion of their disposable income on consumption. Therefore, individuals in need of social programs can be the same individuals funding them through indirect taxes. Another compensation strategy for the loss of revenues from corporate income tax is to cut public expenses whereas cuts in public sector employment, public services, or social protection can affect the enjoyment of economic, social, and cultural rights.[185]

The decline in statutory corporate tax rates can also be attributed to the tax behavior of corporations, which will be addressed in the next subchapter. However, another factor for tax competition among states is the prevalence of low-tax jurisdictions, also called tax havens, that enact legal frameworks which are business-friendly to attract corporations, investors, and capital. This can promote short-term economic growth in a state; however, it will lead to tax base erosion in other jurisdictions.[186]

After the financial crisis in 2008, governments began to highlight the issue of tax base erosion and profit shifting conducted by MNEs where globalization has opened opportunities for MNEs to minimize their tax burden by profit shifting. Base erosion of the national corporate tax base challenges governments' ability to finance public goods, meanwhile, income is distributed to shareholders instead of governments. Tax base erosion also passes a greater tax burden onto other taxpayers and creates an uneven playing field for other corporations without the same opportunity to employ the same (abusive) measures. For this reason, the G20 and the OECD launched their BEPS project in 2013.[187] Subchapter 3.4 will describe the EU's initiatives on anti-tax avoidance which emanates from the BEPS project.

[185] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, paras 46-47, 28.
[186] Fjeldstad, Odd-Helge., Klæboe Jacobsen, Sigrid., Henriksen Ringstad, Peter., Ngowi, Honest Prosper. (2017) pp- 47-48.
[187] OECD (2013) Action Plan on Base Erosion and Profit Shifting p. 8.

3.3 Corporate Tax Behavior

3.3.1 Legal, Illegal, and the Compliance Mindset

The UNGPs are grounded in the recognition that business enterprises are required to comply with all applicable laws and to respect international human rights.[188] Therefore, this subsection will address the legality and the difference between tax evasion, tax avoidance, tax planning, and aggressive tax planning. In short, tax evasion is illegal and contrary to domestic criminal laws and international tax laws and policies. By contrast, tax avoidance follows the letter of the law, but not the spirit of the law.[189] It is generally accepted that compliance requires respect for both the letter and the spirit of the law.[190] Nevertheless, a literal interpretation is often used to circumvent the spirit of tax laws. The letter of the law refers to the literal interpretation of a regulation, which constitutes the cardinal rule of legal interpretation where the plain meaning of the regulation is expressed. Words can be ambiguous and vague, and gaps, conflicts, and inconsistencies are common in tax law - especially in the global arena where different tax authorities and regulations are involved. Therefore, recourse to other alternatives of interpretation such as maxims of construction, judicial precedents, and legislative purpose may be required. These alternative interpretation tools represent "the spirit of the law".[191] The spirit of the law is the law's underlying goals and norms that reflect the aim or purpose, which naturally corresponds with the reasons to tax as described in Chapter 2.1 and the benefits principle.[192]

The difference between tax evasion and tax avoidance is complex and even specialists cannot agree on the difference.[193] Tax avoidance is often referred to as perfectly legal since it adheres to the letter of the law and does not constitute a criminal offense. However, this is a misconception since many jurisdictions adopt regulatory mechanisms to challenge tax avoidance and behaviors that are exploiting loopholes in

[188] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex p. 6.
[189] Hilling, Axel & Ostas, Daniel T., (2017) pp. 48–49.
[190] See for example OECD (2011) Guidelines for Multinational Enterprises, Chapter XI, Taxation p. 60.
[191] Ostas, Daniel T. (2020) p. 86.
[192] Hilling, Axel & Ostas, Daniel T. (2017) p. 108.
[193] International Bar Association (2013) Tax Abuses, Poverty and Human Rights, p. 24.

the laws. Again, compliance requires respect not only for the letter but also for the spirit of the law.[194]

Aggressive tax planning is not a legal concept, it is a normative term used by the EU and the G20 and the OECD to describe tax abuse outside the scope of tax avoidance and tax evasion. Aggressive tax planning strategies can be defined as "tax-driven transactions that result in tax benefits not intended by government" but is not necessarily classified as tax avoidance according to domestic anti-avoidance regulations. However, aggressive tax planning has the same effects as tax avoidance by challenging tax systems' fundamental functions.[195] According to the EU, aggressive tax planning is not accepted since this kind of planning deliberate exploits loopholes and mismatches within and between national tax systems and can result in double non-taxation.[196] Moreover, a corporation's aggressive tax planning can influence other corporations to employ same the strategies to avoid competitive disadvantage.[197]

Since MNEs operate on a global scale with local presence in different jurisdictions, tax planning can avoid double or multiple taxation in compliance with the single-tax principle in the international tax regime.[198] Tax systems are complex and provide multiple options for compliance and tax planning is a consequence of the inherent features of the tax systems. Therefore, it is generally accepted to choose the least costly option if the tax planning is in compliance with both the letter and the spirit of the law.[199]

Tax is often seen as an area of legal compliance.[200] According to Ostas, there is a hierarchy among laws whereas some laws deserve more respect than others. For example, regulations that concern matters within the scope of *malum in se*, i.e., matters that are wrongful even if the law does not prohibit them, are laws of high saliency. Workplace safety regulations are within the scope of *malum in se* as they can have direct implications on human health, safety and dignity. These regulations require

[194] See Tax Justice Network (2020) Tax avoidance and tax evasion; Hilling, Axel & Ostas, Daniel T. (2017) pp. 49–50.
[195] Hilling, Axel & Ostas, Daniel T. (2017) p. 45.
[196] European Commission (2020) Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices p. 16.
[197] Global Sustainability Standard Board (2019) GRI 2017: Tax 2019, p. 4.
[198] Avi-Yonah, Reuven., Sartori, Nicola., & Marian, Omri. (2011) pp. 156–157.
[199] European Commission (2020) Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices, p. 16.
[200] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 388.

cooperation with authorities to disclose imperfections in the law and measures by the corporation that go beyond the requirements in the law. Other laws such as tax law, are constructed within the scope of *malum prohibitum* i.e., the wrongfulness of the act is determined by reference to the law. These laws, unlike *malum in se*, does not require cooperation - these laws require compliance because there is no ethical reason align to a higher standard than the one specified by the law.[201]

A common interpretation of the rule of law regards individual states as the sole bearers of responsibility for robust and well-functioning tax systems, as well as having the responsibility for enacting legislation to close opportunities for tax abuse. Moreover, it is the states' responsibility to amend legislation to minimize the grey zones and increase legal certainty. This view is rooted in the polemic relationship between taxpayers and the government in which taxes are private burdens. In contrast, CSR scholars have argued that robust and sustainable tax systems need greater cooperation and less polarization between governments and taxpayers since it is not realistic to place the entire responsibility on the legislature for a well-functioning tax legislation. Rapid developments of value creations pose challenges upon legislatures to frame tax laws in a clear language to convey the purpose of the law. Legislatures also face challenges to foresee every possible situation that may arise.[202]

3.3.2 Profit Shifting

Most of the abusive tax planning by MNEs aim to shift taxable income from the jurisdictions where the actual activity takes place (often high-tax jurisdictions) to low tax jurisdictions and thereby undermine the benefits principle. How this is conducted in practice is driven by national tax systems and available treaty networks. The IMF has provided a list of potentially abusive tax practices which includes, among other practices: abusive transfer pricing; thin capitalization; risk transfer; exploiting mismatches; treaty shopping; locating asset sales in low-tax jurisdictions; deferral; and inversion.[203] This is not an exhaustive list. The EU refers to transfer mispricing, change

[201] Ostas, Daniel T. (2020) p. 85.
[202] Hilling, Axel & Sorrentino, Lorena (2019) pp. 56–57, 61–62.
[203] IMF (2014) Spillovers in International Corporate Taxation p. 11.

of location, and debt shifting as key examples of aggressive tax planning.[204] These measures reduce the corporation's tax liabilities which subsequently harms states' capacity to fulfill human rights. In addition, gaps in domestic laws, due to the global incoherency in tax policies, are exploited by MNEs.[205] In the following, the thesis will address transfer pricing and treaty shopping as illustrating examples.

Transfer pricing is a method by which MNEs can shift profits out of the countries where they operate by exploiting, stretching, or violating weaknesses in the arm's length principle.[206] The MNE can sell goods and services to itself via its subsidiaries located in different jurisdictions. For example, the cost for a MNE to produce pens in State A is 100 dollars. The MNE can sell the pens to an affiliate located in a tax haven - State B - for 100 dollars. This transaction results in no profits in State A. Thereafter, the affiliate in State B can sell the pens for 300 dollars to another affiliate in State C, leaving 200 dollars profit in the tax haven. The affiliate in State C can sell the pens on the market for 300 dollars, leaving no profits in State C. As a result, the MNE does not pay taxes in State A or State C. The 200-dollar profit is shifted to State B - a tax haven with no or low tax.[207] The arm's length principle is aimed to target these situations. Nevertheless, as mentioned above, the principle has flaws and developing states faced with scarce resources may be unable to address complex issues such as transfer mispricing.[208]

To prevent double taxation and remove obstacles in cross-border trade, bilateral treaties have been concluded by nearly all states in the world which has given rise to treaty shopping.[209] Corporations can arrange a corporate structure where they route investments through third states to access the benefits enshrined in the third state's tax agreement. A report from Oxfam revealed that during 2009-2014, an Australian mining company operating in Malawi routed intracompany interest and management fees payments from the subsidiary in Malawi to the parent company in Australia through a subsidiary in the Netherlands - a subsidiary with no employees. The tax treaty in force between Malawi and the Netherlands did not allow Malawi to apply

[204] European Commission (2020) Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices, p. 16.
[205] OECD (2013) Action Plan on Base Erosion and Profit Shifting p. 9.
[206] IMF (2014) Spillovers in International Corporate Taxation p. 11.
[207] Tax Justice Network, What is transfer pricing?
[208] HRC (2015) Illicit financial flows, human rights and the post-2015 development agenda, A/HRC/28/60, para 32.
[209] OECD (2021) Prevention of Tax Treaty Abuse, para 67.

withholding taxes on the transactions at hand from Malawi to the Netherlands. However, if the transactions from the Malawian subsidiary would have gone directly to Australia, Malawi could have been able to apply statutory withholding tax of 15 percent due to the lack of a tax treaty between Malawi and Australia. In this way, by using a treaty and a subsidiary in the Netherlands that existed solely as a conduit, the MNE allegedly avoided 27.5 million UK pounds in taxes. This could have financed 431,000 annual HIV/AIDS treatments or 39,000 annual teachers' salaries in Malawi.[210]

3.3.3 Abusive Tax Practices

This section will address tax-motivated behaviors from companies that may have an adverse impact on human rights beyond the impact on state budgets. However, it is important to acknowledge that every economic impact does not constitute an adverse human rights impact.[211] The decline in statutory corporate tax rates, as demonstrated in the previous subchapter, can be attributed both to the tax behavior of corporations and tax competition between jurisdictions. Corporations cannot be held solely responsible for states' tax policies. Nevertheless, corporations can influence tax incentives and negotiate directly with governments to create specific incentives and tax breaks.[212] Corporation and business' interests have pushed governments for reduced tax levels either for individual companies or entire industries. To demand lower tax rates, corporations have threatened to relocate their operations which is a driving force of tax competition between states. [213]

For example, in the 1990s two states in Brazil competed to attract a Ford Motor Company plant. The state Rio Grande do Sul offered a package of incentives with extremely favorable conditions including a loan of 210 dollars from the state and an assured loan from the national development bank of 500-million-dollar, infrastructure financed by the state for 243 million dollars, and exemptions from local taxes for 10 years. Rio Grande do Sul attempted to renegotiate the package as it considered it too generous. Then another state, Bahia, offered a similar package to Ford as the one in Rio

[210] See ActionAid (2015) An Extractive Affair.
[211] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 402
[212] Ibid p. 395.
[213] Fjeldstad, Odd-Helge., Klæboe Jacobsen, Sigrid., Henriksen Ringstad, Peter & Ngowi, Honest Prosper. (2017) pp. 47–48.

