

Articles

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

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Abstract

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

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

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

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

² Vanessa Houlder, 'Skimping tax can still leave a bitter taste for coffee companies', *Financial Times* (16 June 2015), <http://www.ft.com/intl/cms/s/0/4daf995e-10dc-11e5-9bf8-00144feabdc0.html#axzz4779K9ece> (accessed 1 June 2016).

international level. The unanimous endorsement by the United Nations Human Rights Council of a set of Guiding Principles on Business and Human Rights in 2011 can be seen as a key development.³ A growing number of states have committed to implementing these Guiding Principles nationally, while preliminary discussions are underway regarding a potential binding instrument on business and human rights.⁴ The once disputed notion that companies have human rights responsibilities is gaining greater acceptance, and a variety of legal and policy measures are being implemented with a view to ensuring business respect for human rights. Despite the relatively advanced state of developments in both contexts, and the seemingly obvious overlap between the two, corporate tax avoidance has not featured significantly on the business and human rights agenda. Tax avoidance by companies has thus been called ‘the elephant in the room’ for business and human rights.⁵ This article addresses this divorced approach and seeks to assess the utility of considering corporate tax avoidance through the lens of business and human rights.

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

While issues related to tax have been relatively neglected in the literature and practice of both corporate social responsibility and business and human rights to date, there is an emerging focus on the tax practices of companies through the prism of their social and human rights responsibilities.⁶ This article will consider what a business and human rights approach may add to the discussion of tax avoidance. In particular, it explores the dual emphasis on the responsibilities of both states and companies in the United Nations Guiding Principles and the potential role of the concept of human rights due diligence. To illustrate the practice and impact of tax avoidance by large multinationals, the case of Ireland will be drawn upon, a country whose tax rules, incentives and low rates have attracted such companies, as well as accusations that it operates as a tax haven.⁷

³ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011).

⁴ Human Rights Council, Resolution 26/9, A/HRC/26/L.22/Rev.1 (25 June 2014). See further Olivier de Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2016) 1(1) *Business and Human Rights Journal* 41.

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

⁶ See, for example, International Bar Association, note 1; John Christensen and Richard Murphy, ‘The Social Irresponsibility of Corporate Tax Avoidance: Taking CSR to the bottom line’ (2004) 47(3) *Development* 37; Prem Sikka, ‘Smoke and Mirrors: corporate social responsibility and tax avoidance’ (2010) 34 *Accounting Forum* 153; John Hasseldine and Gregory Morris, ‘Corporate social responsibility and tax avoidance: A comment and reflection’ (2013) 37 *Accounting Forum* 1; Jasmine M. Fisher, ‘Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility’ (2014) 94 *Boston University Law Review* 337; Rhys Jenkins and Peter Newell, ‘CSR, Tax and Development’ (2013) 34(3) *Third World Quarterly* 378; Grahame R. Dowling, ‘The Curious Case of Corporate Tax Avoidance: Is it Socially Irresponsible?’ (2014) 124 *Journal of Business Ethics* 173.

⁷ Jim Stewart, ‘Is Ireland a Tax Haven?’, IIS Discussion Paper No. 430 (July 2013), <https://www.tcd.ie/iis/documents/discussion/pdfs/iisdp430.pdf> (accessed 1 June 2016).

In addition, the Irish example demonstrates the emergence of corporate tax avoidance as a business and human rights issue, with the matter having been frequently raised by civil society in the context of Ireland's preparation of a national action plan for the implementation of the United Nations Guiding Principles on business and human rights.⁸ The article also identifies possible avenues for further research on the evolution of a business and human rights approach to corporate tax avoidance.

I. CORPORATE TAX AVOIDANCE

Tax abuse, including tax avoidance by multinational corporations is on the international political agenda like never before. Declining government revenues and public discontent at tax scandals involving major corporations like Apple, Google and Starbucks, and international banks such as HSBC and Barclays, have pressured states to address large-scale tax avoidance by companies. The Organisation for Economic Cooperation and Development (OECD) and the G20 group of states gave an undertaking in 2011 to address aggressive tax planning, as well as 'offshore tax evasion'.⁹ Speaking in 2013, the British Prime Minister David Cameron said that tax avoidance and evasion are issues 'whose time had come'.¹⁰ While tax evasion is clearly unlawful, Cameron put it that some forms of tax avoidance 'have become so aggressive that I think it is right to say these raise ethical issues, and it is time to call for more responsibility and for governments to act accordingly'.¹¹ Just over a year later, United States President Barack Obama spoke at the G20 of the steps taken towards 'closing tax loopholes for multinational companies, and stopping tax evaders and criminals from hiding behind shell companies'.¹² His *President's Framework for Business Tax Reform* acknowledged that 'empirical evidence suggests that income-shifting behaviour by multinational corporations is a significant concern that should be addressed through tax reform'.¹³ The growing size, wealth and mobility of multinational corporations have added a new dimension to the familiar problem of tax havens and other means that are used to avoid paying taxes.¹⁴ Corporate power can be seen to have generated some media reluctance to expose corporate tax avoidance.¹⁵

⁸ See discussion below in Section V.

⁹ OECD, *Tackling Aggressive Tax Planning through Improved Disclosure and Transparency; Report on Disclosure Initiatives* (2011) 6, <http://www.oecd.org/ctp/exchange-of-tax-information/48322860.pdf> (accessed 1 June 2016).

¹⁰ 'Prime Minister David Cameron's Speech to the World Economic Forum in Davos' (24 January 2013), <https://www.gov.uk/government/speeches/prime-minister-david-camersons-speech-to-the-world-economic-forum-in-davos> (accessed 1 June 2016).

¹¹ *Ibid.*

¹² 'Remarks by President Obama at G20 Press Conference' (16 November 2014), <https://www.whitehouse.gov/the-press-office/2014/11/16/remarks-president-obama-g20-press-conference-november-16-2014> (accessed 1 June 2016).

¹³ *President's Framework for Business Tax Reform*, Department of the Treasury, (United States Department of the Treasury, 2012) 7.

¹⁴ See generally Ronen Palan, Richard Murphy and Christian Chavagneux, *Tax Havens; How Globalisation Really Works* (Ithaca, NY: Cornell University Press, 2010); Nicholas Shaxson, *Treasure Islands; Tax Havens and the Men who Stole the World* (London: The Bodley Head, 2011).

¹⁵ Jasper Jackson, 'Alan Rusbridger: press can't afford to cover corruption and tax avoidance', *The Guardian* (21 May 2015), <http://www.theguardian.com/media/2015/may/21/alan-rusbridger-press-corruption-tax-avoidance-guardian> (accessed 1 June 2016).

Current international taxation rules are out of step with contemporary globalized business activities, in that they allow companies to avoid paying taxes where economic activity takes place and where value is created. Studies have shown an ‘increased segregation between the location where actual business activities and investment take place and the location where profits are reported for tax purposes’.¹⁶ According to the OECD:

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

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

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

¹⁶ OECD, *Addressing Base Erosion and Profit Shifting* (2013) 15.

¹⁷ *Ibid.*, 27–8.

¹⁸ OECD, *Tackling Aggressive Tax Planning*, note 9, 6.

¹⁹ Tax Justice Network, ‘The Cost of Tax Abuse: A briefing paper on the cost of tax evasion worldwide’ (2011), http://www.tackletaxhavens.com/Cost_of_Tax_Abuse_TJN%20Research_23rd_Nov_2011.pdf (accessed 1 June 2016).

²⁰ IMF, *Spillovers in International Corporate Taxation* (9 May 2014) 17, <https://www.imf.org/external/np/pp/eng/2014/050914.pdf> (accessed 1 June 2016).

²¹ OECD, *Tackling Aggressive Tax Planning*, note 9, 6.

²² House of Commons, Committee on Public Accounts, ‘Tax Avoidance—Google’, Ninth Report of Session 2013–2014 (2013) 5, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/112/112.pdf>.

²³ IMF, *Spillovers in International Corporate Taxation*, note 20, 8.

²⁴ *Ibid.*, 11. See also OECD, *Addressing Base Erosion and Profit Shifting*, note 16, 33–45.

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

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

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

²⁵ United Nations Conference on Trade and Development, *World Investment Report 2013* (New York/Geneva: United Nations, 2013) 136.

²⁶ IMF, *Spillovers in International Corporate Taxation*, note 20, 17.

²⁷ OECD, *Addressing Base Erosion and Profit Shifting*, note 16, 33.

