# Corporate Tax Abuse: The Elephant in the Room of Business & Human Rights

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TAX JUSTICE NETWORK

# Contents

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# I. Introduction

The United Nations Guiding Principles on Business and Human Rights (UNGPs) represent the world's most authoritative normative framework for addressing human rights abuses in business operations and global supply chains. Developed in response to the fact that many of the world's most chronic and pervasive human right violations result from the conduct of business entities, the UNGPs were unanimously endorsed by the UN Human Rights Council in 2011 and have since become established as the definitive interpretation of how international human rights law pertains to the distinct but complementary responsibilities and obligations of both states and business entities.

Comprising 31 principles, the UNGPs are organised under three pillars; the state duty to protect human rights, business entities' responsibility to respect human rights, and right of impacted persons or communities to access remedy for human rights violations. Importantly, the UNGPs clarify that, in the context of a globalised economy and complex transnational commercial relationships, businesses must conduct ongoing due diligence of their supply chains in order to identify, prevent and mitigate human rights harms.

In the years since the UNGPs came into being, the issues of just taxation and financial transparency have risen up the human rights agenda, amidst growing recognition of the determinative impact taxation - at both domestic and international levels - has on the full spectrum of human rights outcomes.

The 2014 report of the then Special Rapporteur on Extreme Poverty and Human Rights Magdalena Sepulveda marked a pivotal moment in bringing taxation to the fore of the human rights movement.[1] Since then, concerns over the harmful domestic and extra-territorial human rights impacts of crossborder tax abuse and financial secrecy regimes has become an increasing concern of UN treaty bodies, including the Committee on Economic, Social and Cultural Rights,[2] the Committee on

[1] OHCHR, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, 2014. https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_28_ENG.doc

[2] See, for example, Committee on Economic, Social and Cultural Rights, Concluding observations on the fourth periodic report of Ireland, March 2024. https://www.ohchr.org/en/documents/concluding-observations/ec12irlco4-concluding-observations-fourth-periodic-report-ireland Committee on Economic, Social and Cultural Rights Concluding observations on Paraguay, 20 March 2015, E/C.12/PRY/CO/4. https://digitallibrary.un.org/record/798123 ; Concluding observations on Spain, 25 April 2018, E/C.12/ESP/CO/6, https://www.ohchr.org/en/documents/concluding-observations/ec12espco6-committee-economic-social-and-cultural-rights , Concluding observations Burundi, 15 Oct 2015, https://digitallibrary.un.org/record/832481?ln=en

the Elimination of Discrimination Against Women[3] and the Committee on the Rights of the Child.[4]

The State of Tax Justice 2024 demonstrates that countries lose US $492 billion to crossborder tax abuse each year.[5] Of this sum, the largest share – some $347 billion - is lost to cross-border tax abuse by multinational corporations, while $145 billion is lost to offshore tax abuse by wealthy individuals.[6] This torrent of lost revenue decimates governments' capacity to provide quality public services and, in turn, the realisation of fundamental human rights. And although it is the industrialised economies of the Global North that lose most in absolute terms, the impact on human rights realisation is far greater in poorer nations where the losses incurred represent a much higher proportion of government spending. Modelling by the Government Revenue and Development Estimations initiative at St Andrew's University shows that, were the revenue lost to abusive crossborder tax practices to be recovered and spent in accordance with existing spending patterns, the human rights impacts would be dramatic:[7]

- 34 million more people would have access to appropriate sanitation
- 17 million more people would have access to drinking water
- Some three million children would access an additional year of schooling
- Infant mortality would be reduced by 600,000
- Maternal mortality would be reduced by 73,000

Importantly, the lion's share of this revenue loss is caused by the abusive international tax practices of multinational corporations. As such, crossborder tax abuse may be the most severe and pervasive driver of human rights violations linked to the activities of business entities. These facts notwithstanding, the UNGPs do not make any explicit reference to tax practices as a human rights concern. As explained in the sections below, however, many of the Principles are of direct relevance to both how businesses conduct their tax affairs, and

[3] See, for example, Committee on the Elimination of Discrimination Against Women, 2018, Concluding observations on the combined 6th and 7th periodic reports of Luxembourg https://digitallibrary.un.org/record/1627639?ln=es ; CEDAW, 2019, Concluding observations on the combined fifth and sixth periodic reports of the United Kingdom. https://www.ohchr.org/en/documents/concluding-observations/cedawcgbrco8-concluding-observations-eighth-periodic-report ; CEDAW, 2016, Concluding observations on the combined 4th and 5th periodic reports of Switzerland. https://digitallibrary.un.org/record/861848?ln=en

[4] See, for example, Committee on the Rights of the Child, 2022, Concluding observations on the combined fifth and sixth periodic reports of the Kingdom of the Netherlands. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fNLD%2fCO%2f5-6&Lang=en ; CRC, 2023, Concluding observations on the combined fifth and sixth periodic reports of Ireland. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FIRL%2FCO%2F5-6&Lang=en ;

[5] Tax Justice Network, The State of Tax Justice 2024. https://taxjustice.net/reports/the-state-of-tax-justice-2024/

[6] Ibidem.

[7] Stephen Hall (et al), Tax Abuse – The Potential for the Sustainable Development Goals (2020). https://med.st-andrews.ac.uk/grade/wp-content/uploads/sites/13/2021/06/Tax-abuse-the-potential-for-the-SustainableDevelopment-Goals-WP.pdf

states' duties in the implementation of the Business and Human Rights agenda.

Recognition of the determinative human rights impacts of crossborder tax abuse led the United Nations Working Group on Business and Human Rights to highlight taxation as a crucial concern in its 2021 stocktaking[8] of the first 10 years of the UNGPs: "Coherence challenges remain at all levels, however… this includes need for UNGPs' integration in... other global policy agendas where responsible business conduct is or should be considered a key issue, including anti-corruption, finance, trade and investment, and taxation." The pressing need to address corporate tax abuse as a core human rights concern was reiterated by the High Commissioner for Human Rights in his 2023 address to the Human Rights Council.[9]

At the heart of this nexus lies the reality that governments need resources in order to provide for the realisation of human rights. The role of taxation in democratic and rights-respecting societies is often framed according to the 5 Rs, of which public **revenue** is just one, however. In an era of historic and unprecedented levels of economic inequality, both among and within states, the role of progressive taxation policies in the **redistribution** of resources is likewise essential from a human rights perspective. Through its role in **repricing** goods and services, meanwhile, taxation also plays a critical role in shaping and influencing consumption choices in the marketplace, including by disincentivising such goods as fossil fuels, which have deleterious human rights impacts through their contribution to climate change. Reform of the international governance of taxation, which currently facilitates neocolonial patterns of economic extraction, is a necessary component of **reparations** for historical harms. It is also well documented that the payment of taxation plays a fundamental part in cementing the bonds of accountability between government and citizenry, and as such can be considered a form of **representation**.

The sections below examine how just taxation policies can and must be addressed in the implementation of the Business and Human Rights Agenda, both by governments and by private sector entities. Through case studies of Ireland and Kenya, both of which have been vocal champions of the Business and Human Rights agenda, the report examines how human rights norms and standards should be incorporated into the design and implementation of taxation policies,

[8] UN Working Group on Business and Human Rights, Raising the Ambition - Increasing the Pace: UNGPs 10+. Available at: https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf

[9] UN High Commissioner for Human Rights, 2023, Address to the 54th Session of the Human Rights Council. Transcription available at: https://www.ohchr.org/en/statements/2023/09/turk-human-rights-are-antidote-prevailing-politics-distraction-deception

the negotiation of international taxation agreements and the tax planning strategies of business actors.

# II. The State Duty to Protect Human Rights

As the primary duty bearer for realisation of human rights, states are subject to a range of human rights norms and standards that should guide the design and implementation of both fiscal policies and the regulation of business entities' tax behaviours.

Parties to the International Covenant on Economic, Social and Cultural Rights are obliged to respect, protect and fulfil the economic, social and cultural rights of all persons within their jurisdictions.[10] The duty to respect requires governments to avoid any actions that would impede the realisation of economic social and cultural rights (ESCR); while the duty to protect obliges them to prevent third parties, including businesses and financial institutions, from hindering the enjoyment of these rights. The duty to fulfil meanwhile imposes an obligation to take positive legal, budgetary and administrative steps to advance the enjoyment of these rights.

