NOTES

REVENUE MOBILIZATION ACCOUNTABILITY: COMBATING HARMFUL TAX REGIMES WITH THE LAW OF HUMAN RIGHTS

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ABSTRACT

International tax evasion has gained much consideration in recent years. Between Apple's assertion that it was tax resident "nowhere," and a whistleblower's leak of Luxembourg's secret tax rulings, the legal field has tried to remedy international tax schemes on all fronts. Recently, a number of human rights advocates and scholars have started to turn their attention to tax evasion. So the argument goes: if Luxembourg issues secret rulings to give corporations lower tax rates, it illegally takes revenue away from other countries that need the money to support their citizens. The issue with this argument is that most human rights treaties, and especially those relating to economic rights, do not have an extraterritorial application—Luxembourg cannot be held accountable for the effects of its actions abroad. For this reason, the line between international tax evasion and human rights is far too attenuated. Yet, not all hope is lost for the connection between tax and human rights. Human rights law is applicable to domestic tax harms, such as regressive policies and poor procedural mechanisms, which prevent governments from collecting sufficient revenue to support their own people. Human rights advocates should thus redirect their efforts to these domestic concerns and use the law to seek tax reform where the work of the World Bank and International Monetary Fund (IMF) has come up short.

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I. Introduction

United Nations Special Rapporteur Philip Alston recently visited the United States to report on extreme poverty and human rights.[1] Many were surprised with Alston's choice to visit the United States, as it ranks among the wealthiest countries in the world.[2] But Alston viewed his visit as an important one, to investigate the relationship in the United States between poverty and civil rights.[3]

In his report, Alston detailed the extreme levels of poverty he found in the United States.[4] Among other observations, Alston found that despite the extraordinary level of innovation and technology in the United States, the country's infant mortality rate is the highest in the developed world, Americans live shorter and sicker lives than in any other rich democracy, inequality levels are higher than in most European countries, and Americans are plagued by neglected tropical diseases.[5] Alston attributed blame to multiple government functions for this level of poverty in the United States, with the most controversial being the democratic system.[6]

What has received somewhat less press coverage within the report is Alston's criticism of the U.S. tax system. Alston denounced the Tax Cuts and Jobs Act of 2017 on many fronts.[7] He cited "the lack of public debate, the closed nature of the negotiation, the exclusion of the representatives of almost half of the American people from the process, and the inability of elected representatives to know in any detail what they are being asked to vote for" as concerns.[8] Alston also viewed as problematic Congress's effort to uproot the current tax system, replacing it with something unpredictable to the American people. Overriding all these concerns, however, was the inequality resulting from the tax reform bill. Alston called the tax reform efforts "essentially a bid to make the US the world champion of extreme inequality," since the top one

1. *An Outsider's View of How the U.S. Treats Its Most Vulnerable*, NPR (Dec. 15, 2017, 4:23 PM), https://www.npr.org/2017/12/15/571199941/an-outsiders-view-of-how-the-u-s-treats-its-most-vulnerable/.

2. Marc Silver & Nadia Whitehead, *The U.N. Looks at Extreme Poverty in the U.S., From Alabama to California*, NPR (Dec. 12, 2017, 3:56 PM), https://www.npr.org/sections/goatsandsoda/2017/12/12/570217635/the-u-n-looks-at-extreme-poverty-in-the-u-s-from-alabama-to-california/.

3. *Id.*

4. Philip Alston, U.N. Special Rapporteur on extreme poverty and human rights, Statement on Visit to the USA, U.N. Office of the High Comm'r for Hum. Rts. (Dec. 15, 2017), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533/.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

percent of adults earn about twenty percent of all income.[9] This figure has increased from ten percent in 1980 and compares to twelve percent in Europe.[10]

Reasonable minds may differ as to whether or not Alston's official visit to the United States was the best use of his time as a U.N. Special Rapporteur. But his connection between tax systems and extreme poverty opens the door to a road largely untraveled in international human rights law. Scholars have only recently started to discuss whether harmful tax practices can be examined under a human rights lens.[11] The small amount of literature that exists on this topic focuses heavily on the international effects of harmful tax regimes.[12] However, little effort has been concentrated on the domestic tax practices that violate human rights laws.

This Note first explains the difficulties in realizing accountability for harmful international tax practices under human rights law. Section II discusses the competitive tax practices of nation states. It explains how taxpayers avail themselves of the rules and practices of multiple governments at once to avoid or illegally evade paying taxes. Their actions deprive states of necessary revenue, which prevents governments from providing basic goods to their people. This section also details how the mismatched tax rules of two states, albeit legal, can lead to a deprivation of revenue, especially in developing nations. Although all of these tax practices result in harm, this Note ultimately concludes that they are not human rights violations due to the inapplicability of the International Covenant for Economic, Social and Cultural Rights (ICESCR).

While human rights law fails to address harmful international tax practices, however, it has great potential for success in mobilizing domestic revenue. Section III takes a more positive view toward the interplay between tax and human rights. It begins by reviewing the shortcomings of developing nations' tax policies and revenue collection practices. It then examines the failed attempts by the World Bank and the IMF to improve such procedures, as well as the conflicting recommendations put forth in academia. Finally, it discusses the law of human rights as an alternative to past development efforts to mobilize

9. *Id.*

10. *Id.*

11. *See* INT'L BAR ASS'N, TAX ABUSES, POVERTY AND HUMAN RIGHTS (2013), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4A0CF930-A0D1-4784-8D09-F588DCDDFEA4/.

12. *E.g.*, *id.*; *see also* Stephen B. Cohen, *Does Swiss Bank Secrecy Violate International Human Rights?*, 104 TAX NOTES 355 (July 22, 2013).

revenue in developing nations. After interpreting provisions of the ICESCR that affect tax collection, this Note concludes that human rights law is not only applicable to domestic revenue mobilization, but it can be highly effective in solving some of the issues at hand.

II. Scrutiny of Harmful International Tax Practices Under Human Rights Law

In 2014, a whistleblower at PricewaterhouseCoopers (PwC) exposed Luxembourg's secret tax rulings to the world.[13] An investigation following the leak found that Luxembourg provided at least 548 rulings to various multinational companies, allowing for drastic tax reductions through complex structures such as "arbitrage manufacturing."[14] The same ten Luxembourgish tax administrators signed off on all of the rulings, and forty percent of them were granted the same day they were submitted.[15]

This scandal, otherwise known as "LuxLeaks," is only one of numerous tax evasion schemes, most of which go undiscovered. When a multinational corporation avails itself of secret rulings and other tax evasion mechanisms, it divests its state of residence from revenue the government would otherwise collect. In turn, the residence state has less money to allocate through spending programs, which in some cases, would help fulfill human rights obligations. Although tax evasion, and likewise tax avoidance, can be problematic for developed nations, it hits harder in developing states, where governments struggle to mobilize revenue even without the loss from evading multinationals. This section addresses the harmful tax practices of states that deprive developing nations of the revenue they need, not only by promoting tax evasion but through other policy regimes that inadvertently have a greater effect abroad than policymakers realize. It concludes that although these practices have severe effects, human rights law lacks the mechanisms necessary to combat them.

A. *How States Tax*

Before analyzing the harmful international tax practices most likely to violate human rights laws, it is worth spending some time on the international taxing methods adopted by nation states. This analysis

13. *An ICIJ Investigation, Luxembourg Leaks: Global Companies' Secrets Exposed*, Int'l Consortium of Investigative Journalists, https://www.icij.org/investigations/luxembourg-leaks/ (last visited May 2, 2018).

14. *Id.*

15. *Id.*

guides an understanding of how the allocation of income through various harmful tax practices affects basic human rights. The two primary rules states use to tax individuals and organizations within their boundaries are source and residence rules.[16] A source-based tax derives from the territorial connection between the state and the income. Essentially, states tax income arising in their country.[17] For example, Argentina can tax a Belgian resident doing business within Argentina based on the income that arises within Argentina's territory. A residence-based tax, on the other hand, derives from the connection between the state and the owner of that income.[18] Residence-based taxes typically rely on worldwide income, that is income from all sources.[19] The United States can therefore levy taxes on its own resident, even if that resident conducts its business elsewhere. States have varying complex rules for determining resident status, but most states have some kind of residence tax.

Since states have not agreed on a common method of taxing, issues of double taxation (and double non-taxation) often arise when two states attempt to tax the same income. States generally deal with double taxation through three different methods: deduction, exemption, and credit.[20] Governments adopt these methods unilaterally or through treaties aimed at relieving double taxation.[21]

According to the deduction method, a state takes into account its residents' worldwide income and then allows a deduction for taxes paid to foreign states.[22] The foreign income is, thus, treated as a cost of doing business.[23] Under the deduction method, a taxpayer with $100 of foreign source income who pays a foreign tax of thirty percent, or $30, will have the $30 deducted from his or her foreign source income and will then be taxed on the rest.[24] In this example, a residence country with a fifty percent tax rate on foreign income would end up taxing fifty percent of the leftover $70 after the deduction. The taxpayer would thus pay $35 to the residence country on his or her foreign source income and $30 to the source country for a total tax of $65. The deduction

16. BRIAN J. ARNOLD, INTERNATIONAL TAX PRIMER 15 (3d. ed., 2016).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 47.
23. *Id.*
24. *Id.*

method is the least favorable, because it grants the least relief from double taxation.

The exemption and credit methods, on the other hand, have both been authorized by the Organisation for Economic Co-operation and Development (OECD) and U.N. Model Treaties.[25] According to the exemption method, the residence country taxes residents' domestic income and exempts the tax on some or all of the foreign source income.[26] A taxpayer with $100 of foreign source income who pays a foreign tax of thirty percent, or $30, will pay no tax at all to the residence country on that income. The total amount paid in taxes is $30. This tax is the most favorable, because it typically grants the most relief from double taxation.

Finally, under the credit method, a country credits the foreign tax up to the resident amount.[27] Therefore, a taxpayer with $100 of foreign source income who paid $30 in foreign tax is considered to have a net foreign income of $100 under the credit method. The state of residence will then levy a tax on this entire amount—so, a fifty percent tax would result in a $50 tax payment—but credit the $30 already paid. The ultimate amount paid to the residence state is $20. Together with the $30 paid to the source state, the taxpayer will pay a total amount of $50 on the foreign source income. This method ultimately achieves a final payment according the resident state's rate.

B. *Harmful Tax Practices*

Leaving aside other business considerations, taxpayers will invest their capital in the states with the lowest rates. Generally, there is nothing legally wrong with this practice. A great number of businesses and individuals avoid tax in their resident state by availing themselves of beneficial source and residence rule mix-matches.[28] However, even when legal, these practices can become harmful by depriving governments of the revenue they need to support their people. And in some instances, states adopt rules and procedures that facilitate illegal tax evasion, which has the ability to produce even more harmful results.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* Owen Jones, *Tax avoidance may be legal but it's bankrupting our social order*, THE GUARDIAN (Nov. 7, 2017, 7:28 PM), https://www.theguardian.com/commentisfree/2017/nov/07/paradise-papers-bankrupt-social-order-tax-avoiders/.

1. Tax Avoidance and Evasion Mechanisms

In order to compete for high-income earning taxpayers, states have adopted a variety of methods to attract income, usually in the form of a tax haven or a preferential tax regime. The term "tax haven" is difficult to define but typically refers to states with low or no tax rates and rules in place to prevent foreign taxpayers' resident states from finding out about their foreign source income.[29] For instance, a tax haven might disallow the exchange of information with other countries, which undermines the ability of states to enact defensive measures against tax evasion.[30] A tax haven might also lack transparency by applying bank secrecy laws that protect the privacy and confidentiality of banks' clients.[31] Tax havens could further cease to enforce any kind of requirement that an individual or company engages in substantial activity to allocate capital to the haven.[32] This allows companies to set up a subsidiary in the tax haven solely for the purpose of channeling money in and out.

The term "preferential tax regime" is likewise difficult to define, but it typically involves special regimes inside a state that otherwise look normal from a tax standpoint.[33] A preferential tax regime might, for example, exempt specified classes of income from tax.[34] Developing nations that offer tax incentives to certain industries are considered preferential tax regimes.

Individuals and companies utilize a variety, and often a combination, of tax avoidance and evasion mechanisms to avail themselves of tax havens and preferential tax regimes. Tax avoidance is distinguished from tax evasion, where the former refers to lawful transactions by a taxpayer "to minimize the amount of tax payable" and the latter refers to illegal activity often involving the nondisclosure of income or fraud.[35] Tax avoidance strategies include, but are not limited to:

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29. ARNOLD, *supra* note 16, at 122.

30. *See* OECD, MANUAL ON THE IMPLEMENTATION OF EXCHANGE OF INFORMATION PROVISIONS FOR TAX PURPOSES 4-5 (2006), http://www.oecd.org/ctp/exchange-of-tax-information/36647823.pdf/.

31. *See* OECD, TAX CO-OPERATION 2010: TOWARDS A LEVEL PLAYING FIELD (2010), http://www.oecd.org/tax/exchange-of-tax-information/taxco-operation2010towardsalevelplayingfield-assessmentbytheglobalforumontransparencyandexchangeofinformation.htm#NewMaterial/.

32. *See* OECD, HARMFUL TAX PRACTICES - 2017 PROGRESS REPORT ON PREFERENTIAL REGIMES: INCLUSIVE FRAMEWORK ON BEPS: ACTION 5 13-22.

33. Michael Littlewood, *Tax Competition: Harmful to Whom?*, 26 MICH. J. INT'L L. 411, 414 (2004).

34. *See* HARMFUL TAX PRACTICES, *supra* note 32.