²⁸ *Ibid.*

²⁹ PwC, *Paying Taxes 2014*, <http://www.pwc.com/gx/en/paying-taxes/assets/pwc-paying-taxes-2014.pdf> (accessed 1 June 2016).

³⁰ Jane G. Gravelle and Thomas L. Hungerford, ‘Corporate Tax Reform: Issues for Congress’, Congressional Research Service, Report RL34229 (24 July 2008), <http://file.wikileaks.org/file/crs/RL34229.pdf> (accessed 1 June 2016). See also Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, Congressional Research Service (15 January 2015).

³¹ See Letter from Michael Collins, Ambassador of Ireland to Senators Levin and McCain, Permanent Subcommittee on Investigations (27 May 2013), *reprinted in* Jim Stewart, note 7, 15; Gary Tobin and Keith Walsh, ‘What makes a country a tax haven? An assessment of international standards shows why Ireland is not a tax haven’ (2013) 44(3) *Economic and Social Review* 401.

³² See, for example, Hearing before the Permanent Subcommittee on Investigations, ‘Offshore Profit Shifting and the U.S. Tax Code—Part 2 (Apple Inc.)’ (21 May 2013) 78, <http://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf> (accessed 1 June 2016); Peter Boone and Simon Johnson, ‘Irish Miracle – or Mirage?’, *New York Times* (20 May 2010).

³³ See Stephen C. Loomis, ‘The Double Irish Sandwich: Reforming Overseas Tax Havens’ (2012) 43 *St. Mary’s Law Journal* 825.

It's an idea, conceived in the age of empires, that taxes should be paid in the capital rather than in the colonies. You could call it fiscal imperialism.³⁴

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

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

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

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

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

³⁴ Cliff Taylor, 'How might clampdown on tax avoidance hit Ireland?', *Irish Times* (14 November 2014) 2.

³⁵ See Philip Brennan (ed.), *Tax Acts 2016; Income Tax, Corporation Tax, Capital Gains Tax* (London: Bloomsbury Professional, 2016).

³⁶ Stewart, note 7, 5–6.

³⁷ Hearing before the Permanent Subcommittee on Investigations, 'Offshore Profit Shifting', note 32, 3.

³⁸ *Ibid.*

³⁹ Adrian Weckler, 'Six points to remember from Apple Tax Report', *Sunday Business Post* (21 May 2013).

⁴⁰ 'European Commission says Apple's Irish tax deals 'constituted state aid'', RTE News (1 October 2014), <http://www.rte.ie/news/2014/0930/648865-ireland-tax-apple/> (accessed 1 June 2016).

⁴¹ House of Commons, Committee on Public Accounts, 'Tax Avoidance—Google', Ninth Report of Session 2013–2014 (2013) 5, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/112/112.pdf> (accessed 1 June 2016).

⁴² *Ibid.*, 5.

received ‘preferential treatment’ compared to small businesses and individual taxpayers,⁴³ and considered as ‘disproportionately small’ the tax settlement of GB£130 million made by Google in 2016.⁴⁴ The company’s profit-shifting activities to Ireland have given rise to a French criminal investigation into potential tax fraud and a police raid on Google’s Paris offices in May 2016.⁴⁵ Ireland, for its part, has committed to closing certain tax loopholes and phasing out the ‘double Irish’, although a proposed ‘knowledge development box’ will offer an effective tax rate related to research and development and intellectual property that is lower than the current standard rate of 12.5 per cent.⁴⁶ In addition to deliberate profit-shifting, the globalized nature of the digital economy and the mobility of intellectual property presents particular challenges for ensuring tax is not avoided by information technology and social media companies.⁴⁷

Such tax scandals involving multinational corporations have led to high-profile international efforts aimed at tackling tax abuse. The OECD has focused on addressing the erosion of tax bases by profit shifting (BEPS).⁴⁸ The organization has noted the need for international action, given that it may be ‘very difficult for any single country, acting alone, to effectively combat BEPS behaviours’. Sri Mulyani Indrawati, the Managing Director of the World Bank has also emphasized the need for international cooperation ‘to address the demand for and the supply of tax havens as well as the cover-up of illicit financial transfers’.⁴⁹ Other proposed measures which might address corporate tax avoidance include automatic exchange of information between tax jurisdictions, greater transparency, including disclosure of company ownership, and country-by-country reporting regarding revenues, profits, sales and taxes.⁵⁰ In addition to strengthening relevant national legislation and institutions, it has been suggested that a World Tax Authority be established in order to provide a multilateral approach to addressing international tax issues, including corporate tax avoidance.⁵¹ Within the United Nations,

⁴³ House of Commons Committee of Public Accounts, ‘HM Revenue & Customs 2010–11 Accounts: Tax Disputes’ (2011) 4.

⁴⁴ House of Commons, Committee on Public Accounts, ‘Corporate Tax Settlements’, Twenty-fifth Report of Session 2015–16 (2016) 3.

⁴⁵ Gaspard Sebag and Stephanie Bodoni, ‘French Investigators Swoop on Google’s Paris Offices’, *Bloomberg* (24 May 2016), <http://www.bloomberg.com/news/articles/2016-05-24/french-tax-investigators-swoop-on-google-s-paris-offices> (accessed 1 June 2016).

⁴⁶ Department of Finance Tax Policy Division, *The Knowledge Development Box*, Public Consultation Paper, (January 2015) 5, http://www.finance.gov.ie/sites/default/files/Knowledge_Development_Box_%20DFinance_consultation_finalweb%20cover_0.pdf (accessed 1 June 2016).

⁴⁷ See Jim Corkery et al, ‘Taxes, the Internet and the Digital Economy’ (2013) 23(1) *Revenue Law Journal* article 7.

⁴⁸ OECD, *Addressing Base Erosion and Profit Shifting*, note 16. See also OECD Final Reports of the BEPS project for reform of the international tax system to tackle tax avoidance (October 2015), <http://www.oecd.org/ctp/beps-2015-final-reports.htm> (accessed 1 June 2016).

⁴⁹ ‘Speech by World Bank Managing Director and COO Sri Mulyani Indrawati at Event on Tax Evasion and Development Finance’ (17 April 2005), <http://www.worldbank.org/en/news/speech/2015/04/17/speech-wb-md-coo-sri-mulyani-event-tax-evasion-development-finance> (accessed 1 June 2016).

⁵⁰ See Thomas Pogge and Krishen Mehta (eds.), *Global Tax Fairness* (Oxford: Oxford University Press, 2016); OECD, *Tackling Aggressive Tax Planning*, note 9; Global Financial Integrity, *Illicit Financial Flows from Developing Countries: 2003-2012* (2014), ix.

⁵¹ Oxfam, ‘Business Among Friends’, 185 Oxfam Briefing Paper, May 2014, 15–16. See also Vito Tanzi, ‘Is there a need for a World Tax Organisation?’, in Assaf Razin and Efraim Sadka (eds.), *The Economics of Globalization: Policy Perspectives from Public Economics* (Cambridge: Cambridge University Press, 1999).

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

II. THE HUMAN COSTS OF TAX AVOIDANCE

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

⁵² *United Nations Model Double Taxation Convention between Developed and Developing Countries* (New York: United Nations, 2011).

⁵³ See, for example, Oxfam, note 51; BEPS Monitoring Group, ‘Summary of Evaluations of BEPS Action Plan Proposals’ (2015), <https://bepsmonitoringgroup.files.wordpress.com/2015/03/summary-march-2015.pdf>.

⁵⁴ Ignazio Saiz, ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds.), *Human Rights and Public Finance; Budgets and the Promotion of Economic and Social Rights* (Oxford and Portland, OR: Hart Publishing, 2013) 77.

⁵⁵ See Philip Alston, ‘Tax Policy is Human Rights Policy: The Irish Debate’, Keynote Address at Christian Aid conference on The Human Rights Impact of Tax and Fiscal Policy, Dublin (12 February 2015); Richard Wilkinson and Kate Pickett, *The Spirit Level; Why Equality is Better for Everyone* (London: Penguin, 2009).

⁵⁶ Council of Europe Commissioner for Human Rights, ‘Safeguarding human rights in times of economic crisis’, Issue Paper (November 2013), 16; Ruth Lupton et al, *The Coalition’s Social Policy Record: Policy, Spending and Outcomes 2010-2015* (2015), <http://sticerd.lse.ac.uk/dps/case/spcc/RR04.pdf>; Irish Human Rights and Equality Commission, *Ireland and the International Covenant on Economic, Social and Cultural Rights* (2015), http://www.ihrec.ie/download/pdf/icescr_report.pdf.