Of particular relevance to the implementation of these principles is Article 2 of the International Covenant on Economic, Social and Cultural Rights, which obliges States parties to generate 'the maximum of available resources', with a view to 'achieving progressively the full realization' of human rights. The Committee on Economic, Social and Cultural Rights has clarified that, while full realisation of ESCR may be achieved progressively over time, states parties also face 'immediate obligations'[11] in this regard, including the duty to protect 'minimum essential levels'[12] of these rights.

The principle of non-retrogression, as elucidated in CESCR General Comment 3 on the nature of states parties' obligations, meanwhile makes it clear that any measure which foreseeably reduces the enjoyment of economic, social and cultural rights can only be justified 'by reference to the totality of rights provided for in the Covenant and in the context of the full use of maximum available resources'.[13]

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[10] OHCHR, 'International Human Rights Instruments Volume I, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies',
United Nations, 2008.

[11] Committee on Economic, Social and Cultural Rights (1990), 'General Comment No.3, The Nature and Scope of States Parties Obligations', UN Doc E/1991/23 (14 December 1990);

[12] CESCR, 2007 'An Evaluation of the Obligation to Take Steps to the Maximum of Available Resources under an Optional Protocol to the Covenant', Geneva, 2007. Available at:
http://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf.

[13] CESCR, 1990, General Comment No. 3: The Nature of States Parties' Obligations. See:
https://www.refworld.org/pdfid/4538838e10.pdf

Given that extreme levels of socioeconomic inequality undermine the full spectrum of human rights, and have a particularly pernicious impact on marginalized sectors such as women, ethnic minorities and persons with disabilities, the redistributive role of taxation plays a critical role in the realisation of human rights.[14] This in turn implies that, in order to fulfill their human rights obligations, states have a duty to ensure the taxation regime is sufficiently progressive to counter extreme levels of inequality whilst also delivering the necessary resources for the realisation of human rights. A human rights-fulfilling fiscal regime thus requires that states seek to raise resources through progressive taxes, such as corporate taxation and wealth taxes, and do not rely excessively on alternatives such as value added tax, which disproportionately impact poorer sectors.

Closely linked to the above, states must maintain the necessary public policy space to design and implement progressive fiscal regimes." At the domestic level, this implies that they must prevent corporate capture of public policy space and guarantee democratic and participative processes. At the international level, meanwhile, UNGP 9 states clearly that: "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises."

States' extra-territorial human rights obligations have important implications, requiring that their actions, both through participation in international institutions and through bilateral international relations with other governments, serve to advance rather than undermine the realisation of human rights in other countries. UNGP 10 clarifies that "States, when acting as members of multilateral institutions that deal with business-related issues, should seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights." This implies that they must collaborate internationally in good faith so as facilitate the mobilisation of maximum available resources for the fulfilment of human rights in other countries as well as their own.

These international responsibilities are underpinned by the duty of international cooperation, which obliges states to take steps both individually and collectively to facilitate the full realisation of human rights in all countries.[15] Moreover, the Committee on Economic, Social and Cultural Rights has provided clear guidance on states' human rights obligations as they pertain to business entities' tax behavior: "States

[14] Philip Alston and Nikki Reisch, Tax, Inequality and Human Rights (New York, 2019)
[15] OHCHR, The Right to Development and International Cooperation.
https://www.ohchr.org/sites/default/files/Documents/Issues/RtD/RTD_InternationalCooperation.pdf

parties should encourage business actors whose conduct they are in a position to influence to ensure they do not undermine the efforts of states in which they operate to fully realize the Covenant rights, for instance by resorting to tax evasion or tax abuse."[16] The Committee goes on to specify that participation in the 'race to the bottom' in international corporate taxation is incompatible with states' obligations under the Covenant, while the provision of financial secrecy services to corporate actors runs contrary to the 'maximum available resources' principle.[17]

While the UN Guiding Principles on Business and Human Rights do not explicitly reference taxation, the human rights obligations incumbent on states with regard to their governance of taxation are thus clear. Any meaningful commitment on the part of a government to protect human rights in the context of business activities should be implemented in accordance with these obligations.

The UNGPs also contain a number of other principles which are of clear relevance to governments' regulation and oversight of corporate tax behaviour. As detailed in the UNGPs+10 stocktaking report, human rights-compatible policy coherence should be ensured in all aspects of state operations (including in the areas of finance, revenue and private sector oversight). According to UNGP8, "States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates". UNGP3 meanwhile clarifies that the state duty to protect understands that governments must "ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights."

The central focus of the UNGPs on human rights due diligence likewise has implications for governments in this arena, as they are required to provide business entities with appropriate guidance and support in the implementation of the same. The due diligence requirements of the UNGPs extend not only to a business' own activities, but also to the behaviour of other businesses with which they conduct commercial relationships. As such, their approach to due diligence should include screening for abusive tax practices among their clients and through their supply chains.

[16] Committee on Economic, Social and Cultural Rights, 2017. Economic, Social and Cultural Rights in the context of business activities. https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2017-state-obligations-context

[17] Committee on Economic, Social and Cultural Rights, 2017. Economic, Social and Cultural Rights in the context of business activities. https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2017-state-obligations-context

With all of the above in mind, states should include a commitment to just regulation of corporate tax behavior as a core pillar of National Human Rights Action Plans. This should include guidance on the detail of what responsible tax behaviour must comprise (explained further in the following section) and the explicit incorporation of tax transparency on the part of multinational corporates as a component of mandatory human rights due diligence.

# III. The Corporate Responsibility to Respect Human Rights

While states are the primary duty bearers for the fulfilment of human rights, the 2011 adoption of the UNGPs represented a pivotal moment in recognising that business entities are also subject to human rights responsibilities and that these responsibilities 'lie over and above compliance with national laws and regulations protecting human rights.'[18] UNGP 11 states that "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved." In this regard, it must be emphasised that the deleterious impacts stemming from the abusive tax practices of multinational companies manifestly represent adverse human rights impacts with which they are involved.[19]

The 14 principles falling under Pillar 2 of the UNGPs – the Corporate Responsibility to Respect Human Rights – set out guidelines for how businesses should identify their negative human rights impacts and develop policies and procedures to address them. One of the foundational principles of the corporate responsibility to respect is that business enterprises "avoid causing or contributing to adverse human rights impacts through their own activities" (UNGP 13a). They are further required to "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" (UNGP 13b).

These include that an explicit human rights policy commitment should be put in place (UNGP 16), with oversight responsibility established at the highest level of the firm (UNGP 15), and that ongoing human rights due diligence should be undertaken to identify, mitigate and prevent human rights violations linked to the companies' activities (UNGP 15, UNGP 17). Remediation mechanisms should also be established, offering channels of accountability to those persons impacted by any human rights harms (UNGP 22).

In the context of the activities of multinational companies, aggressive tax planning arguably represents the most pernicious channel through which they contribute to human rights violations.[20] By siphoning

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[18] OHCHR, 2011, United Nations Guiding Principles on Business and Human Rights. https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

[19] Tax Justice Network, 2021, Tax Justice & Human Rights: The 4 Rs and the realisation of rights. https://taxjustice.net/reports/tax-justice-human-rights-the-4-rs-and-the-realisation-of-rights/

[20] Tax Justice Network, 2023, The State of Tax Justice 2023 https://taxjustice.net/reports/the-state-of-tax-justice-2023/

revenue away from government coffers and into tax havens or financial centres in other countries, they are constraining governments' capacity to invest in public services and, thereby, to progressively realise human rights.

It follows that responsible and transparent conduct of tax affairs should be considered a core element of implementing business duties under the UNGPs. The Fair Tax Foundation's 'Global Multinational Business Standard' (GMBS) offers straightforward and actionable guidance on what responsible tax conduct should comprise,[21] and marries with the UNGPs criteria for businesses' implementation of their human rights responsibilities.

Just as the UNGPs require that businesses have an official human rights policy which is embedded at the highest level of the company, so the GMBS 'Fair Tax Mark' requires companies to publish a binding tax policy, with responsibility for implementation and oversight allocated to a board member and regular reporting on compliance.[22] This policy should include a commitment to avoid any presence in tax havens or secrecy jurisdictions that are not underpinned by legitimate trading activity, and that it should avoid structuring transactions or operations artificially for the purpose of avoiding tax.