Grande do Sul which made Ford move to Bahia. These fiscal wars between states cost Brazilian taxpayers around 172,000 dollars per job created which was, at that time, five times higher than the cost of the job creation in a General Motors plant in the United States of America.[214] Tax-driven corporations are less likely to invest sustainably and in the long-term in local economies and infrastructures. In addition, it is less likely that they will create highly skilled jobs of good quality compared to other corporations with stable investments.[215]

According to ActionAid, Christian Aid, and Oxfam, tax-motivated decisions can affect the creation of a quality job, transfer of technology and skills to developing states, and investment and prices. Tax-motivated decisions can therefore have economic and social impacts on human rights.[216] Management hubs can also be used in order to reduce MNEs' tax liabilities. By using management hubs, a MNE can move a local subsidiary's manager to a management hub in a low-tax jurisdiction. This may affect a MNEs' tax liabilities and tax payments in several jurisdictions. This behavior can disincentivize the corporation from employing local managers and thereby hinder the availability of higher-skilled, better-paid employment to qualified individuals in the state where the subsidiary is located.[217] Another tax behavior is debt financing which can artificially depress profits in a subsidiary of a MNE. This can adversely affect local minority shareholders since the subsidiary will have its distributable reserves reduced. This artificial depression can lead to an artificial view of the subsidiary's "unprofitability" which may be used to reduce employees' wages.[218]

Apart from social and economic impacts, corporate tax behavior can also impact civil and political rights. Tax incentives are often negotiated in secret between the government and the corporation concerned, which has implications for the right to information, transparency, and accountability which may foster corruption and weaken governance.[219] The prevalence of corruption can increase with abusive tax behavior

[214] World Bank (2009) World Development Report: Reshaping Economic Geography p. 257.
[215] ActionAid, Christian Aid, and Oxfam (2015) Getting to Good pp. 28–29.
[216] Ibid p. 11.
[217] ActionAid, Christian Aid, and Oxfam (2015) Getting to Good p. 28–29; Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 395.
[218] ActionAid, Christian Aid, and Oxfam (2015) Getting to Good p. 28.
[219] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 65.

which can deny citizens' civil and political rights, as corruption interferes with political processes, erodes the rule of law, and affect the delivery of public services.[220]

3.4 Regulatory Initiatives from the EU

3.4.1 Anti-Tax Avoidance Package

Anti-tax abuse measures often rely on two pillars: first, to align taxation where the value is created, and second; to create transparency on local taxation or non-taxation.[221] In 2016, the EU launched its Anti-Tax Avoidance Package with measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all businesses in the EU.[222] Some of the key measures of the EU's Anti-Tax Avoidance Package are the Anti-Tax Avoidance Directive and the revision of the Administrative Cooperation Directive. The package aims to complement and reinforce the OECD's BEPS project and implement BEPS measures in EU law.[223]

The EU's main instrument against tax avoidance is the Anti-Tax Avoidance Directive ('ATAD') I adopted in 2016.[224] It contains five anti-abusive measures: first, a controlled foreign company (CFC) rule to deter profit shifting to low or no-tax jurisdictions; second, a switchover rule to prevent double non-taxation of certain income; third, exit taxation to prevent companies from avoiding tax when re-locating assets; fourth, interest limitation to discourage artificial debt arrangements designed to minimize taxes; and fifth, the general anti-abuse rule to counteract aggressive tax planning when other rules don't apply.[225] In the following year, in May 2017, the ATAD II was adopted. The amendment contains provisions regulating hybrid mismatches between the EU and third countries.[226]

These measures can be divided into general and specific regulations. Since the ATAD is a Directive and not a Regulation, the implementation of these rules can differ

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[220] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 397.
[221] CSR Europe (2019) A Blueprint for Responsible and Transparent Tax Behavior p. 11.
[222] European Commission (2016) The Anti Tax Avoidance Package.
[223] European Commission (2016) The Anti Tax Avoidance Package - Questions and Answers.
[224] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
[225] European Commission (2016) The Anti Tax Avoidance Package.
[226] Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

among the Member States. Therefore, I have chosen to explain the features of the Directive on a general basis. Specific Anti-Avoidance Regulations (SAARs) cover situations and transactions where the risk of tax avoidance is high. Examples of SAARs in the ATAD are the CFC-rule and the exit-taxation rule. SAARs add to the complexity of the tax system since they all have a clearly defined scope and apply to specific situations with requisites that are extensively described. Nevertheless, these measures meet the high demands for legal certainty, which is a strong and traditional feature in tax legislation.[227]

Article 6 in the ATAD I contains a general anti-abuse rule and is the fifth measure in the ATAD. Such measures are usually called General Anti-Avoidance Regulations (GAARs) and are only applied in specific cases when other anti-tax avoidance rules do not apply. They are generally drafted more imprecise than SAARs and have been criticized for their lack of legal certainty.[228] However, GAARs are aimed to fill in gaps in SAARs and the general anti-abuse rule should be applied in a uniform manner including in domestic situations, within the EU, and vis-à-vis third countries.[229] According to Article 6 of the ATAD I, Member States shall ignore arrangements that have been put in place for the main purpose of obtaining a tax advantage that is not genuine and consequently defeats the object or purpose of the applicable tax law for the purpose of calculating the corporate tax liability.[230] However, such arrangements are only regarded as genuine if they are put into place for valid commercial reasons which reflect economic reality.[231]

3.4.2 Tax Transparency Measures

The majority of the instruments from the EU address tax transparency, enhanced international tax cooperation, and aim to coordinate EU cooperation in tax matters.[232] Moreover, the initiatives presented by the OECD and the EU resulting in anti-avoidance regulations rely on information about a corporation's business. The EU requires

[227] Hilling, Axel & Ostas, Daniel T. (2017) p. 52.
[228] Ibid.
[229] Council Directive (EU) 2016/1164, Preamble 11.
[230] Article 6(1) of the Council Directive (EU) 2016/1164.
[231] Article 6(2) of the Council Directive (EU) 2016/1164.
[232] European Commission (2020) Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices, p. 22.

extensive documentation regarding a corporation's business to assess risks and whether a corporation engages in activities relevant to the regulation. For example, the general abuse rule in Article 6(2) ATAD I states that an arrangement shall not be regarded as genuine if they are not put in place for "valid commercial reasons which reflect economic reality". Information is vital for the authorities to determine whether a transaction or position fulfills the requirement.[233]

To implement the principle of aligning the right to tax with economic activity, a greater focus has been directed to country-by-country reporting on intra-group transactions. [234] Country-by-country reporting is generally considered a major step forward to combat tax abuse and enhance transparency and reflect BEPS Action 13. Reports can disclose whether the MNE has a real economic presence where it declares and pay taxes. Public reports can allow not only governments but also the public and other stakeholders to identify misalignments. Country-by-country reporting differs from other financial reporting mechanisms which only require a single set of information at the global level while country-by-country reporting requires corporations to publish information for every country they operate in.[235] The country-by-country reporting mechanism treats a corporate group as a single entity and thereby creates a foundation to apply a unitary approach to corporations.[236]

In July 2013, Accounting Directive 2013/34/EU[237] entered into force which requires companies in the oil, gas, mining, and forestry sectors to report on a country-by-country basis regarding payments of more than EUR 100,000 to governments of the countries in which they operate, including taxes on their income, production or profits, royalties, and license fees. The Directive aims to enhance transparency and accountability in the extractive sectors and to facilitate states' adoption of the Extractive Industry Transparency Initiative.[238]

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[233] Hilling, Axel & Ostas, Daniel T. (2017) p. 48.
[234] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 389.
[235] European Commission, Public country-by-country reporting.
[236] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 389.
[237] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.
[238] European Commission, Public country-by-country reporting.

In May 2016, the Council Directive (EU) 2016/881[239] was adopted. The Directive requires large MNEs to report on a country-by-country basis on key tax-related information to authorities in the Member States. The MNEs shall report selected information on their business and tax payments in every country in which they operate. The Directive entered into force in June 2017 and since July 2018, the reports are automatically exchanged to the Member States in which one or more companies of the MNE are either resident for tax purposes or subject to tax due to permanent establishment. This Directive is not public; hence the reported information is only available to tax authorities in the Member States.[240]

In November 2021, the European Parliament adopted a public country-by-country reporting Directive.[241] The Member States shall implement the Directive into domestic law before 22 June 2023. Unlike the Council Directive (EU) 2016/881, this new Directive requires public country-by-country reporting. It will apply to large multinational groups with a net turnover above EUR 750 million.[242] This Directive aims to be a tool for enhanced public scrutiny of MNEs' corporate income taxes.[243] The Directive will require information on all members of the group, including non-EU members. It will affect an entity or branch in the EU, e.g., headquarter, subsidiary or branch. However, it will also affect non-EU headquarters through their presence in the EU by medium-sized or large subsidiaries. The entities with an EU presence are required to publish information that covers the ultimate parent.[244] The required information has seven key areas: a brief description of activities, number of employees, net turnover, profits or loss before tax, tax accrued, tax paid, and the amount of accumulated earnings.[245]

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[239] Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation

[240] European Commission (2019) Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights p. 27

[241] Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.

[242] Articles 1 and 2 of the Directive (EU) 2021/2101.

[243] Directive (EU) 2021/2101 preamble 1.

[244] KPMG (2021) EU public country-by-country reporting.

[245] KPMG (2021) EU: "Public" country-by-country reporting directive published in EU Official Journal.

3.4.3 Proposal for Unitary Taxation in the EU

In 2011, the European Commission proposed a Directive for a Common Consolidated Corporate Tax Base ('CCCTB'). The proposal proved too ambitious for the Member States and in 2016, the Commission proposed to re-launch an amendment of the proposal for a CCCTB.[246] The proposal aims to improve the Single Market for businesses and combat tax avoidance by implementing a common EU tax system for calculating their tax base in the EU. According to the proposal, the current rules for corporate taxation do not fit the modern context since the economic environment has become more globalized, mobile, and digital while corporate income is generally taxed at the national level. In addition, corporate structures and business models are more complex making it easier to shift profits.[247]

However, in 2021 the Commission announced in its Communication on Business Taxation for the 21st century that the proposals will be withdrawn and be replaced by the Business in Europe: Framework for Income Taxation ('BEFIT'). This new proposal, BEFIT, will be a single rulebook for corporate taxation in the EU. It will be based on key features of a common tax base where the EU members of a MNE will be consolidated into a single tax base. The profits will be allocated between the Member States based on a formula and thereafter taxed at national corporate income tax rates. The formula will reflect the market where a MNE does business, have assets, and labor to ensure a balanced distribution of tax revenues among the EU Member States. Along with other objectives such as reducing barriers to cross-border investment, the proposal will combat tax avoidance and ensure predictable corporate tax revenues for the Member States. The application of complex transfer pricing rules within the EU will be removed for companies within the scope of the proposal. According to the Communication, it will ensure that mismatches between EU's corporate tax systems will not undermine the ability of Member States to raise revenue to finance national priorities. [248]

[246] European Commission, Common Consolidated Corporate Tax Base.
[247] European Commission (2016) Proposal for a Council Directive on a Common Corporate Tax Base p.2.
[248] European Commission (2021) Business Taxation for the 21st Century pp. 11–12.

4 Responsible Business Agenda

This chapter will first introduce the UNGPs and their historical relationship to tax. Thereafter, the chapter will describe the EU's responsible business agenda, the legal framework, and an analysis of how the legal framework corresponds with tax. Finally, the chapter will present voluntary initiatives regarding responsible corporate tax behavior.