⁵⁷ *Letter from the Committee on Economic, Social and Cultural Rights to all States parties to the International Covenant on Economic, Social and Cultural Rights*, CESCR/48th/SP/MAB/SW (16 May 2012), <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf> (accessed 1 June 2016).

⁵⁸ Ibid. Saiz, ‘Resourcing Rights’, note 54, 96–7; Magdalena Sepúlveda Carmona, ‘Alternatives to austerity: a human rights framework for economic recovery’ in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014) 23, 38–9.

⁵⁹ Article 2(1), International Covenant on Civil and Political Rights (1966).

the resources available for the fulfilment of children's rights'.⁶⁰ The Committee has taken individuals countries to task where tax evasion, alongside corruption, have negatively impacted on the level of resources available for the implementation of the Convention.⁶¹

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

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

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

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

⁶⁰ Committee on the Rights of the Child, *General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16, para 55.

⁶¹ Committee on the Rights of the Child, *Concluding Observations of the Committee of the Rights of the Child – Georgia*, CRC/C/15/Add.124 (28 June 2000), para 18.

⁶² OECD, *Tackling Aggressive Tax Planning*, note 9, 15.

⁶³ Tax Justice Network, *Ten Reasons to Defend the Corporation Tax* (2015) 5, http://www.taxjustice.net/wp-content/uploads/2013/04/Ten_Reasons_Full_Report.pdf (accessed 1 June 2016).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* See also Saiz, 'Resourcing Rights', note 54, 84–6.

⁶⁶ Oxfam, note 51, 2.

⁶⁷ 'Prime Minister David Cameron's Speech to the World Economic Forum in Davos', note 10.

⁶⁸ 'Illicit financial flows, human rights and the post-2015 development agenda', Interim report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Human Rights Council, A/HRC/28/60 (10 February 2015), paras 4–7.

⁶⁹ *Ibid.*, paras 8–22.

⁷⁰ 'Illicit Financial Flows', Report of the High Level Panel on Illicit Financial Flows from Africa (2015), 3.

‘perpetuate their aggressive and illegal activities’.⁷¹ Given that such illicit financial outflows end up in other countries, the High Level Panel asserted a responsibility on the part of receiving countries, both to prevent illicit flows and to assist with repatriation and prosecution.⁷²

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

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

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

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

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

⁷¹ Ibid.

⁷² Ibid.

⁷³ Alston, note 55.

⁷⁴ World Bank, *Financing for Development Post-2015* (2013), 9.

⁷⁵ ‘Report of the High Level Panel on Illicit Financial Flows from Africa’, (2015) 36, 43.

⁷⁶ Audrey Gaughran, ‘Cracking down on tax abuse will help promote economic and social rights’, *Open Democracy* (18 February 2015), <https://www.opendemocracy.net/openglobalrights/audrey-gaughran/cracking-down-on-tax-abuse-will-help-promote-economic-and-social-ri> (accessed 1 June 2016).

⁷⁷ ‘Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona’, A/HRC/26/28 (22 May 2014), para 36.

⁷⁸ Ibid.

⁷⁹ Ibid.

‘development finance’ loss is estimated to be between of US\$250 to US\$300 billion.⁸⁰ Such loss of revenue for developing countries ‘bleeds them of essential resources’:

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

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

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

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

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

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

⁸⁰ ‘Speech by World Bank Managing Director and COO Sri Mulyani Indrawati’, note 49.

⁸¹ Ibid.

⁸² Oxfam, note 51, 6.

⁸³ United Nations, ‘Addis Ababa Action Agenda of the Third International Conference on Financing for Development’ (July 2015), para 22.

⁸⁴ Ibid, para 28.

⁸⁵ Oxfam, note 51, 4, 6.

⁸⁶ Addis Ababa Action Agenda, note 83, para 23.

⁸⁷ Ibid (emphasis added).

⁸⁸ Ibid.

⁸⁹ Ibid, para 27.

efforts of the G20 and the OECD on base erosion and profit shifting, which have been criticized for leaving developing countries on the periphery and for the excessive influence of corporate lobbyists in the process.⁹⁰ At Addis Ababa, it was agreed to marginally strengthen the capacity of the UN Committee of Experts on International Cooperation in Tax Matters.⁹¹ Developing countries and civil society have expressed disappointment with the results of the conference, in particular that developed countries defeated the attempt by the G77 countries to have a more representative world tax authority established.⁹²

The G20 and OECD efforts on base erosion and profit shifting have also been criticized for not addressing tax incentives.⁹³ The Financing for Development Conference considered that tax incentives ‘can be an appropriate policy tool’, while seemingly recognizing their potential downsides by suggesting that in order to ‘end harmful tax practices, countries can engage in voluntary discussions on tax incentives in regional and international forums’.⁹⁴ Developing countries are often engaged in a race to the bottom in regards to tax offerings in order to attract foreign direct investment. Oxfam contends that this strategy ‘brings greater benefits to multinationals and their shareholders, than to the citizens and governments of developing countries’.⁹⁵ A 2014 report by staff of the IMF has emphasized that tax incentives are ‘significantly undermining revenue in developing countries’, where corporate income tax is a more important source of revenue than in advanced economies.⁹⁶ Developing countries face particular challenges in collecting taxes due, especially when offshore transactions are involved and given the practical difficulties associated with applying the arm’s length principle.⁹⁷ The IMF staff report concluded that the institutional framework for addressing international tax spillovers, that is, the impact of one country’s international tax practices have on another, is ‘weak’.⁹⁸

Ireland was amongst the OECD states at the 2015 ‘Financing for Development’ conference that strongly opposed calls to create a more representative intergovernmental tax authority.⁹⁹ The potential negative impact on developing countries of the tax practices of companies located in Ireland has been highlighted,¹⁰⁰ as well as concerns

⁹⁰ Oxfam, note 51, 2.

⁹¹ Addis Ababa Action Agenda, note 83, para 29.

⁹² Eliza Anyangwe, ‘Glee, relief and regret: Addis Ababa outcome receives mixed reception’, *The Guardian* (16 July 2015), <http://www.theguardian.com/global-development/2015/jul/16/outcome-document-addis-ababa-ffd3-financing-for-development> (accessed 1 June 2016).

⁹³ Oxfam, note 51, 2.

⁹⁴ Addis Ababa Action Agenda, note 83, para 27.

⁹⁵ Oxfam, note 51, 7.

⁹⁶ IMF, *Spillovers in International Corporate Taxation*, note 20, 7.

⁹⁷ *Ibid.*, 30, 33–4.

⁹⁸ IMF, *Spillovers in International Corporate Taxation*, note 20, 1, 5–6.

⁹⁹ Sorley McCaughey, ‘Giving poorer countries a say at the finance table’, *Irish Times* (17 July 2015) 14.

¹⁰⁰ See, for example, Sheila Killian, *Driving the Getaway Car; Ireland, Tax and Development* (Debt and Development Coalition: 2011), <http://communityplatform.ie/uploads/driving%20the%20getaway%20car%20-%20Debt%20and%20Development.pdf> (accessed 1 June 2016); see also Christian Aid, ‘Tax of Life; How Tax Dodging Undermines Irish Support to Poor Nations’ (2010), http://www.christianaid.org.uk/Images/Tax_of_Life_Report.pdf (accessed 1 June 2016); ActionAid, *Mistreated; The tax treaties that are depriving the poorest countries of vital revenue – Ireland’s tax treaties* (Dublin: ActionAid, April 2016).

regarding the domestic effect of low effective corporation tax rates.¹⁰¹ Certain tax schemes in Ireland, according to Philip Alston, ‘look to all the world to be designed to facilitate tax avoidance by huge multinationals in return for a pittance of a reward to Ireland. But more importantly, the costs to other countries, including developing countries, have been immense’.¹⁰² Given Ireland’s commitment to overseas aid and development, such as initiatives aimed at enhancing tax collection in certain developing countries, an inherent contradiction in Irish public policy is evident:

despite Ireland’s track record of solidarity with the Global South, the domestic system of corporate taxation is structured in a manner that supports a practice which impoverishes hundreds of millions of the world’s poorest citizens by facilitating multinational firms in reducing their international tax bill.¹⁰³