Together with this, the GMBS demands a comprehensive set of transparency measures along with standards on actual tax practices. These include public disclosure of consolidated financial statements, the nature of business activities, place of trading, management control and beneficial ownership of all shareholdings over 5 percent.[23] The FTM also requires that accredited companies provide comprehensive country-by-country reporting on their tax affairs, listing all subsidiaries, employment data, net and gross assets, along with revenue and profits for each country in which they are present.[24] Critically, this must be complemented by data on total tax charge, current tax charge, deferred tax charge and cash taxes paid in each jurisdiction. Taken together, these measures represent the policies and procedures that would necessarily be put in place by a multinational company committed to being fully transparent with regard to its tax affairs.

The Fair Tax Mark also considers a company's average tax rate, in terms of cash taxes paid, over the course of the previous five years, in combination with information disclosed under the transparency measures above, in order to determine whether the business is indeed

[21] Fair Tax Foundation, 2021, Global Multinational Business Standard. https://fairtaxmark.net/wp-content/uploads/2022/10/Global-MNC-standard-criteria-print-version.pdf
[22] Ibidem, Part 2 Tax Policy, Implementation and Compliance (pp15)
[23] Ibidem, Part 1, General Transparency (pp11)
[24] Ibidem, Part 3, Country-by-country reporting (pp20)

'paying its fair share' of taxation.[25] While it is technically possible for a company to pay little or no taxation over a given period whilst also conducting its tax affairs responsibly, this could only be achieved if its policies, governance, and reporting were all exemplary. In other words, if they were conducted in full accordance with the spirit, rather than the letter, of tax laws.

Importantly, the GMBS requirements regarding transparency and reporting cohere with the UNGPs' onus on transparency, reporting and due diligence. The UNGPs go further than the GMBS criteria, however, by requiring that multinational companies interrogate potential adverse impacts both in their own operations and through their value chains. The UNGPs clarify that, where a company is linked to adverse human rights impacts through its relationships with other business entities, it should use its leverage over those entities to address the human rights impacts and, if necessary, end the relationship (UNGP19 Commentary). This provision has important implications for companies' relationships with enablers of abusive tax practices, such as the 'Big 4' accountancy firms.

It should also be noted that the due diligence requirements set out in the UNGPs are further echoed in soft law instruments including the OECD's Guidelines for Multinational Enterprises[26] and its complementary Due Diligence Guidelines for Responsible Business Conduct.[27] The former explicitly requires that enterprises comply with both the letter and the spirit of tax laws in order to behave as good corporate citizens, while the latter sets out detailed provisions for what due diligence should look like. Meanwhile, the European Commission has developed new legislation on mandatory human rights due diligence that is to be implemented across the EU.[28]

To date, however, companies' implementation of human rights policies in accordance with the UNGPs has mostly been limited to more 'explicit' forms of human rights violation, such as child labour and modern slavery, omitting to directly address more systemic but equally egregious issues such as aggressive tax planning.

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[25] Ibidem, Part 5, Tax Rate (pp28)

[26] OECD Guidelines for Multinational Enterprises, 2011, http://www.oecd.org/daf/inv/mne/48004323.pdf

[27] OECD Due Diligence Guidance for Responsible Business Conduct, http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf

[28] European Commission, Corporate sustainability due diligence. https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en ; European Commission, 2022, Commission lays down rules for companies to respect human rights and environment in global value chains. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145 For more on this, see: Center for Strategic and International Studies, 11 March 2022, European Union Releases Draft Mandatory Human Rights and Environmental Due Diligence Directive. https://www.csis.org/analysis/european-union-releases-draft-mandatory-human-rights-and-environmental-due-diligence

Large companies that are genuinely committed to both respecting human rights and being good corporate citizens should include transparency and reporting practices in line with the GMBS criteria as part of their implementation of the UNGPs. This should include reporting on the human rights impacts of their tax practices on all stakeholders and rights-holders, from employees and consumers to citizens of other countries where they do business. In their procurement processes, they should also carry out thorough due diligence of the tax practices and corresponding human rights impacts of  actors in their supply chains.

# IV. Ireland and Kenya: Development of BHR National Action Plans

A central pillar of the implementation of the UNGPs is the development of National Actions Plans on Business and Human Rights (NAPs). To date some 53 countries have either developed or are in the process of developing NAPs, which are designed to articulate priorities and actions for the implementation of the UNGPs. Typically, the development of a NAP is preceded by a baseline study, commissioned from an independent research body, to identify key policy concerns and legislative gaps that need to be addressed in order to meaningfully implement the UNGPs.

Robust participation of civil society organisations in the design of National Action Plans is a crucial precondition to ensuring they effectively address the most pressing human rights concerns linked to business activities in a given jurisdiction. Ireland's Department of Foreign Affairs and Trade, which was tasked with leading the NAP development process, invited submissions from interested parties in 2015, receiving over 30 written inputs from both civil society and the business sector.[29] The deleterious extra-territorial human rights impacts of Ireland's tax 'offering' were highlighted in various of the civil society submissions, with calls for the country's fiscal regime to be reformed as part of the implementation of the UNGPs.[30] Significantly, concerns over the human rights impacts of the country's fiscal policies were also highlighted by both the national human rights ombudsman[31] – the Irish Human Rights and Equality Commission – and the independent baseline assessment commissioned from consultancy firm ReganStein.[32] The issue of just taxation and the well-documented crossborder impacts of Ireland's tax haven policies were entirely ignored when a working outline of the National Action Plan was published, however. This omission was again highlighted by multiple civil society organisations in

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[29] Government of Ireland, 2017, National Plan on Business and Human Rights (2017- 2020). Available at: https://www.gov.ie/en/publication/5bf5e-national-plan-on-business-and-human-rights-2017-2020/

[30] See, for example, Christian Aid Ireland, Government of Ireland consultation on a National Action Plan for Business and Human Rights, 1 March 2015. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/257298/3de54715-aa6e-487d-9238-5997400d09e9.pdf#page=null ; CIVICUS, CIVICUS submission to the Department of Foreign Affairs and Trade on the development of Ireland's National Plan on Business and Human Rights, 27th February 2015. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/257299/4ab1f91b-af45-4112-bae9-1a7392d2fecf.pdf#page=null ; Irish Centre for Human Rights, Submission to the Department of Foreign Affairs and Trade on the development of a national plan on business and human rights, 1 March 2015. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/257307/9d2c80f6-9941-4a8d-a1a1-23273db49f01.pdf#page=null

[31] Irish Human Rights and Equality Commission, Submission on Ireland's National Action Plan on Business and Human Rights, March 2015. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/257311/bd40dd5a-4fbe-4ac4-9406-a989db10241f.pdf#page=null

[32] ReganStein, Baseline assessment of the legal and regulatory framework pertaining to business and human rights in Ireland, 2019. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/257266/48af739b-0faa-4cc8-adcc-272cc0bded42.pdf#page=null

follow-up submissions made in response to the working outline, but these concerns were again ignored by the government.[33]

Kenya's National Action Plan, by contrast, established 'Revenue Transparency and Management' - including the taxation-human rights nexus - as one of five guiding themes, stating explicitly "Tax justice and the regulation of financial behaviour of companies can no longer be treated in isolation from the corporate responsibility to respect human rights".

The NAP states: "Like many other jurisdictions, Kenya faces challenges concerning revenue mobilisation and the link to business activities, among them illicit financial flows, tax avoidance and tax evasion by businesses. These practices result in reduction of the resources available for investment in essential social services, fostering inequalities, undermining economic and social institutions, and even discouraging transparency in matters of public finances."

This positioning resulted from a far more in-depth and participative consultation process in development of the NAP: A series of eight national consultations were staged between 2016 and 2018, along with nine regional consultations bringing together the voices of a wide range of rights-holders likely to be impacted by business activities in key locations around the country. The perspectives of indigenous communities were meanwhile incorporated through a dedicated consultative platform.

A series of thematic working groups, comprised of independent expert consultants, were also set up, along with policy dialogue meetings with key state, non-state and justice administration actors. The entire process was led collaboratively by the  Department of Justice (DoJ) and the Kenya National Commission on Human Rights (KNCHR), with a National Steering Committee bringing together 13 key public, private and civil society actors which served as the decision making body. Importantly, the NSC gave meaningful voice to expert civil society groups, union representatives, and political bodies, and was supported by the UN Office of the High Commissioner for Human Rights.

