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Transferring Away Human Rights: Using Human Rights to Address Corporate Transfer Mispricing

Monica Iyer

An estimated sixty percent of international trade happens within multinational enterprises. Transfer pricing occurs when one part of a firm sets a price in order to sell to another division in another country. When these prices are deliberately set at something other than market rate in order to minimize the firm's tax liability, this is known as transfer mispricing, or abusive transfer pricing. These practices account for an enormous portion of global illicit financial flows. This paper will consider transfer mispricing as a violation of human rights, and will look at the ways in which various human rights instruments and mechanisms might be employed in order to address this global problem. In doing so, this paper seeks to add to a growing body of literature that considers the human rights implications and the importance of incorporating a human rights approach to issues like tax policy, trade, and corruption, with the aim of addressing the underlying structural drivers of human rights violations. It also seeks to address a gap in law and policy discussions that is generally characterized by an uneven power relationship between stakeholders and lack of voice for those most affected.

I. INTRODUCTION

In recent years a great deal of global attention has been focused on international taxation issues, and particularly transfer pricing: the prices that one division or subsidiary of a transnational corporation ("TNC")[1] sets in order to sell to another division or subsidiary in another country. It is unsurprising that this should have become an area of focus, given that estimates hold that up to sixty percent of global trade may now happen within TNCs.[2] The reason that transfer pricing is a significant area of concern is its great potential for transfer *mis*pricing, also known as abusive transfer pricing, which occurs when firms set prices for these international intrafirm sales at rates other than the market rate, generally in order to take advantage of tax differences between jurisdictions. For example, in 2008, revenue authorities in Zambia investigated a global mining company, Glencore, and found that copper from a mine primarily owned by a Glencore subsidiary in Zambia was being sold to the Swiss-based parent

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[1] There has been much discussion of the exact definition of a transnational corporation. This paper will use the terms "TNC," "multinational," "company," and "firm" interchangeably to discuss "companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways." Organization for Economic Cooperation and Development [OECD], *OECD Guidelines for Multinational Enterprises,* at 17, (2011), *available at* http://dx.doi.org/10.1787/9789264115415-en.

[2] Transfer Pricing, Tax Justice Network, http://www.taxjustice.net/topics/corporate-tax/transfer-pricing/ (last visited Oct. 19, 2015).

company at prices significantly below the market rate.[3] These practices, which are sometimes illegal and sometimes technically legal but still abusive,[4] make up a significant proportion of global illicit financial flows ("IFF"),[5] defined as money that is illegally or illicitly obtained, transferred, or utilized.[6] They deprive states of billions of dollars' worth of potential tax revenues.[7]

These abusive corporate practices have been the subject of intense technical discussion by economists and diplomats, particularly at the Organization for Economic Cooperation and Development ("OECD").[8] At the same time, a handful of international non-governmental organizations ("NGOs"), notably ActionAid, Christian Aid, and the Tax Justice Network, have sought to illuminate the human costs of these practices as a result of the revenue lost by developing countries.[9] This paper seeks to build on the work of those organizations, and also on the work of actors including the International Bar Association's Human Rights Institute ("IBAHRI") and a number of United Nations Special Rapporteurs who seek to elucidate the linkages between taxation and human rights, specifically by examining transfer mispricing as a human rights violation.[10]

As early as 1992, the U.N. Special Rapporteur on Economic and Social Rights recognized that "the system of levying tax should be a criteria against which compliance with international obligations is measured, as well as a central means of redressing existing imbalances of income distribution."[11] Although there is much room for debate regarding the ideal taxation system,[12]

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[3] AFRICA PROGRESS PANEL, EQUITY IN EXTRACTIVES: STEWARDING AFRICA'S NATURAL RESOURCES FOR ALL: AFRICA PROGRESS REPORT 65 (2013). The Africa Progress Panel is a group of ten high-level individuals from the public and private sector, chaired by former UN Secretary General Kofi Annan, that advocates for equitable and sustainable development in Africa. The Panel issues an annual report that seeks to highlight important issues for development policy.

[4] *See infra* section II (a) for a discussion of the terms tax evasion, tax avoidance, and tax abuse.

[5] DEV KAR & JOSEPH SPANJERS, GLOBAL FINANCIAL INTEGRITY, ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: 2003-12 vii (2014) ("The vast majority of illicit financial flows – 77.8 percent in the 10-year period covered in this report – are due to trade misinvoicing.").

[6] *See* GLOBAL FINANCIAL INTEGRITY, ILLICIT FINANCIAL FLOWS FROM AFRICA: HIDDEN RESOURCE FOR DEVELOPMENT 7 (2010).

[7] *See* KAR & SPANJERS, supra note 6, at vii.

[8] *See*, *e.g.*, OECD Centre for Tax Policy and Administration [CTPA], *News Conference – Launch of the 2015 BEPS Package*, (Oct. 5, 2014), https://www.youtube.com/watch?v=dVRVfIz9c64.

[9] *See*, *e.g.*, ACTIONAID, HOW TAX HAVENS PLUNDER THE POOR (May 2013), *available at* https://www.actionaid.org.uk/sites/default/files/publications/how_tax_havens_plunder_the_poor_2.pdf. *See also* TAX JUSTICE NETWORK-AFRICA & CHRISTIAN AID, AFRICA RISING? INEQUALITIES AND THE ESSENTIAL ROLE OF FAIR TAXATION (Feb. 2014).

[10] *See* LLOYD LIPSETT ET AL., INT'L BAR ASSOC. HUMAN RIGHTS INST., TAX ABUSES, POVERTY AND HUMAN RIGHTS: A REPORT OF THE INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE TASK FORCE ON ILLICIT FINANCIAL FLOWS, POVERTY AND HUMAN RIGHTS 28 (Oct. 2013). *See also* Juan Pablo Bohoslavsky (Independent Expert), U.N. Human Rights Council, *Illicit Financial Flows, Human Rights and the Post-2015 Development Agenda*, ¶ 5, U.N. Doc. A/HRC/28/60 (Feb. 10 2015). *See also* U.N. Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepùlveda Carmona*, ¶ 77, A/HRC/26/28 (May 22, 2014) [hereinafter Carmona]. *See also* Philip Alston, Keynote Address at Christian Aid Conference on The Human Rights Impact of Tax and Fiscal Policy: Tax Policy is Human Rights Policy: The Irish Debate (Feb. 12, 2015) (transcript available at http://www.ohchr.org/Documents/Issues/EPoverty/Alston-Tax_policy.docx).

[11] Danilo Türk (Special Rapporteur, Comm. on Human Rights), *The Realization of Economic Social and Cultural Rights*, ¶ 83, U.N. Doc. E/CN.4/Sub.2 (July 3, 1992).

and the optimal tax policy will necessarily vary according to local and national circumstances,[13] it is widely recognized that domestic resource mobilization through progressive taxation can be an important tool in achieving equity and social progress.[14] And yet human rights commentaries often leave out taxation as a means of resource generation,[15] and the human rights discourse is only beginning to pay serious attention to the human rights effects of taxation policies.[16]

Transfer mispricing, as a specific and widespread form of tax abuse, both has its own set of human rights implications and is illustrative of many of the human rights violations caused by international tax abuse more generally. Tax abusive practices deprive states of resources necessary to respect, protect, promote, and fulfill human rights.[17] They slow the progress of the right to development, subvert the right to self-determination, exacerbate social and economic inequality, and damage governmental accountability. Transfer mispricing, in particular, represents a failure of transparency, as well as a failure of states to fulfill their extra-territorial human rights obligations and their human rights obligations as actors in the international economic and social order.

By examining the human rights implications of transfer mispricing, this paper seeks to open up new strategies for addressing this global problem and new ways of considering it. Part I of the paper provides an overview of the mechanics of transfer mispricing and its effects, particularly in the developing world. Part II discusses the ways in which transfer mispricing directly violates or leads to the violation of a number of human rights and human rights principles. Finally, Part III seeks to enhance the practical utility of this discussion by explaining some of the technical solutions that are proposed for this global problem and suggesting some of the ways that a human rights framework can be used to combat abusive transfer mispricing.

I. Transfer Mispricing and Its Effects

A. How does transfer mispricing work?

According to the principle of tax sovereignty, each state is entitled to set its own tax policy without interference from others, resulting in potentially vast differences between the tax policy and tax rates applied to components of TNCs located in different jurisdictions.[18] Setting a lower tax rate may allow a country "to enhance its competitive advantage in the marketplace for

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[12] *See, e.g.*, N. Gregory Mankiw, et al., *Optimal Taxation in Theory and Practice available at* http://scholar.harvard.edu/files/mankiw/files/optimal_taxation_in_theory.pdf.

[13] IMF, *IMF Policy Paper: Fiscal Policy and Income Equality*, ¶ 30-39 (Jan. 23, 2014).

[14] *See* Center for Economic and Social Rights & Christian Aid, A Post-2015 Fiscal Revolution: Human Rights Policy Brief, at 5 (May 2014), http://www.cesr.org/downloads/fiscal.revolution.pdf. *See also* IMF, *IMF Policy Paper: Fiscal Policy and Income Equality*, ¶ 34-35 (Jan. 23, 2014).

[15] Ignacio Saiz, *Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective, in* Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights 81 (Aoife Nolan et al. eds., 2013).

[16] *See* Lipsett et al., *supra* note 10, at 8-9 ("In general, stakeholders noted that tax abuses have not often been approached from a human rights perspective; however, there are indications that this conversation about human rights and tax is beginning.").

[17] Tax Justice Network Germany, "Taxes and Human Rights," Policy Brief (Feb. 2013).

[18] *See, e.g.*, Diane M. Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 Fla. Tax Rev. 555 (2009).

capital, investment, and/or nominal business presence."[19] However, these differing rates also open up the possibility of cross-border tax manipulation.[20] In order to avoid such manipulation by TNCs, most countries have transfer pricing rules, the purpose of which "is to establish how transactions within a multinational (the price that a subsidiary, for example, charges to the parent company for specific components of a product) should be accounted for tax purposes."[21]

The fact is that the various elements of a TNC "are not subject to the same market forces shaping relations between two independent companies," but, legally, these entities often get treated like they are completely separate and independent, despite their behavior to the contrary.[22] Thus transfer pricing rules are generally quite easy to evade and to manipulate to the tax benefit of the multinational and to the detriment of tax revenues.[23] While a distinction is often drawn between illegal tax evasion and legal tax avoidance that takes advantages of loopholes or of differences between the tax laws in different jurisdictions, this paper will follow the practice of others in referring to "tax abuse" or "abusive practices" to capture actions that fall on both sides of the line of technical legality.[24] This is because while tax evasion and tax avoidance may vary in their methods and legality, many of their consequences, particularly their human rights effects, are similar and can be addressed with similar strategies.[25] Further, transfer mispricing, the particular form of tax abuse addressed by this paper, can be accomplished both through legal and illegal means.

