Human Rights and Public Finance

Budgets and the Promotion of Economic and Social Rights

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Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective

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I. Introduction

Taxation is a rarely explored topic on the human rights agenda, yet it is one of the most important policy instruments governments can deploy to generate the resources needed to realise the full range of human rights. This chapter looks at tax as a human rights issue, and explores how inequitable tax policies can be assessed and challenged from the perspective of human rights principles and standards.

The chapter begins by highlighting three central functions of taxation from a human rights perspective: its role in generating the 'maximum available resources' to finance human rights-related expenditure; its potential role in redistributing resources in order to mitigate and redress social inequalities; and its role in cementing the bonds of accountability between state and citizen. The author argues that it is particularly critical to bring taxation under the lens of human rights scrutiny in the wake of the global financial and economic crises, and the international community's failure to meet many of the Millennium Development Goals (MDGs), contexts which have brought to the fore the need to bolster the resourcing, redistributive and accountability functions of taxation.

In doing so, the author highlights two recent examples of the application of human rights analysis to domestic tax policy, drawing on the experience of the Center for Economic and Social Rights (CESR) in tracing the link between inadequate revenue generation and poor human development outcomes in Guatemala, and assessing the human rights impact of fiscal austerity measures adopted in Europe in the aftermath of recession. The author concludes with some reflections on further opportunities for linking human rights and tax justice advocacy at the

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international as well as national level, including the potential for human rights principles to strengthen the case for a global financial transactions tax and more effective action against international tax evasion.

II. Fiscal Policy and the Resourcing of Rights

The effective protection of all human rights—whether civil, political, economic, social or cultural—has resource implications. Training law enforcement officials in the prevention of torture, combating gender stereotypes in society or guaranteeing defendants a fair trial all involve the creation of state institutions and programmes which require a considerable investment of public funds. Yet, as argued elsewhere in this volume, the question of resources is particularly critical to the fulfilment of economic, social and cultural rights (ESC rights), since a country's ability to ensure the conditions in which these rights can be fully realised will be conditioned to a great extent by the resources it has at its disposal to fund the requisite public services and social policy interventions.[1]

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) places an obligation on each State Party to the Covenant

> to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[2]

Despite its ungainly phrasing, Article 2(1) articulates what should be seen as a fundamental tenet of economic and social policymaking: that advancing swiftly towards the fulfilment of these rights is an obligation of all states, regardless of their level of development, and that in order to do so they must deploy the maximum resources they can generate domestically and, where necessary, through international cooperation and assistance.[3] A lack of adequate resources cannot

[1] See Elson, Balakrishnan and Heintz, ch 1 in this volume.

[2] International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by UN General Assembly resolution 2200, 16 December 1966, Art 2(1).

[3] The normative scope and content of the principle of progressive realisation according to the maximum of available resources has been addressed in a number of General Comments issued by the United Nations treaty bodies. See in particular UN Committee on Economic, Social and Cultural Rights, ComESCR, General Comment No 3 on the nature of States parties' obligations (art 2 (1)), UN Doc E/1991/23 (1990). It has been further elucidated in the case law of several jurisdictions around the world. See International Network for Economic, Social and Cultural Rights, 'Database of Economic, Social and Cultural Rights Related Jurisprudence, Cases and Other Decisions': www.escr-net.org/caselaw. The content of Art 2(1) ICESCR has also been the subject of extensive legal scholarship. See eg, M Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp, Intersentia, 2003) ch 7.

be invoked by any state as an excuse for inaction in the face of deprivations of economic and social rights (ESR).[4]

The principle of 'progressive realisation', with its apparent underlying premise of linear progress fuelled by increasing growth and ever expanding resources, may seem ill-suited to our current age of economic recession and fiscal retrenchment. Yet it is particularly important to ensure it is given effect to in times of economic downturn. As affirmed by the Committee on Economic, Social and Cultural Rights (the Committee)—the UN expert body which monitors compliance by States Parties with the provisions of the Covenant—even in times of resource constraints, all states have a duty to move as expeditiously and effectively as possible towards the goal of fully realising all rights.[5] Any deliberately retrogressive measures require strict justification and must be carefully considered with regard to the totality of rights set forth in the Covenant.[6] In straightened circumstances, states must demonstrate that every effort has been made to use all resources at their disposal to satisfy as a matter of priority their minimum core human rights obligations, to take deliberate and targeted measures to safeguard the rights of vulnerable members of the population and to ensure the widest possible enjoyment of rights in the prevailing circumstances.[7]

Much attention has rightly been paid to the essential role of international cooperation in helping resource-constrained states to fulfil their economic, social and cultural rights obligations. As the Committee has emphasised,

> in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realisation

[4] ComESCR General Comment No 3, para 10.

[5] Ibid paras 9 and 11.

[6] Ibid para 9. The Committee has since elaborated on the concept of non-retrogression in other General Comments, including those on the rights to housing (ComESCR General Comment No 4 on the right to adequate housing, UN Doc E/1992/23) Annex iii, 114 (1991), para 11; health (ComESCR General Comment No 14 on the right to the highest attainable standard of health (art 12), UN Doc E/C.12/2000/4 (2000), para 32); and social security (ComESCR General Comment No 19 on the right to social security, UN Doc E/C.12/GC/19), para 42), as well as in a recent letter to States Parties to the ICESCR from the ComESCR Chairperson, AG Pillay following its 48th session in May 2012. Committee on Economic, Social and Cultural Rights, 'Letter from ComESCR Chairperson to States Parties in the context of the economic and financial crisis', CESCR/48th/SP/MAB/SW, 16 May 2012: www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf. For further analysis of the concept of non-retrogression in international human rights law, see C Courtis (ed), *Ni Un Paso Atrás, La Prohibición de Regresividad en Materia de Derechos Sociales* (Buenos Aires, Del Puerto, 2006) and Sepulveda above n 3.

[7] ComESCR General Comment No 3, paras 10–12. See also the Committee's 2007 statement, 'An Evaluation of the Obligation to Take Steps to the Maximum of Available Resources under an Optional Protocol to the Covenant', UN Doc E/C.12/2007/1 (2007), para 4. The duty to satisfy minimum core obligations irrespective of the level of resources is reaffirmed in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights drawn up by a group of international experts convened by the International Commission of Jurists and Maastricht University in January 1997, paras 9 and 10: www1.umn.edu/humanrts/instree/Maastrichtguidelines.html.

of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.[8]

Nevertheless, this obligation in no way absolves states of their primary duty to organise and deploy the resources domestically available to them. Fiscal policy—referring to the use of government revenue collection and expenditure to influence the economy[9]—is one of the key policy instruments states have to shape the conditions in which all human rights, and particularly ESR, can be fulfilled.

III. Tax as a Human Rights Issue

Within the human rights community, there have been growing efforts over the last decade to analyse budgetary processes and assess the allocation of resources in light of human rights criteria.[10] Rights-based budget analysis has been part of a broader trend towards greater oversight of how public funds are spent, in order to bring about greater accountability and transparency in policymaking.[11] Although the wealth of experience from different parts of the world makes it difficult to generalise, budget analysis from a human rights perspective has tended to involve assessing the adequacy of public expenditure on specific sectors, such as health or education, as well as the equity or fairness of budgetary allocations in terms of their distributional impacts on disadvantaged population groups such as women or indigenous people.[12]

Less attention has traditionally been paid from a human rights perspective to the revenue side of the fiscal policy equation. For example, as highlighted in the chapter by Elson, Balakrishnan and Heintz in this volume, two key treaty body statements from 2007 analysing the meaning of 'maximum available resources' under Article 2(1) ICESCR and Article 4 of the UN Convention on the Rights of

[8] ComESCR General Comment No 3, para 14. The content of the obligation to provide international cooperation and assistance for the realisation of ESC rights has been further articulated in the Maastricht Principles on the Extra-Territorial Obligations of States in the area of Economic, Social and Cultural Rights, drafted by a group of 40 distinguished experts in international law and human rights from around the world convened by the International Commission of Jurists and Maastricht University in February 2012. See, in particular, Principles 28–35: www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm.

[9] A O'Sullivan and SM Sheffrin, *Economics: Principles in Action* (New Jersey, Pearson, 2003) 387.

[10] For more on human rights-based budget work, see the contributions by Nolan, Rooney and Dutschke in this volume.

[11] See M Robinson (ed), *Budgeting for the Poor* (Basingstoke, Palgrave Macmillan, 2008) for an analytical overview of the field of civil society budget work.

[12] For a selective overview of budget work across the globe, including human rights-based analysis, see International Budget Partnership (IBP), 'Who Does Budget Work: Case Studies': international-budget.org/who-does-budget-work/case-studies. On budget analysis from a women's rights perspective, see D Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW* (New York, UNIFEM, 2006).

the Child do not address the issue of taxation as a means of resource generation, focusing largely on budget allocations and international assistance.[13] International human rights standards grant governments a wide margin of discretion in matters of economic and social policy, acknowledging that they are often faced with invidious choices regarding the resources to be assigned to competing social policy priorities within their existing budgetary constraints.[14] This may in part account for the traditional reluctance of human rights adjudication and oversight mechanisms to weigh in on politically contentious aspects of fiscal policy such as taxation.