35. ARNOLD, *supra* note 16, at 11.

- Shifting a residence to a different country with lower tax rates;
- Diverting domestic source income to a controlled foreign entity in a tax haven;
- Establishing a subsidiary in a tax haven to earn foreign source income or receive dividends in a country with lower tax rates; and
- Routing dividends, interest, and royalties through subsidiaries in low tax jurisdictions to reduce the withholding tax on such amounts.[36]

By implementing these practices, taxpayers are able to pay little to no taxes to both their source and resident states.

A taxpayer who evades the tax laws of his or her residence state could do so by transferring income to a low-tax foreign jurisdiction with strict bank secrecy laws and declining to include the amount in their gross income to their residence state. Likewise, a taxpayer could transfer income to a jurisdiction that provides secret rulings, giving the taxpayer a lower rate that is unknown to his or her residence state. If the source state refuses to exchange taxpayer information with the resident state, the taxpayer can abstain from disclosing the lower rate. If the resident state uses a credit method to relieve double taxation, the taxpayer would only have to pay the difference between the source state's typical rate and the resident state's rate, instead of the difference between the source state's secret rate and the resident state's rate.

These competition practices, which are widely adopted, become harmful because they erode the tax bases of other states. This is an especially dire problem for developing nations, because their high-income earners prove even more likely to transfer their capital offshore.[37] Whereas two percent of North American and eight percent of European private wealth is invested offshore, more than twenty-five percent of Latin American and thirty-three percent of Middle Eastern and African private wealth is transferred offshore.[38] An estimation of the annual tax gap for developing countries caused by the bank secrecy laws of other nations ranged from $100 billion to several times that figure.[39] Moreover, a 2013 report estimated that developing nations lost $5.86 trillion to illicit financial flows from 2001 to 2010, eighty percent of

36. *Id.*
37. *See* Cohen, *supra* note 12.
38. *Id.*
39. *Id.*

which were due to corporate tax abuses.[40] Since developing nations can only meet the basic needs of their citizens if they have a supportable tax base, these tax competition practices are harmful by eroding those nations' tax bases.

2. Unequal Distribution of Revenue Issues

Another practice that is fully legal, but can still be harmful, is the adoption of certain methods to relieve double taxation. Unless resident states adopt the exemption method in regard to foreign source income, they hinder other states' ability to raise revenue. Tax treaties promote a bilateral approach to relieve double taxation on income included by both the source and residence state.[41] And tax treaties often, though not always, succeed in alleviating the burden of double taxation.[42] A problem arises, however, where potential source states offer lower rates in an attempt to increase revenue through investment, but those rates are offset by the resident state's rate.

It is best to understand this problem by way of example. Paraguay offers a low corporate tax rate of ten percent, in order to attract investment.[43] The United States, conversely, has a corporate tax rate of twenty-one percent.[44] If the United States applied the credit method, a U.S. company with income in Paraguay would pay a ten percent tax on that income to Paraguay and then an eleven percent tax on the income to the United States. This method relieves the burden of double taxation, but it does nothing to help Paraguay attract U.S. investors by implementing low tax rates because the taxpayer still ultimately pays the U.S. rate.

The deduction method is even more problematic. If, instead of the credit method, the United States used the deduction method in the example above, a U.S. corporation earning $100 of income in Paraguay would pay ten percent, or $10, to Paraguay and twenty-one percent to the United States on the remaining $90, or $18.90. Therefore, the only way to fully allow the source state to take advantage of its low tax rates is by completely exempting the foreign source income. Although more

40. INT'L BAR ASS'N, *supra* note 11, at 7.

41. Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 942 (2000).

42. *Id.*

43. KARI JAHNSEN & KYLE POMERLEAU, CORPORATE INCOME TAX RATES AROUND THE WORLD, TAX FOUNDATION (Sep. 7, 2017), https://taxfoundation.org/corporate-income-tax-rates-around-the-world-2017/.

44. 26 U.S.C. § 11(b) (2018).

states are moving towards the exemption method, a number of states still rely on the credit and deduction methods.[45]

If resident states use the credit method, source states are faced with a dichotomy. On the one hand, source states can provide a low tax rate and attract only residents from states using the exemption method.[46] Source states will have little to gain, because they will be limited in the number of investors they can attract, and then only derive a small amount of tax from that small group of investors.[47] In this way, source states give up tax revenue without gaining much additional investment. On the other hand, source states may choose not to lower their rates, because companies who would invest in their states regardless of tax rates will pay the higher tax.[48] As long as the tax rate is not higher than that of the investors' home states, it will at least not serve as a deterrent for investors whose resident states use the credit method.[49] However, source states would not be able to promote additional investment with low tax rates.[50] Since it is hard to predict how many new investors source states might gain by offering low tax rates, determining which of these options is preferable for developing states is difficult.

Using the credit method to relieve double taxation is harmful for developing nations. Tsilly Dagan blames this issue on the lack of symmetry in investment.[51] When a developing nation enters into a tax treaty with a developed nation, the developing nation typically receives most of the inbound investment, acting as the source state in most situations.[52] Thus, the developing nation gives up tax revenue by offering lower rates to attract investors from the developed state, and that loss in revenue shifts to the developed nation, if the developed nation uses the credit or deduction method.[53] In a relationship between two developed nations, or between two developing nations for that matter, the amount

45. KYLE POMERLEAU, ELIMINATING DOUBLE TAXATION THROUGH CORPORATE INTEGRATION, TAX FOUNDATION (Feb. 23, 2015), https://taxfoundation.org/eliminating-double-taxation-through-corporate-integration/.

46. *See* Kristian Reinert Haugland Nilsen, The Concept of Tax Sparing: A General Analysis, and an Analysis and Assessment of the Various Features of Tax Sparing Provisions 9 (Nov. 2013) (unpublished LL.M. Thesis, University of Oslo), https://www.jus.uio.no/ior/english/research/projects/global-tax-tranparency/publications/the-concept-of-tax-sparing.pdf.

47. *See id.*

48. ARNOLD, *supra* note 16, at 55-56.

49. *Id.*

50. *Id.*

51. Dagan, *supra* note 41, at 982.

52. *Id.*

53. *Id.*

of inbound and outbound investment would be more or less even.[54] Therefore, although the practice of relieving double taxation by credit or deduction is not harmful in theory or even in practice in some instances, it becomes especially harmful for developing nations who are more often than not in the position of the source state.

C. *Applying Human Rights Law to Harmful International Tax Practices*

The harmful tax practices discussed in Section II.B are currently combatted through both domestic legislation and international tax policies. To address tax evasion achieved through bank secrecy methods, for example, the United States passed the Foreign Account Tax Compliance Act which requires foreign financial institutions to report information on U.S. account holders directly to the U.S. government.[55] The OECD also recently designed a new plan on Base Erosion and Profit Shifting (BEPS). The BEPS package intends to prevent tax planning strategies that "exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity."[56]

Various scholars and international organizations have argued that human rights law might serve as an alternative avenue to combat international tax abuses. Most notably, the International Bar Association (IBA) produced a paper in 2013 arguing that states have a duty to alter their tax laws if such laws impede on the realization of human rights in other states.[57] The IBA premised its claim on the fact that the harmful tax practices of one state deprive other states from raising revenue and in turn prevent the government from providing basic human needs.[58] Finding a legal basis for its claim, the IBA pointed to the Maastricht Principles, adopted by a group of legal scholars in 2012.[59] According to these principles, states have a number of extraterritorial obligations in the area of economic, social, and cultural rights.[60] They provide that states should "refrain from conduct that, directly or indirectly, nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories."[61] The IBA suggests that

54. *Id.* at 983.
55. Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1601 (2003).
56. *Base erosion and profit shifting*, OECD, http://www.oecd.org/tax/beps/.
57. INT'L BAR ASS'N, *supra* note 11.
58. *Id.*
59. *Id.* at 109.
60. *Id.*
61. *Id.*

under the Maastricht Principles, states have a positive obligation to create an environment that enables the achievement of human rights worldwide.[62]

This author disagrees with the evolving belief that harmful international tax practices can be addressed under human rights law. The IBA acknowledged in its 2013 paper that the Maastricht Principles are not the law and have not been endorsed by governments or the U.N.[63] Moreover, there is currently no human rights treaty in force that references harmful international tax practices.[64] Neither is there an international tax treaty referencing human rights.[65]

Multiple treaties and declarations address the effects of harmful tax practices under human rights laws,[66] but their limited applicability and enforcement prohibits affected states from bringing a claim. Tax revenue can be, and often is, applied to a number of social welfare items, including healthcare, safety net programs for low-income earners, and education.[67] Multiple human rights accords consider these kinds of social and economic privileges to be human rights and obligate countries to provide for them.[68] The most widely recognized treaties and declarations on social and economic rights today include the International Covenant on Economic, Social and Cultural Rights (ICESCR or Covenant), the Universal Declaration of Human Rights (UDHR), and the Resolution on Human Rights and Extreme Poverty. Since the ICESCR is the only binding document of these three, it would be the most likely to lead to success in addressing harmful tax practices. Scholars often cite the ICESCR as the best way to combat harmful tax practices under human rights law.[69] However, because the ICESCR has only a very limited extraterritorial application, it does not obligate states to alter their tax laws that might negatively affect other states.

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62. *Id.*

63. *Id.* at 109, n.230.

64. Cohen, *supra* note 12.

65. *Id.*

66. *E.g.*, International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1996, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A (Dec. 10, 1948); G.A. Res. 47/134 (Dec. 18, 1992).

67. *See, e.g.*, *Policy Basics: Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET AND POLICY PRIORITIES (Oct. 4, 2017), https://www.cbpp.org/research/federal-budget/policy-basics-where-do-our-federal-tax-dollars-go/.

68. *Supra* note 68.

69. *E.g.*, INT'L BAR ASS'N, *supra* note 11, at 140; Cohen, *supra* note 12.

1. The ICESCR cannot be applied extraterritorially to situations where a developed nation deprives a developing nation of tax revenue

The ICESCR translated the UDHR into ten legal obligations imposed on ratifying states: "the human rights to work, just and fair conditions of labour, trade union membership, social security, protection for the family, an adequate standard of living, healthcare, education, and participation in cultural life."[70] States Parties to the ICESCR are required to provide for these rights, and they are also obligated to submit to the Secretary-General of the U.N. reports on the measures they have adopted to achieve the observance of the rights within the Covenant.[71]

The IBA argues that it is possible to infer "a responsibility to address tax abuses as these necessarily reduce the available resources for the progressive realization of economic, social and cultural rights."[72] Professor Stephen Cohen also claims that harmful tax practices, like bank secrecy laws, interfere with the basic economic rights guaranteed by the ICESCR.[73] Cohen emphasizes the fact that, regardless of the Covenant's extraterritoriality, the secrecy of offshore accounts makes it difficult for developing countries to provide the rights laid out in the ICESCR to their citizens.[74]

For the ICESCR to apply in cases of harmful tax practices, however, it must carry an extraterritorial application, meaning that a state would have obligations in human rights law to persons outside its jurisdiction.[75] If the ICESCR applied extraterritorially, a developed nation could potentially be liable for depriving a developing nation of tax revenue either by attracting the developing nation's investors as a tax haven or preferential tax regime, or by crediting the difference in rate between the developing nation and its own. However, the issue with an extraterritorial application arises from the general principle in human rights law holding that nations can be held accountable only for violations of human rights that occur in their territory or within their jurisdiction.[76]

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70. MARY DOWELL-JONES, CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: ASSESSING THE ECONOMIC DEFICIT 1 (2004).

71. ICESCR, *supra* note 67, art. 16.

72. INT'L BAR ASS'N, *supra* note 11, at 108.

73. Cohen, *supra* note 12.

74. *Id.*

75. Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 1, 5 (2011).

76. *Id.*

More recently, an effort has emerged to apply human rights treaties extraterritorially.[77] In Comments and Opinions by the Committee on Economic, Social and Cultural Rights (CESCR) and the International Court of Justice (ICJ), the ICESCR has been given extraterritorial application only in very limited cases, and it has never been applied to harmful international tax practices.[78] For practical purposes, this is likely because the link between one state's domestic tax laws and the effects of those practices in another state is too attenuated. Most domestic laws, not only those relating to tax, have some effect abroad. To hold that a state must always take these potential effects into consideration when implementing new laws would lead to absurd results.

Setting practical effects aside, however, a proper interpretation of the ICESCR, under the rules of the Vienna Convention on the Law of Treaties (VCLT),[79] also prevents an extraterritorial application of the treaty's obligations. The VCLT is a widely accepted international agreement governing the interpretation of treaties.[80] Since it came into force in 1969, both national and international courts have routinely applied the VCLT to interpret vague or unclear treaty language.[81] It is relevant here, because there is no specific clause in the ICESCR declaring an extraterritorial effect. Instead, an analysis of various clauses of the treaty under the VCLT allows a determination as to its extraterritorial extent. Articles 31 and 32 of the VCLT set forth the following rules of interpretation:

> Article 31
> *General rule of interpretation*
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> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
>
> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble . . .:

77. SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE 245-63 (2011).

78. *Id.*

79. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

80. *Id.* art. 31.

81. Anthony Aust, *Vienna Convention on the Law of Treaties (1969)*, *in* OXFORD PUBLIC INTERNATIONAL LAW (June 2006).

> . . .
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> There shall be taken into account, together with the context:
>
> . . .
>
> (b) any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties
>
> . . .
>
> Article 32
> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 32, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[82]

Thus, according to Article 31, it is proper to interpret the treaty's text in context and in light of the treaty's object and purpose. The context is derived from the text of the treaty and other instruments relating to the treaty. Subsequent state practice and relevant rules of international law are also to be taken into account. To confirm the meaning derived from the analysis under Article 31, Article 32 allows for an examination of the preparatory work of the treaty.