Transfer mispricing can take at least four different forms: export mispricing, import mispricing, IP rights, and re-invoicing. They are all designed to have a number of effects related to a company's tax situation. The first, export mispricing, is where a "subsidiary of a company avoids paying taxes in a relatively high-tax country by selling its products at a loss to a subsidiary in a low-tax country, which then sells the product to final customers at market price and yields the profit."[26] This form of transfer mispricing is illustrated by the actions of Glencore in Zambia, described above. The second, import mispricing, occurs "where locally run enterprises are able to shift profits to affiliates in countries offering lower levels of taxation through…artificially inflating the price paid for intermediate products purchased from overseas affiliates so as to lower stated local profits."[27] For example, ActionAid has chronicled how global beer company SABMiller's breweries in Ghana pay extremely high fees for "management services" from a Swiss-based affiliate, thus lowering corporate profits within Ghana.[28] Thirdly, and increasingly commonly, companies will "store" their intellectual property rights in a subsidiary in a low-tax jurisdiction and then charge affiliates in high-tax jurisdictions artificially

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[19] Ring, *supra* note 18, at 562.
[20] *See, e.g.*, *id*. at 564.
[21] CLAUDIO RADAELLI, CREATING THE INTERNATIONAL TAX ORDER: TRANSFER PRICING AND THE SEARCH FOR COORDINATION IN INTERNATIONAL TAX POLICY 3 (European University Institute Working Papers RSC 98/28 1998).
[22] LIPSETT ET AL., *supra* note 10, at 28.
[23] *See*, *e.g.*, HIGH LEVEL PANEL ON ILLICIT FINANCIAL FLOWS FROM AFRICA, ILLICIT FINANCIAL FLOWS 27-28 (2015) [hereinafter HLPIFFA].
[24] *See*, *e.g.*, LIPSETT ET AL., *supra* note 10, at 7. *See also* Carmona, *supra* note 10, at ¶ 3. *See also* EURODAD ET. AL., HIDDEN PROFITS: THE EU'S ROLE IN SUPPORTING AN UNJUST GLOBAL TAX SYSTEM 18 (2014), http://www.eurodad.org/files/pdf/1546298-hidden-profits-the-eu-s-role-in-supporting-an-unjust-global-tax-system-2014-.pdf (using "tax dodging" to the same effect).
[25] LIPSETT ET AL., *supra* note 10, at 7.
[26] Bohoslavsky, *supra* note 10, at ¶ 5.
[27] Saiz, *supra* note 16, at 86.
[28] ACTIONAID, CALLING TIME: WHY SABMILLER SHOULD STOP DODGING TAXES IN AFRICA 8 (2012).

high rates for the use of that intellectual property.[29] SABMiller, for example, holds the rights to brands of beer sold in Africa in a Dutch company, to which African brewers must pay significant royalties.[30] Fourthly, and clearly illegal, re-invoicing,[31] "occurs when goods leave a country of export under one invoice, then the invoice is redirected to another jurisdiction…where the price is altered, and then the revised invoice is sent to the importing country for clearing and payment purposes."[32] Because of the illegal nature of these practices it is more difficult to point to specific examples, but researchers have calculated that they lead to significant annual tax revenue losses, particularly in developing countries.[33]

The existence of jurisdictions with particularly favorable terms of corporate taxation, generally called tax havens, is crucial to corporations' abilities to successfully engage in these sorts of abusive practices. ActionAid estimates that "almost one in every two dollars of reported corporate investment in developing countries is now being routed from or via a tax haven."[34] Further, "poor countries may be more vulnerable to this practice than wealthier ones: 46% of reported cross-border investment into low- and lower-middle income countries in 2011 came from tax havens, compared to 37% into upper-middle and high-income countries."[35] In addition to having extremely low tax rates, many of these tax havens are also "secrecy jurisdictions," helping corporations to hide their incomes and investments. These secrecy jurisdictions, as well as "the more widely condoned practices of corporate tax opacity" around the world are also key to permitting the persistence of transfer mispricing.[36] This opacity is characterized by a lack of information on "beneficial ownership," which is to say the details of corporate structure and who really owns various international subsidiaries, and "the fact that companies are not required to report systematically their income and activities on a country-by-country basis."[37]

In addition to the increased likelihood of having investment or profits funneled through tax havens, developing nations are also hampered by a typical lack of capacity of their tax authorities to establish and enforce transfer pricing rules.[38] In 2014, the High Level Panel on Illicit Financial Flows from Africa found that "only three African countries had transfer pricing units in their internal revenue services."[39] Developing country tax authorities may lack the information required to make effective use of a system of tax information exchange.[40] While such systems are commonly cited as a potential solution to the problem of the lack of global tax transparency, they can be complex and expensive, and technical reciprocity requirements often mean that

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29 MARKUS HENN, FRIEDRICH-EBERT-STIFTUNG, TAX HAVENS AND THE TAXATION OF TRANSNATIONAL CORPORATIONS 5 (June 2013).

30 ACTIONAID, *supra* note 29, at 8.

31 *See* ANN HOLLINGSHEAD, GLOBAL FINANCIAL INTEGRITY, THE IMPLIED TAX REVENUE LOSS FROM TRADE MISPRICING (2010).

32 *Id*. at 1.

33 HOLLINGSHEAD, *supra* note 32, at 19.

34 ACTIONAID, *supra* note 9, at 8.

35 *Id*.

36 TAX JUSTICE NETWORK-AFRICA & CHRISTIAN AID, *supra* note 10, at 29.

37 U.N. Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepùlveda Carmona,* ¶ 77, A/HRC/26/28 (May 22, 2014) [hereinafter Sepùlveda Carmona].

38 LIPSETT ET AL., *supra* note 10, at 30.

39 HLPIFFA, *supra* note 24, at 27.

40 *Id*. at 46. *See also* AFRICA PROGRESS PANEL, *supra* note 4, at 65.

developing countries are blocked from participating.[41] Accordingly, a power imbalance can be created between countries with substantial capacity and information and those without, making those without more vulnerable to transfer pricing activities.[42]

B. What is the global impact of transfer mispricing?

Transfer mispricing does significant damage to tax collection around the world and also has wide-ranging economic and social effects beyond the lost revenue. A number of efforts have been made to calculate the monetary loss that is incurred around the world and in particular countries as a result of transfer mispricing. However, "since illicit financial flows are by definition hidden, it is inevitable that estimates will be subject to substantial uncertainty."[43] Further, the complicated nature of the international financial system generally and transfer pricing in particular can lead to variations in estimates, as choices are made about which practices to include and how impacts are calculated.[44]

Still, while there may not be an exact figure available for the amount of money lost to transfer mispricing, one widely-cited estimate suggests that transfer mispricing may cost developing countries alone up to $160 billion each year,[45] and a brief survey of the various monetary estimates can help to give a sense of the magnitude of this problem. Since, as described above, the burden of transfer mispricing falls more heavily on developing countries, much of the study of the effects of transfer mispricing also focuses on these countries. In addition to the capacity and vulnerability issues described above, transfer mispricing is also in some ways a greater burden on developing countries because they are more reliant on corporate taxes, particularly from TNCs: in developed countries, on average, corporate taxes constitute about ten percent of total tax revenues,[46] whereas in developing nations corporate taxes tend to make up more than 25% of the tax base.[47]

The serious study of the question of the amounts lost to transfer mispricing was initiated in 2005 by Raymond Baker with the publication of his book, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System*.[48] One of Baker's key insights was that although issues like corruption and illegal trafficking tend to attract a good deal of attention, the actual amount of money lost to these activities is dwarfed by the amounts lost to transfer mispricing and other corporate tax evasion.[49] Subsequent to that publication, Baker founded an NGO, Global Financial Integrity ("GFI"), which studies IFFs and related policies. GFI has been

[41] HLPIFFA, *supra* note 24, at 46, 59, 71-72.

[42] DAVID MCNAIR ET AL., CHRISTIAN AID, TRANSFER PRICING, AND THE TAXING RIGHTS OF DEVELOPING COUNTRIES 2 (2010).

[43] Bohoslavsky, *supra* note 10, at ¶ 8.

[44] *See* KAR & SPANJERS, *supra* note 6, at 3-6 (discussing GFI's methodology for calculating illicit financial flows and comparing to methods used by others).

[45] CHRISTIAN AID, DEATH AND TAXES: THE TRUE TOLL OF TAX DODGING 5 (2008).

[46] R.S. Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals*, 3 *available at* http://ssrn.com/abstract=2344760 (last visited Oct. 17, 2016).

[47] *Id*. p. 4.

[48] RAYMOND BAKER, CAPITALISM'S ACHILLES HEEL: DIRTY MONEY AND HOW TO RENEW THE FREE-MARKET SYSTEM (2005).

[49] *See* KAR & SPANJERS, *supra* note 6, at vii.

publishing annual reports on IFFs out of developing countries over a ten-year period.[50] Their most recent study, cited above, "finds that between 2003 and 2012, the developing world lost US $6.6 trillion in illicit outflows," including US $991.2 billion in 2012 alone.[51] Almost eighty percent of these flows can be attributed to trade misinvoicing,[52] which encompasses both the kind of reinvoicing within multinationals described above and manipulated invoices when a company sells to an unrelated entity. It is worth noting that the size of these flows has grown almost every year that GFI has studied them, at an average of 9.4 percent each year.[53]

Even given global reductions in corporate tax rates and increased use of tax incentives to attract foreign investment, the tax revenue lost from these outflows is substantial. Ann Hollingshead, also working with GFI, estimates "that developing countries lost somewhere between US $98 billion and US $107 billion per year in tax revenues between 2002 and 2006" due to only a subset of transfer mispricing—re-invoicing.[54] Another frequently cited estimate, referenced above, comes from Christian Aid, which attempted to include all of the types of transfer mispricing described in section I(a) above,[55] and which calculated that transfer mispricing and false invoicing cost the developing world $160 billion annually in tax revenues.[56]

Research has also focused on specific countries, geographic regions, or sectors. For example, in Zambia, 2008 estimates suggest that nearly half of the national GDP was lost to transfer mispricing of copper exports.[57] In a study of five African countries from 2002-2011, GFI found that "Ghana lost $386 million, Kenya lost $435 million, Mozambique lost $187 million, Tanzania lost $248 million, and Uganda lost $243 million on average per year in potential tax and tariff revenue during the ten-year period of the study."[58] Even in highly developed Norway, a government study found that up to 30% of potential taxes due from foreign multinationals were being lost to transfer mispricing.[59] Former U.N. Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, noted that "the annual loss to Africa from transfer mispricing has been estimated at $38 billion, higher than the flow of development assistance to the region over the same period."[60]

This last point is particularly important, that the magnitude and significance of the problem of transfer mispricing are made more clear by considering the problem in the context of the financial flows that are more frequently associated with developing nations: official development aid ("ODA") and debt. As GFI points out, "while African countries have had to shoulder a heavy