Increasingly, however, voices from within the international human rights system as well as from the broader human rights movement have begun to raise concerns that inadequate efforts to generate more resources for the public coffers can pose a serious obstacle to the realisation of human rights.[15] In particular, a number of UN Special Rapporteurs with mandates focused on economic, social and cultural rights have highlighted the role of taxation in creating conditions in which all can enjoy these rights.[16] Similarly, other UN human rights experts have warned that inadequate revenue generation can also jeopardise civil and political rights, where for example the effective administration of justice is undermined through under-resourcing of the judicial or law enforcement systems.[17]

Taxation can be seen as having several essential functions of great relevance to states' human rights obligations. First, and most obviously, as described above, taxation has a *resourcing* function, enabling investment in public services and programmes in areas such as health, education, housing, justice, security social protection, transport and communications.[18] For most states, taxation is the primary

[13] See ComESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources"' above n 7 and Committee on the Rights of the Child, 'Day of General Discussion—Resources for the Rights of the Child: Responsibility of States', 46th Session (2007).

[14] The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights recognises that a 'State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant': Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on 10 December 2008, art 8(4).

[15] See eg, ComESCR, 'Concluding Observations: Hong Kong', UN Doc E/C.12/1/Add. 58 (2001), para 14; ComRC, 'Concluding Observations: Georgia', UN Doc CRC/C/15/Add. 124 (2000), paras 18–19, followed up in CRC/C/15/ADD.222 (CRC, 2003); and on Guatemala, CRC/C/GTM/CO/3-4 (CRC, 2010), paras 25 and 26.

[16] See D Türk, 'Report of the Special Rapporteur on the Realisation of Economic, Social and Cultural Rights, (UN Doc E/CN.4/Sub.2/1992/16), para 83; M Sepúlveda Carmona, 'Report of the Independent Expert on the question of human rights and extreme poverty on the human rights based approach to recovery from the global economic and financial crises, with a focus on those living in poverty' (UN Doc A/HRC/17/34), paras 80–81 (on the obstacle posed by low levels of taxation to the protection of the human rights of those living in poverty in the context of the global economic crises); and A Grover 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (UN Doc A/67/302), para 15 (on the role of progressive taxation in financing of the right to health).

[17] See eg, P Alston, 'Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Guatemala' (A/HRC/4/20/Add.2), para 61.

[18] M Todaro, and S Smith, *Economic Development* (Harlow, Pearson, 2006) 762.

source of public resource generation.[19] It is therefore one of the critical areas of policy to interrogate when assessing whether states are drawing on the maximum of available resources,[20] and an indispensable policy instrument for mobilising additional public resources without necessarily sacrificing spending priorities, thereby expanding what economists refer to as 'fiscal space'.[21] In many countries, both north and south, it is not simply a question of assessing how the budgetary pie has been divided up, but of questioning the size of the pie.

Second, taxation has a potentially *redistributive* function, providing mechanisms for transferring and redistributing wealth from upper to lower income groups so as to reduce income inequalities and disparities in human rights enjoyment that flow from these.[22] Redistributive tax measures are thus part of the arsenal of measures that states should deploy to tackle and redress systemic discrimination, and to ensure universal access to ESR.[23] Taxation has been shown to be a key determinant of gender inequality in the enjoyment of ESR, as tax structures frequently discriminate against women directly or indirectly, whether in their formulation or impact.[24] While eliminating adverse discrimination in the economic and social sphere is a human rights imperative in its own right,[25] the existence of stark social inequalities is a factor fuelling societies' vulnerability to conflict and political instability, contexts in which an even broader range of rights are put at risk.[26]

[19] M Moore, 'How Does Taxation Affect The Quality of Governance?' (2007) Institute of Development Studies Working Paper 280, 14. The exceptions are the few states which obtain a larger proportion of their revenue from natural resource export surpluses or from international development assistance.

[20] See R Balakrishnan, D Elson, J Heintz and N Lusiani, *Maximum Available Resources and Human Rights: Analytical Report* (New Jersey, Center for Women's Global Leadership, Rutgers University, 2011). Balakrishnan et al identify taxation as one of five points in the 'Maximum Available Resources (MAR) Star', along with public spending, monetary and debt policy and international cooperation.

[21] I Ortiz, J Chai and M Cummins, 'Identifying Fiscal Space: Options for Social and Economic Development for Children and Poor Households in 184 Countries' (2011) Social and Economic Policy Working Paper (New York, UNICEF) 7–16. On the concept of 'fiscal space' and its relationship to the principle of progressive realisation according to maximum available resources under Art 2(1) ICESCR, see Elson, Balakrishnan and Heintz, ch 1 in this volume.

[22] Türk, 'Report of the Special Rapporteur' above n 16, para 83. On the role of progressive taxation policies in reducing inequalities, see I Ortiz and M Cummins, *Global Inequality: Beyond the Bottom Billion: A rapid review of income distribution in 141 countries* (UNICEF, New York, 2011) 38–45.

[23] On the links between progressive fiscal policy, the reduction of inequality and promoting universal access to social rights, see M Hopenhayn, *Desigualdades Sociales y Derechos Humanos: Hacia un Pacto de Protección Social* (Santiago, CEPAL, 2006).

[24] See Elson above n 12, 69–103.

[25] Art 2(2) ICESCR obliges each State Party to guarantee that all Covenant rights are exercised without discrimination of any kind. The General Comments of the Committee on Economic, Social and Cultural Rights analyse the application of this principle to specific Covenant rights. ComESCR General Comment 20 on non-discrimination provides further clarification of the Committee's understanding of the normative content and scope of Art 2(2). See ComESCR General Comment No 20 on Non-discrimination in economic, social and cultural rights, UN Doc E/C.12/GC/20 (2009).

[26] On the role of taxation in tackling inequalities and mitigating the risk of social conflicts, see F Stewart, G Brown and A Cobham, 'The Implications of Horizontal and Vertical Inequalities for Tax and Expenditure Policies' (2009) Crise Working Paper 65 (Centre for Research on Inequality, Human Security and Ethnicity).

Taxation also has an *accountability* function, helping to promote social citizenship and responsive government. Drawing on an extensive body of thought on the role played by taxation in the emergence of the modern state, recent development practice has increasingly focused on taxation as a manifestation of the social contract between state and citizen, and as a means of strengthening accountable governance.[27] Taxation incentivises those in power to promote citizen prosperity and to develop institutional capability, while motivating taxpayers to scrutinise how revenue is used and engage in public policy deliberation.[28] Its central role in state-building is thus seen as residing in two principal areas: the rise of a social contract based on bargaining around tax; and the institution-building stimulus provided by the revenue imperative, fostering accountability, capability and responsiveness of state institutions.[29] Research suggests that states which get their primary revenues from sources other than taxation of their citizens—for example from natural resource exploitation or heavy dependence on foreign aid donors—tend to be more corrupt, conflict-ridden, authoritarian, poorer, more unequal, and have lower long-term economic growth, whereas governments which are dependent to a greater extent on domestic taxes for their revenue have incentives to be more answerable to taxpayers.[30]

Human rights concerns are particularly likely to occur where a country's tax structures and policies undermine these resourcing, distributive and accountability functions. The need to bolster these functions of taxation has increasingly come to the fore in recent years, as the international community takes stock of the slow progress made in meeting the MDGs agreed at the turn of the century,[31] and as countries of the global north and south struggle to recover from the impact of the global financial and economic crises. One of the key lessons learnt from the current MDG process is that greater attention must be paid to the role of domestic resource mobilisation as a key determinant of poverty eradication efforts in developing countries.[32] This is all the more pertinent as economic recession in donor

[27] See eg, Moore, 'How Does Taxation Affect the Quality of Governance?' above n 19; and D Brautigam, OH Fjeldstad and M Moore (eds), *Taxation and State-Building in Developing Countries: Capacity and Consent* (Cambridge, Cambridge University Press, 2008).

[28] Moore, 'How Does Taxation Affect the Quality of Governance?' above n 19, 17.

[29] D Brautigam, 'Taxation and State Building in Developing Countries' above n 27, 1.

[30] Brautigam above n 29. See also ML Ross, 'Does Taxation Lead to Representation?' (2004) 34 *British Journal of Political Science* 229.

[31] On the progress made in meeting the Millennium Development Goals, see United Nations, *The Millennium Development Goals Report 2012* (New York, UN, 2012).