4.1 Guiding Principles on Business and Human Rights

As mentioned in the introduction, the UNGPs are the global standard of practice relating to BHR and are not legally binding. Nevertheless, the UNGPs have a normative contribution and are built upon existing standards and practices from international and domestic law. The UNGPs are based on the UN Framework's three pillars: the state duty to protect human rights; the corporate responsibility to respect human rights; and the need for greater access to remedy for victims of business-related abuse. Within the structure of these pillars, the UNGPs contain 31 Principles outlining steps for both states and businesses.[249]

According to the first pillar, states have an obligation to protect human rights. The obligation to "protect" is one of the obligations in the tripartite typology of states' human rights obligations under IHRL namely: respect, protect and fulfill human rights. Under IHRL, states have a duty to protect right-holders against adverse impacts on human rights caused by third parties, including business enterprises. This duty includes two sets of obligations: first, the state has an obligation to refrain from interfering with the enjoyment, and second, the state has an obligation to ensure the enjoyment or realization of the right.[250] Moreover, all human rights impose obligations to respect, protect and fulfill rights that require states to implement measures that require resources.[251] According to the first principle of the UNGPs, states must take appropriate steps to prevent, investigate, punish, and redress human rights abuses within their

[249] OHCHR (2012) The Corporate Responsibility to Respect Human Rights, an Interpretative Guide. p. 1.
[250] Ruggie, John (2013) pp. 83–84.
[251] International Bar Association's Human Rights Institute (2017) The Obligation to Mobilize Resources p. 30.

territory and/or jurisdiction by third parties, through effective policies, legislation, regulations, and adjudication.[252] Chapter 2 represents pillar one and provides an overview of the human rights obligations upon states to mobilize resources and tackle tax abuse.

The second pillar is the corporate responsibility to respect human rights and is the centerpiece of the UN Framework and the UNGP. Corporations do not have human rights obligations; however, they have legal duties in relation to human rights.[253] The baseline of corporations' responsibility to respect human rights constitutes compliance with national laws.[254] If there is a gap between national laws and the standards in IHRL or conflicting requirements, corporations are expected to honor the principles of internationally recognized human rights.[255] The corporate responsibility to respect human rights is an established social norm, hence if corporations violate social norms, they can lose their social license to operate. In the sphere of MNEs, there is a near-universal recognition of this social norm which is widely recognized by the business community.[256] To meet their responsibility to respect human rights, business enterprises should have a policy commitment, a Human Rights Due Diligence ('HRDD') process, and processes of remediation in place according to Principle 15 of the UNGPs.

A part of the corporate responsibility to respect human rights is to carry out an impact assessment and the HRDD is at the heart of the UNGPs. Corporations should, according to Principle 17, carry out HRDD to identify, prevent, mitigate, and account for how they address their adverse human rights impacts. The HRDD process is therefore preventive in nature and requires companies to have internal processes where they assess how their operations and decisions might impact human rights. The HRDD should include an assessment of actual and potential human rights impacts the corporation may cause or contribute to through its own activities or directly linked to its operation according to Principle 17(a). HRDD in the context of the UNGP is an ongoing management process that a reasonable and prudent enterprise needs to undertake to

[252] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, para 1.
[253] Ruggie, John (2013) p. 90.
[254] HRC (2008) Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5, para 54.
[255] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, Principle 23, p. 21.
[256] Ruggie, John (2013) pp. 91–92.

meet its responsibility to respect human rights.[257] HRDD requires four steps for implementation: first, a human rights impact assessment to become aware of risks and impacts; second, to take appropriate action based on the findings; three, track the effectiveness of the measures taken; and fourth, communicate how impacts were addressed. The complexity of the HRDD will vary depending on the corporation's size and nature and context of its operations and the risk of severe human rights impacts.[258]

The third pillar expresses the need for greater access to remedy for victims of business-related abuse. According to Principle 25, states must take appropriate steps to ensure that when business-related human rights abuses occur within their territory, those affected have access to an effective remedy. There are different types of remediations, for example, state-based judicial mechanisms (Principle 26) and non-judicial grievance mechanisms (Principle 27), but also non-state-based grievance mechanisms (Principle 28). Examples of non-state-based mechanisms are grievance mechanisms administered by corporations, industry associations, or human rights bodies.[259]

4.2 Tax and Business and Human Rights

There is currently no direct reference to corporate tax behavior within the UNGPs, nor something that bars the application of the UNGPs in relation to tax.[260] Even if corporate tax behavior has been called "the elephant in the room", there have been developments. In 2015, the Working Group mentioned tax avoidance as a specific issue where there is a need for better delineated roles, responsibilities, and appropriate accountability systems.[261] In 2021, the Working Group published its Roadmap for the next decade of Business and Human Rights which is the result of a project to take stock of the implementation of the UNGPs and to direct a course for the next decade.[262]

There are several references to corporate tax behavior within the Roadmap. For example, businesses are called upon to raise awareness of the incompatibility between a

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[257] OHCHR (2012) The Corporate Responsibility to Respect Human Rights, an Interpretative Guide p. 6.
[258] See Principle 17 of the UNGPs.
[259] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex p. 24.
[260] Darcy, Shane (2017) p. 21.
[261] HRC (2015) Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/29/28, para 89.
[262] Working Group on BHR (2021) UNGPs 10+ A Roadmap For the Next Decade of Business and Human Rights, p. V

commitment to respect human rights while engaging in practices or relationships that undermine human rights.[263] Key issues of corporate practices inconsistent with commitments to respect human rights include "[t]ax practices that undermine the State's ability to fulfill economic and social rights." Moreover, greater coherence can be achieved if HRDD is applied across all business functions and relationships driven by leadership from the top. According to the Working Group, outcomes needed for the next decade are "an increasing number of business enterprises demonstrate that human rights due diligence is applied across all corporate activities and functions, such as political engagement and lobbying, tax, legal, marketing and business development".[264] States should reinforce emerging mHRDD on complex corporate structures, shell companies and registrations of business entities in jurisdictions favoring secrecy.[265]

There is a need for a cultural change to realize lasting change and ingrain business respect for human rights. According to the Working Group, this can be conducted by integrating HRDD into the core of the business model, the governance, and organizational frameworks. Moreover, embedding HRDD into corporate governance and culture is a key challenge for effective implementation of the business responsibility to respect human rights. The question "How does the company's business model or the way it operates link to impacts on people?" captures the essence of the UNGPs and should be answered in the sustainability reports of companies.[266] Moreover, the Working Group considers that the integration of the UNGPs is needed in other global policy agendas where responsible business conduct is or should be considered as a key issue - including taxation. The Roadmap explicitly refers to the Global Reporting Initiative's ('GRI') Universal Standard for sustainability reporting, which covers taxation. Further on, the Roadmap calls upon all reporting standards to integrate HRDD as a core element of sustainable business and investment activities.[267]

[263] Working Group on BHR (2021) UNGPs 10+ A Roadmap For the Next Decade of Business and Human Rights p. 29.
[264] Ibid p. 28.
[265] Ibid p. 23.
[266] Ibid p. 26.
[267] Ibid pp. 12–13.

4.3 Business and Human Rights in the EU

In the EU, the concept of CSR or Responsible Business Conduct is used instead of Business and Human Rights. CSR was previously defined as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."[268] However, in 2011, the EU adopted a new definition of CSR where enterprises are responsible for their impacts on society. Moreover, CSR concerns actions by companies that go beyond their legal obligations towards society and the environment. A prerequisite for meeting that responsibility is to respect applicable legislation and collective agreements between social partners. Moreover, corporations should have in place a process to integrate social, environmental, ethical, human rights, and consumer concerns into their business operations and core strategy with close collaboration with their stakeholders and identify, prevent and mitigate the corporation's possible adverse impacts. Similar to the UNGPs, the EU proposes a smart mix of regulations where public authorities should support voluntary measures and complement with necessary regulations. Such regulation can be to promote transparency, create market incentives for responsible business conduct and ensure corporate accountability.[269] Moreover, the European Commission has called upon States to develop national implementation plans for the implementation of the UNGPs.[270] The regulatory and the voluntary measures by the EU have developed into regulatory regimes: non-financial reporting by companies; import control and sourcing of certain minerals and timber products; and public procurement.[271] Moreover, the EU has several overarching policy initiatives that are relevant to BHR whereas the European Green Deal is a key initiative.[272] The European Green Deal aims to foster a new economy comprised of a new growth strategy that will transform the EU into a fair and prosperous society with no net emissions of greenhouse gases in 2050. An integral part of this objective is to implement the UN's 2030 Agenda

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[268] European Commission (2001) Promoting a European Framework for Corporate Social Responsibility, para 8.
[269] European Commission (2011) A renewed EU strategy 2011-14 for Corporate Social Responsibility, pp. 3 and 6–7.
[270] Ibid p. 14.
[271] Footer, Mary E. (2020) p. 313.
[272] Holly, Gabrielle & Andreasen Lysgaard, Signe (2022a) p. 8.

and the SDGs.[273] In the transformation of the EU's economy for a sustainable future, the private sector will be key to financing the green transition.[274]

4.3.1 Legal Framework in the EU

4.3.1.1 Reporting requirements

The Non-Financial Reporting Directive 2014/95/EU[275] ('NFRD') stems from the EU's CSR considerations.[276] Non-financial reporting provides investors, civil society organizations, consumers, policymakers, and other stakeholders with information to evaluate companies' performance and impact on society.[277] The overall objective of the directive is to increase the comparability, relevance, and consistency of the disclosed information.[278] The NFRD covers approximately 11,700 companies and applies to large public-interest companies with an average of 500 employees, and public-interest entities that are parent companies of a large group with over 500 employees on a consolidated basis.[279] According to Article 1(3), companies shall include a non-financial statement in their annual report containing information necessary to understand the development, performance, position, and impact of the enterprise's activity relating to environmental, social, and employee matters, respect for human rights, anti-corruption and bribery matters. In addition, the enterprise shall disclose how these risks are managed. However, if the enterprise does not pursue such policies in relation to these matters, the statement shall provide a clear and reasoned explanation for not doing so.

The Commission published non-binding reporting guidelines for companies in 2017 and 2019, with the aim to improve the quality of information. However, the information did not improve. Instead, on 21 April 2021, the European Commission published a proposal to amend the NFRD and rename the Directive to Corporate Sustainability Reporting Directive (CSRD). The proposal aims to revise, complement,

[273] European Commission (2019) The European Green Deal p. 2.
[274] Ibid p. 16.
[275] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance
[276] Directive 2014/95/EU preamble 3.
[277] European Commission (2020) Corporate sustainability reporting.
[278] Directive 2014/95/EU paras 6 and 21.
[279] See European Commission (2020) Corporate sustainability reporting; Directive 2014/95/EU Article 1(3).

and strengthen the NFRD. According to the Commission, receiving better data from companies is essential to achieve the objectives of the European Green Deal.[280] The proposal extends the scope to all large companies and all listed companies with a net turnover of EUR 40 million. The proposal will therefore cover 49 000 companies compared with 11 600 under the current regulation.[281] The proposal will require assurance for reported sustainability information. Moreover, the proposed amendment will specify the information that companies should report in greater detail and require corporations to report in line with mandatory reporting standards. Finally, the proposal will ensure that the information is published as a part of the management reports of corporations and that they will be disclosed in a format that is digital and machine-readable.[282]

Under the European Green Deal, there are several key legislative and policy initiatives relevant for BHR, including the Action Plan on Sustainable Finance where the Sustainable Finance Disclosure Regulation 2019/2088[283] emanates from.[284] The Regulation aims to strengthen disclosures of the financial service sector where financial market participants shall disclose specific information on how they tackle negative impacts on the environment or social justice of their investments or financial advice. It seeks to prevent greenwashing and support the transition to a sustainable economy.[285] According to Article 2(17) of the Regulation, sustainable investment means an investment that does not significantly harm environmental or social objectives. Moreover, sustainable investments entail good governance practices, in particular with respect to tax compliance.

4.3.1.2 Taxonomy

The other initiative under the Action Plan on Sustainable Finance relating to BHR is the Taxonomy Regulation 2020/852,[286] adopted to classify environmentally sustainable

[280] European Commission (2021) Proposal for a Directive of the European Parliament and of the Council as regards corporate sustainability reporting pp. 1–2.
[281] Ibid p. 10.
[282] Ibid p. 5.
[283] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.
[284] Holly, Gabrielle & Andreasen Lysgaard, Signe (2022a) p.8
[285] European Commission, Regulation on sustainability-related disclosure in the financial services sector.
[286] Council Regulation 2020/852 (EU) On the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 [2020] OJ 2 198/13.

activities to prevent greenwashing by providing common definitions to investors, companies, and policymakers.[287] According to Article 3(c), for the establishment of the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity, *inter alia*, is carried out in compliance with the minimum safeguards laid down in Article 18. According to Article 18, the minimum safeguards shall align with the OECD Guidelines for Multinational Enterprises (‘OECD Guidelines’) and the UNGPs, including the principles and rights in the fundamental international human rights conventions.