82. VCLT, *supra* note 80, art. 31.

a. The Context of the ICESCR

The context of a treaty can first be derived from the treaty's text. Unlike other international human rights agreements, the text of the ICESCR does not contain an explicit jurisdictional clause.[83] The only suggestion of any potential extraterritorial reach is through the treaty's international assistance and cooperation language. Article 2(1) of the ICESCR requires that

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[84]

Article 11(2) also requires States Parties to take into consideration food-importing and food-exporting states to ensure an equitable distribution of food supply in relation to need.[85] Some argue that the international assistance and cooperation language alone promotes an extraterritorial application of the ICESCR.[86] It is clear that the language demonstrates that implementation of the ICESCR involves the contemplation of actors beyond a state's own borders. However, international assistance and an extraterritorial obligation to provide the rights in the treaty are two completely different requirements.

There are at least two ambiguities resulting from the international assistance and cooperation language. First, it is unclear whether international assistance and cooperation applies to all the rights in the treaty or only some. Numerous provisions within the Covenant explicitly make clear that international cooperation is especially important, if not

83. *E.g.*, International Covenant on Civil and Political Rights, art. 2(1), *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. . . .").

84. ICESCR, *supra* note 67, art. 2(1).

85. *Id.* art. 11(2).

86. *See* MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 226 (1995); M. MAGDALENA SEPU¯LVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 274 (2003) ("[I]t is beyond doubt that States Parties are required to apply the Covenant within their territories and within the territory over which they have effective control.").

necessary, in regard to certain rights. In Article 11, paragraph 1, the Covenant provides that "States Parties will take appropriate steps to ensure the realization of [the right to an adequate standard of living], recognizing to this effect the essential importance of *international co-operation* based on free consent."[87] Article 11, paragraph 2 also speaks to international cooperation in that "States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through *international co-operation*, the measures, including specific programmes, which are needed."[88] Finally, Article 15, paragraph 4 recognizes "benefits to be derived from the encouragement and development of *international contacts and co-operation* in the scientific and cultural fields."[89]

Since international cooperation is mentioned in regard to the rights to an adequate standard of living, to be free from hunger, and to enjoy the benefits of scientific progress and its applications, a potential interpretation could result that international cooperation is neither important nor necessary in respect of other rights. The canon of interpretation "*expressio unius est exclusio alterius*" holds that when one or more things of a class are expressly mentioned, others of the same class are excluded.[90] Therefore, international cooperation may only be necessary in regard to certain rights.

Regardless of whether the international cooperation requirement applies only to the aforementioned rights or to all the rights in the treaty, the ICESCR's application in most cases involving harmful tax practices would be only marginally different. Harmful tax practices of developed nations deplete the revenue of developing nations, which in turn hinders the developing nation's ability to provide an adequate standard of living, to eradicate hunger, and to guarantee the right to enjoy the benefits of scientific progress and its applications.[91] Therefore, as long as these three rights are lacking in the developing nation, which they often are, this ambiguity would not prevent the finding of a violation. However, if these rights are already fulfilled in the nations under review, the analysis would likely stop here.

Second, although provisions throughout the ICESCR require international cooperation to guarantee at least some of the economic,

87. ICESCR, *supra* note 67, art. 11(1) (emphasis added).

88. *Id.* art. 11(2) (emphasis added).

89. *Id.* art. 15(4) (emphasis added).

90. *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (10th ed. 2014).

91. *See* Cohen, *supra* note 12 (explaining how bank secrecy laws deprive developing nations of revenue needed to meet basic needs. This same analysis is applicable to all tax laws allowing for evasion.).

social, and cultural rights in the Covenant, the text is silent as to whom each State Party must guarantee these rights.[92] That is to say, the extent of the international cooperation could be interpreted in two ways. The language could be understood as requiring that States Parties must collaborate with other states to guarantee rights to those *within their own borders*.[93] Under this interpretation, the treaty does not carry an extraterritorial obligation. Conversely, and as some scholars have argued, the language might mean that States Parties must collaborate internationally to guarantee rights *internationally*.[94]

The first interpretation is correct, because it follows the internationally accepted principle that states owe human rights obligations only to those within their own jurisdiction.[95] Further, the treaty's text in no way suggests a deviation from common principles of human rights law. Article 23 provides more detail as to what kind of international cooperation is necessary under the ICESCR by describing international action:

> The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.[96]

Articles 2 and 23 together do not lead to the conclusion that states must alter their domestic laws for the promotion of human rights elsewhere. Therefore, states should not be obligated under human rights law to terminate bank secrecy laws or put an end to secret rulings in the event that such practices cause harm to residents of another nation. Since international assistance includes the conclusion of covenants for the promotion of human rights,[97] one might argue that a tax treaty allowing for the credit method of relieving taxation is contrary to the obligation under the ICESCR. However, taking into consideration the

92. ICESCR, *supra* note 67, arts. 11(1), 11(2), 15(4).

93. *See* Coomans, *supra* note 76, at 6 (explaining the general rule relating to human rights treaties that states have a responsibility to uphold the rights of individuals within their own borders).

94. *Id.* at 6.

95. *Id.* at 5.

96. ICESCR, *supra* note 67, art. 23.

97. *Id.*

principle of human rights law that a state only owes obligations to those within its jurisdiction, it follows that the "conclusion of covenants" requirement means that a state should attempt to negotiate treaty terms that are helpful to its *own* residents. It does not lead to an obligation that nations must enact treaties that benefit nonresidents. Therefore, the extent of the Covenant's extraterritoriality can be described as follows: States Parties have an obligation to fulfill the positive rights in the Covenant to those in their jurisdiction, and they have an obligation to obtain technical and economic assistance from other nations in order to fulfill those rights.

i. Instruments Made in Connection with the Covenant

The instruments made in connection with the conclusion of the ICESCR support the interpretation derived from its text. States' reservations and declarations adopted when signing and ratifying the ICESCR shed light on its extraterritorial application. The United Kingdom reserved the right "not to apply sub-paragraph (b) of paragraph 1 [of Article 8] in Hong Kong."[98] It also declared that "the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented."[99] At the time of the ICESCR's enactment, Hong Kong and Zimbabwe (then-Southern Rhodesia) both belonged to the British Crown.[100] Therefore, the United Kingdom's concern about the application of the treaty in both territories demonstrates a belief that the treaty only applies to foreign areas that are under the jurisdiction of a State Party. If the treaty had an all-encompassing extraterritorial application, the United Kingdom would have no reason to renounce its obligation specifically to these two areas.

Further, Article 2 of the Optional Protocol to the ICESCR demonstrates the absence of an extraterritorial effect. Article 2 allows communications to be submitted "by or on behalf of individuals or groups of individuals, *under the jurisdiction of a State Party*, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in

98. Reservation to ICESCR of the United Kingdom of Great Britain and Northern Ireland, 1976 U.N.T.S. 993 (May 20).

99. *Id.*

100. *How Britain said farewell to its Empire*, BBC (July 23, 2010), http://www.bbc.com/news/magazine-10740852/.

the Covenant *by that State Party.*"[101] Therefore, a victim of a violation under the ICESCR can only bring a claim against the State Party if he or she is under that state's jurisdiction. This provision clearly suggests that the ICESCR does not have an extraterritorial effect, because if a state breached its obligation to an individual outside its jurisdiction, that individual would have no means of resolving his or her dispute. Article 13 further supports this lack of extraterritoriality in referring only to individuals within a state's jurisdiction.[102]

ii. Subsequent Developments Following the Ratification of the ICESCR

Subsequent developments aid in interpreting a treaty under the VCLT by demonstrating the treaty's function in practice.[103] As regards the ICESCR, most subsequent developments have come by form of the CESCR, which has commented on the extraterritorial application of the treaty in multiple instances.[104] Its Comments are not binding on states, but they are informative in determining a proper interpretation of the treaty.[105] The CESCR has often relied on the "international cooperation and assistance" language in considering the treaty's extraterritorial application.[106]

In one particular instance, the CESCR hinted at the extraterritoriality of the treaty. Regarding water rights, the Committee explained:

> To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction . . . .[107]

101. G.A. Res. 63/117, annex, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights art. 2 (Dec. 10, 2008) (emphasis added) [hereinafter ICESCR Optional Protocol].

102. *Id.* art. 13.

103. VCLT, *supra* note 80, art. 31.

104. JOSEPH, *supra* note 78, at 245-63.

105. *Id.*

106. *Id.*

107. *Id.* at 250-51 (citing CESCR, General Comment No. 15: The Right to Water, U.N. Doc. E/C.12/2002/11 (2003)).

Yet the Committee has also made clear that the treaty has broader application in cases of health crises.[108] Therefore, even if states might be obliged to take other states' needs into consideration when forming emergency health policies, such as concerns the enjoyment of water, they are still under no obligation to positively guarantee these rights in other states. Moreover, there is no suggestion that States Parties must consider the needs of other states in areas aside from emergency health policy.[109]

In most of its General Comments, however, the CESCR has limited its extension of the Covenant's extraterritoriality to areas over which a state exercises control. For instance, the Committee explained that when imposing sanctions, States Parties to the ICESCR should take upmost care to ensure that economic, social, and cultural rights are still met in the country upon which sanctions are imposed.[110] Its reasoning was based on the fact that "when an external party takes upon itself even partial responsibility for the situation within a state (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its powers to protect the economic, social and cultural rights of the affected population."[111] The Committee described this obligation, however, as a negative one that only pertains to the action at issue.[112] That is to say, if the United States imposes sanctions on North Korea, it is not obliged to start giving North Koreans food supplies, nor must it implement tax laws that are favorable towards North Korea. Rather, the United States would be required to ensure that the sanctions specifically do not deprive North Koreans of the right to an adequate food supply. Likewise, the Committee has held regarding the Israel-Palestine conflict that the decisive factor in determining extraterritoriality under the ICESCR is whether one state exercises effective control over a foreign territory and over the populations residing within that territory.[113]

Finally, the Committee has interpreted the international cooperation and assistance language as requiring that each State Party work with other states to promote international policies that will allow it to

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108. *Id.*

109. *See id.* at 254 (citing CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶¶ 38-40, UN Doc. E/C.12/2000/4 (2000)).

110. Coomans, *supra* note 76, at 10-13.

111. *Id.* at 11 (quoting CESCR, General Comment No. 8: The relationship between economic sanctions and respect for economic and social rights, ¶ 13, U.N. Doc. E/C.12/1997/8 (1997)).

112. *Id.*

113. CESCR, Concluding Observations regarding Israel's Initial Report, ¶¶ 17-22, U.N. Doc. E. C.12/1/27 (1998).

fulfill its own treaty obligations.[114] For instance, when reviewing one of Italy's routine reports, the CESCR encouraged the Italian government "as a member of international organisations, in particular IMF and the World Bank, to do all it can to ensure that the policies and decisions of those organisations are in conformity with the obligations of States Parties to the Covenant."[115] The Committee has made similar remarks when reviewing the reports of other nations, such as Belgium, Japan, and Germany.[116] Therefore, in these instances, the international cooperation principle has not been treated as an extraterritorial expansion of the treaty, but instead as a requirement that states work together in the international organizations to which they belong to make sure that obligations are met. This interpretation is exactly in line with the meaning derived from the treaty's text. As applied to international tax practices, the Committee would therefore require that Italy promote language in tax treaties that will allow Italy to fulfill its obligations to its own people. It would not require that Italy take into considerations the needs of every individual abroad.

The Committee's view on the ICESCR has further been supported by decisions of the ICJ. In *Democratic Republic of Congo v. Uganda*, for instance, the ICJ explained that states are responsible for acts performed abroad while exercising jurisdiction in occupied territories.[117] Likewise, in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the ICJ held that states have an obligation under the ICESCR to "territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction."[118] Therefore, both the CESCR and the ICJ clearly believe that the ICESCR applies extraterritorially, but only in very limited circumstances where one State Party exercises some sort of control over another state.

It is worth noting that states often assist each other in achieving the rights set out in the ICESCR, but they do so voluntarily. In fact, the CESCR has urged developed states to assist their developing neighbors

114. SEPÚLVEDA, *supra* note 87, at 339 (quoting CESCR, Concluding Observations Italy, ¶ 26, E/2001/22 (2005)).

115. *Id.*

116. *Id.*

117. JOSEPH, *supra* note 78, at 250 (citing Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, Merits, 2005 I.C.J. Rep. 168, ¶ 216 (June 23)).

118. *Id.* (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 ¶¶ 111-13 (Dec. 8)).

in combatting poverty and hunger.[119] It is important to note, however, that the CESCR uses recommendatory language, such as "should," instead of referring to any sort of binding obligation with words like "must."[120] Thus, state practice of international aid and assistance is not the result of a treaty obligation, but rather a plain desire to help those in need.