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[50] Global Financial Integrity, *Reports*, http://www.gfintegrity.org/reports/ (last visited Nov. 29, 2016).
[51] *Id*.
[52] *Id*.
[53] *Id*. at 7.
[54] HOLLINGSHEAD, *supra* note 32, at 14.
[55] *See* CHRISTIAN AID, DEATH AND TAXES: THE TRUE TOLL OF TAX DODGING 53 (2008), *available at* http://www.christianaid.org.uk/images/deathandtaxes.pdf.
[56] *Id*. at 5.
[57] Nicholas J. Lusiani, *Only the Little People Pay Taxes: Tax Evasion and Switzerland's Extraterritorial Obligations to Economic, Social and Cultural Rights*, *in* LITIGATING TRANSNATIONAL HUMAN RIGHTS OBLIGATIONS: ALTERNATIVE JUDGMENTS 121 (Mark Gibney & Wouter Vandenhole, eds., 2014).
[58] GLOBAL FINANCIAL INTEGRITY, HIDING IN PLAIN SIGHT: TRADE MISINVOICING AND THE IMPACT OF REVENUE LOSS IN GHANA, KENYA, MOZAMBIQUE, TANZANIA, AND UGANDA: 2002-11 vii (2014).
[59] GUTTORM SCHJELDERUP ET AL., NORWEGIAN MINISTRY OF FOREIGN AFFAIRS, TAX HAVENS AND DEVELOPMENT 52 (2009).
[60] Carmona, *supra* note 10, at ¶ 77.

debt burden, a number of researchers…have shown that sustained illicit outflows have turned the continent into a net creditor to the rest of the world."[61] Lusiani highlights the estimate that the money lost in low and middle-income countries to IFFs in 2009 (more than sixty percent of which was attributable to tax evasion) was more than ten times the value of the ODA sent to those countries in that year.[62]

These revenue losses have broad effects on national budgets, economies, and societies. Governments tend to try to make up for these lost revenues by increasing regressive taxes or reducing spending on social welfare.[63] O'Hare et al., studying IFFs generally, found that curtailing such flows would have led to timely accomplishment of the fourth Millennium Development Goal, a two-thirds reduction in the under-five mortality rate within sixteen Sub-Saharan African countries, and significant reductions in accomplishment time in eighteen others.[64] But social spending is not the only area of government expenditure affected. As ActionAid asserts:

> "[M]aking investment profitable in developing countries depends on functioning infrastructure such as roads and airports, and on a healthy and educated workforce. When global businesses and investors use tax haven structures and offshore profits to avoid paying taxes in poor countries, they are both undermining their own long-term financial prospects, and free-riding on other individuals and businesses in developing countries that do not have access to tax havens, and which shoulder an excessive share of the tax burden."[65]

Indeed, these effects go beyond government spending to distort economic power and income distribution across the entire economy. Tax abuse by large international companies can undermine efforts to give tax support to small and medium local businesses, giving rise to "the missing middle," an economy built primarily on large enterprises and extremely small, informal ones.[66] These practices create an edge for multinationals over local businesses,[67] and local partners of multinational corporations may also suffer from lost dividend payments and reduced profitability.[68] Tax-driven corporate behavior can also result in the "de-skilling of a sector or an economy if high-value functions are offshored to low-tax jurisdictions,"[69] reduced local wages or returns to local shareholders,[70] and increased employment volatility.[71]

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[61] GLOBAL FINANCIAL INTEGRITY, *supra* note 59, at 6.
[62] Lusiani, *supra* note 58, at 117.
[63] *Id.* at 119.
[64] Bernadette O'Hare et al., *The Effect of Illicit Financial Flows on Time to Reach the Fourth Millennium Development Goal in Sub-Saharan Africa: A Quantitative Analysis*, 107 J. ROYAL SOC'Y MED. 148-56 (2014).
"[65] ACTIONAID, *supra* note 9, at 6.
[66] CHRISTIAN AID, THE MISSING MILLIONS: THE COST OF TAX DODGING TO DEVELOPING COUNTRIES SUPPORTED BY THE SCOTTISH GOVERNMENT 3 (2009).
[67] ACTIONAID, *supra* note 9, at 6.
[68] *Id.* at 28.
[69] ACTIONAID, RESPONSIBLE TAX PRACTICES BY COMPANIES: A MAPPING AND REVIEW OF CURRENT PROPOSALS 16 (2015).
[70] *Id.*
[71] *Id.*

Further, transfer mispricing disproportionately impacts countries with significant inequality.[72] Abusive tax practices "make efforts to tax wealth largely ineffective and therefore contribute directly to worsening income inequality."[73] GFI points out, "So long as illicit capital continues to hemorrhage out of poor African countries over the long term at a rapid pace, efforts to reduce poverty and boost economic growth will be thwarted as income distribution becomes ever more skewed leading to economic and political instability."[74] As discussed above, the bulk of the illicit capital outflows studied by GFI are attributable to transfer mispricing.

As that quote suggests, beyond the economy, transfer mispricing can be detrimental to security and trust. Cobham describes, "a growing base of evidence on the linkages; in particular, [between transfer mispricing and similar IFFs and] 'positive security' (the ability of states to provide secure conditions in which rapid human development can take place)."[75] He points out that "a vicious cycle is possible: [IFFs] undermine the resources available to states, and their effectiveness (and often willingness) to use resources for broad-based development, undermining human development outcomes; while weak institutions and a lack of confidence in fair political representation encourage further [IFFs]."[76] What is more, "the legal use by a multinational of highly secretive jurisdictions may both provide cover for illegal use of the same secrecy, and also inadvertently legitimize such behaviour."[77] In addition to its primary purpose of reducing taxes paid by corporations, transfer mispricing can be used "as a technique for money laundering … capital flight, and import duty fraud."[78] Thus this is another vicious cycle: "economic growth without credible [tax] reform could lead to more, not less, capital flight, as the increase in incomes would simply finance the increased accumulation of foreign assets."[79]

II. Transfer Mispricing as a Violation of Human Rights

From the above it is evident that transfer mispricing has significant negative effects on economic growth, social services, and security as well as revenue collection. But how is this a human rights issue rather than simply a question of economics and policy? In fact, transfer mispricing leads to violations of a number of international human rights laws and instruments, including the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the International Covenant on Civil and Political Rights ("ICCPR"), and the Declaration on the Right to Development. This section illustrates how transfer mispricing violates human rights law, as laid out in the texts of international human rights treaties, declarations, and other instruments of soft and hard law. Mispricing reduces the resources available for human rights, impedes the rights to development and self-determination, and damages efforts to ensure equality, non-discrimination, accountability, and transparency. States, by allowing transfer mispricing, are failing to live up to

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[72] Lusiani, *supra* note 58, at 119.

[73] Tax Justice Network-Africa & Christian Aid, *supra* note 10, at 28.

[74] Global Financial Integrity, *supra* note 59, at 17.

[75] Alex Cobham, The Impacts of Illicit Financial Flows on Peace and Security in Africa: Study for Tana High-Level Forum on Security in Africa 2014 ii (2014), http://dspace.africaportal.org/jspui/bitstream/123456789/34769/3/IFFs%20and%20Security%20(1).pdf?1.

[76] Cobham, *supra* note 76.

[77] *Id.* at 3.

[78] David Spencer, *Cross-Border Tax Evasion and Bretton Woods II, Part 3*, 20 J. Int'l Tax'n 44, 50 (2009).

[79] Global Financial Integrity, *supra* note 59, at 17.

their human rights responsibilities as actors in a global community. Section III will turn to the utility of approaching transfer mispricing from a human rights perspective.

A. Transfer mispricing keeps states from devoting maximum available resources to human rights.

Perhaps the most immediately obvious impact of transfer mispricing on human rights is that the practice deprives the government of revenues that could be spent instead on respecting, promoting, protecting, and fulfilling human rights obligations. This is especially relevant in the context of Article 2(1) of the ICESCR,[80] under which "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[81] This requirement is also echoed in Article 4 of the Convention on the Rights of the Child ("CRC").[82]

The questions of what it means to devote "maximum available resources" to the realization of human rights, or of what it means to "progressively achieve" that realization are sources of much debate within and outside the human rights community.[83] However, one certainty is that, despite the claims of some critics, the flexibility of progressive realization does not deprive economic, social, and cultural rights of any real meaning or obligation.[84] To the contrary, the committee charged with interpreting the ICESCR and monitoring its implementation has held that states do have an immediate obligation under the Covenant to provide minimum essential levels of the rights therein.[85] It is also worth noting that while these questions are primarily discussed in relation to economic, social, and cultural rights, owing in large part to the differences in language between Article 2 of the ICESCR and the corresponding article in the ICCPR, the question of allocation of state resources is essential to the realization of all human rights, as realization of civil and political rights is only possible through the funding of government institutions including an adequate independent judiciary, a well-trained and well-regulated police force, and free and fair elections.[86] To this point, and relevant specifically not only to resources generally, but to taxation in particular, a former U.N. Special Rapporteur on

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[80] The ICESCR and the ICCPR are the foundational treaties of international human rights law, giving legal force to the principles enunciated in the UDHR. One hundred sixty-four countries are party to the ICESCR (although notably not the United States, which signed the treaty but has never ratified it). One hundred sixty-eight countries are party to the ICCPR. *See generally* OHCHR, *Fact Sheet No. 2 (Rev. 1): The International Bill of Human Rights*, (June 1996), http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf.

[81] International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[82] Convention on the Rights of the Child art. 4, Nov. 20, 1989, 1577 U.N.T.S. 3.

[83] *See, e.g.*, John Southalan, *What Are the Implications of Human Rights for Minerals Taxation?* 36 RESOURCES POL'Y 214, 215-17 (2011) (summarizing debate).

[84] Comm. on Econ., Soc., & Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* ¶ 9 (1991), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en.

[85] *Id*. at ¶¶ 10-12. *See also* Carmona, *supra* note 10, at ¶ 27.

[86] *See, e.g.*, Ellen Wiles, *Aspirational Principles or Enforceable Rights: The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 46-47 (2006).

extrajudicial, summary, or arbitrary executions chronicled how inadequate revenue collection and allocation contributed to a broken criminal justice system and a culture of impunity in Guatemala, saying: "The lack of resources is due to a lack of political will: rather than funding a high-quality criminal justice system, Congress has decided to impose very low levels of taxation and, thus, to starve the criminal justice system and other parts of Government."[87]

While the concept of maximum available resources has not yet been completely defined by the law and commentary, a body of interpretation by courts and commentators suggests that it requires efficient and equitable action by the state.[88] Good fiscal policy, including effective taxation, is essential to efficient and equitable government action, and "is one of the key policy instruments states have to shape the conditions in which all human rights…can be fulfilled."[89] As elaborated in the U.N.'s Guiding Principles on Extreme Poverty: "States should make certain that adequate resources are raised and used to ensure the realization of the human rights of persons living in poverty. Fiscal policies, including in relation to revenue collection, budget allocations and expenditure, must comply with human rights standards and principles, in particular equality and non-discrimination."[90] The U.N. Committee on the Rights of the Child has also notably recognized that a failure to combat tax evasion and to ensure a functioning system of tax collection can interfere with a state's ability to allocate sufficient resources to human rights protection and implementation.[91]

Of course, it must be acknowledged that the collection of taxes is only one part of what must be done to fulfill states' obligations under Article 2 of the ICESCR and other human rights instruments. As the IBAHRI emphasizes, "a full discussion of the human rights implications of tax abuses requires not only an examination of the state's obligations as a tax collector, but also an examination of its obligations in terms of allocating and spending increased tax revenues."[92] In other words, revenue must not only be made available, it must be used for the realization of human rights. This has led a number of human rights actors to study resource allocation issues, including examining topics like human rights budgeting,[93] and questions of allocation have been the focus of litigation over maximum available resources, notably in South Africa, where the concept of available resources for rights is enshrined in the constitution.[94] Still, the collection of

[87] Philip Alston (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Civil & Political Rights, Including the Questions of Disappearances & Summary Executions, Add. Mission to Guatemala*, ¶ 61, U.N. Human Rights Council, U.N. Doc. A/HRC/4/20/Add. 2 (Feb. 19, 2007).