[32] In 2005 the Millennium Campaign projected that the increased investments needed to achieve the MDGs could be financed through domestic resource mobilisation in developing countries through a four per-cent increase in tax revenue as a percentage of GDP. See UN Millennium Campaign, 'Resources Required to Finance the Millennium Development Goals', in *Investing in Development: A Practical Plan to Achieve the MDGs* (UN Millennium Campaign, 2005). In the outcome document of the MDG Review Summit in September 2010, states resolved to enhance and strengthen domestic resource mobilisation and fiscal space through more efficient tax collection, broadening the tax base and effectively combating tax evasion and capital flight. See 'Keeping the Promise: United to Achieve the Millennium Development Goals', resolution adopted by the UN General Assembly at its 64th session, 17 September 2010, UN Doc. A/65/L.1, 30.

countries threatens to reduce levels of official development assistance (ODA), and as the incidence of poverty is increasingly to be found in middle-income developing countries less reliant on ODA.[33]

In many developing countries, the resourcing function has been undermined because weak and ineffective tax systems continue to yield a far smaller tax base than in industrialised countries, meaning that the amount of revenue generated for the public coffers is often insufficient to enable adequate investment in areas of public spending critical for the fulfilment of human development objectives.[34] More than 20 low-income countries still have tax ratios (tax revenue relative to Gross Domestic Product (GDP)) below 15 per cent, and in no region has there been a significant increase in the average tax ratio over the last three decades, other than in Latin America and the Caribbean.[35] Tax yields have also reduced in many industrialised as well as developing countries as a result of rising unemployment and declining consumption in the wake of the global economic crisis, exacerbating their fiscal deficits and prompting further reductions in areas of social spending essential to the realisation of ESR.[36]

The redistributive function of taxation has also been undermined where tax reforms implemented in the context of development or economic recovery strategies are regressive, falling disproportionately on lower-income quintiles and therefore aggravating social inequalities instead of reducing them.[37] Tax reforms promoted by the World Bank and International Monetary Fund (IMF) in developing countries since the 1980s have tended to favour the introduction or expansion of indirect taxation (in particular through value added taxes or VAT) and reductions in the rates of corporate and personal income taxation.[38] Taxation regimes which rely heavily on indirect taxes on consumption rather than direct income taxes are often regressive, ie, they place a greater burden on the poor and may be discriminatory in effect, particularly if proper exemptions and other safeguards are not in place and if tax is applied to items of mass consumption such as basic

[33] See A Sumner, 'Global Poverty and the New Bottom Billion: Three Quarters of the World's Poor Live in Middle-income Countries', Institute of Development Studies Working Paper 349, November 2010.

[34] See International Monetary Fund (IMF), *Revenue Mobilisation in Developing Countries*, March 2011; T Minh Le, B Moreno-Dodson and J Rajchaichanintham, *Expanding Taxable Capacity and Reaching Revenue Potential: Cross-country Analysis*, World Bank Working Paper (2008).

[35] IMF, *Revenue Mobilisation* above n 34, 7.

[36] See I Ortiz and M Cummins (eds), *A Recovery for All: Rethinking Socio-Economic Policies for Children and Poor Households* (New York, UNICEF, 2012). See also J Brondolo, 'Collecting Taxes during an Economic Crisis: Challenges and Policy Options', IMF Fiscal Affairs Dept, Staff Position Note July 2009: www.imf.org/external/pubs/ft/spn/2009/spn0917.pdf.

[37] D Itriago, *Owning Development: Taxation to Fight Poverty* (Oxfam International, Oxford, 2011).

[38] See M Ruiz, R Sharpe and MJ Romero, *Approaches and Impacts: IFI Tax Policy in Developing Countries* (Eurodad/ActionAid, 2011): www.actionaid.org.uk/doc_lib/ifi_tax_policy_developing_countries.pdf.

foods, clothing and household utensils.[39] For example, the UN Special Rapporteur on the Right to Food noted that tax rates in Brazil were comparatively high for goods and services and low for income and property, with the inequitable result that government social programmes 'are essentially funded by the very persons whom they seek to benefit, as the regressive system of taxation seriously limits the redistributive aspect of the programmes'.[40]

Direct taxation on income and property is generally considered more progressive, in that the amount deducted rises proportionate to income.[41] Yet personal income taxes still yield much less revenue as a proportion of GDP in developing countries than in OECD (Organisation for Economic Co-operation and Development) countries.[42] Indirect taxation such as value added taxes on sales and import, export and excise duties on commodities constitutes the primary source of fiscal revenue in least developed countries.[43] Data also suggest that the contribution of consumption taxes to overall revenue increased in middle-income countries from around 10 per cent of GDP in 2000 to 14 per cent in 2009, with a slightly lower increase for lower-income countries.[44] The comparative ease and efficiency of collecting indirect taxes on sales and commodities, as opposed to income, is often advanced as one of the reasons why these account for such a large proportion of public revenues in many developing countries, yet the evidence for this is conflicting.[45]

On the other hand, corporate tax benefits have tended to be ring-fenced and safeguarded in tax reforms promoted by international financial institutions, both in the context of development assistance to low income countries and in rescue packages to countries facing fiscal deficits.[46] Corporate tax incentives, concessions and exemptions offered to companies in a bid to attract and retain investment deprive many countries of potentially available resources for human rights realisation. Developing countries across all regions decreased commercial tax rates, on

[39] See OECD, 'Income Inequality and Growth: The Role of Taxes and Transfers', OECD Economics Department Policy Notes, No 9, January 2012. Ortiz and Cummins, *A Recovery for All* above n 36, 242. As Ortiz and Cummins point out, consumption taxes can be progressively designed by allowing exemptions for basic goods such as fuel or food staples, while setting higher rates for luxury goods that are consumed principally by wealthier sectors, such as certain types of car or alcoholic beverages, or goods with negative public health effects such as tobacco: ibid 246.

[40] O de Schutter, 'Report of the Special Rapporteur on the Right to Food—Mission to Brazil' (UN Doc A/HRC/13/33/Add.6, 2009), para 36.

[41] Ortiz and Cummins, *A Recovery for All* above n 36, 247.

[42] J Stiglitz, 'Development-oriented Tax Policy' (2008) Initiative for Policy Dialogue Working Paper Series, (Columbia University) 7: academiccommons.columbia.edu/catalog/ac:126733. See also, IMF above n 34, 31.

[43] Todaro and Smith above n 18, 760.

[44] Ortiz and Cummins, *A Recovery for All* above n 36, 245.

[45] Joseph Stiglitz, for example, argues that in many developing countries VAT is not an efficient tax and can undermine growth and fuel unemployment. See Stiglitz, 'Development-oriented Tax Policy' above n 42, 9. The IMF, on the other hand, finds VAT to be a 'relatively efficient' instrument and that its distributional impact is 'benign'. See IMF, *Revenue Mobilisation* above n 34, 25.

[46] Ortiz and Cummins, *A Recovery for All* above n 36, 248.

average, between 2005 and 2010.[47] The argument that lowering corporate taxes is a prerequisite for encouraging business investment and entrepreneurial activity is increasingly being questioned based on the experience of many countries which have dramatically cut corporate tax rates without seeing corresponding benefits in economic activity and ability to invest in human and social development.[48] Analysts increasingly converge on the conclusion that other factors play a more decisive role in determining investment decisions.[49] In the case of multinational foreign enterprises, the ability of developing countries to collect substantial taxes is frustrated where locally run enterprises are able to shift profits to affiliates in countries offering lower levels of taxation through transfer pricing (artificially inflating the price paid for intermediate products purchased from overseas affiliates so as to lower stated local profits). Estimates place the loss of revenue resulting from transfer pricing at scores of millions of dollars.[50]

Such imbalances and inequities in the tax structure often reflect broader deficits in democratic governance, which result in tax systems skewed in favour of wealthy economic elites or powerful business interests rather than accountable to the ordinary citizen. For example, in countries where the ownership of property is heavily concentrated and therefore represents a major determinant of inequality, property taxes can be an efficient and administratively simple mechanism, both for generating public revenues and correcting gross inequalities in income distribution.[51] Nevertheless, the share of property taxes has not increased in the majority of developing countries in recent decades, a fact attributable to the political influence of large landowning elites in many regions.[52]

Entrenched cultures of 'elite capture' not only permit the lawful avoidance of taxes by those able to influence fiscal policy decisions. They encourage large-scale tax evasion by the wealthiest sectors of the population.[53] Estimates by the Tax Justice Network based on World Bank data indicate that US$3.1 trillion is lost annually to tax evasion globally; Africa is estimated to lose tax revenues amounting to approximately US$79 billion annually, representing 98 per cent of total health care expenditures for that continent, while in Bolivia, tax losses due to evasion were estimated at over four times the annual health care budget.[54]

[47] Ibid.

[48] Ibid. On challenges to orthodox economic assumptions regarding the benefits of low tax rates, see generally JE Stiglitz, *The Price of Inequality, How Today's Divided Society Endangers Our Future* (New York, Norton, 2012) and J Quiggin, *Zombie Economics: How Dead Ideas Still Walk Among Us* (Princeton, Princeton University Press, 2010).

[49] IMF, *Revenue Mobilisation* above n 34, 35.

[50] See Christian Aid, *False Profits: Robbing the Poor to Keep the Rich Tax-free*, (March 2009).

[51] Todaro and Smith above n 18, 762.

[52] Ibid.