It has been claimed that a tax treaty between Ireland and Zambia may have deprived the latter of €1 in every €14 of Irish development aid,¹⁰⁴ given that the treaty permitted certain tax write-offs, and that profits were shifted to companies in Ireland, leading to lower tax bills and government revenue for Zambia.¹⁰⁵ The Irish Department of Finance and the Revenue Commissioners do not encourage transfer mispricing, but have been criticized for leaving the onus of proof on the country claiming lost revenue, despite the ‘lack of capacity in the global south to track tax avoidance and evasion’.¹⁰⁶ While allowing for exchange of information is now routinely included in Ireland’s tax treaties, it is not yet done on an automatic basis.¹⁰⁷ In its recent review of foreign policy, Ireland acknowledges its human rights obligations, its development commitments, and its support for OECD efforts to address ‘harmful tax competition’, but fails to consider the potential human rights impact of Irish tax practices.¹⁰⁸ The ‘spillover analysis’ of the Department of Finance only considered the economic impact on developing countries of Ireland’s tax rules. It did not fully exonerate Ireland’s tax laws and practice, finding that ‘the Irish tax system *on its own* can hardly lead to significant loss of tax revenue in developing countries’.¹⁰⁹

III. BUSINESS AND HUMAN RIGHTS

There have been several attempts over recent decades to devise international standards and mechanisms aimed at holding companies, especially multinational corporations,

¹⁰¹ See, for example, Centre for Economic and Social Rights, ‘Mauled by the Celtic Tiger; Human Rights in Ireland’s Economic Meltdown’, Rights in Crisis Briefing Paper (2012) 16, <http://www.cesr.org/downloads/cesr.ireland.briefing.12.02.2012.pdf> (accessed 1 June 2016).

¹⁰² Alston, note 55.

¹⁰³ TASC, *Tax Injustice; Following the Tax Trail* (2012) 28, http://www.tasc.ie/download/pdf/tasc_tax_injustice.pdf (accessed 1 June 2016).

¹⁰⁴ Eurodad, *Hidden Taxes: the EU’s Role in Supporting an Unjust Global Tax System* (2014) 53, <http://www.eurodad.org/hiddenprofits> (accessed 1 June 2016).

¹⁰⁵ ActionAid, *Sweet Nothings; The human cost of a British sugar giant avoiding taxes in Southern Africa* (2013) 16–19, 22–3, http://www.actionaid.org/sites/files/actionaid/sweet_nothings.pdf (accessed 1 June 2016).

¹⁰⁶ Eurodad, note 104, 51. See also Killian, note 100, 22.

¹⁰⁷ Killian, note 100, 23.

¹⁰⁸ Department of Foreign Affairs and Trade, *The Global Island, Ireland’s Foreign Policy for a Changing World*, (2015) 27, 49.

¹⁰⁹ See Department of Finance, ‘IBFD Spillover Analysis; Possible Effects of the Irish Tax System on Developing Economies’ (July 2015) 5 (emphasis added), http://www.budget.gov.ie/Budgets/2016/Documents/IBFD_Irish_Spillover_Analysis_Report_pub.pdf (accessed 1 June 2016).

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

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

¹¹⁰ See generally Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013); Steven R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale Law Journal* 443; Olivier de Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006); David Kinley, *Human Rights and Corporations* (Farnham: Ashgate, 2009).

¹¹¹ UN Sub-commission on the Protection and Promotion of Human Rights, E/CN.4/Sub.2/2003/12 (2003).

¹¹² See David Kinley and Rachel Chambers, ‘The UN human rights norms for corporations: the private implications of public international law’ (2006) 2 *Human Rights Law Review* 447.

¹¹³ Commission on Human Rights, Resolution 2005/69, 20 April 2005.

¹¹⁴ *Ibid.*, para 1(a)–(b).

¹¹⁵ Human Rights Council, ‘Human rights and transnational corporations and other business enterprises’, Resolution A/HRC/RES/17/4 (6 July 2011). See also John Gerard Ruggie, *Just Business; Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013).

¹¹⁶ ‘Guiding Principles on Business and Human Rights’, note 3.

¹¹⁷ *Ibid.*, 5–6.

¹¹⁸ *Ibid.*, 13.

¹¹⁹ *Ibid.*, 14–21.

¹²⁰ *Ibid.*, 22.

The UN Guiding Principles on business and human rights have been favourably received by states, as evidenced by their unanimous endorsement by the Human Rights Council.¹²¹ The Guiding Principles provide an authoritative statement of how states and companies can address corporate activities that might violate human rights, and have led to a considerable upsurge in advocacy and policy initiatives on business and human rights.¹²² Both the UN Human Rights Council and the European Commission have called on states to develop national implementation plans for the Guiding Principles,¹²³ while the Council-established Working Group on business and human rights has the mandate to ‘promote the effective and comprehensive dissemination and implementation of the Guiding Principles’.¹²⁴ The OECD revised its Guidelines for Multinational Enterprises to include a human rights chapter which draws heavily on the UN Guiding Principles.¹²⁵ Civil society has offered support for the UN Guiding Principles, while also pushing for binding standards on business and human rights.¹²⁶ Within the UN human rights system, an Intergovernmental Working Group has been established with a view towards elaborating a potential international treaty on business and human rights.¹²⁷ Most Western states, including the United States and EU member states, however, have decided to remain outside the discussions on a binding treaty, and favour pursuing the implementation of the UN Guiding Principles.¹²⁸

The UN Guiding Principles and Framework do not focus on specific human rights issues or particular business practices, unlike the Draft Norms, but rather aim to provide an overarching template through which business respect for human rights might be ensured, with the hope of contributing to a ‘socially sustainable globalization’.¹²⁹ All ‘internationally recognized human rights’ fall within the corporate responsibility to respect, although greater attention may need to be paid to individuals belonging to certain groups, such as indigenous peoples, women, minorities, children, persons with disabilities, migrant workers and their families.¹³⁰ Accordingly, it is understandable that corporate tax avoidance, the ‘elephant in the room’ of business and human rights,¹³¹

¹²¹ See, however, Surya Deva, ‘Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principle’ in Deva and Bilchitz (eds.), note 110, 78, 90–91.

¹²² For a comprehensive view see the website of the Business and Human Rights Resource Centre: <http://business-humanrights.org>.

¹²³ Human Rights Council, ‘Human rights and transnational corporations and other business enterprises’, Resolution A/HRC/RES/26/22 (15 July 2014), para 2; European Commission, ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’, Brussels, 25 November 2011, 14.

¹²⁴ Human Rights Council, ‘Human rights and transnational corporations and other business entities’ A/HRC/17/L.1/Rev/1 (15 June 2011) para 6(a).

¹²⁵ OECD Guidelines for Multinational Enterprises (OECD Publishing, 2011) 31–4.

¹²⁶ See, for example, Global Movement for a Binding Treaty, ‘Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse’, <http://www.treatymovement.com/statement/> (accessed 1 June 2016).

¹²⁷ Human Rights Council, ‘Elaboration of an internationally legally binding instrument on transnational corporations and other business entities with respect to human rights’ A/HRC/22/L.22/Rev/1 (24 June 2014).

¹²⁸ See, for example, Human Rights Council, ‘Human rights and transnational corporations and other business entities’ A/HRC/26/L.1 (23 June 2014); Doug Cassel, ‘Treaty Process Gets Underway; Whoever Said It Would Be Easy?’, *Business and Human Rights Resource Centre* (13 July 2015), <http://business-humanrights.org/en/treaty-process-gets-underway-whoever-said-it-would-be-easy> (accessed 1 June 2016).

¹²⁹ ‘Guiding Principles on Business and Human Rights’, note 3, 6.

¹³⁰ *Ibid.*, 14.

¹³¹ International Bar Association, note 1, 118.

is not specifically mentioned in the UN Guiding Principles or Framework. It is surprising, however, that this issue was not addressed to any noticeable degree by the Special Representative during his six-year mandate, during which time numerous reports and studies on a broad range of topics were prepared and presented to the Human Rights Council.¹³² Corporate tax avoidance was similarly not referred to in the Draft Norms, nor has it been a prominent issue for the UN Working Group on business and human rights since it was established in 2011.