An independent evaluation of Kenya's National Action Plan conducted by the Danish Institute for Human Rights (DIHR) found that this far more expansive and participative approach to developing the NAP served to

[33] See, for example, ActionAid Ireland, Submission to Department of Foreign Affairs and Trade in relation to the development of Ireland's National Action Plan on Business and Human Rights, 2016. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/257417/9e8168b2-0d01-4f64-9921-488ce66931f5.pdf#page=null ;  Dochas, Dóchas Response to the Working Outline of Ireland's National Action Plan on Business and Human Rights, 2016-2019. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/257424/8082ef5d-072a-4632-b084-8102fd673412.pdf#page=null ; Trocaire, Trócaire Response to the Working Outline of Ireland's National Action Plan on Business and Human Rights, 2016-2019, 2016. Available at: https://www.gov.ie/pdf/?file=https://assets.gov.ie/257437/655f72d2-a46d-4402-b3b3-0051e906b2d1.pdf#page=null

sensitise a broad spectrum of stakeholders to both the UNGPs and the NAP process, whilst bolstering goodwill and ownership among rights-holders and other stakeholders.[34]

In contrast to Ireland's relatively superficial consultations, Kenya's more inclusive process brought together a broad spectrum of rights-holders and other actors, including at the regional and community levels, and led to a more meaningful and legitimate delineation of thematic priorities in the context of business activities. While the process was not without shortcomings – the aforementioned DIHR evaluation states that consultations could have been deeper and more nuanced, and warns there were shortfalls in the involvement of political actors – it appears to more meaningfully reflect how business activities impact human rights in the country.

[34] Danish Institute on Human Rights, The Kenya national action plan on business and human rights – a case study on process, lessons learned and ways forward, November 2020. Available at: https://www.humanrights.dk/publications/kenya-national-action-plan-business-human-rights-case-study-process-lessons-learned

# V. Double Tax Agreements

Ireland and Kenya signed a new double taxation agreement (DTA) in July 2021.[35] DTAs are designed to allocate taxing rights over income and capital between two countries to prevent 'double taxation' - the risk that income streams are taxed twice - and in so doing to facilitate trade between the two jurisdictions.

Depending on the provisions agreed, however, DTAs can have a detrimental impact on the revenue of one or other of the countries. This is especially true in the case of DTAs signed between developing countries and developed countries, and even more so when the wealthier nation is a tax haven.[36]

Furthermore, it is well documented that Ireland's vast network of 74 double tax agreements make it a 'leaky bathtub' for taxation, facilitating multinational companies in shifting profits away from developing countries in order to take advantage of Ireland's extremely low corporate tax rate of 12.5 percent.[37] It is likewise well-documented that many such companies enjoy effective tax rates of close to zero percent.[38] Indeed, Ireland has been found to have ignored warnings from its own officials about the detrimental impacts of its aggressive approach to negotiating tax treaties with poorer countries.[39]

A central consideration in the design of DTAs are questions over 'residence' and 'source' taxation. 'Residence' refers to the jurisdiction in which the taxpayer is domiciled, while 'source' refers to the location from which the income is derived. When two countries deploy differing source and residence criteria to determine their taxing rights over an income stream, the discrepancy can result in income being taxed in both jurisdictions.

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[35] Ireland Department of Revenue, Double Taxation Agreement between Ireland and the Republic of Kenya, 2021, https://www.revenue.ie/en/tax-professionals/tax-agreements/double-taxation-treaties/K/kenya.aspx

[36] Beer and J. Loeprick, 'The Costs and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa', IMF Working Paper WP/18/227 (24 October 2018)

[37] Jim Brumby and Michael Keen, Tax treaties are like a bathtub; a single leaky one is a drain on a country's revenues, 'Tax Treaties: Boost or Bane for Development?' IMF Blog (16 November 2016). https://www.imf.org/en/Blogs/Articles/2016/11/16/tax-treaties-boost-or-bane-for-development

[38] See, for example, ActionAid Ireland, Christian Aid Ireland, Global Legal Action Network, Integrated Social Development Centre (Ghana), Mary Cosgrove, Cairnes School of Business & Economics, National University of Ireland, Galway, Oxfam Ireland, Tax Justice Coalition Ghana, Tax Justice Network, 2020, Ireland's Responsibility for the Impacts of Crossborder Tax Abuse on the Realisation of Children's Economic, Social and Cultural Rights. https://www.christianaid.ie/sites/default/files/2022-11/crc-tax-submission.pdf
See also, Seamus Coffey, 2017. 'Review of Ireland's Corporation Tax Code presented to the minister of finance and public expenditure and reform by Mr Seamus Coffey'. https://assets.gov.ie/7255/b275ad7f0874433b9d6d0c54c8f84764.pdf

[39] The Irish Times, 'Irish officials disregarded Dept of Foreign Affairs concerns over Ghana trade deal', *Irish Times,* 27 September 2019: https://www.irishtimes.com/business/economy/irish-officials-disregarded-dept-of- foreign-affairs-concerns-over-ghana-trade-deal-1.4031852

Historically, a residence-based approach to allocating taxing rights has been the norm in DTAs. This is generally the most efficient and equitable approach when flows of taxable revenue between two countries are broadly comparable. However, the preponderance towards a residence-based allocation can be pernicious for lower income countries, as their wealthier counterparts tend to be the locations where multinational enterprises and high-wealth individuals are resident.

The OECD Model Tax Convention on Income and on Capital[40] - the most widely-used baseline for negotiations of DTAs – was designed by high-income countries and skews heavily towards residence-based taxation. In order to address the imbalances inherent for developing countries in signing up to DTAs based on the OECD model, the United Nations developed an alternative template; The Model Convention for Tax Treaties between Developed and Developing Countries,[41] which offers criteria with more weight afforded to 'source taxation'. As such, assessments of whether a DTA between a developed and a developing country benefits or harms the latter often involves analysing to what extent it draws on the OECD or UN models respectively.

The Ireland-Kenya DTA does include some positive elements. For example, the criteria for defining the existence of a company's permanent establishment (Article 5.3) follows the UN model's 6-month recommendation rather than the 12 months suggested by the OECD. This lower threshold benefits developing countries by making it easier to secure their tax base.

Article 13 of the agreement meanwhile imposes withholding taxes on technical services. Given that taxpayers in residence countries often seek to class technical services within the scope of royalty payments, this clause can be used to make residence countries – in this case Ireland – liable to pay withholding taxes on technical services despite not having a physical presence in the partner country.

Unfortunately, the DTA also includes several elements that are likely to be harmful to Kenya's revenue collection and, as such, to its capacity to progressively realise human rights. Of particular note is the agreement's failure to include an expanded agency definition of permanent establishment. This failure is particularly striking as expanded agency language is included as standard in the current OECD model. Ireland did not voice any reservation to the OECD model, and has included this criteria in other DTAs with developing countries such as Kazakhstan.

[40] OECD, Model Tax Convention on Income and on Capital. https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-full-version_9a5b369e-en
[41] UNDESA, United Nations Model Double Taxation Convention between Developed and Developing Countries. https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf

Furthermore, the rate of withholding tax on dividends is set at 8 percent, which is extremely low. Given that Kenyan domestic law sets a general rate of 15 percent, this represents a major concession to Ireland. In DTAs with other OECD countries, the withholding tax on dividends is generally higher (United Kingdom, 15 percent; France, 10 percent; Germany, 15 percent).

Similarly, in the case of royalties, the agreed rate of 10 percent - half Kenya's domestic rate of 20 percent - represents a further concession on the part of Kenya. Given that large flows of intellectual property royalty payments are channelled to Ireland, which is host to many of the world's major tech companies, this represents a further 'win' for the European country and will lead to significant revenue being lost from Kenyan state coffers.

From a human rights perspective, it must also be emphasised that it is not just the content of the DTA, but also the process through which it was negotiated that must be considered. In accordance with the duty to international cooperation and extra-territorial human rights obligations set out in previous sections, both Ireland and Kenya are required to ensure participation and transparency in such processes and to deliver an agreement conducive to the generation of the maximum of available resources for the realisation of human rights.