The Taxonomy has limited references to social sustainability, but the Platform on Sustainable Finance received a mandate from the European Commission to work on the extension of the taxonomy to include social objectives. [288] The Commission asked the Platform to include a particular reflection on sustainability objectives linked to business ethics, governance, anti-bribery, or tax-compliance matters.[289] In February 2022, the final report on the social taxonomy was published. The report identifies transparent and non-aggressive tax planning, tax transparency and tax approach as topics within governance directly linked to sustainability. Moreover, taxes were described as significant sources of government revenue and as playing a vital role in achieving the SDGs. In addition, taxes are crucial for inequality reduction and can redistribute wealth globally. According to the report, aggressive tax planning can therefore be the largest potential impact on inequality levels both globally and nationally.[290]

4.3.1.3 Import Control and Due Diligence

In the EU, there are two import control regulations that involve due diligence requirements: the Timber Regulation No 995/2010[291] which requires companies or persons placing timber on the EU market conduct due diligence on the source of the timber and its legality; and the Conflict Minerals Regulation 2017/821/EU.[292] The

[287] Council Regulation 2020/852 (EU), preamble 11.
[288] Platform on Sustainable Finance (2022) Final Report on Social Taxonomy p. 10.
[289] Ibid p. 60.
[290] Ibid pp. 64, 66.
[291] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.
[292] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

Conflict Minerals Regulation, in force 1 January 2021, requires EU importers of tin, tantalum and tungsten, and minerals originating from conflict-affected and high-risk areas to conduct supply chain due diligence. The Regulation refers to the UNGPs, the OECD Guidelines and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk-Areas.[293] Moreover, according to Article 4 (f)(v) of the Regulation, importers of minerals or metals from conflict-affected and high-risk areas shall provide information on the taxes, fees, and royalties paid.

4.3.1.4 Proposal on Corporate Sustainability Due Diligence

A few of the Member States in the EU have adopted mandatory mHRDD legislation.[294] However, the national initiatives may create fragmentation and undermine the legal certainty and the level playing field for companies in the single market. Therefore, on 23 February 2022, the European Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence 2019/1937.[295] The Proposal aims to improve corporate governance practices by integrating risk management and mitigation processes of human rights and environmental risks and impacts into corporate strategies, including value chains. It aims to create legal certainty for corporations and stakeholders regarding behavior and liability while avoiding fragmentation of different due diligence requirements in the single market. The Proposal will increase corporate accountability for adverse impacts, improve access to remedies for victims of adverse human rights and environmental impacts and complement other EU measures in force or proposed.

According to Article 2(1)(a) of the proposal, the Directive will apply to large EU companies with more than 500 employees and have a net worldwide turnover of more than EUR 150 million. It will also apply to medium EU companies with 250 employees and a worldwide net turnover of more than EUR 40 million if half of the net turnover is derived from a high-impact sector according to Article 2(1)(b)(i-iii). Moreover, the Directive will also apply to some large and medium non-EU

[293] Regulation (EU) 2017/821 Preamble 4-5.
[294] See France (Loi relative au devoir de vigilance, 2017), Germany (Sorgfaltspflichtengesetz, 2021), and the Netherlands (Wet zorgplicht kinderarbeidm 2019).
[295] European Commission (2022) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, Explanatory Memorandum p. 3

companies.[296] Nevertheless, the proposal will have a limited scope; only an estimated 13,000 EU and 4,000 non-EU companies will be covered.[297]

The proposal requires companies to conduct due diligence with respect to adverse human rights impacts and adverse environmental impacts.[298] According to Article 4 (1)(a)-(f), a Member State shall ensure that companies conduct human rights due diligence by: integrating due diligence into their policies in accordance with Article 5; identifying actual or potential adverse impacts in accordance with Article 6; preventing and mitigating potential adverse impacts and bringing actual adverse impacts to an end and minimizing their extent in accordance with Articles 7 and 8; establishing and maintaining a complaints procedure in accordance with Article 9; monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10; and publicly communicating on due diligence in accordance with Article 11. In contrast to the UNGPs, there is no explicit requirement for a policy commitment to respect human rights. However, according to the Danish Institute of Human Rights, the proposal holistically aligns with the UNGPs and the OECD Guidelines.[299]

The proposal defines "adverse human right" as "an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions" listed in the Annex Part I.[300] This deviates from the UNGPs and OECD Guidelines which use the term "adverse impacts" as any action or omission that reduces or removes the ability of an individual to enjoy his or her human rights: not a violation. According to the Danish Institute, the use of "violation" as a concept raises the threshold for when an impact would be covered by the Proposal and subsequently a part of the due diligence obligation. The wording "one of the rights" can also lead to an isolated assessment of specific rights instead of holistic HRDD.[301] Meanwhile, the rights listed in the Annex Part I Section 1, are often phrased in relation to workers or in the context of the working place excluding other stakeholders. For example, the right to adequate housing, food, clothing, water and sanitation in accordance with Article 11 of the ICESCR is limited to

[296] It will apply to large non-EU companies with a turnover of than EUR 150 million in the Union and medium non-EU companies with a turnover of EUR 40 million in the Union if at least half of its net worldwide turnover was generated in a high impact sector, see Article 2(2)(a)-(b).
[297] European Commission (2022) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, Explanatory Memorandum p. 16.
[298] See Article 5.
[299] Holly, Gabrielle & Andreasen Lysgaard, Signe (2022b) p. 25.
[300] See Article 3(c) of the Proposal.
[301] Holly, Gabrielle & Andreasen Lysgaard, Signe (2022b) p. 13.

the access to the workplace and the accommodation provided by the company.[302] This implies that due diligence limits the scope of potential rights-holders to the ones directly affected by companies' operations.[303]

Article 11 of the proposal sets out the obligations for communication. Companies that are not subject to the Directive 2013/34/EU nor the proposed CSRD, shall publish an annual statement on their website. The proposal of CSRD aims to fulfill the reporting stage of the due diligence duty.[304] This, together with the other initiatives in the proposal's Explanatory Memorandum such as the Taxonomy Regulation, shows how different sustainability initiatives in the EU integrate and reinforce each other.[305]

The proposal creates a civil liability mechanism in Article 22. Companies can be liable for the damages arising due to their failure to comply with the obligations under Articles 7 and 8, i.e., to conduct due diligence. Companies can be held reliable if an adverse impact occurred and led to damage that should have been identified, prevented, mitigated, ended, or minimized through appropriate measures.

4.3.2 Tax and the EU's Responsible Business Agenda

Tax is becoming an integral part of the EU's understanding of CSR. Already in 2001, the integration of companies in their local setting was interpreted as a part of CSR where companies contribute to local communities in Europe and worldwide by providing jobs and tax revenues.[306] In its last paper from 2011, the European Commission promotes three principles of good tax governance: transparency, exchange of information, and fair tax competition between states. In relation to enterprises, they are encouraged, where appropriate, to work towards the implementation of the principles. Moreover, the Commission encourages enterprises to disclose information related to good tax governance standards.[307] The Platform for Tax Good Governance

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302 European Commission (2022) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, Annex Part I, 8.

303 Holly, Gabrielle & Andreasen Lysgaard, Signe (2022b) p. 13

304 European Commission (2022) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, Explanatory Memorandum p. 4

305 See European Commission (2022) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, Explanatory memorandum p. 4; and Article 18 Taxonomy Regulation 2020/852.

306 European Commission (2001) Promoting a European Framework for Corporate Social Responsibility, para 43.

307 European Commission (2011) A renewed EU strategy 2011-14 for Corporate Social Responsibility, pp. 7, 11.

was established in 2012 by the Commission to develop initiatives to promote good governance in tax matters in third countries, tackle aggressive tax planning and identify and address double taxation. The platform allows the Member States to discuss with businesses, NGOs, and academia about issues relating to corporate taxation.[308] The Platform has highlighted the issue of tax and CSR.[309]

The regulatory initiatives from the EU, addressed in Chapter 3, have focused on anti-tax avoidance and tax transparency. Directive 2013/34/EU for example, requires some companies in the extractive business to report on a country-by-country basis on their tax payments. These initiatives are not framed within the BHR agenda. However, as the next subchapter will address, tax transparency is a key measure according to several soft law instruments calling for responsible tax behavior from corporations. Therefore, tax transparency regulations might not be framed as a BHR measure, however, they can further those objectives.

Nevertheless, the Directive on public country-by-country reporting adopted in 2021[310] has been criticized since it will only apply to large MNEs - excluding around 85-90 percent of MNEs.[311] In addition, the personal scope of the sustainability reporting modalities in the EU lacks alignment. The proposed CSRD only requires EUR 40 million in net turnover while the Directive on country-by-country reporting requires EUR 750 million. Moreover, the Directive on public country-by-country reporting only covers tax payments within the EU or non-cooperative jurisdictions[312] excluding developing states. Another issue regarding the country-by-country reporting Directive is the lack of reporting requirements on tax strategies, policies, and governance. Hence, in contrast to the proposed CSRD, corporations' sustainability ambitions or assessments on how their tax positions can impact society will not be disclosed.[313]

The presented scope of the EU's existing legal framework relating to BHR has few references to tax. The reporting requirements in the NFRD and the proposal of

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[308] European Commission, Platform for Tax Good Governance.
[309] See Platform on Tax Good Governance (2021) Corporate Social Responsibility and Tax.
[310] Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.
[311] Tenwick, Jade (2021) EU agreement fails to deliver on expectations for real corporate tax transparency.
[312] The EU's list of non-cooperative jurisdictions for tax purposes from 14 February 2022: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands, and Vanuatu.
[313] Hilling, Axel., Sandell, Niklas., Sonnerfeldt, Amanda & Vilhelmsson, Anders (2022) p. 3.

CSRD do not cover tax issues. Nevertheless, the Conflict Minerals Regulation requires companies within its scope to report on the taxes, fees and royalties paid.[314] In addition, the Sustainable Finance Disclosure Regulation includes a reference to tax compliance as a metric to classify an investment as sustainable in Article 2(17). Therefore, tax transparency is linked to at least two initiatives relating to BHR in the EU.

The existing Taxonomy Regulation does not relate directly to corporate tax behavior; however, Article 18 refers to alignment with the OECD Guidelines and the UNGPs as a minimum standard. This may afford an inclusion of corporate tax behavior if an interpretation of UNGPs includes corporate tax behavior. Moreover, as will be addressed in section 4.2.2, the OECD Guidelines contain a chapter on taxation. Therefore, there is an indirect link to corporate tax behavior in the Taxonomy regulation. Moreover, a possible expansion of the Taxonomy in the future may address corporate tax compliance explicitly as a social sustainability issue.[315]

The proposal on Corporate Sustainability Due Diligence does not refer to tax which will be discussed in Subchapter 5.2.2. Nevertheless, there might be initiatives from the EU relating to BHR in the future that will address corporate governance and tax behavior. Following the historic agreement on global tax reform, i.e., the OECD's agreement and the EU's proposed Directive on 15 percent minimum effective corporate tax rate,[316] the European Parliament, the Council of the European Union, and the European Commission in their Joint Declaration on EU Legislative Priorities for 2022 aims to improve the regulatory framework on sustainable corporate governance and tackle tax fraud and tax evasion.[317]

4.4 Voluntary Initiatives on Responsible Tax Behavior

4.4.1 Tax Transparency and Due Diligence

There are two trends of initiatives for tax transparency from private organizations. The first trend includes organizations that certify corporations complying with high

[314] See Article 4 (f)(v) Regulation (EU) 2017/821.
[315] Platform on Sustainable Finance (2022) Final Report on Social Taxonomy p. 10.
[316] European Commission (2021) Fair Taxation.
[317] Council (2021) Joint declaration of the European Parliament, the Council of the European Union and the European Commission on EU Legislative Priorities for 2022, p. 2.

standards of tax transparency or organizations that provide standards for sustainability reporting which includes taxes, such as the Global Reporting Initiative (GRI).[318] The GRI is an international organization founded in 1997 and develops the world's most widely used standards for sustainability reporting. To comply with the reporting requirement under the Non-Financial Reporting Directive, many corporations use the GRI Standards.[319] The GRI provides a tool for reporting on taxation. In 2019, the Topic Standard for tax called 'GRI 207: Tax 2019'[320] was published as the first international requirement for sustainability reporting relating to tax law.[321] The standard aims to increase corporations' tax transparency to different stakeholders and can be used by any organization irrespectively of size, type, sector, or geographic location. The standard is effective for reports published after 1 January 2021. The GRI 207: Tax 2019 standard is designed to help a corporation to communicate its management approach in relation to tax by reporting its revenue, tax, and business activities on a country-by-country basis.[322] However, the GRI 207 standard does not contain a human rights due diligence component.