The absence of corporate tax avoidance from the UN Guiding Principles or their preparatory work does not prevent this practice from being addressed through the prism of business and human rights. It may not be a natural fit, as David Scheffer notes, but ‘it is entirely plausible that refraining from tax avoidance schemes could fit within the Ruggie framework’.¹³³ Other scholars have treated as a gap that the Guiding Principles:

... say little about the political responsibilities of business to pay taxes to ensure that citizens have access to affordable healthcare, education, water, etc., which are basic human rights according to the International Bill of Human Rights. Hence, the corporate responsibility to pay taxes, which essentially are investments in public goods, is a key, albeit missing, element.¹³⁴

It may be that the indirect nature of the impact on human rights of corporate tax avoidance partly explains why it was neglected in the development of the business and human rights agenda. It may also explain, at least in part, why businesses have not tended to treat tax compliance as a matter of corporate responsibility: ‘Companies do not think of taxes as material to their human rights risks, at least not directly. They are more concerned about what happens with what is paid, i.e., corruption and complicity in violations human rights’.¹³⁵ Before turning to a consideration of how corporate tax avoidance may and indeed is beginning to be addressed through the lens business and human rights, it is worth considering how it has been treated within corporate social responsibility.

IV. CORPORATE SOCIAL RESPONSIBILITY AND TAX AVOIDANCE

Corporate social responsibility has been the dominant model for addressing the social impact of business activities in recent decades.¹³⁶ In response to public, consumer or government pressure, companies have often given commitments to act ethically with regard to specific issues of concern, such as the environment, child labour or human trafficking. Although there is a lack of agreement on the precise meaning of the concept,¹³⁷ corporate social responsibility can be characterized broadly as voluntary

¹³² A repository of documents is available at <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights>.

¹³³ David Scheffer, ‘The Ethical Imperative of Curbing Corporate Tax Avoidance’ (2013) 27(4) *Ethics and International Affairs* 361, 365.

¹³⁴ Susan Ariel Aaronson and Hugh Higham, ‘Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms’ (2013) 35(2) *Human Rights Quarterly* 333, 362.

¹³⁵ International Bar Association, note 1, 118.

¹³⁶ See generally Andrew Crane et al (eds.), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008).

¹³⁷ *Ibid.*, 4.

business-led attempts to address social and environmental issues arising in the context of corporate activities. Such initiatives have been criticized for being selective and for not being underpinned by a set of universal principles,¹³⁸ with human rights being a relatively recent addition to discussions of the social responsibilities of business.¹³⁹ Although corporate social responsibility and business and human rights can be considered as conceptually distinct, there are obvious overlaps and shared concerns with these approaches to business responsibility.¹⁴⁰ The influence of the business and human rights agenda on contemporary understandings of corporate social responsibility is becoming apparent; the European Commission recently broadened its definition of corporate social responsibility to encompass 'the responsibility of enterprises for their impacts on society'.¹⁴¹ Leaving to the side these broader conceptual issues regarding corporate social responsibility, it is readily apparent that tax compliance has rarely featured in the social and ethical commitments made by companies to date. Issues of tax payment and tax avoidance, according to Jenkins and Newell, 'have largely been absent from the CSR agenda'.¹⁴² Several major tax scandals have involved multinationals who see themselves as leaders in the area of corporate social responsibility.¹⁴³

The corporate social responsibility statements of a number of major multinational companies ring hollow in the face of their reported tax avoidance practices, as the following examples illustrate. Apple places strong emphasis on its environmental and supplier responsibility, and the right of workers to a health and safe working environment,¹⁴⁴ while at the same time having avoided significant amounts of corporation tax in several jurisdictions.¹⁴⁵ Boston Scientific, a United States medical devices company, describes itself as 'a good corporate citizen', yet a holding firm of the company allegedly paid an effective corporation tax rate of just 4 per cent in Ireland on profits of US\$1.6 billion.¹⁴⁶ HSBC, the British bank, was said to have effectively provided 'a tax avoidance and tax evasion service' for certain customers,¹⁴⁷ yet it claims that its 'corporate citizenship' entails a responsibility not just towards 'customers, employees and shareholders but also to the countries and communities in which we

¹³⁸ On the distinction between corporate social responsibility and business and human rights, see Joanne Bauer, 'Business and Human Rights: A New Approach to Advancing Environmental Justice in the United States' in Shareen Hertel and Kathryn Libel, *Human Rights in the United States: Beyond Exceptionalism* (Cambridge: Cambridge University Press, 2011) 175, 176–80.

¹³⁹ See Matthew Grenier, 'Communicating Human Rights: a summary of recent trends in European annual reports', (2003) 2 *New Academy Review* 1, 76, 78–9.

¹⁴⁰ Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22(4) *Business Ethics Quarterly* 739.

¹⁴¹ European Commission, 'A renewed EU strategy', note 123, 6.

¹⁴² Jenkins and Newell, note 6, 379. See also Dowling, note 6, 173–4.

¹⁴³ Jenkins and Newell, note 6, 379.

¹⁴⁴ For Apple's policies, see <https://www.apple.com/environment/> and <https://www.apple.com/supplier-responsibility/> (accessed 1 June 2016).

¹⁴⁵ See Section II above.

¹⁴⁶ Colm Keena and Simon Carswell, 'US medical giant paid effective tax rate of 4% in 2011', *Irish Times* (31 May 2013) 1.

¹⁴⁷ David Leigh et al, 'HSBC files show how Swiss bank helped clients dodge taxes and hide millions', *The Guardian* (8 February 2015), <https://www.theguardian.com/business/2015/feb/08/hsbc-files-expose-swiss-bank-clients-dodge-taxes-hide-millions> (accessed 1 June 2016).

operate'.¹⁴⁸ The United Kingdom House of Commons Public Accounts Committee accused accounting firm PricewaterhouseCoopers of helping hundreds of companies avoid tax 'on an industrial scale'.¹⁴⁹ The accounting firm claims that its corporate responsibility includes playing a 'significant role ... in building trust in society and solving important problems'.¹⁵⁰ It is worth noting that two partners of the firm wrote in 2010 that tax could be considered as a corporate responsibility issue:

We believe that paying tax has already started to develop as a corporate responsibility issue. We suggest that large companies, if they have not already done so, should start to think about where tax fits into their approach and strategy on corporate responsibility. Not all companies will want to be a leader in this area, but not to have a position could well be a risk.¹⁵¹

Despite this suggestion, the company's 2014 Code of Conduct does not specifically refer to tax when setting out how the company can behave 'in a socially responsible way'.¹⁵²

Given the scale of corporate tax avoidance, the proliferation of corporate social responsibility statements and policies has been described as 'organised hypocrisy'.¹⁵³ Companies themselves have not tended to refer to tax directly in the context of corporate social responsibility,¹⁵⁴ with the few references which do exist usually referring to the requirement of meeting national legal rules concerning tax. Mobile phone company Vodafone, following claims of serious tax avoidance,¹⁵⁵ adopted a tax risk management strategy which treats tax as part of 'corporate sustainability'.¹⁵⁶ The strategy notes that it is not possible for the company to determine a fair amount of tax to be paid, that Vodafone companies must follow the tax rules as set by governments.¹⁵⁷ In deference to the reality of business concerns, the document also mentions that the company's 'main objective is to enhance shareholder value'.¹⁵⁸ Barclays, also embroiled in a high-profile tax avoidance scandal, has included several 'tax principles' as part of its 'responsible citizenship' policy, including that the company will act in accordance with 'generally accepted custom and practice, in addition to the law and the UK Code of Practice on Taxation of Banks'.¹⁵⁹

¹⁴⁸ See <http://www.hsbc.com/citizenship> (accessed 1 June 2016).

¹⁴⁹ Vanessa Houlder, 'PwC sold "tax avoidance on industrial scale"', *Financial Times* (8 December 2014), <https://next.ft.com/content/d2a73216-7f0a-11e4-a828-00144feabdc0> (accessed 1 June 2016).

¹⁵⁰ See <http://www.pwc.com/gx/en/corporate-responsibility/> (accessed 1 June 2016).

¹⁵¹ Thomas Scheiwiller and Susan Symons, 'Corporate responsibility and paying tax', *OECD Observer*, No. 276-277, December 2009 - January 2010, 27, at 28.

¹⁵² PwC, *Doing the Right Thing – the PwC way*, Code of Conduct (2014), <http://www.pwc.com/gx/en/ethics-business-conduct/pdf/pwc-global-code-of-conduct-update.pdf> (accessed 1 June 2016).

¹⁵³ Sikka (2010), note 6, 154. See also Hasseldine and Morris, note 6; Prem Sikka, 'Smoke and Mirrors: corporate social responsibility and tax avoidance: A reply to Hasseldine and Morris' (2013) 37 *Accounting Forum* 15.

¹⁵⁴ Jenkins and Newell, note 6, 389; Dowling, note 6, 174.