[53] See J Henry, *The Price of Offshore Revisited* (Tax Justice Network, 2012): www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf.

[54] See Tax Justice Network, *The Cost of Tax Abuse: A Briefing Paper on the Cost of Tax Evasion Worldwide* (Tax Justice Network, 2011): www.tackletaxhavens.com/Cost_of_Tax_Abuse_TJN%20Research_23rd_Nov_2011.pdf. See also D Kar and S Freitas, *Illicit Financial Flows from Developing Countries 2001–2010* (Global Financial Integrity, 2012) 27 which estimates that US$859 billion in

The weakness of tax administration systems, particularly in developing countries, undermines their effectiveness in dealing with large-scale tax evasion and thus expanding the tax base. The perception of tax administration systems as corrupt, unfair and inefficient fosters greater tax secrecy on the part of the citizen and lack of transparency on the part of the state, undermining faith in taxation as an expression of the social contract linking both in a bond of mutual accountability.[55]

The following sections highlight how human rights analysis can be brought to bear in specific contexts to address the failure of taxation policy to fulfil its resourcing, redistributive and accountability functions, as described above. Drawing on research and advocacy carried out by the Center for Economic and Social Rights, they look at the application of human rights analysis to taxation in two different contexts: the impact of inadequate tax mobilisation in Guatemala, a low-to-middle income country, on the country's human development objectives and on its population's basic ESR; and the failure to put in place equitable tax policies in response to the fiscal deficits created by the economic crises in Ireland and Spain.

IV. Tax and Stunted Human Development: The 'Rights or Privileges' Project in Guatemala

In the project, *Rights or Privileges? Fiscal Commitment to the Rights to Health, Education and Food in Guatemala*, CESR and the Instituto Centroamericano de Estudios Fiscales (ICEFI) developed and applied a rights-based framework for holding the Guatemalan State accountable for the role that its tax and budget policies played in stunting the fulfilment of ESR in the country.[56] A collaboration between an international human rights organisation and a Central American civil society organisation specialising in monitoring fiscal policies, the project aimed to assess Guatemala's development efforts through the lens of its human rights obligations. Taking as its starting point the country's astonishingly high rates of maternal death, child stunting (an indicator of chronic malnutrition) and primary school incompletion, the project sought in particular to interrogate the State's efforts

revenues is lost annually due to illicit financial flows, including tax avoidance, tax evasion and other forms of financial crime and corruption.

[55] See Brautigam above n 29; Moore, 'How Does Taxation Affect the Quality of Governance?' above n 19.

[56] See Center for Economic and Social Rights and Instituto Centroamericano de Estudios Fiscales (CESR/ICEFI), *Rights or Privileges? Fiscal Commitment to the Rights to Health, Education and Food in Guatemala*, Executive Summary (Guatemala City/Madrid, CESR/ICEFI, 2009). The full study is available in Spanish as *Derechos o Privilegios? El Compromiso Fiscal con La Salud, La Educación y La Alimentación en Guatemala.* Both are available at: www.cesr.org/guatemala. The footnote references below refer to the English version.

to generate the maximum of its potentially available resources to progressively fulfil the rights to reproductive health, food and education. Tax analysis was an integral part of a more holistic assessment of Guatemala's compliance with its obligations under Article 2(1) ICESCR.

Despite being a middle-income country with the largest economy in Central America, Guatemala's human development indicators are alarming, with more than half the population living below the national poverty line and one in seven Guatemalans living in extreme poverty.[57] The country has among the highest rates of child malnutrition, maternal mortality and child primary incompletion in Latin America, despite these issues having been declared a national priority for many years by successive governments in Guatemala, and the renewed commitments made in the context of the MDGs.[58] The persistence of systemic inequality and discrimination could be partially explained by the legacy of almost 40 years of armed conflict. Nevertheless, the study was motivated by the conviction that the dismal state of ESC rights in Guatemala could not be attributed solely to limited state resources, but to inadequate and inequitable fiscal policies which constrain how resources are generated and distributed.

In consultation with development economists and public health experts, CESR and ICEFI devised a methodological framework for assessing the compliance of Guatemala's tax and budget policies with the range of principles applicable to the obligation to fulfil ESR, and in particular the rights to health, education and food.[59] These principles included the duty of states to prioritise minimum core obligations, to use maximum available resources to progressively realise rights, to ensure equality and non-discrimination, to promote the availability, accessibility, acceptability and good quality of relevant social services and to ensure participation, transparency and accountability in the process of policy implementation.[60]

The methodological framework which sought to operationalise these principles consisted of four basic steps, encapsulated in the acronym OPERA. First, Guatemala's maternal health, child nutrition and education outcomes were analysed through the lens of the above principles. Second, the State's policy efforts including legal and policy commitments relating to these rights, were examined, as well as efforts in practice to ensure access to essential social services and programmes. Third, the project analysed the resources assigned to relevant areas of social spending from a human rights perspective, examining tax policies to determine the use of maximum available resources in line with human rights principles. Finally, an overall assessment was made of the State's compliance with

[57] CESR/ICEFI, *Rights or Privileges*? above n 56, 7.

[58] Ibid 11–13.

[59] For a detailed explanation of the methodological framework employed in the study, see Center for Economic and Social Rights, *Assessing Fiscal Policies from a Human Rights Perspective: Methodological Case Study on the Use of Available Resources to Realise Economic, Social and Cultural Rights in Guatemala* (Madrid, CESR, 2012): www.cesr.org/downloads/assessing.fiscal.policies.from.a.human.rights.perspective.pdf.

[60] Ibid 5.

the obligation to fulfil ESC rights, based on a triangulation of the above elements, and taking into account contextual factors and the political constraints faced by the government.[61]

A range of quantitative and qualitative assessment tools was used at each step. For the first step, selected quantitative indicators were identified relating to health/education/nutritional outcomes. Comparisons with other countries in the region, particularly those with similar levels of GDP, were used as benchmarks for assessing whether Guatemala's outcomes could be considered reasonable given its level of resources. A comparative analysis of outcome indicators highlighted how far Guatemala's ESR outcomes at the aggregate level fell below what could be considered 'minimum essential levels' of the rights to health, food and education. By plotting rates of maternal mortality, chronic malnutrition and primary school completion for all countries in the region taking into account their levels of GDP per capita (as a proxy for the country's available resources), the resulting standard deviation line provided a benchmark for quantifying Guatemala's shortfall in respect of regional standards of achievement at comparable levels of resources (see Figure 1).

Source: Own calculations based on data from UNDP Human Development Report 2007/2008

Figure 1: Comparing Right to Food Outcomes in Latin America in Light of Resources

Source: CESR/ICEFI 2009

Indicators were disaggregated where possible to identify disparities along lines of gender, ethnicity, region and socio-economic status, and were tracked over time to

[61] Ibid. For a comprehensive explanation of the OPERA framework and methodology for assessing ESR fulfillment, see Center for Economic and Social Rights, *The OPERA Framework: Assessing Compliance with the Obligation to Fulfill Economic, Social and Cultural Rights* (Madrid, CESR, 2012): www.cesr.org/downloads/the.opera.framework.pdf.

assess their progress.[62] This revealed striking disparities that raised questions about what the State was doing to ensure substantive equality and non-discrimination in access to relevant services. For example, while Guatemala was found to have one of the highest estimated maternal mortality rates in Latin America, indigenous women were three times more likely to die in pregnancy or childbirth.[63] Those who died tended to be poor, rural and uneducated women. Moreover, such disparities had not reduced over time. Progress over time in reducing Guatemala's maternal mortality rate had been much slower than that of poorer countries in the region, flagging a concern regarding efforts to progressively realise the right to maternal health.[64]

In step two, qualitative as well as quantitative methods were also used to analyse the adequacy of policy efforts to combat maternal mortality, school desertion and child malnutrition. This part of the analysis looked first at legal and policy commitments on paper, and the extent to which these reflected relevant international human rights standards. This was done through a combination of desk and field based research.[65] The assessment of policy efforts found a striking contrast between the state's legal and policy commitments, which by and large embodied its international commitments to the rights to health, education and food, and its policies in practice. Across all three areas studied, the scope and coverage of policy interventions was found to be woefully inadequate, failing to meet any reasonable standard of availability, accessibility, cultural acceptability and quality. For example, Guatemala had the same proportion of births attended by skilled personnel as Sierra Leone, one of the world's poorest countries.[66] Disparities in outcomes (for example, variations in maternal mortality rates across regions) were found to correlate with disparities of policy effort. For example, a mapping of obstetric services by region revealed that services were least available in regions with the highest maternal mortality rates.[67]

For the third step of the analysis, in order to understand the resources Guatemala had 'available' to it—and how it had used those resources—it was necessary to examine the system of raising revenue (especially through tax collection) and determining expenditures (including income redistribution and financing of public social services). A range of assessment methods was used to interrogate fiscal policies through the lens of human rights principles (see Figure 2). Budget analysis was used to assess the reasonableness of resource allocations, using international comparisons as a benchmark, longitudinal data to assess changes over

[62] See CESR, *Assessing Fiscal Policies* above n 59, 5–10.
[63] CESR/ICEFI, *Rights or Privileges*? above n 56, 11.
[64] Ibid 12.
[65] Policy efforts were examined by conducting a review of the literature on effective public policy interventions and carrying out interviews with professionals in the health, education and child nutrition sectors, as well as with policymakers in these fields. Case research and interviews were then carried out with individuals and families affected by maternal death, child malnutrition and school desertion in the predominantly indigenous community of Senahú, Alta Verapaz. Group interviews also assessed community members' perceptions of the availability, accessibility, acceptability and quality of social services. For more on the methods used to analyse Guatemala's policy efforts, see CESR, *Assessing Fiscal Policies* above n 59, 12–17.
[66] CESR/ICEFI, *Rights or Privileges*? above n 56, 14–16.
[67] Ibid 12–16.