In light of these interpretations, subsequent practice following the ratification of the treaty does not suggest that harmful international tax practices amount to violations of the ICESCR. When the United States devises its tax laws, it is not required to take into consideration how those laws could potentially take revenue away from other states.[121] The interpretations by the CESCR and the ICJ do suggest that the United States might have to consider such effects regarding territories over which it exercises jurisdiction, because it takes upon itself the responsibility for the situation within a state.[122] It also might have to consider the needs of other states when adopting health policies during times of crisis.[123] But these situations are limited, and when they have arisen in the past, states have already been cognizant to function within the corners of the treaty.[124] For example, before the United States got rid of the credit method for relieving double taxation, it enacted Section 933 of the Internal Revenue Code, which exempted Puerto Rican source income from federal tax.[125] Essentially, the law eliminated the negative effect of the credit method on U.S. investments in Puerto Rico.[126] This enactment demonstrated the understanding of the U.S. government that it had an obligation to Puerto Rico as a U.S. territory, but it did not have a similar obligation to states where it lacked jurisdiction. Aside from similar situations, where one state has jurisdiction over the people in another, practices developing subsequent to the ratification of the ICESCR do not suggest that States Parties are under an obligation to write their tax laws in consideration of their potential effects abroad.[127]

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119. *See, e.g.*, General Comment No. 15, *supra* note 108, ¶ 33 ("[S]teps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.").

120. Coomans, *supra* note 76, at 29.

121. Nowhere in the tax code does Congress state it is following a requirement to consider the revenue capabilities of other nations. *See* 26 U.S.C. § 1 (2018).

122. *See supra* notes 109-120 and accompanying text.

123. CESCR, General Comment No. 14, *supra* note 110.

124. *See, e.g.*, Income from sources within Puerto Rico, 26 U.S.C. § 933 (2012).

125. *Id.*

126. *Id.*

127. *See supra* notes 105-128 and accompanying text.

b. The Object and Purpose of the ICESCR

The Covenant's object and purpose is described in the Preamble to the ICESCR as well as in the Preamble to the Optional Protocol. The Preamble of the ICESCR supports the interpretation derived from the rest of the texts that States Parties do not have an obligation to those outside their own jurisdiction.[128] The Preamble to the Option Protocol is more open to an extraterritorial application, but it does not contradict the findings from the treaty's text.[129]

The language of the Preamble demonstrates that the ICESCR intends to guarantee economic, social, and cultural rights to all human beings. It makes clear that the Covenant was accepted upon the consideration that "recognition of inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. . . ."[130] The language goes on to acknowledge that the rights in the Covenant "derive from the inherent dignity of the human person. . . ."[131] It again emphasizes the rights of all human beings in that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. . . ."[132] From these provisions, it is clear that the purpose of the Covenant is to provide the universal protection of economic, social, and cultural rights. One might argue that to distinguish between individuals within a state's jurisdiction and those outside its jurisdiction in guaranteeing rights would be contrary to the universality of the treaty.

The discussion of individuals' obligations in the Preamble, however, supports an interpretation void of extraterritoriality. After espousing the principle of universal protection, the Preamble emphasizes that an individual maintains an obligation specifically to the community to which he or she belongs.[133] It maintains that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant. . . ."[134] The Preamble is silent on the states' obligations. However, if the object and purpose of

128. ICESCR, *supra* note 67, pmbl.
129. ICESCR Optional Protocol, *supra* note 102, pmbl.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

the treaty is achievable where individuals only owe an obligation to their own communities, it can also be understood that the object and purpose is achievable where states owe an obligation only to those in their own jurisdiction. An individual's actions could just as easily deprive people outside its jurisdiction of human rights as could states' actions For instance, an individual who avoids paying taxes owed in a source state deprives that nation's citizens of just as much revenue as if the nation were to provide a secret ruling obviating the individual's tax obligation. Therefore, in this context, it does not follow logically that individuals only have duties to those in their communities, but States Parties have obligations abroad.

Unlike the Preamble to the ICESCR, the Preamble to the Optional Protocol of the ICESCR is more friendly towards an extraterritorial application.[135] The Preamble to the Optional Protocol reaffirms "the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms."[136] Thus, it acknowledges other human rights as a part of the equation. The International Covenant on Civil and Political Rights (ICCPR) has, more often, been interpreted as carrying an extraterritorial application.[137] One might argue that if civil and political rights are interdependent with economic, social, and cultural rights, then economic, social, and cultural rights likewise carry an extraterritorial obligation. However, this argument fails because intent to provide the rights in one treaty cannot be transposed onto another treaty. Since the rest of the Preamble to the Optional Protocol is otherwise similar to the language of the ICESCR, it holds that the object and purpose does not require extraterritorial application.[138]

c. Travaux Préparatoires of the ICESCR

Article 32 of the VCLT provides that the purpose of the *travaux préparatoires* in interpreting a treaty is to confirm any meaning derived from the context and the object and purpose of the treaty.[139] The *travaux préparatoires* of the ICESCR do not speak directly to the extraterritorial application of the treaty. During the drafting stage, however, there was a small discussion surrounding the international cooperation

135. ICESCR Optional Protocol, *supra* not 102, pmbl.

136. *Id.*

137. JOSEPH, *supra* note 78, at 248-49.

138. ICESCR Optional Protocol, *supra* not 102, pmbl.

139. VCLT, *supra* note 80, art. 32.

language.[140] A Syrian delegate proposed that the phrase "based on free consent" be added to make clear that international assistance was voluntary.[141] The Syrian amendment passed, in part because there was a large number of abstentions to the vote.[142] In his book on extraterritoriality, Maarten den Heijer suggests that the abstention was likely due to the fact that delegates did not view the international cooperation language as "detailed enough to be seen as compulsory" in the first place.[143] Therefore, the delegates' reaction to the Syrian amendment clearly supports the meaning otherwise derived, that the treaty does not apply extraterritorially.

D. *Concluding Remarks on Harmful International Tax Practices*

An analysis of the ICESCR under the VCLT does not support an extraterritorial application of the treaty. The context of the treaty does not encourage extraterritoriality,[144] nor does the treaty's object and purpose.[145] But those suffering from harmful international tax practices are not left completely without a remedy. The new BEPS project of the OECD encourages the adoption of multiple anti-avoidance mechanisms to prevent mismatched rules that allow companies to shift profits to places where economic activity does not actually take place.[146] Over 100 countries have signed onto BEPS, including a number of developing nations who have staged their concerns since the early days of the project.[147] This solution is not a perfect one and fails to give a direct outlet to individual victims of tax abuse, but it improves the international tax schema by preventing scenarios like LuxLeaks from reoccurring.

III. Improving Domestic Tax Systems Through Human Rights Law

Not all hope is lost for the relationship between tax and human rights. It is the argument of this author that scholars and international

140. U.N. GAOR, Third Committee, 11th Sess., 742nd mtg. ¶ 33, U.N. Doc. A/C.3/SR.742 (Jan. 25, 1957).

141. *Id.*

142. Maarten den Heijer, Europe and Extraterritorial Asylum 37-38 (2011).

143. *Id.*

144. *See supra* notes 85-129 and accompanying text.

145. *See supra* notes 130-140 and accompanying text.

146. *Base erosion and profit shifting*, Organisation for Economic Co-operation and Development, http://www.oecd.org/tax/beps/.

147. *About the Inclusive Framework on BEPS*, Organisation for Economic Co-operation and Development, http://www.oecd.org/tax/beps/beps-about.htm/.

organizations are applying international human rights law to the wrong kind of tax practices. The current literature focuses heavily on states' deprivation of revenue through foreign bank secrecy laws and tax rulings that encourage tax dodgers to move to their jurisdiction.[148] However, claims upon these bases have shown to be fruitless, and human rights law can be better applied toward other areas lacking in extraterritoriality difficulties.

Although it is difficult to address harmful international tax practices through human rights mechanisms, such mechanisms can more successfully resolve failing domestic tax systems, and individuals can more readily bring claims against their own governments.[149] While foreign actors deprive individuals in developing countries of revenue, so do the governments of those countries. Unequal tax policies and inadequate administration procedures prevent the mobilization of revenue, which in turn impedes governments' ability to provide basic needs to their people.[150] Holding a government accountable for revenue mobilization failures eliminates the problems of extraterritoriality that arise with international tax harms. It is also likely to have better long-term effects, if a government responds to the claims against it by changing its policies and procedures. The rest of this Note, therefore, discusses the application of international human rights law to domestic tax failures.

Little attention is given to domestic tax concerns around the world. Developing nations have struggled for years to determine a successful kind of tax.[151] Organizations like the World Bank and the IMF have long advocated for a broad Value Added Tax (VAT)[152] on consumer goods.[153] But the VAT's success is contested, with some scholars instead promoting increased taxes on imports, exports, and excises.[154] Developing nations also struggle to ensure the progressivity of their tax codes.[155] In turn, the majority of revenue collection falls on the poorest

148. *E.g.* INT'L BAR ASS'N, *supra* note 11, at 140; Cohen, *supra* note 12.

149. *See supra* notes 279-393 and accompanying text.

150. *See supra* notes 162-213 and accompanying text.

151. *See* Reuven Avi-Yonah & Yoram Margalioth, *Taxation in Developing Countries: Some Recent Support and Challenges to the Conventional View*, 27 VA. TAX REV. 1 (2007).

152. The VAT is a type of consumption tax on the value added to goods and services. *What is VAT?*, EUR. COMM'N, https://ec.europa.eu/taxation_customs/business/vat/what-is-vat_en (last visited May 2, 2018).

153. Avi-Yonah & Margalioth, *supra* note 152, at 3.

154. *Id.*

155. *See* Norman Gemmell & Oliver Morrissey, *Tax Structure and the Incidence on the Poor in Developing Countries* (Univ. of Nottingham Ctr. for Res. in Econ. Dev. & Int'l Trade, Res. Paper No. 03/18, Oct. 2003).

people in their nations, while high income earners pay little to no tax.[156] These policy issues are only exacerbated by governments' inability to collect taxes through sound administrative procedures.

Although the World Bank and the IMF have attempted to solve revenue mobilization concerns in developing nations, their attempts have been highly unsuccessful.[157] Their failings are in large part due to governments' opposition to change and uprooting of the status quo.[158] This is where human rights law comes into play. By failing to collect sufficient revenue, which would otherwise provide for the basic human rights of their people, tax administrations are in violation of multiple human rights accords, including the ICESCR.[159] Human rights claims will prove more successful than development attempts alone, because international treaties are legally binding and they provide resolution mechanisms. The development procedures of the World Bank and the IMF might be helpful down the road, but only after holding governments legally accountable for their actions and getting to the root of the problem to achieve real change.

A. *Tax Concerns in Developing Nations*

When thinking about typical human rights violations, the failure to collect taxes is not often the first thing that comes to mind. This is because, in the developed world, tax collection is not a major problem. Although some citizens try to avoid paying taxes, the government is usually able to collect the majority of tax revenue owed, or at least what is required to run the nation. In the developing world, however, tax collection remains a serious issue.[160] Whereas the richer countries belonging to the OECD collect about thirty percent of their GDP in taxes, low-income countries only collect around twelve percent.[161] This is especially problematic since the main source of revenue in developing nations comes from the tax system.[162]

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156. *Id.*

157. DEV. FIN. INT'L, IS IMF TAX PRACTICE PROGRESSIVE? (2017), https://policy-practice.oxfam.org.uk/publications/is-imf-tax-policy-progressive-620350; INDEP. EVALUATION GRP., TAX REVENUE MOBILIZATION: LESSONS FROM WORLD BANK GROUP SUPPORT FOR TAX REFORM, WORLD BANK (2017), http://documents.worldbank.org/curated/en/245881489609740950/pdf/113533-WP-REPLACEMENT-PUBLIC.pdf.

158. *See* DEV. FIN. INT'L, *supra* note 159; INDEP. EVALUATION GRP. *supra* note 159.

159. *See supra* notes 271-321 and accompanying text.

160. Jacques Morisset & Victoria Cunningham, *Why isn't anyone paying taxes in low-income countries?* BROOKINGS (Apr. 30, 2015), https://www.brookings.edu/blog/future-development/2015/04/30/why-isnt-anyone-paying-taxes-in-low-income-countries/.

161. *Id.*

162. Avi-Yonah & Margalioth, *supra* note 152, at 4.

The lack of revenue in developing nations is most often attributed to poorly drawn tax policies and failing administrative procedures. Reuven S. Avi-Yonah, a prominent tax scholar at Michigan Law School, points to these two issues when analyzing the tax systems of developing nations.[163] He and his co-author, Yoram Margalioth, have described how developing nations' tax systems are distinct from those in developed nations due to "variations in industry type . . ., in the size of the administrative and compliance costs, in the levels of corruption, in the levels of monetization in the economy, in political constraints, and in the relative size of the informal economy."[164] They also explain that whereas developed nations obtain about two-thirds of their tax revenue from direct taxes and the other one-third from domestic sales taxes, the situation is reversed in developing nations.[165] These distinctions make it especially difficult for developing nations to adopt effective laws and implement successful administrative procedures.

1. Tanzania's Tax System: Failing Tax Policies and Administrative Procedures

A look into Tanzania's tax code demonstrates common revenue mobilization problems in developing nations. Ranked 148th in PwC's paying taxes rankings, [166] Tanzania has been widely criticized not only for its failures in implementing successful tax policy, but also for its tax administration failures.[167] These shortcomings make Tanzania a prime example of tax concerns arising in developing nations. The Tanzanian government collects approximately $6 billion in revenue each year, which is only about half of the government's total expenses.[168] Since Tanzania has little funding from other sources, the government is unable to provide for basic goods and needs.[169] At the same time, Tanzania's population continues to grow rapidly.[170] To adequately provide for its people, the government will require $550 million in

163. *Id.*

164. *Id.*

165. *Id.* at 4-5.