[88] John Southalan, *What Are the Implications of Human Rights for Minerals Taxation?* 36 RESOURCES POL'Y 214, 217 (2011).

[89] Saiz, *supra* note 16, at 80. In addition to allocation of adequate resources, Saiz identifies two other functions of taxation in relation to human rights: income redistribution and enforcing accountability – these will be discussed in later sections.

[90] Magdalena Sepúlveda Carmona (Special Rapporteur on Extreme Poverty & Human Rights), *Final Draft of the Guiding Principles on Extreme Poverty & Human Rights*, ¶ 53 U.N. Doc. A/HRC/21/39 (July 18, 2012)[hereinafter "Guiding Principles"].

[91] Comm. on the Rights of the Child, *Concluding Observations: Georgia*, ¶¶ 18-19, U.N. Doc. CRC/C/15/Add.124 (June 28, 2000).

[92] LIPSETT ET AL., *supra* note 10, at 116; *see also* AFRICA PROGRESS PANEL, *supra* note 4, at 66-68.

[93] *See* RADHIKA BALAKRISHNAN ET AL. CTR. FOR WOMEN'S GLOB. LEADERSHIP, MAXIMUM AVAILABLE RESOURCES & HUMAN RIGHTS: ANALYTICAL REPORT 2-3 (2011).

[94] *See, e.g.*, *Government of the Republic of South Africa v. Grootboom* (2001) 1 SA 46 (CC) ¶ 46 (S. Afr.).

adequate resources is an important precondition for the proper allocation of those resources, and tax and fiscal policy are an important component of resource mobilization.[95]

These questions are particularly relevant in an era when countries around the world, at all stages of development, are experiencing fiscal contractions and moving towards instituting austerity measures with significant impact on the realization of all human rights, and particularly economic and social rights, both because of domestic policy choices and because of international pressure to adopt such measures. As a network of European NGOs pointed out in 2013, "currently, 98 countries have introduced or are considering wage bill caps or cuts, including in the education and public health sectors; 86 are working on pension 'reforms'; 80 countries are reconsidering their safety nets; and 100 countries are revising and reducing subsidies, including on food products. Meanwhile large amounts of wealth are still escaping the tax net through tax evasion and tax avoidance."[96] The Committee on Economic, Social and Cultural Rights, which interprets and monitors the ICESCR, has recognized the threat that austerity measures can pose to the realization of human rights, especially for the most vulnerable, and has written an open letter to member states on the subject, calling on them to ensure that policies "comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected."[97]

Issues surrounding adequate revenue collection and allocation matter in particular to developing countries, where, as discussed above, tax enforcement may be weaker and the tax base may be significantly smaller, limiting the availability of government resources and the possibilities for maximizing them.[98] On average, low-income country tax revenues represent only about thirteen percent of GDP, compared to an average of thirty-six percent in the OECD countries.[99] As a European NGO coalition has recognized, "in developing countries the impacts of the missing tax revenues are felt directly by the world's poorest people, who depend on their public sector to provide education, healthcare and basic social services."[100] A number of actors have calculated exactly what these missing revenues mean for the fulfillment of economic, social, and cultural rights in the developing world and in specific developing countries. For example, ActionAid has variously estimated that the money lost by developing countries to tax avoidance and evasion constitutes "three times the estimated cost of the agricultural investment needed to achieve a world free from hunger, and twelve times the cost of ending the global scourge of malnutrition,"[101] and that recovery of this money "would raise government spending

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95 *See generally* BALAKRISHNAN, *supra* note 93.

96 EUROPEAN NETWORK ON DEBT & DEV. [EURODAD], GIVING WITH ONE HAND & TAKING WITH THE OTHER: EUROPE'S ROLE IN TAX-RELATED CAPITAL FLIGHT FROM DEVELOPING COUNTRIES 2013 8 (Nov. 15, 2013) [hereinafter EURODAD GIVING], *available at*, http://www.eurodad.org/files/pdf/52dfd207b06d7.pdf.

97 U.N. Comm. on Econ., Soc., & Cultural Rights, Letter dated 16 May 2012 from the Chairperson of the Committee on Economic, Social and Cultural Rights addressed to States parties to the International Covenant on Economic, Social and Cultural Rights, (May 16, 2012) [hereinafter CESCR], http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fSUS%2f6395&Lang=en.

98 Saiz, *supra* note 16, at 84.

99 SCHJELDERUP ET AL., *supra* note 60, at 58.

100 EURODAD GIVING, *supra* note 97, at 10.

101 ACTIONAID, *supra* note 9, at 5.

enough to reduce child deaths in the developing world by 230 children every day."[102] GFI estimates that if Ghana had used all of the money lost to trade mispricing for poverty reduction, the poverty reduction budget in that country could have been increased by 21.4% in 2011,[103] and that, "had the government [of Mozambique] been successful in curtailing trade misinvoicing by 50 percent, it would have been able to expand its social program by nearly 36 percent, which represents a significant loss in its fight to alleviate poverty."[104]

B. Transfer mispricing impedes the fulfillment of the right to development.

Another right violated by transfer mispricing is the right to development, as elaborated in the 1986 United Nations Declaration on the Right to Development ("DRD"). The DRD defines the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[105] Thus it enshrines a vision of development that is people-centered and concerned with improving lives for individuals, communities, and entire populations, rather than exclusively focused on economic growth. It promotes development that is characterized by free, active, and meaningful participation of all individuals, communities, and states and the fair distribution of the benefits of that development.[106] While the DRD is not a binding legal instrument, it incorporates many of the rights and principles contained in other human rights documents,[107] and explicitly emphasizes the indivisibility of all human rights.[108] It is a right that is recognized in a number of international instruments and in states around the world, and that is justiciable in the African human rights system.[109] Thus it could potentially form the basis for a legal case in the African human rights system, as discussed in Section III(b) below, and is also a potential advocacy tool.

The vision of human-centered economic and social development enshrined in the DRD is clearly impeded by transfer mispricing.[110] The tax revenues lost through transfer mispricing can be spent on social programs, as discussed above, but can also be devoted to development efforts. Article 2 of the DRD calls for fair and equitable sharing in development, which can be accomplished in part through the redistributive function of taxation.[111] Article 8 of the DRD

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[102] ACTIONAID, *supra* note 9, at 8.

[103] GLOBAL FINANCIAL INTEGRITY, *supra* note 59, at 13.

[104] *Id.* at 27.

[105] G.A. Res. 41/128, annex, Declaration on the Right to Development art. 1 (Dec. 4, 1986) [*hereinafter* DRD].

[106] DRD, *supra* note 106, at art. 2.

[107] *See* Tamara Kunanayakam, *The Declaration on the Right to Development in the Context of United Nations Standard-setting*, *in* REALIZING THE RIGHT TO DEVELOPMENT: ESSAYS IN COMMEMORATION OF 25 YEARS OF THE UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT 17, 18,(United Nations, 2011) (tracing the evolution of legal concepts contained within the DRD).

[108] DRD, *supra* note 106, at art. 6.

[109] *See, e.g.*, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 276/2003, Afr. Comm'n on Human and Peoples' Rights (Feb. 4, 2010) (finding a violation of Article 22 of the African Charter of Human and Peoples' Rights, which enumerates the right to development) [*hereinafter* Endorois v. Kenya].

[110] *See* LIPSETT ET AL., *supra* note 10, at 89 ("For many stakeholders, the connections between taxes, poverty and development were easier to make than the linkages with human rights.").

[111] *See, e.g.*, TAX JUSTICE NETWORK-AFRICA & CHRISTIAN AID, *supra* note 10, at 24.

requires states to "undertake…all necessary measures for the realization of the right to development," including adopting appropriate fiscal policy.[112] Further, it is important to recognize that tax avoidance through transfer mispricing means not just lost tax revenues, but also lost profits that might be locally reinvested and thus spur local development and growth,[113] and that tax abuses by TNCs can have detrimental effects on local economies, as described in Section I(b) above.

C. Transfer mispricing undermines the right to self-determination.

The right of all peoples to self-determination is a basic and fundamental right in the international system, so important as to constitute the common first article of the ICCPR and the ICESCR.[114] This article in its first paragraph establishes that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[115] As the former Special Rapporteur on extreme poverty and human rights has underlined, this language "has clear implications for activities that undermine the ability of other States to raise revenue and fund their own development."[116] This notion is closely linked to the principle of sovereignty, which is at the heart of international relations and the structure of the United Nations and key to the manner in which states interact and cooperate.[117]

However, in an increasingly globalized world, notions of sovereignty are challenged at every turn, and the global tax system is a potent illustration both of how sovereignty has been eroded and how its invocation can be abused. International tax cooperation efforts have been frustrated by an emphasis on tax sovereignty, the idea that each state should set its own tax policy without any interference from others. However, at the same time, through a combination of structural adjustment requirements, power imbalances, the global "race to the bottom" on corporate tax rates in order to encourage investment, and the sort of international tax mismatches that enable transfer mispricing, this tax sovereignty is in reality non-existent for a number of countries.[118] As Saiz explains, "national-level policies are shaped and constrained by trends in the international tax policy framework."[119] And the revenue lost through weak tax policies and tax enforcement can erode sovereignty in other policy areas. "[T]axation . . . allows the government more policy space and capacity to be responsive and accountable to national objectives that are not tainted by the conditionalities of foreign aid."[120] As the High Level Panel on Illicit Financial Flows in Africa noted:

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[112] DRD, *supra* note 106, at art. 8.

[113] LIPSETT ET AL., *supra* note 10, at 23.

[114] International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171. [*hereinafter* ICCPR]. ICESCR, *supra* note 82, at art. 1.

[115] *Id*.

[116] Carmona, *supra* note 10, at ¶ 19.

[117] *See* U.N. Charter art. 2, ¶ 1.

[118] U.N. Charter, art. 2, ¶ 34. *See also* DAVID KINLEY, CIVILISING GLOBALIZATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY 103 (2009).

[119] Saiz, *supra* note 16, at 101.