Element	Human Rights Principles	Types of Assessment Techniques
Evaluate planned and actual resource expenditures	*Core obligations* *Non-discrimination* *Progressive realization according to maximum available resources* *Transparency and accountability*	Calculate the percentage of the state's budget allocated to social spending relevant to specific right, comparing to relevant benchmarks. Identify which population groups are benefitting from spending; contrasting spending disparities with disparities in human rights outcomes. Compare allocations to previous budgets to see how spending has evolved overtime, taking into account economic growth over the period. Track public expenditure (e.g. using PETS, QSDS, or social audits).
Evaluate resource generation	*Progressive realization according to maximum available resources* *Non-discrimination*	Calculate the state budget as a percentage of the overall economy and compare to similar countries. Identify and assess the adequacy and equity of the state's main revenue sources (e.g. taxation, borrowing, international assistance). Evaluate the state's fiscal and/or monetary policies governing the raising of revenue (e.g. identify tax base as % of GDP and track its evolution over time, taking into account economic growth over the period).
Analyze relevant policy processes	*Participation, accountability, transparency*	Collect feedback on public participation in the design, implementation and evaluation of fiscal and monetary policies (e.g. through interviews or other qualitative methods and quantitative data, if available). Analyze indicators related to transparency and accountability of economic policy process

Figure 2: Assessing available resources through a human rights lens (breakdown of step 3 of the OPERA framework)

Source: CESR, Assessing Fiscal Policies, 2012 (see n 59)

time and benefit incidence analysis to assess distributional impacts across social groups and income quintiles. Again, disparities in the allocation of resources were correlated with disparities of outcome. Analysis of the tax structure examined whether available resources were being marshalled in line with principles of non-discrimination and progressive realisation. In order to identify deficiencies in the raising of revenue, the project compared the size of the state's budget to the overall size of the economy and analysed how taxation affected different groups of the population (for example, whether taxes attach to income or to goods; whether they are fixed or proportionate to means etc).[68]

[68] For more on the methods used to analyse Guatemala's resource mobilisation efforts, see CESR, *Assessing Fiscal Policy* above n 59, 18–22.

The assessment of resources found that Guatemala's social spending as a proportion of GDP was among the lowest in Latin America, despite being a low-middle income country.[69] Allocations to health had not exceeded 1 per cent of GDP since the end of the war in 1996 (compared, for example, with the 5 per cent devoted by Costa Rica).[70] Distribution of spending was found to be highly inequitable, with per capita health spending three times higher in the capital than in Quiché, the poorest region.[71] Resource allocations on health had not evolved over time, despite targets set under the 1996 Peace Accords, and were in fact lower in 2008 than in 2001.[72] Budgetary spending on maternal health was opaque, making it next to impossible for policymakers and civil society organisations to track amounts of spending and their impact in reducing maternal death among the most vulnerable populations.[73]

Low social spending was directly linked to the small size of the public budget. Despite 10 years of economic growth, the national budget remained one of lowest in the region (15 per cent of GDP, while the regional average was almost 27 per cent).[74] One of the main reasons for this was the country's low tax base—still one of the lowest in Latin America, despite commitments under the Peace Accords to increase it.[75] Unlike other countries with low tax burdens, however, tax revenue constituted the main source of revenue for the Guatemalan State.[76] In terms of its resourcing function, therefore, the tax system did not generate the sufficient resources needed for the State to comply with its obligation to progressively realise ESC rights and universalise certain minimum levels of rights enjoyment.

With regard to its redistributive function, the tax system was also found to be highly inequitable, with more than 75 per cent of income generated through generally regressive indirect taxes rather than direct taxation on income and assets.[77] This disproportionately affected the poorest sectors of the population, who instead of benefiting from redistributive transfers of resources, were effectively shouldering the main burden of funding the state's social programmes. In contrast, the country's most profitable business sectors (for example, coffee and sugar producers, textile 'maquilas' and the tourism, mining, energy and telecommunications sectors) enjoyed unparalleled tax privileges and incentives. In 2008, the total amount of these tax breaks, deductions and exemptions was twice the amount the State expected to collect in income tax. For each quetzal collected in

[69] CESR/ICEFI, *Rights or Privileges*? above n 56, 16. For a more detailed analysis of the findings, in Spanish, see CESR/ICEFI, *Derechos o Privilegios*? above n 56, ch 5 'La Política Fiscal y la Inversión en los Derechos Económicos y Sociales'.

[70] Ibid 16–17.

[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] Ibid 18.

income tax, the State effectively 'gave back' over 2.5 quetzals in exemptions and deductions.[78]

The tax system was also found to be deficient with regard to its accountability function. Analysis of the political economy of fiscal reform revealed that the lack of adequate investment in the realisation of ESR resulted not simply from the State's incapacity or inefficiency in gathering and reassigning public resources, but from a historical co-option of the State by economic elites that had blocked all attempts at fiscal reform and ensured that public policymaking protected their privileges at the expense of the rights of the whole population.[79] Following the Peace Accords, a fiscal pact had been agreed in broad consultation with civil society, aimed at creating a more just and equitable tax system that was progressive, universal and obligatory. However, the pact did not win approval in Congress and attempts to introduce the fiscal reforms contemplated in the Pact were systematically thwarted by the politically powerful business sector, continuing a decades-long practice of using a series of tactics to block any attempt at reform.[80] The exceptional degree of influence that economic elites traditionally had over Guatemalan political life enabled them to maintain tax privileges on a scale surpassing those in other countries in the region. Furthermore, while the system for tax oversight and the legal regime against tax evasion had been strengthened since 1998, evasion continued to have a devastating impact.[81]

Overall, a compelling picture emerged from the three-stepped analysis of outcomes, policy efforts and resources, which pointed to a failure of the State to comply with its obligation to draw on the maximum of available resources to progressively realise ESR without discrimination. That Guatemala's democratic transition had not resulted in significant progress in the fulfilment of ESR was due, in large part, to the vision of the state that had dominated fiscal policymaking in recent decades. Guatemala had become a 'minimal' state that had increasingly ceded more space to private markets, treating its people as consumers rather than rights-holding citizens. The result had been to transform education, health and food into privileges for those who can afford them, rather than universal rights the state has a duty to uphold.[82]

The findings—backed by quantitative and qualitative evidence—enabled CESR and ICEFI to make detailed recommendations to the Government on the need for more equitable approaches to taxation and expenditure that would be aimed at the fulfilment of basic human rights. The report's recommendations included an approximate estimation of the resources and spending increases necessary to enable universal coverage of essential health, education and food programmes

[78] Ibid.
[79] Ibid 18–19.
[80] Ibid 20. For a more detailed discussion of the political economy of fiscal reform in Guatemala, see CESR/ICEFI, *Derechos y Privilegios*? above n 56, 5.4 'El Bloqueo a la Reforma Fiscal' 91–94.
[81] Ibid 18–19.
[82] Ibid 20.

in line with the state's core obligations and its commitments under the MDGs. It also recommended specific tax reforms that could make this increase in funding possible, as well as enhancing citizen participation in the decision-making process.[83]

Launched in the context of parliamentary discussions on the 2010 budget, the project report was intended to support the efforts of civil society groups and progressive policymakers to push for more equitable tax reforms. By framing issues such as maternal mortality, child malnutrition and education incompletion as human rights issues, and tracing the link between these poor human rights outcomes and inequitable tax policies, the report sought to shift the public debate from the speculative and highly ideological discussions on taxation that had dominated public discourse for decades, towards a more evidence-based and rights-grounded consideration of the need for tax reform as part of a fairer fiscal policy.