166. WORLD BANK GRP., WHY SHOULD TANZANIANS PAY TAXES? THE UNAVOIDABLE NEED TO FINANCE ECONOMIC DEVELOPMENT 26 (July 2015), http://www.worldbank.org/content/dam/Worldbank/document/Africa/Tanzania/Report/tanzania-economic-update-why-should-tanzanians-pay-taxes-the-unavoidable-need-to-finance-economic-development.pdf.

167. *Id.*; Morisset & Cunningham, *supra* note 161.

168. Morisset & Cunningham, *supra* note 161.

169. *Id.*

170. *Id.*

secondary education expenses alone by 2020.[171] This amount is a significant increase from the current budget of only $51 million for secondary education.[172] Infrastructure and health expenditures will also continue to grow, while the amount of revenue collected remains stagnant.[173]

In a report titled "*Why Should Tanzanians Pay Taxes?*," the World Bank assessed the Tanzanian tax system to determine why its tax performance is so poor.[174] The report first analyzed Tanzania's tax policies. It described the four main categories of taxes underlying the Tanzanian system: the VAT, income taxes, import duties and charges, and excise taxes.[175] The World Bank acknowledged that dependence on these four items for taxation is not uncommon in developing nations.[176] However, Tanzania's reliance on income taxes to contribute to more than forty percent of total gross tax venues, with only twenty-seven percent attributable to the VAT, is uncommon among developing nations.[177] The amount of Tanzania's import taxes is also declining due to the trade liberalization policies enacted over the past decade.[178] The IMF, the World Bank, and a host of scholars have encouraged developing nations to shift their tax systems towards one primarily relying on the VAT.[179] The World Bank thus blames the high reliance on income taxes and lower reliance on the VAT for at least part of Tanzania's poor taxing performance.[180]

Issues also exist within Tanzania's tax administration. One major weakness within the tax system is compliance. Due to noncompliance, Tanzania's VAT is concentrated in only a few sectors domestically and in one geographic location internationally.[181] The VAT on domestic transactions is collected primarily from three sectors: telecommunications, beverages, and cigarettes.[182] Yet national accounts data demonstrates that there are many other sectors of economic activity in Tanzania going untaxed.[183] Moreover, most of the VAT revenue

171. *Id.*
172. *Id.*
173. *Id.*
174. WORLD BANK GRP., *supra* note 167.
175. *Id.* at 27.
176. *Id.*
177. *Id.*
178. *Id.* at 29.
179. Avi-Yonah & Margalioth, *supra* note 152, at 3.
180. WORLD BANK GRP., *supra* note 167, at 27.
181. *Id.* at 30.
182. *Id.* at 28.
183. *Id.*

collected on international transactions occurs at the port of *Dar es Salaam* on the border.[184] In fact, the Dar es Salaam region accounts for about ninety percent of the country's total tax revenues, even though it accounts for only seventeen percent of its total GDP.[185] Thus, important regions of the country are clearly going undertaxed.

These collection issues are due in large part to the complexity of Tanzanian tax laws. A report conducted in 2013 found that seventy-two percent of Tanzanians are unable to determine which taxes to pay.[186] The complications in the Tanzanian tax code exists for all four categories of taxes.[187] This complexity is only made worse by the excessive application of exemptions and the small taxes collected by public sector entities.[188] An average of forty-nine taxes per year are imposed on Tanzanian businesses, and businesses spend an average of 181 hours each year paying their taxes.[189]

Tanzania's tax policy and administration weaknesses represent the problems across many developing nations. Many countries have adopted the VAT without much consideration into how it will function in practice.[190] They likewise struggle to balance the VAT with other tax sources, like income.[191] Moreover, by trying to provide excessive exemptions, developing nations create complexities in the code that result in an extreme loss in revenue.[192] Due to administrative costs[193] and an unwillingness to change,[194] governments are slow to amend any policies and procedures that actually have the potential to realize success.

2. Regressive Tax Rates

Much of the literature on tax policy in developing nations, including the report on Tanzania, speaks to the best kind of tax to impose.[195] Professors Norman Gemmell and Oliver Morrissey, however, have

184. *Id.*

185. *Id.*

186. *Id.* at 31.

187. *Id.*

188. *Id.* at 32.

189. *Id.*

190. DEV. FIN. INT'L, *supra* note 158, at 5.

191. Richard M. Bird, *Tax Challenges Facing Developing Countries: A Perspective from Outside the Policy Arena* (March 2007) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393991.

192. *Id.*

193. *Id.*

194. *See* INDEP. EVALUATION GRP., *supra* note 158, at 14.

195. *See* Avi-Yonah & Margalioth, *supra* note 152 (reviewing the recent literature).

found in their research that a major problem lies in the lack of progressivity throughout developing nations.[196] A progressive tax is one that increases with ability to pay.[197] A regressive tax, in contrast, is one that applies uniformly.[198] The tax becomes regressive because, while the rate remains stable, those with lower incomes pay a larger percentage of that income in taxes than do others with higher incomes.[199] Thus, the percentage of taxes in relation to income decreases with ability to pay.

Gemmell and Morrisey drew upon data from a 1986 report, demonstrating the proportionality of taxes across developing nations.[200] Overall, the tax systems of developing nations were found to be highly regressive.[201] Personal income taxes in those nations are typically progressive, but their evasion is often ignored.[202] Property taxes are also progressive, but make up a low share of revenue.[203] Indirect taxes, however, are generally regressive and corporate taxes are U-shaped, starting off regressive and shifting to progressive.[204] Finally, import and export taxes are mostly regressive.[205]

This model, adopted by many developing nations, results in the poor paying the highest percentage of taxes in relation to income.[206] Since the rich receive greater flows of income than the poor, they should, in theory, be paying more in taxes. But because it is so easy to evade income taxes, much of that revenue goes uncollected.[207] Corporate taxes, because of their U-shaped nature, result in high tax payments for the very poor and the very rich.[208] And although property taxes are typically progressive, the poor are less likely to own property and thus do not benefit from this progressive structure.[209] The regressivity of both

196. Gemmell & Morrissey, *supra* note 156.

197. Econ. & Private Sector, Taxation and Developing Countries: Training Notes 4 (2013), https://www.odi.org/sites/odi.org.uk/files/odi-assets/events-documents/5045.pdf/.

198. *Id.* at 5.

199. *Id.*

200. Gemmell & Morrissey, *supra* note 156, at 16-17.

201. *Id.*

202. *Id.* at 16.

203. *Id.* at 17.

204. *Id.* at 16-17.

205. *Id.* at 17.

206. *Id.* at 16-17.

207. *Id.* at 16.

208. *Id.*

209. *See* Avi-Yonah & Margalioth, *supra* note 152, at 8 (citing Richard M. Bird, *Taxation in Latin America: Reflections on Sustainability and the Balance between Equity and Efficiency* 7 (Joseph L. Rotman Sch. of Mgmt., Univ. of Toronto ITP Paper 0306, 2003).

indirect and import taxes falls heavily on the poor, because a larger percentage of their income goes towards consumption items than the rich.[210] Export taxes also more often implicate the poor, because in developing nations, low-income local producers make up a large share of the exports.[211] Therefore, developing nations not only wrestle with the kind of taxes imposed and the way they are imposed, but also the regressivity of their tax codes, all of which must be amended in order to better mobilize revenue.

B. *Recent Approaches to Improving Developing Nations' Tax Systems Have Failed*

In response to the revenue mobilization concerns in developing nations, the World Bank and the IMF have spearheaded tax reform efforts since 1982.[212] Working together and with other international organizations, they have implemented a number of proposals to bring both awareness and improvement to developing nations.[213] The World Bank has taken the lead on finance and investment projects, whereas the IMF has focused on tax policy and administrative reform.[214]

One of the earlier goals of both organizations was to encourage countries to implement the VAT.[215] They viewed export taxes as inefficient for putting local producers at a disadvantage and import taxes as harmful because their effects were passed on to local consumers.[216] The VAT, conversely, was intended to "improve macroeconomic stability and to introduce the benefits of free trade to developing economies."[217] Since the 1980s, many states have adopted the organizations' suggestion.[218] Whether or not the VAT is the best way to raise revenue in developing nations, however, is highly contested to this day.[219]

Beyond their support for the VAT, the World Bank and the IMF have taken a number of initiatives to improve tax revenue mobilization in developing nations.[220] In recent years, their efforts have endured many

210. *Id.* at 5.
211. *Id.*
212. INDEP. EVALUATION GRP., *supra* note 158, at 1.
213. *Id.*
214. *Id.* at 2.
215. Avi-Yonah & Margalioth, *supra* note 152, at 3.
216. *Id.* at 5.
217. *Id.*
218. *Id.*
219. *Id.* (reviewing differing views on the successfulness of the VAT).
220. DEV. FIN. INT'L, *supra* note 158; INDEP. EVALUATION GRP., *supra* note 158.

shortcomings.[221] Two reports, by the Independent Evaluation Group (IEG) and Development Finance International (DFI), highlight the failures of these institutions.[222]

In a 2017 report, the IEG reviewed the World Bank's tax reform efforts spanning fiscal years 2005 to 2015.[223] The majority of the World Bank's assistance has been through programmatic developing policy operations (DPOs), which included tax progress as a part of larger economic programs seeking to strengthen the investment climate in developing nations.[224] Most of the World Bank's DPOs were located in Latin America, the Caribbean, and Sub-Saharan Africa.[225] The two primary goals of the World Bank have been to improve tax policy by broadening the tax base and simplifying rates, as well as strengthening tax administrative procedures.[226] In Guatemala, for example, the World Bank implemented a series of operations aimed at "raising government revenue to create fiscal space for higher public expenditure. . . ."[227]

The IEG found that the tax components of the World Bank's DPOs have been less successful than the overall operations to which they belong.[228] The World Bank made more strides in altering tax administration procedures than in making policy changes.[229] But even efforts to improve administrative procedures were highly ineffective. In Colombia, the direction of policy actions was not clearly defined and administrative reforms were too complex to achieve success.[230] The World Bank also attempted to implement technical and institutional reforms in Guatemala, but it failed to take into consideration governance barriers, such as political opposition to tax policy reform.[231] In all of the monitored countries, the World Bank failed to address economic efficiency and equity concerns.[232]

In a similar report published in 2015, DFI reviewed the IMF's policies from 2010 to 2015.[233] The IMF influences tax policy in developing

221. *See id.*
222. *Id.*
223. INDEP. EVALUATION GRP., *supra* note 158, at viii.
224. *Id.*
225. *Id.*
226. *Id.* at 9.
227. *Id.* at 13.
228. *Id.* at x.
229. *Id.*
230. *Id.* at 14.
231. *Id.*
232. *Id.* at xi.
233. DEV. FIN. INT'L, *supra* note 158.

nations in four ways: "(1) by providing [technical assistance] on tax policy to countries; (2) by setting policy conditions on tax in IMF-approved economic programs; (3) by setting global standards on tax policy practices, which influence all countries; [and] (4) by analyzing global tax policy trends, and making recommendations to the G20."[234] Two recent goals of the IMF have been to increase progressivity and combat evasion.[235]

DFI found that the IMF failed to achieve these goals in a number of ways. The IMF's policies on the personal income tax rates and social security and pension contributions have not been consistent.[236] For instance, many developing nations attempt to reduce personal income tax rates to increase foreign investment.[237] In 2000, Peru reduced its maximum rate from thirty percent to twenty percent.[238] The IMF criticized this reduction and eventually convinced Peru to increase its rate back up to thirty percent.[239] However, the IMF has never found issue with Ghana's very low income tax rate of twenty-five percent.[240] Moreover, the IMF assisted two countries in introducing taxes based on ability to pay, but it has opposed financial transaction taxes, which would be crucial in achieving a progressive system.[241] The IMF's position on corporate income tax rates is particularly unclear.[242] And although it has played a key role in introducing the VAT to developing nations, the IMF has failed to take measures to ensure the progressivity of the VAT.[243] Most notably, the IMF has advocated for a flat VAT rate to maximize revenue, but without exemptions or lower rates for goods consumed by the poor.[244]

Despite, or perhaps in light of, their shortcomings in past years, in 2015, the World Bank and the IMF agreed to a joint initiative to help developing nations raise revenue.[245] This initiative has two pillars: "(i) deepening the dialogue with developing countries on international tax issues, aiming to help increase their voice in the international

234. *Id.* at 9.
235. *Id.*
236. *Id.* at 4.
237. *Id.*
238. *Id.* at 18.
239. *Id.*
240. *Id.*
241. *Id.* at 5.
242. *Id.*
243. *Id.*
244. *Id.* at 24.
245. INDEP. EVALUATION GRP., *supra* note 158, at 3.

debate on tax rules and cooperation, and (ii) developing improved diagnostic tools to help member countries evaluate and strengthen their tax policies."[246] Their diagnostic tools are now available in thirty states.[247] The organizations' approach uses methodologies to determine the particular problems arising in each tax jurisdiction.[248] It remains completely unclear, however, as to whether the joint initiative will prevail over past attempts to improve tax policies and administrations in developing nations.