The second trend is to integrate tax transparency into the governance metric within the CSR framework. Formed by a global group of business leaders, The B Team is an example of an initiative of this kind that has presented Responsible Tax Principles.[323] Another example is CSR Europe's initiative 'A Blueprint for Responsible and Transparent Tax Behavior' where tax is implemented into CSR strategies to increase tax transparency.[324]

Today, many corporations conduct tax-related due diligence.[325] Some large companies publish their approach to tax and present evidence of their compliance with their tax principles. For example, by voluntarily disclosing their tax paid in different jurisdictions or disclosing their risk analysis of their tax positions. Many of these due

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[318] Hilling, Axel & Sorrentino, Lorena (2019) p. 69.
[319] Holle, Florian, Madeleine Kockrow, & Arne Schnitger (2021) pp. 703–704.
[320] Global Sustainability Standards Board (2019) GRI 207: Tax.
[321] Holle, Florian, Madeleine Kockrow, and Arne Schnitger (2021) p. 702.
[322] Global Sustainability Standards Board (2019) GRI 207: Tax, pp. 4, 2.
[323] Hilling, Axel & Sorrentino, Lorena (2019) p. 69; See The B Team (2018) A New Bar for Responsible Tax.
[324] CSR Europe (2019) A Blueprint for Responsible and Transparent Tax Behaviour.
[325] European Commission (2020) Study on due diligence requirements through the supply chain p. 56.

diligence activities are framed as risk assessments, however, even if they are not framed as human rights impact assessments, they may be compatible with the UNGPs.[326]

One example of a company that has integrated tax in its impact assessment on society is BASF, a MNE with its headquarters in Germany.[327] BASF has developed a model called Value-to-Society, which conducts an assessment of the economic, ecological, and social impacts of the business activities along the value chain. In their assessment, the driving positive factors to society are taxes paid, wages, social benefits, employee training, and net income. They conduct measurement and monetary valuation of BASF's impacts on society.[328] The impact categories are economic, social, and environmental where taxes are a part of the social category. However, human rights impacts are not yet included in the Value-to-Society model.[329]

4.4.2 OECD Guidelines for Multinational Enterprises

The OECD Guidelines are non-binding principles and standards consistent with applicable laws and internationally recognized standards for responsible business conduct for MNEs. In 2011, the OECD Guidelines were updated and adopted by the 42 OECD and non-OECD governments. The OECD Guidelines contain different chapters whereas the updated version implements the UN framework of Protect, Respect, and Remedy and includes a human rights chapter consistent with the UNGPs on BHR.[330] According to the OECD Guidelines, enterprises should carry out risk-based due diligence to identify, prevent and mitigate actual and potential adverse impacts and avoid causing or contributing to adverse impacts on matters within the scope of the OECD Guidelines. Enterprises should seek to prevent or mitigate such adverse impacts and address them.[331]

In addition, the 2011-version also includes a specialized chapter on taxation.[332] According to the OECD Guidelines, enterprises shall comply with both the letter and spirit of the tax laws of the countries in which they operate and follow the intention of

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326 Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 392.
327 European Commission (2020) Study on due diligence requirements through the supply chain p. 58.
328 BASF, We create value.
329 BASF (2018) Value-To-Society p. 5.
330 OECD (2011) Guidelines for Multinational Enterprises p. 3.
331 Ibid p. 20.
332 Ibid p. 4.

the legislature. Tax compliance does not entail a requirement to pay more taxes than established by law. However, it includes a requirement to provide relevant information to tax authorities, co-operation with tax authorities, and conform with transfer pricing practices and the arm's length principle. Moreover, enterprises should treat tax governance and tax compliance as important elements of their risk management systems and corporate boards should adopt tax risk management strategies to ensure that financial, regulatory, and reputational risks are identified and evaluated.[333] In general, enterprises should refrain from seeking or accepting exemptions that are not contemplated in the statutory or regulatory framework related to human rights, environmental, taxation, or other issues.[334]

In 2018, the OECD published its due diligence guidance for responsible business conduct.[335] However, the chapter on taxation is explicitly excluded from due diligence in the guidelines from 2011 and the guidance from 2018.[336] According to Ruggie and Nelson, the inclusion of tax was not considered appropriate.[337] Moreover, there is no link between human rights and taxation in the OECD guidelines. The OECD has recognized the social implications of corporate tax abuse, but the OECD's approach is not anchored in human rights.[338] In the OECD 2018 guidance on due diligence, "bribery of public officials to obtain favorable tax treatment or other preferential treatment […]" is an example of adverse impact on matters covered by the OECD guidelines for MNEs within the scope of bribery, bribe solicitation, and extortion; not human rights.[339]

Governments adhering to the OECD Guidelines are required to set up a National Contact Point ('NPC'). The main duty of the NCPs is to advance the effectiveness of the OECD Guidelines by raising awareness and function as a non-judicial grievance mechanism against corporations that allegedly have failed to meet the standards of the OECD Guidelines. Participation is voluntary.[340]

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333 OECD (2011) Guidelines for Multinational Enterprises pp. 60–61.
334 Ibid p. 19.
335 See OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct.
336 Darcy, Shane (2017); See also OECD (2011) Guidelines for Multinational Enterprises p. 23-4; OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct p. 10.
337 Ruggie, John & Nelson, Tamaryn (2015) Human Rights and the OECD Guidelines for Multinational Enterprises p. 6.
338 Darcy, Shane (2017) pp. 23, 26.
339 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct p. 40.
340 OECD, What are National Contact Points for Responsible Business Conduct?

4.4.3 Getting to Good: Towards Responsible Tax Behaviors

In 2015, the discussion paper *Getting to Good: Towards Responsible Tax Behaviors* was published jointly by the NGOs Christian Aid, Oxfam, and ActionAid. The paper addresses how responsible corporate tax behavior could impact human rights and the developing countries in which they operate.[341] The paper explicitly refers to the UNGPs and provides a table on how their approach corresponds to elements of the Pillar 2 of the UNGPs and the corporate responsibility to respect human rights.[342] The paper identifies and proposes three key principles: transparency, assessment, and progressive and measurable improvement. Moreover, the paper identifies eight key issue areas: tax planning practices; public transparency and reporting; non-public disclosure; relationships with tax authorities; tax function management and governance; impact evaluation of tax policy and practice; tax lobbying/advocacy; and tax incentives.[343]

According to the paper, a tax responsible company "is radically and proactively transparent about its business structure and operations, its tax affairs and tax decision-making". The key issue of transparency corresponds to Principle 16(a) of the UNGPs where businesses should have a publicly available human rights policy approved at the most senior level of the business enterprise and Principle 17 of the UNGPs where businesses shall communicate how human rights impacts are addressed. The key principle of assessment corresponds with Principle 17 in the UNGPs where businesses shall assess actual and potential human rights impact. According to the paper, a company that is responsible "assesses and publicly reports the fiscal, economic, and social impacts (positive and negative) of its tax-related decisions and practices in a manner that is accessible and comprehensive". The final key principle, i.e., progressive and measurable improvement, corresponds with Principles 11, 17, and 22 of the UNGPs since a responsible company "Takes steps – progressively, measurably and in dialogue with is stakeholders – to improve the impact of its tax behaviour on sustainable

[341] ActionAid, Christian Aid, and Oxfam (2015) Getting to Good p. 14.
[342] Ibid Annex A p. 37.
[343] Ibid p. 14.

development and on the human rights of employees, customers and citizens in the places where it does business.“ [344]

Corporate tax behaviors can have a fiscal impact on governments as it may deprive governments of resources to realize the fundamental human rights of their citizens. In addition, the human rights impact can also be economic and social at the local level. For example, corporates' tax-motivated decisions can affect the creation of good quality jobs, investment and prices, and the transfer of technology and skills to developing economies. These decisions affect the human rights of right bearers such as employees, consumers, and citizens of the countries in which they operate. The report also highlights that tax avoidance poses serious risks to companies and their investors. Not only reputational risk but also financial risks as stakeholders such as consumers also have expectations of corporations' tax behavior.[345]

The report highlights that corporations should be in compliance with the benefits principle and ensure that taxable income, profits, or gains arise in jurisdictions where the operations are located. Moreover, the paper proposes that MNEs should progressively improve the international equity of their tax payments. The aim should be to pay a larger proportion of the global tax bill in low-income states if it is consistent with transfer pricing rules.[346]

The report demonstrates that corporations have a role to play to tackle corporate tax avoidance in conjunction with states' regulatory role to reform international tax rules to create coherent and fair rules. However, regulative initiatives by states cannot tackle all the problems even if regulation could constrain the corporations' opportunities. Accordingly, achieving equitable tax outcomes will also require a change in corporations' attitude and approach toward tax.[347]

[344] Ibid Annex A p. 37.
[345] ActionAid, Christian Aid, and Oxfam (2015), Getting to Good, pp. 11–12.
[346] Ibid p. 15.
[347] Ibid pp. 10–11.

5 Integrate Tax on the Business and Human Rights Agenda

This chapter will discuss and analyze how corporate tax behavior could be integrated within the framework of BHR and the possible added value of such inclusion and address potential obstacles. The chapter will focus on pillars two and three of the UNGPs since the first pillar regarding states' obligations in relation to resource mobilization and to tackle tax abuse was addressed in Chapter 2.

5.1 General Considerations on Advantages and Obstacles

IHRL does not have the technical solutions to corporate tax abuse. However, by highlighting the issue of corporate tax abuse from a human rights perspective, it can emphasize the human rights principles such as fairness, transparency, and accountability.[348] A BHR approach to corporate taxation could help to develop a coherent idea of all businesses' impacts on human rights. In addition, HRDD could help corporations to identify and prevent adverse human rights impacts caused by tax behavior.[349] According to the Roadmap from the Working Group on BHR, there is a need for a cultural change to realize lasting change and ingrain business respect for human rights. This can be done by integrating HRDD into the core of the business model. The Working Group also suggests that HRDD should be applied to taxation.[350]

Initiatives such as the UN's Global Compact, are insufficient to combat corporate tax abuse according to Scheffer. However, it may serve as a starting point.[351] According to Dietsch, it would be utopian to expect that the tax planning industry would adopt a socially responsible behavior derived from self-imposed norms.[352] Voluntary norms would be if "the fox guards the hen house". In addition, corporations may also lack the motivation to engage in responsible initiatives, especially in the tax planning

348 Darcy, Shane (2017) p. 29.
349 Kohonen, M., Sarin, R., Boerrild, T., & Livingston, E. (2019) p. 388.
350 Working Group on BHR (2021) UNGPs 10+ A Roadmap For the Next Decade of Business and Human Rights p. 28.
351 Scheffer, David (2013) pp. 365, 367.
352 Dietsch, Peter (2011) p. 344.

industry since it is their business model to facilitate tax abuse.[353] CSR is regarded as self-imposed norms which emphasize responsible behavior beyond the law. In contrast, BHR establishes that corporations have a responsibility to respect human rights.[354] There may be an added value of bringing in tax in BHR instead of the CSR initiatives presented in Chapter 4.3.1. Even in the absence of a legally binding obligation to respect human rights, the moral and normative case for corporate responsibility is much stronger with a BHR approach.[355] Nonetheless, even if the language differs, measures to comply with the corporate responsibility to respect human rights such as HRDD are still voluntary in most jurisdictions.