At the launch of the report in November 2009, CESR and ICEFI secured a public commitment from the Minister of Finance to significantly increase social spending and to push through progressive tax reforms, taking into account the report's findings and recommendations.[84] However, powerful lobbying by the country's business sector confederation led to the stalling of these promised fiscal initiatives and eventually to the minister's resignation.[85] Once again, powerful economic elites in the country were able to thwart attempts at progressive reforms thanks to their inordinate influence on the political process, the revolving door between high-level business and government positions and the co-option of influential media outlets, academic institutions and think tanks propagating traditional neo-classical arguments against 'enlarging the state' through increasing social spending and broadening the tax base.[86]

Nevertheless, the approach taken in the project was embraced and taken forward by other relevant official bodies, including the Reproductive Health Observatory (Observatorio en Salud Reproductiva or OSAR), a supervisory body set up by the Guatemalan Congress in association with civil society organisations to monitor maternal health policies and the resources allocated to them.[87] Internationally, the project succeeded in drawing the links between fiscal

[83] Recommended measures included increasing the rate of income and property taxes; eliminating or reducing certain tax exemptions shown to have inequitable impacts; strengthening programs against tax evasion and non-compliance; and improving the transparency and accountability of the tax administration system: ibid 20–22.

[84] Ministerio de Finanzas Públicas, 'Ministro de Finanzas recibe estudio sobre compromiso fiscal', Nota Informativa No 43, dcs-pr-no-43 (5 November 5, 2009): www.minfin.gob.gt/archivos/prensa/notas_informativas/notinfo43_051109.pdf.

[85] 'La renuncia del Ministro de Finanzas guatemalteco', Central American Data.com: www.centralamericadata.com/es/article/home/La_renuncia_del_Ministro_de_Finanzas_guatemalteco.

[86] On the historical co-option of the state by the economic elite in Guatemala, see CESR and ICEFI, *Derechos y Privilegios* above n 56, 91–94.

[87] The project's methodology enabled OSAR to incorporate a human rights framework more systematically in its monitoring of maternal health policy and in its proposals for reform. Members of Congress linked to OSAR subsequently presented a new maternal health law to Congress, the *Ley*

policy and preventable maternal death in Guatemala to the attention of UN treaty bodies, including the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Rights of the Child and the Human Rights Committee, all of which raised concerns regarding reproductive health with the state.[88] In the context of maternal mortality, the monitoring framework developed in Guatemala was also welcomed by donor agencies and UN specialised agencies in the context of efforts to operationalise a human rights perspective in monitoring progress on Goal 5 of the MDGs.[89]

Indeed, the *Rights or Privileges* project provides invaluable lessons for current efforts to set and monitor future human development goals to replace the MDGs in 2015. It illustrates how rights-based tax policy analysis can be integrated into an assessment of whether states are taking all reasonable efforts to meet their development objectives, and are doing so in light of their human rights obligations to progressively realise ESR according to the maximum of available resources. As patterns of poverty evolve, becoming more prevalent in middle-income countries less dependent on international development assistance, and as inequalities persist or widen in emerging economies experiencing sustained levels of economic growth, domestic resource mobilisation is taking on additional significance as a sustainable source of financing for development in low and middle-income countries.[90] Future progress in meeting human development goals will depend on such countries increasing their tax self-sufficiency and decreasing their dependence on international assistance.[91] It will become all the more relevant for human rights advocates in such contexts to scrutinise the role of domestic resource mobilisation in realising rights and redressing social inequalities.

de Maternidad Saludable, which was adopted in September 2010. The law aims to guarantee safe motherhood by ensuring the right of all women to universal, timely and free access to reproductive health information and services, which should be accessible to all, culturally appropriate and of good quality (Arts 1 and 13). The law prioritises efforts to reduce maternal mortality among rural, indigenous women and mandates that the necessary resources be provided, including through earmarked funding generated from specific direct taxes (Arts 2 and 25–27). See Congreso de Guatemala, Ley para la Maternidad Saludable, Decreto No 32-2010. For more information on the Observatorio en Salud Reproductiva, see: www.osarguatemala.org.

[88] See Committee on the Elimination of Discrimination against Women (CEDAW), 'Concluding Observations: Guatemala', UN Doc C/GUA/CO/7 (2009); Committee on the Rights of the Child, 'Concluding Observations: Guatemala', UN Doc CRC/C/GTM/CO/3-4 (2010): Human Rights Committee, 'Concluding Observations: Guatemala' (2012).

[89] See eg, Netherlands Ministry of Foreign Affairs, *Report of the Seminar on Human Rights and the Millennium Development Goals Report*, (The Hague, 2009): waterwiki.net/images/e/e5/HRandMDGSSeminarReportDec2009.pdf, where the Rights or Privileges project was used as a case study on how the Goals could be more effectively framed and monitored from a human rights perspective.

[90] See *Keeping the Promise: United to Achieve the Millennium Development Goals*, resolution adopted by the UN General Assembly at its 64th session, 17 September 2010 (N Doc A/65/L.1) 30.

[91] See UN Millennium Campaign, 'Resources Required to Finance the Millennium Development Goals' in *Investing in Development: A Practical Plan to Achieve the MDGs* (UN Millennium Campaign, 2005).

V. Tax and Rights-Based Alternatives to Austerity in the Context of Economic Crisis: A Focus on Ireland and Spain

Fiscal policy has moved to the centre of the political debate in recent years in the context of fiscal austerity measures implemented in the wake of the global financial and economic crises. Whereas in 2008 and 2009, many governments initially launched fiscal stimulus plans and policies that resulted in increased spending on public infrastructure and social protection programmes to mitigate the effects of the economic downturn, 2010 saw a sharp shift from fiscal stimulus to fiscal austerity. This was characterised primarily by a severe reduction in public spending. While this trend was observed in many parts of the world, with more than 90 developing countries expected to reduce budgetary expenditures in 2012, it was particularly pronounced in several European Union Member States facing large budget deficits as a consequence of the crisis. These came under pressure from international and regional financial institutions to reduce their deficits as a condition of international loans and rescue packages, and in order to maintain the confidence of investors and the financial markets.[92] Fiscal tightening has also taken hold in many developing countries and emerging economies where the impacts of the economic downturn in Europe and North America have been more indirect.[93]

Fiscal austerity measures in both developing and industrialised countries have tended to focus on cuts in public expenditure, rather than on increasing revenue through progressive tax reforms or other potentially more equitable forms of expanding 'fiscal space'.[94] Yet, drastic social expenditure cuts are not inevitable during periods of economic adjustment if all available fiscal alternatives are explored. Increasing tax compliance and/or raising tax rates are alternative strategies for mobilising additional public resources without necessarily sacrificing spending priorities or increasing debt, and they can potentially also support equity objectives, especially where progressive taxation from the richest income groups is increased to finance social and pro-poor investments.[95]

Nevertheless, where tax reforms have been introduced in the aftermath of the economic crisis, these have typically consisted of potentially regressive increases in sales and consumption taxes, rather than changes to personal income, property or corporation taxes.[96] An estimated 71 governments worldwide were reported to have increased or expanded consumption taxes in recent years.[97] Unless the

[92] Ortiz and Cummins, *A Recovery for All* above n 36, 18–20.
[93] Ibid 18–23.
[94] See Ortiz, Chai and Cummins above n 21.
[95] Ibid 7.
[96] Ortiz and Cummins, *A Recovery for All* above n 36, 241–53.
[97] Ibid 246.

distributional impacts of such reforms are properly addressed, they risk shifting the tax burden to already vulnerable low-income households, further exacerbating existing inequalities. Moreover, 12 countries were reported in 2009 as having cut higher rates of income tax for the wealthiest in comparison to pre-crisis years.[98] Although it is often argued that tax cuts for the wealthy will stimulate increased spending and investment, thereby prompting economic recovery, evidence calls into question this correlation and indicates that such tax cuts are less effective in stimulating the economy in times of recession than investments in social protection programmes.[99] As income taxes are the principal redistribution tool available to policymakers, such measures are also highly problematic from an equity perspective.[100] Corporate tax rates in developing countries are reported to have decreased on average across all regions between 2005 and 2010, in some cases being reduced by more than 25 per cent.[101] While some governments have sought to increase fiscal space post-crisis by introducing or increasing taxes on property, land and natural resource extraction, such examples are the exception.[102]

This skewed approach to fiscal policy—privileging austere social spending cuts over the creation of a progressive and broad based tax regime—has risked depriving the public coffers in many countries of the resources needed to maintain essential public services, deepening social inequalities already exacerbated by the crisis and undermining democratic accountability by fuelling distrust in the capacity of elected governments to safeguard the inherent human rights of ordinary citizens against the implacable demands of the financial markets.[103]

The Center for Economic and Social Rights has documented the threat to human rights posed by some of the fiscal austerity measures imposed in Ireland and Spain in the context of the economic crisis. In both countries, the failure to implement or even consider alternative taxation policy options to narrow the budget deficit led CESR to conclude that drastic social spending cuts in successive government budgets may have been retrogressive and in breach of ICESCR, to which both Ireland and Spain are party.

In its 2012 report on Ireland, CESR found that a poorly managed recession, followed by a series of austerity budgets characterised by significant cuts to social spending, had markedly undermined the rights to education, health, housing, work and an adequate standard of living.[104] The National Recovery

[98] Ibid 247.