¹⁵⁵ Katherine Rushton, 'Vodafone in controversy over its tax bill', *The Daily Telegraph* (10 June 2012) *Business*, 3.

¹⁵⁶ Vodafone, *Tax risk management strategy*, https://www.vodafone.com/content/dam/sustainability/pdfs/vodafone_tax_risk_management_strategy.pdf (accessed 1 June 2016).

¹⁵⁷ *Ibid.*, 3. On the question of fairness in tax, see Dowling, note 6, 181.

¹⁵⁸ *Ibid.*, 5.

¹⁵⁹ See <http://www.barclays.com/citizenship/our-approach/policy-positions.html> (accessed 1 June 2016).

Although these examples may be emblematic of a growing move towards the addressing of tax issues in terms of corporate responsibility, it has generally been the case that ‘most major companies do not currently regard tax as an aspect of CSR’.¹⁶⁰ Jenkins and Newell assert that corporate social responsibility has tended to exclude activities that are central to profitability and competitiveness.¹⁶¹ A senior policy adviser at Oxfam has argued that short-term profit maximization through tax avoidance has actually become ‘an integral component of many companies’ growth and profit strategies’.¹⁶² Initiatives such as the ‘fair tax mark’ in the United Kingdom require companies to do more than merely claim to be have a socially responsible approach to taxation, requiring that criteria relating to transparency, disclosure and avoidance are met before accreditation.¹⁶³ To date, only one FTSE 100 company has received the mark.¹⁶⁴ It has been suggested that an eleventh principle on ‘fair taxation’ be added to the UN Global Compact, whereby business should ‘undertake measures to promote fair taxation of their revenues, including non-resort to tax avoidance schemes and prohibition of any tax evasion practices’.¹⁶⁵

With corporate tax avoidance now described as the ‘true nemesis’ of corporate social responsibility,¹⁶⁶ there is increasing attention being paid to issues of tax compliance within policy-making in this context. For example, the European Commission’s 2011–2014 corporate social responsibility strategy specifically refers to three principles of ‘good tax governance’: transparency, exchange of information and fair tax competition between states.¹⁶⁷ There is little doubt that these principles if implemented could assist in countering tax avoidance, although tax competition in and of itself is problematic.¹⁶⁸ Moreover, the strategy typifies the predominantly voluntary approach to corporate social responsibility, by merely ‘encouraging’ enterprises ‘to work towards’ implementing the principles.¹⁶⁹ Ireland’s national plan on corporate social responsibility also addresses tax compliance:

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

¹⁶⁰ Jenkins and Newell, note 6, 380–81.

¹⁶¹ Ibid. See also Dowling, note 6, 183.

¹⁶² Claire Godfrey, ‘Tax rules facilitate avoidance, with developing countries the biggest losers’, *The Guardian* (2 May 2014), <http://www.theguardian.com/sustainable-business/tax-avoidance-multinationals-developing-countries-oxfam-report> (accessed 1 June 2016).

¹⁶³ For details see <http://www.fairtaxmark.net> (accessed 1 June 2016).

¹⁶⁴ Vanessa Houlder, ‘Companies debate merits of “fair tax” kitemark’, *Financial Times* (2 February 2015), <https://next.ft.com/content/5960de76-a9f7-11e4-9fa7-00144feab7de> (accessed 1 June 2016).

¹⁶⁵ Scheffer, note 153, 366–7. See also *Declaration of the Independent Commission for the Reform of International Corporate Taxation* (June 2015) para 32, http://www.icriict.org/wp-content/uploads/2015/06/ICRICT_Com-Rec-Report_ENG_v1.4.pdf (accessed 1 June 2016).

¹⁶⁶ Scheffer, note 153, 367.

¹⁶⁷ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (25 October 2011), COM(2011) 681 final, 7.

¹⁶⁸ On tax competition, see Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (Oxford: Oxford University Press, 2015).

¹⁶⁹ European Commission, note 167, 7, see also 11.

ensuring that essential funds are available to Government to meet economic and social objectives.¹⁷⁰

The making of the connection between paying taxes and social objectives is important, but the national plan ultimately treats tax as a legal compliance matter. The CEO of the American Chamber of Commerce Ireland, Joanne Richardson claimed that multinational firms from the United States based in Ireland ‘exemplified corporate responsibility’ because they paid €2.7 billion in Irish taxes in 2004.¹⁷¹ Given that tax avoidance largely occurs within existing legal rules, the approach of Ireland’s national plan on corporate social responsibility does not press companies to address the social impact or the effect on human rights of avoiding tax.

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

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

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

¹⁷⁰ *Good for Business, Good for the Community*, Ireland’s National Plan on Corporate Social Responsibility (2014-2016) 5, <https://www.djei.ie/en/Publications/Publication-files/Good-for-business-Good-for-the-community.pdf> (accessed 1 June 2016).

¹⁷¹ Wikileaks, ‘Grants and Taxes: The Recent Irish Focus on U.S. Firms’ (12 December 2005), https://wikileaks.org/plusd/cables/05DUBLIN1505_a.html (accessed 1 June 2016).

¹⁷² Vodafone Group Plc, *Sustainability Report 2014/15*, 95, <https://www.vodafone.com/content/dam/sustainability/2015/pdf/vodafone-full-report-2015.pdf> (accessed 1 June 2016).

¹⁷³ Dowling, note 6, 176; John A Barrick and Raquel Meyer Alexander, ‘Tax Lobbying and Corporate Political Activity: How Do Firms Seek Tax Relief?’ (22 September 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500959 (accessed 1 June 2016).

positive relationship between tax lobbying efforts and a firm's corporate social responsibility index rating.¹⁷⁴ For public corporations in the United States at least, 'the payment of taxes is not viewed as an important socially responsible activity by an influential subset of firms' stakeholders'.¹⁷⁵ The reduction of tax burdens remains an integral aspect of corporate activity.

Corporate social responsibility itself has been described as a 'voluntary tax', which can bring certain reputational and commercial benefits to companies.¹⁷⁶ Its practice to date can be criticized for being voluntary and selective in nature, for overemphasizing the extent to which citizens and consumers can provide oversight of business activities and, at worst, for being a public relations exercise which deflects from more meaningful regulation.¹⁷⁷ Perhaps a more substantive and effective model of corporate social responsibility may emerge, particularly in light of the increasing emphasis on human rights and the expectations for rather than of companies. In 2010, Special Representative Ruggie stated that 'the era of declaratory CSR is over'.¹⁷⁸ The UN Guiding Principles seem to address corporate social responsibility implicitly when they state that 'Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations'.¹⁷⁹ The limitations of addressing corporate tax avoidance through corporate social responsibility have led Jenkins and Newell to conclude that 'a regulatory approach is required in order to ensure compliance across the board'.¹⁸⁰ The next section turns to consider corporate tax avoidance in the context of the growing business and human rights agenda.

V. CORPORATE TAX AVOIDANCE AND THE GUIDING PRINCIPLES

The absence of any direct reference to corporate tax avoidance in the United Nations Guiding Principles on business and human rights has not prevented their being applied to the issue of tax practices of business enterprises which may negatively impact on human rights. Several United Nations bodies and individual experts, as well as civil society organizations, have already begun to draw on the Guiding Principles for this purpose. In its 2015 report to the Human Rights Council, the United Nations Working Group on business and human rights highlighted tax avoidance as an area where the Guiding Principles could be of future relevance.¹⁸¹ The Working Group considered that with

¹⁷⁴ Angela K Davis, David A Guenther, Linda K Krull and Brian M Williams, 'Do Socially Responsible Firms Pay More Taxes?', *The Accounting Review* 91 (1): 47, 64–5.

¹⁷⁵ *Ibid.*, 65.

¹⁷⁶ Killian, note 100, 39.

¹⁷⁷ See generally Peter Fleming and Marc T. Jones, *The End of Corporate Social Responsibility: Crisis and Critiques* (London: Sage Publishing, 2013).

¹⁷⁸ 'Statement by Professor John Ruggie, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Entities, 65th Session of the United Nations General Assembly' (26 October 2010) 3, <http://www.business-humanrights.org/media/documents/ruggie-statement-to-un-gen-assembly-26-oct-2010.pdf> (accessed 1 June 2016).

¹⁷⁹ 'Guiding Principles on Business and Human Rights', note 3, 13.

¹⁸⁰ Jenkins and Newell, note 6, 391. But see Fisher, note 6, 349–54.