In absence of mandatory BHR measures, another obstacle may arise for corporations: the perceived obligation of profit maximization and shareholder primacy. Company law is often silent on the purpose of the corporation, however, there is a social norm that the purpose of the corporation is to maximize shareholder value.[356] Nevertheless, according to many jurisdictions in the EU, the directors' duties are owed primarily to the company and not the shareholders.[357] Shareholder primacy is one of the driving factors behind tax abuse whereas tax is regarded as a cost and minimizing tax would therefore maximize profits in the interests of its shareholders.[358] Shareholder primacy is problematic since tax revenues benefit other stakeholders by financing the realization of human rights. The focus on shareholders can be seen as an undemocratic redistribution since the potential revenues for states are being allocated to corporate owners – not states.[359] Meanwhile, corporations can allocate revenues intended for government expenditure by their own choice and prioritize projects or issues they cherish which may not correspond with the government's priorities. In addition, corporations may regard voluntary mechanisms as a competitive disadvantage since they might increase tax liabilities and infringe upon their shareholder primacy. Therefore, mandatory measures are a clear preference since it levels the playing field for corporations. Moreover, questions on commercial confidentiality in relation to tax transparency will also be clarified if mandatory measures are implemented. However,

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[353] Dietsch, Peter (2011) p. 351, 349.
[354] Wettstein, Florian (2016) p. 80
[355] Ibid p. 84.
[356] Sjåfjell, Beata (2020) p. 183.
[357] European Commission (2020) Study on directors' duties and sustainable corporate governance, p. 32.
[358] Ibid p. 29.
[359] Hilling, Axel & Sorrentino, Lorena (2019) pp. 60–61.

most businesses routinely argue against mandatory BHR measures.[360] Similarly, the proposals for public country-by-country reporting in the EU received heavy resistance from lobbyists in the business sector which expressed concerns about the EU's role as a lone front runner undermining the EU's attractiveness for investments from overseas.[361]

As demonstrated in chapter 3, the EU has adopted several measures to tackle aggressive tax planning. These measures may not hinder an economically rational corporation according to Hilling and Sorrentino, since the regulations on the exchange of information do not decrease the grey zone area in which corporations can conduct tax abuse. Instead, the regulations increase the risk of being accused while the penalties are limited.[362] Therefore, more deterring regulations may have to be implemented, in accordance with states' obligations to tackle tax abuse.[363] Nevertheless, negative criticism from stakeholders leading to reduced earnings may motivate a corporation to implement less aggressive tax behavior, however, if the negative attention does not impact the corporation's earnings - the tax positions often remain.[364]

Invoking the language of human rights might not be suitable regarding corporations solely motivated by shareholder primacy: these corporations may not recognize the corporate responsibility to respect human rights in the first place. In my view, the focus from civil society that wants to include HRDD in tax should be directed towards corporations that already claim that they comply with human rights norms. These corporations are maybe more likely to develop an understanding of the impact of their tax positions and corporate structures on human rights. According to the UNGPs, a business may undertake other commitments to support and promote human rights, however, this does not offset a failure to respect human rights throughout their operations.[365]

IKEA for example is a corporation that claims that they respect human rights based on the UNGPs and support the proposal for the Directive on Corporate Sustainability Due Diligence in the EU.[366] However, in 2016, a report disclosed how the corporate structure of IKEA facilitated profit shifting and tax avoidance estimating that

[360] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 400.
[361] Hilling, Axel & Sorrentino, Lorena (2019) p. 68.
[362] Ibid p. 64.
[363] See Chapter 2.
[364] Hilling, Axel & Sorrentino, Lorena (2019) pp. 60–61.
[365] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, Principle 11, p. 13.
[366] IKEA, Our view on human rights.

the loss of tax revenues for European countries between 2009 and 2014 amounted to 1 billion EUR.[367] As a response to the report, the European Commission opened an in-depth investigation in 2017 regarding the Netherlands' tax treatment of Inter IKEA since the Netherlands allowed Inter IKEA to pay less tax than other companies in breach of EU State aid rules.[368] The investigation was extended in 2020 and is still ongoing.[369] This discrepancy in the understanding of human rights impacts could be alleviated if a BHR approach to tax were applied resulting in a coherent idea of all businesses' impacts on human rights.[370]

5.2 Pillar Two: Business Responsibility to Respect Human Rights

The second pillar of the UNGPs is the corporate responsibility to respect human rights and is the centerpiece of the UN Framework and the UNGP.[371] According to Principle 11 of the UNGP, this responsibility to respect entails that corporations should avoid infringing on the human rights of others and address adverse human rights impacts in which they are involved. In addition, corporations should not undermine the ability of states to meet their own human rights obligations.[372] According to Principle 12 of the UNGP, the responsibility to respect includes internationally recognized human rights expressed in the ICCPR, ICESCR, and the right to development.[373] Moreover, special attention should be paid to vulnerable groups and individuals such as indigenous peoples, women, minorities, and children.[374]

In relation to tax behavior, businesses must ensure that their tax planning strategies and policies comply with national law, but also with IHRL norms.[375] According to the former Special Rapporteur, business practices that avoid taxation may

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[367] Auerbach, Marc (2016) IKEA: flat pack tax avoidance, p. 5.
[368] European Commission (2017) State aid: Commission opens in-depth investigation into the Netherlands' tax treatment of Inter IKEA.
[369] European Commission (2020) Netherlands Possible State aid in favour of Inter IKEA.
[370] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 388.
[371] Ruggie, John (2013) p. 90.
[372] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, p. 13.
[373] OHCHR (2016) Frequently Asked Questions on the Right to Development p. 4.
[374] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, p. 6.
[375] HRC (2015) Illicit financial flows, human rights and the post-2015 development agenda, A/HRC/28/60, para 22.

breach their responsibility to respect human rights if such actions have an adverse impact. Business enterprises that avoid paying taxes are purposefully depriving states of necessary resources to fulfill their human rights obligations.[376] The Interim Study by the Independent Experts on illicit financial flows states that MNEs and their tax advisers and financers must understand that their tax planning strategies have potential negative impacts on human rights. Corporations that contribute to illicit financial outflows through transfer mispricing or tax evasion can cause adverse human rights impacts by undermining the abilities of states to realize economic, social, and cultural rights – particularly when they operate in states facing difficulties to meet the minimum core human rights obligations.[377]

One explanation for why corporations have not viewed responsible tax behavior as a matter of human rights compliance is the perceived weak link to human rights.[378] Nevertheless, Chapter 2 has demonstrated that tax is vital for states' ability to fulfill all human rights and can be used as a tool for poverty reduction and achieving equality. Tax abuse has disproportionate impacts on people living in poverty and women since they are more dependent on public services financed by the state.[379] Moreover, the GRADE tool demonstrates how determinants of health in individual states are impacted by tax abuse by providing a tool for the relationship between government revenue and health determinants.

Corporate activities such as tax abuse do not constitute a direct breach of specific human rights i.e., a breach of a deontological rule; however, it weakens the ability of states to realize human rights and may cause harm to human rights.[380] This is contrary to the UNGPs since business enterprises should not undermine states' ability to meet their own human rights obligations.[381] The UNGPs do not refer to violations of human rights – instead, the UNGPs refer to impacts. A deontological interpretation of the UNGPs only covers certain prohibited acts which render into a "violation" which

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376 HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28. para 7.
377 HRC (2015) Illicit financial flows, human rights and the post-2015 development agenda, A/HRC/28/60, paras 33-34.
378 Darcy, Shane (2017) p. 16; International Bar Association (2013) Tax Abuses, Poverty and Human Rights, p. 118.
379 HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 44.
380 Birchall, David (2019) p. 28.
381 HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, p. 13.

has taken to mean "impact". Within the deontological approach, if harm occurs from an act that is not prohibited, the harm will not constitute a violation. However, according to Birchall, the UNGPs can be interpreted as adopting a consequentialist language in which businesses have responsibility for their actions that has the consequence of removing or reducing an individual's enjoyment of human rights. By adopting such an approach, the UNGPs can address and include systemic and macro-level harm by capturing all actions which have the consequence of removing or reducing the enjoyment of rights.[382]

According to Principle 13, the responsibility to respect human rights requires corporations to avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. They should also seek to prevent or mitigate such adverse impacts that are directly linked to their operations, products, or services by their business relationship, even if they have not contributed to those impacts.[383] Adopting a BHR approach to tax abuse and international tax law can help to clarify the responsibilities of corporations in their relationship with subsidiaries, business partners, and other stakeholders.[384] Business activities in the UNGPs are understood to include both actions and omissions. Moreover, business relationships include relationships with other businesses, entities in their value chain, and any other entity, non-state, or state, directly linked to its business operations, products, or services.[385] Therefore, facilitators of tax abuse including lawyers, accountants, and even financial institutions such as banks should consider their involvement in tax abuse. However, the facilitators' role is relatively unexplored.[386]

The UNGPs apply to all business enterprises regardless of their size, sector, ownership, and structure according to Principle 14. Moreover, Principle 23 of the UNGPs states that "all businesses have the same responsibility to respect human rights wherever they operate". Principle 19 states that businesses, to prevent and mitigate adverse human rights impacts, shall use their leverage to address such adverse

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[382] Birchall, David (2019) p. 28.
[383] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, p. 14.
[384] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 388.
[385] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/3, Annex, p. 14.
[386] De Schutter (2019b) p. 69; Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 403.

impacts.[387] The concept of leverage under the UNGP can be a basis to resolve corporate tax abuse from a BHR perspective since a conglomerate is treated as a single entity under the UNGP framework. Hence, a conglomerate should use its leverage to resolve abusive business practices.[388]

To meet their responsibility to respect human rights, corporations should, according to Principle 15, have in place a policy commitment, an HRDD process, and processes of remediation to meet their responsibility to respect human rights. The UNGP recommends businesses to report transparently on their efforts to address human rights impacts. According to the Independent Expert, embracing a greater degree of transparency by publishing country-by-country reports on their sales, profits, and taxes is one obvious way for businesses to show responsible behavior.[389]

An argument against HRDD in tax matters, is that tax law is already heavily regulated.[390] This is true, however, tax laws are incoherent on a global scale and create loopholes that may be exploited.[391] As Chapter 3.3 has demonstrated, MNEs can shift profits by constructing complicated corporate structures that violate the benefits principle and the spirit of the law. The baseline of corporations' responsibility to respect human rights is to be in compliance with national laws and it is generally accepted that both the letter and the spirit of the law should be complied with.[392] A BHR approach may not alter corporations' legal interpretations of tax laws. However, it may foster a different approach to tax if corporations gain a better understanding of the relationship between tax and human rights, whereas the spirit of the law corresponds with human rights.[393] Corporations have a responsibility to respect human rights in their tax strategies. This is not a legal obligation; however, the moral case is stronger compared

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[387] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, p. 21.
[388] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 391.
[389] HRC (2015) Illicit financial flows, human rights and the post-2015 development agenda, A/HRC/28/60, para 34.
[390] European Commission (2020) Study on due diligence requirements through the supply chain p. 57.
[391] OECD (2013) Action Plan on Base Erosion and Profit Shifting p. 9.
[392] HRC (2008) Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5, para 54; See for example OECD (2011) Guidelines for Multinational Enterprises, Chapter XI, Taxation p. 60.
[393] See Chapter 2.1 how human rights correspond with the reasons to tax; Hilling, Axel & Ostas, Daniel T. (2017) p. 108.

to initiatives based on CSR norms.[394] Therefore, a BHR perspective may add a layer of responsibility.[395]

Moreover, if there is a gap between national laws and the standards of IHRL, corporations are expected to self-regulate and honor the principles in IHRL.[396] The benefits principle is not a principle of IHRL, however, it states that corporations should pay taxes in the source state since it is there the corporation benefits from public services.[397] The right to development - which businesses shall respect - establish that revenues gained from the exploitation of natural resources shall serve to fulfill the population's rights.[398] If a MNE in the extractive business, for example, the Australian mining company operating in Malawi mentioned in Chapter 3,[399] has a corporate structure and conducts treaty shopping that minimizes their tax liabilities in the host state, it may be contrary to the right to development since it deprives the host state of revenues and thereby undermines the host state's development and ability to fulfill human rights. Therefore, there may be an added value in emphasizing the connection between human rights, the spirit of the law, the benefits principle, and businesses' responsibility to respect human rights.