[120] AFRICAN FORUM & NETWORK ON DEBT & DEVELOPMENT [AFRODAD], WHAT HAS TAX GOT TO DO WITH DEVELOPMENT? A CRITICAL LOOK AT MOZAMBIQUE'S TAX SYSTEM 7 (2011),

> "Given the well-known dependence of several African countries on significant amounts of official development assistance, the loss of resources through IFFs can only serve to deepen reliance on donors. Such dependence is apparent not only in terms of funds to support the social sector and state institutions, but also in terms of development ideas. It is an established fact that despite assertions of ownership, development policy very often reflects the perspectives of creditors or donors. Thus, when strapped for resources, African countries can often find themselves at the receiving end of externally imposed ideas that might not really be in their own perceived interests."[121]

The second paragraph of common Article 1 of the ICCPR and ICESCR holds that "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law."[122] Inherent in this language is the idea that the natural wealth and resources of a state should be employed to the social benefit of the people of that state. This element of the right to self-determination is also threatened by transfer mispricing, when TNCs involved in extraction of natural resources use abusive practices to avoid paying taxes on the profits of that extraction in the country of origin.[123] As referenced above, a key example of this possibility is Zambia, which Lusiani notes lost a total amount of capital equivalent to half of its GDP, and the accompanying tax revenues, as a result of transfer mispricing of copper exports in 2008.[124] As the Tax Justice Network-Africa and Christian Aid summarize, "[d]espite the huge potential, the income capture by sub-Saharan governments from their natural resource sector is extremely low. It is a far from fair share of the wealth extracted from the country; a disproportionate share of the benefits goes to the multinational companies who extract and sell the resource."[125]

D. Transfer mispricing erodes equality and non-discrimination.

Key to fulfilling states' human rights obligations and included almost universally in human rights instruments are the principles of equality and non-discrimination.[126] These principles require that states act in particular to protect and advance historically marginalized or vulnerable groups, including women, children, persons with disabilities, racial and ethnic minorities, and those living in extreme poverty. States that do not adequately address issues of tax evasion may be unable to fund social programs and thus may entrench persistent social inequalities.[127] As a global coalition of 157 NGOs declared in 2015, "[t]axation…plays a fundamental role in redistributing resources in ways that can prevent and redress gender, economic and other

https://docs.google.com/spreadsheets/d/1DSHJCKHPD5C6QFO36-QS8SXYTO7GPBDYGAAHZ9SN26I/edit#gid=867247536.

121 HLPIFFA, *supra* note 24, at 52.

122 ICCPR, *supra* note 105, at art. 1 (2). ICESCR, *supra* note 82, at art. 1(2).

123 *See* Carmona, *supra* note 10, ¶ 18.

124 Lusiani, *supra* note 58, at 121.

125 TAX JUSTICE NETWORK-AFRICA & CHRISTIAN AID, *supra* note 10, at 50.

126 *See, e.g.*, ICCPR, *supra* note 105, at art. 2(1). ICESCR, *supra* note 82, at art. 2(2). CRC, supra note 83, at art. 2(1).

127 *See* Carmona, *supra* note 10, ¶ 17.

inequalities and reduce the disparities in human rights enjoyment that flow from them."[128] "[A]ddressing inequality depends on a society's willingness to reduce social disparities by financing equitable policies through taxes and investments. Addressing equity is at the center of the social contract between governments and citizens: how much a society is willing to redistribute and how to do so."[129] The High Level Panel on Illicit Financial Flows in Africa summarizes the damage that IFFs can do to these rights, stating:

> "The social consequences of IFFs extend … to the worsening inequality in Africa. Our earlier observation that IFFs contribute to a regressive tax system and impose an unfair tax burden on poorer sections of society is pertinent in this regard. IFFs contribute to worsening inequality in Africa in other ways as well. The provision of social services and social protection schemes are means of reducing inequality. African governments find it increasingly harder to provide these forms of support in increasingly constrained economic circumstances."[130]

Tax injustice does not only contribute to increasing broad social and economic inequalities between rich and poor, but is also particularly likely to impact vulnerable and traditionally marginalized groups, who may have a history of exclusion from economic and social opportunity and who may rely on non-discriminatory government services in order to remedy past and present injustices. Persons with disabilities and women are two groups that are more likely to be reliant on government social and health services that suffer when revenues are inadequate,[131] and two groups that rely on such services to provide a base for a move from historic disenfranchisement to lasting economic empowerment.[132]

Additionally, it is not just how much tax revenue is collected that matters for questions of equality and non-discrimination, but also how those taxes are collected and from whom. "Tax reforms promoted by the World Bank and International Monetary Fund in developing countries since the 1980's have tended to favor the introduction or expansion of indirect taxation (in particular through value added taxes or VAT) and reductions in the rates of corporate and personal income taxation."[133] This tends to have the effect of shifting the tax burden more towards the poor and marginalized.[134] Specifically in the gender context, Elson's analysis shows that "if tax paid by corporations falls and by persons rises…the incidence of tax on women, especially poor women, will tend to increase."[135] When states fail to address transfer mispricing, they fail to live up to their human rights obligations to the principles of equality and non-discrimination, both by underfunding social protection programs and by shifting the burden for paying for those programs onto those who are most in need.

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[128] LIMA DECLARATION ON TAX JUSTICE AND HUMAN RIGHTS para. 2 (2015), [hereinafter LIMA DECLARATION].

[129] Isabel Ortiz & Matthew Cummins, *Global Inequality: Beyond the Bottom Billion* 32 (UNICEF Social and Economic Policy Working Paper, Apr. 2011), SSRN: https://ssrn.com/abstract=1805046 or http://dx.doi.org/10.2139/ssrn.1805046.

[130] HLPIFFA, *supra* note 24, at 56.

[131] *Id*. at 44.

[132] ACTIONAID, LEVELLING UP: ENSURING A FAIRER SHARE OF CORPORATE TAX FOR DEVELOPING COUNTRIES 7 (2015). *See also* LIMA DECLARATION, *supra* note 130.

[133] Saiz, *supra* note 16, at 84-85.

[134] *Id*.

[135] DIANE ELSON, UNIFEM, BUDGETING FOR WOMEN'S RIGHTS: MONITORING GOVERNMENT BUDGETS FOR COMPLIANCE WITH CEDAW 95 (2006).

E. Transfer mispricing damages accountability and transparency.

International human rights law includes a set of human rights principles that must guide government policy-making in all arenas and that are integral to good governance. As the former Special Rapporteur on extreme poverty and human rights has emphasized, "[t]he rights to participation, accountability, transparency, and access to information are critical human rights principles that also apply to fiscal policies."[136] This requirement, rooted in states' international human rights commitments, means, among other things, that tax policies should be open to judicial oversight[137] and that public officials should be accountable for fiscal decisions that imperil human rights.[138] Unfortunately, many of the policies that enable transfer mispricing not only fail to respect these basic requirements, but also act to undermine essential human rights principles in a number of ways.

As Cobham explains:

> "Effective taxation provides 4 R's: not only revenue, and the opportunity to reprice social goods and bads, but redistribution and political representation. Taxation should provide both the funds and the means to redistribute in order to address important deficits in positive security. In addition, however, taxation provides a critical link to effective political representation and wider standards of governance."[139]

In other words, a just and fair tax system contributes to broader governance goals through common interest processes, by which governments have incentives to promote growth because they are dependent on taxes; state capacity processes, in which tax revenue enables the creation of effective bureaucracy; and citizen engagement, which encourages greater accountability.[140]

Perhaps the human rights and good governance principle most implicated by transfer mispricing is transparency, because transfer mispricing is fundamentally a problem of transparency,[141] and a violation of the right to information, as embodied in Article 19 of the ICCPR.[142] Transfer mispricing is enabled by secrecy about corporate profits, assets, and ownership, and by lack of effective information sharing between the different jurisdictions in which corporations operate. As a result, these corporations have an incentive to use their political and economic power to combat efforts to bring greater transparency and participation to the global tax system.[143] Thus the High Level Panel on Illicit Financial Flows in Africa has asserted: "We believe that transparency is key to all efforts to arrest IFFs, given that the primary aim of perpetrators is to hide wealth."[144] Accordingly that panel has advocated for better corporate

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136 Carmona, *supra* note 10, at ¶ 20.
137 *See* Carmona, *supra* note 10, at ¶ 20.
138 *Id*. ¶ 23.
139 COBHAM, *supra* note 73, at 16 (citation omitted).
140 LIPSETT ET AL., *supra* note 10, at 92-93.
141 *See* GLOBAL FINANCIAL INTEGRITY, *supra* note 59, at 46-49.
142 *See General Comment No. 34,* Human Rights Committee, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).
143 *See, e.g., The Openness Revolution*, THE ECONOMIST, Dec. 13, 2014, http://www.economist.com/news/business/21636070-multinationals-are-forced-reveal-more-about-themselves-where-should-limits.
144 HLPIFFA, *supra* note 24, at 45.

reporting and better exchange of information between countries.[145] Such policy changes would be consistent with transparency as a human rights principle.

Additionally, a number of commentators have noted that a just and efficient tax system includes an accountability function.[146] Taxation is a manifestation of the social contract, and therefore encourages government accountability and citizen oversight. Cobham explains: “The act of paying tax provides an important accountability link. Empirical studies suggest the higher the share of tax in government spending, the stronger the process of improving governance and representation; while direct tax – taxes on income, profits and capital gains – appears to play a particularly strong role.”[147] As a result, abusive tax practices like transfer mispricing damage accountability “by generating a revenue escape valve.”[148] Tax imbalances often reflect broader democratic deficits.[149] Further, corporations that seek to engage in abusive tax practices will sometimes engage in bribery and other corrupt practices in order to perpetuate these activities, thus contributing to “entrenched impunity and the institutionalization of corruption.”[150]

F. Transfer mispricing violates states’ extraterritorial human rights obligations and obligations as members of the international community.

There is an obligation on all states, stemming from their human rights commitments, to strengthen their own domestic tax revenue collection and to work together to address the global problem of transfer mispricing in service of making sufficient resources available such that all human rights can be realized for all. The discussion in this section thus far has implicitly emphasized the domestic human rights obligations of states in collecting and distributing taxes. However, transfer mispricing is by its very nature an international problem and implicates states’ obligations of international cooperation and their responsibilities to one another and to each other’s citizens. In other words, transfer mispricing is an example of a human rights violation that gives rise to extraterritorial human rights obligations (“ETO”). While each state is primarily responsible for human rights issues within its own territory, the interconnectedness of today’s globalized world means that these obligations cannot end at national borders. ETOs are grounded in the U.N. Charter, the UDHR, the ICESCR, and a number of other human rights treaties and instruments.[151] They are articulated in the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social, and Cultural Rights, which are non-binding, but gather the principles found in binding instruments, and which describe the obligation of states to “desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of

[145] HLPIFFA, *supra* note 24, at 45.
[146] *See, e.g.*, COBHAM, *supra* note 73, at 16 (citation omitted).
[147] *Id.*
[148] Lusiani, *supra* note 58, at 118.
[149] Saiz, *supra* note 16, at 86.
[150] HLPIFFA, *supra* note 24, at 51.
[151] CENTER FOR ECONOMIC AND SOCIAL RIGHTS & THIRD WORLD NETWORK, UNIVERSAL RIGHTS, DIFFERENTIATED RESPONSIBILITIES: SAFEGUARDING HUMAN RIGHTS BEYOND BORDERS TO ACHIEVE THE SUSTAINABLE DEVELOPMENT GOALS (Apr. 2015), *available at* http://www.cesr.org/downloads/CESR_TWN_ETOs_briefing.pdf.

economic, social and cultural rights extraterritorially,"[152] and to take steps to ensure that TNCs that they are in a position to regulate do not violate or impair these rights.[153]

A number of actors have enumerated the relevance of ETOs for global taxation issues. As Lusiani argues, under the ICESCR, "no State is permitted to infringe on another State's ability to mobilize the resources necessary for fulfilling Covenant rights, including through fiscal and tax policy."[154] Thus, the former Special Rapporteur on extreme poverty and human rights advises:

> "The actions of States to facilitate and/or actively promote tax abuse and other illicit financial flows through their tax secrecy laws and policies could jeopardize their compliance with international human rights obligations, particularly with regard to international cooperation and economic, social and cultural rights. States should therefore take concerted and coordinated measures against tax evasion globally as part of their domestic and extraterritorial human rights obligations and their duty to protect people from human rights violations by third parties, including business enterprises . . . ."[155]

Article 28 of the UDHR holds that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[156] Article 3(3) of the DRD operationalizes this requirement, by calling on states "to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observation and realization of human rights."[157] State responsibility to contribute to the formation of this order "can be derived from several factors, including a State's global economic weight and capacity; a State's relative power and influence over the direction of finance, trade and development; and the degree to which a State benefits from the existing distribution of global wealth and resources."[158] Human rights laws entail an obligation to provide a supranational institutional design that is conducive to the fulfilment of human rights and the reduction of poverty.[159] The U.N.'s Guiding Principles on Extreme Poverty elaborate on this obligation, insisting that "States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation."[160]

Permitting transfer mispricing is an example of a violation of the obligation to create an international global order that is conducive to fulfillment of human rights and the reduction of

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152 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights ¶ 13 (2011), *available at* http://www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf.