C. *Current Literature on Tax Policy in Developing Nations*

Scholars have responded to tax policy and administrative concerns with a number of suggestions.[249] Their comments often come in the form of endorsing or criticizing the development attempts of the IMF and the World Bank, especially the organizations' suggestion that developing nations replace trade taxes with domestic consumption taxes.[250] Much of the recent research has focused on developing nations' responses to IMF and World Bank policies by adopting the VAT in an effort to better align their tax systems with the best potential revenue sources.[251]

Some of the literature supports the viewpoints of the World Bank and the IMF.[252] The general consensus here is that most taxes, and especially consumption taxes, are more efficient than taxes on income.[253] Professors Gemmell and Morrisey point to the fact that export taxes are regressive in developing nations and should be replaced with consumption taxes, which are slightly more progressive.[254] Professor Richard Bird, citing the unequal distribution of land ownership in developing nations specifically in Central America, argues for increasing property taxes, improving tax administration, and raising taxes on estates.[255] Like Professors Gemmell and Morrisey, Professor Bird also promotes the VAT as "the best tax system . . . that produces

246. *Id.*
247. *Id.*
248. *Id.*
249. *See* Avi-Yonah & Margalioth, *supra* note 152 (describing the recent recommendations in tax literature).
250. *Id.*
251. *Id.*
252. *Id.* at 6-10.
253. *Id.* at 21.
254. *Id.* at 7 (citing Gemmell & Morrissey, *supra* note 156, at 29).
255. *Id.* at 8 (citing Bird, *supra* note 210, at 40).

the most revenue in the least costly and distorting way."[256] Together, Professor Bird and Professor Eric Zolt argue for fiscal decentralization and heavier reliance on withholding.[257]

Other recent literature challenges the above viewpoints.[258] Professors M. Shahe Emran and Joseph E. Stiglitz argue that trade taxes function better in developing nations than the VAT.[259] They explain that an increase in consumption taxes through the VAT creates a distortion between the formal and informal sectors of the economy.[260] Trade taxes, they believe, are also superior due to [the] administrative costs of the VAT.[261] Moreover, Professors Thomas Baunsgaard and Michael Keen found that developing nations have a difficult time replacing the revenue lost by trade liberalization with that from domestic sources, such as consumption.[262] Finally, Professors Roger Gordon and Wei Li acknowledge the tax enforcement issues of the VAT, explaining that consumption tax rates vary by firm and many firms avoid taxes entirely in developing nations by resorting to cash-based operations.[263] Therefore, their model focuses on high corporate tax rates, because taxes can most easily be collected from firms that are dependent on the financial sector.[264]

In addressing all of these viewpoints in their paper on taxation in developing nations, Professors Avi-Yonah and Margalioth conclude that "[a] good tax system is one that fits both the social institutions as well as other specific determinants of distribution and economic growth in each country."[265] They believe that a country-by-country analysis will better determine the correct taxing method in different areas

256. *Id.* at 9 (quoting Richard M. Bird, Jorge Martinez-Vazquez & Benno Torgler, *Societal Institutions and Tax Effort in Developing Countries* 47 (Joseph L. Rotman Sch. of Mgmt., Univ. of Toronto, ITP Paper 04011, 2004).

257. *Id.* at 9 (citing Richard M. Bird & Eric M. Zolt., *Rethinking Redistribution: Tax Policy in an Era of Rising Inequality: Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627 (2005)).

258. *Id.* at 10-20.

259. *Id.* at 10 (citing M. Shahe Emran & Joseph E. Stiglitz, *On Selective Indirect Tax Reform in Developing Countries*, 89 J. PUB. ECON. 599, 618 (2005)).

260. *Id.* at 11.

261. *Id.* at 13.

262. *Id.* (citing Thomas Baunsgaard & Michael Keen, *Tax Revenue and (or?) Trade Liberalization* (Int'l Monetary Fund, Working Paper No. 50/112, 2005)).

263. *Id.* at 14 (citing Roger Gordon & Wei Li, *Tax Structure in Developing Countries: Many Puzzles and a Possible Explanation* (Nat'l Bureau of Econ. Research, Working Paper No. 11267, 2005)).

264. *Id.* at 16.

265. *Id.* at 20.

of the world.[266] Their approach seems most likely to succeed, because states face different hurdles to tax compliance.[267] For instance, the VAT might find success in states with larger formal sectors, but a trade tax might be better in states with businesses relying more heavily on cash transactions. Their recommendation is also in line with the most recent direction of the World Bank and the IMF, whose joint initiative seeks to better understand the particular underpinnings of each state.[268]

D. *Human Rights as an Outlet to Addressing Tax Issues in Developing Nations*

Ineffective World Bank and IMF programs, as well as unsuccessful academic recommendations, have led to the most recent effort to address tax policy and administration issues on a country-by-country basis. While this author agrees on the direction tax efforts are headed, she still questions whether tax reforms will succeed at the implementation stage. That is to say, once the World Bank and the IMF discover the individual problems of each developing nation, what will they do better to implement their responsive improvements? The ability to amend current tax practices is especially dubious for governments like Guatemala, which adamantly oppose tax reform.[269]

1. Human Rights Mechanisms to Enforce Tax Collection

Human rights law has the ability to improve tax systems that development organizations lack. Countries like Tanzania, that fail to collect sufficient revenue to provide for their citizens, are probably in violation of multiple treaties and declarations on international human rights. Philip Alston has claimed that failed tax systems implicate all kinds of human rights, including not only economic, social, and cultural rights, but also civil and political.[270] However, the author sees a more direct connection between tax and economic, social, and cultural rights. Whereas revenue is necessary to fulfill civil rights, such as the right to a fair trial,[271] it is not sufficient, since such rights are also subject to other

266. *Id.*

267. *See* Richard Posner, *Why Are Tax Burdens So Different in Different Developed Countries?*, THE BECKER-POSNER BLOG (Jan. 27, 2008), https://www.becker-posner-blog.com/2008/01/why-are-tax-burdens-so-different-in-different-developed-countries–posner.html.

268. INDEP. EVALUATION GRP., *supra* note 158, at 3.

269. *Id.* at 14.

270. CTR. FOR ECON. SOC. RTS., *Philip Alston: Tax as a fundamental human rights issue*, CESR (Apr. 29, 2015), http://www.cesr.org/philip-alston-tax-fundamental-human-rights-issue/.

271. *Id.*

concerns unrelated to revenue, like lawmakers' moral and ethical values.[272] The attainment of economic, social, and cultural rights, in contrast, relies completely on the availability of resources.[273] Therefore, when governments fail to mobilize revenue, they more directly violate the ICESCR, the UDHR, the Resolution on Human Rights and Extreme Poverty, and other declarations involving economic, social, and cultural (ESC) rights. Since the ICESCR is legally binding, and because it has been widely ratified,[274] it is most likely to be successful in addressing domestic tax systems.

Although the ICESCR does not speak specifically to tax policy, failing to collect an adequate amount of revenue is a significant impediment to the achievement of the rights agreed to under the ICESCR.[275] Mary Dowell-Jones, in her book on the ICESCR, writes that "macroeconomic, microeconomic, and social policies must be pursued in concert: serious macroeconomic imbalances pose undeniable risks to the standard of living of individuals which must be dealt with in order to create conditions in which Covenant rights can be enjoyed."[276] Thus, poorly drafted tax policies and failing administrative procedures result in a lack of revenue that, if otherwise collected, would be used to improve the standard of living.

An analysis of the treaty, in line with the principles of interpretation under the VCLT, demonstrates that a failing tax system amounts to a violation of the ICESCR. As a review, under Article 31 of the VCLT, it is correct to interpret a treaty's text in context and in light of its object and purpose.[277] The context is derived from the text of the treaty and other instruments relating to the treaty.[278] It is proper to also account for subsequent state practice and relevant rules of international law.[279]

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272. *See* Linda C. McClain, *The Civil Rights Act of 1964 and "Legislating Morality": On Conscience, Prejudice, and Whether "Stateways" Can Chance "Folkways"*, 95 BOSTON UNIV. L. REV. 891 (2015) (explaining how Congress legislated morality in enacting the Civil Rights Act of 1964). Even if a country has enough revenue to realize certain civil rights, lawmakers have different opinions on the morality of such rights and might try to prevent the enactment thereof.

273. *See* Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 A.J.I.L. 462, 464 (2004).

274. *See International Covenant on Economic, Social and Cultural Rights, Status at 02-05-2018*, U.N.T.C., https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en/.

275. *See supra* notes 279-321 and accompanying text.

276. DOWELL-JONES, *supra* note 71, at 9.

277. VCLT, *supra* note 80, art. 31.

278. *Id.*

279. *Id.*

To confirm the meaning derived from this analysis, Article 32 provides for an examination of the treaty's preparatory work.[280]

a. The Context of the ICESCR

The text of the ICESCR demonstrates its applicability to address failing tax systems. Under the ICESCR, States Parties are required to implement certain rights upon ratification of the treaty. Most of the rights are subject to a "progressive achievement" requirement under Article 2 (1).[281] However, the CESCR has interpreted some of the provisions to be immediately effective.[282] This includes: Article 2(2) on nondiscrimination; Article 3 on equal rights for men and women; Article 7(a)(i) on equal pay; Article 8 on the right to be involved in trade unions; Article 10(3) on nondiscrimination in protecting children; Article 13(2)(a) on free and compulsory primary education; Article 13(3) on parental freedom in making decisions for a child's education; Article 13(4) on liberty of individuals and groups to establish educational institutions; and Article 15(3) on freedom of research and creative activity.[283] Matthew Craven has explained that the text of the ICESCR requires immediate implementation because these rights cannot be achieved progressively.[284] Therefore, States Parties must take measures upon ratification to ensure such rights. Some of these rights are achievable without an alteration in a country's tax code, but others might rely on an increase in revenue, such as the provision of free and compulsory primary education.[285]

In line with the immediate effect of some of the provisions, the treaty is subject to a minimum threshold, so that states are "ensur[ing] the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent on every State party."[286] According to the Limburg Principles, which interpret the covenant, the minimum essential levels

280. VCLT, *supra* note 80, art. 32.

281. ICESCR, *supra* note 67, art. 2(1).

282. DOWELL-JONES, *supra* note 71, at 20 (quoting CESCR, General Comment No. 3: The nature of States parties obligations, ¶ 5, U.N. Doc. E/1991/23 (1990)).

283. *Id.*

284. *Id.* (citing M. Craven, *The Justiciability of Economic, Social and Cultural Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEIR IMPLEMENTATION IN UNITED KINGDOM LAW (R. Bruchill, D. Harris & A. Owers, eds. 1999)).

285. For instance, enacting a law to give women the same suffrage rights as men would come at no revenue cost since lawmakers are already paid to enact laws.

286. CESCR, General Comment No. 3: The Nature of State Parties' Obligations (Art. 2, Para. 1, of the Covenant), 3, ¶ 10, U.N. Doc. E/1991/23 (1990).

apply irrespective of the availability of resources.[287] The Committee has gone on to say that

> If resource constraints render it impossible for a State party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above.[288]

An improved tax system is an available resource to increase revenue in order to provide for these rights.[289] On the basis of the Committee's Comment, if a state does not attempt to amend its tax policies in order to meet the minimum threshold, it has not done everything possible to satisfy the obligations in the ICESCR.[290] Therefore, at least as regards the immediate enforcement of certain rights and the minimum threshold, states are clearly in violation of the treaty for failing to take measures to collect an adequate amount of tax.

Beyond this minimum threshold, states still have an obligation to work progressively towards fulfilling the rights in the treaty.[291] The word "fulfill" is chosen carefully here because it is distinct from other kinds of obligations such as the obligation to "respect," which imposes a negative duty on states not to interfere with an individual's rights, and the obligation to "protect," which involves the state's role in regulating interactions between private individuals and actors.[292] Fulfilling rights, on the other hand, means that the state must "pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood. . . ."[293] This obligation best describes the role imposed on states under the ICESCR, because the text of the treaty emphasizes that states must "take steps" to achieve the realization of the rights set forth.[294] Therefore, one of these steps could be improvements in the tax system. Combined with other

287. *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 15 NETH. Q. HUM. RTS. 244, 245, 247-28 (1997).

288. CESCR, General Comment No. 12: The right to adequate food, ¶ 17, U.N. Doc. E/C/.12/1999/5 (1999).

289. Bernardin Akitoby, *Raising Revenue*, 55 FIN. & DEV. 1 (2018).

290. *See* General Comment No. 12, *supra* note 289, ¶ 17.

291. ICESCR, *supra* note 67, art. 2(1).

292. *See* General Comment No. 12, *supra* note 289, ¶ 29-30.

293. *Id.* at ¶ 15.

294. *See* ICESCR, *supra* note 67, art. 2(1).

provisions of the treaty, it becomes more clear that one of the steps, in fact, should be improvements in the tax system.

The adoption of sound tax policies and administrative procedures as a requirement under the treaty is further supported by the language that States Parties must use "all appropriate means, including *particularly* the adoption of legislative measures" to fulfill their treaty obligations.[295] The enactment of legislative measures is also emphasized in the Option Protocol to the treaty.[296] The CESCR has made clear that legislation improving the overall economic position of a state is important where a state fails to provide for the rights in the treaty.[297] In its concluding observations of a routine report, the Committee praised Mexico for its "improved macroeconomic performance, particularly the reduction of foreign debt, the decrease in inflation and the growth of export capacity, all of which create an environment conducive to a more effective implementation of the rights under the Covenant."[298] Tax policy, as economic policy, thus falls into this same category. Other international actors have similarly interpreted the obligation to provide ESC rights as necessitating a strong tax system.[299] For example, in discussing policy changes for the betterment of ESC rights, a report issued by the office of the President of the Philippines in 1996 highlighted the importance of a stable tax base.[300] Therefore, because economic legislation is essential to achieving the rights in the treaty, states should be held accountable for failing to take action on improving their legislation for the mobilization of revenue.