¹⁸¹ 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', A/HRC/29/28 (28 April 2015), 23.

regard to tax avoidance, there was a need ‘to better delineate roles, responsibilities and appropriate accountability systems for both States and business enterprises’.¹⁸² In its list of priority issues for 2015, the Institute of Human Rights and Business considered included ‘Developing Policy and Regulatory Architecture to Tackle Human rights abuses arising from tax avoidance and illicit financial flows’.¹⁸³ This section offers a preliminary consideration of the potential for addressing corporate tax avoidance through the Guiding Principles on business and human rights.

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

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

¹⁸² Ibid.

¹⁸³ Institute of Human Rights and Business, ‘Top 10 Business and Human Rights Issues 2015’ (10 December 2014), <http://www.ihrb.org/library/top-10/top-ten-issues-in-2015> (accessed 30 June 2016).

¹⁸⁴ ‘Guiding Principles on Business and Human Rights’, note 3, 5.

¹⁸⁵ Ibid, 5.

¹⁸⁶ Ibid, 6.

¹⁸⁷ International Bar Association, note 1, 105.

¹⁸⁸ ‘Report of the Special Rapporteur’ (2014), note 77, para 6.

¹⁸⁹ Winnie Byanyima, *Why is Oxfam calling for a World Tax Summit?* (23 January 2015), <https://blogs.oxfam.org/en/blogs/15-01-23-why-oxfam-calling-world-tax-summit> (accessed 1 June 2016).

those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights'.¹⁹⁰ While international organizations such as the OECD have recognized the societal implications of corporate tax avoidance, the approach adopted is not anchored in human rights. The Guiding Principles advocate that states '[e]ncourage those institutions, within their respective mandates and capacities, to promote business respect for human rights'.¹⁹¹ The OECD Guidelines on Multinational Enterprises have incorporated the Guiding Principles, but have adopted a bifurcated approach to human rights and taxation, as discussed further below.

The Guiding Principle's second pillar, the corporate responsibility to respect human rights, sets out that 'Business enterprises should respect human rights'. Companies should effectively seek to do no harm. They should 'avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.¹⁹² The corporate responsibility to respect is not a matter of legal obligation, but is described as a 'global standard of expected conduct for all business enterprises wherever they operate'.¹⁹³ In this vein, it is evident that the majority of public opinion is quite clearly opposed to tax avoidance by multinational companies.¹⁹⁴ The responsibility to respect human requires that companies:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.¹⁹⁵

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

The corporate responsibility to respect human rights has been engaged as a means of addressing corporate tax avoidance. Magdalena Sepúlveda Carmona considered that tax avoidance would amount to a breach of the responsibility of business enterprises to respect human rights, 'insofar as they have a negative human rights impact'.¹⁹⁶ Companies that 'knowingly avoid paying tax are purposefully depriving countries of the resources they need to fulfil their human rights obligations'.¹⁹⁷ Juan Pablo Bohoslavsky, the United Nations' Independent Expert on the effects of foreign debt and other related

¹⁹⁰ 'Guiding Principles on Business and Human Rights', note 3, 12.

¹⁹¹ Ibid.

¹⁹² Ibid, 14.

¹⁹³ Ibid, 13.

¹⁹⁴ See, for example, Mark Hilliard, 'Policy of taxing foreign firm "morally wrong"', *Irish Times* (18 September 2015) A4.

¹⁹⁵ 'Guiding Principles on Business and Human Rights', note 3, 13.

¹⁹⁶ 'Report of the Special Rapporteur' (2014), note 77, para 7.

¹⁹⁷ Ibid.

international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights, has applied the corporate responsibility to respect to illicit financial flows.¹⁹⁸ He has asserted that:

Multinational enterprises, as well as their advisers and financiers, need to understand that their tax planning strategies have potential negative impacts on human rights. [...] Business enterprises that contribute through transfer mispricing, tax evasion or corruption to significant illicit financial outflows cause adverse human rights impacts by undermining the abilities of States to progressively achieve the full realization of economic, social and cultural rights. This is particularly the case when they operate in States that have difficulties in meeting the minimum core human rights obligations.¹⁹⁹

Civil society has also drawn on the second pillar of the Guiding Principles in the context of tax avoidance. The *Lima Declaration on Tax Justice and Human Rights*, which has been signed by over 150 organizations, declares that ‘the tax behaviour of business can no longer be treated outside the purview of the corporate responsibility to respect human rights’.²⁰⁰

To advance corporate respect for human rights, the Guiding Principles recommend that business enterprises make a policy commitment to meet their responsibility to respect human rights, undertake due diligence to ‘identify, prevent, mitigate and account for how they address their impacts on human rights’, and provide for or contribute to remedies for victims of adverse human rights impacts which they cause or contribute to.²⁰¹ The Guiding Principles introduce an element of proportionality for the corporate responsibility to respect human rights which would clearly be of relevance in the context of tax avoidance. While the responsibility to respect applies to all companies, ‘the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts’.²⁰² Certain companies are more directly involved in facilitating avoidance, while the scale of tax avoidance by larger multinational corporations would obviously be far greater in terms of impact than that of small and medium-sized enterprises.

Key elements of the second pillar of the Guiding Principles are reflected in the *Lima Declaration on Tax Justice and Human Rights*, which calls upon companies to assess and address tax abuse ‘in their policy statements, due diligence and grievance processes’. With regard to an appropriate policy commitment in the area of taxation, it has been suggested that this would comprise ‘[a] clear, publicly communicated tax policy, which aligns the company on a tax risk management scale; sets out the company’s approach to tax negotiations; and rules out specified aggressive tax practices’.²⁰³ In addition to a

¹⁹⁸ ‘Illicit financial flows, human rights and the post-2015 development agenda’, Interim report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Human Rights Council, A/HRC/28/60 (10 February 2015), para 33.

¹⁹⁹ Ibid, paras 33–4.

²⁰⁰ Lima Declaration on Tax Justice and Human Rights (June 2015). For text and list of signatories see http://www.cesr.org/downloads/Lima_Declaration_Tax_Justice_Human_Rights.pdf (accessed 1 June 2016).

²⁰¹ ‘Guiding Principles on Business and Human Rights’, note 3, 13.

²⁰² Ibid, 13.

²⁰³ ActionAid, ‘Tax Responsibility: An Investor’s Guide’ (19 April 2013) 3, https://www.actionaid.org.uk/sites/default/files/publications/tax_guide_for_investors_final.pdf (accessed 1 June 2016).

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

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

²⁰⁴ ‘Guiding Principles on Business and Human Rights’, note 3, 20.

²⁰⁵ ‘Interim report of the Independent Expert’, note 198, para 34. See also ActionAid, note 203, 3.

²⁰⁶ John Christensen, ‘Why the tax justice movement should embrace human rights. And vice versa’ (27 April 2015), http://cesr.org/downloads/John_Christensen_ISM_Lima_28_APR_2015.pdf (accessed 1 June 2016).

²⁰⁷ OECD, *Transfer Pricing Documentation and Country-by-Country Reporting; Action 13: 2015 Final Report* (October 2015), 9–10. See also OECD, *Mandatory Disclosure Rules; Action 12: 2015 Final Report* (October 2015).

²⁰⁸ European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, COM (2016) 198 final (12 April 2016). For criticism of the proposals see Financial Transparency Coalition, *Commission’s selective tax transparency proposal leaves most of the world in the dark* (12 April 2015), <https://financialtransparency.org/commissions-selective-tax-transparency-proposal-leaves-world-dark/> (accessed 1 June 2016).

²⁰⁹ ‘Guiding Principles on Business and Human Rights’, note 3, 13.

²¹⁰ International Bar Association, note 1, 4.

²¹¹ ‘Guiding Principles on Business and Human Rights’, note 3, 13.

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

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

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

²¹² Lima Declaration, note 200. See also Jenkins and Newell, note 6, 390–91.

²¹³ OECD Guidelines for Multinational Enterprises, note 125, 17.

²¹⁴ *Ibid.*, 60.

²¹⁵ *Ibid.*, 19.

²¹⁶ *Ibid.*, 23–4.

²¹⁷ John Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges', (2015) Corporate Social Responsibility Initiative Working Paper No. 66, 6. See, however, 'Interim report of the Independent Expert', note 198, para 35.

²¹⁸ Christian Aid, Oxfam and ActionAid, *Getting to Good; Towards Responsible Corporate Tax Behaviour* (November 2015) 28, <https://www.oxfam.org/en/research/getting-good-towards-responsible-corporate-tax-behavior> (accessed 1 June 2016).