153 *Id.* at ¶ 24.

154 Lusiani, *supra* note 58, at 126.

155 Carmona, *supra* note 10, ¶ 62.

156 *See* Asbjørn Eide, *Article 28*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 444-45 (Asbjørn Eide et al., eds., 1992).

157 G.A. Res. 41/128, annex, Declaration on the Right to Development, at art. III, § 3 (Dec. 4 1986).

158 Shyami Puvimanasinghe, *International Solidarity in an Interdependent World*, *in* REALIZING THE RIGHT TO DEVELOPMENT 188 (U.N. Office of the High Comm'r for Human Rights 2011) (*citing* MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS 196-204 (2007)).

159 *See* Thomas Pogge, *Are We Violating the Human Rights of the World's Poor?* 14 YALE HUM. RTS. & DEV. L. J., no. 2, 2011, at 32.

160 Guiding Principles, *supra* note 91, at 23.

poverty,[161] and a symptom of an international system that is currently inequitable and unjust. It is state action that makes it so. Bilateral tax treaties currently tend to aggravate transfer mispricing issues by allocating tax rights in a manner that is detrimental to developing countries and by lowering taxation of cross-border financial transfers.[162] Tax laws can give rise to "inequality spirals," where those in positions of strength are able to reinforce that strength through greater access.[163] Even in their efforts to actually address this problem, thus far, developed country governments have supported the OECD taking the lead on transfer mispricing issues, despite the limited role that this implies for developing country governments,[164] and the OECD's own admission that developing country priorities may not be emphasized in its approach.[165] The responsibility to create a just social and economic order impels states to generate a human rights-conscious framework for all aspects of foreign direct investment ("FDI"),[166] including the way in which corporations making those investments are taxed. Thus far, contrary to the urging of the UDHR, they have failed to do so.[167]

Inextricably linked to the creation of a just social and international order and equally relevant to the issue of transfer mispricing is the requirement of international cooperation for the realization of human rights. This principle is laid out in the very first article of the UDHR, which holds that "[a]ll human beings…should act towards one another in a spirit of brotherhood,"[168] and given legal force in Article 2 of the ICESCR, which includes a requirement that states act through international assistance and cooperation to progressively realize human rights.[169] It is more fully fleshed out in articles 3 and 4 of the DRD, which require that states demonstrate full respect for the principles of international law concerning friendly relations and cooperation among states, in accordance with the Charter of the United Nations,[170] and that they cooperate with each other in ensuring development and eliminating obstacles to development, in formulating international development policies, in creating national and international conditions favorable to the realization of the right to development, in encouraging the observance and realization of human rights, and in promoting a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all states.[171] In Article 4, the Declaration also calls for sustained action for more rapid development of

[161] *See* Pogge, *supra* note 160, at 29-30.

[162] *See, e.g.*, EURODAD ET AL., *supra* note 25, at 18. *See also* Michael J. McIntyre, *Developing Countries and International Cooperation on Income Tax Matters: A Historical View* 5-6 (2015), http://www.michielse.com/files/mcintyre_intl_cooperation.pdf. *See also* HLPIFFA, *supra* note 24, at 41-42.

[163] LIPSETT ET AL., *supra* note 10, at 87 (citation omitted).

[164] EURODAD ET AL., *supra* note 25, at 6.

[165] News Conference - Launch of the 2015 BEPS Package, *supra* note 9.

[166] *See* Olivier De Schutter, *Transnational Corporations as Instruments of Human Development*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 435-38 (Philip Alston & Mary Robinson eds., 2005).

[167] *See generally* INDEPENDENT COMMISSION FOR THE REFORM OF INTERNATIONAL CORPORATE TAXATION (ICRICT), DECLARATION (2015) (listing reforms necessary to ensure a just and rights-enabling international tax system) [*hereinafter* ICRICT].

[168] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 1 (Dec. 12, 1948).

[169] ICESCR, *supra* note 82, at art. 2.

[170] DRD, *supra* note 106, at art. 3(2).

[171] *Id.* at arts. 3(3), 4(1).

developing countries and effective international cooperation to provide them with appropriate means and facilities to foster their comprehensive development.[172]

The Guiding Principles on Extreme Poverty, after calling on states to create an international enabling order for human rights, emphasize that "this includes cooperating to mobilize the maximum of available resources for the universal fulfillment of human rights."[173] Similarly, the Committee on Economic and Social Rights ended an open letter to States Parties with the reminder "that international cooperation is a fundamental obligation for the progressive universal realization of economic, social and cultural rights."[174] More broadly, a U.N. Secretary-General's Report explains:

> "In a world of interconnected threats and challenges, it is in each country's self-interest that all of them are addressed effectively. Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among States. Such cooperation is possible if every country's policies take into account not only the needs of its own citizens but also the needs of others. This kind of cooperation not only advances everyone's interests but also recognizes our common humanity."[175]

The problem of transfer mispricing is a vivid illustration of the critical need for international cooperation to achieve the realization of all human rights, including the right to development. Tax abuse of this sort is an inherently international problem that "is not possible in a domestic vacuum."[176] The Africa Progress Panel has explained: "Tax evasion is a global problem that requires multilateral solutions. Africa cannot combat tax evasion solely through national and regional policy."[177] They point to tax havens, secrecy jurisdictions, and the complexities of TNC structures as cross-border problems.[178] Thus they insist: "Far more than increased aid, what Africa needs is strengthened international cooperation so that it can secure a fair share of the wealth now being drained out of the region through unfair and sometimes illegal practices."[179] International problems that cannot be solved unilaterally by any one country or region are among the stated purposes for the existence of the United Nations,[180] and Articles 1, 55, and 56 of the U.N. Charter require international cooperation to solve them.[181]

In sum, transfer mispricing undermines states' abilities to fulfill their human rights obligations in a number of different areas. It is inimical to principles of human rights and good governance and represents a failure of international cooperation and global governance. It impedes states' abilities to fully benefit from their own resources and restricts the policy space available to create an enabling environment for fair, equitable, and sustainable development. And it is both a symptom and a cause of an unjust global economic and social order that leads to

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[172] DRD, *supra* note 106, at art. 4(2).

[173] *Guiding Principles*, *supra* note 91, at 23.

[174] CESCR, *supra* note 98, at 2.

[175] U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights For All: Report of the Secretary-General*, ¶ 18, *delivered to the General Assembly*, U.N. Doc. A/59/2005 (Mar. 21, 2005).

[176] Carmona, *supra* note 10, at 61. *See also id*. at 74-78.

[177] AFRICA PROGRESS PANEL, *supra* note 4, at 79.

[178] *Id*.

[179] *Id*. at 78.

[180] U.N. Charter art. 1, para. 3.

[181] *Id*. at arts. 1, 55, 56.

systemic violations of the human rights of people living in poverty all over the world.[182] The good news is that understanding transfer mispricing as a human rights violation may open up new avenues to combat these practices, and this is what we turn to in the next section.

III. COMBATING TRANSFER MISPRICING USING HUMAN RIGHTS

Transfer mispricing is widely recognized as a global problem, damaging to governments, economies, and human rights around the world.[183] Naturally a number of academics, activists, and policy-makers have proposed potential solutions to this problem, notably led by the Base Erosion and Profit Shifting ("BEPS") Project at the OECD.[184] However, there is no broad consensus on the best actions for the global community to take to combat these and other tax abuses. The solutions proposed by the OECD are criticized as too weak,[185] but more incisive actions have failed to gather widespread support.[186] This section of the paper describes some of the proposed technical and legal strategies for addressing transfer mispricing and then proposes that analyzing transfer mispricing from a human rights perspective may offer a way forward in the debate around how to address the problem, less by proposing new solutions than by opening up new fora in which those solutions can be discussed and new perspectives for viewing them, as well as increasing public pressure on policy-makers.

A. Proposed strategies for combating transfer mispricing.

The main strategy that countries around the world use to avoid the problem of transfer mispricing is the requirement and enforcement of the "arm's length method," as advocated by the OECD's transfer pricing guidelines.[187] The essential thrust of the arm's length principle is that for tax purposes companies should treat related enterprises as separate businesses and should set prices at market rates, in the same manner that they would with an unrelated entity.[188] Thus, for example, when Glencore's mine in Zambia sells copper to its affiliate in Switzerland, for tax purposes the Zambian government would consider the copper to have been sold at the market price that Glencore would have received from selling the copper to an unrelated buyer, and tax the Zambian subsidiary accordingly.

However, this method can be difficult to use for sophisticated transactions, for certain goods and services it is not possible to establish a market price, and it can be hard to account for intangible goods, like intellectual property, using this method.[189] To return again to prior examples, it is very difficult to calculate what SABMiller's breweries in Ghana might have paid to an outside company for the right to use the Castle beer brand, or for an amorphous set of

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[182] Pogge, *supra* note 160.

[183] *See, e.g.*, ICRICT, *supra* note 168, at 6-8.

[184] OECD, "Base Erosion and Profit Shifting," http://www.oecd.org/tax/beps/ (last visited Nov. 29, 2016).

[185] *See, e.g.*, ICRICT, Evaluation of the Independent Commission for the Reform of International Corporate Taxation for the Base Erosion and Profit-Shifting Project of the G20 and OECD (2015), *available at* http://www.icrict.org/wp-content/uploads/2015/10/ICRICT_BEPS-Briefing_EN_web-version-1.pdf.

[186] *See, e.g.*, Tax Justice Network, "Transfer Pricing," http://www.taxjustice.net/topics/corporate-tax/transfer-pricing/ (discussing obstacles to the adoption of unitary taxation).

[187] Tax Justice Network, *supra* note 187.

[188] Radaelli, *supra* note 22, at 3-4.