Following the signing of the DTA between Ireland and Kenya, the African country put the agreement out to public consultation. It is disappointing there that Ireland's Department of Finance and Department of Revenue both cited this fact – Kenya's proactive encouragement of participation - as the rationale not to cooperate more meaningfully with this research. Freedom of Information requests sent to both departments received responses stating that the Kenyan consultation process meant the agreement was still under deliberation and therefore they were disinclined to release relevant records on the grounds that they 'might impact the international relations of the state'.

Following persistent criticism from civil society organisations and United Nations human right bodies of the impacts of its tax policies on poorer countries,[42] the Irish government published a new policy on tax treaties in 2022 explicitly recognising the dangers they pose to developing countries.[43] This policy applies only to least-developed countries, which

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[42] Ibidem, The Irish Times, Irish tax policy is now a human rights issue for the UN, 24 november 2020.https://www.irishtimes.com/opinion/irish-tax-policy-is-now-a-human-rights-issue-for-the-un-1.4418291; Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights, 2015. Tax Policy is Human Rights Policy: The Irish Debate. https://www.ohchr.org/Documents/Issues/EPoverty/Alston-Tax_policy.docx

[43] Department of Finance, *Ireland's Tax Treaty Policy Statement*, https://www.gov.ie/en/publication/6ee4f-irelands- tax-treaty-policy-statement/

have not been the target of Ireland’s tax treaty strategy, and excludes low- and middle-income countries such as Kenya, however.

# VI. Positions and negotiations in international spaces

As explained in previous sections, the duty to international cooperation together with extra-territorial human rights obligations obligate states to ensure their positioning and comportment in international fora do not impede the ability of other states to raise the maximum of available resources for the progressive realisation of human rights.

It is well-documented that Ireland played an instrumental role in lowering the ambition of the OECD proposals for a global minimum corporate tax rate, however.[44] While the Biden administration in the US had originally tabled proposals for minimum rate of 21 percent, which was backed by major European economies including France and Germany, negotiations at the OECD subsequently saw this lowered to 15 percent thanks to the positioning of a small number of tax haven countries including Ireland.[45] During the negotiation process, Ireland also broke ranks with both its European Union partners.[46] The only other EU countries not to back the agreement were Hungary (corporate tax rate 9 percent) and Estonia (whose corporate tax rate ranges from 14 too 20 percent, but only targets 'distributed profits, i.e. shareholder dividends) . Thanks to the requirement of unanimity in tax policy changes at the EU level, this meant three countries that together represent 4 percent of European GDP effectively scuppered the European Union's ability to present a unified position.

Ireland eventually agreed to sign on to the deal after winning a commitment that small multinationals with annual revenue of less than €750 million would not face the new rate.[47] It also insisted that the words "at least" be removed from the OECD position in order to ensure the rate could not be increased in the future.[48] In so doing, Ireland played a significant role in weakening the OECD minimum tax rate

[44] International Tax Review, 22 April 2021, Ireland pushes back on US proposal for 21% global minimum tax. https://www.internationaltaxreview.com/article/2a6a8gff5n2hu8m8gg2dc/ireland-pushes-back-on-us-proposal-for-21-global-minimum-tax ; TASC, The real reasons Ireland is against a 15% minimum corporate tax rate, 23 July 2021. https://www.tasc.ie/blog/2021/07/23/the-real-reasons-ireland-is-against-a-15-minimum-c/ ; The New York Times, 8 October 2021, Global Deal to End Tax Havens Moves Ahead as Nations Back 15% Rate. https://www.nytimes.com/2021/10/08/business/oecd-global-minimum-tax.html

[45] Reuters, 20 May 2021, U.S. Treasury floats global corporate tax of at least 15%. https://www.reuters.com/business/finance/us-treasury-backs-off-21-global-minimum-corporate-tax-rate-wants-least-15-2021-05-20/

[46] Euronews, 2 July 2021, Ireland, Hungary and Estonia opt out of OECD tax deal and cast shadow over EU's unified position. https://www.euronews.com/my-europe/2021/07/02/ireland-hungary-and-estonia-opt-out-of-oecd-tax-deal-and-cast-shadow-over-eu-s-unified-pos

[47] The New York Times, 8 October 2021, Global Deal to End Tax Havens Moves Ahead as Nations Back 15% Rate. https://www.nytimes.com/2021/10/08/business/oecd-global-minimum-tax.html

[48] Ibidem.

agreement, effectively scuppering its potential to have a meaningful impact in halting the 'race to the bottom'.

The country's corporate tax rate of 12.5 percent has long been the source of controversy in its international relationships. Together with a matrix of tax treaties that make Ireland one of the world's most significant conduit jurisdictions for corporate tax avoidance, this enables many multinationals to reduce their tax payments to close to zero. Most notably, in 2016 the European Commission ordered Apple to repay €13 billion in unpaid taxes and found Ireland culpable of providing illegal state aid to the tech giant.[49] The country then refused to accept the money and appealed the ruling, resulting in it being struck down by the European General Court in 2020.[50] The European Commission appealed and overturned that ruling before the European Court of Justice, arguing that the General Court's ruling included several legal errors.[51]

Kenya, by contrast, participated in good faith in the OECD's 'Inclusive Framework' process, which promised to offer a meaningful voice to non-OECD members in the negotiations, and backed proposals from the G24 group[52] which had the potential to deliver just reform in global taxing rights.[53]

After the G24 proposals were ignored in favour of an alternative agreement designed bilaterally between the US and France, which was skewed to favour the interests of OECD member states,[54] Kenya (along with Nigeria, Pakistan and Sri Lanka) refused to sign on to the deal.[55]

One of Kenya's key concerns regarding the OECD deal was its insistence that participating nations abandon unilateral digital services takes – a measure Kenya implemented in 2019 but which is vehemently opposed by countries such as the United States which host many of the world's largest tech companies.[56]

[49] The Financial Times, 30 August 2016, Apple's EU tax dispute explained. https://www.ft.com/content/3e0172a0-6e1b-11e6-9ac1-1055824ca907
[50] Ibidem.
[51] International Consortium of Investigative Journalists, 13 September 2024, Top EU court rules Apple owes Ireland over $14B in back taxes . https://www.icij.org/investigations/paradise-papers/top-eu-court-rules-apple-owes-ireland-over-14b-in-back-taxes/
[52] G-24 Working Group on tax policy and international tax cooperation, 17 January 2019, Proposal for Addressing Tax Challenges Arising from Digitalisation. https://www.g24.org/wp-content/uploads/2019/03/
[53] Tax Justice Network, 20 March 2019. Submission to the OECD consultation. https://taxjustice.net/reports/the-tax-justice-network-submission-to-the-oecd-consultation/
[54] Tax Justice Network-Africa, 2020, Time for developing countries to go beyond the OECD-led tax reform! https://taxjusticeafrica.net/resources/blog/time-developing-countries-go-beyond-oecd-led-tax-reform
[55] Kenya Revenue Authority, 2022, Navigating Complex Tax Consultations: An Assessment of Kenya's Engagement in the Inclusive Framework (IF). https://www.kra.go.ke/images/publications/Kenya-and-the-Inclusive-Framework---A-Case-Study-Report.docx.pdf
QZ, 2 November 2021, Why Kenya and Nigeria haven't agreed to a historic global corporate tax deal. https://qz.com/africa/2082754/why-kenya-and-nigeria-havent-agreed-to-global-corporate-tax-deal
[56] UNDP, 5 January 2023, The global corporate tax deal - an African perspective. https://www.undp.org/blog/global-corporate-tax-deal-african-perspective

As one of the leading members of the Africa Group, Kenya has also played a fundamental role in pushing forward proposals for the establishment of a framework convention on international taxation under the auspices of the United Nations.[57] The country has likewise protagonised efforts to advance cooperation on new global taxes to address the climate crisis and the achievement of the sustainable development goals.[58] With these fact in mind, it would appear that Kenya, through its participation in international fora and spaces, has acted as a champion for meaningful reforms to deliver a more just and progressive international taxation architecture.