The ICESCR further requires that a State Party must use "the maximum of its available resources" to fulfill the rights in the treaty.[301] The Limburg Principles explain that this language requires "equitable and effective use of and access to [a State Party's] available resources."[302] Implementing better tax policies and procedures surely puts resources to a more equitable use, especially because revenue contribution currently falls on the poor in many developing nations. In fact, CESCR

295. *Id.* (emphasis added).

296. ICESCR Optional Protocol, *supra* note 102, pmbl.

297. *See* DOWELL-JONES, *supra* note 71, at 44 (citing CESCR, State Party Report: Mexico, ¶ 3, U. N. Doc. E/C.12/Add.14 (1999)).

298. *Id.*

299. *See, e.g.*, PHIL., NAT'L ECON. AND DEV. AUTH., REPUBLIC OF THE PHIL.: THE PRESIDENT'S 1996 SOCIO-ECONOMIC REPORT 1-13 (1996).

300. *Id.*

301. ICESCR, *supra* note 67, art. 2(1).

302. DOWELL-JONES, *supra* note 71, at 45 (citing P. HALL, THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS 27 (1989)).

member Ade Adekuoye suggested in a question to the United Kingdom that tax policy plays an important role in utilizing the maximum of available resources. He asked: "[W]hether, in view of the claims that the United Kingdom was one of the poorer countries of Europe, the Government's promise not to raise taxes would have any effect on its ability to fulfill its obligations."[303] Therefore, included in the maximum of available resources is the ability to alter the current tax regime. Until States Parties to the treaty have taken steps to make strides in tax policies and procedures, they have not done everything possible under this provision to secure the rights in the treaty.

The Optional Protocol to the ICESCR explains that when reviewing states' practices, the Committee should take into consideration the reasonableness of the steps taken by States Parties to fulfill the treaty rights.[304] It is relevant here that executing new tax policies is less expensive than other processes involved in ensuring the rights under the ICESCR.[305] Governments might not have the ability to make larger food supplies appear out of thin air, but they can change their laws with little financial hardship.[306] Thus, because tax mobilization is an available resource to almost every state, even the poorest of developing nations, a government cannot make the argument that a new tax system is out of the realm of reasonableness.

Through their practice, states have also demonstrated a belief that the ICESCR requires the improvement of tax procedures to ensure economic, social, and cultural rights. While under review by the CESCR, the Dominican Republic tried to emphasize its steps taken towards the fulfillment of rights by explaining that it made improvements in government revenue.[307] A Dominican Republic representative explained that the government "tighten[ed] up the collection of income tax and

303. *Id.* at 46-47 (quoting CESCR, Summary of the 17th Meeting, ¶ 51, U.N. Doc. E/C.12/1997/SR.36 (1997)).

304. ICESCR Optional Protocol, *supra* note 102, art. 8(4).

305. Marty Garrity, the director of the Bureau of Legislative Research at the Capitol, said it was difficult to estimate the cost of enacting a bill because "[t]here are clearly staff costs associated with all of the stages of [the legislative] process, but because this is happening with hundreds of pieces of different legislation at once, it's not feasible to put a price tag on any single bill." *Ask the Times: How Much Does a Bill Cost?*, ARK. TIMES (Apr. 16, 2015), https://www.arktimes.com/arkansas/ask-the-times-how-much-does-a-bill-cost/Content?oid=3811839. In theory, however, if states have already voted in legislators, and their salaries are already included in the national budget, the states would not pay an extra cost for the legislators' efforts in enacting a tax bill.

306. *See id.*

307. DOWELL-JONES, *supra* note 71, at 95 (quoting CESCR, Summary Record of the 31st Meeting, ¶ 27, U.N. Doc. E/C.12/1997/SR.31 (1997)).

Customs duties and . . . reduce[d] tariffs."[308] The representative also stated that the Dominican Republic would amend the social security system by making efforts to reduce tax evasion.[309] This is not the only occasion where references to the tax systems have come up in Committee reviews.[310] Therefore, the context of the ICESCR, in consideration with this subsequent state practice, demonstrates that the treaty can successfully address failing tax systems.

b. The Object and Purpose of the ICESCR

The object and purpose of the ICESCR supports the analysis derived from the treaty's context. The object and purpose is set out in its Preamble, which makes clear that all human beings have the right to be free from fear and want.[311] Moreover, this freedom can only be achieved if everyone has the ability to enjoy economic, social, and cultural rights.[312] This universality of ESC rights further supports tax failures as a violation of the ICESCR. Especially considering that the tax systems of many developing nations place a heavy burden on the poor while allowing tax evasion for the rich,[313] it is impossible to achieve universal equality. Through implementing more progressive policies and altering administrative mechanisms to combat tax avoidance and evasion by the rich, states will work towards the universal equality of rights. In fact, without improved tax policies, it will be nearly impossible to achieve universal rights because there is only so much a state can do for the poor and suffering without a stable revenue base.

c. Travaux Préparatoires of the ICESCR

The *travaux pre¨paratoires* directly support the obligation of State Parties to work towards improving tax legislation to fulfill the rights set out in the ICESCR. During negotiations, the necessity of a sound tax system was brought up on multiple occasions.[314] When discussing the provision regarding the right to adequate housing, Poland's representative made clear that "the phrase 'all necessary measures' did not imply

308. *Id.*

309. *Id.* at 94.

310. *See id.* at 63.

311. ICESCR Optional Protocol, *supra* note 102, pmbl.

312. *Id.*

313. *See* Gemmell & Morrissey, *supra* note 156, at 16-17.

314. U.N. ESCOR, Comm'n on Human Rights, 8th Sess., Summary record of the 294th meeting held at headquarters, New York, U.N. Doc. E/CN.4/SR.294 (May 14, 1952); U.N. ESCOR, Comm'n on Human Rights, Summary record of the 21st meeting held at 7 Palais des Nations, Geneva, U.N. Doc. E/CN.4/SR.221 (June 7, 1951).

only the building of houses but such measures as subsidies, tax exemptions, loans and the provision of the requisite materials on favourable terms."[315] In a later session concerning the right to social security, drafters also pointed out that in the United Kingdom, "a worker's family received State aid in the form of subsidies and allowances to the amount of £2.7.0. a week, but that it paid £3.7.10. in taxes." [316] They found it problematic that the government took away more than it gave.[317] This inadequacy was therefore part of the motivation to include a social security provision in the ICESCR. The drafters again discussed tax in relation to wages, and the representative to Yugoslavia stated that it made more sense to tax profits in the interest of workers on the whole, instead of giving benefits to those who are well-off.[318]

A clear goal of the treaty was to hold states accountable for their failing policies, like those of the United Kingdom, which deprive the poor of economic, social, and cultural rights. Moreover, the comment by Poland's representative, explaining that "all necessary measures" included the implementation of tax policies, shows that the similar "maximum available resources"[319] language eventually adopted likely includes the same. In conjunction with the meaning derived from the context and object and purpose of the treaty, it is clear that a failure to mobilize revenue constitutes a violation of the ICESCR.

2. Why Human Rights Law Will Help Mobilize Revenue

It is clear that human rights law has applicability to tax reform. But why is it a beneficial alternative to other revenue mobilization attempts? The author sees three reasons. First, international human rights law is legally binding on states. Second, it is more advantageous than other legal approaches grounded in national law, because it eliminates standing barriers faced by domestic taxpayers. Third, it can help shape the policies of the World Bank and the IMF, which have an interest in improving the tax systems of developing nations.

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315. U.N. ESCOR, Comm'n on Human Rights, Summary record of the 294th meeting, *supra* note 315.

316. U.N. ESCOR, Comm'n on Human Rights, Summary record of the 21st meeting, *supra* note 315, at 6.

317. *Id.*

318. *Id.* at 13.

319. ICESCR, *supra* note 67, art. 2(1).

a. Human rights law is legally binding

The advantage of a human rights approach to mobilize revenue is first due to the fact that it is grounded in the law.[320] Guatemala, for instance, which has resisted other development measures, has ratified the ICESCR.[321] Therefore, while Guatemala is under no obligation to adopt the recommendations of the World Bank or the IMF, it is required to comply with the treaties to which it is a party.[322]

Under the ICESCR, states must prepare reports every five years documenting the human rights situations in their territories.[323] When a State Party fails to do so, the CESCR uses its own mechanisms to review the situation in that country.[324] Individuals can also send communications to the Committee for review when they feel they are victims of a violation.[325] After it examines a report, the CESCR then makes concluding observations and recommendations.[326] These recommendations often include strong language on the lack of compliance with the treaty. More recently, the Committee has started to "urge" states to comply with their obligations, as opposed to "recommending" they do.[327] The CESCR also makes clear when an activity is completely prohibited by the treaty.[328] These findings by the CESCR are legal obligations, with which States Parties are required to comply. While it is true that some of the obligations under the ICESCR are only of a progressive nature, States Parties must at least demonstrate that they have taken action to work towards the fulfillment of the rights in the treaty.[329]

Although it can be difficult to achieve immediate compliance with CESCR recommendations, the naming and shaming that results from

320. States are bound by the treaties they sign, ratify, accept, approve, or accede. VCLT, *supra* note 80, art. 11. This assertion presupposes that the state has also signed the VCLT. However, the laws of certain states, like the United States, also agree to be bound by the treaties they ratify through domestic law. CONG. RES. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE: A STUDY 1 (COMM. PRINT 2001).

321. Status at 02-05-2018, *supra* note 275.

322. *Id.*

323. *Human Rights Enforcement Mechanisms of the United Nations*, ESCR-NET, https://www.escr-net.org/resources/human-rights-enforcement-mechanisms-united-nations (last visited May 2, 2018).

324. *Id.*

325. ICESCR Optional Protocol, *supra* note 102, art. 2.

326. *Human Rights Enforcement Mechanisms of the United Nations*, *supra* note 324.

327. SEPU˙LVEDA, *supra* note 87, at 37.

328. *Id.*

329. *Id.*

these procedures is highly effective.[330] In recent decades, there has been an increased interest worldwide in human rights law.[331] States continue to sign onto more and more human rights treaties, and international actors emphasize the importance of human rights.[332] NGOs and scholars around the world also highlight their importance.[333] Therefore, when the Committee condemns a State Party for a violation of its human rights violation, it will feel pressure from the international community.

NGOs, news outlets, and even governments find it highly effective to name and shame a state that has committed a human rights violation.[334] For example, in 1984, the United States renamed the street in front of the Soviet Embassy in Washington as "Andrei Sakharov Plaza," after the leading Soviet dissident who was exiled indefinitely to Gorky by the Soviet Union.[335] Every time the Soviets sent mail to their embassy in Washington, they had to write Sakharov's name on the mailing label. Two years later, Gorbachev terminated Sakharov's exile order.[336]

This economic vulnerability that results from naming and shaming has shown to directly reduce the repression of human rights.[337] Studies show that naming and shaming reduces both foreign direct investment and aid flows into developing states.[338] Human rights violations are seen as a risk to investors and multilateral aid flows slow down as a form of punishment to the perpetrators.[339] For the same reason, naming and shaming also increases the likelihood of sanctions against a regime that violates human rights obligations.[340] Thus, in order to prevent or stop the negative consequences of naming and shaming, states cut back on their human rights abuses.[341]

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330. KATRIN KINZELBACH & JULIAN LEHMANN, CAN SHAMING PROMOTE HUMAN RIGHTS? PUBLICITY IN HUMAN RIGHTS FOREIGN POLICY 5, EUR. LIBERAL F. (2015), http://www.gppi.net/fileadmin/user_upload/media/pub/2015/Kinzelbach_Lehmann_2015_Can_Shaming_Promote_Human_Rights.pdf/.

331. SEPU¯LVEDA, *supra* note 87, at 45.

332. *Id.*

333. *See* Lina Marcinkute, *The Role of Human Rights NGOs: Human Rights Defenders or State Sovereignty Destroyers?*, 4 BALTIC J. L. & POL. 52 (2011).

334. KINZELBACH & LEHMANN, *supra* note 331.

335. Pedro Pizano, *The Power of Naming and Shaming*, FOREIGN POL'Y (Aug. 5, 2014, 9:16 PM), http://foreignpolicy.com/2014/08/05/the-power-of-naming-and-shaming/.

336. *Id.*

337. KINZELBACH & LEHMANN, *supra* note 331, at 15-16.

338. *Id.* at 15.

339. *Id.* at 16.

340. *Id.*

341. *Id.* There is currently more research on naming and shaming in response to violations of civil and political rights. However, the data that has started to emerge regarding economic, social, and cultural rights has so far confirmed the positive effects of shaming.

The legal obligations imposed by human rights treaties are thus likely to prove more effective in mobilizing revenue than the World Bank and the IMF development strategies alone, the rejection of which comes with no consequences.[342] It especially is difficult to convince corrupt governments to take action when there is nothing in it for them. This is not to say that developments cannot be successful, but their likelihood of success will increase if paired with some kind of legal obligation. In some cases, the recommendations of the CESCR in and of themselves may be enough to incentivize states to improve their tax systems. If not, the naming and shaming by-product of human rights treaties will probably prove persuasive.

b. Difficulties in National Courts

International human rights law is also beneficial in comparison to national legal outlets. This is due to the difficulty in demonstrating taxpayer standing in national courts. In 2006, the U.S. Supreme Court held that a taxpayer did not have standing to challenge Ohio's award of a tax credit to DaimlerChrysler Corporation.[343] The taxpayers in that case argued that the tax credit awarded to promote in-state business depleted state funds to which they contribute.[344] The alleged injury was the decline in public revenue available to the taxpayers. The Court held that the taxpayer's injury was not "concrete and particularized" but instead "conjectural or hypothetical," because it depended on how state legislators would respond to the reduction in revenue.[345] Establishing taxpayer standing is not just a problem in the United States. The courts of other countries, such as France, have also denied taxpayer's standing as to claims challenging revenue legislation.[346]

Since taxpayers will have a difficult time establishing standing to challenge the laws depriving them of government benefits, human rights

342. The World Bank and IMF have no law enforcement powers. *Who We Are*, WORLD BANK, https://www.worldbank.org/en/who-we-are (last accessed May 25, 2019); *About the IMF*, INT'L MONETARY FUND, https://www.imf.org/en/About/ (last accessed May 25, 2019).

343. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006).

344. *Id.* at 339.

345. *Id.* at 344 (citing Lujan v. Defenders of Wildlife, 504 U.S. 505, 560 (1992)).

346. Jean Massot, *The Powers and Duties of the French Administrative Judge*, YALE L. SCH. 7 (Apr. 1, 2016), https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_massot_powers.pdf (adapting Jean Massot, President., French Conseil d'État, Address at the *Troisième journées juridiques et administratives franco-croates* [Third Juridical and Adminsitrative Days]: *Les pouvoirs et les devoirs du juge administratif dans l'examen des requêtes* [The Powers and Duties of the Administrative Judge in the Examination of Requests], (Oct. 26-27, 2009) (Peter Lindseth, trans.).

law provides an outlet to achieve the same result. In accordance with the Optional Protocol of the ICESCR, individuals claiming to be victims of human rights violations can submit communications to the CESCR.[347] The Optional Protocol provides that the Committee will not accept a communication unless all domestic remedies have been exhausted.[348] Since taxpayers will often be unable to establish standing in their national courts, they should have an easy time meeting this threshold. The Committee will then examine the individual's complaint, and in some cases, will provide the relief that national courts are unable to provide.[349]

c. Implementation of Committee Recommendations by the World Bank and the IMF

Despite the generally powerful naming and shaming effect of Committee reports, there is still some doubt as to whether governments will abide by the recommendations of the CESCR.[350] Although the ICESCR is a legal document, its goals are largely aspirational. When under review, governments often show that they are progressively moving towards the implementation of treaty obligations, but in reality, there is still much progress to be made.[351] Where the governments of developing nations fall short in implementing Committee recommendations, however, the World Bank and the IMF are likely to pick up their slack.

Beth A. Simmons explained the difficulty of achieving treaty compliance in her book, *Mobilizing for Human Rights*.[352] On the whole, her data demonstrates that human rights treaties have a significant effect on outcomes.[353] But compliance is dependent on "the nature of the right, the range of potential violators, and the nature of individuals who might benefit from the right in question."[354] The ICCPR, for instance, has inspired certain religious groups to attain increased freedom from government interference with religion.[355] Simmons found that states that

347. ICESCR Optional Protocol, *supra* note 102, art. 2.

348. *Id.* art. 3(1).

349. *Id.* arts. 8, 9, 14.

350. *See* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS, INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

351. *E.g.*, CESCR, Implementation of the International Covenant on Economic, Social and Cultural Rights, State Party Report: United Republic of Tanzania, U.N. Doc. E/C.12/TZA/1-3 (Mar. 28, 2011).

352. SIMMONS, *supra* note 351.

353. *Id.* at 357.

354. *Id.*

355. *Id.*

ratified the ICCPR were more likely to respond positively to these religious groups. Yet other rights, with weaker support, are not as easy to effectuate, such as the right to a fair trial.[356] Moreover, the government is more likely to fulfill human rights that can be effectively observed and monitored.[357] Thus, governments struggle to enforce the prohibition against torture, since torture is decentralized and committed by a number of different actors in all parts of a state. Finally, Simmons makes the point that it is difficult to compel the government to uphold the rights of the less powerful members of society.[358] This is because the political coalitions that demand government response to human rights violations are unlikely to advocate for the poor.[359] In response to this barrier, Simmons suggests using national courts to uphold the rights of the poor and underprivileged.[360]

Simmons's findings suggest that the ICESCR might not be the most perfect outlet to compel states to better mobilize revenue. On the one hand, tax collection is for the most part a centralized process, alleviating the organizational burdens that arise with rights like the prohibition on torture. But on the other hand, improved tax systems would most greatly benefit the poor in developing nations.[361] Therefore, according to the data, it is less likely that governments will comply with their obligations under the ICESCR. Moreover, taxpayers do not even have the ability to go to national courts as would other human rights victims.[362]

Yet, even if states fail to comply with their treaty obligations, any recommendations made by the CESCR are not for nothing. The World Bank and the IMF will likely implement at least some of these recommendations. Sigrun Skogly and other international law scholars have suggested that, like states, the World Bank and the IMF assume certain human rights obligations.[363] Skogly explains that because both institutions have international legal personalities, meaning they are acknowledged in the international community, they are "entitled to rely upon legal rights, obliged to respect legal duties, and privileged to utilise

356. *Id.*

357. *Id.* at 358.

358. *Id.* at 362.

359. *Id.*

360. *Id.*

361. *See* Gemmell & Morrissey, *supra* note 156, at 16-17.

362. *See* SIMMONS, *supra* note 351.

363. SIGRUN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 3 (2001).

legal processes."[364] He comes to this conclusion by analyzing the institutions' Articles of Agreements, their functions, and their past experiences in conducting international operations.[365] Therefore, the World Bank and the IMF must operate within the framework of the international legal regime, which includes protection for human rights.[366]

However, the two institutions do not operate under the same human rights obligations as states.[367] Skogly explains that human rights obligations appear at three levels: fulfillment, protection, and respect.[368] The kind of obligation triggered depends on the situation from which the right derives.[369] The World Bank and the IMF are not under an obligation to fulfill, because the positive act of fulfilling rights stems from treaties to which the institutions are not parties.[370] On the other side of the coin, they are under an obligation to respect human rights. The obligation to respect has been incorporated into customary international law, which is binding on the institutions because they have international legal personalities.[371] The obligation to respect encompasses two requirements. First, it involves a negative obligation, requiring parties to refrain from action that would violate human rights.[372] Second, it obliges international actors to observe human rights as they are currently implemented.[373] Skogly concludes, then, that the World Bank and the IMF must not violate human rights in their policies and procedures nor take action that would restrict current measures promoting the enjoyment of rights.[374]

The development plans of the World Bank and the IMF have failed in a number of ways, and in some cases, their plans have actually prevented the actualization of human rights. For instance, the IMF has advocated for a flat VAT rate without exemptions or lower rates for goods consumed by the poor.[375] Without these limitations, the VAT turns into a regressive tax, which disturbs the government's ability to collect revenue from higher-earning taxpayers. In Colombia, the World

364. *Id.* at 63.
365. *Id.* at 65-70.
366. *Id.* at 70.
367. *Id.* at 151.
368. *Id.* at 148.
369. *Id.*
370. *Id. at* 151.
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id. at* 152.
375. DEV. FIN. INT'L, *supra* note 158, at 24.

Bank's complex administrative reforms also made it difficult to improve revenue mobilization.[376] In these ways and more, the institutions have not fully respected the observation of human rights while carrying out their development plans abroad.

However, if the CESCR were to provide recommendations on improving tax systems for the attainment of human rights, the World Bank and IMF are more likely than states to abide by such recommendations. Despite their shortcomings, the institutions' efforts to mobilize revenue in developing nations spans forty years.[377] Both the World Bank and the IMF have made clear of their goals to alleviate poverty and to promote growth.[378] For this reason, they will probably be more receptive to the recommendations of the CESCR than some of the states to whom such recommendations are provided. In fact, even though the institutions are only under an obligation to respect human rights, their interest in improving tax systems suggests that they might even go one step further by fulfilling some of the recommendations of the CESCR.

Moreover, where states are unwilling to adopt the recommendations of the CECSR on their own, they might be more willing to work with the World Bank and the IMF to improve their tax systems. Simmons explained that states are less likely to fulfill human rights standards that benefit the poor.[379] But if the World Bank and the IMF are prepared to put in the grunt work, governments will probably not object to their doing so. Therefore, even if states are reluctant to adopt treaty recommendations, whether on their own or at all, the willingness of the IMF and the World Bank validates the importance of human rights law in improving tax systems.

3. How Human Rights Law Will Help Mobilize Revenue

The ICESCR's likely success in mobilizing revenue next begs the question of how that mobilization might look. Although it is difficult to predict exactly how the Committee would respond in this context, especially given the distinctions in states' needs and governance styles, the practices of the World Bank and the IMF, as well as suggestions from tax scholarship, provide insight into potential recommendations.

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376. INDEP. EVALUATION GRP., *supra* note 158, at 14.

377. Avi-Yonah & Margalioth, *supra* note 152, at 3.

378. *How we do it*, INT'L MONETARY FUND, https://www.imf.org/external/about/howwedo.htm (last visited May 2, 2018); *What We Do*, THE WORLD BANK, http://www.worldbank.org/en/about/what-we-do (last visited May 2, 2018).

379. SIMMONS, *supra* note 351, at 362.

The past practices of the World Bank and the IMF make clear that recommendations should vary by state.[380] The broad suggestions made by the World Bank and the IMF have largely failed due to their lack of specificity.[381] In Guatemala, for example, the World Bank failed to consider the political and governmental barriers to altering the tax system.[382] Both institutions also advocated for increasing reliance on the VAT in developing nations, but the VAT's success has been contested because it only works well under certain conditions, which are present in some nations and not others.[383] Likewise, in his review of recent scholarship, Avi-Yonah has found that recommended approaches differ due to distinctions in nations' particular hurdles.[384] He first points out that the tax systems of developing nations differ from those of developed nations, but he also makes clear that recommendations should diverge even among developing nations:

> A good tax system is one that fits both the social institutions as well as other specific determinants of distribution and economic growth in each country. Searching for one optimal tax systems for countries grouped together by a definition based on GDP per capita is problematic.[385]

Tanzania's tax system, for example, is replete with its own particularities. Tanzania has relied heavily on an income tax and the VAT.[386] Since these two bases have failed to mobilize revenue, Tanzania might find more success in shifting reliance towards import and export taxes. The CESCR might, therefore, suggest that Tanzania broaden its trade tax base. That such taxes have the potential for success is demonstrated by the fact that ninety percent of VAT revenue collected occurs at the border.[387] Tanzania also needs to expand its tax geographically and categorically.[388] Thus, the Committee would likely also suggest implementing measures to expand taxes to both new places and to untouched prosperous sectors in the economy, since many sectors currently go untaxed.

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380. *See supra* notes 214-250 and accompanying text.
381. *See* DEV. FIN. INT'L, *supra* note 158; INDEP. EVALUATION GRP., *supra*, note 158.
382. INDEP. EVALUATION GRP., *supra*, note 158, at x.
383. *See* Avi-Yonah & Margalioth, *supra* note 152.
384. *Id.*
385. *Id.* at 20.
386. WORLD BANK GRP., *supra* note 167, at 27.
387. *Id.* at 28.
388. *Id.* at 30.

Yet, whereas these changes might improve the tax system in Tanzania, they will undoubtedly fail in other states. In other countries, the Committee might encourage broadening the VAT, as it has proven to be successful in certain instances.[389] Moreover, some governments struggle more than others to implement progressive tax measures.[390] In such states, the Committee might focus on eliminating regressivity. These are all examples of potential recommendations, but it is best to emphasize that there is no "one-size-fits-all" approach. In fact, the DFI criticized the IMF for its inconsistencies in policy suggestions,[391] but the IMF might have been more on track by varying its approach by states.

IV. Conclusion

In a video produced for a tax strategy meeting in Peru, Philip Alston explained that "the starting point is to acknowledge that tax policy is actually human rights policy."[392] The human rights movement has been slow to address revenue mobilization, first because human rights experts often shy away from issues relating to tax and economics.[393] But also, human rights groups assume that the fiscal status quo is not open to change.[394]

Alston further suggested that mobilizing revenue might even be of more importance than others rights traditionally addressed in international law.[395] Whereas many human rights activists discuss action plans and white papers, Alston believes most of their efforts "remain in the realm of theory."[396] Tax planning, on the other hand, reflects the real priorities of the government.[397] In fact, Alston would even extend the effects of poor revenue mobilization to civil and political rights. He explains that without revenue, there is no effective policing or decent court systems, just like there is no access to water or healthcare.[398]

Finally, Alston asked what the human rights movement can bring to the area of tax development efforts.[399] This question, he believes, is not

389. Avi-Yonah & Margalioth, *supra* note 152, at 6-10.
390. *See* Gemmell & Morrissey, *supra* note 156.
391. Dev. Fin. Int'l, *supra* note 158, at 207.
392. Ctr. for Econ. and Soc. Rts., *supra* note 271.
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*

one that is easy for tax experts to understand because it involves more than just "cold economic policy."[400] While acknowledging that there is not an easy answer, he believes progress can begin with a summit on international tax policy.[401] He further suggests establishing a specialist in the U.N. for tax matters, ending tax evasion, ensuring the flow of revenue to developing nations, and ensuring that developed and developing nations are able to work together.[402]

Though some of Alston's suggestions are more easily achievable through human rights work than others, his emphasis on bridging the gap between tax policy and human rights law hits the nail on the head. Tax experts too often fail to comprehend the normative realm of human rights law, and human rights experts struggle to grasp the positive complexity that is tax law. This Note attempts to fuse these two areas, to at least achieve what Alston has deemed "a starting point."[403] It is the hope of this author that this Note will help human rights experts to better understand the interplay of tax with the provision of basic goods, and that tax experts will appreciate the practical effect of tax policies.

400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*