[189] *Id.*

management services. In order to account for these failings, Brazil has instituted a set of reforms whereby, "when dealing with intra-firm trade in areas lacking comparable prices, tax authorities will determine a price through a credible institution, or relevant price on a commodities exchange, and apply it to the transactions in question. All companies trading from Brazil through low tax jurisdictions will be subject to the new regime."[190]

While some reformers suggest following the Brazilian model, others seek to replace the arm's length method entirely, advocating instead a system known as worldwide unitary taxation, by which taxes are apportioned among jurisdictions where a multinational corporation operates according to the activity that the corporation conducts within each jurisdiction.[191] Thus in the case of SABMiller's Ghana breweries, it might be determined, for example, that seventy percent of the activity to produce the products comes from the actual brewing in Ghana, twenty percent comes from the holding and developing of the brand in the Netherlands, and ten percent from the management services provided in Switzerland. Accordingly, Ghana would be able to levy tax on seventy percent of the group's profits, the Netherlands on twenty percent, and Switzerland on ten percent, each according to the tax rates established by domestic law. In this way the corporation's income is taxed without reference to its internal organization, eliminating incentives to shift profit within the corporation.[192] However, this system could be complex to implement, and might still involve iniquities.[193] Notably, this is not a system that can be enforced unilaterally; as suggested by the name, there must be a worldwide commitment to the imposition of unitary taxation,[194] and right now there is very little enthusiasm for the idea among the governments of OECD countries.[195] This is because the current global system of allocation of taxing rights favors the "home" countries where TNCs are based over the "source" countries where they invest, and thus developed nations stand to lose from a more equitable system.[196] Further, this system places higher disclosure requirements on corporations, as it can best be supported by country-by-country reporting of financial and tax information.[197]

Even without imposing an entirely new global transfer pricing system, there are a number of reforms that have been proposed that could serve to make the current system more fair and effective. Saiz notes that "growing advocacy by groups such as the Tax Justice Network has prompted stronger international commitments to clamp down on tax havens and secrecy jurisdictions, to foster progressive and transparent tax systems, and to ensure greater international cooperation on tax, regulation and crime."[198] One potential method of securing this greater international cooperation would be the establishment of a U.N. intergovernmental body on tax issues,[199] which was the subject of strong but ultimately unsuccessful lobbying by

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190 AFRICA PROGRESS PANEL, *supra* note 4, at 80.

191 Radaelli, *supra* note 22, at 4.

192 LIPSETT ET AL., *supra* note 10, at 33.

193 *Id*. at 34.

194 Radaelli, *supra* note 22, at 4.

195 Pascal Saint-Amans, Director, Centre for Tax Policy and Administration, *Webcast Announcing Base Erosion and Profit Shifting Project Final Outcomes*, OECD (Oct. 5, 2015), http://www.oecd.org/tax/beps-webcasts.htm.

196 *See, e.g.*, Luzius Cavelti, et al., *Why Corporate Taxation Means Source Taxation :A Response to the OECD's Actions Against Base Erosion and Profit Shifting* 4 (Swiss Economics Working Paper 0054, 2016), http://ssrn.com/abstract=2773614.

197 LIPSETT ET AL., *supra* note 10, at 33.

198 Saiz, *supra* note 16, at 102.

199 EURODAD ET AL., *supra* note 25, at 22.

developing countries at the Addis Ababa Financing for Development Conference in July 2015.[200] Saiz also suggests the possible imposition of international minimum corporate tax rates.[201] While this proposal is primarily aimed at preventing a "race to the bottom" as countries compete to attract foreign investment, it would also serve to minimize some of the incentives to shift profits from one jurisdiction to another.

As referenced above, the OECD, through its Base Erosion and Profit Shifting ("BEPS") project, is working to address the harm caused by transfer mispricing. Key elements of this effort include a move to requiring country-by-country reporting by multinationals,[202] as well as eliminating the possibility of holding intellectual property in low-tax jurisdictions where companies have no other real presence, and facilitating information exchanges between nations.[203] However, the BEPS project has been criticized for the lack of meaningful participation of developing countries, undue private sector influence, assumptions that privilege developed country interests and the potential for continued gaps and loopholes.[204] Indeed, even the Director of the OECD's Centre for Tax Policy and Administration acknowledges that the priorities of developing countries are not a primary concern for the BEPS project.[205] There is ultimately a sense among those who advocate for tax justice that despite significant rhetoric around the issue of transfer mispricing, governments, especially in developed countries, have not really acted to take the steps that might remedy the problem.[206] This is both a reason why transfer mispricing constitutes a human rights violation and why it might be useful to use a human rights frame to address this problem.

B. Human rights enforcement mechanisms can increase pressure on states to address transfer mispricing.

The international human rights system encompasses a number of mechanisms for addressing violations of human rights, with varying degrees of enforcement capabilities. On the soft power end of the spectrum are the Special Procedures of the Human Rights Council, which are empowered to make country visits and to present country and thematic reports to the Council.[207] As has been referenced several times throughout this paper, both the current and former Special Rapporteurs on extreme poverty and human rights have shown particular interest in issues of tax policy, including transfer mispricing.[208] The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has also recognized

[200] *See* Luke Shore, *In Addis Ababa*, LONDON REVIEW OF BOOKS BLOG (AUG. 20, 2015), http://www.lrb.co.uk/blog/2015/08/20/luke-shore/in-addis-ababa/.
[201] Saiz, *supra* note 16, at 98.
[202] Organization for Economic Cooperation and Development/G20 Base Erosion and Profit Shifting Project, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13- 2015 Final Report* (2015), http://www.oecd.org/tax/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf.
[203] Saint-Amans, *supra* note 196.
[204] ACTIONAID, *supra* note 9, at 18-19.
[205] Saint-Amans, *supra* note 196.
[206] *See* EURODAD ET AL., *supra* note 25, at 6 (finding that EU countries have failed to take or support a number of actions that would reform global taxation).
[207] *See* OHCHR, "Special Procedures of the Human Rights Council," http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx.
[208] *See, e.g.*, Carmona, *supra* note 10. *See also* Alston, *supra* note 10.

tax evasion and reduced tax revenues as having a direct impact on the allocation of sufficient resources for health.[209] Additionally, the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, recently completed a report on illicit financial flows, human rights, and the 2030 Agenda for Sustainable Development that covers transfer mispricing and its relation to human rights.[210]

Another mechanism that has gained increasing attention in recent years is the Universal Periodic Review ("UPR"), a process by which states report regularly to the Human Rights Council regarding their efforts to fulfil their human rights obligations.[211] Civil society is able to contribute through stakeholder submissions and by lobbying states.[212] States are given the opportunity to question other states about their human rights situation, and the Council issues a set of recommendations.[213] As the IBAHRI report suggests, there is "no reason that" tax issues should not be raised through the UPR.[214] In fact, a Swiss NGO coalition included Switzerland's failure to adequately regulate multinational corporations in its submission to the Council during Switzerland's most recent UPR process,[215] and similar considerations could be raised during the UPR process for other states whose tax policy is viewed as facilitating transfer mispricing. Other U.N. human rights treaty bodies, which are charged with monitoring the implementation of the various human rights treaties, have similar review processes in which such issues can be raised.[216] For example, in 2016 a coalition of NGOs submitted a report prior to Switzerland's review before the Committee on the Elimination of Discrimination Against Women highlighting the effects that Switzerland's role in cross border tax abuse have for women's rights and gender equality.[217]

Additionally, there is the possibility of raising a formal complaint before one of the treaty bodies, which generally have some capacity to hear both individual and inter-state complaints. Lusiani suggests the possibility of an inter-state complaint against a tax haven before the Committee on Economic, Social and Cultural Rights, offering the example of a complaint brought by Zambia against Switzerland.[218] His imagined action relies on the obligations of parties to the ICESCR to refrain from actions or omissions that impair the enjoyment of human rights, to protect against human rights abuse by third parties, and to cooperate and assist in mobilizing maximum available resources.[219] However, while Lusiani presents an interesting, and certainly theoretically valid proposal, the reality is that there is very little political will to bring

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[209] U.N. Secretary-General, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*: *Interim rep. of the Special Rapporteur*, ¶ 2, ¶ 21, U.N. Doc. A/67/302 (Aug. 13, 2012).
[210] Bohoslavsky, *supra* note 10.
[211] OHCHR, "Basic Facts About the UPR," http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx.
[212] *Id.*
[213] *Id*.
[214] LIPSETT ET AL., *supra* note 10, at 140.
[215] Swiss NGO Coalition for the UPR, *14th Universal Periodic Review 2012: Swiss NGO's Submission*, ¶ 38 (2012).
[216] *See, e.g.*, Berne Declaration et al., *State Responsibility for the Impacts of Cross-Border Tax Abuse on Women's Rights & Gender Equality* (Feb. 22, 2016), *available at* http://www.cesr.org/downloads/Switzerland_CEDAW_Submission_TaxFinance_1mar2016.pdf.
[217] *Id*.
[218] Lusiani, *supra* note 58, at 122.
[219] *Id*.

inter-state complaints within the U.N. human rights system.[220] Individual complaints are more feasible, but are generally only allowed against states that have ratified certain optional protocols to the various treaties, and are limited to violations that occur within national boundaries,[221] limiting the possibility of addressing the transnational scourge of transfer mispricing.

Finally, there is the possibility of using regional human rights courts. This may be particularly relevant in the African system where a great deal of evidence has been accumulated about the impact of transfer mispricing, and where, as referenced above, the right to development is fully justiciable.[222] However, this option would only allow for complaints against African states, again, failing to address the transnational character of transfer mispricing. Still, it is possible to imagine a state under the influence of corporate power failing to act to the best of its independent abilities to limit transfer mispricing, and this situation could provide a basis for public interest litigation in the regional courts.

C. Businesses should incorporate transfer mispricing and other tax issues in their human rights policies.

With the rise of globalization and the power of TNCs and the erosion of state sovereignty, issues of the impacts of businesses on human rights and their accountability for human rights violations have become hot topics in the global human rights arena.[223] This debate is relevant to questions of transfer mispricing, which, while enabled by state action and policy, is ultimately a corporate act. The U.N. Guiding Principles on Business and Human Rights, developed by John Ruggie, then the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and adopted by the Human Rights Council in 2011, lay out a "Respect, Protect, and Remedy" framework that calls on businesses to respect human rights in their dealings and on states to take action to protect against violations of human rights by businesses both within and outside of their borders.[224]

The former Special Rapporteur on extreme poverty and human rights has very clearly explained how this framework applies in the context of taxation of TNCs. With regard to state obligations, she says:

> "that States should take steps to prevent violations of human rights outside of their territories as a result of the activities of business enterprises that are incorporated under their laws or that have their main seat or place of business under their jurisdiction. For example, States should take measures to ensure that business enterprises that the State is in a position to regulate, including

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220 *See* Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects, or Wishful Thinking?*, 10 HUM. RTS. Q. 249, 253-55.

221 OHCHR, "Human Rights Bodies – Complaints Procedures," http://ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx.

222 *Endorois v. Kenya*, *supra* note 100. *See also* Obiora Chinedu Okafor, *A Regional Perspective: Article 22 of the African Charter on Human and Peoples' Rights*, in OHCHR, REALIZING THE RIGHT TO DEVELOPMENT: ESSAYS IN COMMEMORATION OF 25 YEARS OF THE UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT (2011).

223 *See, e.g.*, OHCHR, "Business and Human Rights," http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx.

224 John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises) *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31(Mar. 21, 2011).