[57] United Nations Second Committee, 5 October 2023. Speakers Call for New Innovative Methods of International Tax Cooperation, Reform of Inequitable Global Financial System, as Second Committee Takes Up Reportshttps://press.un.org/en/2023/gaef3586.doc.htm
[58] Al Jazeera, 6 Septemebr 2023. African leaders seek global taxes for climate change at Nairobi summit. https://www.aljazeera.com/news/2023/9/6/african-leaders-seek-global-taxes-for-climate-change-at-nairobi-summit

# VII. Human rights failures in Ireland's domestic tax regime

As explained in previous sections, Ireland's international human rights obligations require it to generate the maximum of available resources for the progressive realisation of human rights. Domestic tax policy is a critical concern in this regard for several reasons. Most obviously, progressive taxation is fundamental to raising the resources necessary for the realisation of human rights. The design and implementation of domestic taxation regime is also a key driver of inequality outcomes, which in turn determine human rights outcomes.[59] At a more systemic level, taxation also serves as a repricing tool to disincentivise 'public bads', like excess carbon emissions, which ramify into the enjoyment of human rights, and is a key modality of representation, strengthening the bond of accountability between states and citizens with regard *inter alia,* to human rights provisioning.

It must be acknowledged that Ireland has one of the most progressive tax and expenditure systems in the European Union,[60] but this must be considered in the light of the fact that it has among the highest rates of market inequality (i.e. inequality before tax and expenditure) in the European Union.[61] Moreover, it remains a low-tax economy[62] and even the IMF has argued that it should seek to expand its tax base.[63]

While a thoroughgoing analysis of Ireland's current domestic tax policies is beyond the scope of this briefing, a cursory review of its key features reveals several concerns from a human rights perspective, particularly with regard to the business and human rights agenda.

As explained in previous sections, Ireland is one of the world's most notorious corporate tax havens. Its rock bottom corporate tax rate of 12.5 percent is complemented by a series of loopholes and tax incentives which result in many multinational companies domiciled in the country paying effective rates of around 7 percent, and in many cases not paying any corporate tax.[64] The 7 percent effective corporation tax rate compares to a 31 percent effective rate for labour.

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[59] CESR, 2020, A Rights-Based Economy: Putting people and planet first . https://www.cesr.org/sites/default/files/Rights%20Based%20Economy%20briefing.pdf

[60] TASC, 2023, The State We Are In 2023. https://www.tasc.ie/assets/files/pdf/the_state_we_are_in_2023.pdf

[61] Ibidem.

[62] Organisation for Economic Cooperation and Development, Revenue Statistics 2022 – Ireland. https://www.oecd.org/tax/revenue-statistics-ireland.pdf

[63] Intnerational Monetary Fund, 2023, Ireland: Staff Concluding Statement for the 2023 Article IV Consultation Mission. https://www.imf.org/en/News/Articles/2023/11/03/cs-irl-2023

[64] EU Tax Observatory. https://www.taxobservatory.eu//www-site/uploads/2023/10/global_tax_evasion_report_24.pdf

Ireland's 'fiscal offering' enables financial structures through which multinational companies can book sales in an Irish entity and then shift the profits to low or no-tax jurisdictions through an Irish-registered but overseas resident company. Amid recurrent controversy over its facilitation of abusive international tax practices, a pattern has emerged in which Ireland purports to shut down tax avoidance structures but simultaneously opens new offerings to enable precisely the same behaviours.

The 'Double Irish', as it came to be known, was one of the world's most popular corporate tax avoidance structures and a source of repeated criticism from both European institutions and the US Senate.[65] It enabled multinational technology companies to keep intellectual property patents in subsidiaries that were based in Ireland but not domiciled there for tax purposes. In so doing, these companies could channel massive sums of profits through the country and onto other legal vehicles in low or no-tax jurisdictions such as the Cayman Islands. Indeed, a 2018 briefing by the National Bureau of Economic Research found that Ireland was the number one destination for profit shifting in the world, accounting for more than US $100 billion in shifted profits in 2015 alone.[66] When legislation was passed to end the Double Irish in 2014, it was effectively replaced by the 'Green Jersey', which provided tax breaks on intellectual property and thereby allowed companies to shield their profits from taxation without having to move the money to a third country.[67] While this 'onshore' approach proved attractive to many MNCs, others were offered a new offshore structure, the 'Single Malt', which allows multinational companies to shift their profits to other low-tax jurisdictions, such as Malta, with which Ireland has signed tax treaties.[68] Following repeated criticism from Irish civil society, the government announced in 2018 that it had reached an agreement with

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[65] The Irish Times, 'Google used 'double-Irish' to shift $75.4bn in profits out of Ireland', 17 April 2021, https://www.irishtimes.com/business/technology/google-used-double-irish-to-shift-75-4bn-in-profits-out-of-ireland-1.4540519. See also European Commission, *Decision of 30.8.2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple*, https://ec.europa.eu/competition/state_aid/cases/253200/253200_1851004_674_2.pdf ; US Senate Permament Subcommittee on Investigations, *Hearing on Offshore Profit Shifting and the US Tax Code* (20 September 2012), https://www.govinfo.gov/content/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pd

[66] Zucman, Torsolv, Weir, 2018, The Missing Profits of Nations. National Bureau of Economic Research. Available at: https://gabriel-zucman.eu/files/TWZ2018.pdf

[67] E. Clancy and M. B. Christensen, *Exposed: Apple's Golden Delicious Tax Deals* (report for the GUE/NGL group in European Parliament), June 2018: https://left.eu/content/uploads/2018/06/Apple_report_final.pdf

[68] Christian Aid Ireland, 'Impossible structures: tax outcomes overlooked by the 2015 Spillover Analysis', November 2017: https://www.christianaid.ie/resources/campaigns/impossible-structures-2017-tax-report

Malta to end aggressive tax planning,[69] but evidence shows that the structure is still in operation.[70]

When it has been challenged over its facilitation of crossborder tax abuse, the Irish government has generally pointed to a 2015 spillover analysis which found that Ireland's fiscal regime did not negatively affect revenue collection in developing countries.[71] However, this analysis only addressed 13 countries, 12 of which were among the lowest recipients of direct foreign investment from Ireland, and examined investment data for just two years.[72] Furthermore, it ignored indirect investment through other financial hubs, along with commissions and service fees, and failed to look at sales income reported in Irish sales hubs from customers in other countries, despite the fact this is a key mechanism of tax avoidance channelled through Ireland.[73] As such, the 2015 analysis is fundamentally flawed and incomplete, not to mention being out of date given the evolution of Ireland's 'fiscal offering' in recent years.

Ireland has repeatedly come under fire from human rights treaty bodies over the extraterritorial human rights impacts of its fiscal policies.[74] Most recently, following the 75th Session of the UN Committee on Economic, Social and Cultural Rights (CESCR), Committee members issued a complement of recommendations, calling for measures to address human rights impacts at both domestic and international levels.[75] Notably from the perspective of the Business and Human Rights agenda, these included a demand for "the adoption and enforcement of mandatory due diligence mechanisms" as one component of efforts to stamp out tax evasion and fraud by multinational companies domiciled in the country.[76]

Ireland's overreliance on corporate tax revenue – it accounted for over a quarter of overall revenue in 2022 – has long been a source of

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[69] Statement from Minister P. Donohoe, December 2018: https://www.gov.ie/en/press-release/723aff-minister-donohoe-welcomes-agreement-between-revenue-commissioners-ma/; Competent Authority Agreement under the Ireland-Malta Double Taxation Convention 2008 (November 2018), https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-35/35-01- 10.pdf ; Barry O'Halloran, 'Revenue to close 'single malt' tax loophole', Irish Times, 27 November 2018, https://www.irishtimes.com/business/economy/revenue-to-close-single-malt-tax-loophole-1.3712238
[70] Christian Aid Ireland, Abbott Laboratories Single Malt Tax Structure, September 2021, https://www.christianaid.ie/resources/campaigns/abbott-laboratories-single-malt-tax-shelter-christian-aid-ireland
[71] Department of Finance, IBFD Spillover Analysis. Possible Effects of the Irish Tax System on Developing Economies (July 2015): https://assets.gov.ie/181168/10d97d7e-cf59-4b85-88ae-de377997d069.pdf
[72] Christian Aid Ireland, Global Linkages: re-examining the empirical basis of the 2015 Spillover Analysis (November 2017): https://www.christianaid.ie/sites/default/files/2018-02/global-linkages-tax-report.pdf
[73] Ibidem.
[74] Committee on Economic, Social and Cultural Rights, 2024. Concluding observations on the fourth periodic report of Ireland. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FIRL%2FCO%2F4&Lang=en Committee on the Rights of the Child, 2023, Concluding observations on the combined fifth and sixth periodic reports of Ireland. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FIRL%2FCO%2F5-6&Lang=en
[75] Committee on Economic, Social and Cultural Rights, 2024. Concluding observations on the fourth periodic report of Ireland. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FIRL%2FCO%2F4&Lang=en
[76] Ibidem.

concern among the country's economic institutions.[77] While its extremely favourable treatment of multinational companies results in bountiful receipts for the Irish treasury,[78] this does not necessarily translate into more generous provisions for ordinary Irish households.