[99] See Institute on Taxation and Economic Policy, '"High Rate" Income Tax States are Outperforming No-Tax States' (2012): www.itepnet.org/pdf/junkeconomics.pdf. See also AWID, CESR, COC, CWGL and ESCR-Net, *Bringing Human Rights to Bear in Times of Crisis: A Human Rights Analysis of Government Responses to the Economic Crisis*, Submission to the High level Segment of the 13th Session of the UN Human Rights Council on the global economic and financial crises (March 2010) 9.

[100] Ortiz and Cummins, above n 36, 248.

[101] Ibid.

[102] Ibid 250–53.

[103] AWID et al above n 99, 13.

[104] See Center for Economic and Social Rights (CESR), *Mauled by the Celtic Tiger: Human Rights in Ireland´s Economic Meltdown*, (New York, CESR, 2012) 4.

Plan 2011–14 prioritises drastic cuts in social expenditures over progressive tax reforms in a country ranking among the lowest in Europe in terms of overall tax levels (only Romania and Latvia source less revenue from taxation).[105] While increases to Value Added Tax (VAT) have hit poorer households most severely, Ireland has maintained a generous regime of tax incentives and exemptions for corporations and high-income earners, long part of its strategy to compete with other jurisdictions for investment inflows.[106]

Ireland's tax structure continues to be characterised by very low effective income tax rates for high earners, and generous tax breaks which, if reduced in line with EU norms, could raise €5 billion for the public coffers, according to estimates.[107] Corporate tax rates are exceptionally low (at just 12.5 per cent, one of the lowest in the EU). The ability of many companies to route profits through Ireland on the way to paying little if any tax in any jurisdiction has pushed Ireland into the realm of a tax haven.[108] An estimated €7.64 billion are lost to illegal tax evasion in Ireland. This figure is several times the €1.24 billion removed from the social protection budget between 2011 and 2012.[109] VAT accounts for over 40 per cent of all tax income, far higher than the EU average, and is markedly regressive (representing 15 per cent of income for the lowest decile and only 6.8 per cent for the highest). Nevertheless, VAT rates have been increased in recent years as a response to the fiscal deficit.[110]

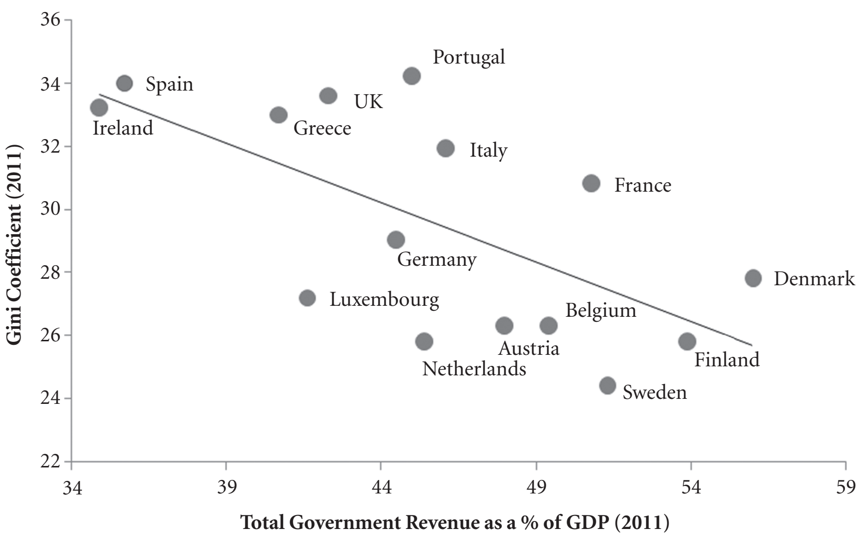
In its recommendations, CESR called on the Government to increase incrementally the remarkably low overall tax base in order to mobilise the maximum available resources for ESR and redistribute more equitably the social costs of the crisis.[111] It also recommended reviewing the incidence of VAT increases and tax breaks and eliminating those found to be regressive or discriminatory. It urged the Government to support the establishment of an EU-wide minimum rate of corporation tax, as well as to take meaningful steps against tax evasion.[112]

Similarly, Spain's fiscal austerity measures have come under scrutiny from CESR and other non-governmental organisations based in the country, which have increasingly questioned the preference for social spending cuts over progressive tax reforms in response to the fiscal deficit.[113] As in the examples of

[105] Ibid 11.
[106] Ibid 14.
[107] Ibid 14–15.
[108] Ibid 15.
[109] Ibid 15.
[110] Ibid 15.
[111] Ibid 25.
[112] Ibid 25.
[113] See Center for Economic and Social Rights, *Factsheet No 12: Spain* (2012). For an analysis of the retrogressive nature of Spanish fiscal policy in recent years, see N Lusiani, 'Rationalizing the Right to Health: Is Spain's Austere Response to the Economic Crisis Impermissible under International Human Rights Law?' in A Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge, Cambridge University Press, forthcoming 2014).

Guatemala and Ireland, Spanish tax policy is criticised not only for failing to generate sufficient resources for the fulfilment of ESR, but for exacerbating social inequalities. Indeed, it is striking to note that both Spain and Ireland are among the EU countries which collect the lowest levels of government revenue as a percentage of GDP, while also having the highest levels of income inequality as indicated by the Gini coefficient (see Figure 3). Spain also has one of the fastest rising levels of income inequality in the EU since 2007, pointing to the inequitable nature of resource generation and distribution in the aftermath of the economic downturn.[114]

A coalition of 20 Spanish civil society groups, coordinated by CESR, presented concerns regarding the human rights impact of austerity measures to the Committee on Economic, Social and Cultural Rights, on the occasion of Spain's review in May 2012.[115] They argued that social spending cuts had been retrogressive as the state had not taken into consideration tax policy alternatives that could have served to increase the state's available resources in a more equitable manner, including taking serious steps against tax evasion, which according to the National



Source: Eurostat 2012. Codes:

Figure 3: Government Revenue and Income Inequality in Europe (2011)

[114] CESR, *Factsheet No 12: Spain* ibid, Figure 13.

[115] Center for Economic and Social Rights, Observatori DESC et al, 'Joint Submission to the Committee on Economic, Social and Cultural Rights, on the occasion of the review of Spain's fifth periodic report at the 48th Session, May 2012': www.cesr.org/section.php?id=161.

Union of Tax Inspectors (GESTHA) resulted in a tax loss of some €88 billion in 2010.[116] The Tax Justice Network ranks Spain among the ten countries in the world with the greatest losses due to tax evasion in absolute terms. GESTHA further estimates that 72 per cent of tax fraud is committed by large companies and wealthy individuals.[117]

As well as echoing many of the concerns raised by human rights groups regarding Spain's fiscal austerity measures in its Concluding Observations,[118] the Committee took the unusual step of issuing a letter to all States Party to the ICESCR. The letter reminded them that, before embarking on austerity measures such as social spending cutbacks which could have a retrogressive impact on human rights, international human rights law mandates governments to ensure that an exhaustive examination of all other options has been undertaken. This includes progressive tax increases, in order to ensure that such measures are justified as strictly necessary, proportionate and temporary.[119]

As the examples of Ireland and Spain illustrate, states' leeway to determine their domestic tax policies is increasingly constrained by the policy prescriptions of international and supranational bodies. The measures undertaken in both Ireland and Spain have been carried out in the context of the Fiscal Compact adopted by 25 EU states in February 2012, which effectively obliges all signatory states to enshrine a permanently balanced budget, or face exclusion from future crisis financing. The ceiling can only be raised in a severe economic downturn or other 'exceptional circumstances' which only the European Court of Justice in Luxembourg can define.[120]

The Fiscal Compact's new enforcement capabilities and the constitutional status of the deficit caps may in practice exacerbate austerity-driven human rights setbacks by constraining even moderate deficit financing, limiting the fiscal tools available for current and future governments to mitigate the human rights impacts of further financial or economic crises and to sustainably invest in ESR programmes which are at the heart of a just and sustainable recovery. In the words of Amartya Sen, entrenching austerity measures in economic downturns risks triggering a 'spiraling catastrophe'[121] for the economy and for human rights.

[116] Ibid 2.

[117] CESR, *Factsheet No 12: Spain* above n 113, 7.

[118] See ComESCR, 'Concluding Observations: Spain', UN Doc E/C.12/ESP/CO/5 (2012).

[119] Letter from ComESCR Chairperson to States Parties above n 6.

[120] See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact), adopted by the Council of the European Union, 2 March 2012.

[121] 'Nobel Economist Blasts Europe's Austerity Plans' (Financial Times, 14 December 2011): www.ft.com/home/europe.

VI. Opportunities for Linking Human Rights and Tax Justice Advocacy in the Current Context

The examples described above illustrate how human rights analysis can be fruitfully brought to bear to advocate for tax policy reforms at the domestic level in the post-crisis and post-MDG contexts. However, as highlighted already, national-level policies are shaped and constrained by trends in the international tax policy framework.[122] In taking stock of the factors that led to the global economic downturn and to inadequate progress in achieving the MDGs, intergovernmental institutions have increasingly recognised the need to revisit some of the fiscal policy orthodoxies that have undermined the role of taxation in promoting human development and economic recovery for all.[123] This has created space and momentum for previously unheeded tax reform proposals to make headway on the international agenda. Two key international issues which offer broad scope for collaboration between human rights and tax justice advocates in the current context are described here.