As noted in Chapter 3, tax law is often regarded as an issue of legal compliance. This suggests that companies are passive objects of tax laws. This passive role can be questioned since corporate lobbying is common in tax matters.[400] Moreover, if tax laws are considered as a matter of compliance, the human rights implications of a corporate's tax behavior will not be regarded as a human rights issue. This narrow interpretation disregards the implications on third parties and the grey areas of tax law according to Kohonen et al.[401] Moreover, the International Bar Association has stated that mere compliance with tax laws is not enough when this results in human rights violations.[402] Tax laws could be regarded as laws that require cooperation since they relate to states' ability to fulfill human rights and thereby corresponds with issues

[394] Wettstein, Florian (2016) p. 84.
[395] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 392.
[396] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, Principle 23, p. 21.
[397] Avi-Yonah, Reuven., Sartori, Nicola., & Marian, Omri. (2011) pp. 154–156; Hilling, Axel & Ostas, Daniel T., (2017) pp. 40–41.
[398] De Schutter, Olivier (2019b) p. 565.
[399] See ActionAid (2015) An Extractive Affair.
[400] Darcy, Shane (2017) p. 20.
[401] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 388.
[402] International Bar Association (2013) Tax Abuses, Poverty and Human Rights, p. 4.

falling in the scope of *malum in se* such as human health.[403] This does not have to imply that corporations must pay more taxes than stated by law. Instead, such cooperation beyond the law, besides HRDD, can for example entail transparency and disclosure mechanisms on tax matters that could be available for both the public and legislators.[404]

As subchapter 3.2 has demonstrated, tax competition among states and states offers of tax incentives to attract investments is not only attributable to corporations and they cannot be held solely responsible for states' tax policies. However, corporations can influence tax incentives and negotiate directly with governments to create specific incentives and tax breaks.[405] If corporations conclude tax agreements offering "tax stability" or "advance pricing", they may consider the evolving impact on human rights as a part of their responsibility to respect human rights since these forms of incentives should be examined with caution under IHRL by states.[406]

5.2.1 Human Rights Due Diligence

Corporations should, according to Principle 17, carry out HRDD to identify, prevent, mitigate, and account for how they address their adverse human rights impacts. The HRDD should include an assessment of actual and potential impacts on human rights the corporation may cause or contribute to through its own activities or directly linked to its operation.[407] As seen in chapters 3 and 4, there are many disclosure mechanisms, both voluntary and mandatory relating to either tax, human rights, or both. In contrast to disclosure mechanisms, HRDD require corporations to assess how their behavior impacts human rights.

HRDD requires four steps for implementation: first, a human rights impact assessment to become aware of risks and impacts; second, to take appropriate action based on the findings; three, to track the effectiveness of the measures taken; and fourth, to communicate how impacts were addressed. The complexity of the HRDD will vary depending on the corporation's size, nature and context of its operations, and the risk of

[403] See Ostas, Daniel T. (2020) p. 85.
[404] Darcy, Shane (2017) p. 20.
[405] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 395.
[406] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, para 66.
[407] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex, p. 16.

severe human rights impacts. According to the commentary to Principle 17 of the UNGPs, MNEs that have a large number of entities may identify general areas where the risk of adverse human rights impacts is most significant and thereby prioritize these areas for HRDD.[408] Severe human rights impacts are defined with reference to their scale, scope, and irremediable character.[409] Corporate tax abuse may not qualify as a prioritized area, especially for businesses in a high-risk sector where the likelihood of causing harm of irremediable character is high. Nevertheless, according to the Roadmap, HRDD processes should be embedded in corporate governance and business models while tax abuse undermining states' ability to fulfill economic, social, and cultural rights is a key issue.[410] Therefore, the prioritizing of areas covered in HRDD may be an obstacle for voluntary undertakings.

The starting point for a HRDD process is to identify risks.[411] However, the risk identified should include the risks to rights-holders, not the corporation itself. The HRDD differs from ordinary internal risk-management procedures within a corporation where the focus is to identify risks for the corporation itself. Nevertheless, HRDD could be included in the broader risk-management system if it also includes risks to rights-holders.[412]

The chapter on tax is explicitly excluded from the due diligence requirements in the OECD Guidelines and according to Ruggie and Nelson, the inclusion of tax was not considered appropriate.[413] They do not provide an explanation for this statement. However, the statement differs from the Roadmap from 2021, where tax practices that undermine the state's ability to fulfill economic and social rights are explicitly referred to as a key issue. In addition, the Roadmap calls for an increasing number of business enterprises to demonstrate that HRDD is applied across all corporate activities and functions - including tax.[414] According to the International Bar Association, the UNGPs

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[408] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/3, Annex, p. 16.
[409] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/3, Annex, p. 14.
[410] Working Group on BHR (2021) UNGPs 10+ A Roadmap For the Next Decade of Business and Human Rights p. V.
[411] OHCHR (2012) The Corporate Responsibility to Respect Human Rights, an Interpretative Guide p. 36.
[412] HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), A/HRC/17/31, Annex p. 16.
[413] Ruggie, John & Nelson, Tamaryn (2015) Human Rights and the OECD Guidelines for Multinational Enterprises p. 6.
[414] Working Group on BHR (2021) UNGPs 10+ A Roadmap For the Next Decade of Business and Human Rights p. 28.

"can assist in the articulation of new due diligence requirements related to the tax practices of multinational enterprises in different economic sectors."[415] Therefore, HRDD in the sphere of corporate taxation can identify external impacts of corporations' activities which can have adverse human rights impacts potentially leading to strengthened protection for right-holders.[416]

The integration of HRDD in corporate tax decisions was proposed in the discussion paper *Getting to Good: Towards Responsible Tax Behaviors*.[417] As the paper acknowledges, tax decisions' human rights impacts can be hard to assess due to measurement challenges. An assessment concerning a tax decision can focus on the tax decisions' impact on the tax liability and its subsequent impact on government revenue and the public purse.[418] To assess how the tax decision impact human rights through the public purse indeed poses a challenge. However, the GRADE project has developed a tool that may assist MNEs to review their contributions to public finances and their impacts on detriments of health.[419] Therefore, it is possible for large corporations to assess their tax behaviors' fiscal impact on some human rights.

Large corporations already conduct tax risk management or due diligence where tax liabilities on a country-by-country basis can be measured.[420] These processes are not framed as HRDD, but they may be compatible with the UNGPs. The BASF's Value-to-Society approach shows how corporations can assess their contributions to society. However, the separate entity principle in tax law may pose a threat to a tax approach adopted by a MNE. If a subsidiary deviates from the MNEs' tax strategy, in accordance with the host states' legal framework, it could undermine the whole MNEs' tax strategy.[421]

The *Getting to Good: Towards Responsible Tax Behaviors* paper does not only propose impact evaluation relating to the minimizing of tax liabilities and their consequences on the public purse, but also the impacts of tax-driven decisions on human rights and sustainable development at the local level. If a corporation, for example, intends to move to a different jurisdiction motivated by tax, the company can

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[415] International Bar Association (2013) Tax Abuses, Poverty and Human Rights, p. 103.
[416] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 396.
[417] ActionAid, Christian Aid, and Oxfam (2015), Getting to Good p. 11.
[418] Ibid pp. 29–28.
[419] The GRADE Project (2021) User Guide p. 1.
[420] ActionAid, Christian Aid, and Oxfam (2015), Getting to Good p. 29.
[421] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 392.

assess the impact on the local community, employees, shareholders, and customers.[422] Corporates' tax-motivated decisions may affect the creation of good quality jobs, investment and prices, and the transfer of technology and skills to developing economies. These decisions may affect the human rights of right bearers such as employees, consumers, and citizens of the countries in which they operate. [423] To measure the direct and local impact of tax-motivated behavior, stakeholders need to be consulted.[424]

5.2.2 Corporate Sustainability Due Diligence Directive

The EU's Proposal on Corporate Sustainability Due Diligence does not share the consequentialist language of the UNGPs, and instead, the proposal refers to violations.[425] Nor does the proposal refer to corporate tax behavior. This is contrary to the Working Group's call for integration of HRDD processes on tax since states should reinforce emerging mHRDD on complex corporate structures, shell companies, and registrations of business entities in jurisdictions favoring secrecy.[426]

Nevertheless, this was anticipated. In 2020, a study on due diligence requirements through the supply chain was carried out for the European Commission to prepare the proposal for the Directive on Corporate Sustainability Due Diligence. The study examined, *inter alia*, current market practices for due diligence through the supply chain through surveys, interviews, literature review, and legal research.[427] The study found that according to 25.8 percent of business respondents, profit-shifting to low tax jurisdictions is expressly included in their due diligence practices and implied as included in 74.15 percent. Nevertheless, the scope of the project did not address companies' tax-saving behaviors since it is already addressed through tax policy at the national level and in tax treaties.[428]

Withal, the study included interviews with stakeholders regarding sustainability impacts and whether due diligence practices were applied to large-scale

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[422] ActionAid, Christian Aid, and Oxfam (2015), Getting to Good p. 28.
[423] Ibid p. 11.
[424] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 402.
[425] Holly, Gabrielle & Andreasen Lysgaard, Signe (2022b) p. 4.
[426] Working Group on BHR (2021) UNGPs 10+ A Roadmap For the Next Decade of Business and Human Rights pp. 28, 23.
[427] European Commission (2020) Study on due diligence requirements through the supply chain p. 44
[428] Ibid p. 56; see footnote 112 p. 40.

negative economic impacts such as profit-shifting to low tax jurisdictions and income inequality.[429] One interviewee responded that companies are still struggling with familiar human rights impacts. The task to link these wider social impacts, e.g., income inequality and profit-shifting to low tax jurisdictions to companies' individual impacts and due diligence efforts are relatively new. The interviewee asked whether companies were willing to make decisions that may have business costs to get to better outcomes. According to another interviewee, part of the reason why the connection to human rights impacts and tax avoidance has not been explicitly included until now is the fact that the human rights movements and tax movement have been separate and the area is complex. In addition, tax evasion is only starting to be regarded as a human rights issue.[430]

The study claims that the social, environmental, and human rights impacts of corporate taxation are complex and contested. While reaching this conclusion, the study refers to another study from the European Economic and Social Committee which found that there is a consensus that the tax burden is passed on to people other than the shareholders and where workers, not shareholders, bear the real incidence of the corporate tax income. That study emphasizes the importance of incidence. In addition, another study is quoted stating that "higher taxes reduce wages most for the low-skilled, for women, and for young workers".[431] However, integrating tax in a HRDD mechanism does not imply that states should impose higher corporate income taxes. Hence, one of the reasons why states are imposing other taxes is to compensate for corporations' aggressive tax planning which has implications for the most disadvantaged.[432]

Several interviewees highlighted that tax and profit-shifting are already highly regulated and a new regulatory mechanism providing a civil remedy or a due diligence defense should not override and water down existing provisions in criminal laws. One interviewee calls for carefulness since the accountability model implies civil liability which can make it problematic since civil liability could be used to hold companies accountable for non-payment of tax. [433] Article 22 in the proposed Directive provides a

[429] European Commission (2020) Study on due diligence requirements through the supply chain p. 40.
[430] Ibid pp. 56–57.
[431] Ibid p. 58.
[432] HRC (2014) Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, paras 46-47.
[433] European Commission (2020) Study on due diligence requirements through the supply chain p. 57.

mechanism for civil liability where companies can be liable for damages if they fail to comply with the due diligence obligations. Civil liability may indeed be problematic since there is no sufficiently strong causal link, which will be discussed in the next Subchapter.[434] Nevertheless, tax abuse in the form of tax avoidance or aggressive tax planning would not water down criminal provisions since these types of tax abuse do not normally constitute criminal offenses.[435]

Another problem regarding remediation was highlighted by an interviewee that explained that actual remediation activities in relation to wider social impacts may lead to territories further away from the human rights framework. The interviewee brought the example of remediation in relation to child labor. Such remediation activities may relate to improving access to education and school building which, according to the interviewee, goes much further than the human rights framework within the SDGs and the development agenda. In addition, the interviewee points out that a lot of companies will be lost if the identification or assessment process is too broad which will affect the clarity of what is expected of companies.[436] Nevertheless, for these reasons, caution should be taken when considering due diligence to corporate tax according to the study.[437]

5.3 Pillar Three: Human Rights Remediation

The third pillar of the UNGPs addresses access to remedy for victims of business-related abuse. According to Principle 25, states must take appropriate steps to ensure that when business-related human rights abuses occur within their territory where those affected shall have access to an effective remedy. There are different types of remediations, for example, state-based judicial mechanisms (Principle 26) and non-judicial grievance mechanisms (Principle 27), and non-state-based grievance mechanisms (Principle 28) administered by corporations, an industry association, or

[434] Darcy, Shane (2017) p. 26.
[435] See Chapter 3.3.1.
[436] European Commission (2020) Study on due diligence requirements through the supply chain p. 57.
[437] Ibid p. 58.

human rights bodies.[438] Remedies may include “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions […]”[439]

Remediation within the third pillar focus on victims of business-related abuse. Nevertheless, the government, judiciary, and legislators are duty bearers under IHRL and have a role in remedying indirect impacts resulting from corporate tax abuse.[440] There are three forms of relationships that theoretically can give rise to human rights claims in relation to tax on the basis of the individual as a taxpayer: individual’s and home states; individual and foreign states; and interstate relationships based on their membership in the international community.[441] However, none of these relationships involves remediation in relation to corporations. The process of initiating legal proceedings by states against corporations violating tax laws does not involve the rights-holders; however, they may benefit from such proceedings if the revenue is recovered. Another example that does not involve rights-holders is investigations by the European Commission against the Member States in tax matters.[442]

Remediation in the context of corporate tax abuse may seem unsuitable for individuals since tax abuse may lack a clear causal link between the tax behavior of a single corporation and the specific adverse impact on the human rights of an individual or community. Hence, corporate tax abuse has a broader, cumulative, and harmful impact on human rights.[443] In subchapter 3.3.3, the thesis demonstrated that tax-motivated behaviors e.g., moving to another jurisdiction or using management hubs may have direct impacts on local communities. However, every economic impact does not constitute an adverse human rights impact.[444] Nonetheless, if there is a direct impact on human rights it could at least in theory be possible for remediation.