In its analysis of the 2024 national budget, Social Justice Ireland (SJI) warned that changes to the domestic tax regime would "widen divides in Irish society".[79] Effective income tax rates were again reduced in the latest national budget, following a trend that has been maintained for over two decades in the country. Given that progressive rates of income tax are central to the redistributive role of taxation, this is particularly problematic.

Another key area of concern in Ireland's domestic taxation regime is the proliferation of tax expenditures that may pose a threat to adequate revenue generation. Given that tax expenditures tend to benefit higher income earners and the wealthy most, these measures may exacerbate inequality levels. Tax breaks on capital and intergenerational wealth transfers are of particular concern, while similar measures targeting landlords' rental income have been interpreted as populist measures that will do little to counter the country's ongoing housing crisis.[80]

Ireland's complex matrix of tax expenditures was highlighted as an important factor underpinning the human rights retrogressions experienced in the 2008 financial crisis.[81] It is unsurprising, therefore, that the provision of similar policies in the latest budget has been criticised as a "return to past mistakes".[82] Dysfunctional tax incentives, together with market distortions caused by a bloated financial sector and overreliance on corporate taxation, meanwhile played a key role in driving the 2008 housing crisis and with it widespread violations of the right to housing.[83] Though more meaningful efforts to address supply shortages in the country's housing market are in train, there is controversy over who will benefit from the tax incentives deployed.[84]

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[77] Irish Fiscal Advisory Coundil, 2023, Understanding Ireland's top corporation taxpayers. https://www.fiscalcouncil.ie/wp-content/uploads/2023/05/Understanding-Irelands-Top-Corporation-Taxpayers-Brian-Cronin-Fiscal-Council-2023.pdf
[78] BBC, 23 April 2023, How the Republic of Ireland reaped an astonishing tax bounty https://bbc.com/news/world-europe-65343497
[79] Social Justice Ireland, 2023, Budget 2024 Analysis & Critique: A Budget of Missed Opportuniies Given Enormous Resources. https://www.socialjustice.ie/publication/budget-2024-analysis-and-critique
[80] Ibidem.
[81] Center for Economic and Social Rights, 2012, Mauled by the Celtic Tiger: Human rights in Ireland's economic meltdown. https://www.cesr.org/sites/default/files/cesr.ireland.briefing.12.02.2012_0.pdf
[82] Social Justice ireland, 2023, Budget 2024 Analysis & Critique: A Budget of Missed Opportuniies Given Enormous Resources. https://www.socialjustice.ie/publication/budget-2024-analysis-and-critique
[83] Nicholas Shaxon, 2019, The Finance Curse. See also: Center for Economic and Social Rights, 2012, Mauled by the Celtic Tiger: Human rights in Ireland's economic meltdown. https://www.cesr.org/sites/default/files/cesr.ireland.briefing.12.02.2012_0.pdf
[84] The Irish Examiner, 2 September 2023, Spotlight falls on the high cost of tax incentives for home buyers, builders, and landlords. https://www.irishexaminer.com/business/economy/arid-41217082.html See also: tax Strategy Group, 2023, Budget 2024 Tax Strategy Group papers, https://www.gov.ie/en/collection/a4b60f-tas-strategy-group-papers/

Moreover, the failure to provide meaningful analysis of the impacts of its tax expenditures reflects a continuing transparency failure, and one that ignores the recommendations of independent analyses commissioned by the government itself.[85]

[85] Commission on Taxation and Welfare, 2022, Foundations for the Future: Report of the Commission on Taxation and Welfare. https://www.gov.ie/en/campaigns/92902-commission-on-taxation-and-welfare/

# VIII. Human rights failures in Kenya's domestic tax regime

Kenya, like Ireland, has ratified the International Covenant on Economic, Social and Cultural Rights, and as such is bound to the same matrix of human rights obligations with regard to the design and implementation of fiscal policy. As a lower middle-income country with GDP per capita of US $2000, it clearly faces very different challenges and constraints to its European counterpart, however.

The country was hard hit by economic impacts of the Covid pandemic and the ensuing inflationary crisis, and also faces a staggering debt burden, with debt servicing accounting for 55 percent of revenue in 2023. [86] In nominal terms, Kenya's national debt surpassed 73 percent of GDP in 2023.[87]

In the context of the recent crisis, Kenya introduced a digital services tax and increased excise duties. The 2023 Fair Tax Monitor reported that, in the face of spiralling fiscal pressures, the country "mostly resorted to inequitable means of raising tax revenue while still maintaining a plethora of unevaluated harmful tax incentives and exemptions and failing to effectively tax wealth".[88]

At the heart of the question of whether the business sector is paying its fair share to public coffers in Kenya lies a contradiction; while Kenya has one of the highest corporate tax rates in the East Africa Region – 30 percent - it also offers an extremely generous and overly permissive range of tax incentives and exemptions. The Kenya Revenue Authority reports that tax incentives cost the country 5.15 percent of GDP in 2017 and 3 percent in 2020.[89]

One of the most contentious issues regarding Kenya's approach to taxing the business sector is its vigorous development of special economic zones (SEZ) and export processing zones (EPZ). The country's SEZs offer a broad range of very significant tax incentives, including that capital expenditure on buildings and machinery can be deducted at 100 percent. For those business entities taking advantage of SEZs, corporate income tax is reduced to 10 percent for the first 10 years and 15 percent for the following 10 years, while withholding taxes on payments to non-residents are reduced to 5 percent and dividends to both residents and non-residents are exempted entirely. Export processing zones meanwhile offer a 10-year corporate income tax

[86] IMF Country Report Kenya 2024. https://www.imf.org/-/media/Files/Publications/CR/2024/English/1KENEA2024001.ashx
[87] IMF Country Report Kenya 2024. https://www.imf.org/-/media/Files/Publications/CR/2024/English/1KENEA2024001.ashx
[88] Oxfam, 2022, Kenya Fair Tax Monitor. https://kenya.oxfam.org/latest/publications/kenya-fair-tax-monitor
[89] Kenya Revenue Authority, Tax Expenditures Report 2021.

holiday to enterprises devoted to manufacturing goods for export. This combines with a 10-year withholding tax holiday on dividends or other remittances to non-residents and 100 percent deduction for new investment in buildings and machinery.

Kenya's special economic zones were originally planned to replace the export processing zones, but in reality the two have continued to operate side-by-side, making it relatively straightforward for some actors to take advantage of both at the same time. Moreover, while investors are ostensibly required to demonstrate meaningful contribution to priority economic sectors, requirements for proof to demonstrate this are, in practice, very weak.[90]

With at least 28 special economic zones[91] and over 70 export processing zones now scattered around the country, there is increasing concern over the lack of evidence that their net impact is one of benefit to the country. The Parliamentary Budget Office reported in 2018 that revenue lost to the proliferation of tax incentives offered under these facilities was equivalent to 35.7 percent of overall revenue collected.[92] As a result, and despite Kenya's headline rate of 30 percent, corporate income tax accounted for 11 percent of tax revenue in 2023,[93] one of the lowest amounts in the region.

Being mindful of the potential concerns from the perspective of the business and human rights agenda, it should also be highlighted that Kenya's export processing zones have been criticised over more overt human rights violations, with widespread allegations of sexual harassment and the infringements on the labour rights of women in particular.[94]

The main taxation issue addressed in Kenya's Business and Human Rights Action Plan is that of transparency and illicit financial flows. There is no question that large sums of corporate tax revenue are lost through this channel, with the Kenya Revenue Authority estimating that US $565 million per annum are lost in this way. This is likely to be enabled, in part at least, by Kenya's network of 15 double tax treaties, which includes agreements with European tax havens including Ireland and the Netherlands, along with many others such as Mauritius and the Seychelles.