The global economic crisis, with its roots in the loose and biased regulation of the financial system, has brought the issue of financial sector accountability and reform to the centre of public attention. A focus of much civil society advocacy in this regard has been the push for a global financial transaction tax (FTT).[124] The FTT currently under debate has two basic policy objectives. First, it would raise significant revenue. By introducing a tiny tax rate on the trading of bonds, shares

[122] See A Christians, 'Global Trends and Constraints on Tax Policy in the Least Developed Countries' (2009) 40 *University of British Columbia Law Review* 1: www.law.ubc.ca/files/pdf/ncbl/papers/Christians.pdf.

[123] Eg, the Commission of Experts established by the UN General Assembly in 2009 to propose international policy responses to the global economic crisis, referred to growing income inequality and the reduced progressivity of tax regimes as factors which contributed to the crisis. Its recommendations included an 'International Tax Compact' to strengthen progressive means of domestic resource mobilisation, and to promote international cooperation in tackling tax evasion and avoidance, including via offshore financial centres. *Report of the Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System* ('Stiglitz Commission') (September 2009) 219. Similarly, the outcome document of the MDG Review Summit in September 2010 affirmed a new resolve to strengthen domestic resource generation systems through fairer and more efficient tax collection, and effectively combating tax evasion and capital flight. See *Keeping the Promise: United to Achieve the Millennium Development Goals*, 17 September 2010 (UN Doc. A/65/L.1) 30. More recently, even the IMF appears to be questioning its traditional fiscal policy prescriptions to countries undergoing fiscal adjustment. A working paper by IMF Chief Economist Olivier Blanchard acknowledges that IMF forecasters seriously underestimated the negative impact of austerity measures, both budget and tax-related, on growth and economic recovery. See O Blanchard and D Leigh, 'Growth Forecast Errors and Fiscal Multipliers' (2013) IMF Working Paper WP/13/1.

[124] See D Beitler, *Raising Revenue A Review of Financial Transaction Taxes Throughout the World* (Just Economics, 2010); United Nations High Commissioner for Human Rights (UNHCR), 'G-8/ EU: A Global Financial Transaction Tax, A Human Rights Imperative Mow More than Ever' (May 2012): www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12150&LangID=E (reporting the call by several United Nations independent experts urging the EU to adopt a global financial transaction tax).

and derivative products, such as futures contracts, the FTT would yield about US$48 billion at its lowest rate across the G20 countries, with higher rates offering up to US$250 billion per year—significant amounts to offset the widespread austerity measures in countries north and south. Second, the FTT aims to stabilise financial markets by discouraging speculation (especially in high-frequency trades) and mitigating price volatility.[125] Financial transaction taxes can thus serve to generate additional resources, to introduce greater progressivity into the tax system and to exact accountability from the sector whose excessive risk taking and speculative activity led to the near collapse of the financial system.[126]

Although moves to approve a eurozone-wide FTT were adopted at the European Finance Ministers' Meeting in June 2012, such taxes continue to meet strong opposition from powerful states and the financial sector itself.[127] To date, few human rights voices have joined the call for an FTT.[128] Yet framing the demand for the FTT from the perspective of states' domestic and extraterritorial human rights obligations could serve to underscore the moral force of existing campaigns by development agencies. Human rights principles can also inform the debate on how the proceeds from such a tax should be used as a priority.

Similarly, the role of 'tax havens' (or offshore banking in secrecy jurisdictions) has also been the focus of development and social justice advocacy in the context of responses to the crisis and debates on future financing for development, though it has yet to figure prominently on the human rights agenda. On a conservative estimate, tax revenue lost through offshore banking totals some US$250 billion, more than three times the total development assistance of all OECD countries.[129] Tax havens have a corrupting effect on national tax regimes, undermine financial regulation and deprive governments of significant revenue that should be used to realise human rights. The use of tax havens and offshore banking may also contravene the extraterritorial obligations of states to respect, protect and fulfil ESR.[130] Growing advocacy by groups such as the Tax Justice Network has prompted stronger international commitments to clamp down on tax havens and secrecy jurisdictions, to foster progressive and transparent tax systems and to ensure greater international cooperation on tax, regulation and crime.[131]

[125] See Center of Concern, CESR and others, *Financial Transaction Tax: A Human Rights Imperative*, Righting Financial Regulation series, No 3 (2012).

[126] Ibid.

[127] See CESR, 'Europe Moves Forward on Robin Hood Tax While US Balks' (10 October 2012): www.cesr.org/article.php?id=1370.

[128] See, however, Office of the High Commissioner for Human Rights (OHCHR), 'A Global Financial Transactions Tax, A Human Rights Imperative Now More than Ever', joint statement by five UN Special Rapporteurs (14 May 2012); and Center of Concern, CESR and others above n 125.

[129] See Tax Justice Network, *The Price of Offshore* (Tax Justice Network, 2005).

[130] See N Lusiani, 'Only the Little People Pay Taxes: Tax Evasion and Switzerland's Extraterritorial Obligations to Economic, Social and Cultural Rights in Zambia' in W Vandenhole et al (eds), *Extraterritorial Human Rights Obligations: Hypothetical Case Studies* (forthcoming, 2013).

[131] See eg, the commitments made by G20 leaders at the June 2012 G20 Summit in Los Cabos, Mexico, to tackle illicit financial flows by moving towards the automatic exchange of tax information and calling on other countries to do the same. See 'G20 Leaders' Declaration, Los Cabos, 18–19 June

Given these and other potential areas of common interest between the human rights and tax justice movements, there is strong potential for advocacy agendas to converge. Indeed, at the national, regional and global levels, inspiring examples of increasingly broad based and collaborative advocacy on tax and human rights can already be found.[132] As Allison Christians argues, human rights principles can help to shift the dominant tax policy discourse and provide a powerful vocabulary for advocating for taxation systems which fairly distribute the benefits and burdens among society's members.[133] Of particular relevance to today's context, the duty to devote the 'maximum of available resources' to the full realisation of human rights gives legal force to the imperative to tax, as well as articulating the ultimate goal of tax policy. The principles of 'equality' and 'non-discrimination' can act as a much needed corrective to the long-standing tendency in traditional tax discourse to privilege the pursuit of 'efficiency' over that of 'equity' or 'fairness'.[134] Human rights can enrich understandings of the accountability relationship between decision-makers and taxpayers by recasting it in terms of the rights and corresponding obligations of each. And the duties of states to cooperate in the realisation of human rights beyond their borders can provide a useful counterpoint to the notion of 'tax sovereignty' which has hampered effective action against the transnational impacts of tax evasion and harmful tax competition.[135]

VII. Conclusion

As this chapter has argued, tax policy is critical in determining a state's ability to generate and assign resources in ways that fulfil ESR. Taxation is also a key vehicle for redressing social inequalities, and goes to the heart of the accountability bond between state and citizen. Yet, despite the grave human rights impact of manifestly inequitable fiscal policies in many countries, including the regressive fiscal austerity measures being pursued in many countries in the wake of the economic crisis, and the role of tax evasion and avoidance in undermining progress in human

2012', 48: www.gfintegrity.org/content/view/553/70/. The Tax Justice Network is an independent organisation which carries out research, analysis and advocacy in the field of tax and regulation. It works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens, and to encourage reform at the global and national levels. For more on the work of the Tax Justice Network, see: www.taxjustice.net/cms/front_content.php?idcatart=2&lang=1.

[132] See CESR, *Tax Policy and Human Rights: Opportunities for Collaboration By Human Rights and Tax Justice Advocates* (forthcoming, 2013).

[133] A Christians, 'Fair Taxation as a Basic Human Right' *International Review of Constitutionalism 2009* University of Wisconsin Legal Studies Research Paper No 1066, 3 and 4: ssrn.com/abstract=1272446.

[134] See DJ Ventry, 'Equity vs Efficiency and the US Tax System in Historical Perspective' in JJ Thorndike and DJ Ventry (eds), *Tax Justice: The Ongoing Debate* (Washington DC, The Urban Institute Press, 2002) available at: ssrn.com/abstract=1345349.

[135] Christians, above n 133, 6–9.

rights and development, a coherent approach to addressing tax injustice from a human rights perspective has yet to emerge. An agenda around the three rights-related functions of taxation—resourcing, redistribution and accountability—could be devised in alliance between human rights and tax justice advocates, and mutually enriched through increased interdisciplinary collaboration and exchange. The global discussions underway on the content and goals of the post-2015 development agenda to succeed the MDGs, and growing awareness of the fallacies underpinning conventional fiscal policy responses to the global economic crisis,[136] provide opportunities to forge and advance such an agenda and to bring the voice of human rights to the worldwide struggle for tax justice.

[136] See Center for Economic and Social Rights: *Fiscal Fallacies: Eight Myths About the Age of Austerity, and Human Rights Responses* (Madrid, CESR, 2012).