> legal, accounting and other specialized firms that assist in tax abuse, do not participate in or facilitate tax abuse or illicit financial flows, given that they have a detrimental impact on the realization of economic, social and cultural rights."[225]

And regarding business obligations, she adds,

> "[M]oreover, under the Guiding Principles on Business and Human Rights, business enterprises also have a responsibility to respect human rights . . . . Business practices that avoid taxation may breach their responsibility to respect insofar as such actions have a negative human rights impact . . . . In addition, business enterprises that knowingly avoid paying tax are purposefully depriving countries of the resources they need to fulfil their human rights obligations."[226]

To this end, the Independent Expert on the effects of foreign debt has suggested that "one obvious way for business enterprises to show responsible behaviour and demonstrate compliance is to embrace a greater degree of transparency, in particular by publishing on a country-by-country basis their sales, profits and taxes."[227] Further, the OECD guidelines for multinational enterprises incorporate the U.N. Guiding Principles on Business and Human Rights and also include specific guidance on taxation, suggesting that companies should "comply with both the letter and the spirit" of tax laws and regulations.[228]

However, despite the clarity of this position and despite the fact that there is a need for corporations "to realise that it is in their longer-term commercial interest to contribute to financing the infrastructure, communications, and education levels upon which strong markets depend,"[229] there is a tendency of businesses to omit tax issues from their human rights, sustainable development, or Corporate Social Responsibility policies,[230] and the discourse around state protection from human rights violations by businesses also has not tended to focus on this issue.[231] This may stem from what De Schutter has identified as the propensity for the business and human rights discourse to concentrate on what he calls "micro-analysis" – that is, an examination of the human rights "impact of a particular investment or project."[232]

Considering transfer mispricing in the context of business and human rights, conversely, is consistent with the "macro-analysis" of business and human rights that he recommends, which

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[225] Carmona, *supra* note 10, at ¶ 6.

[226] *Id*. at ¶ 7. *See also* LIMA DECLARATION, *supra* note 130, at 2 ("In order to implement their obligations in accordance with the United Nations Guiding Principles on Business and Human Rights, we call on governments to develop legal and regulatory frameworks which safeguard against the human rights risks of business tax behaviour. We also call on governments to provide effective remedy for any harmful conduct stemming from tax behaviour. In parallel, we urge companies and corporate groups to assess and address corporate tax abuse, for example in their policy statements, due diligence and grievance processes.").

[227] Bohoslavsky, *supra* note 10, at ¶ 34.

[228] OECD, *supra* note 2.

[229] OXFAM, TAX HAVENS: RELEASING THE HIDDEN BILLIONS FOR POVERTY ERADICATION 11 (2000). *See also* ACTIONAID, *supra* note 29, at 6 ("Multinational companies, which make billions of pounds in developing countries each year, need these taxpayer-funded schools, hospitals and roads just as much as local people.").

[230] ACTIONAID, *supra* note 29, at 10.

[231] ACTIONAID, RESPONSIBLE TAX PRACTICES BY COMPANIES: A MAPPING AND REVIEW OF CURRENT PROPOSALS 16 (2015).

[232] De Schutter, *supra* note 167, at 405.

looks beyond particular instances of human rights violations by corporations to the structural effects that business activity can have on the overall realization of rights.[233] De Schutter elaborates: "The legal framework of FDI, in particular, must be critically examined from that perspective. Otherwise there exists a real risk that, while we devote our energies to scrutinizing the activities of TNCs in developing states, we forget about the structural dimensions of their presence in those states, such as the pressure under which developing states are to attract FDI and the concessions they make to ensure that foreign capital flows in, or the consequences of FDI on the situation of local producers and investors or on the relative wages."[234] In applying this analysis specifically to the use of export processing zones to attract FDI, De Schutter suggests that, "in particular, the absence or quasi-absence of fiscal revenues for the host country from companies investing in [export processing] zones…seem[s] to be in clear tension with the right to development of that country."[235] This is equally true for any situation that enables TNCs to operate in and extract profit within a country without contributing to that country's fiscal revenues.[236]

De Schutter's macro-analysis represents a vision of the business and human rights framework that is consistent with the principle of international cooperation and the requirement of an international social and economic order that provides an enabling environment for the realization of human rights. If states and businesses are truly committed to the realization of human rights and to a vision of sustainable development that provides long-term prosperity and improvement of the human condition, they will have to start giving more attention to structural aspects of the business and human rights issue, including trade, investment, and international tax policy and the problem of transfer mispricing.

D. A human rights analytical framework can shift the discourse on transfer mispricing and increase public awareness.

Ultimately, however, perhaps the greatest contribution that examining transfer mispricing as a human rights issue can make is as a discursive and analytical tool, bringing a new perspective to a conversation that is often dominated by technicality and politics and confined to the realms of economists and diplomats. A human rights perspective has the potential to shift the dominant tax policy discourse.[237] Emphasizing the duty of states to devote maximum available resources to the realization of human rights moves away from questions of how much revenue is collected and in what manner. towards questions of allocation and the real uses that revenue can be put to.[238] At the same time, incorporating human rights' emphasis on equality and non-discrimination brings in questions of who really benefits from tax policy and revenue allocation, and recognizing the need for international cooperation in the realization of human rights contests the dominance of the principle of tax sovereignty.[239] "Using the language of rights could thus

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[233] De Schutter, *supra* note 167, at 405.
[234] *Id*. at 406.
[235] *Id.* at 412.
[236] *Id*.
[237] Saiz, *supra* note 16, at 103.
[238] *Id*.
[239] *Id*.

help articulate an approach to tax policy that is more responsive to the problems of global poverty and economic inequality."[240]

A human rights perspective casts the tax policy discourse in terms of duty-bearers and rights-holders, recognizing that, while corporations have an obligation not to engage in transfer mispricing, ultimate responsibility for ending these practices lies with the state.[241] As Kinley emphasizes, "The significance…of the role of governments in the global economy is not just to facilitate the conditions for productive, prosperous and prudent commercial enterprise, but also to ensure that, in the process, they do not renege on their social responsibilities to promote freedom, equality, order and welfare as represented, in part, by their international human rights law obligations."[242]

Using human rights language puts a human face on debates over tax policy.[243] As Robinson has noted, "Rights lend moral legitimacy and reinforce principles of social justice that already underpin much development thinking. They help shift the focus of analysis to the most deprived and excluded, especially to deprivations caused by discrimination."[244] The need for this framing is evident even within governments. As one tax official interviewed by IBAHRI proposed, "Legally, it may not make much of a difference to understand tax evasion as a human rights issue. However the human rights analysis could be very important to help strengthen the tax system from a tax morale and political perspective."[245]

Overall, applying a human rights perspective may seem only relevant to realms of discussion and debate, but in reality it can have a genuine policy impact. It is important to note that human rights treaties are binding legal obligations on states, and thus, as the Guidelines on Extreme Poverty remind us, "States should take into account their international human rights obligations when designing and implementing all policies, including international trade, taxation, fiscal, monetary, environmental and investment policies…Before adopting any international agreement, or implementing any policy measure, States should assess whether it is compatible with their international human rights obligations."[246] Human rights impact assessments are a policy tool that can be applied to tax regimes, in order to provide "rigorous, evidence-based scrutiny of the impacts tax laws, policies and practices have on human rights and equality abroad"[247] and at home.

Further, discussing transfer mispricing as a human rights issue can increase pressure around these issues from the grassroots, civil society, and the international community.[248] "[H]uman rights can provide a useful frame of reference for greater engagement by citizens in the complex and technical issues related to tax,"[249] and human rights activism is adept at using time-honoured "naming and shaming" techniques to bring political pressure on states and on private actors. These techniques have been empirically shown to have an effect in this area, by Dyreng, Hoopes,

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[240] Allison Christians, *Fair Taxation as a Basic Human Right*, 9 INT'L REV. CONST. 211, 212 (2009).

[241] EURODAD GIVING, *supra* note 97, at 12.

[242] KINLEY, *supra* note 109, at 22.

[243] Carmona, *supra* note 10, at ¶ 3.

[244] Mary Robinson, *What Rights Can Add to Good Development Practice*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 38-39 (Philip Alston & Mary Robinson, eds., 2005).

[245] LIPSETT ET AL., *supra* note 10, at 94.

[246] *Guiding Principles*, *supra* note 91, at ¶ 61.

[247] LIMA DECLARATION, *supra* note 130, at 2.

[248] Saiz, *supra* note 16, at 93-95.

[249] LIPSETT ET AL., *supra* note 10, at 9.

and Wilde, who demonstrate how an ActionAid campaign pressured FTSE 100 companies to comply with tax disclosure rules.[250]

Ultimately, the fight to combat transfer mispricing is a long and difficult one, requiring a struggle against powerful interests, a great deal of technical expertise, and a commitment to international cooperation. The mechanisms, guidance, and perspective of the international human rights system do not provide an instant solution to this problem. But they do offer new avenues for advocacy and a new way of thinking about the issue for those who are committed to solving it.

IV. CONCLUSION

It has now been acknowledged that there are a number of systemic causes of detriment to the enjoyment of human rights that do not fit a traditional understanding of human rights violations as the specific acts of an individual agent or small group of agents against a particular victim or group of victims.[251] Recognizing that there are more systemic sources of harm, linked to the operation of social institutions like the global tax regime, some have suggested that a human rights violation can be said to occur "when there is an avoidable contribution to a negative human rights impact, and one where those contributing are in a position to know how their conduct results in a negative impact."[252] Under this definition, engaging in or allowing transfer mispricing constitutes a human rights violation. The question then is what is to be done about this violation, what tools are at our disposal for combating it? The good news where transfer mispricing is concerned is that this is not necessarily an issue where a traditional imbalance of power will necessarily hamper efforts to address the problem: while developed countries may have some interest in protecting the profits of the TNCs that call them home, they also have a significant interest in putting an end to the revenue losses that they themselves experience as a result of these abusive practices.[253] The challenge is bringing these interests in line with those of developing countries, and most importantly, with those of rights-holding individuals and communities around the world who bear the true burden of these abuses, and finding a solution that is just, equitable, and capable of being implemented around the world.

International human rights law provides tools to use in the search for that solution, and an analytical frame for that search. Most importantly, it provides a legal obligation for states to solve this problem. As described in Section II above, allowing transfer mispricing violates a number of human rights treaties and instruments, including the UDHR, the ICESCR, the ICCPR, the CRC and the DRD. By acting to address transfer mispricing, states will be better able to comply with their obligations under the ICESCR to take steps towards the progressive realization of economic, social, and cultural rights. They will help to create stronger societies with greater incorporation of human rights principles, including equality and non-discrimination and good governance principles: participation, accountability and transparency. Finally, they will be closer to fulfilling the promise of the right to development, the promise of a world where international cooperation can give rise to a new, just international social and economic order where genuinely

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[250] Scott Dyreng, et al., *Public Pressure and Corporate Tax Behaviour* 2-3 (Oxford Univ. Ctr. for Bus. Taxation, Working Paper 14/16 2014).

[251] *See* Elizabeth Ashford, *The Inadequacy of Our Traditional Conception of the Duties Imposed by Human Rights*, 19 CAN. J. L. & JURISPRUDENCE 217 (2006).

[252] LIPSETT ET AL., *supra* note 10, at 95. *See also* Ashford, *supra* note 252, at 228-29.

[253] *See* Tax Justice Network, *supra* note 187.

sustainable, human-centered social, economic, cultural and political development can take place in an enabling environment for all human rights and fundamental freedoms.