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[90] Oxfam, 2022, Kenya Fair Tax Monitor. https://kenya.oxfam.org/latest/publications/kenya-fair-tax-monitor

[91] https://www.pd.co.ke/news/28-special-economic-zones-gazetted-so-far-ps-reveals-210503/

[92] Parliamentary Budget Office, 2018, Eye on the Big Four: Budget Watch for 2018/2019 and the Medium term.

[93] Organisation for Economic Cooperation and Development, Revenue Statistics in Africa 2023 – Kenya, https://www.oecd.org/tax/tax-policy/revenue-statistics-africa-kenya.pdf

[94] Kenya Human Rights Commission/SOMO, 2008, Assessing the Impact of Kenya's Trade and Investment Policies and Agreements on Human Rights (FIDH, 2008) https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT_CESCR_NGO_KEN_41_9389_E.pdf

Kenya has taken steps to clamp down on crossborder corporate tax abuse, inter alia through the 2021 Finance Act which brought progressive changes to capitalisation rules and deductions related to interest payments, whilst also strengthening the audit powers of the Kenya Revenue Authority.[95] Steps to introduce beneficial ownership transparency in the country have also been welcomed by civil society actors, though there is significant concern that the public availability of BO information remains highly constrained and can only be accessed with the consent of the beneficial owner or through court order.[96]

In sum, while Kenya has taken important steps to improve transparency in some areas of its fiscal treatment of businesses, the system is still shrouded in a significant layer of opacity – especially with regard to tax incentives and special economic zones – and there is clearly room for the business sector, and multinational companies in particular, to make a far greater contribution to state coffers.

[95] Everlyn Muendo, Leonardo Wanyama, 2021, The Finance Bill Should Protect Small Businesses in New Tax Proposals, Citizen Digital. https:// citizentv.co.ke/blogs/opinion-the-finance-bill-should-protect-small-businesses-in-new-tax-proposals-11853373/?amp
[96] Oxfam, 2022, Kenya Fair Tax Monitor. https://kenya.oxfam.org/latest/publications/kenya-fair-tax-monitor
[96] https://www.pd.co.ke/news/28-special-economic-zones-gazetted-so-far-ps-reveals-210503/

# IX. Conclusions and recommendations

The United Nations Guiding Principles on Business and Human Rights represent the definitive normative guidance on how human rights law pertains to business. While states remain the primary duty bearers for the realisation of human rights, the UNGPs make it clear that businesses are subject to human rights responsibilities and that they must take action to prevent human rights abuses to which they are linked, whether directly through their own operations or indirectly through their supply chains.

As parties to the International Covenant on Economic, Social and Cultural Rights, almost all states are subject to a matrix of human rights norms and standards that should guide the regulation of business entities' tax behaviours. The respect, protect, fulfil framework obliges them to avoid any actions that would impede the realisation of human rights. In particular, the duty to protect requires that they prevent businesses and financial institutions from doing the same. The duty to fulfil meanwhile imposes an obligation to take positive legal, budgetary and administrative steps to advance the enjoyment of rights. Taken together with the obligation to generate the maximum of available resources for the progressive realisation of human rights, these standards mean that states must ensure corporations are paying, at a minimum, their fair share of taxation to government coffers.

These facts notwithstanding, abusive tax practices by multinational corporations continue to impose devastating human rights impacts on ordinary people around the world, with millions deprived of basic public services such as safe water and sanitation, education and basic healthcare. This reality is manifestly incompatible with the responsibility to respect human rights as set out under Pillar 2 of the UNGPs.

To date, corporate tax abuse has remained largely absent from the National Action Plans developed by dozens of governments around the world in order to implement the UNGPs. Recognition of the determinative human rights impacts of abusive tax practices has led the UN Working Group on Business and Human Rights to highlight taxation as a crucial concern that must be addressed through the implementation of the UNGPs moving forward, however.

As the analysis set out in this briefing demonstrates, Ireland and Kenya offer an illustrative contrast with regard to incorporation of corporate tax conduct in implementation of the UNGPs. While civil society in both countries made strong demands for tax justice to be incorporated into their National Action Plans, this call was ignored by the Irish government. The decision to omit this crucial concern, despite well-documented evidence of the impact Ireland's facilitation of abusive corporate tax practices has on the realisation of human rights in other countries, represented a wilful and pronounced example of policy incoherence in the implementation of the UNGPs. The country's aggressive approach to negotiating double tax agreements, and its regressive positions and behavior in international tax negotiations likewise appear incoherent with its stated commitment to the Principles. Thanks to a far more participative and inclusive process in the design of its National Action Plan, Kenya meanwhile explicitly addressed corporate tax behaviour in its implementation of the UNGPs. Its approach focused solely on the international dimensions of corporate taxation, however, and failed to ensure the business sector is paying its fair share at domestic level. In particular the expansion of special economic zones together with an overly generous and opaque regime of tax incentives and exemptions suggest Kenya still has some way to go in bringing its tax policies into line with its human rights obligations.

Moving forward, corporate tax conduct should be incorporated into National Action Plans on Business and Human Rights. In their implementation of the UNGPs, both governments and business entities should ensure that corporations are paying their fair share of taxation as part of a progressive fiscal regime that simultaneously counters socioeconomic inequalities and maximises the available resources for the realisation of human rights. Both governments and the private sector should cooperate in good faith at the international level to ensure businesses are making a just contribution to public coffers in every jurisdiction in which they operate.

In their implementation of the UNGPs, **governments** should ensure that corporate tax conduct is explicitly addressed as a key human rights concern. This requires the design and implementation of progressive tax policies that ensure the private sector is obliged to pay its fair share to public coffers in line with internationally agreed human rights standards. Achieving this in turn requires robust transparency standards, delivering comprehensive public country by country reporting along with full public beneficial ownership transparency. In the development of National Action Plans on Business and Human Rights, governments should guarantee comprehensive and meaningful participation of civil society organisations, along with capacity building on the linkages between corporate tax conduct, financial transparency and human rights outcomes. They should further commission independent human rights impact assessments of their tax policies, with due attention to the spillover effects their tax regime may have on the capacity of other countries to effectively collect tax from multinational corporations.

Governments should also cooperate in good faith in international fora so as to ensure corporations comply with the spirit as well as the letter of the law in all jurisdictions in which they operate. The same principles of fairness and transparency should also be adhered to in the negotiation of double tax agreements. Being mindful of the Organisation for Economic Cooperation and Development’s well-documented failure to deliver just reforms to international tax governance[97] - largely due to the exclusive dynamics of its stewardship of international negotiations - advancing human rights-compliant tax cooperation further requires that governments throw support behind the negotiations on a Framework Convention on International Tax Cooperation currently underway at the United Nations.

**Business entities** committed to complying with the corporate responsibility to respect human rights, both in their own operations and through their supply chains, should ensure that they are paying the right amount of tax in the right place at the right time, and that they are doing so transparently. This requires that they have no artificial presence in tax havens, that they deliver comprehensive public country-by-country reports on all entities within their multinational group, and that they provide full, public beneficial ownership transparency. They should demonstrate through their reporting that their tax arrangements comply with the spirit as well as the letter of the law in all countries in which they have presence. Importantly, responsibility for delivering on these criteria should be mandated to a named-individual at the board level. Human rights due diligence systems deployed in their supply chains should also consider the tax conduct of suppliers and other commercial partners, especially with regard to major accountancy firms.

Both **civil society organisations** and **National Human Rights Institutions** should demand the inclusion of just corporate taxation as a core element of National Action Plans on Business and Human Rights. This should comprise robust criteria on both responsible tax conduct, reporting and transparency, including measures to deliver automatic exchange of information, full public beneficial ownership transparency and public country by country reporting. Civil society organisations and NHRIs should further demand that state and business efforts to implement the UNGPs explicitly recognise the human rights impacts of corporate tax behaviour and that independent human rights impact assessments of corporate tax policies be carried out as part of this undertaking. In accordance with the duty to international cooperation and extra-territorial human rights obligations, civil society and NHRIs should further insist that their governments cooperate in good faith in international negotiations so as to halt the race to the bottom in corporate taxation and ensure business entities are paying their fair share of tax in all jurisdictions in which they operate. This should include committing to support a just process and outcome in the negotiation of the Framework Convention on International Tax Cooperation at the UN.

[97] Tax Justice Network, 21 May 2024, Litany of failure: the OECD’s stewardship of international taxation. https://taxjustice.net/reports/litany-of-failure-the-oecds-stewardship-of-international-taxation/