²¹⁹ 'Guiding Principles on Business and Human Rights', note 3, 13.

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

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

²²⁰ Ibid.

²²¹ International Bar Association, note 1, 146.

²²² See, for example, *Sherpa et al v Glencore International AG and First Quantum Minerals Ltd.* (2012); *RAID v Anglo American* (2008), *War on Want and Change to Win v Alliance Boots* (2014), http://www.oecdwatch.org/search?portal_type=Case&SearchableText=taxation (accessed 1 June 2016).

²²³ KJ de Graaf and JH Jans, ‘The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change’ (2015) 27 *Journal of Environmental Law* 517.

²²⁴ Claire Methven O’Brien et al, ‘National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool’ (2016) 1(1) *Business and Human Rights Journal* 127; Damiano de Felice and Andreas Graf, ‘The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights’ (2015) 7(1) *Journal of Human Rights Practice* 40.

²²⁵ The Netherlands Ministry of Foreign Affairs, *National Action Plan on Business and Human Rights*, April 2014, 30.

²²⁶ Irish Human Rights and Equality Commission, *Submission on Ireland’s National Action Plan on Business and Human Rights* (1 March 2015), 15. See also Amnesty International, *Submission to the Department of Foreign Affairs on Ireland’s National Action Plan on Business and Human Rights* (March 2015), 5–6. All submissions are available at <https://www.dfa.ie/our-role-policies/international-priorities/human-rights/human-rights-in-ireland/national-plan-on-business-and-human-rights/> (accessed 1 June 2016).

²²⁷ Irish Centre for Human Rights, *Submission to the Department of Foreign Affairs on the Development of a National Plan on Business and Human Rights* (1 March 2015), 8.

²²⁸ Christian Aid Ireland, *Christian Aid Ireland submission, Government of Ireland consultation on a National Action Plan for Business and Human Rights* (1 March 2015), 5.

It put forward that Ireland's national action plan should 'include government recommendations to businesses not to engage in aggressive tax avoidance as part of their CSR commitments and human rights responsibilities'.²²⁹ The organization urged transparency in tax dealings, in particular publicly accessible country-by-country reporting by companies and a register of owners of companies.²³⁰ Despite these various calls, which were echoed in a private members motion in the Irish parliament,²³¹ the draft national action plan published by the Irish Department of Foreign Affairs and Trade has made no reference to the issue of taxation.²³²

VI. CONCLUSION

Corporate tax avoidance has become a high-profile matter of international public policy. As with other illicit financial flows, such tax avoidance can have a negative impact on human rights. The concerted efforts of the G20 group of states and the OECD to address tax abuse have included some acknowledgment of the human costs of large-scale tax avoidance by multinational corporations, but their undertakings have not adopted a human rights-based approach, and an element of self-interest of states is apparent in the process.²³³ The Base Erosion and Profit Shifting project has been welcomed by civil society as an important step, but there have been calls for greater and more equal participation of developing countries in the process.²³⁴ Parallel to these initiatives, human rights has become a touchstone in the debates on tax avoidance and tax justice.²³⁵ According to Philip Alston, this constitutes a break with the traditional approach of human rights, where there has been a greater focus on civil and political rights, and because lawyers, who dominated the field, 'tended to steer clear of matters of economic policy'.²³⁶ The nature of the phenomenon of corporate tax avoidance and the actors that are implicated therein presents a serious challenge for the existing human rights machinery, which has only turned its attention to the activities of business entities relatively recently. Nevertheless, human rights can serve as a lens through which to view the issue of corporate tax avoidance, one which provides a principled and universal basis to examine and challenge the fairness of tax laws, policies and practices. With the business and human rights agenda growing in prominence, it was inevitable that corporate tax

²²⁹ Ibid, 13.

²³⁰ Ibid, 13–14.

²³¹ Corporate Tax Policy: Motion (Private Members) 891(3) *Dáil Éireann Debate* 43.

²³² Department of Foreign Affairs and Trade, *Working Outline of Ireland's National Plan on Business and Human Rights 2016-2019* (December 2015), <https://www.dfa.ie/our-role/policies/international-priorities/human-rights/human-rights-in-ireland/national-plan-on-business-and-human-rights/> (accessed 1 June 2016).

²³³ See, for example, Daniel Boffey, 'US official says British government undermined progress on tax avoidance', *The Observer* (21 June 2015), <https://www.theguardian.com/business/2015/jun/21/us-official-british-government-undermined-progress-tax-avoidance> (accessed 1 June 2016).

²³⁴ *Declaration of the Independent Commission for the Reform of International Corporate Taxation* (June 2015) para 30, http://www.icriict.org/wp-content/uploads/2015/06/ICRICT_Com-Rec-Report_ENG_v1.4.pdf (accessed 1 June 2016).

²³⁵ Niko Lusiani, 'Let's get fiscal – human rights advocates are tackling tax injustice', *Open Democracy* (8 April 2015), <https://www.opendemocracy.net/openglobalrights/niko-lusiani/let-s-get-fiscal—human-rights-advocates-are-tackling-tax-injustice> (accessed 1 June 2016).

²³⁶ Alston, note 55.

avoidance would come to be addressed through this prism, thus overcoming a reluctance which was similarly evident in the realm of corporate social responsibility.

The United Nations Guiding Principles have been the focal point of the efforts of many states, international governmental organizations and civil society in the area of business and human rights and are slowly becoming embedded in human rights practice and processes. There is little doubt that they have contributed to the considerable advancement of the business and human rights agenda over the past decade, although it is not yet apparent that the prominence of such undertakings has been matched by a positive impact on the prevention and remediation of corporate human rights harm. National implementation of the Guiding Principles has been poor,²³⁷ and advocates are increasingly turning their attention to a possible binding business and human rights treaty.²³⁸ With regard to corporate tax avoidance, a business and human rights approach can offer some potential for addressing the issue and the Guiding Principles provide a useful framework, given that they authoritatively articulate the obligations and responsibilities of states and corporations when it comes to activities that may harm human rights. While corporate social responsibility has tended to be a business-centred endeavour, with the role of the state being somewhat downplayed, the approach of business and human rights is to treat corporations and states as having differing though parallel responsibilities concerning human rights. Both states and corporations contribute in different yet interrelated ways to corporate tax avoidance. While tax is not explicitly mentioned in the Guiding Principles themselves, their potential is beginning to be harnessed by tax justice advocates and United Nations experts and bodies.

Placing corporate tax avoidance more firmly on the business and human rights agenda can help to stimulate further discussion, debate and analysis of the human rights implications of this global issue, maintain the attention of states, corporations, civil society and human rights bodies, and perhaps even foster human rights-oriented developments aimed at addressing this harmful practice.²³⁹ While it may be that human rights law as it stands does not offer technical solutions to tax abuse, a human rights based approach that emphasizes principles such as fairness, transparency and accountability, as well as paying attention to marginalized groups, has obvious merit in this context.²⁴⁰ To advance the potential of a business and human rights approach to addressing corporate tax avoidance, further research and analysis is required, including on the articulation of the negative human rights impact of tax avoidance by companies, the role of human rights in international organizations addressing issues of taxation,

²³⁷ See, for example, Susan Ariel Aaronson and Hugh Higham, 'Putting the Blame on Governments; Why Firms and Governments Have Failed to Advance the Guiding Principles on Business and Human Rights', Institute for International Economic Policy Working Paper Series (Elliot School of International Affairs, George Washington University, June 2014), <https://www.gwu.edu/~iiep/assets/docs/papers/2014WP/AaronsonHingham201406.pdf>. See also Chris Jochnick, 'Challenging Corporate Power through Human Rights', forthcoming in Cesar Rodriguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501084 (accessed 1 June 2016).

²³⁸ David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1(2) *Business and Human Rights Journal* 203.

²³⁹ International Bar Association, note 1, 146.

²⁴⁰ See further 'Report of the Special Rapporteur' (2014), note 77, paras 54–67.

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

²⁴¹ Josh Curtis and Shane Darcy, ‘The right to a social and international order for the realization of human rights: Article 28 of the Universal Declaration and international cooperation’, in David Keane and Yvonne McDermott (eds.), *The Challenges of Human Rights; Past, Present and Future* (Cheltenham/Northampton: Edward Elgar, 2012) 9.

²⁴² Ruggie, note 115, 99 (emphasis in original).

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