The judicial system is not the only forum to pursue human rights remedies, human rights mechanisms within the UN have the mandate and the potential to articulate the links between tax abuse and human rights on an authoritative basis.[445]

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438 HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (2011), A/HRC/17/3, Annex, p. 24.
439 Ibid p. 22.
440 Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 402.
441 Christians, Allison (2019) p. 115.
442 See for example: European Commission (2017) State aid: Commission opens in-depth investigation into the Netherlands’ tax treatment of Inter IKEA.
443 Darcy, Shane (2017) p. 26.
444 Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 402
445 International Bar Association (2013) Tax Abuses, Poverty and Human Rights, p. 156.

Another avenue would be complaints to national human rights institutions, human rights commissions, and equality bodies.[446] Nevertheless, corporations cannot be defendants before any international human rights bodies or courts, since corporations do not have any direct obligations under IHRL.

The OECD process is the only available option for third parties to put legal pressure on MNEs as systemic contributors to tax avoidance.[447] Nevertheless, NCPs are voluntary and not legally binding. There have been complaints concerning taxation under NCPs relating to the OECD Guidelines. In 2011, several NGOs filed a joint complaint against Glencore International AG and First Quantum Mining Ltd against their Zambian subsidiary, Mopani Copper Mines Plc., alleging that the corporation manipulated its financial accounts to evade taxation in breach of the OECD Guidelines provisions on taxation and general policies.[448] The Swiss NCP accepted the complaint which rendered it into a "agree to disagree" decision between the parties. Another example is from 2013 when an NGO called War on Want & Change to Win filed a complaint against Alliance Boots alleging that the corporation engaged in tax avoidance and for violating disclosure requirements. However, the NCP in the UK rejected the complaint with reference to unsubstantiated allegations.[449] None of the complaints were successful, however, a pending case before the Dutch NCP filed in 2020 and accepted in 2021, regards an oil company based in the Netherlands. The complaint is made by four indigenous federations supported by several NGOs, which allege that the corporation failed to conduct due diligence to prevent environmental and human rights impacts from its operations in the Amazon rainforest. The corporation is a mailbox company, where the headquarters are officially in the Netherlands. The complainants allege that the corporation uses a structure to channel money to the Bahamas and that the establishment of the headquarters is likely to facilitate tax avoidance.[450] The OECD Guidelines on taxation do not relate to human rights and the chapter on taxation is explicitly excluded from HRDD.[451] Therefore, NCPs may not be an appropriate avenue for claiming adverse human rights impacts derived from corporate tax abuse. However,

[446] Kohonen, Matti., Sarin, Radhika., Boerrild, Troels., & Livingston, Ewan (2019) p. 397.
[447] Christians, Allison (2019) p. 123.
[448] Sherpa et al. (2011) Specific Instance regarding Glencore International AG and First Quantum Minerals Ltd. and their alleged violations of the OECD guidelines for multinational enterprises via the activities of Mopani Copper Mines Plc. in Zambia.
[449] OECD Watch (2014) War on Want & Change to Win vs. Alliance Boots.
[450] OECD Watch (2021) Peruvian Indigenous Federations et al. vs. Pluspetrol.
[451] Darcy, Shane (2017) p. 26.

the chapters on human rights and taxation may be taken in conjunction as demonstrated above.

According to Darcy, climate change litigations may serve as a model for remedies since tax abuse and climate change harm human rights on a systemic basis.[452] In the landmark judgment *Milieudefensie et al. v Royal Dutch Shell,* the District Court in the Hague in the Netherlands ordered a private company to reduce its carbon dioxide emission. The case was built upon the *Urgenda*[453] ruling with references to human rights. The obligation to reduce emissions arose from the duty of care under Dutch tort law. However, the court interpreted the corporation's duty of care in relation to international soft law, including the UNGPs.[454]

There is no research comparing possible tax justice litigations and climate change litigations. In my view, the biggest difference between climate change and corporate tax abuse is the high level of regulation of tax. It would be a radical shift to bring an action based on international soft law in tax matters which may infringe upon the principle of rule of law contrary to the general conception of tax law which is traditionally recognized as legalistic with high demands on legal certainty.[455] Another difference is the requirement of a causal link. Climate change litigations also share the issue of a clear causal link; however, it is difficult to prove a causal link between human rights harms and tax abuse since states are the mediators. Additional revenue does not guarantee that the revenue will be allocated to fulfill human rights. Hence it is policies, events, and decisions that are factors that can deny people their human rights.[456] The GRADE tool can be used to show how additional revenue - if the spending would be the same as in recent years - impacts determinants of health, but not prove individual harm.[457]

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[452] Darcy, Shane (2017) p. 27.
[453] Urgenda Foundation v State of the Netherlands [2015] The Hague District Court C/09/456689 / HA ZA 13-1396.
[454] Macchi, Chiara, & van Zeben, Josephine (2021) p. 409.
[455] Hilling, Axel & Ostas, Daniel T. (2017) p. 52.
[456] Tax Justice Network (2021) Tax Justice & Human Rights pp. 11–12.
[457] The GRADE Project (2021) User Guide pp. 4–5.

6 Conclusion

This thesis has clarified the human rights obligations upon states in relation to resource mobilization and tax abuse. States must not only generate resources, but they must also prevent and take strong measures against corporate tax abuse to demonstrate that every effort has been made to devote the maximum of all available resources for the realization of human rights. Laws relating to financial secrecy may affect the ability of states to meet their obligation to mobilize the maximum available resources for the implementation of the rights enshrined in the ICESCR. Hence, a state that does not take strong measures against corporate tax abuse does not devote the maximum of available resources to the realization of the rights enshrined in the ICESCR.

This thesis has shown that a decrease in tax revenues is not only attributable to corporate tax behavior. Systemic weaknesses in the current international tax regime, including tax competition between states and tax havens, will require the implementation of fundamental reforms on a global scale: a question that extends the scope of this thesis but can be a topic for further research from a human rights perspective. Nonetheless, the thesis has demonstrated that states have an extraterritorial obligation to not adopt laws and policies interfering with individuals' enjoyment of rights or other states' ability to comply with the ICESCR. Tax havens, excessive protection for bank secrecy, and permissive rules on corporate taxation may affect other states' ability to meet their obligation to mobilize available resources.

Under the first pillar of the UNGPs, states have an obligation to protect human rights from business-related human rights abuses. The thesis has shown that states should encourage business actors not to undermine the efforts by states in which they operate to realize economic, social, and cultural rights. States should revise relevant tax codes and impose criminal or administrative sanctions and penalties where business activities result in abuses of the rights enshrined in the ICESCR. In addition, states should combat transfer pricing practices, deepen international tax cooperation, and explore the possibility to tax MNEs as single firms.

The EU as a regulatory actor has developed several regulatory initiatives to combat corporate tax avoidance, enhance tax transparency, and adopted proposals regarding unitary taxation for MNEs. These modalities are not framed within the smart mix of regulatory measures in BHR but can further those objectives by regulating corporate tax behaviors. Nonetheless, tax is included in two regulations in the EU's regulatory modalities relating to BHR: the Conflict Minerals Regulation and the Sustainable Finance Disclosure Regulation. The Taxonomy Regulation includes an indirect reference to tax since it refers to the OECD Guidelines. Nevertheless, the proposed Directive on Corporate Sustainability Due Diligence, which will harden HRDD to law, does not include a reference to tax which was anticipated. The proposal excludes the possibility of including tax by referring to violations in the context of the working place. Furthermore, the thesis has demonstrated that the EU may adopt other proposals for responsible business conduct in relation to tax. This would be welcomed since states should, according to the Working Group, reinforce emerging mHRDD on, *inter alia*, complex corporate structures.

The thesis has identified several advantages of including tax in the framework of BHR. If corporate tax behavior would be treated as an issue within the framework of BHR, it could foster a coherent framework where all adverse human rights impacts from businesses are included. Furthermore, corporations have a responsibility to respect human rights under the second pillar of the UNGPs which extends to corporations' tax strategies and tax behaviors. This thesis has shown that corporate tax behaviors can be divided into two categories: first, abusive tax planning strategies that affect states' budgets and thereby undermine states' ability to protect, fulfill and respect human rights. Second, tax-motivated behaviors, e.g., negotiating for tax incentives and threatening to relocate. To respect human rights, corporations should assess their tax behaviors and decisions' impact on human rights since the responsibility to respect human rights extends to corporations' tax strategies and tax behaviors. HRDD could help corporations identify and prevent adverse human rights impacts caused by tax behavior which can lead to strengthened protection for right-holders.

An argument against integration is that tax law is already heavily regulated. However, the thesis has shown that some aggressive tax planning strategies follow the letter but not the spirit of the law; compliance requires respect for both. The corporate responsibility to respect human rights is not a legal obligation; however, the thesis argues that the UNGPs may reinforce the existing obligation to follow both the letter and the spirit of domestic tax laws whereas the spirit of the law also corresponds with human rights. Therefore, an inclusion may foster a different approach to tax compliance if corporations recognize the relationship between tax and human rights.

Nonetheless, the thesis has also identified several obstacles to integrating tax in the framework of BHR. First, there is a challenge to measure adverse human rights impacts derived from corporate tax abuse in a HRDD. This issue might be resolved for large corporations since MNEs can measure tax liabilities on a country-by-country basis in conjunction with the GRADE tool. Second, the principle of corporations as single entities might be an issue since a responsible tax strategy from a MNE can be undermined by a subsidiary that deviates from it in accordance with domestic laws. Third, corporations that are driven by shareholder primacy might lack the motivation to comply with voluntary HRDD while regarding HRDD as a competitive disadvantage. In addition, tax is only starting to be regarded as a human rights issue. Voluntary BHR measures can therefore be inadequate, however, the Working Group proposes that corporations should apply HRDD on tax in the next decade.

Finally, the thesis has identified remediation in the third pillar of the UNGPs as an inherent challenge to integration regarding corporate tax abuse affecting states' budgets. Remediation is not only an issue within the civil liability mechanism created by the EU's proposed Directive on Corporate Sustainability Due Diligence but also an obstacle within the framework of BHR. Corporate tax abuse has a broad, cumulative, and harmful impact on human rights equally to climate change. In addition, states are the mediators allocating the budgets. Therefore, individual remediation is not appropriate since corporate tax abuse lacks a direct causal link between the tax behavior of a single corporation and the specific adverse impact on the human rights of an individual or community. Therefore, more research on possible avenues for remediation in the context of tax abuse and broad systematic impacts on human rights is welcomed in the light of the Working Groups' goal for companies to apply HRDD on tax in the next decade.

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